

HONG KONG / JUDGMENT

DING HUIRONG v. CHINA TIMES SECURITIES LTD

[2020] HKCFI 376**COURT**

Court of First Instance

DECIDED

12 March 2020

CASE / FILE NUMBER

HCA365/2018

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bjbj ADAM INTERNATIONAL INVESTMENTS LIMITED 2nd Defendant

Before: Mr Recorder Stewart Wong SC in Chambers Date of Hearing: 4 November 2019 Date of
Decision: 12 March 2020 DECISION

INTRODUCTION

This case concerns a parcel of shares (the Shares), namely 19,112,000 issued shares in Billion Industrial Holdings Limited (Billion Industrial), a company listed on the Main Board of the Stock Exchange of Hong Kong (stock code 2299). The plaintiff was the owner of the Shares. According to his pleaded case, sometime in 2017, he was interested in borrowing funds, using the Shares as collateral. As a result, through arrangements made by intermediaries, he, as the borrower, signed a Non-Recourse Loan and Securities Pledge Agreement effective as of 20 April 2017 (the LC3 Loan Agreement), with the lender being LC 3 Inc (). Under the LC3 Loan Agreement, LC3 agreed to make a loan of up to US\$50,000,000 to the plaintiff, and provided that the plaintiff was to open an account with the 1st defendant to hold Listco Securities of the Borrower . Such an account was called the Borrower Securities Account and Listco Securities were the shares in Billion Industrial owned by the plaintiff. The plaintiff did open an account with the 1st defendant, a securities dealer licensed by the Securities and Futures Commission, by various documents dated 2 May 2007 (the Account). The LC3 Loan Agreement contained various provisions concerning the Pledged Securities provided by the plaintiff as general and continuing security for the due, prompt and complete performance by the plaintiff of his obligations thereunder, being the Listco Securities delivered to the Borrower Securities Account, together with: all substitutions, additions and proceeds thereof, all dividends, interest, income, revenue, return of capital or other distributions made in respect thereof and all rights and claims of the Borrower in respect of the foregoing or evidenced thereby . On 8 May 2017, the plaintiff transferred the Shares to the

Account . On 3 June 2017, the plaintiff received a Funding Notice . The Funding Notice referred to a Secured Loan and Pledge Agreement dated June 1, 2017 between [the plaintiff], as Borrower, and Adam International Limited, as Lender , to the Total Collateral as 19,112,000 pledged shares of 2299.HK , and to the total amount of the loan of approximately US\$6,400,000, available in four tranches. The net fund provided, after deductions, was HK\$11,946,099, with the Tranche Shares involved being 4,778,000 (exactly a quarter of the total collateral). The sum of HK\$11,946,099 was credited to the Account on 9 June 2017. In the statement dated 9 June 2017 of the Account, the description of this sum was Transfer from 810220 Adam International Investment Limited . It will have been noted that while the plaintiff says that the lender with which he contracted was LC3, and has produced a copy of the LC3 Loan Agreement before me, the Funding Notice refers to a loan agreement of a different date, with the lender being Adam International Limited) rather than LC3, while the statement of the Account refers to the provider of the first tranche to be Adam International Investment Limited . While the plaintiff does not deny receiving the Funding Notice, or the HK\$11,946,099 in the Account, he says that at the time he did not pay attention to the identity of the entity with which he contracted, or the lender on the Funding Notice, which he assumed was the contracting counterpart. At all times he was dealing with the lender through intermediaries. The question of the identity of the lender which contracted with the plaintiff is a matter of dispute in this case. While the plaintiff says that it was LC3, it is the defendants case that it was the 2nd defendant, Adam International Investments Limited AIIL), which had entered into (i) a loan agreement dated 1 June 2017 (the Adam Loan Agreement), which contained a Promissory Note, a Pledge Agreement and a Pledge Addendum , with the plaintiff, and (ii) a Collateral Agency Agreement therefor of the same date (the Adam CAA) with the plaintiff and the 1st defendant. However, as in the Funding Notice, the lender was referred to in those documents as Adam International Limited , and not Adam International Investments Limited . It is AIIL s case that those were mistakes: the entity concerned was AIIL but was misstated to be Adam International Limited because of a miscommunication between it and its attorney at the time. The plaintiff denies ever dealing with or signing any agreements with AIL or AIIL, and alleges that the signatures purporting to be his on the Adam Loan Agreement and the Adam CAA were forged. After the first tranche of funds was received by the plaintiff, he says he repeatedly reminded the intermediary to liaise with the lender to make available the remainder of the loan, but to no avail. Frustrated, he wanted to terminate the loan. On 11 July 2017, the plaintiff s assistant sent an email to the 1st defendant and a firm of lawyers said to represent the lender to give notice of termination of the loan. The email asked for a return of the 14,334,000 shares in Billion Industrial which had not been pledged, and, as for the 4,778,000 shares pledged: we would like to see if there is any solution to cancel this loan . However, on 6 July 2017, apparently a Notice was issued (the Notice). AIIL says that it sent the Notice to the plaintiff and his associates (which he denies) and a copy thereof to the 1st defendant. Relying on an event of default stated in Clause 6(a)(15) of the Adam Loan Agreement , the Notice stated: Based on the foregoing, pursuant to Section 6(b)(2) of the Loan Agreement the Lender has the right to exercise all rights with respect to the Collateral as if it were the sole and absolute owner thereof, without limitation to any and all other rights set forth under Section 6(b) of the Loan Agreement . In response to the email from the plaintiff purporting to cancel the loan, on 13 July 2017, AIIL sent a letter to the plaintiff.

The letter referred to a Loan Agreement dated 1 June 2017 between AIIL as the Lender and the plaintiff as the Borrower, and stated: We received your correspondence in connection with the above-referenced Loan Agreement regarding your desire to have collateral returned to you and/or cancel the loan. We reiterate from our last communication: there were unambiguous defaults by the Borrower, including without limitation the Borrower attempting to incur indebtedness for borrowed money secured by shares of Common Stock. As you know, this as an extremely material issue for us and the reason we had originally contemplated holding your additional shares in a separate account. This was a very risky non-recourse loan we made were all we had to look for repayment was the collateral, and we trusted you not to harm us by dealing with the shares. Instead you flagrantly violated your commitment to us. Given the time of the breach we suspect you fraudulently induced us into making this loan by misrepresenting your intentions with respect to other loans. Therefore, we find it unconscionable after your egregious actions that you would seek to benefit from this behavior. In conformance with and as explicitly permitted by the Loan Agreement, the Borrower's Events of Default resulted in the Lender taking full control and possession of the applicable stock, and the Borrower can expect any actions in contravention of such to be met with a vigorous response for which the Lender will hold it liable for all costs and expenses. We sincerely hope you dispense with this fruitless exercise. In the statement for the Account dated 10 July 2017 issued by the 1st defendant, it was stated that the Shares were still there, with a market value of HK\$103,969,280. There was, however, the following notation: We have received a notice from Adam International Investment Limited (Adam) that an Event of Default has occurred. Pursuant to the collateral agency agreement, Adam now has full and exclusive control and ownership of all the shares in this account. Even though the plaintiff had only been provided with HK\$11,946,099 and notwithstanding the terms of the Funding Notice which referred only to 4,778,000 of the Shares as Tranche Shares, it is clear that AIIL was purporting to take control and ownership of the entire 19,112,000 shares. By this action, the plaintiff makes various claims against the 1st defendant and AIIL for fraud and deceit in common law, securities fraud contrary to the Securities and Futures Ordinance, conversion, and breaches of the Money Lenders Ordinance, and against the 1st defendant for breach of agreement and breach of duty. Further or alternatively, the plaintiff claims against the 1st defendant and AIIL relying on his right in equity to redeem the Shares. Reliefs sought include the delivery up of the Shares and dividends and tracing claims in relation to the Shares and dividends. Without setting out in detail the pleaded answers to the plaintiff's claims by the 1st defendant and AIIL, in summary they deny all allegations of wrongdoing. One can immediately see that there are many disputed issues between the parties which can only be resolved by a full trial. However, by a Summons dated 15 March 2019 and amended on 17 June 2019 (the Summons), the plaintiff seeks to carve out an issue for decision under Order 14A, rule 1, of the Rules of the High Court, concerning his equity of redemption vis-à-vis the Shares under the terms of the Adam Loan Agreement, which, of course, the plaintiff denies he has ever entered into. That is, the plaintiff asks me to rule on the legal effect of the Adam Loan Agreement in relation to his equity of redemption, on the assumption (which he does not, at present, accept to be correct) that he had entered into the Adam Loan Agreement (and presumably the Adam CAA as well) with AIIL. In the Summons, the plaintiff asks for the following:

1. Pursuant to Order 14A, rule 1 of the Rules of the High Court, that as a matter of law, if the allegations of fact set out in the 1st and 2nd Defendant s respective Defence dated 17 August 2018 and Defence and Counterclaim dated 20 August 2018 are assumed to be correct:
 - (1) The terms of the loan agreement described as between the Plaintiff and the 2nd Defendant dated 1 June 2017, which purportedly entitle the 2nd Defendant to forfeit the Plaintiff s 19,112,000 shares in Billion Industrial Holdings Limited (stock code: 2299) (the Shares) and cash dividends in relation to such Shares, constitute an unlawful clog on the Plaintiff s equity of redemption. Subject to the determination of the application under paragraph 1 above, the action against both Defendants be discontinued upon the completion of the following conditions:
 - (1) The Plaintiff, in exercising his equity of redemption, pays the loan principal of HK\$11,946,099 (as described in the Funding Notice purportedly issued by the 2nd Defendant on 3 June 2017) with interest into Court. Such interest shall be calculated and agreed as between the Plaintiff and the 2nd Defendant, failing which either party shall be at liberty to apply to the Court for an assessment of such quantum (the Redemption Funds);
 - (2) Subject to the Plaintiff s payment of the Redemption Funds into Court, the Defendants shall deliver the Shares and Dividends to the Plaintiff within seven (7) days;
 - (3) Other directions as the Court deems appropriate; and
 - (4) Subject to the delivery of the Shares and Dividends to the Plaintiff, the Court shall release the Redemption Funds to the 2nd Defendant.
3. Further and/or in the alternative to paragraph 1 above:
 - (1) There be summary judgment in this action against both Defendants for (i) the Shares and Dividends (the latter to be further assessed as at the date of the order to be made) pursuant to a part of the claim as set out in paragraphs 51, 59-67, and prayer (1) of the Statement of Claim; (ii) interest thereon (under paragraph 67 and prayer (7) of the SOC); and (iii) or alternatively for any part thereof;
 - (2) other directions as the Court deems appropriate; and
 - (3) Subject to the determination of sub-paragraphs (1) and (2) above, the action against both Defendants be discontinued ;
4. Until final determination of paragraphs 1 to 3 above, the action be stayed; and
5. Costs of this action and of this application be to the Plaintiff to be taxed if not agreed . IS THE ORDER 14a PROCEDURE APPROPRIATE?
18. For AIIL, Mr Jose-Antonio Maurellet SC takes the preliminary point that the use of the Order 14A procedure is inappropriate, as the plaintiff is proceeding on an assumed fact which he denies, namely that he had entered into the Adam Loan Agreement (and presumably the Adam CAA) with AIIL. In opposition to the Summons, Mr Mark Pierrepont, appearing for

the 1st defendant, relies on and adopts the submissions of AILL. Order 14A, rule 1(1), provides as follows: The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that

- (a) such question is suitable for determination without a full trial of the action; and
- (b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein . It is of course trite that the Order 14A procedure is not to be used to resolve factual disputes between the parties, which ought to be reserved for trial. But it is also clear from the terms of Order 14A, rule 1(1), itself that where there is a discreet question of law or construction of documents which can be determined without a full trial, i.e. where such a determination is possible notwithstanding the existence of factual disputes between the parties which can only be resolved at a full trial, then, provided that the condition under Order 14A, rule 1(1)(b), is also satisfied, then the Court may (but not must) determine the question under Order 14A. Where the question of law or construction is interwoven with issues of fact then it is obvious that to determine the question of law or construction without determining the issues of fact is inappropriate, or may indeed be impossible. Nor is the determination of the question of law or construction appropriate where facts relevant to the determination of the question of law or construction, are hypothetical, future or fictitious, as those facts may turn out to be untrue when the issues of fact are considered at trial, thereby rendering the determination of the question of law or construction inapplicable or even wrong. However, where the question of law or construction can be determined irrespective of how the issues of fact in dispute are to be resolved, and if there are good reasons to carve out the question of law or construction to a hearing ahead of the full trial even though its determination may not necessarily determine the entire cause or matter finally but will determine the issue arising from the question of law or construction, then in my judgment the Court can and ought to exercise its discretion to determine the question under Order 14A. The above is supported by two leading local authorities. First, in *Rockwin Enterprises Ltd v Shui Yee Ltd* , Recorder Ma SC (as the Chief Justice then was) said:
 - 18. Once seized of an application under O 14A, the court s approach is essentially a three step approach:
 - (1) Is the relevant question one of law or of the construction of a document?
 - (2) If so, is that question one that should be determined under the O 14A procedure?
 - (3) If the answer to (2) is , what is the determination of that question and what orders should the court make as a consequence of determining that question?
 - 19. Usually, step
 - (1) will cause little difficulty for the court to ascertain.

20. Step
- (2) requires the court to be satisfied of the following :
- (a) That the question of law or construction is one that is suitable for determination without a trial. In other words, the court has all the necessary facts and matters before it in order to determine the question of law or construction.
 - (b) That if so suitable and should it be determined by the court, that it will finally determine (subject to a possible appeal) the entire cause or matter or any issue or claim therein.
 - (c) Even if the above two conditions are fulfilled, that the court in its discretion is satisfied that the question is one that ought to be determined under O 14A.
21. It is clear that the court has a residual discretion whether or not to embark on a determination of a question under O 14A even where the first two requirements (set out in paras 20(a) and (b) above) are fulfilled. This is clear from the word in O 14A r 1(1) and from the authorities.
22. I have been helpfully referred by Mr Chain to a judgment (unfortunately only in transcript form) of the English Court of Appeal in *Korso Finance Establishment Anstalt v. John Wedge* (15 February 1994, unreported). There, one of the dominant issues was the construction of a letter of agreement for the acquisition of a master collateral commitment. Indeed, this was probably the dominant issue in that case since the letter of agreement was described as being at the heart of the dispute . The judge in the court below had refused an application under O 14A by the plaintiff on the basis that the court should not entertain the application unless the determination of the question would finally determine the entire matter. The learned judge was of the view that if the question had been decided against the plaintiff, he would nevertheless still carry on with the action even though if the point was decided in his favour, that would signal the end of the action since judgment against the defendants would inevitably follow.
23. The Court of Appeal allowed the plaintiff's appeal on the basis that the wording of O 14A did not require that the determination of the relevant question should finally determine the action. It was enough that a claim or an issue in the proceedings would be finally determined. As Leggatt LJ said in his judgment (with which the other members of the court agreed), In my judgment the question of construction is well capable of constituting an issue in the cause or matter. An issue may be said to be a disputed point of fact or law relied on by way of claim or defence . With respect, this is plainly correct. However, in my view, it does not follow that even if the determination of a question of law or construction would finally determine a claim or issue in the proceedings, the court should automatically be required to embark on the determination of a question under O 14A. There is, as I have already remarked, a residual discretion vested in the court.

24. Quite how that residual discretion is to be exercised in any given case depends of course on the circumstances. In *Korso*, two factors were relevant to the Court of Appeal's decision to allow the appeal thereby enabling the question there to be determined under O 14A:
- (a) The question of construction was a dominant feature of the case, going to what was described as an important issue, namely, the primary liability of the defendants in that case. As I have remarked, the letter of agreement to be construed was said to be at the heart of the case.
 - (b) If the question of construction was dealt with, this might or would enable the parties to avoid the expense of trial and assist them in the efficient disposal of the action.
25. These are no doubt relevant (and in some cases decisive) considerations that a judge can legitimately take into account but there may be other considerations. Other considerations include the following :
- (a) The court can take an overall view of the matter to see the context in which the question arises. If the court is of the view that there would not be a great saving of time or costs in determining the question (or indeed if it feels quite the opposite), this would be a factor against adopting the O 14A procedure. For example, if the question involves an issue that is not determinative of the action or is but one of many issues or which may at the end of the day be an academic one, a court may well not embark on a determination under O 14A. In such situations, it may be that a determination by the court leading possibly to appeals at two further levels, will result in more delay and expense to the parties than if the whole matter was decided at one go at trial.
 - (b) On the other hand, an issue may recur so much on a continuing basis that to determine it may not only be convenient but extremely desirable. For example, where the determination of an issue would result in the discovery process not being as extensive or expensive as might otherwise be the case, it may well be appropriate to use the O 14A procedure.
26. It is of course not possible to set out all the circumstances which may be relevant in any given case to the exercise of the court's discretion. Much will depend on the perception and instinct of the Judge seized of the matter.
27. Of course, the residual discretion becomes exercisable really only where the two requirements (referred to in paras 20(a) and (b) above) have been fulfilled. Here, it is important to emphasise that the question of law or construction is one that is suitable for determination without a trial. In other words, the court must have all the necessary facts and matters before it in order to determine the question of law or construction. Where the court is not seized of all relevant facts, it would be an extremely rare case (if ever) in which the procedure under O 14A would be adopted. In *Cable & Wireless HKT International Ltd v New World Telephone Ltd* (HCCL 229/1999. 5 April 2000, Stone J, unreported), the main concern of the court was that the factual basis for the determination of the question he was invited to determine, was uncertain. On appeal, the Judge's views were upheld by the Court

of Appeal. I note that this approach is entirely consistent with those passages contained in Hong Kong Civil Procedure 2001 at para 14A/2/4 [emphasis added]. Second, in *Shell Hong Kong Ltd v Yeung Wai Man Kiu Yip Co Ltd*, Chan PJ (with whom all the other judges sitting in the Court of Final Appeal agreed) said:

20. The O.14A procedure was first introduced in England in 1991 and in Hong Kong in 1992. The underlying policy of this Order is, as The Supreme Court Practice 1993 described, to accelerate the final judicial disposal of an action at the interlocutory stage and thereby save the expense and delay which would otherwise arise not only if the action were to proceed to a full trial but also if the parties would be required to undertake the necessary pre-trial steps to prepare for such trial. Vol.1, paras.14A/1-14A/2/1, p. 175.
21. [Order 14A, rule 1(1), was set out.]
22. This rule may be invoked for a determination of a question of law or construction of any document by the court, provided that the two conditions in (a) and (b) above are fulfilled. The parties must either have consented to adopt such a procedure or have had the opportunity to be heard. Order 14A r.1(3).
23. In cases which involve the determination only of a question of law or the construction of a document or where the whole case largely depends on the resolution of a question of law or the construction of a document, the O.14A procedure is often adopted to put an early end to the entire case. However, it can be seen that under the condition in (b), this procedure can be invoked for the purpose of finally determining not only the entire cause or matter but also any claim or issue in the cause or matter. It is not necessary for the making of an application under O.14A that the determination of a question of law or construction of any document would finally determine the whole action. Such a requirement would be wrong as a matter of interpretation of the order and as an exercise of discretion. See Leggatt LJ in *Korso Finance Establishment Anstalt v. Wedge & Others* (unrep., 15 February 1994), CA Transcript, at p.7 (in which it was held that an issue of construction was still suitable for determination under O.14A even though a determination of this issue would not finally determine the entire action between the parties). It is sufficient if an issue in the case can be disposed of using such procedure. However, it is not contemplated that the parties would submit a trivial matter for determination under O.14A. This would not only be contrary to the spirit and purpose of this procedure, but may also lead to possible abuse, resulting in unnecessary expense and delay and wastage of judicial time. No judge would accede to that sort of request or application in the proper exercise of his discretion.
24. It must also be noted that it is inappropriate to use this procedure if the issues of facts are interwoven with the legal issues to be determined. For obvious reasons, the question of law or construction of document cannot be dealt with on assumed or hypothetical facts. And if it is necessary for the court to hear evidence to resolve a factual dispute in order to come to a determination on the question of law or construction of document, it would not normally be suitable to invoke O.14A.

25. Hence, even if the conditions are satisfied, the court still has a discretion under r.1 to decide whether to entertain an application under this Order. He has to decide on the suitability of adopting the procedure in the case in hand before adjudicating on the merits. This was what the Deputy Judge had done in the present case [Emphasis added]. It is therefore plain to me that it is not that the Court must have each and every fact in the case agreed, admitted, found or resolved before the procedure under Order 14A can be invoked. Order 14A itself expressly contemplates that the determination of the question of law or construction does not need to determine finally the entire cause or matter, thereby implying that a full trial, which will resolve outstanding disputes (factual or legal), can still follow. As Recorder Ma SC and Chan PJ made clear, in the words I have emphasised from quotes from their respective judgments, what the Court needs to have before it are all the facts necessary, or in order, for it to come to a determination on the question of law or construction, but not all the facts relevant to the entire cause or matter, when the resolution of those other facts are not necessary before the question of law or construction can be determined. It is only the facts which are necessary for the Court to come to a determination on the question of law or construction which cannot be assumed or hypothetised. In the present case, the question which I am asked to determine under Order 14A, i.e. whether the proposition as set out at 1 of the Summons is correct, concerns a pure question of the nature of the transaction constituted by the Adam Loan Agreement and the Adam CAA, and the effect of the relevant clauses thereof on the plaintiff's equity of redemption (if any). Of course I may have to construe the relevant provisions but construction of documents is a question that can be entertained under Order 14A. Further, even though construction of a contract is to be done in the context of the surrounding factual circumstances when the contract is made, and the meaning of words in a document is also a question of fact, I see no issues of fact, relating to the surrounding circumstances or meaning of words or otherwise, which are relevant to the consideration of the question under Order 14A here, but which need to be resolved at trial. While Mr Maurellet suggests that expert evidence on market practice, and evidence on context, may need to be considered at trial in characterising the arrangement between the parties, no particulars are given in the pleadings or submissions as to what such possible evidence may be, especially when AIIL itself denies in its pleadings that it was engaging in the money lending business and as such it is difficult to see the relevance of any market practice. While the Summons asks the Court to assume that the factual allegations in the pleadings of the 1st defendant and AIIL to be correct, none of such allegations, in so far as they are in dispute, is material to the determination of the question posed in the sense that any such determination will depend on how any disputed fact is to be resolved. The only fact I need to assume is that the plaintiff was a party to the Adam Loan Agreement and the Adam CAA. This assumption is not so much to put before the Court any fact in dispute which is necessary for it to determinate the question one way or another, but rather, in my judgment, to put the question in proper context and to explain why it is appropriate to have it determined under Order 14A. Since the action concerns a claim by the plaintiff for the Shares and the 1st defendant and AIIL are relying on their purported rights and entitlements under the Adam Loan Agreement as well as the Adam CAA, in my judgment,

notwithstanding the plaintiff's pleaded case in relation thereto, the proper construction thereof and their effect on the plaintiff's right of redemption (if any) is a, or even the, dominant feature in this case. A ruling will finally (subject to any appeal) determine this question. Further, as Mr Li SC submits, a determination of this question will have a significant impact on how the plaintiff would proceed with the action, for example, as to whether it is still necessary to pursue the question of whether he was a party to a loan from AILL, so that the determination (to adopt the description of Korso Finance Establishment Anstalt v Wedge by Recorder Ma SC in Rockwin): might or would enable the parties to avoid the expense of trial and assist them in the efficient disposal of the action. In the premises, I find that it is appropriate for me to determine the question of whether the proposition as stated in 1 of the Summons is correct, and I shall proceed to do so. Mr Maurellet does not suggest that I do not have the jurisdiction to hear the Order 14A application on his no assumed fact argument, but only that I should be extremely reluctant to do so. For reasons above, I disagree.

EQUITY OF REDEMPTION The following are the relevant terms of the Adam Loan Agreement, purportedly made between the plaintiff as the Borrower and Adam International Limited or an affiliate thereof as the Lender WHEREAS, the Borrower is the sole legal, record and beneficial owner of at least 19,112,000 freely trading ordinary shares, all in electronic book entry form (Shares) of the common stock (Common Stock) of Billion Industrial Holding Limited (HK.2299) (Issuer), a corporation organized under the laws of the Cayman Islands with limited liability and listed on the Stock Exchange of Hong Kong Limited (Stock Exchange), out of a total of 2,153,348,000 shares of Common Stock outstanding; and WHEREAS, the Borrower has requested the Lender to make a non-recourse loan (Loan) to the Borrower of up to USD\$6,400,000 (Maximum Loan Amount) secured by the Shares of Common Stock; and WHEREAS, in order to induce the Lender to make the Loan to the Borrower, the Borrower has agreed to execute and deliver to the Lender this Agreement, including without limitation the pledge contained herein to the Lender and to pledge the Shares held by it to secure the prompt payment, performance and discharge in full of all of the Borrower's Obligations (as defined below); and WHEREAS, the Lender is willing to make the Loan contemplated herein secured by the Collateral (as defined below) in accordance with the terms hereof (Recitals); Collateral means all the Pledged Shares (including without limitation hereinafter Pledged Shares in which the Lender is granted a security interest pursuant to a Pledge Addendum) and all securities and interests received, receivable or otherwise distributed in respect of or in exchange for the Pledged Shares, including without limitation any securities and interests into which the Pledged Shares are convertible or exchangeable, and the proceeds and any and all of the products, whether tangible or intangible, of all of the foregoing, including without limitation proceeds of insurance covering any or all of the Collateral, and any and all accounts, equipment, general intangibles, goods, negotiable collateral, investment property, money, deposit accounts, or other tangible or intangible, real or personal, property resulting from the sale, exchange, collection, rent, lease, license or other disposition of the Collateral, or any portion thereof or interest therein, and the proceeds thereof. In the event that the Shares are exchanged by the Issuer for a different security, the provisions of this Agreement

relating to the Collateral and the Shares shall apply to such other security mutatis mutandis (Clause 1(d)); Pledged Shares means 19,112,000 Shares of Common Stock of the Issuer, including without limitation any securities for which such Shares are exchanged by the Issuer, which shall be subject to a security interest granted by the Borrower to the Lender or otherwise collaterally assigned to the Lender, pursuant to this Agreement, together with any additional shares of the Issuer included as Pledged Shares pursuant to a Pledge Addendum of share dividend (as such number of Pledged Shares are appropriately and equitably adjusted for stock splits, stock dividends, and similar events) (Clause 1(aa)); Portfolio Protection Arrangements means any arrangements or transactions effectuated to mitigate the risk of loss of principal, assets or securities values, including without limitation effecting a pledge, encumbrance, hypothecation and/or loan of or on securities (Clause 1(bb)); Tranches. The Loan contemplated hereby shall be funded in four (4) or more (in the Lender's sole discretion) tranches (Tranches). The tranches shall be in such amounts as agreed by the Lender in its sole discretion subject to market conditions. All Tranches, if any, shall be made in such amounts as adjusted and agreed by the Lender in its sole discretion with each funding (each a Funding Date) reasonably determined by the Lender, subject to prevailing market conditions, provided that all the conditions for such funding have been satisfied or waived as contemplated herein. On each Funding Date, the Lender shall advance to the Borrower such portion of the Loan as determined by the Lender in its sole discretion (Tranche Amount), provided that (i) the Tranche Amount shall not exceed an amount equal to the Tranche Valuation Price multiplied by the LTV Percentage, (ii) the aggregate of all Tranche Amounts may not exceed the Maximum Loan Amount, and (iii) the Borrower shall have pledged to the Lender at least such number of Shares as shall be necessary to cause the Collateral Value as of such Funding Date to at least equal to the total Loan amount outstanding (including such Tranche Amount for such Funding Date) divided by the LTV Percentage (Clause 2(a)); Pledge. As collateral security for all of the Obligations, the Borrower hereby grants, transfers, assigns and conveys to the Lender a continuing security interest in, and pledges and grants a charge on, all currently existing and hereafter acquired or arising Collateral to secure prompt repayment of any and all Obligations and to secure prompt performance by the Borrower of his/her covenants and duties under the Note and this Agreement. The Borrower agrees that the Lender shall have the rights stated in this Agreement with respect to the Collateral in addition to all other rights which the Lender may have by law (Clause 3(a)); Brokerage Account Control. At least three (3) days prior to the first Funding Date, the Borrower shall transfer to and/or maintain in a securities brokerage account (Account) which is subject to the Collateral Agency Agreement executed by the Borrower and the Broker. The Borrower shall cause any additional Pledged Shares included in any Pledge Addendum to be transferred to and/or maintained in such securities brokerage account subject to the Collateral Agency Agreement within three (3) business days of such Pledge Addendum being required hereunder. Borrower shall remain the beneficial owner of their respective accounts, provided that following an Event of Default the Lender may sell or otherwise dispose of the securities and assets therein in accordance with the terms herein and in such Collateral Agency Agreement (Clause 3(b)); Non-Recourse

Loan. The Lender agrees that, except as otherwise expressly provided in this Agreement, the responsibility to make payments hereunder is a non-recourse obligation of the Borrower, such that, for repayment of the Note, the Lender shall only look to the Collateral and/or the other instruments of security that secure the Note, and may not subsequently make any claim or institute any action or proceeding against the Borrower or any successors or assigns of the Borrower for any deficiency remaining after collection upon the Collateral (Clause 3(c)); NTT Loan. The Lender shall not Transfer any Pledged Shares prior to an Event of Default, after which time the Lender may Transfer the Pledged Shares. The Borrower acknowledges that following an Event of Default, in the event of a diminution in the fair market value of the Pledged Shares, the failure of the Lender to dispose of the Collateral shall under no circumstances be deemed to be a failure to exercise reasonable care in the custody or preservation of the Collateral, and any such sale or other disposition of the Pledged Shares shall be deemed to be commercially reasonable under the applicable Pledge Laws. Notwithstanding anything contained herein, the Borrower acknowledges that during the term of this Agreement and the Loan Documents, the Lender shall have the absolute right to effect Portfolio Protection Arrangements free and clear of any liens, claims or encumbrances (Clause 3(d)); Maximum LTV; Top-Up. In the event that at any time the Collateral Value falls below the Minimum Collateral Value, then within three (3) days thereafter, the Borrower shall pledge and deliver additional Shares (including without limitation instructing the Broker in writing to cause additional Shares to be delivered to the Lender) and/or cash (or cash equivalents) acceptable to the Lender, to the bank account directed by the Lender) as additional Collateral hereunder in such amounts as shall cause the Collateral Value to exceed 100% of the Target Collateral Value, together with whatever reasonable documentation may be requested by the Lender to evidence that any such additional Shares constitute additional Collateral under the Loan Documents. Without limiting the foregoing, within such 3-day period the Borrower shall have duly executed and delivered a Pledge Addendum, if necessary, for at least such amount of additional Shares of Common Stock as is necessary to provide sufficient Collateral hereunder such that the Collateral Value exceeds 100% of the Target Collateral Value (Clause 3(e)); Dividends and Voting. As to any of the Collateral, while any Obligations to the Lender shall remain outstanding and unpaid, Borrower hereby assigns to Lender all dividends and distributions (of whatever nature including, but not limited to, cash or stock) paid or made by the Issuer on the Shares included in such Collateral. Prior to the occurrence of an Event of Default, the Borrower shall be entitled to exercise all voting or other such consensual rights and powers appurtenant to the Collateral provided that (1) the Borrower shall not exercise such voting rights in any manner that could give rise to, or otherwise permit or agree to any (a) variation of the rights attaching to or conferred by any of the Pledged Shares or (b) liability on the part of the Lender, and (2) such voting or consensual rights shall be subject to the customary and usual limitations set forth in typical brokerage account agreements for margin accounts with regulated securities brokers. To the extent any dividends related to the Collateral are received by the Borrower, such dividends shall be held in trust for the benefit of the Lender and shall forthwith be delivered to the Lender or its designated agent (accompanied by

proper instruments of assignment and/or stock powers executed by the Borrower in accordance with the Lender's instructions). The Borrower shall deliver to the Lender any distribution consisting of additional certificated securities of an Issue of Pledged Shares immediately upon receipt, together with executed stock powers and corporate resolutions authorizing the transfer of title of such shares after the occurrence and during the continuance of an Event of Default pursuant to the terms of this Agreement (Clause 3(f)); Return of Collateral. At such time as all of the Borrower's Obligations have been paid in full, the Pledged Shares shall be returned to the Borrower to the extent and in the manner set forth herein. The Lender acknowledges and agrees that all shares of Common Stock, including the Pledged Shares, are fungible, such that the Lender's obligation to return the Pledged Shares herein is understood to mean the delivery to the Borrower of such number of shares of Common Stock as is equal to the total number of Pledged Shares required to be delivered to the Lender hereunder (Clause 3(g)); Borrower. The Borrower represents and warrants to the Lender, as of the date hereof and each Funding Date, as follows:

- (6) Title. The Borrower is the sole legal, record and beneficial owner of and holds good and marketable title to the Pledged Shares free and clear of any liens, security interests, encumbrances, rights or claims, and is fully authorized to grant the security interest and/or collaterally assign the Pledged Shares as contemplated herein. There is not on file in any governmental or regulatory authority, agency or recording office an effective financing statement, security agreement, license or transfer or any notice of any of the foregoing covering or affecting any of the Pledged Shares. It is the intention of the parties that the Lender shall enjoy a first priority security interest in and lien on all Pledged Shares constituting Collateral hereunder. The Shares have been duly authorized and validly issued, were fully paid, are non-assessable, were issued in compliance with all applicable securities laws, and are free of any restrictions against transfer. The Borrower shall defend the Lender's rights in the Collateral against any and all claims and demands
- (8) Security Interest. This Agreement, together with the Collateral Agency Agreement, creates in favor of the Lender a valid first priority security interest in the Shares included within the Collateral, and will create a valid first priority security interest in any additional Shares added to the Collateral in the future in accordance with the terms of the Loan Documents, securing the payment and performance of the Obligations. All security interests created under the Loan Documents in the Collateral shall have been and will be duly perfected and subject to no prior encumbrances (Clause 4); The Borrower covenants and agrees with the Lender as follows: Perfection. The Borrower agrees to execute at any time and from time to time such documents and take whatever other actions are reasonably requested by the Lender which may be necessary or desirable to create a security interest in favor of the Lender in, and/or to perfect and continue the Lender's security interest in, the Collateral, including without limitation execution of any collateral assignments and any documents required to be filed with governmental agencies or authorities. The Borrower represents that his/her name and the location of his/her principal business are as indicated in the first paragraph of this Agreement. The Borrower will notify the Lender of any intended change in

his/her name or principal residence address at least 30 days prior to any such change taking effect. This Agreement is a continuing pledge and security interest and will continue in effect until all of the Obligations are satisfied and paid in full (Clause 5); Events of Default. Each of the following events shall constitute an Event of Default :

- (11) The security interest and pledge granted hereunder (together with the Collateral Agency Agreement if necessary) shall cease to create at any time and for any reason a valid and perfected first priority security interest in and to the property subject thereto or the validity or priority of such security interest shall be contested by the Borrower or by any other Person; or any of the other Loan Documents shall at any time after their execution and delivery for any reason cease to be in full force and effect or shall be declared null and void, or the validity or enforceability thereof shall be contested by the Borrower or by any other Person (Clause 6(a)) Remedies. Following the occurrence of any Event of Default, the Lender shall have the right to exercise all of the remedies conferred hereunder, under the Note, under the Collateral Agency Agreement and applicable law. In such event, without limiting the foregoing, the Lender shall have the following rights and powers:
 - (2) The Lender shall have the right (but not the obligation) to exercise all rights with respect to the Collateral as if it were the sole and absolute owner thereof.
 - (3) The Lender shall have the right (but not the obligation) to assign, sell, lease, transfer or otherwise dispose of and deliver any and all of the Collateral, at a public or private sale or otherwise (including without limitation selling any and all Shares on any public exchange or market), for cash or on credit or for future delivery, at such time or times and at such place or places, as the Lender may deem commercially reasonable, all without right of redemption of the Borrower, which is hereby expressly waived. Upon each such sale, lease, assignment or other transfer of the Collateral, the Lender may purchase all or any part of the Collateral being sold, free from and discharged of all trusts, claims, right of redemption and equities of the Borrower, which are hereby waived and released.
 - (4) The Lender may maintain a judicial suit for foreclosure and sale of the Collateral.
 - (5) The Lender may transfer title to the Collateral into the name of the Lender or its designee and have such transfer recorded in any place(s) deemed appropriate by the Lender, and/or effect transfer of title upon sale of all or part of the Collateral. For this purpose, the Borrower irrevocably appoints the Lender as its attorney-in-fact to execute endorsements, assignments and instruments in the name of the Borrower as shall be necessary or reasonable following any such sale to effect the transfer of title.
 - (7) The Lender shall have all the rights and remedies of a secured creditor under the provisions of all applicable laws, including without limitation the applicable Pledge Laws, if applicable, as may be amended from time to time. In addition, the Lender shall have and may exercise any or all rights and remedies they may have available at law, in equity, or otherwise (Clause 6(b)); Enforcement. Upon the occurrence of an Event of Default, the Borrower waives any and all rights that it may have to a judicial hearing in advance of the enforcement of any of

the Lender's rights and remedies hereunder, including without limitation its rights following an Event of Default to take immediate possession of the Collateral and to exercise its rights and remedies with respect thereto (Clause 6(c)); Sale of Collateral. The Borrower agrees that any sale of the Pledged Shares on any public exchange or market by the Lender following any Event of Default hereunder shall constitute a commercially reasonable sale, and the Borrower shall not take any position or make any claim to the contrary. To the extent the Lender has sold any Pledged Shares after an Event of Default, the Lender shall have the right to retain any and all proceeds of such sale, offset such amount of proceeds from any amounts remaining due from the Borrower, and retain any proceeds received in excess if such amounts due without any obligation to remit any proceeds whatsoever to the Borrower (Clause 6(d)). Rights. Upon the occurrence and during the continuance of an Event of Default, all rights of the Borrower (x) to exercise or refrain from exercising the voting and other consensual rights that it would otherwise be entitled to exercise, if any, shall, upon notice to the Borrower by the Lender, cease and (Lender) to receive the dividends and interest payments that it would otherwise be authorized to receive and retain, if any, shall automatically cease, and all such rights shall thereupon become fully vested in the Lender, which shall thereupon have the indefeasible sole right to exercise or refrain from exercising such voting and other consensual rights and to receive and hold as additional Pledged Shares such dividends, interest payments and other distributions. For the avoidance of doubt, the Lender is hereby granted an irrevocable proxy coupled with an interest to exercise all voting power with respect to any additional certificated securities of an Issuer of Pledged Shares, effective upon the occurrence and during the continuance of an Event of Default. To the extent that the Lender is prohibited from exercising such voting power, the Borrower shall vote or refrain from voting as directed by the Lender. All dividends, interest payments and other distributions that are received by the Borrower contrary to the provisions of paragraph shall be received in trust for the benefit of the Lender, shall be segregated from other funds of the Borrower and shall be forthwith paid over to the Lender as Collateral in the same form as so received (with any necessary endorsement) (Clause 6(g)). Under the Pledge Agreement attached to the Adam Loan Agreement: Collateral means all the Shares which the Pledgor has pledged and/or granted a security interest in to the Lender to secure the Borrower's Obligations (including without limitation Shares in which the Lender is granted a security interest pursuant to this Agreement and all securities and interests received, receivable or otherwise distributed in respect of or in exchange for such Shares, including without limitation any securities and interests into which such Shares are convertible or exchangeable, and the proceeds and any and all of the products, whether tangible or intangible, of all of the foregoing, including without limitation proceeds of insurance covering any or all of the Collateral, and any and all accounts, equipment, general intangibles, goods, negotiable collateral, investment property, money, deposit accounts, or other tangible or intangible, real or personal, property resulting from the sale, exchange, collection, rent, lease, license or other disposition of the Collateral, or any portion thereof or interest therein, and the proceeds thereof (Clause 1(b)). As Collateral for the Obligations, the Pledgor [i.e. the plaintiff] hereby grants, transfers, assigns and conveys to the Lender a

continuing security interest in and pledge of and charge on the following Shares: 19,112,000 free trading common shares of Billion Industrial Holding Limited (HK.2299) (Pledged Shares), which Pledged Shares shall hereinafter constitute Collateral and Pledged Shares under the Loan Agreement (Clause 2.1). In the Adam CAA, purportedly made between the plaintiff as the Customer , the 1st defendant as the Collateral Agent and Adam International Limited as the Lender , and which of course I can take into account in considering the nature and effect of the Adam Loan Agreement , the following provisions are relevant: WHEREAS, in order to induce the Lender to make the Loan, pursuant to such Loan Agreement the Customer has granted the Lender a security interest in and pledged to the Lender 19,112,000 freely trading ordinary shares (Shares) of the common stock of Billion Industrial Holding Limited (HK.2299), a corporation organized under the laws of the Cayman Islands whose stock is listed on The Stock Exchange of Hong Kong Limited (Recital); Appointment. The Lender hereby appoints the Collateral Agent as its agent to hold the Shares in an Account with account number M810235 on behalf of the Lender, provided that such Account will be in the name of, and beneficially owned by, the Customer (Clause 1). Control. So long as the Loan is outstanding, the Customer may not withdraw, transfer, pledge or otherwise deal with any securities or cash deposited into the Account by the Customer without the prior written consent of the Lender. Without limiting the foregoing, the Customer, in order to secure its obligations to Lender under the documentation for the Loan, has granted, and is hereby granting, to the Lender and the Collateral Agent, a security interest in the Account (including the Shares) and exclusive control over the Account by the Collateral Agent and the Lender. The Customer represents, warrants and covenants that there is no lien, claim or encumbrance on, or any right or interest of any third party in, the Account or Shares, and the Customer shall not grant any lien, claim or encumbrance on, or right or interest in, the Account or Shares, except for the security interest granted hereunder and in the Loan Agreement and other relevant documents to the Lender and the Collateral Agent (Clause 3); Priority of Lender s Security Interest. The Collateral Agent hereby subordinates, in favor of the Lender, any security interest, lien, or right of setoff it may have, now or in the future, against the Account or property in the Account, except that the Collateral Agent will retain its prior lien on property in the Account to secure payment for property purchased for the Account and normal commissions and fees for the Account (Clause 4); If the Lender notifies each of the Collateral Agent and Customer in writing that an event of default has occurred under the Loan, this Agreement will thereupon immediately terminate without any further action on the part of the parties and the Collateral Agent shall promptly transfer all property and other amounts in the Account to Lender or pursuant to instructions issued by or on behalf of the Lender (Clause 7.3). The plaintiff s case is simple. The Shares were provided by him as security for a loan. He therefore had (and still has) an equity of redemption as a matter of law. Upon paying the outstanding principal and interest, which he is willing to, he is entitled to have all the Shares back. The pleaded response of AIIL, contained in its Defence and Counterclaim, is as follows: It is averred that as a result of the occurrence of an Event of Default referred to in paragraph 45 above, [the plaintiff] has no right to force [AIIL] to return the Shares by

agreeing to pay the 1st Tranche of the Adam Loan with interest 47). [AIIL] avers that upon the occurrence of an Event of Default under the Adam Loan Agreement referred to in paragraph 45 above, [AIIL] had the right to, and did at least on 6 July 2017 exercise the remedies conferred under Clause 6(b) of the Adam Loan Agreement, including but not limited to:

- (a) The right to exercise all rights with respect to the Shares as if [AIIL] were the sole and absolute owner thereof (Clause 6(b)(2));
- (b) The right to assign, sell, lease, transfer or otherwise dispose of and deliver any of the Shares all without right of redemption of [the plaintiff] which is thereby expressly waived (Clause 6(b)(3)); and
- (c) The right to transfer title to the Shares into the name of [AIIL] or its designee and have such transfer recorded in any place(s) deemed appropriate by [AIIL], and/or effect transfer of title upon sale of all or part of the Shares (Clause 6(b)(5)) 52). [AIIL] further avers that:-
 - (a) Pursuant to Clause 6(c) of the Adam Loan Agreement, [the plaintiff] expressly agreed to, upon the occurrence of an Event of Default, waive any and all rights it may have to a judicial hearing in advance of the enforcement of any of [AIIL s] rights and remedies under the Adam Loan Agreement, including without limitation its rights following an Event of Default to take immediate possession of the Shares and to exercise its rights and remedies with respect thereto.
 - (b) Pursuant to Clause 6(d) of the Adam Loan Agreement, [the plaintiff] expressly agreed to the extent [AIIL] sold any Shares after an Event of Default, [AIIL] would have the right to retain any and all proceeds of such sale, offset such amount of proceeds from any accounts remaining due from [the plaintiff], and retain any proceeds received in excess of such amounts due without any obligation to remit any proceeds whatsoever to [the plaintiff] 53). [AIIL] avers that [the plaintiff s] right of redemption in the Shares, if any, have been expressly waived and released by [the plaintiff], as expressly agreed, as a result of the occurrence of an Event of Default under the Adam Loan Agreement 60). In answer, the plaintiff argues that as a matter of law an equity of redemption cannot be waived by contract and the relevant clauses in the Adam Loan Agreement constituted an unlawful clog thereon and are void. AIIL submits that the Adam Loan Agreement was not, or did not contain, any security arrangement. The plaintiff therefore did not and does not have any equity of redemption to speak of. Further, since under Clause 3(g) of the Adam Loan Agreement, AIIL had no obligation to return exactly the same shares to the plaintiff, but in the meantime could undertake the Portfolio Protection Arrangements (as defined in Clause 1(bb)) under Clause 3(d), as a matter of law the plaintiff could not and cannot have any equity of redemption. Before considering the submissions of Mr Li and Mr Maurellet, perhaps I should explain the concept of equity of redemption . It was first developed in equity to relieve the consequence of a mortgagor failing to repay the mortgage and have the mortgaged property reconveyed to him according to the terms of the mortgage, when legal

mortgages took the form of a transfer or assignment of the property from the mortgagor to the mortgagee with a right of the mortgagor to repay and to get back the property by a certain time. If there is no repayment by the contractual deadline, the legal right to repay and have the property reconveyed is gone. Equity stepped in to allow the mortgagor to redeem on payment even after the contractual deadline has passed, and such a right to redeem is gone only when the property is sold or foreclosed. Seen in this light, to refer to an equity of redemption in a case like the present, where there is no transfer or assignment of the property concerned, but that the borrower remains the legal and beneficial owner of the property (before and after an event of default) (as in this case, as I shall explain below), may be inapt. However, this concept of equity of redemption has been consistently applied to other forms of secured loan, such as a charge, where there is no transfer of ownership but only the creation of a security interest in the property. As stated by Viscount Haldane LC in *G and C Kreglinger v New Patagonia Meat and Cold Storage Co Ltd*, one of the leading authorities in this area, which concerned a floating charge: A floating charge is not the less a pledge because of its floating character, and a contract which fetters the right to redeem on which equity insists as regards all contracts of loan and security ought on principle to be set aside as readily in the case of a floating security as in any other case [Emphasis added]. In the premises, in the context of a transaction where a loan is made against secured property the ownership of which is not transferred to the lender but is only charged or pledged, the borrower has a right in equity to redeem, in the sense of a right to have the property restored to an unencumbered state on payment of all that is outstanding, even after the contractual due date for payment, and any clog or fetter on, or any waiver of, the right to redeem is void. The authority primarily relied upon by Mr Maurellet in his submission that the present transaction was not a secured loan, and there was and is no equity of redemption, is the judgment of Finkelstein J, sitting in the Federal Court of Australia, in *Beconwood Securities Pty Ltd v Australia and New Zealand Banking Group Ltd*, concerning a Securities Lending and Borrowing Agreement) which the lender of the shares argued was in fact a mortgage of shares giving rise to an equity of redemption, where his Honour said: [50] In light of the foregoing, the argument that the SLA can be characterised as a mortgage is simply unsustainable. It breaks down at many points. First of all, by the express terms of the SLA, unencumbered title in both lent securities and collateral passes on delivery. Second, when the transaction comes to an end there is no obligation to hand back in specie the securities initially lent. Nor is there an obligation to return the collateral actually provided. The obligation falling on the borrower is to deliver the same number and type of securities. The same is true as regards the collateral. Third, there are the netting and set off provisions that come into effect on default. This is the means by which the parties mitigate credit risk, converting redelivery obligations into payment obligations. The provisions are particularly important because they confirm that the parties did not intend there to be any equitable property rights retained over lent securities or collateral following their delivery, for if such rights existed, they could not simply be converted by contract to monetary obligations. Equity does not allow the redemption to be clogged *Kreglinger v New Patagonia Meat Cold Storage Co Ltd* [1914] AC 25 at 61; *E I Sykes and S Walker, The Law of Securities*,

5th ed, Law Book Co, 1993 at p 70.

- [56] The second problem is equally fundamental. Having regard to the definition of Equivalent Securities, the fact that OPS immediately holds, or may at some future point come to hold, shares that are the same as those it has borrowed does not convert those shares into Equivalent Securities. It is true that, according to the definition, Equivalent Securities are securities of an identical type, nominal value, description and amount to the lent securities. But it is equally true that the definition does not require the lent securities (or even any particular batch of securities identical in number and type to the lent securities that happen to be received by OPS prior to its obligation to deliver equivalent securities falling due) to be equivalent securities. Rather, the SLA contemplates that OPS will deal with the lent securities as it sees fit and that, in order to meet its obligations to return Equivalent Securities in accordance with cl 6.1, it may have to get them in. This it can do from its own holdings or in the open market.
- [57] Put another way, OPS has the freedom to decide how and from whom it will obtain securities that answer the description of Equivalent Securities. Crucially, there is no provision in the SLA restricting OPS from disposing of the lent securities or requiring OPS to keep on hand at anytime specific securities for delivery to Beaconwood as equivalent securities. In these circumstances, Beaconwood cannot obtain a legal or equitable interest in any shares, even if they meet the description of equivalent securities, before shares that satisfy the description are appropriated to the agreement: *Re Goldcorp Exchange Ltd* [1995] 1 AC 74; [1994] 3 NZLR 385; [1994] 2 All ER 806. This is no more than an application of the rule that until property which is previously unidentified is appropriated to an agreement, neither a legal nor an equitable interest in that property can be created by that agreement: *Hoare v Dresser* (1859) 7 HLC 290; 11 ER 116; *Citizens Bank of Louisiana v First National Bank of New Orleans* (1873) LR 6 HL 352. Referring to Beaconwood, it was stated in *Goode and Gullifer, Legal Problems of Credit and Security*, referring to transactions relating to transactions such as sale and repurchase of shares (repos) and stock-lending: Such title transfer transactions have a number of features which are not consistent with security. First, the buyer or transferee in the on-leg (sale or loan) has the freedom to use the securities as it pleases. Secondly, the redelivery obligation of the buyer or transferee is to deliver equivalent securities and not identical securities, so that the transferor has no equity of redemption. In Beale, Bridge, Gullifer and Lomnicka, *The Law of Security and Title-Based Financing* Beale et al), a similar view was expressed, citing Beaconwood, in relation to repos and stock-lending. In distinguishing an earlier case, where a transaction structured as a sale and lease-back was recharacterised as a secured loan, the learned authors said: There are several points of distinction between these transactions and that in *Re Curtain Dream*. The first is that it is an important element of the transaction that the buyer in the on-leg (the sale) has the freedom to use the transferred securities in any way it chooses, for example, by selling them, by using them to fulfil its obligations under a short sale or by using them as collateral for borrowing without restriction. This was not the case in *Re Curtain Dream*, where the financier was not permitted to sell the fabric unless the bill of exchange, by which the

borrower paid the price for the repurchase, was dishonoured and where the fabric remained at all times in the possession of, and under the control of, the borrower. This shows that the on-leg sale was a genuine outright sale. Further (and following on from this last point), the buyer's obligation to deliver equivalent securities in the off-leg could be fulfilled by securities from any source, and not just those sold in the on-leg. Thus it is impossible to argue that the seller has an equitable right of redemption in the shares sold. By contrast, in *Re Curtain Dream* the repurchase agreement related to the very same fabric that was sold to the financier. A third point is that repos and stock-lending agreements normally have netting and set-off arrangements on default, so that the delivery obligations (of both the securities and collateral) are accelerated and turned into money obligations, which are then set off against each other so that a single sum is payable. These arrangements only operate satisfactorily if there is a transfer of title in the on-leg. Were the transaction to create a security interest, these arrangements would amount to a contractual restriction on the right to redeem, and would be unenforceable. Thus their existence supports the conclusion that the transaction is a genuine sale and repurchase. As far as I understand, the reasons of Finkelstein J in *Beaconwood* that the SLA, structured as a share lending and borrowing, was not a mortgage of shares with the original transferor of the shares thereunder having an equity of redemption, are threefold, being the same three points discussed in Beale et al: (a) the total freedom of the transferee to deal with the shares in the meantime; (b) that the transferee need not return the identical subject matter at the end, but only equivalents; and (c) the netting-off provisions. In particular, because OPS, which provided the money to the transferor in that case, had the freedom to deal with the shares transferred in whatever way it liked and did not have to return the identical shares but only Equivalent Securities, the transferor retained and could retain no proprietary rights of any kind, including any equity of redemption which is a proprietary right, because unless and until shares were appropriated for the purpose of return to the transferor, there was no subject matter in which a proprietary interest could exist in favour of the transferor. Since there was no equity of redemption, which could not otherwise be clogged, the argument that the transaction was one of genuine stock lending and borrowing rather than a security arrangement is supported. Since the equity of redemption is a fundamental feature of a loan secured by property, so much so that any provision in the loan documents which purports to put a clog or fetter on the equity of redemption is void, the existence of a provision which appears to be negating or inconsistent with the existence of an equity of redemption may be, as Beale et al suggested, supportive of a conclusion that the transaction is not one of a secured loan. On the other hand, if the transaction is truly one of a secured loan considered as a whole having regard to all its provisions, including provisions which purport to negative or are inconsistent with the existence of an equity of redemption, then those latter provisions would simply be void. The fact that there are numerous cases of both ancient and modern vintages laying down the principle that a provision taking away or otherwise clogging the equity of redemption of a party borrowing with security is void suggests plainly that the mere existence of such a provision does not necessarily mean that the transaction is not one of a secured loan. Thus, in my judgment, the correct approach is that the Court

should consider the transaction as a whole, by reference to all the provisions therein, including provisions which purport to negative or are inconsistent with the existence of an equity of redemption, to see whether the transaction is one of secured loan or something else. On this approach, I am of the clear view that the Adam Loan Agreement was a transaction whereby the plaintiff borrowed money from AIIL, with the Shares as security, and he as a matter of law had (and still has) an equity of redemption in relation to the Shares. I say so for the following reasons: Unlike the transactions considered in *Beconwood* and discussed in the two texts referred to above, the transaction here was stated to be, and structured as, a secured loan, as is plain from all the Recitals of, as well as all the clauses I quoted above in, the Adam Loan Agreement and the Adam CAA. All such provisions, in particular Clauses 4(6) and 4(8) of the former, suggests that AIIL was not intended to have anything other than a security interest in the Shares, with the beneficial owner remaining to be the plaintiff (see in particular Clause 1 of the Adam CAA, where the plaintiff was to be the beneficial owner of the Account into which the Shares were to be deposited). I do not think that even Clauses 3(d) or 3(g) of the Adam Loan Agreement (which I shall deal with below) suggest that AIIL was to hold anything other than a security interest over the Shares. Rather, Clause 6(b)(3), in providing for a waiver by the plaintiff of his equity of redemption (without qualifying it with the words if any, which those now acting for AIIL are careful enough to do in the pleadings and the skeleton submissions), was clearly drafted on the basis that such an equity did otherwise exist, consistent with the rest of the documents. Further, under Clause 6(g), even after an event of default had arisen, dividends, interest payments and other distributions, emanating from the Shares, were to be held by AIIL as further Collateral or additional Pledged Shares, thereby suggesting that before or after an event of default, AIIL had only a security interest in the Shares as a secured lender. While it must be a matter of substance rather than form, the form of the transaction adopted by the parties (i.e. a secured loan) is certainly a matter to be taken into account in ascertaining what is the true substance and nature of the transaction: just as one does not readily assume, especially in a legal document, that the parties have used the wrong word, one does not readily assume that they have used the wrong form either. In the absence of any improper intention, or any suggestion that the transaction is a sham or that some mistake has been made, one would expect the parties to a transaction to use a form and language consistent with the intended substance. *Beconwood* is distinguishable. Of the three reasons stated by Finkelstein J, the third is inapplicable here. As for the first, unlike OPS in *Beconwood*, AIIL did not have any unfettered right to deal with the Shares in any way it wanted. Before an event of default arose, by the terms of the Adam Loan Agreement, the only thing it could do was to undertake Portfolio Protection Arrangements under Clause 3(d) (which otherwise prohibited AIIL was doing anything with the Shares), but the very definition of such arrangements in Clause 1(bb), which referred to the mitigation of the risk of loss of principal, assets or securities values, suggests that the whole purpose of such arrangements was to protect AIIL as a secured creditor, and not because it had acquired rights in the Shares as an outright owner of the Shares, or that the transaction was anything other than a secured loan. Even when an event of default arose, in my judgment AIIL did not thereby become the owner of

the Shares. There is no provision to that effect. Rather, Clause 6(b)(2) of the Adam Loan Agreement provided that AIIL was to exercise all rights with respect to the Collaterals as if it were the sole and absolute owner, meaning that in fact it was not. If it were, there would not be any need for express provisions allowing AIIL to assign, sell or lease etc the Shares (Clause 6(b)(3)), to purchase the Shares (ibid), to apply for foreclosure (Clause 6(b)(4)), to transfer the Shares to itself or its designee (Clause 6(b)(5)), to collect payments (Clause 6(b)(6)), and to sell the Shares (Clause 6(d)). I have already noted Clause 6(g) above. Under the CCASS system, all that is required would have been an acknowledgment by the 1st defendant that the 19,112,000 shares in Billion Industrial in its account thereat were owned by AIIL. As for the second reason in *Beconwood*, as I said above, the existence of a clause such as Clause 3(g), which is supportive of an argument that an equity of redemption does not exist, is a matter to be taken into account, but it cannot be determinative, and must be considered in the context of the entire transaction as a whole. In my judgment, the entire tenor of the Adam Loan Agreement and the Adam CAA, with a large number of clauses drafted on the basis that AIIL was only to be granted a security interest in the Shares, suggests that, both as a matter of form and substance, the transaction was one of a secured loan. The Shares being provided as security, all provisions which purported to put a clog or fetter on the equity of redemption, including any purported waiver, in particular Clauses 3(d), 3(g) and 6(b)(3), as well as other provisions in Clause 6(b) relied upon by AIIL, to the extent that they purported to deny or limit the plaintiff's right to redeem the Shares, are void. In answer to Mr Maurellet's submission that AIIL did not have to return exactly the same shares, Mr Li also refers to the nature of the CCASS holding system, and the following passage in the judgment of Yuen J (as she then was) in *Re CA Pacific Finance Ltd*. In our case, however, the subject matter is shares. It is well established that shares are simply bundles of intangible rights against the company which had issued them. Share certificates are not valuable property in themselves they are just evidence of the true property, which are the proportionate interests of the shareholders in the ownership of the company. One *pari passu* share is exactly the same as another. This was recognised in *Solloway v McLaughlin* [1938] AC 247 where the Privy Council held that the broker need only have retained an equivalent quantity of stock in its possession, and in the more recent cases of *Hunter v Moss* [1993] 1 WLR 934 (Ch), [1994] 1 WLR 452 (CA) and *Re Harvard Securities Ltd (in liquidation)* [1997] 2 BCLC 369. Therefore, each share certificate with HKSCC's depositary evidences the same bundle of rights, and each bundle of rights can satisfy the client's proprietary interest as any other. With respect, I agree. What was required under Clause 3(g) of AIIL was strictly a return (meaning, as I explained above, the restoration to the plaintiff free from encumbrance) of a bundle of rights represented by 19,112,000 shares in Billion Industrial to the plaintiff upon repayment, whether it was evidenced by the same certificate or otherwise. Each bundle of right, as held under the CCASS in the account of the broker in question, is exactly the same as the other, and thus, notwithstanding the wording of Clause 3(g), it did require AIIL, via CCASS, to return the same subject matter to the plaintiff upon repayment. *Beconwood* was also considered by DHCJ Fee in *Tsang Yan Kwong v 360 HK Ltd*. That was an application for interlocutory injunction and the learned Deputy Judge found that the borrower there, under

an agreement with a similar clause 3(g) but also various clauses referring to security interests, had shown a strong prima facie case based on a Clog on Equity of Redemption ground. I need to and do go further, and for reasons stated find that the proposition stated in 1 of the Summons to be correct.

DISPOSITION

For the above reasons, I find that the proposition stated at 1 of the Summons to be correct. As for 2 of the Summons, I do not think that it is appropriate for me to make an order in the terms thereof, as the making of such an order does depend on whether the plaintiff did enter into the Adam Loan Agreement and the Adam CAA with AIIL, which remains unresolved. It is for the plaintiff to decide how to proceed with this action in the light of my ruling on 1 of the Summons (subject of course to any appeal). In all the circumstances, it is appropriate for me to adjourn 2 of the Summons sine die with liberty to restore. As for 3 of the Summons, even though the plaintiff seeks an adjournment thereof, he has conceded that this Court is unable to grant summary judgment given the allegations of fraud in the Statement of Claim. The application is clearly improper and I see no reason not to dismiss it. I so order. I also see no reason for a stay in the light of my decisions on 1-3 of the Summons. I dismiss 4 of the Summons. As for costs, the plaintiff has succeeded on the Order 14A application but not his summary judgment application, which occasioned some submissions on behalf of the 1st defendant and AIIL. There should therefore be a reduction in the costs to be paid to the plaintiff, and in my view a 5% reduction is fair. Even though the 1st defendant adopts the submissions of AIIL, it does oppose the application and I see no reason why it should not also be liable for the costs of the plaintiff as well. I therefore make an order nisi that the 1st defendant and AIIL are to pay 95% of the costs of the plaintiff of and occasioned by the Summons, including the hearing before me, with certificate for two counsel, to be taxed if not agreed. I thank the legal representatives of all parties for their assistance. (Stewart Wong SC) Recorder of the High Court Mr Laurence Li SC and Mr Jacky Lam, instructed by CL Chow & Macksion Chan, for the plaintiff Mr Mark Pierrepont, of Arun Nigam Associates, for the 1st defendant Mr Jose-Antonio Maurellet SC and Mr Byron Chiu, instructed by DLA Piper Hong Kong, for the 2nd defendant This was effected by way of a transfer of 19,112,000 shares in Billion Industrial held at the Central Clearing and Settlement System (CCASS) from the account of Citibank NA thereat to that of the 1st defendant. It will be noted that the full name of the 2nd defendant, as stated in the title of this action, is different from the name of the entity named as the lender in the Funding Notice (i.e. that entity does not have the word Investment or Investments in its name), and from the name of the entity from which the sum of HK\$11,946,099 was said in the statement of the Account to come from (i.e. that entity has the word Investment , and not Investments , in its name). The sender of the Notice was named as Adam International Investment Limited on the letterhead and underneath the signature at the end of the letter. However, the caption referred to the lender as Adam International Investments Limited Clause 6(a)(15) stated: If the borrower or any of his/her Affiliates, without the prior written consent of the Lender (a) incurs any indebtedness for borrowed money which is secured by any shares of Common Stock of the Issuer, or (b) sells, transfers, pledges, grants a security interest in,

hypothecates, lends or otherwise grants any other rights in or to any Shares or any other securities issued by the Issuer, or enters into any agreement or attempts to effect any of the foregoing, without the Lender's prior written consent. The Issuer is Billion Industrial. The letterhead, the caption and the name at the end of this letter all stated the name of the sender to be Adam International Investments Limited. Despite what was said in this letter, what AIIL now relies on as the event of default was the use of shares in Billion Industrial by the plaintiff's brother-in-law, and not the plaintiff himself, to borrow: see the affidavit of Velibor Colovic, the sole director of AIIL. Cap 571. Cap 163. Cap 4A. At the hearing, Mr Laurence Li SC, appearing for the plaintiff together with Mr Jacky Lam, does not pursue his application for summary judgment and asks me to adjourn it. Appearing with Mr Byron Chiu.

[2003] 3 HKC 174.

(2003) 6 HKCFAR 222. 1 of the Summons is not in the form of a question but a proposition, and it is clear to me that the question involved is whether that proposition is correct as a matter of law. *Jumbo King Ltd v Faithful Properties Ltd* (1999) 2 HKCFAR 279 at 296 per Lord Hoffmann NPJ. Chitty on Contracts (33rd ed, 2018) at [13-044]. 15 February 1994, unreported judgment of the Court of Appeal of England and Wales (Sir Donald Nicholls VC (as he then was), Leggatt and Henry LJ). Lewison, *The Interpretation of Contracts* (6th ed, 2015) at [3.03]. See Fisher and Lightwood's *Law of Mortgage* (15th ed, 2019) at [47.2].

[1914] AC 25 at 41.

(2008) 246 ALR 361. 6th ed (2017), at [3-07]. 3rd ed (2018), at [4.30]. *Re Curtain Dream plc* [1990] BCLC 925. *Common Luck Investment Ltd v Cheung Kam Chuen* (1999) 2 HKCFAR 229 at 235D-F per Litton PJ; *Chung Yuen Chu v Cosimo Borrelli* [2018] 2 HKLRD 898 at [22] per Chow J. *Jumbo King* at 296G per Lord Hoffmann NPJ.

[1999] 2 HKLRD 1 at 18D-F.

[2018] HKCFI 1886; HCA 548/2017 (16 August 2018) at [91-97]. - PAGE * MERGEFORMAT - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V umbT h2bz hc^% gd2bz gd!W. gd!W. gd!W. gd!W. |xt| hZ\# hjBO h!W. xmbmWmOm h!<T h!<T h5e8 h5e8 h|k0 hZ\# gd5e8 h!<T h';] h!<T h2#G h';] h';] qcqy[S[G h';] maUa gd'^H qWqWqe h2#G h';] h';] gd'^H zrjr` }q}q} h';] gd<W zjzj hvH% gd:9 gd<W h';] h';] gd<W gd:9 zqkqkek[kqk hvH% hvH% hq-V hq-V h{<r hvH% hvH% h)bK h';] ~t~j~`SF hvH% hvH% hvH% rfYf hvH% h';] h{<r hdZO h)bK T^T^ h{<r ph779 ph779 h}.F vjZjMjAjM ph779 ph779 ph779 uk`UB

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Prepared on 28 October 2026 · Esheria