IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 264

Suit No 200 of 2016

Between

(1) Sun Electric Pte Ltd
(2) Sun Electric Power Pte Ltd

… *Plaintiffs*

And

(1) Menrva Solutions Pte Ltd
(2) Chan Lap Fung Bernard

… *Defendants*

JUDGMENT

[Contract] — [Breach]
[Contract] — [Contractual terms]
[Tort] — [Negligence] — [Duty of care]
[Tort] — [Negligence] — [Breach of duty]
[Companies] — [Incorporation of companies] — [Lifting corporate veil]

TABLE OF CONTENTS

Sun Electric Pte Ltd and another
v
Menrva Solutions Pte Ltd and another

[2018] SGHC 264

High Court — Suit No 200 of 2016
Vinodh Coomaraswamy J
24–26, 30–31 January; 26 June 2018

3 December 2018 Judgment reserved.

Vinodh Coomaraswamy J:

1 Sun Electric Power Pte Ltd ("SEP") is a market-maker in Singapore's electricity futures market.[1] SEP's parent company, Sun Electric Pte Ltd ("SE"),[2] engaged Menrva Solutions Pte Ltd ("Menrva") as a consultant to advise on SEP's obligations as a market-maker. Under their consultancy agreement ("the Consultancy Agreement"), Menrva was obliged to provide the services of Menrva's principal, Mr Bernard Chan ("Mr Chan"), to SE.[3] To mitigate SEP's risk as a market-maker, Mr Chan committed SEP to a series of hedges.[4] These hedges turned out to be loss-making. Has Menrva breached the Consultancy Agreement? Did Menrva and Mr Chan owe the two Sun Electric companies a

---

1 Plaintiffs' closing submissions at paras 8–9.

2 Defendants' opening statement at para 7.

3 Affidavit of evidence-in-chief ("AEIC") of Matthew Peloso at p 128.

4 Plaintiffs' closing submissions at para 126.

duty of care? Can Mr Chan be held personally liable for Menrva's breaches of duty? These are the questions raised in this action.

The background

The parties

2 SE is the first plaintiff in this action. It is in the business of operating solar electric power systems and trading energy.[5] SEP is the second plaintiff in this action. It is a wholly-owned subsidiary of SE and is in the business of generating electricity. It holds a retail licence to sell electricity in Singapore.[6] The director and chief executive officer of both plaintiffs is Dr Matthew Peloso ("Dr Peloso").

3 Menrva is the first defendant in this litigation. It is in the business of trading commodities and providing business and management consultancy services.[7] Mr Chan is the second defendant in this litigation. He is the sole director and sole shareholder of Menrva.[8]

The Scheme

4 In early 2015, the Energy Market Authority of Singapore ("EMA") established the Enhanced Forward Sales Contract Scheme ("the Scheme"). The objective of the Scheme is to facilitate the participation of industry players in Singapore's electricity futures market.[9]

---

5 Statement of claim at para 1.

6 Statement of claim at para 2.

7 Statement of claim at para 3.

8 AEIC of Bernard Chan at para 1.

9 Plaintiffs' closing submissions at para 8 and statement of claim at para 4.

5 Participants in the Scheme are market-makers in the electricity futures market. They therefore undertake an obligation to create liquidity in the market.[10] The core obligation of a participant is either to buy or to sell a certain volume of electricity futures each trading day, depending on the prevailing price of the futures.[11]

6 Like any futures, electricity futures fluctuate significantly in value from day to day and even minute to minute. The market-making obligations of a participant in the Scheme therefore entail a significant amount of risk. Under the Scheme, participants can mitigate this risk by entering into forward sale contracts ("FSCs") with SP Services Limited ("SPS").[12]

7 When an FSC between a Scheme participant and SPS is settled, the participant will either receive a payment from SPS or make a payment to SPS. The direction of the payment and the size of the payment on settlement depends on the difference between the wholesale electricity price ("WEP") and the liquefied natural gas vesting price ("LVP") at that time.[13] If the WEP is *higher* than the LVP, *a participant* is obliged to pay SPS the difference between the WEP and the LVP. This is known as a negative FSC payment. If the WEP is *lower* than the LVP, *SPS* is obliged to pay the participant the difference between the WEP and the LVP. This is known as a positive FSC payment.

8 The EMA accepted SEP as a participant in the Scheme in March 2015.[14] It was in the course of seeking the status of a participant in the Scheme that Dr

---

10 Plaintiffs' closing submissions at para 9.

11 AEIC of Bernard Chan at para 25(c).

12 Plaintiffs' closing submissions at para 10.

13 Plaintiffs' closing submissions at para 11.

14 Plaintiffs' closing submissions at para 9.

Peloso and Mr Chan met for the first time.[15] Mr Chan was introduced to Dr Peloso as an experienced power trader who could provide advisory, consultancy and risk management services to the plaintiffs in connection with SEP's participation in the Scheme.[16] On one occasion, Dr Peloso invited Mr Chan to a meeting with representatives of the EMA.[17] After that, Dr Peloso sought advice from Mr Chan informally on the Scheme, such as whether it was a worthwhile venture and how SEP would carry out its market-making obligations should it become a participant.[18]

9 Dr Peloso and Mr Chan eventually sought to formalise their collaboration. They had several discussions about how they would do so. One suggestion which they discussed was a joint venture between Dr Peloso's companies and Abundance Way Investments Ltd ("Abundance Way"). Abundance Way is Mr Chan's wholly-owned corporate vehicle incorporated in the British Virgin Islands.[19] An alternative suggestion was a consultancy agreement between Dr Peloso's companies and Abundance Way. The parties eventually agreed to structure their collaboration as a consultancy agreement between SE and a corporate vehicle to be incorporated in Singapore by Mr Chan.[20]

10 To this end, Mr Chan incorporated Menrva in April 2015.[21]

---

15 Plaintiffs' closing submissions at para 13.

16 Defendants' closing submissions at para 19.

17 AEIC of Bernard Chan at para 24.

18 AEIC of Bernard Chan at paras 27–28

19 Defendants' closing submissions at para 20.

20 Defendants' closing submissions at para 21.

21 Defendants' closing submissions at para 23.

The Consultancy Agreement

11 Menrva and SE executed the Consultancy Agreement a few days after Menrva was incorporated.[22] The parties agreed to backdate the agreement to 3 April 2015 – even though Menrva had not yet been incorporated on that date – to reflect the fact that Mr Chan had commenced providing consultancy services to SE from that date.[23]

12 One of the key issues in this case arises from the fact that SEP was the participant in the Scheme, and therefore the target of Dr Peloso's services, but was not a counterparty to the Consultancy Agreement.

13 Clause 1 of the Consultancy Agreement stipulated that Menrva was to perform its obligations to SE under the agreement by providing Mr Chan's advisory services:[24]

> **1. Services**
>
> a. [Menrva] shall provide the services of Bernard Chan (the "**Advisor**")
>
> b. [Menrva] shall provide SE the service for setting up the … Market Making Obligations of the [Scheme]. Services include:
>
> i. Evaluation of partner(s) for fulfilling the … Market Making Obligations and its Risk Management ("**MM Partner**")
>
> ii. Evaluation of proposals from MM Partner
>
> iii. Facilitation of negotiation with the MM Partner
>
> iv. Structuring of the Definitive Agreement between SE and the MM Partner

---

22 Defendants' closing submissions at para 24.

23 Defence and counterclaim (amendment no 2) at para 5; plaintiffs' closing submissions at para 136.

24 AEIC of Matthew Peloso at p 128.

> v. [Menrva] will be appointed to the SE Advisory Committee throughout the term below, and provide the following services if the fees payment defined in Section 3 below from the preceding quarter exceeds SG$20,000
>
> a) Daily indicative valuation of the FSC for risk monitoring
>
> b) Quarterly Outlook on the drivers affecting the value of the FSC
>
> c) Quarterly auditing of the financial settlement with the MM Partner and the [EMA] / [SPS]
>
> d) Consultation on risk management of the FSC
>
> e) Report of consolidated FSC income and costs for SE accountants.

14 In addition to these express terms, it is common ground that the Consultancy Agreement contains an implied term that Menrva would exercise reasonable care and skill in providing its services under the Consultancy Agreement.[25]

15 One of the key steps which SE had to have in place before agreeing to be a participant in the Scheme was to identify and appoint what the Consultancy Agreement calls the MM Partner. The purpose of the MM Partner was to allow SEP to lay off some of the risk associated with being a participant. The corollary of that was that SEP would have to share with the MM Partner some of its reward for being a participant.

16 On 1 June 2015, with the assistance of Menrva, SEP secured Tong Teik Pte Ltd ("Tong Teik") as its MM Partner.[26] Tong Teik's obligations as the MM

---

[25] Defendants' closing submissions at para 190; plaintiffs' closing submissions at paras 184–185.

[26] Defendants' closing submissions at para 27.

Partner were to perform SEP's market-making obligations and to make all negative FSC payments due to SPS. In return, SEP agreed to pay Tong Teik 70% of the positive FSC payments which it received from SPS.

The Scheme and the amended Scheme

17 The Scheme was launched on 1 July 2015,[27] the beginning of the third quarter of 2015. In the week following its launch, there was significant volatility in the electricity futures market. As a result, the EMA suspended the Scheme on 11 July 2015 in order to undertake a review of it.[28]

18 On 21 August 2015, as a result of the review, the EMA announced a suite of amendments to the Scheme.[29] It introduced a cap on positive FSC payments, a floor on negative FSC payments and a global revenue cap. The result of these amendments was to remove much of the risk associated with being a participant in the Scheme, while at the same time limiting a participant's reward.

19 These amendments took effect from 1 October 2015, the beginning of the fourth quarter of 2015. That is when the Scheme was re-launched.

The CFDs

20 From the outset of the Scheme, there were concerns over volatility in the electricity market. These concerns were prompted largely by the possibility of electricity suppliers in Singapore deliberately restricting supply.[30] These

---

27 Plaintiffs' closing submissions at para 78.

28 Plaintiffs' closing submissions at para 79.

29 Plaintiffs' closing submissions at para 82.

30 Plaintiffs' closing submissions at para 60.

electricity suppliers did not want the Scheme to proceed. As suppliers, they could disrupt the Scheme by reducing the supply of electricity in the market, thereby causing the WEP to increase. That, in turn, would cause participants in the Scheme to incur negative FSC payments.

21 One of the ways to hedge against volatility in the electricity futures market is by entering into contracts for differences on the WEP ("CFDs"). A CFD is a contract in which the seller of the CFD pays the buyer of the CFD the difference between the current value of an asset and the future value of the asset on a stipulated date.[31] If the difference is negative, it is the buyer who pays the seller instead. The asset which forms the basis of the CFDs in this action is wholesale electricity. The value of these CFDs was dependent on the prevailing WEP.

22 In order to hedge against volatility in the electricity futures market,[32] SEP entered into seven CFDs:

(a) A CFD on 29 June 2015 for the third quarter of 2015;[33]

(b) A CFD on 7 July 2015 for the fourth quarter of 2015;[34]

(c) A CFD on 3 August 2015 for the fourth quarter of 2015;[35]

(d) A CFD dated 31 August 2015 for the fourth quarter of 2015;[36]

(e) A CFD on 14 September 2015 for the fourth quarter of 2015;[37]

---

31 AEIC of Bernard Chan at para 153.

32 Plaintiffs' closing submissions at para 67.

33 AEIC of Bernard Chan at para 161.

34 Agreed bundle of documents, vol 4, at pp 2319–2335.

35 Agreed core bundle, vol 3, at pp 1622–1638.

36 Agreed core bundle, vol 3, at pp 1741–1757.

(f) A CFD on 15 September 2015 for the fourth quarter of 2015;[38] and

(g) A CFD on 17 December 2015 for the first quarter of 2016.[39]

Of these seven CFDs, the last six were loss-making. SEP suffered a loss on these six CFDs totalling just under $1.46m.[40] That loss forms the bulk of the plaintiffs' claim against the defendants.

Termination of the Consultancy Agreement

23 On 20 January 2016, Dr Peloso emailed Mr Chan saying "[s]ince we [have] all these caps there is really no risk. Just threw away so much money".[41] Dr Peloso was referring to the effect of the amendments to the Scheme which the EMA had introduced with effect from 1 October 2015 which had capped both the risk and the reward associated with being a participant in the Scheme.

24 Dr Peloso followed this with an email on 26 January 2016 notifying Mr Chan that SE was terminating the Consultancy Agreement for "non-performance" and "for cause". His allegation was that Menrva had breached cll 1(b)(v)(a)–(e) of the Consultancy Agreement.[42] Mr Chan replied on 28 January 2016 rejecting the allegations of breach. He reminded Dr Peloso that payment was due to Menrva under the Consultancy Agreement.[43]

---

37 Agreed bundle of documents, vol 6, at pp 3459–3475.

38 Agreed bundle of documents, vol 5, at pp 3440–3456.

39 Agreed core bundle, vol 4, at pp 2305–2321.

40 Statement of claim at para 18.

41 AEIC of Bernard Chan, part III, at p 2140.

42 AEIC of Bernard Chan, part III, at p 2168.

43 AEIC of Bernard Chan, part III, at pp 2166–2167.

25 The parties met on 30 January 2016 in an unsuccessful attempt to resolve their differences.[44] The plaintiffs commenced this action on 1 March 2016.

26 The plaintiffs' claim in this action is that the defendants are in breach of contract and have breached their duty of care in tort.[45] The plaintiffs also claim that Menrva's corporate veil should be lifted so as to hold Mr Chan directly liable to the plaintiffs for Menrva's defaults. The defendants counterclaim the fees due to Menrva under the remainder of the Consultancy Agreement.[46]

Issues to be determined

27 The issues to be decided in this action are:

(a) Has Menrva breached the Consultancy Agreement?

(b) Do either Menrva or Mr Chan owe a duty of care in tort to the plaintiffs, and if so have they breached it?

(c) Should the corporate veil of Menrva be lifted?

(d) Is SE liable to Menrva for the fees which it would have been obliged to pay Menrva if the Consultancy Agreement had not been terminated?

Preliminary issue on pleadings

28 Before I turn to these issues, I address a preliminary issue raised by the defendants on the adequacy of the plaintiffs' pleadings.

---

44 AEIC of Bernard Chan, at paras 297–299.

45 Statement of claim at paras 15–16.

46 Defence and counterclaim (amendment no 2) at paras 27–28.

29 The defendants contend that the plaintiffs have raised "new matters" in their reply, *ie* matters which are not pleaded in their statement of claim and which are pleaded for the first time in the reply even though they are not responsive to any plea in the defence and counterclaim.[47] These new matters concern the lifting of Menrva's corporate veil, Mr Chan's authority to enter into CFDs without SEP's prior approval, and the CFD dated 17 December 2015.

30 The defendants rely on *Romar Positioning Equipment Pte Ltd v Merriwa Nominees Pty Ltd* [2004] 4 SLR(R) 574 ("*Romar Positioning*") and *Nirumalan K Pillay and others v A Balakrishnan and others* [1996] 2 SLR(R) 650 ("*Nirumalan*") to argue that I should disregard these new matters.

31 The rules of pleading assure a fair and transparent process for the resolution of disputes by ensuring that each party gives the other party adequate notice of the case which the other will have to meet at trial. One rule of pleading is that the plaintiff must plead his cause of action with sufficient particulars (*V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422 ("*V Nithia*") at [2]). Another such rule, as the court in *Nirumalan* noted at [10], is that:

> because the function of a reply is to answer matters raised in the defence, its contents must relate to matters raised in the defence … [The plaintiff] may not supplement his statement of claim by including in his reply matters which ought to have been included in the statement of claim.

32 The rules of procedure, though important, are merely a means to the end of attaining a fair resolution of the parties' dispute. They are not an end in themselves. The courts are thus not required to adopt an overly formalistic and inflexibly rule-bound approach to procedure, and in particular to pleadings. This

---

47 Defendants' closing submissions at para 61.

explains why, for example, the courts may allow an unpleaded point to be raised if no prejudice is caused to the other party (*V Nithia* at [40]). For the same reasons, I see no reason why a point which is pleaded in a reply but not in the statement of claim cannot similarly be allowed to form part of a plaintiff's case, provided that the pleading is not tactical or abusive and causes no prejudice to the defendant. Late pleading is less egregious than no pleading at all.

33 In the present case, I find that the defendants are not prejudiced by the raising of new matters in the reply. They were clearly aware of these aspects of the plaintiffs' claim against them as these matters were in fact pleaded (albeit late). The defendants even addressed the new matters in their opening statement.[48] The defendants also had more than enough time to prepare to deal with these new matters at trial, given that the amended reply was filed about three months before trial. If anyone could have suffered prejudice from these new matters being raised only in the reply, it was only the plaintiffs themselves. By their late pleading, the plaintiffs relieved the defendants from an obligation to state their position on these new matters on the pleadings. In the event, the defendants filed a rejoinder and voluntarily pleaded a position on these new matters.

34 The present case is thus very different from *Romar Positioning*. In that case, the defendant became aware of the plaintiff's *unpleaded, alternative* case only on the *first day of trial*. Quite understandably, the Court of Appeal in *Romar Positioning* accepted that the defendant was prejudiced by the inclusion of the hitherto unpleaded, alternative case at virtually the latest possible moment. The Court of Appeal thus said that it would have allowed the appeal against the granting of leave to amend the reply, if it had not already held that

---

48 Defendants' opening statement at paras 25, 27 and 40(i).

the defendant should succeed on another limb of its appeal (*Romar Positioning* at [38] and [41]).

35 I also do not consider that the plaintiffs have behaved tactically in raising these new matters in the reply rather than by way of amendment to their statement of claim.

The claim in contract

36 I now turn to the first issue in this action: has Menrva breached the Consultancy Agreement? In their statement of claim, the plaintiffs allege that Menrva breached the Consultancy Agreement by failing to provide the services listed in cll 1(b)(i)–(v).[49] The plaintiffs have since withdrawn their allegation that Menrva breached cll 1(b)(i)–(iv).[50] The only question that remains, therefore, is whether Menrva breached cl 1(b)(v) of the Consultancy Agreement. That clause obliges Menrva to provide the following five separate services to SE:[51]

> a) Daily indicative valuation of the FSC for risk monitoring
>
> b) Quarterly Outlook on the drivers affecting the value of the FSC
>
> c) Quarterly auditing of the financial settlement with [Tong Teik and the EMA or SPS]
>
> d) Consultation on risk management of the FSC
>
> e) Report of consolidated FSC income and costs for [SE's] accountants.

For ease of exposition, I will refer to these five obligations only by the letters of their respective sub-clauses, *ie* simply as sub-cl (a) to sub-cl (e).

---

49 Statement of claim at paras 14–15.

50 Plaintiffs' closing submissions at para 39.

51 AEIC of Matthew Peloso at p 128.

37 Under the express terms of the Consultancy Agreement, Menrva's obligation to perform these five services arose only when the fee payment from SE to Menrva for the preceding quarter exceeded $20,000.[52] It is common ground that that condition precedent was satisfied only in the third quarter of 2015. Menrva's obligations to perform the services under cl 1(b)(v) therefore arose only in the fourth quarter of 2015, *ie* between 1 October 2015 and 31 December 2015.

Meaning of "FSC"

38 Before considering the five separate services which Menrva was obliged to provide to SE under sub-cl (a) to sub-cl (e), it is necessary first to consider the ambit of cl 1(b)(v). Sub-clauses (a), (b) and (d) make reference to the "value of the FSC" and to "risk management of the FSC". The ambit of these terms affects the ambit of Menrva's obligations under cl 1(b)(v).

39 The plaintiffs contend that these terms must include the value and risk of the CFDs. In other words, the "value of the FSC" refers to the value of the entire portfolio of market contracts which SEP held, taking into account the value of the FSCs and the value of the CFDs which were associated with the FSCs. So too, the plaintiffs submit, "risk management of the FSC" refers to risk management of the entire portfolio of FSCs and CFDs taken together.[53]

40 The defendants disagree. They argue that these terms refer to SEP's portfolio of FSCs alone, disregarding any associated CFDs.[54]

---

52 Plaintiffs' closing submissions at para 148 and defendants' closing submissions at para 104.

53 Plaintiffs' closing submissions at para 147.

54 Defendants' reply closing submissions at para 18.

41 I find that the terms "value of the FSC" and "risk management of the FSC" refer to the value and risk of SEP's portfolio of FSCs and CFDs taken together. At the time the Consultancy Agreement was entered into, it was envisaged that SEP would enter into CFDs as a hedge against the risk of being a participant in the Scheme. This is evident from, for example, a spreadsheet prepared by Mr Chan and sent to Dr Peloso on 3 April 2015.[55] The spreadsheet calculated the *value of the FSC, factoring in hedging*, and formed the basis for discussions between Mr Chan and Dr Peloso on negotiations with Tong Teik.[56]

42 Similarly, in an email dated 16 April 2015, Mr Chan stated that "the fact that i [have] a *consultation on the risk management of FSC* will allow [SEP] to seek help from me to identify third party *hedge provider*" [emphasis added].[57] At this point in time, sub-cl (d) had already been included in the draft Consultancy Agreement.[58] Mr Chan was thus clearly referring to the obligation in sub-cl (d) for "[c]onsultation on risk management of the FSC" and saying that this included consultation on hedging.

43 Given that the parties envisaged that SEP would enter into CFDs to hedge against the risks involved in being a participant in the Scheme, the natural meaning of these references to "value of the FSC" and "risk management of the FSC" is that they include the CFDs associated with the FSCs. It is the entire portfolio of both types of contracts which affected the risk and the reward to SEP of participating in the Scheme.

---

55 Agreed core bundle, vol 1, at p 542.

56 AEIC of Bernard Chan at paras 86–88.

57 AEIC of Matthew Peloso at p 156.

58 AEIC of Matthew Peloso at pp 144 and 146.

44 The defendants argue that the parties could not have intended the terms "value of the FSC" and "risk management of the FSC" to include CFDs. At the time the Consultancy Agreement was executed, SEP was still negotiating with potential MM Partners. One of the possible arrangements with the MM Partner then under discussion was a fixed-fee model.[59] Under a fixed-fee model, SEP would effectively subcontract its entire market-making obligation to the MM Partner in exchange for a fixed fee. The MM Partner would then, in economic substance, become the Scheme participant. It would undertake all of SEP's market-making obligations, receive all of the positive FSC payments due to SEP and make all of the negative FSC payments.[60] Because a fixed-fee model left no residual risk with SEP, adopting this model meant that SEP would have no need to hedge at all. Therefore, the defendants argue, CFDs were not within the ambit of the terms "value of the FSC" and "risk management of the FSC".

45 I reject the defendants' argument. Although a fixed-fee model was indeed mooted at one time, the evidence establishes that SEP, on Mr Chan's advice,[61] never seriously considered it. On 26 March 2015, well before parties executed the Consultancy Agreement, Dr Peloso informed Tong Teik that SEP could not agree to the fixed-fee model and proposed a different model instead.[62]

46 Further, if SEP was going to adopt a fixed-fee model, there would be no need for sub-cll (a), (b) and (d) at all. This is because under a fixed-fee model, as I have mentioned, there would be no market risk to SEP at all. Its only risk would be the counterparty risk of Tong Teik being unable to pay the fixed fee. As Mr Chan stated in a Whatsapp message to Dr Peloso, under the fixed-fee

59 Defendants' reply closing submissions at para 26(b).

60 AEIC of Bernard Chan at para 52.

61 AEIC of Bernard Chan at para 76.

62 AEIC of Bernard Chan at para 76.

model Tong Teik would effectively be "buy[ing] the license" from SEP,[63] who would have no further economic participation in the Scheme. If that were the case, there would be no need for the plaintiffs to monitor the value of the FSC through daily indicative valuations (*ie* sub-cl (a)), consider the drivers affecting the value of the FSC (*ie* sub-cl (b)) or conduct risk management of the FSC (*ie* sub-cl (d)). All of those risks would be solely for Tong Teik's account. The parties' decision to include and agree these clauses in the Consultancy Agreement indicates to me that the parties envisaged that SEP would need to engage in some sort of active risk management, *ie* by entering into CFDs as active hedges.

47 Having determined that the references to the "value of the FSC" and "risk management of the FSC" include SEP's entire portfolio of market contracts, including both FSCs and CFDs, I turn to consider the individual obligations under cl 1(b)(v) and whether Menrva has breached them.

Daily indicative valuation

48 Under sub-cl (a), Menrva was to produce "[d]aily indicative valuation of the FSC for risk monitoring". I have already held that "FSC" should be construed as a reference to SEP's portfolio of market contracts. Menrva argues that its obligation was to set up a system for monitoring and valuing SEP's portfolio.[64] This obligation was discharged by arranging for Tong Teik to provide SE with reports on the indicative valuation of the portfolio ("Tong Teik Reports").[65] Alternatively, Menrva argues that SE waived Menrva's obligation

63 AEIC of Bernard Chan at p 505.

64 Defendants' closing submissions at para 78.

65 Defendants' closing submissions at paras 83 and 85.

to produce daily indicative valuations of the portfolio by agreeing for Tong Teik to produce Tong Teik Reports.[66]

49 I find that Menrva did breach sub-cl (a). In interpreting a contract, even though text and context are of equal importance and often interact with each other, the text is the first port of call: *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd)* [2015] 5 SLR 1187 ("*Soup Restaurant*") at [32]. The task of the court is thus to ascertain the objective intention of the parties at the time they entered into the contract, paying close attention to both text and context: *Soup Restaurant* at [32] and [35].

50 In my view, what Menrva was obliged to produce under sub-cl (a) is set out in plain and unambiguous text, as described in *Soup Restaurant* at [31]:

> the *text* itself [is] *plain and unambiguous inasmuch as it admits of one clear meaning.* Correlatively, this would also mean that there is a *coincidence* between both text and context inasmuch as there is nothing untoward in the context which militates against what is the plain language of the text itself. [emphasis in original]

Sub-clause (a) unambiguously requires Menrva to produce a *daily* indicative valuation of SEP's FSC portfolio for risk monitoring. It is impossible to read sub-cl (a) as requiring Menrva to set up a system for monitoring and valuing SEP's FSC portfolio.

51 Menrva has sought to rely on context to suggest ambiguity in the text of sub-cl (a). Menrva relies on a Whatsapp message sent by Mr Chan to Dr Peloso saying that he wanted to help SE to think about a simple risk system for monitoring and valuing the Scheme.[67] Following this Whatsapp message, Mr

---

66 Defendants' closing submissions at para 89.

Chan amended the draft Consultancy Agreement to include sub-cl (a). In his email to Dr Peloso attaching the amended draft, Mr Chan wrote "[a]s a share holder I'm happy to share with you ideas to risk manage your portfolio (though to be clear I will not be too involved in the actual implementation)". Menrva contends that, in the context of this exchange of Whatsapp messages, sub-cl (a) should be interpreted as imposing an obligation on Menrva to set up a *system* for monitoring and valuing the futures portfolio, and not an obligation to produce daily indicative valuations of the futures portfolio.

52 The "context" which Menrva has raised is no more than Mr Chan's subjective intention. Both the Whatsapp message and the email are merely manifestations of Mr Chan's subjective intention as to Menrva's obligation under sub-cl (a). As the Court of Appeal said in *Hewlett-Packard Singapore (Sales) Pte Ltd v Chin Shu Hwa Corinna* [2016] 2 SLR 1083 at [55]:

> Pursuant to the *objective* principle of interpretation, the court is concerned with the *expressed intentions of the parties,* and *not* their *subjective intentions*. The standpoint adopted is that of a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were *at the time the contract was formed*. The extrinsic material sought to be admitted must always go towards proof of what the parties, from an objective viewpoint, ultimately agreed upon. [emphasis in original]

Dr Peloso did not agree to incorporate Mr Chan's subjective intention into the Consultancy Agreement. In his reply to the email,[68] although Dr Peloso responds to other aspects of Mr Chan's email, Dr Peloso does not respond to this expression of Mr Chan's subjective intention. And as for Mr Chan's Whatsapp message, Dr Peloso did not even reply to it. That message was sent on 4 April 2015 at 12:04 am, and went without a response.[69] Dr Peloso's next Whatsapp

---

67 Defendants' closing submissions at paras 80–81.

68 Agreed core bundle, vol 1, at p 558–559.

message to Mr Chan was at 5:30pm, and responded to a Whatsapp message Mr Chan had sent on an unrelated matter at 5:24pm. It thus cannot be said that Dr Peloso accepted Mr Chan's subjective intention as defining the scope of Menrva's contractual obligation under sub-cl (a).

53 A reasonable person having all the background knowledge would thus interpret sub-cl (a) as requiring Menrva to produce precisely what it says: daily indicative valuations. It is not disputed that Menrva did not do so.[70] Further, even if the Tong Teik Reports could be construed as having been given on Menrva's behalf, the Tong Teik Reports were not sufficient to discharge Menrva's obligations under sub-cl (a) as they were produced on a bi-weekly or monthly[71] basis. Sub-clause (a) required Menrva to produce reports on a daily basis.

54 I also reject Menrva's contention that SE waived Menrva's obligation to produce daily indicative valuations of the futures portfolio by agreeing for Tong Teik to produce the Tong Teik Reports. Clause 11(c) of the Consultancy Agreement provides that "[t]he failure by either party to insist on strict enforcement of the [*sic*] any provision herein on any occasion shall not be deemed a waiver of its rights under that provision or any other provisions herein".[72] That suffices to dispose of Menrva's waiver argument.

Quarterly outlook on drivers

55 Clause (b) obliged Menrva to produce a "[q]uarterly [o]utlook on the drivers affecting the value of the FSC" portfolio. Menrva contends that it

69 Agreed core bundle, vol 1, at p 90.

70 Plaintiffs' closing submissions at para 154.

71 Defendants' closing submissions at para 85.

72 AEIC of Matthew Peloso at p 129.

discharged its obligation by producing a report which Mr Chan sent to Dr Peloso on 30 November 2015 (the "November Report").[73] The plaintiffs take the view that the November Report did not discharge Menrva's obligations under sub-cl (b) because the report was only two pages long, was based largely on "historical anecdotes" and did not mention the CFDs.[74]

56 I find that Menrva did not breach sub-cl (b). Although I have found that the term "value of the FSC" refers to the value of the futures portfolio, including both the FSCs and the CFDs, this does not mean that the November Report had to set out or analyse the performance of the CFDs, as the plaintiffs seem to suggest. What sub-cl (b) requires is a quarterly outlook on the *drivers* affecting the value of the futures portfolio; *ie* the factors contributing to the increase or decrease in the value of the futures portfolio.

57 The factors contributing to the increase or decrease in value of the FSCs alone and contributing to the increase or decrease in value of the CFDs alone are necessarily the same. The value of an FSC depends on the WEP and LVP at the time of valuation (see [7] above). The value of a CFD depends on the WEP at the time of valuation (see [21] above).

58 Therefore, all Menrva needed to do to report on the drivers affecting the value of the futures portfolio – including both the FSCs and the CFDs – was to set out the key drivers of the WEP. This, Menrva did. Mr Chan stated in the November Report that the WEP had dropped because of an increase in electricity supply and decrease in oil prices, factors that would continue to impact the WEP going forward.[75]

---

73 Defendants' closing submissions at para 103.

74 Plaintiffs' closing submissions at para 165.

75 Agreed core bundle, vol 4, at p 2220. Note that the parties use WEP and USEP

59 Although the November Report was indeed only two pages long, I do not see – and the plaintiffs have not explained – how this fact alone puts Menrva in breach of sub-cl (b). That clause does not stipulate the length of the report required. Nor do I consider that the implied term of reasonable care and skill stipulates a minimum length for this report. On 23 November 2015, Mr Chan sent a Whatsapp message to Dr Peloso asking what Dr Peloso expected from Menrva's quarterly report.[76] Dr Peloso replied saying "[r]eview market (spot /ef) , show some. Plots of what happened. A brief outlook. Not long, but please cover it so investors see we are keeping track of the market seriously" and "[j]ust do 1-2 pages each [quarter]. Short summary, mention key events. Dont need too much time in it".

60 Dr Peloso sent this Whatsapp message – outlining what he expected for the November Report – after the parties entered into the Consultancy Agreement. This message cannot therefore be taken as the parties' agreement on the scope of sub-cl (b) or as an aid to construing sub-cl (b). Nevertheless, the specifications which Dr Peloso set out in this Whatsapp message are relevant in determining whether Menrva breached the implied term to exercise reasonable care and skill. In other words, I take Dr Peloso's specifications as the standard of reasonable care and skill to be attained by a person standing in Mr Chan's shoes, given that no other evidence has been adduced on this point.

61 Having followed Dr Peloso's specifications in producing a two-page report providing a brief outlook for the value of the futures portfolio, I find that Menrva satisfied the implied term to exercise reasonable care and skill. The

---

interchangeably as they are usually equivalent (plaintiffs' closing submissions at para 12).

[76] Agreed core bundle, vol 1 at p 255.

plaintiffs, having got all that they wanted and expected from this report, are in no position to complain about it.

Quarterly auditing and consolidated reports

62 Under sub-cll (c) and (e), Menrva was to carry out "[q]uarterly auditing of the financial settlement with the MM Partner and [EMA and SPS]" and produce a "[r]eport of consolidated FSC income and costs for [SE's] accountants". It is undisputed that Menrva did not carry out the quarterly auditing or produce the consolidated report.[77]

63 Menrva argues that it was unable to carry out quarterly auditing under sub-cl (c) because, as of 26 January 2016 when the plaintiffs terminated the Consultancy Agreement, Mr Chan did not have the all the documents necessary to do so.[78] The documents which Mr Chan says were necessary but which he did not have include:

(a) Tong Teik's quarterly auditing of their financial settlement with SE, EMA and SPS for the fourth quarter of 2015;

(b) SPS's credit note for the FSC payments for December 2015;

(c) monthly statements on the FSC payments;

(d) the FSC buffer amount as at 20 January 2016;

(e) the FSC margin call payments as at 20 January 2016; and

(f) the FSC pre-payment on 21 January 2016.

---

77 Plaintiffs' closing submissions at para 169 and defendants' closing submissions at para 119.

78 Defendants' closing submissions at para 120.

Menrva further argues that the parties agreed on 1 June 2015 that Mr Chan could "match" his quarterly auditing to a quarterly report produced by Tong Teik.[79]

64 As for the consolidated report under sub-cl (e), Menrva contends that the parties agreed that Menrva did not have to produce a separate consolidated report to comply with that sub-clause. Instead, it was agreed that the report which resulted from the quarterly auditing under sub-cl (c) would also discharge Menrva's obligation to produce a consolidated report under sub-cl (e).[80]

65 The plaintiffs argue that Menrva did not need any further documents from them in order to carry out its quarterly auditing obligation. In any event, Menrva had full access to whatever documents of the plaintiffs which it needed to carry out its quarterly auditing. Mr Chan had direct access to the plaintiffs' office and their Google Drive cloud storage system.[81] Finally, the plaintiffs deny any agreement that Menrva's obligation under sub-cl (e) would be discharged by performing its obligation under sub-cl (c).[82]

66 Menrva's obligations under cl 1(b)(v) were engaged only at the beginning of the fourth quarter of 2015, *ie* on 1 October 2015.[83] The first quarterly auditing under sub-cl (c) and the first consolidated report under sub-cl (e) would thus have been for that quarter. The first quarterly audit could have been carried out and the first consolidated report produced only after the fourth quarter of 2015 ended. That quarter ended on 31 December 2015.[84] But the

79 Defendants' closing submissions at para 120(a).

80 Defendants' closing submissions at paras 114–117.

81 Plaintiffs' closing submissions at para 172.

82 Plaintiffs' closing submissions at para 174.

83 Plaintiffs' closing submissions at para 148 and defendants' closing submissions at para 104.

84 Defendants' closing submissions at para 119.

Consultancy Agreement was terminated on 26 January 2016 (whether by reason of Menrva's repudiatory breaches or by reason of SE's repudiatory breach in terminating the Consultancy Agreement without justification). This gave Menrva less than a month to carry out the first quarterly auditing and to produce the first consolidated report.

67 The question then is: did these two obligations of Menrva fall due for performance before the Consultancy Agreement was terminated on 26 January 2016? If they fell due for performance only after the Consultancy Agreement was terminated, then Menrva's performance obligation would have been discharged by the termination. In that event, Menrva's failure to carry out a quarterly auditing and to produce a consolidated report could not be a breach of contract.

68 Sub-clauses (c) and (e) do not stipulate when the quarterly auditing has to be carried out and when the consolidated report is to be produced. In my view, the implied term that Menrva is to exercise reasonable care and skill in providing the services under the Consultancy Agreement encompasses a temporal aspect as well. The result is that Menrva was obliged to carry out the quarterly auditing and produce the consolidated report within a reasonable time (see, for example, *PlanAssure PAC (formerly known as Patrick Lee PAC) v Gaelic Inns Pte Ltd* [2007] 4 SLR(R) 513 at [90]).

69 I find that a month constitutes reasonable time for Menrva to carry out the quarterly auditing and produce the consolidated report. In arriving at this finding, I take into account that Tong Teik required about 20 days to provide SE with an audit report.[85] Tong Teik is a multinational company[86] which no

[85] AEIC of Andrew Koscharsky at para 9.

[86] AEIC of Bernard Chan at para 50.

doubt has its own accounting department. I thus think it reasonable for Menrva, a one-man show run by Mr Chan,[87] to take a month to carry out the quarterly audit and to produce the consolidated report. I bear in mind especially that Menrva, to fulfil its own obligations, would require more time because it would have to obtain the relevant information and documents from Tong Teik. Tong Teik, in carrying out its audit and producing its own report, would have all the necessary information and documents in its own possession and control.

70 I therefore hold that Menrva did not breach sub-cl (c) and (e) because the time for performance of those two obligations had not expired when the Consultancy Agreement was terminated on 26 January 2016.

Consultation on risk management

71 Under sub-cl (d), Menrva was to provide "[c]onsultation on risk management of the FSC". The plaintiffs argue that Menrva failed to provide "any proper consultation on risk management of the FSC" because Mr Chan "did not bother to advise on, monitor, manage and/or report on the performance of any of the CFDs".[88] The plaintiffs further argue that Menrva failed to exercise reasonable care and skill in advising the plaintiffs to enter into the six loss-making CFDs[89] entered into between 7 July 2015 and 17 December 2015 (see [22] above).

72 Menrva contends that it discharged its obligation under sub-cl (d) because it made suggestions as to how SEP should allocate its volume of electricity futures under the Scheme and also advised SEP on the last CFD dated

---

87 Plaintiffs' closing submissions at para 133.

88 Plaintiffs' closing submissions at paras 180–181.

89 Plaintiffs' closing submissions at para 186 and plaintiffs' reply submissions at para 53.

17 December 2015.[90] Menrva's position is that its advice in relation to all of the loss-making CFDs was given with reasonable care and skill.[91]

73 I find that Menrva discharged its obligation under sub-cl (d). First, Dr Peloso admits that Menrva responded to consultations on risk. In his affidavit of evidence-in-chief Dr Peloso says:[92]

> I expressed objections to the Defendants' advice that the Plaintiffs enter into further CFDs, as the Amendments to the FSC Scheme had essentially eliminated the risk of the original scheme. The Defendants nonetheless persisted in promoting and subsequently entering into CFDs. This advice from the Defendants, as part of their "*[c]onsultation [services] on risk management of the FSC*" under Clause 1(d) of the [Consultancy] Agreement, continued from July 2015 to December 2015.

74 Second, I do not agree that sub-cl (d) can be interpreted as including an obligation to "advise on, monitor, manage and/or report on the performance" of the CFDs, in so far as it is suggested that such an obligation requires Menrva to take the *initiative* to so advise and manage, and in so far as such an obligation goes *further than the obligation in sub-cl (a)* to give daily indicative valuations of the futures portfolio. The plaintiffs' interpretation of sub-cl (d) effectively imports an obligation on Menrva to monitor and report on the performance of each of the CFDs and then, on Menrva's own initiative and in its own discretion, to advise the plaintiffs whether to manage the CFDs' risk by closing some out early or in some other way. In my view, sub-cl (d) requires Menrva only to give advice on the futures portfolio where SE sought such advice.

75 Clause (d) requires Menrva to provide "consultations". That is defined in the Oxford English Dictionary as a meeting with an expert in order to *seek*

---

90 Defendants' closing submissions at footnote 119.

91 Defendants' closing submissions at para 248.

92 AEIC of Matthew Peloso at para 40.

advice. In other words, "consultation" does not encompass unsolicited advice. The obligation on Menrva was only to give SE advice when SE sought it from Menrva.

76 The context reinforces my interpretation of sub-cl (d). The job of *actively* advising, monitoring, managing and reporting on CFDs is typically the role of a financial risk manager or a trader.[93] But it was common ground between Mr Chan and Dr Peloso that Mr Chan would not perform the role of a financial risk manager or trader for SE. This is evident from an exchange of Whatsapp messages between Mr Chan and Dr Peloso on 10 March 2015. Dr Peloso asked if Mr Chan was going to be the one to trade.[94] Mr Chan said that he would not be the one doing the trading, as he did not have the time. To this, Dr Peloso replied: "Ok". As further proof of this understanding, Dr Peloso eventually sought to hire a third party as a financial risk manager.[95]

77 Further, construing sub-cl (d) as an obligation actively to advise on, monitor, manage and report on the CFDs does not make commercial sense. This is because the obligation under sub-cl (d) is engaged only when the fee payment from SE to Menrva for the preceding quarter exceeds $20,000. The plaintiff's construction of sub-cl (d) would mean that, if the fee payment did not exceed $20,000 for a particular quarter, there would correspondingly be no obligation on Menrva actively to advise on, monitor, manage and report on the CFDs for the following quarter. That would ascribe to the parties an intention that one CFD, while it remained open, would be actively managed in some quarters and remain unmanaged in others. The parties cannot have intended this haphazard manner of dealing with the CFDs. The value of a CFD may fluctuate

93 AEIC of Bernard Chan at para 165(d).

94 AEIC of Bernard Chan, part II at p 1414.

95 AEIC of Bernard Chan at para 165(d).

significantly over time, right up until it is settled. Managing an open CFD only in some quarters but not others would be imprudent if not foolish.

78 I shall illustrate the lack of commercial sense in the plaintiffs' construction of sub-cl (d) with a hypothetical. Assume that the fee payment from SE to Menrva for the second quarter of 2015 exceeded $20,000. This would mean that Menrva's obligation under sub-cl (d) would be engaged for the third quarter of 2015. SEP held six open CFDs in the third quarter of 2015:

(a) CFD dated 29 June 2015 for the third quarter of 2015;[96]

(b) CFD dated 7 July 2015 for the fourth quarter of 2015;[97]

(c) CFD dated 3 August 2015 for the fourth quarter of 2015.[98]

(d) CFD dated 31 August 2015 for the fourth quarter of 2015;[99]

(e) CFD dated 14 September 2015 for the fourth quarter of 2015;[100] and

(f) CFD dated 15 September 2015 for the fourth quarter of 2015.[101]

79 Of these six CFDs, only the CFD dated 29 June 2015 was to settle in the quarter in which Menrva's obligation under sub-cl (d) was engaged (the third quarter of 2015). All of the other five CFDs were to settle in the fourth quarter of 2015. Assuming now that the fee payment for the third quarter of 2015 did not exceed $20,000, this would mean that Menrva would cease to be under any

96 AEIC of Bernard Chan at para 161.

97 Agreed bundle of documents, vol 4, at pp 2319–2335.

98 Agreed core bundle, vol 3, at pp 1622–1638.

99 Agreed core bundle, vol 3, at pp 1741–1757.

100 Agreed bundle of documents, vol 6, at pp 3459–3475.

101 Agreed bundle of documents, vol 5, at pp 3440–3456.

obligation to manage these five CFDs once the fourth quarter of 2015 began. If SEP's position on these five CFDs deteriorated severely in the course of the fourth quarter, Menrva would be under no obligation to do anything about it. If the correct construction of sub-cl (d) is that Menrva was under an obligation actively to manage the CFDs, it would not make sense to condition its obligation on fee payment for the preceding quarter. The obligation would have to be unconditional, incumbent on Menrva so long as a particular CFD remained open. This reinforces my conclusion that Menrva was under no obligation actively to manage the CFDs.

80 Thus, I find that the sole obligation imposed on Menrva under sub-cl (d) was to provide consultation on risk management of the futures portfolio when SEP sought consultation. The plaintiffs have adduced no evidence that SEP ever sought any consultation from Menrva which was refused or ignored. Accordingly, Menrva is not in breach of sub-cl (d).

81 I also reject the plaintiffs' submission that Menrva breached the implied term to exercise reasonable care and skill in performing its obligation under sub-cl (d). I explain why I do not consider Menrva to have been in breach of the implied term to exercise reasonable care and skill in advising the plaintiffs to enter into the CFDs below, at [119]–[124].

Remedy for breach of Consultancy Agreement

82 In summary, I have found Menrva to be in breach only of sub-cl (a) of the Consultancy Agreement. As damages for breach of contract, the plaintiffs seek to recover from Menrva the losses incurred on the six loss-making CFDs.[102] These losses amount to just under $1.46m.

---

102 Plaintiffs' closing submissions at para 198.

83 There are multiple difficulties with the plaintiffs' claim to recover this $1.46m. First, SEP suffered this loss,[103] not SE. But SEP is not a party to and is therefore not privy to the Consultancy Agreement. SEP cannot recover its loss from Menrva in contract because SEP is not a party to the contract which Menrva breached.

84 The plaintiffs argue that:[104]

> even though the Consult[ancy] Agreement was entered into between [SE] and [Menrva], the Defendants were well aware that the Consult[ancy] Agreement was with respect to the FSC Scheme (which [SEP] was the proper participant of) and that the obligations / duties owed by the Defendants under the Consult[ancy] Agreement clearly extended to [SEP].

Even if Menrva was aware that SEP was the entity participating in the Scheme, this does not have the effect in contract law of extending the contractual benefit of Menrva's obligations under the Consultancy Agreement to SEP. At most, it could possibly ground an estoppel by convention on the authority of *Amalgamated Investment and Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1982] QB 84. But that is not how the plaintiffs have put their case.

85 The Consultancy Agreement makes no mention of SEP. It lists only SE and Menrva as parties. The Consultancy Agreement stipulates that Menrva's obligations under the agreement are owed to SE. For example, cl 1(b) states that Menrva "shall provide SE the service for setting up the Associated Market Making Obligations of the [Scheme]". The result is that Menrva owed these obligations *only* to SE. That in turn implies that the parties intended to keep the Consultancy Agreement separate from any arrangement or agreement between

---

103 AEIC of Matthew Peloso at para 57.

104 Plaintiffs' closing submissions at para 36.

the plaintiffs under which SE would pass on to SEP any reports or advice which it received from Menrva under the Consultancy Agreement.

86 In any event, even if the benefit of the obligations under the Consultancy Agreement do somehow extend to SEP, the plaintiffs have not shown a legal basis for SEP to recover damages for a breach of these obligations. The plaintiffs do not argue that the Contracts (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed) allows SEP to make a claim under the Consultancy Agreement.

87 Furthermore, SE cannot recover the $1.46m on SEP's behalf. Clause 6(b) of the Consultancy Agreement stipulates that "[i]n no event will either party be liable to the other for incidental consequential, or indirect damages, including without limitation lost profits, even if such party has been informed of the possibility of such damages". "Incidental consequential, or indirect" loss falls within the second limb of the rule in *Hadley v Baxendale* (1854) 9 Exch 341: *Singapore Telecommunications Ltd v Starhub Cable Vision Ltd* [2006] 2 SLR(R) 195 at [59] and [67]. In other words, incidental, consequential or indirect losses are those which do not arise naturally from a defendant's breach of contract. Any losses which *SE* suffered as a result of *SEP's* losses on CFDs do not arise naturally out of Menrva's breach of sub-cl (a) of the Consultancy Agreement. From SE's perspective, those losses are within the second limb of *Hadley v Baxendale* and are irrecoverable by virtue of cl 6(b) of the Consultancy Agreement.

88 As an aside, I note that the plaintiffs plead in their reply that cl 6(b) contravenes s 2(2) of the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed).[105] The plaintiffs have not pursued this point further in their closing submissions. I take it that the plaintiffs have abandoned this point.

105 Reply at para 9(c).

89 Second, I am not satisfied that there is a causal link between Menrva's breach of sub-cl (a) and SEP's loss of $1.46m. The plaintiffs argue that if Menrva had provided the daily indicative valuations, the plaintiffs would have been alerted that the CFDs were in a loss-making position and could have taken preventive steps.[106] But the evidence shows that this was unlikely to have been the case. Dr Peloso admitted on the stand that he "didn't always read"[107] the Tong Teik Reports, which *included a section on the performance of the CFDs*.[108] The Tong Teik Report sent on 2 November 2015 showed a loss of almost $1m on the CFDs.[109] The Tong Teik Report sent on 17 November 2015 showed a loss of more than $1.1m on the CFDs.[110] The lack of regard Dr Peloso paid to the Tong Teik Reports is highlighted by the fact that despite this, Dr Peloso became alive to these losses only around the end of November 2015.[111] Coupled with the fact that SE never once complained that Menrva had failed to send the daily indicative valuations,[112] I find it more likely than not that Dr Peloso would not have read and acted on Menrva's daily indicative valuations even if Menrva had produced them.

90 Further, the plaintiffs have not adduced evidence on what "preventive steps" they would have taken to stem the losses incurred on the CFDs.[113] Preventive steps could include closing out a CFD early. That was what SEP did with the first CFD, entered into on 29 June 2015.[114] But there is no guarantee

---

106 Plaintiffs' closing submissions at para 199.

107 Certified Transcript, 25 January 2018, at page 33, line 13.

108 Defendants' closing submissions at para 314.

109 Agreed core bundle, vol 4, at p 2190.

110 Agreed core bundle, vol 4, at p 2195.

111 AEIC of Matthew Peloso at para 49.

112 Defendants' closing submissions at para 90.

113 Defendants' reply submissions at para 62.

that an early close out could have been effected for the loss-making CFDs. An early close out would have to be negotiated with Tong Teik, who had the contractual right to demand that the CFD run to settlement. The early close-out of the 29 June 2015 CFD appears to be an indulgence granted by Tong Teik arising from the Scheme being unexpectedly suspended.[115] The 29 June 2015 CFD covered the third quarter of 2015 but the Scheme was suspended for almost all of that quarter.

91 Given these difficulties, I am unable to award either plaintiff damages for the loss of $1.46m on the CFDs. Nevertheless, as the plaintiffs note, damages are awarded as of right for breaches of contract: *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal* [2007] 4 SLR(R) 413 ("*RDC Concrete*") at [114].[116]

92 I therefore award SE nominal damages of $1,000 for Menrva's breach of sub-cl (a) of the Consultancy Agreement.

The claim in tort

Do Menrva and Mr Chan owe a duty of care?

93 I now turn to the second plank on which the plaintiffs rest their case: the tort of negligence. The plaintiffs argue that both defendants owe both plaintiffs a "duty to exercise reasonable care and skill in providing the Advisory and Consultancy Services to the Plaintiffs, including on risk management of the [Scheme], at common law".[117] The "Advisory and Consultancy Services"

---

114 AEIC of Matthew Peloso at para 33.

115 AEIC of Matthew Peloso at para 33.

116 Plaintiffs' closing submissions at para 197.

117 Statement of claim at para 12.

referred to here are the services stipulated in cl 1 of the Consultancy Agreement (reproduced at [13] above).

94 The plaintiffs' case is that both defendants breached this alleged duty: (i) when Mr Chan negligently advised SEP to enter into the six loss-making CFDs; and (ii) when Mr Chan failed to advise, monitor, manage and report on the performance of the six loss-making CFDs.[118]

95 The universal test for a duty of care has been laid down by the Court of Appeal in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*"). This test entails a threshold requirement of factual foreseeability followed by a two-stage test incorporating the requirement of proximity and the absence of any policy considerations weighing against a duty of care.

96 At the outset, I note that the plaintiffs argue that Menrva and Mr Chan each owe a duty of care to SE and SEP each.[119] To my mind, the only relationship I need to examine to see if a duty of care arises is the relationship of each defendant with SEP. This is because SE suffered no loss arising from anything which either defendant did or failed to do. As I have pointed out above, the losses on the CFDs were suffered by SEP alone. It is therefore wholly unnecessary to consider whether either defendant owed a duty of care to SE.

Factual foreseeability

97 The threshold requirement of factual foreseeability is one which is easily satisfied in the ordinary case. It is easily satisfied in this case. The defendants

---

118 Plaintiffs' closing submissions at para 232.

119 Statement of claim at para 12.

ought to have known that SEP would suffer from the defendants' negligence in advising SEP to enter into CFDs or in negligently advising, monitoring, managing and reporting on the CFDs.

Proximity

98 The next requirement is proximity. This is where the difficulties in SEP's case in tort appear. It argues that there is proximity in this case, relying on *Hotel Royal @ Queens Pte Ltd (trading as Hotel Royal @ Queens) v J M Pang & Seah (Pte) Ltd* [2014] 3 SLR 967 ("*Hotel Royal*"). Alternatively, it contends that the factors of physical proximity, circumstantial proximity, causal proximity and the twin criteria of voluntary assumption of responsibility and reliance are present.[120]

99 I first address SEP's reliance on *Hotel Royal*. The plaintiff in *Hotel Royal* was a hotelier. The defendant was a licensed electrical worker. The plaintiff and defendant entered into an agreement for the defendant to conduct bimonthly inspections at the plaintiff's premises and to provide consultancy services as to the maintenance of the plaintiff's premises. The plaintiff's premises experienced a total power failure. The plaintiff claimed that the defendant's negligence caused the power failure. The court found that there was sufficient proximity between the parties, holding that the "fact that the Agreement clearly stipulated that the Defendant was to provide the consultation services to the Plaintiff establishes such a necessary relationship" (*Hotel Royal* at [32]). It is crucial to note that the relevant contract in *Hotel Royal* was between the party alleged to owe the duty of care and the party who suffered a loss by reason of the breach of the alleged duty of care. In that situation, the

120 Plaintiffs' closing submissions at paras 211–222.

relevance of the contractual agreement to the question of proximity is obvious. As I will explain, the same cannot be said here.

100 SEP argues that the Consultancy Agreement, just like the agreement in *Hotel Royal*, establishes the necessary relationship between the parties in this case to create sufficient proximity.[121] SEP acknowledges that it is not a party to the Consultancy Agreement but contends that the Consultancy Agreement nevertheless creates sufficient proximity with Menrva and Mr Chan given that: (a) cl 1(a) of the Consultancy Agreement stipulates that Mr Chan is to perform the services which Menrva undertook to provide SE; and (b) the defendants were aware that the Consultancy Agreement was with respect to the Scheme, in which SEP was formally the participant.[122]

101 I do not agree. Where parties structure their commercial relationship by way of contract, the court must ask whether the parties' decision to do so demonstrates an intent, objectively ascertained, to exclude a duty of care in tort. If it does, there is no proximity and no duty of care. To hold otherwise would "cut across and be inconsistent with the structure of relationships created by the contracts, into which the parties had entered": *Max-Sun Trading Ltd and another v Tang Mun Kit and another (Tan Siew Moi, third party)* [2016] 5 SLR 815 ("*Max-Sun*") at [90]; see also *Spandeck* at [98].

102 In this case, the structure of the parties' contractual relationships demonstrates that they intended to exclude both: (i) a duty of care owed to anyone by Mr Chan; and (ii) a duty of care owed by anyone to SEP.

---

121 Plaintiffs' closing submissions at para 211.

122 Plaintiffs' closing submissions at para 211.

103 First, Mr Chan's use of the corporate form to enter into the Consultancy Agreement was deliberate. He did so to avoid personal liability.[123] SEP was aware of this. SE's act of entering alone into the Consultancy Agreement with Menrva demonstrates that both SE and SEP accepted Mr Chan's intent.[124] Finding a duty of care in tort owed by Mr Chan to SEP in relation to the subject-matter of the Consultancy Agreement would be wholly inconsistent with the choices which all the parties to this action made in structuring that relationship.

104 Second, cl 6(b) limits Menrva's liability under the Consultancy Agreement for "incidental, consequential, or indirect damages". As I have explained above (see [87]), this category of damages as against SE includes damages for losses suffered by SEP. It would thus be inconsistent with the structure created by the Consultancy Agreement to find a duty of care owed by Menrva to SEP allowing it to claim damages in tort from Menrva.

105 Finally, the scope of the duty of care said to be owed by Menrva and Mr Chan is exactly the same as the scope of the implied term in the Consultancy Agreement obliging Menrva to exercise reasonable care and skill. Both of these obligations require the exercise of reasonable care and skill in *providing the services under the Consultancy Agreement*. Yet the scope of the duty of care alleged by SEP differs from the scope of the implied term in the Consultancy Agreement in two aspects.

106 First, the duty of care alleged includes within its scope an obligation which I have found is not part of the subject-matter of the Consultancy Agreement: an obligation to monitor, manage and report on the performance of the CFDs (see [74]–[79] above).[125]

---

123 Certified Transcript, 26 January 2018, at page 58, lines 6–14.

124 Certified Transcript, 26 January 2018, at page 58, lines 6–14.

107 Second, the scope of the duty of care alleged by SEP is not limited to quarters where the fee payment under the Consultancy Agreement for the *preceding* quarter exceeds $20,000. That is quite unlike Menrva's express obligations under the Consultancy Agreement (see cl 1(b)(v)). The result is that the alleged duty of care is said to extend to all of the CFDs placed by SEP subject to no condition precedent.[126]

108 Finding that Menrva owed SEP a duty of care to exercise reasonable care and skill in monitoring, managing and reporting on the performance of the CFDs even where the fee payment under the Consultancy Agreement for the preceding quarter does not exceed $20,000 would be wholly inconsistent with the structure of the commercial relationship created by the Consultancy Agreement. The Consultancy Agreement was the result of negotiations between all of the parties to this action. Those negotiations led to only two of the parties to this action entering into a contract. As the Court of Appeal said in *Deutsche Bank AG v Chang Tse Wen and another appeal* [2013] 4 SLR 886 at [37]:

> The contractual matrix is, of course, a factor to be considered when determining the question of legal proximity between the parties … Indeed, the emphasis on the closeness and directness of the parties' relationship requires that *all* the facts should be examined, including those leading up to the conclusion of a contract (where that is part of the relevant factual matrix). In particular, ***circumstances showing that the alleged tortfeasor never undertook any relevant responsibility in its contract, or qualified it*** or even disclaimed it, ***would ordinarily be expected to feature in any court's inquiry on the existence of a duty of care.*** [emphasis added in bold italics]

---

125 See plaintiffs' closing submissions at para 204.

126 See for example plaintiffs' closing submissions at para 232.

For these reasons, I hold that the mere existence of the Consultancy Agreement does not create the necessary proximity as between SEP and either defendant. The situation here is quite unlike that in *Hotel Royal*.

109 I now turn to the factors of circumstantial proximity, causal proximity, physical proximity and the twin criteria of voluntary assumption of responsibility and reliance.

110 On circumstantial proximity, SEP's case is that the defendants were their professional advisors.[127] Again, that relationship existed only between Menrva and SE, and only by reason of the Consultancy Agreement. Mere unilateral reliance by SEP does not suffice. There is thus no circumstantial proximity for the purposes of a duty of care owed by either defendant to SEP.

111 On causal proximity, the plaintiffs argue that the defendants were solely responsible for advising SEP to enter into the six loss-making CFDs and for executing the loss-making CFDs.[128] As for physical proximity, the plaintiffs point out that Mr Chan was in constant communication with SEP and had direct access to SEP's office.[129] I agree that both of these factors are made out.

112 On the twin criteria of voluntary assumption of responsibility and reliance, the plaintiffs argue that Mr Chan took it upon himself to advise SEP to enter into the loss-making CFDs and to execute them without prior specific approval.[130] Both defendants were aware that SEP was relying on them because Mr Chan held himself out as an experienced trader who could provide these

---

127 Plaintiffs' closing submissions at para 213.

128 Plaintiffs' closing submissions at para 213.

129 Plaintiffs' closing submissions at para 213.

130 Plaintiffs' closing submissions at para 218.

services.[131] Further, the defendants were aware that SEP did not have a risk manager and was relying on the defendants to act as a risk manager.[132] SEP did rely on the defendants and thus adopted all of Mr Chan's suggestions in entering into to the loss-making CFDs.[133]

113 A voluntary assumption of responsibility as conceptualised by *Hedley Byrne* [1964] AC 465 ("*Hedley Byrne*") is a term of art and not a turn of phrase. It means a contract minus only consideration. Because of its proto-contractual nature, a voluntary assumption of responsibility must be conscious and volitional. The question is thus whether a defendant, expressly or impliedly, *actually* assumed responsibility to a plaintiff to take care in performing the task in question such that the defendant's undertaking to do so would have amounted to a contract if the plaintiff had given consideration for it. If not, are there circumstances from which the court can infer that the defendant did so? *Chu Said Thong and another v Vision Law LLC* [2014] 4 SLR 375 ("*Chu Said Thong*") at [149], [151] and [167]; see also *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 at [63].

114 Menrva and Mr Chan did not voluntarily assume responsibility to SEP for advising it to enter into CFDs or for monitoring, managing or reporting on the performance of the CFDs. As explained earlier, the contractual arrangements (or lack thereof) between the four parties to this action evinces an intention to exclude a duty of care in tort between either defendant and SEP. To add to that, there were instances where Mr Chan (acting on behalf of Menrva) stated outright that he declined to assume responsibility. In an email dated 4 April 2015 Mr Chan attached a draft of the Consultancy Agreement to Dr

131 Plaintiffs' closing submissions at para 219.

132 Plaintiffs' closing submissions at para 222.

133 Plaintiffs' closing submissions at para 220.

Peloso. This draft was, in all material aspects, the same as the Consultancy Agreement ultimately executed. Mr Chan's covering email expressly declined any assumption of responsibility:[134]

> Attached is the revised agreement. I have added more specific terms on the on going responsibilities (in reality, if it's really below that amount I will want to be involved to figure out how to improve it via consultation on risk management) … *As a share holder* I'm happy to share with you ideas to risk manage your portfolio (*though to be clear I will not be too involved in the actual implementation*) … [emphasis added]

Similarly, in a Whatsapp conversation on 10 March 2015, Mr Chan expressly said "No" and "No time" in response to Dr Peloso's question on whether Mr Chan would be the one to trade CFDs.[135] As I have mentioned earlier, the job of advising, monitoring, managing and reporting on CFDs typically falls within the role of a financial risk manager or a trader.[136]

115 One of the reasons SEP argues that each defendant voluntarily assumed responsibility towards it is because both defendants were aware that SEP did not have a risk manager and was relying on the defendants to act as a risk manager.[137] But a voluntary assumption of responsibility as conceived in *Hedley Byrne* springs from the defendant's volition and cannot be imposed by the law or imputed by the court: *Chu Said Thong* at [155]. Nor can it arise from mere reliance alone. Mr Chan, and therefore Menrva, expressly rejected assuming the responsibilities of a risk manager in the email dated 4 April 2015 and the Whatsapp conversation on 10 March 2015. There is thus no room to impute or

---

134 Agreed core bundle, vol 1, at p 551.

135 AEIC of Bernard Chan, part II at p 1414.

136 AEIC of Bernard Chan at para 165(d).

137 Plaintiffs' closing submissions at para 222.

impose an *involuntary* assumption of responsibility to or on Mr Chan or Menrva.

116 In summary, the only factors which point towards a duty of care on the part of Menrva and Mr Chan and in favour of SEP are physical and causal proximity. But as noted in *Animal Concerns* at [38] "[t]he concept of proximity requires more than just physical closeness between the parties". That leaves causal proximity. I do not consider that to be enough to outweigh the parties' manifest intention to exclude a duty of care in tort.

Policy reasons

117 I should add that there is in any event a policy reason militating very strongly against imposing a duty of care on Mr Chan. As mentioned earlier, Mr Chan deliberately used Menrva to enter into the Consultancy Agreement in order to shield himself from personal liability. SE, and indeed SEP, accepted this. Finding that Mr Chan personally owed any duty of care in relation to the subject-matter of the Consultancy Agreement would erode the principle of separate corporate personality: see *Max-Sun* at [92].

118 I deal separately with the plaintiffs' argument that the corporate veil of Menrva should be lifted (see [125]–[147]). The existence of a body of principles in accordance with which the corporate veil can be lifted does not detract from the need to be vigilant to maintain the principle of separate corporate personality in the duty of care analysis. The plaintiffs argue that Mr Chan owed both of them a duty of care in tort merely because he was the one acting for Menrva. If I were to hold that Mr Chan owed a duty of care in tort on that ground alone, it would mean that every person acting for a company would owe a duty of care in tort to persons with whom the company had dealings. That would erode the

principle of separate corporate personality without addressing the underlying issue head on, as I do at [125]–[147] below.

Breach of duty of care

119 Even if I am wrong and it is the case that Menrva and Mr Chan do owe the plaintiffs a duty of care, I find that Menrva and Mr Chan did not breach that duty.

120 The crux of the plaintiffs' case is that the amendments to the Scheme coupled with the arrangement with Tong Teik significantly reduced the risks involved in the Scheme,[138] in the sense that "there would never be a situation where the Plaintiff[s] would have to pay the SPS".[139] The defendants thus breached their duty of care by advising SEP to enter into the loss-making CFDs and also by maintaining the same hedging strategy before and after the Scheme was amended.[140]

121 I reject the plaintiffs' argument. First, the mere fact that the risks involved in the Scheme were reduced did not mean that the plaintiffs should not have entered into CFDs. It is true that there would never be a situation in which SEP would have to pay SPS, given that any negative FSC payments were to be paid by Tong Teik. But SEP undoubtedly chose to participate in the Scheme to *make a profit*, not merely to *avoid a loss*.

122 To earn that profit, SEP would have to enter into hedges.[141] This is because when the market is moving in SEP's favour, its profit is the difference

138 Plaintiffs' closing submissions at para 249.

139 Plaintiffs' closing submissions at para 85.

140 Plaintiffs' closing submissions at paras 248 and 286.

141 AEIC of Bernard Chan at para 155(d).

between 30% of the positive FSC payments it is entitled to retain under its agreement with Tong Teik and the cost of the CFDs. When the market is moving against SEP, its profit arises solely from the CFDs.

123 As a simple illustration, assuming that the market was consistently moving against SEP, the only way for it to make a profit is by entering into CFDs. Indeed, the possibility of the market moving consistently against SEP was not a mere theoretical possibility. At the time the loss-making CFDs were entered into, the possibility that electricity suppliers would deliberately restrict supply was a very real one to the parties.[142] I thus do not accept the plaintiffs' position that "the Loss-[m]aking CFDs should not even have been placed"[143] and that placing the CFDs was in itself a breach of the duty of care which the plaintiffs allege each the defendant owed each of them.

124 Second, it is not true that Menrva maintained the same hedging strategy before and after the amendments to the Scheme. Before the amendments, the hedge ratio proposed by Mr Chan was 50%.[144] After the amendments, the hedge ratio achieved was 39.95%.[145] There was thus some adjustment to the hedging strategy to take into account the effect of the amendments. The plaintiffs have not shown that a hedge ratio of 39.95% was unreasonable.

Lifting the corporate veil

125 Having found Menrva liable to pay nominal damages to SE in the sum of $1,000 for breach of the Consultancy Agreement, I now consider the

---

142 Defendants' closing submissions at pp 132–134.

143 Plaintiffs' closing submissions at para 286.

144 Defendants' closing submissions at para 254.

145 Defendants' closing submissions at para 254.

plaintiffs' submission that I should lift the corporate veil so as to make Mr Chan personally liable to SE for Menrva's breach.

The parties' submissions on the law

126 It is common ground between the parties that the court will lift the corporate veil in order to hold the controller of a company liable for the company's defaults on either of two grounds: (i) if the company is not in truth an entity separate from its controller and is in fact carrying on its controller's business; or (ii) if the company's controller has abused the corporate form to further an improper purpose.[146] I will refer to the former ground as the "*alter ego*" ground and to the latter ground as the "abuse" ground.

127 To argue that Mr Chan ought to be held personally liable for Menrva's breach, the plaintiffs rely on the *alter ego* ground and not on the abuse ground. They do not allege that Mr Chan has abused the corporate form to further an improper purpose. The only basis advanced to lift the corporate veil is that Menrva is Mr Chan's *alter ego* because it is doing nothing more than carrying on Mr Chan's business.[147]

128 The defendants submit that merely exercising ownership or management control over a company is insufficient, without more,[148] to constitute a company the *alter ego* of an individual, with the court generally lifting the corporate veil only if there has been an abuse of the corporate form.[149]

---

146 Plaintiffs' closing submissions at para 127; defendants' closing submissions at para 369.

147 Plaintiffs' closing submissions at para 131.

148 Defendants' closing submissions at para 368.

149 Defendants' closing submissions at para 367.

The alter ego *ground as an independent ground*

129 The parties' submissions cast the *alter ego* ground and the abuse ground as two separate and independent grounds for lifting the corporate veil. In other words, the defendants accept that the plaintiffs are entitled to hold Mr Chan personally liable for Menrva's breach simply by showing that Menrva is Mr Chan's *alter ego* and nothing more. Both parties cite[150] the decision of the Court of Appeal in *Alwie Handoyo v Tjong Very Sumito and another and another appeal* [2013] 4 SLR 308 ("*Alwie*") as authority for the *alter ego* ground being an independent ground for lifting the corporate veil.

130 In *Alwie*, the plaintiff sought to lift the corporate veil and recover personally from the controller of a company a payment which the plaintiff had made to the company. The trial judge: (i) held that the company was the *alter ego* of the controller because it was doing no more than carrying on the controller's business; (ii) lifted the corporate veil; and (iii) held the controller directly liable to repay the plaintiff.

131 On appeal, counsel for the controller argued that the trial judge had erred in lifting the corporate veil on the *alter ego* ground alone, without making a finding that the company was a mere façade or sham or that the abuse ground had been otherwise satisfied. The Court of Appeal rejected this submission, holding that the *alter ego* ground was sufficient in itself to warrant lifting the corporate veil with no necessity to consider the abuse ground (at [96]):

> The ground of *alter ego* is distinct from that based on façade or sham, and the key question that must be asked whenever an argument of *alter ego* is raised is whether the company is carrying on the business of its controller …

---

150 Plaintiffs' closing submissions at para 130.

This passage is generally taken to have established as a matter of Singapore law that the *alter ego* ground is an independent ground for lifting the corporate veil.

132 The Court of Appeal went on to uphold the trial judge's finding of fact that the company was the *alter ego* of the controller, noting that: (i) the company was incorporated for the sole purpose of receiving the plaintiff's payment; (ii) the controller admitted that he was the controlling mind and will of the company; and (iii) the controller drew no distinction between himself and the company, including in his dealings with the company's funds: *Alwie* at [97]–[100].

133 The leading case in English law on lifting the corporate veil is now *Prest v Petrodel* [2013] 2 AC 415 ("*Prest*"), a decision of the UK Supreme Court. The decision in *Prest* was handed down after our Court of Appeal had reserved judgment in *Alwie*. As a result, our Court of Appeal could not take the opportunity in *Alwie* to consider *Prest*.

134 In *Prest*, Lord Sumption held (at [27]) that it is well-established at common law that the court may lift the corporate veil "if a company's separate legal personality is being abused for the purpose of some relevant wrongdoing". The difficulty is with formulating a principle which will identify what "abuse" and what "relevant wrongdoing" will justify lifting the corporate veil. Lord Sumption deprecated formulating the principle in terms of epithets such as "façade" or "sham". Instead, he identified (at [28]) two distinct principles which justified lifting the corporate veil: (a) the concealment principle; and (b) the evasion principle. Of these two principles, the one of relevance on the facts of this case is the evasion principle. It is only the evasion principle which permits a court to hold a controller of a company personally liable for the company's defaults *purely* on the basis of that control.

135 As Lord Sumption put it (at [35]), the evasion principle is:

> … a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality.

136 The important point about *Prest* is that it does not recognise the *alter ego* ground as an independent ground for lifting the corporate veil.

137 There are suggestions as to how *Prest* and *Alwie* can be reconciled (see Yeo Hwee Ying and Ruth Yeo, "Revisiting the *Alter Ego* Exception in Corporate Veil Piercing", (2015) 27 SAcLJ 177). Interesting as that exercise may be to undertake, I consider myself bound by *Alwie* to apply the *alter ego* principle as an independent ground for lifting the corporate veil. Although the

facts of *Alwie* disclose a clear abuse of the corporate form and clear wrongdoing by the company's controller, it remains the case that the Court of Appeal upheld the trial judge's decision to lift the corporate veil on the *alter ego* ground alone. I therefore consider the passage in *Alwie* at [96] (which I have cited at [131] above) to form part of *ratio* of *Alwie*. In any event, neither party has explicitly taken the point before me on the differences between *Alwie* and *Prest* and how they can be reconciled.

138 I therefore turn to the facts to consider whether Menrva is the *alter ego* of Mr Chan.

The parties' submission on the facts

139 On the facts of this case, the plaintiff submits that Menrva is nothing more than Mr Chan's *alter ego* for what are essentially three distinct reasons:[151]

(a) Mr Chan is the sole shareholder, director, controller and employee of Menrva; and thereby has absolute control over its bank account; [152]

(b) Mr Chan incorporated Menrva for the sole purpose of concluding the Consultancy Agreement with SE and to receive SE's payments under the Consultancy Agreement;[153] and

(c) The commercial purpose of the Consultancy Agreement was to secure Mr Chan's personal services for SE. The identity of the corporate

---

151 Plaintiffs' closing submissions at paras 132–142.

152 Plaintiffs' closing submissions at paras 132 to 134 and 140.

153 Plaintiffs' closing submissions at paras 135–138.

vehicle which Mr Chan used as the counterparty for the Consultancy Agreement was therefore immaterial to both Mr Chan and to SE.[154]

140 The defendants submit that Menrva is not the *alter ego* of Mr Chan for four reasons:[155]

(a) The evidence shows that Menrva was incorporated for more than the sole purpose of concluding the Consultancy Agreement with SE and receiving payments under the Consultancy Agreement from SE, as Menrva was also in discussions with another potential client around the time Menrva was incorporated.

(b) Menrva maintained its own separate bank account. Although Mr Chan was the sole controller of that account, there is no evidence that he treated the account as his own, in disregard of the rules of corporate governance.

(c) Menrva had its own office premises.

(d) Menrva has not declared dividends.

Menrva is not Mr Chan's alter ego

141 I accept the defendants' submissions. In my view, the plaintiffs have failed to discharge their burden of proving that Menrva is, on the facts of this case, Mr Chan's *alter ego*.

142 There is nothing in the four features which the plaintiffs rely on which, either individually or taken together, suffices for me to draw the inference that

154 Plaintiffs' closing submissions at para 139.

155 Defendants' closing submissions at para 373.

Menrva is doing nothing more than carrying on Mr Chan's business. It is indisputable that Mr Chan is the sole shareholder, director and employee of Menrva. It is equally indisputable that Mr Chan alone owns, controls and acts for Menrva and has sole control of its bank account.[156] But our company law now allows one-man companies. It cannot be that a natural person who takes advantage of a mode of doing business which the legislature permits can, by that fact alone, lose the benefit of the limited liability which the legislature has extended to him under s 19 of the Companies Act (Cap 50, 2006 Rev Ed).

143 So too, nothing turns on the fact that Mr Chan incorporated Menrva for the sole purpose of concluding the Consultancy Agreement. Commercial entities incorporate special purpose vehicles daily. Many of those special purpose vehicles will have a single controller. The controller's desire to limit its liability for the defaults of the special purpose vehicle cannot, by itself, convert the special purpose vehicle's business into the controller's business. It cannot do that even if the controller of the special purpose vehicle is a single natural person.

144 Finally, it is no doubt true that the ultimate commercial purpose of the Consultancy Agreement was to secure the benefit of Mr Chan's personal services for SE. To that extent, the identity of the vehicle through which Mr Chan was to provide those services was undoubtedly a matter of indifference to both SE and even to Mr Chan. But once again, that does not suffice to make the business of the special purpose vehicle the business of Mr Chan. The evidence shows that Mr Chan deliberately wanted to contract through a special purpose vehicle to limit his personal liability. So to that extent, even though the identity of the special purposes vehicle was a matter of indifference, the interposition of

---

156 Statement of claim at para 3 and plaintiffs' closing submissions at para 133.

a special purpose vehicle between Mr Chan and SE was a matter of import to him. That negatives any inference open to me that Menrva was carrying on Mr Chan's business.

145 A point has been taken that Mr Chan draws no distinction between Menrva and himself. Evidence of this could be said to be the backdating of the Consultancy Agreement to 3 April 2015 even though it was executed on 23 April 2015.[157] The defendants claim that the backdating was done to "reflect the fact that [Menrva] had been providing [SE] with the services under … the Consulting Agreement prior to its incorporation since early April 2015".[158] That is, of course, not correct. It was Mr Chan who provided SE with services before Menrva came into existence. But this does not suffice to make Menrva's business that of Mr Chan's.

146 A final point is that cl 5(a) of the Consultancy Agreement refers to a Mutual Non-Disclosure Agreement said to have been made between SE and Menrva:

> All information ("Confidential Information") disclosed by one party (the "**Disclosing Party**") to the other party (the "**Receiving Party**") under or in connection with this Agreement is confidential to the Disclosing Party, and is to be protected as set forth herein and as set forth in the Mutual Non-Disclosure Agreement between the parties dated March 4, 2014 …

But the Mutual Non-Disclosure Agreement[159] was actually between SE and Abundance Way, another of Mr Chan's wholly owned companies.[160] It is far too tenuous to argue that the corporate veil ought to be lifted because cl 5(a) of the

157 Defendants' closing submissions at para 24; defence and counterclaim (amendment no 2) at para 5.

158 Defence and counterclaim (amendment no 2) at para 5.

159 Agreed bundle of documents, vol 2, at p 822.

160 Certified Transcript, 25 January 2018, at page 112, lines 5–20.

Consultancy Agreement refers to a Mutual Non-Disclosure Agreement which was actually signed by Abundance Way as having been signed by Menrva.

147 I accordingly reject the plaintiffs' attempt to lift the corporate veil and to hold Mr Chan personally responsible for Menrva's breach of contract.

The counterclaim

148 In their counterclaim, the defendants seek to recover the fees which SE would have been obliged to pay to Menrva under cl 3 of the Consultancy Agreement had it not been terminated on 26 January 2016.[161] The defendants argue that the fees remain payable by reason of cl 7 of the Consultancy Agreement:[162]

> **7. Termination**
>
> This Agreement may be terminated with one month's notice by either party in writing. The obligations and responsibilities of the parties under sections 3, 4, 5, 6, 8 and 9 are in no way altered or voided by such termination.

149 Clause 7 gives either party the right to terminate the Consultancy Agreement on notice, without cause. But SE did not exercise this right. At no time did SE give one month's notice of termination to Menrva, whether pursuant to cl 7 or otherwise. SE instead claimed to terminate the Consultancy Agreement for cause, arising from non-performance. This is evident from Dr Peloso's email dated 26 January 2016 in which he said: "[t]he contract is in breach due to *non-performance*. We have decided to terminate the contract *for cause*" (emphasis added).[163] This email makes no mention of cl 7.

---

161 Defence and counterclaim (amendment no 2) at paras 28 and 31.

162 Defendants' closing submissions at para 382.

163 AEIC of Bernard Chan, part III, at p 2168.

150 *RDC Concrete* sets out the principles governing how a contract may be terminated at common law. Once termination takes place, both parties are discharged from rendering any further performance under the contract. If SE had a right to terminate the Consultancy Agreement at common law when it purported to do so on 26 January 2016, it would have been discharged from that point forward of all future obligation to pay fees to Menrva.

151 I find that SE did not have the right to terminate the Consultancy Agreement at common law when it purported to do so on 26 January 2016. Its attempt to terminate the agreement without justification in itself amounts to a repudiatory breach of contract. I have found Menrva to have been in breach only of sub-cl (a) of the Consultancy Agreement. Clause (a) can hardly be said to have the status of a condition of the Consultancy Agreement. SE was not deprived of substantially the whole benefit of the Consultancy Agreement by the mere failure of Menrva to produce daily indicative valuations. The fact that SE did not follow up with Menrva when Menrva failed to do so is telling. SE thus committed a repudiatory breach of the Consultancy Agreement by renouncing it on 26 January 2016.

152 Menrva is entitled to damages for SE's repudiatory breach. The *prima facie* measure of damages will be Menrva's expectation loss, *ie* what Menrva was entitled to receive under the Consultancy Agreement had it been allowed to run until its expiry date in July 2018 instead of being terminated without justification by SE in January 2016.

153 Menrva has quantified this loss at $1,495,452.53.[164] Although the plaintiffs do not suggest that this figure is wrong,[165] they do submit that

[164] Defendants' closing submissions at para 380.

[165] Certified Transcript, 24 January 2018 page 28 line 13.

Menrva's counterclaim is not in fact for a liquidated sum but requires assessment in order to take into account various contingencies.[166] Menrva's counterclaim pleads, in the alternative, for an award of damages to be assessed. I therefore order that Menrva's damages on the counterclaim be assessed.

166 Plaintiffs' closing submissions, at para 308.

Conclusion

154 For the reasons above, I hold largely in favour of the defendants on both the claim and counterclaim. I consider that the event in this action is wholly in the defendants' favour, even though I have found one defendant to be in breach of contract and liable to pay nominal damages. Looked at practically and realistically, both the defendants are the successful party in this litigation.

155 Both the defendants are thus *prima facie* entitled to the costs of this action on the standard basis. But the defendants seek costs on the indemnity basis.[167] The defendants argue that the plaintiffs "have conducted their case dishonestly, irresponsibly and in a wasteful manner, causing a significant amount of costs to be incurred irrationally or out of all proportion as to what is at stake".[168] The defendants rely in particular on three aspects of the manner in which the plaintiffs have conducted their case: (i) the plaintiffs abandoned a substantial part of their case at trial, after obliging Mr Chan to deal with it in his affidavit of evidence-in-chief and after spending almost a whole day cross-examining Mr Chan on it;[169] (ii) the plaintiffs' pleadings are "a mess" and include many speculative and weak claims;[170] and (iii) the plaintiffs pursued these speculative and weak claims to the end despite making no attempt to support them with either factual or expert evidence.[171]

---

167 Defendants' closing submissions at para 391 to 396.

168 Defendants' closing submissions at para 392.

169 Defendants' closing submissions at para 393(a) and (b).

170 Defendants' closing submissions at para 394.

171 Defendants' closing submissions at para 395.

156 I do not accept the defendants' submission that they are entitled to costs on the indemnity basis. Although the plaintiffs have failed in substance in their claim and in their defence to the counterclaim, I cannot say that any of the claims which the plaintiffs advanced should never have been advanced. I also do not consider that the plaintiffs conducted their claim "dishonesty, irresponsibly and in a wasteful manner". That allegation should not have been made.

157 The plaintiffs shall therefore pay to the defendants a single set of costs for both the claim and the counterclaim, but on the standard basis, with such costs to be taxed if not agreed.

Vinodh Coomaraswamy
Judge

Daniel Liu Zhaoxiang and Lim Yangyu (WongPartnership LLP) for the plaintiffs;
Ng Lip Chih, Jennifer Sia Pei Ru and Rezvana Fairouse (NLC Law Asia LLC) for the defendants.