

**IN THE SUPREME COURT OF VICTORIA AT MELBOURNE  
COMMERCIAL COURT  
COMMERCIAL LIST – DELANY J**

No. S ECI 2020 03899

BETWEEN

**CHINA INSURANCE GROUP FINANCE COMPANY LIMITED**

Plaintiff

and

**PHILLIP JAMES KINGSTON**

Defendant

**PLAINTIFF'S OUTLINE CLOSING SUBMISSION**

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Date:	22 July 2022	Solicitor's Code:
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## GLOSSARY

<b>Asia Selangor</b>	Asia Selangor Investments Pty Ltd
<b>CIG</b>	China Insurance Group Finance Company Limited
<b>Complectus</b>	Complectus Limited
<b>Diversa</b>	Diversa Trustees Limited
<b>Dragon Shield</b>	Dragon Shield Holdings Pty Ltd
<b>Escala</b>	Escala Partners Ltd
<b>Facility Agreement</b>	the loan agreement between Mr Kingston and CIG comprising: <ul style="list-style-type: none"><li>(a) the “Loan Agreement – Loan Schedule”;</li><li>(b) the “Loan Agreement – Terms and Conditions”;</li><li>(c) each of SA1, SA2, SA3, SA4.</li></ul>
<b>Forci</b>	Forci Alternative Strategies Pty Ltd
<b>GrowthOps</b>	Trimantium GrowthOps Limited
<b>ICBC</b>	Industrial and Commercial Bank of China
<b>Lending Committee</b>	the Lending Business Management Committee of Taiping Securities (HK) Company Limited (formerly the Margin Committee)
<b>Loan Agreement</b>	Loan Agreement between CIG and Mr Kingston dated 28 November 2017
<b>Madison</b>	Madison Financial Group Pty Limited
<b>Margin Committee</b>	the Margin Committee of Taiping Securities (HK) Company Limited
<b>MLO</b>	Money Lenders Ordinance (Cap 163) (HK)
<b>Pattani</b>	Pattani Private Capital Pty Ltd
<b>Promissory Note 1</b>	HK\$500 million promissory note executed by TTIM, Taiping Trustees and Sargon (as Obligor) on 9 February 2018

<b>Promissory Note 2</b>	HK\$190 million promissory note executed by Sargon and TTIM (with the consent of Taiping Trustees) on 28 April 2018
<b>SA1</b>	First Supplementary Agreement to the Loan Agreement between CIG, Mr Kingston and Trimantium International Holdings dated 6 December 2017
<b>SA2</b>	Second Supplementary Agreement to the Loan Agreement between CIG, Mr Kingston, Trimantium International Holdings and Asia Selangor dated 25 January 2018
<b>SA3</b>	Third Supplementary Agreement to the Loan Agreement between CIG, Mr Kingston, Trimantium International Holdings, Asia Selangor, Forci, Pattani, Louis Holbrook Company Pty Ltd, Vonny Tjhin as trustee for Selangor Trust 1, Nattiya Pothong as trustee for Pothong Family Trust, Thananchanok Thaicharoen as trustee for Pattani Private Trust, Trimantium Capital and TCFM dated 20 April 2018
<b>SA4</b>	Fourth Supplementary Agreement to the Loan Agreement between CIG, Mr Kingston, Trimantium International Holdings, Asia Selangor, Forci, Pattani, Louis Holbrook Company Pty Ltd, Vonny Tjhin as trustee for Selangor Trust 1, Nattiya Pothong as trustee for Pothong Family Trust, Thananchanok Thaicharoen as trustee for Pattani Private Trust, Trimantium Capital, Trimantium Limited, TCFM, and TTIM dated 28 September 2018
<b>Sargon</b>	Sargon Capital Limited
<b>SCAH</b>	SC Australian Holdings 1 Pty Ltd
<b>SCOF</b>	Sargon Capital Opportunities Finance Co. Ltd
<b>SPV</b>	special purpose vehicle
<b>Taiping</b>	the China Taiping group (generally)
<b>Taiping Assets Management</b>	Taiping Assets Management (HK) Company Limited
<b>Taiping Financial Holdings</b>	Taiping Financial Holdings Company Limited

<b>Taiping Financial Investment</b>	Taiping Financial Investment Company Limited
<b>Taiping Trustees</b>	Taiping Trustees Limited
<b>TCFM</b>	Trimantium Capital Funds Management Pty Ltd
<b>TIM</b>	Trimantium Investment Management Pty Ltd (formerly TTIM)
<b>Trimantium Capital</b>	Trimantium Capital Pty Ltd
<b>Trimantium International Holdings</b>	Trimantium International Holdings Pty Ltd
<b>Trimantium Taiping</b>	Trimantium Taiping Pty Ltd
<b>TSIT</b>	Trimantium Sargon Investment Trust
<b>TTIM</b>	Trimantium Taiping Investment Management Pty Ltd

## INTRODUCTION

1. This proceeding concerns the claim of the plaintiff, CIG, to recover the sum of HK\$653 million lent by it to the defendant, Mr Kingston, between 6 December 2017 and 18 October 2018 pursuant to a Facility Agreement. The loan was in default by September 2019 and steps to enforce the loan commenced in January 2020, resulting in the commencement of this proceeding in August 2020.
2. CIG's case is in substance a simple claim for debt. There is no dispute about the facts that CIG advanced the money to Mr Kingston and that, although several instalments of interest were paid, the principal has never been repaid to CIG. However, CIG's claim has been vigorously contested. The trial in this Court ran for six days and, before the trial commenced, evidence was taken from a witness in Hong Kong over two days.
3. A large part of the trial was spent dealing with the many and varied issues raised by Mr Kingston's seemingly complex defence. In the end, it is readily apparent that Mr Kingston's defence is unsubstantiated for several reasons. First, Mr Kingston's own evidence fails to support key elements of his defence. Secondly, to the extent that any evidence led by Mr Kingston may tend to support his defence, the Court ought to reject or afford minimal weight to that evidence. As set out below, some aspects of Mr Kingston's evidence are unsatisfactory, to put it softly. Other aspects of Mr Kingston's evidence lack credibility. Mr Kingston's evidence on important matters may be regarded as unreliable having regard to matters relevant to his credit. Thirdly, defences sought to be raised by Mr Kingston are misconceived or untenable as a matter of law.
4. For the reasons set out below, CIG submits that the Court should find that CIG is entitled to judgment for the full outstanding principal and interest under the Facility Agreement.

## THE PARTIES

5. CIG is a financial services company domiciled in Hong Kong. It is also a licensed money lender under the *Money Lenders Ordinance* (Cap 164) (HK).<sup>1</sup>
6. CIG is a subsidiary of Taiping Financial Holdings and a related company of Taiping Trustees. CIG, Taiping Trustees and Taiping Financial Holdings are subsidiaries of China Taiping Insurance Holdings Company Limited, a public company whose securities are listed for quotation on the Hong Kong Stock Exchange.<sup>2</sup>
7. Mr Kingston has resided in the State of Victoria at all relevant times.<sup>3</sup> He holds a Bachelor of Science in Mathematics and Statistics and a Bachelor of Commerce from the University of Melbourne, majoring in actuarial studies and applied mathematics.<sup>4</sup> He is a sophisticated businessman and entrepreneur.<sup>5</sup> He is a member of the Australian Institute of Company Directors, holding a certificate in company directorship awarded by the Institute.<sup>6</sup>
8. Mr Kingston co-founded Sargon in 2015.<sup>7</sup> Sargon was the holding company of a number of subsidiaries which operated superannuation, trustee and financial services businesses (known as the "Sargon Group"). From about 2015 to 2020, Mr Kingston served as Chief Executive Officer of Sargon. During that time, Sargon acquired a number of companies, including:<sup>8</sup>
  - (a) Maxx Super and Como Financial Services in 2015;
  - (b) Tidswell Financial Services Ltd and Linear Asset Management Ltd in 2016;
  - (c) Hong Kong Trust Company Ltd and New Zealand Trust Company in 2017;

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<sup>1</sup> Statement of Claim [1]; ADC [1]; Amended Reply [1].

<sup>2</sup> Guo 1 [4] and [20] at CB95 and 98. See also CB1022.

<sup>3</sup> CB504. For more detailed submissions as to Mr Kingston's residence see paragraphs 443 to 446.

<sup>4</sup> CB4779; T420:5-9.

<sup>5</sup> Kingston XX at T420:20-21.

<sup>6</sup> CB7476; Kingston XX T420:10-12.

<sup>7</sup> Kingston XX at T420:30-421:1.

<sup>8</sup> Kingston XX at T421:8-423:15; Kingston 1 [12] at CB150.



- (d) Madison, Australian Executor Trustees – Corporate Trust, Decimal Software (an ASX listed company) and 19.24% of Sequoia Financial Group (also an ASX listed company) in 2018; and
  - (e) Diversa and CCSL Trustees Limited in 2019.
9. Mr Kingston was also the founder and chief executive officer of GrowthOps. GrowthOps conducted an initial public offering in late 2017<sup>9</sup> and listed on the Australian Securities Exchange in March 2018. The IPO raised A\$70 million, of which 84.2% was funded by money lent by Taiping Trustees (see paragraph 152 below). GrowthOps remained listed until December 2020, when its shareholders voted to delist it.<sup>10</sup>
10. At all relevant times, Mr Kingston was a director and shareholder of a number of companies, including Trimantium Capital (an investment advisory firm he founded in 2008)<sup>11</sup>, GrowthOps, Trimantium Limited (a Hong Kong Company), TTIM, Sargon and Dragon Shield.<sup>12</sup>

## THE WITNESSES

### CIG's witnesses

11. CIG adduced evidence from three lay witnesses: **Wang** Zhen (who also goes by "Andy Wang"), **Guo** Ke and **Zhong** Ming (surnames are emphasised).
12. CIG also tendered a report by an expert HK lawyer, Charles Manzoni QC and an expert translator, Gang **Wang**. Their qualification to opine on the matters in their reports was not contested.

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<sup>9</sup> See the prospectus at CB7395-7558.

<sup>10</sup> Kingston 1 [17] at CB151.

<sup>11</sup> Kingston XX at T429:5-10.

<sup>12</sup> Mr Kingston was a shareholder of Trimantium Capital (indirectly through Phillip Kingston Management Pty Ltd, see CB14714 and T425:27-28), GrowthOps (indirectly through Trimantium Capital, see T426:3-6), Trimantium Limited (HK) (see CB14514), TTIM (indirectly through Trimantium Limited (HK), see CB14755), Sargon (indirectly through Trimantium Capital and Trimantium Limited (HK), see CB15178) and Dragon Shield Holdings Pty Ltd (indirectly through Trimantium Limited (HK) and Trimantium Taiping Investment Management Pty Ltd, see CB14654).

13. Mr Wang joined Taiping Financial Holdings in 2017 as the Deputy General Manager in the Markets Department. A year later Mr Wang was promoted to Manager of the Overseas Investments Department.<sup>13</sup> He left Taiping in March 2020.<sup>14</sup>
14. Mr Wang's role involved accompanying his superiors to meet with clients, carrying out due diligence work, preparing submissions to decision-making committees for approval, and implementing the decisions of those committees. Mr Wang was not a decision maker. He was not a member of any decision-making committee.<sup>15</sup>
15. Mr Wang was involved in the management of the relationship with Mr Kingston and Sargon until 2019 when **Liu** Hongbo was appointed to undertake "post-investment management" of the relationship. After Ms Liu was appointed, Mr Wang was excluded from participating in the conduct of the relationship.<sup>16</sup>
16. Mr Wang gave evidence about whether CIG represented to Mr Kingston that CIG would lend money to Mr Kingston on a non-recourse basis and that Mr Kingston would have no liability to repay the loans personally.
17. Mr Wang did not testify willingly. He was a reluctant witness whose attendance to be examined was compelled by an order of the Hong Kong Court of First Instance. Mr Wang appears to have been aggrieved by what he perceived to be "*unfair treatment*" by Taiping Financial Holdings before he resigned.<sup>17</sup>
18. Mr Guo joined Taiping Financial Investment in October 2020 as Deputy General Manager. In that role, he was in charge of Taiping Financial Investment's alternative investments business.<sup>18</sup> In February 2021, Mr Guo became Deputy General Manager at Taiping Assets Management after an internal restructure, whereby Taiping Financial Investment's alternative investments' business was transferred to Taiping

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<sup>13</sup> Wang XN, Day 1 T10:10-19 at CB14900.

<sup>14</sup> Wang XN, Day 1 T11:2 at CB14901.

<sup>15</sup> Wang XN, Day 1 T11:8-25 at CB14901.

<sup>16</sup> Wang XN, Day 1 T13:7-14 at CB14903.

<sup>17</sup> Order of Master Kot 26 April 2022, at CB14887-14890; Affidavit of Wen-Ts'ai Lim 14 February 2022 (at CB14108), Exh WTL-1 pp 144, 151, 158 (at CB5660, 5663, 5670).

<sup>18</sup> Guo 1 [2] at CB94.

Assets Management.<sup>19</sup> Both Taiping Financial Investment and Taiping Assets Management are subsidiaries of Taiping Financial Holdings.<sup>20</sup>

19. In his role, Mr Guo is responsible for overseeing Taiping Assets Management's investment activities, which comprises structured financing, private equity and fund investments.<sup>21</sup> He is also responsible for the management and supervision of members of the Alternative Investment General Department at Taiping Assets Management.<sup>22</sup>
20. CIG's business is administered as part of the alternative investments business. Since joining Taiping in October 2020, Mr Guo's duties have included overseeing CIG's business, including the management of outstanding loans made by CIG.<sup>23</sup>
21. Mr Guo gave evidence to underpin the tender of CIG's business records relating to the loan to Mr Kingston.
22. Ms Zhong joined Taiping Financial Holdings in March 2015 as an officer in the Finance Department.<sup>24</sup> In April 2021, she was promoted to Manager of the Finance Department.<sup>25</sup>
23. Between April 2015 and May 2019, Ms Zhong's responsibilities included reviewing claims for reimbursement of work-related trip expenses submitted by officers of Taiping or its subsidiaries.<sup>26</sup>
24. Ms Zhong gave evidence explaining the approval process for reimbursement of work-related trip expenses, how disbursement records are stored by Taiping and to underpin the tender of Taiping's records of a business trip undertaken between 23 and

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<sup>19</sup> Guo 1 [1] at CB94.

<sup>20</sup> Guo 1 [3] at CB95.

<sup>21</sup> Guo 1 [1] at CB94.

<sup>22</sup> Guo 1 [1] at CB94.

<sup>23</sup> Guo 1 [3]-[5] at CB95.

<sup>24</sup> Zhong [3(a)] at CB14122.

<sup>25</sup> Zhong [2]-[3] at CB14121 and 14122.

<sup>26</sup> Zhong [4] at CB14122.

26 November 2017 by **Li Xudong**, the former Chief Executive Officer of Taiping Financial Holdings.<sup>27</sup>

25. Another officer of Taiping Financial Holdings who features in the evidence is **Liu Qiaosong**, the General Manager of the Alternative Investments Department.<sup>28</sup> Mr Li and Mr Liu did not give evidence in the case. Mr Li has left the Taiping Group and, after attending two conferences with CIG's solicitors, declined to give evidence in this case.<sup>29</sup> Mr Liu has also left the company. He was prepared to provide a witness statement but declined to attend the hearing to give sworn evidence.<sup>30</sup>

### **Mr Kingston's witnesses**

26. Mr Kingston adduced evidence from two witnesses: himself and Laurence Li SC, an expert in Hong Kong Law. Mr Li's expertise to opine on the matters in his report was not in dispute. Submissions about Mr Kingston's credit as a witness and the reliability of his evidence are made below.

## **THE FACTS (INCLUDING THE ALLEGED REPRESENTATIONS)**

### **Kingston's introduction to China Taiping**

27. Mr Kingston was introduced to representatives of the Taiping group in May 2017 by David **Chen**, an investor in Sargon.<sup>31</sup> He met Mr Wang, Mr Li and Mr Liu, among others.<sup>32</sup>
28. After those initial meetings, Mr Kingston discussed with (principally) Mr Wang various proposals for transactions between Taiping companies and Mr Kingston or companies associated with him. At all times, Mr Kingston understood that any

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<sup>27</sup> Zhong [5]-[9] at CB14122 and 14123.

<sup>28</sup> Wang XX, Day 1 T10:10, T58:10-21 at CB14900 and CB14948.

<sup>29</sup> Affidavit of Wen-Ts'ai Lim 14 February 2022 [20]-[26], CB14111-14112.

<sup>30</sup> Affidavit of Wen-Ts'ai Lim 14 February 2022 [27]-[29], CB14113.

<sup>31</sup> Kingston 1 [26]-[29] at CB152-153.

<sup>32</sup> Kingston 1 [29] at CB153; Wang XX, Day 1 T58:6-9 at CB14948.

proposal had to be approved by Taiping Financial Holdings' investment committee before it could proceed.<sup>33</sup>

29. At that time, Sargon intended to purchase a New Zealand company called Complectus Ltd.<sup>34</sup> From May 2017, Mr Kingston discussed a number of options with Mr Wang by which Taiping could provide financing to Sargon for its intended acquisition of Complectus.<sup>35</sup> Sargon did not ultimately acquire Complectus.<sup>36</sup>
30. In an email sent on 25 May 2017 to Mr Wang, Mr Kingston proposed that the Complectus acquisition be financed by a loan from Taiping, to be secured over the acquired company.<sup>37</sup>
31. In August 2017, Mr Wang and Mr Kingston negotiated the terms of a draft term sheet for Taiping's financing of the Complectus acquisition.<sup>38</sup>
32. On 9 August 2017, Mr Kingston sent an email responding to some questions asked by Mr Wang regarding the proposal. In response to a question which asked, "*Can you / Trimantium give personal guarantee on this?*", Mr Kingston replied:<sup>39</sup>

*Potentially - but the economics of the transaction would need to be quite different as it drastically reduces your risk and increases mine. Other insurance partners we are speaking to are not looking for this, so this would probably exclude Taiping from the next stage.*
33. On 23 August 2017, Mr Kingston sent an email to Mr Wang attaching a draft term sheet prepared by Linklaters,<sup>40</sup> Sargon's solicitors.<sup>41</sup>

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<sup>33</sup> Kingston XX at T449:26-450:3; T458:6.

<sup>34</sup> Kingston I [37] at CB154; CB776.

<sup>35</sup> Kingston XX at T447:8-9.

<sup>36</sup> Kingston XX at T612:23-613:1.

<sup>37</sup> CB776.

<sup>38</sup> Kingston I [51] and [53] at CB157-158; CB932-935 and CB938-940.

<sup>39</sup> CB6656.

<sup>40</sup> Kingston I [64] at CB160; CB959-971.

<sup>41</sup> Kingston XX at T449:16-17.

34. On 29 August 2017, Mr Wang replied to Mr Kingston's email, attaching a marked up copy of the term sheet.<sup>42</sup> The marked up term sheet included a comment from Taiping that said "*Sargon will be the guarantor over the notes no matter what?*".<sup>43</sup> Mr Kingston's evidence was that at this time he understood that if a special purpose vehicle were interposed as the borrower, Taiping would require that Sargon guarantee the facility.<sup>44</sup>
35. In September 2017, Mr Kingston and Mr Wang negotiated an asset advisory agreement between Sargon and Taiping Assets Management.<sup>45</sup> On 28 September 2017, Taiping Financial Holdings announced a strategic partnership with Sargon.<sup>46</sup>
36. On 13 October 2017, Mr Kingston sent an email to Mr Wang attaching a draft prospectus for an initial public offering of shares in GrowthOps.<sup>47</sup> In that email, Mr Kingston said "*I think [the IPO] could be of significant strategic interest to Taiping.*"<sup>48</sup>
37. On 20 October 2017, Mr Kingston received a letter from Taiping Financial Holdings expressing interest in participating in the upcoming IPO of GrowthOps with an expected capacity of HK\$100 million.<sup>49</sup> Taiping did not ultimately follow through on this expression of interest—Mr Kingston's evidence was that Taiping did not subscribe for shares in the GrowthOps IPO.<sup>50</sup>

#### **October 2017 due diligence trip and Oyster & Chop dinner**

38. From 22 October 2017 to about 28 October 2017, Mr Wang, Mr Li and Mr Liu went on a business trip to Australia and New Zealand to engage in fact finding and to

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<sup>42</sup> Kingston 1 [67] at CB161; CB972-986.

<sup>43</sup> CB980.

<sup>44</sup> Kingston XX at T456:19-24.

<sup>45</sup> Kingston 1 [77], [80], [86]-[87] at CB162-165; CB999-1019, CB1028-1040, CB1048-1057 and CB1060-1081.

<sup>46</sup> CB1091-1092.

<sup>47</sup> Kingston 1 [92] at CB165; CB1099-1245.

<sup>48</sup> CB1099.

<sup>49</sup> Kingston 1 [94] at CB166; 1294.

<sup>50</sup> Kingston XX at T457:25-27.

conduct due diligence on behalf of Taiping.<sup>51</sup> The Taiping officers met with senior representatives of a number of corporations as well as with government officials. A Taiping report dated 8 November 2017 summarises the meetings they attended.<sup>52</sup>

39. On 25 October 2017 Mr Kingston, Mr Wang, Mr Li and Mr Liu had dinner at a restaurant in Auckland called Oyster & Chop.<sup>53</sup> Mr Kingston's evidence was:
- (a) A number of topics were discussed at that dinner, including Taiping's potential investment into Sargon and GrowthOps and the structure of that investment.<sup>54</sup> Mr Li said that "from an overseas standpoint" unlisted equity investments were more difficult than listed investments and that debt instruments were easier than listed equity investments.<sup>55</sup>
  - (b) Mr Li proposed that Taiping's potential investment into GrowthOps could be structured as a loan from a Taiping entity to a special purpose vehicle which would make an equity investment into GrowthOps because this would be faster than making a direct equity investment.<sup>56</sup> The speed of the GrowthOps investment was very important because of the timing of the upcoming IPO.<sup>57</sup>
  - (c) Mr Kingston said he did not mind if the funds were provided in the form of a loan provided that interest would be self-funding, because he and the Trimantium entities had no ability to service the loan, but in no circumstances could the lender have recourse to him or the Trimantium entities.<sup>58</sup>
  - (d) Mr Li then said that the loan would comprise enough additional principal to cover interest and that the lender would not have recourse to him or the

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<sup>51</sup> Kingston 1 [96] at CB166; Wang XN, Day 1 T14:22-15:12 at CB14904-14905.

<sup>52</sup> CB1343-1374.

<sup>53</sup> Kingston 1 [100] at CB167; Kingston XN T398:28-399:6.

<sup>54</sup> Kingston XN T399:19-29.

<sup>55</sup> Kingston XN T404:20-29.

<sup>56</sup> Kingston XN T405:14-21.

<sup>57</sup> Kingston XN T405:24-406:15.

<sup>58</sup> Kingston XN T407:26-408:12.

Trimantium entities beyond the pledged collateral. The conversation was conducted in both English and Mandarin and Mr Wang translated.<sup>59</sup>

40. It is improbable that such a conversation took place for three reasons.
41. *First*, Mr Kingston claimed that both Mr Wang and Mr Li used the word "recourse" to convey that neither Mr Kingston nor the Trimantium entities would be liable to repay the loan beyond the value of the securities pledged to the lender.<sup>60</sup> However, the evidence suggests that Mr Wang did not understand that word.
42. During the course of Mr Wang's examination in Hong Kong, Mr Chen, counsel for Mr Wang, interrupted the proceedings and the following exchange took place:<sup>61</sup>

*MR. CHEN: Sorry, Mr. Lee, perhaps for the record there was a conversation between Mr. Wang and Madam Interpreter just now concerning the definition of "recourse," where Mr. Wang asked in Mandarin what was the meaning of "recourse" but that wasn't translated to Ms. Neskovcin.*

*EXAMINER: Could I have the translation for the interpretation of that question and answer, Madam Interpreter.*

*INTERPRETER: Yes, sure. I just thought that he could [not] understand the English language. So I worked it into Chinese for him. Anyway, so he asked me: "What does recourse mean?" And I explained to him that it meant that -- so the liability of paying back the loan would -- the responsibility of that would lie with Mr Kingston.*

*MR. MOLLER: Well, that's the difficulty, with respect, because my learned friend's questions are about the Trimantium entities.*

*INTERPRETER: Initially, the first question, it was about recourse to Mr. Kingston, in the very beginning when that conversation took place.*

*BY MS. NESKOVGIN: Q. Mr. Wang, did you have an understanding at the time about the meaning of "recourse"?*

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<sup>59</sup> Kingston XN T408:12-18.

<sup>60</sup> Kingston XN T409:12-18.

<sup>61</sup> Wang XN, Day 1 T19:9-20:16 at CB14909-14910. The line of questioning began at Day 1 T17:16.



*A. I cannot be certain whether I had an understanding of the word, or whether that word was used.*

*Q. Was it ever said either at the dinner in Auckland or another occasion that the Trimantium entities would have no liability?*

*A. In my recollection, no.*

43. Mr Wang's lack of understanding was genuine. His enquiry as to what "recourse" meant was made privately to the interpreter, who did not translate it at first. It was only when Mr Chen interjected that what had occurred was brought to the attention of Mr Lee, the Examiner.
44. Mr Wang's clear recollection was that he did not say that the loan would be made to Mr Kingston on a non-recourse basis. According to him, the proposition that a loan would have no recourse to the Trimantium entities was also not discussed.<sup>62</sup> He could not, however, recall one way or another whether Mr Li might have said that the loan would be non-recourse.<sup>63</sup>
45. It is likely, however, that if Mr Wang did not know what "recourse" meant, Mr Li could not have said it. Mr Kingston gave the following evidence in chief:<sup>64</sup>

*... Mr Li said that um, **and some of this was translated by Mr Wang** but Mr Li said that - that the loan would advance enough additional principal to cover the full investment amount so that the investment side plus all of the interest and that the loan would not um, have any recourse to you or the Trimantium entities beyond - beyond the pledge collateral and that this loan style was quite common in Hong Kong ... [Emphasis added.]*

46. The fact that Mr Wang needed to translate for Mr Li indicates that the latter had limited English. A business or legal concept like "recourse" is likely to have required translation. And if Mr Wang did not understand the meaning of "recourse" in 2022, it is improbable he would have known it well enough in 2017 to use or translate it.

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<sup>62</sup> Wang XN, Day 1 T19:4-8 at CB14909.

<sup>63</sup> Wang XN, Day 1 T17:16-25 at CB14907.

<sup>64</sup> Kingston XN T408:12-19.

Thus, although Mr Kingston claimed in the witness box that Mr Li said the word "recourse",<sup>65</sup> it is unlikely that he did so.

47. *Secondly*, when Mr Wang was asked if it was ever said either at the dinner in Auckland or on another occasion that the Trimantium entities or Mr Kingston would have no liability to repay a loan or investment, he was adamant that this was not said.<sup>66</sup>
48. As discussed above (see paragraph 17), Mr Wang was not a willing witness. He was not "in CIG's camp" and had no motivation to assist it. However, he gave candid answers and his evidence should be accepted at face value.
49. *Thirdly*, Mr Kingston's account of how the representation that he would have no personal liability came to be made is inherently improbable.<sup>67</sup> According to Mr Kingston, Mr Li proposed that a special purpose vehicle be used to borrow funds and invest in GrowthOps shares. The principal would be grossed-up to enable interest to be paid. Through that structure, the loan could be treated synthetically as if it were an equity investment.
50. In any discussion of such a proposal the question of personal liability on the part of Mr Kingston would not have arisen. It is unlikely that Mr Kingston would have been prompted by that discussion to suddenly proffer that he wanted no personal liability—that part of his story emerges as a *non-sequitur*.
51. Further, as Mr Kingston conceded under cross-examination, he understood that any deal would be subject to committee approval.<sup>68</sup> Mr Kingston also conceded that he knew that Mr Li and Mr Wang did not have the power to decide what the terms of the agreement would be as that was a matter for the committee, and that they were only discussing options at that dinner.<sup>69</sup>

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<sup>65</sup> Kingston XN T409:17.

<sup>66</sup> Wang XN, Day 1 T20:13-22 at CB14910.

<sup>67</sup> Kingston XN T405-408.

<sup>68</sup> Kingston XX T458:23-24.

<sup>69</sup> Kingston XX T463:6-16.

52. It follows that whatever was said over dinner was merely exploratory.<sup>70</sup> Moreover, the Taiping report of 8 November 2017 notes:<sup>71</sup>

*GrowthOps is currently planning to be listed on stock market and it is expected to be listed on the Australian Stock Exchange in early December. At present, Mr Philip, founder and CEO of Sargon, plans to take a loan from the Company by pledging the Sargon equity he holds, so as to subscribe for about 100 million HK dollars equivalent shares of GrowthOps during the listing process of GrowthOps (the acquired listed entity of GrowthOps is also used as pledge).*

53. This report was written well before this case was conceived and is a near contemporaneous record of what was discussed. Whatever structure had also been discussed over dinner, a proposal for Mr Kingston to subscribe himself for GrowthOps shares quite clearly lay at the heart of the discussions.

#### **The change to a personal loan**

54. On 28 October 2017, Mr Kingston sent an email to Mr Wang attaching a draft investment structure. Mr Kingston's evidence is that this investment structure sought to capture the discussions that took place during the Taiping delegation's due diligence trip.<sup>72</sup> Mr Kingston agreed in cross-examination that the draft investment structure essentially involved two loans:<sup>73</sup>

- (a) First, a loan of A\$15 million in respect of an eventual purchase of shares in GrowthOps; and
- (b) Secondly, a loan of A\$85 million for an investment in Sargon.

55. Mr Kingston testified that, on 3 November 2017, Mr Wang called Mr Kingston to say that Taiping's investment committee had given its preliminary approval for a HK\$100 million investment to be made in GrowthOps. This was to take the form of a loan to a "partnership fund" which would then acquire GrowthOps shares in accordance with the structure diagram provided by Mr Kingston to Mr Wang on

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<sup>70</sup> Kingston XX T463:15-16.

<sup>71</sup> CB1368.

<sup>72</sup> Kingston 1 [113] at CB169; CB1297-1298.

<sup>73</sup> Kingston XX T464:26-465:5.

28 October 2017.<sup>74</sup> Mr Kingston agreed in cross-examination that this was consistent with Taiping's investment proceeding in two streams—a "Sargon stream" and a "GrowthOps stream".<sup>75</sup>

56. On 9 November 2017, Mr Wang sent an email to Mr Kingston, attaching a number of documents, including an application form for a loan, a draft loan agreement and a draft supplementary agreement.<sup>76</sup> The covering email said:

*Please see attached the 1) account opening files, 2) Loan agreement (standard terms, never changed) and 3) supplementary agreement (key doc, with all key terms, but in Chinese). For your review. Please let me know if any change of the key terms.*

57. The draft supplementary agreement named Trimantium Taiping Pty Ltd as the proposed corporate borrower.<sup>77</sup> Mr Kingston's evidence was that Trimantium Taiping Pty Ltd was the partnership fund trustee identified in the structure diagram attached to his 28 October 2017 email.<sup>78</sup> Mr Kingston also accepted that, if that structure were adopted, that company would not be left to him to run alone—that is, he would not control the borrower himself.<sup>79</sup> He declined, however, to accept that he did not want Trimantium Taiping to be the borrower for that reason.<sup>80</sup>
58. Nonetheless, it was subsequently proposed that a different company, Trimantium Capital, be the borrower.<sup>81</sup> Two days later, on 11 November 2017, Mr Wang sent an email to Mr Kingston, which requested "*background information on Trimantium Capital (sic) as borrower.*"<sup>82</sup>

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<sup>74</sup> Kingston 1 [116] at CB170.

<sup>75</sup> Kingston XX T465:6-14.

<sup>76</sup> Kingston 1 [117] at CB170; CB1375-1435.

<sup>77</sup> CB1421 (Chinese version), 1427 (translated).

<sup>78</sup> Kingston XX T466:17-467:2.

<sup>79</sup> Kingston XX T467:3-16.

<sup>80</sup> Kingston XX T469:12-16.

<sup>81</sup> Kingston XX T467:26-27.

<sup>82</sup> CB7559.

59. Under cross-examination, Mr Kingston said that he did not want Trimantium Capital to be the borrower, which suggests that the proposal came from Mr Wang and not Mr Kingston.<sup>83</sup> The Court should infer that China Taiping was concerned that either Mr Kingston or a company under his control be directly liable for the loan, consistently with Taiping's previous request, in connection with the Complectus deal, that either Mr Kingston or Trimantium Capital give a guarantee.<sup>84</sup>
60. What happened next is controversial. Mr Kingston claims that, following Taiping's Margin Committee meeting on 16 November 2017, CIG (through Mr Wang) proposed that he borrow the money personally.<sup>85</sup> That claim cannot be correct for the reasons set out below, including what the written records establish about the timing of the proposal that Mr Kingston borrow personally.
61. Three days after receiving various loan documents including an application form (corporate loan),<sup>86</sup> at 2:31pm AEDT on 12 November 2017, Mr Kingston sent an email to Mr Wang attaching a draft structure document.<sup>87</sup> The attachment to that email identified Mr Kingston as the borrower and proposed a form of escrow arrangement:<sup>88</sup>

*Loan Structure:*

- *Loan Size: HK\$100m, rest of document in AUD 1 = 6 HKD (assuming A\$15m for simplicity)*
- *Loan Currency: HKD*
- *Interest Rate: 8% p.a.*
- *Interest Repayments: Quarterly in arrears*
- *Security:*

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<sup>83</sup> Kingston XX T468:23-24.

<sup>84</sup> CB6656.

<sup>85</sup> Kingston XN T413:21-30

<sup>86</sup> See paragraph 56.

<sup>87</sup> CB7560-7566.

<sup>88</sup> CB7561.

- *A\$45m of Ordinary Shares in Sargon Capital Pty Ltd*
- *A\$15m of Ordinary Shares in Trimantium GrowthOps Ltd*

- ***Borrower: Phillip Kingston***

- *Lender: Taiping Financial Holdings Company Limited*
- *Escrow Agent: Barrister of the Supreme Court*
- *Escrow Agent Security Holding Company: Trimantium Taiping Pty Ltd*
  - *Director: Escrow Agent*
  - *Shareholder: Escrow Agent*
  - *Bank Account: ANZ Bank, two signatories: Phillip Kingston and Escrow Agent*
- *Escrow Agent Fees: TBC, paid by Borrower*

***[Emphasis added.]***

62. On 12 November 2017 at 5:38 pm AEDT, Mr Kingston sent an email to Mr Wang:<sup>89</sup>

*For the "Application form (corporate)", it would be the Escrow company "Trimantium Taiping Pty Ltd" ?*

63. On 12 November 2017 at 9:06 pm AEDT, Mr Wang responded to Mr Kingston:<sup>90</sup>

*Need to check with Risk tmr.*

64. On 12 November 2017 at 11:32 pm AEDT, Mr Kingston sent a further email to Mr Wang attaching a draft escrow agreement.<sup>91</sup> The covering email said:<sup>92</sup>

*We'd use a very simple Escrow Agreement as we've drafted attached to sit alongside the Loan Agreement.*

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<sup>89</sup> Kingston 1 [121] at CB171; CB1519.

<sup>90</sup> Kingston 1 [122] at CB172; CB1520.

<sup>91</sup> CB7567-7577.

<sup>92</sup> CB7567.

*As stated - the permitted use of funds would be to buy shares in the Triimantium [sic] GrowthOps Ltd IPO and in Sargon Capital Pty Ltd.*

*We can then use the "借贷补充协议" [translated as "Supplementary Agreement"] that you sent through, with some small changes, as the Loan Agreement, thoughts?*

65. The draft escrow agreement attached to Mr Kingston's email defined "Borrower" as Mr Kingston and provided:<sup>93</sup>

*INTRODUCTION*

- A. *On [25th November 2017], the Lender and the Borrower entered into a Loan Agreement in relation to the purchase of shares in the Trimantium GrowthOps Ltd ("TGO") Initial Public Offering on the Australian Stock Exchange and shares in Sargon Capital Pty Ltd ("Loan Agreement").*
- B. *It is a term of the Loan Agreement that the Lender wires HKD\$100,000,000 ("**Escrow Amount**") to the Escrow Agent within 7 days of execution of the Loan Agreement ("Execution").*

...

66. On 13 November 2017 at 12:08 am AEDT, Mr Wang responded to Mr Kingston:<sup>94</sup>

*Yes, that should be easy.*

67. On 15 November 2017, Jane Zhou of Taiping Financial Holdings sent an email to the members of Taiping's Margin Committee attaching a proposal to lend HK\$100 million to Mr Kingston personally.<sup>95</sup> The proposal explained:<sup>96</sup>

*Mr. Philip James Kingston (hereinafter referred to as "Phillip"), the founder and CEO of Sargon Capital Pty Ltd (hereinafter referred to as "Sargon"), who is our important partner in Australia, currently plans to apply for a loan from us with the equity of Sargon owned by him and the stocks of Trimantium GrowthOps Ltd*

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<sup>93</sup> CB7569.

<sup>94</sup> CB7578.

<sup>95</sup> CB1526-1546.

<sup>96</sup> CB1540.

*(hereinafter referred to as “GrowthOps”) listed on the Australian Stock Exchange as the underlying assets collateral...*

68. Notably, the proposal takes the same form as the 8 November report (see above paragraph 52). On 16 November 2017, the Margin Committee met and approved the proposal to lend HK\$100 million to Mr Kingston.<sup>97</sup>
69. Thus the contemporaneous documentary record, in particular Mr Kingston’s emails of 12 November 2017 referred to above, is inconsistent with Mr Kingston’s assertion that the proposal that he personally be the borrower was first made by Mr Wang in a telephone conversation on 16 November 2017. The documentary record is more reliable than Mr Kingston’s oral evidence and should be preferred (see paragraph 81(c) below).

#### **The alleged conversation on 16 (or 11) November 2017**

70. In his original defence filed on 16 October 2020 Mr Kingston pleaded that on about 11 November 2017, Mr Wang told him that “*for internal reasons within the China Taiping Insurance Group, the loan to finance the investment in the IPO could not be through a corporate entity*”.<sup>98</sup>
71. This allegation remained unchanged in the amended defence filed on 5 February 2021. However, in his amended defence filed on 26 October 2021—after Mr Kingston had obtained discovery of CIG’s internal records including those of the Margin Committee meeting on 16 November 2017<sup>99</sup>—Mr Kingston elaborated on his original case about this important alleged conversation. He did so by pleading that the internal reasons said to have been referred to by Mr Wang included “*know your client (KYC) requirements*” and that Mr Wang had told him not only that the loan could not be through a corporate entity but that it “*would instead **need** to be made to the defendant personally*”.<sup>100</sup> Mr Kingston also pleaded that he told Mr Wang that he

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<sup>97</sup> CB1553, CB1547-1556.

<sup>98</sup> Defence filed 16 October 2020 at [2.8].

<sup>99</sup> Email dated 15 November 2017 from Jane Zhou to the Margin Lending Committee, Minutes of the Meeting of the Margin Lending Committee on 16 November 2017 and Minute of Conditional Approval of the Margin Lending Committee dated 16 November 2017 at CB 1526-1560.

<sup>100</sup> Amended Defence filed 26 October 2021 at [2.8].



had no ability to service the interest on a loan personally, and that Mr Wang told him that this would not change anything substantive about the loan or put liability on him personally.<sup>101</sup>

72. By the same amended defence, Mr Kingston also pleaded the conditional approval by the Margin Committee of Taiping Securities (HK) Company Ltd of a loan of HK\$100 million to Mr Kingston on 16 November 2017.<sup>102</sup>
73. In his witness statement dated 9 November 2021, Mr Kingston placed this alleged conversation not on (or about) 11 November 2017 as pleaded, but on 16 November 2017—the date of the Margin Committee meeting.<sup>103</sup>
74. There is no evidence supporting the pleaded allegation that Mr Kingston told Mr Wang that he had no ability to service the interest on a loan personally.
75. Nonetheless, the relevant paragraphs ([2.8] & [2.8.1]) of Mr Kingston’s defence, including the allegation that such a conversation occurred on about 11 November 2017, then remained unchanged in the amended defence of 15 February 2022<sup>104</sup> and they form part of the case that Mr Kingston took to trial.
76. By their written outline opening submission, having referred to a conversation on 12 November 2017, Mr Kingston’s counsel advanced a case that, “*At some point in the following days, Mr Wang told Mr Kingston that the proposed loan **may** need to be advanced to Mr Kingston personally instead of to a corporate borrower, since this would make it easier for CIG to satisfy its KYC requirements*” (emphasis added) and that “*Mr Kingston’s evidence will be that Wang reassured him that the change would not change anything substantive about the loan or result in Mr Kingston becoming personally liable*”<sup>105</sup>. Again, there was no reference to Mr Kingston allegedly having told Mr Wang that he had no ability to service the interest on a loan personally.

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<sup>101</sup> Amended Defence filed 26 October 2021 at [2.8].

<sup>102</sup> Amended Defence filed 26 October 2021 at [2.8.1].

<sup>103</sup> Kingston 1 [124] CB 171.

<sup>104</sup> Amended Defence filed 15 February 2022 at [2.8].

<sup>105</sup> Defendant’s Outline Opening Submission dated 27 May 2022 at [31].

77. Mr Kingston's evidence-in-chief about this alleged conversation appears at T413:1-415:9. Mr Kingston confirmed—when prompted by his counsel—that the conversation occurred on 16 November 2017.<sup>106</sup> He said that Mr Wang told him that the funds “would” (not “might”) have to be routed through him personally.<sup>107</sup> He also by his evidence raised for the first time the propositions that:

- (a) Mr Wang told him in this conversation that the Margin Committee had approved the loan with a couple of changes;<sup>108</sup> and
- (b) Mr Wang told him that the reason the funds would have to be routed through Mr Kingston personally was "*because the timing of the IPO ... [meant] ... there would be no time to get through the KYC issues of setting up a new company, who the owners would be, the directors and so forth*", so that it needed to be advanced to Mr Kingston's Hong Kong ICBC bank account.<sup>109</sup> For that reason, Mr Kingston's "*role would be that of a sort of, um, escrow agent*".<sup>110</sup>

78. Mr Kingston's testimony continued:<sup>111</sup>

*What, if anything, did you say to Mr Wang about the change?---I said to him that, um, had anything changed in terms of, um, you know, other than this, had anything else changed. And he said, no, the loan size, the duration, the collateral, um, all of the details, the SPV involvement, all of that was the same. But that I would be named as the borrower on the, on the page, um, and I said, well, um, has anything changed in terms of personal liability. And he said there'd still be no personal liability to you. Um, and I sort of – obviously, a big change so I, I probed a little bit about, um, well, - - - Before you come to that, what exactly did he say to you about personal liability?---**He said – the exact thing he said to me is 'that, um, there would be no personal liability and that would be dealt with in the supplementary agreements'**. [Emphasis added.]*

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<sup>106</sup> Kingston XN T413:2-5.

<sup>107</sup> Kingston XN T413:22-23.

<sup>108</sup> Kingston XN T413:15-17.

<sup>109</sup> Kingston XN T413:21-29.

<sup>110</sup> Kingston XN T413:21-30.

<sup>111</sup> Kingston XN T414:8-23.

79. In cross-examination, Mr Kingston:

- (a) denied that prior to the call with Mr Wang on 16 November 2017 he had discussed with Mr Wang the prospect of taking a personal loan in respect of an investment in GrowthOps shares;<sup>112</sup> and
- (b) asserted for the first time that it was Mr Wang who had first raised the issue of personal liability:<sup>113</sup>

*... And then your evidence is that you brought up the question of personal liability. Correct? --- That's correct.*

*It did not come from him? --- Uh, I think he said it at the start, but I was the one who pressed the issue.*

*He said what at the start? --- In listing what had changed, that there would be no personal liability.*

*All right, well that is not what you said this morning. I am just going on what you said this morning - - - ? --- I apologise.*

80. Mr Wang's evidence however was to the contrary. He testified that:

- (a) personal liability was not discussed on this occasion;<sup>114</sup>
- (b) or on any occasion;<sup>115</sup>
- (c) he told Mr Kingston that any loan would have to be approved by the Margin Committee<sup>116</sup> (which Mr Kingston accepted in cross-examination<sup>117</sup>);

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<sup>112</sup> Kingston XN T474:24-28.

<sup>113</sup> Kingston XN T476:16-25.

<sup>114</sup> Wang XN, Day 1 T23:1-15 at CB14913; T26:24-27:3 at CB14916; Wang XX T46:18-20 at CB 14936; Wang XX, Day 2 T64:10-18 at CB 15093.

<sup>115</sup> Wang XX, Day 1 T46:12-20 at CB 14936; Wang XX, Day 2 T65:17-19 at CB 15094.

<sup>116</sup> Wang XX, Day 1 T46:2-8 at CB 14936.

<sup>117</sup> T 449:26 - 450:3; 458:23-24.

- (d) he did not discuss legal matters such as personal liability with Mr Kingston,<sup>118</sup> except to receive questions from Mr Kingston and pass on answers from the compliance team to him.<sup>119</sup>

81. Mr Kingston's evidence of the alleged 16 November 2017 representations is unsatisfactory and unreliable. It should be rejected for the following reasons.

- (a) Mr Kingston's evidence that any such conversation occurred on 16 November 2017 is inconsistent with his pleaded case that it occurred on about 11 November 2017.
- (b) His case as to what was said in the conversation has changed improbably over time. The allegation as to what was said by Mr Wang has flip-flopped between an imperative and a mere possibility, and the case has expanded and extended in its detail in the stages described above, at one point evidently in response to CIG's discovery.<sup>120</sup> This is to be contrasted with memory which, over time, fades and progressively loses detail rather than gaining it.
- (c) It cannot be right that the change to the proposed structure was first discussed on 16 November 2017 when, on 12 November 2017, Mr Kingston sent Mr Wang a proposed loan structure and a draft escrow agreement, each naming himself as borrower.<sup>121</sup> Although this document was not put to Mr Kingston in cross-examination, it was put to Mr Kingston that he was the one who in fact suggested a personal loan and he had an opportunity to respond.<sup>122</sup>
- (d) Moreover, a conversation on 11 or 12 November 2017, which preceded the Committee meeting, would have been different from that which was recounted by Mr Kingston in the witness box. For instance, on 11 or 12 November 2017,

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<sup>118</sup> Wang XN, Day 1 T23:1-15 at CB14913; T26:24-27:3 at CB14916; T41:8-11 at CB14931; T46:18-20 at CB14936; Wang XX, Day 2 T64:10-18 at CB15093.

<sup>119</sup> Wang XX, Day 2 T62:4-8 at CB15091; Wang XX, Day 2 T23:4-7 at CB15052; T24:16-23 at CB15053.

<sup>120</sup> And see T472.

<sup>121</sup> CB7560-7566; 7567-7578.

<sup>122</sup> Kingston XX T468:9 – T474:28.

Mr Wang would not have said that the loan had been approved as that had not yet happened.

- (e) Notably, the first written reference by Mr Kingston to the structural change to a personal loan appears in an email from him with a detailed new structural chart (see paragraph 61 above), and there is no reference to the supposed absence of personal liability on the part of Mr Kingston.
- (f) In the light of these communications, the fact that Mr Kingston did not want Trimantium Capital to be a borrower,<sup>123</sup> and the fact that Mr Kingston had told Mr Wang about his Hong Kong ICBC account before 16 November 2017,<sup>124</sup> it is more plausible despite his denial<sup>125</sup> that the impetus for the change of structure to a personal loan came from Mr Kingston and not from CIG.
- (g) It is implausible that Mr Wang would have said that the change to a personal loan would not put liability on Mr Kingston personally when:
  - (i) Despite the extensive record of email communications between Mr Kingston and Mr Wang, and between Mr Kingston and other officers of Taiping from mid-2017 onwards until the relationship broke down, there is no written reference whatsoever to any such assurance by Mr Wang or any other CIG officer.
  - (ii) In particular, and remarkably, this is so in Mr Kingston's email of 12 November 2017, which contains the first written reference by Mr Kingston to the proposed structural change and is accompanied by a detailed structural chart identifying the borrower as Mr Kingston, but says nothing about Mr Kingston having no personal liability.

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<sup>123</sup> T468:23 – 469:11.

<sup>124</sup> T475:20-21.

<sup>125</sup> T472:27-31; 475:20-25.

- (iii) When Ashurst on behalf of CIG issued formal demands addressed to Mr Kingston personally on 2 December 2019<sup>126</sup> and 20 January 2020,<sup>127</sup> Mr Kingston did not refer to any such assurance. If any such assurance had been made, the natural and expected reaction to demands like these would have been to make a protest to the effect that they were inconsistent with the assurance. Yet Mr Kingston did nothing of the sort.
- (iv) Mr Wang consistently denied having said any such thing or having discussed personal liability with Mr Kingston at any stage.
- (v) Mr Wang did not have authority to provide Mr Kingston with an assurance which bound CIG without first obtaining committee approval—a proposition Mr Kingston accepted.
- (vi) The allegation in paragraph [2.8(b)] of the defence that Mr Kingston told Mr Wang that he had no ability to service the interest on a personal loan is unsupported by evidence.

82. Moreover, it is difficult to tell how exactly the loan allegedly in contemplation would have been structured. If the representations had been implemented literally, Mr Kingston would have had no personal liability to repay the loan. If so, there could never have been a default and CIG would never have recovered its money unless Mr Kingston voluntarily repaid CIG. And without a default, CIG could never have executed on the third-party securities provided by the SPVs. Mr Kingston's case would have had the effect of turning the loans into a gift. It is implausible that the parties could have reached such a nonsensical agreement.

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<sup>126</sup> CB5215-5231.

<sup>127</sup> CB5455-5466.

## The Escrow Agreement does not proceed

83. On 17 November 2017, Mr Kingston sent an email to Mr Wang with the subject line "Re: Share pledge to do list", which said (among other things):<sup>128</sup>

*Contract for Upside:*

1. *Escrow Agent will make sure the 5% upside gets paid, does that work for you? it can be easily inserted into the Escrow Agreement*
2. *Can you send me the full company name and address for the company that will get the 5%?*

*Escrow Agreement:*

1. *We can update the Escrow Agreement with the changes that you want to satisfy KYC/AML:*
  - a) *Money is banked into Phillip Kingston account FIRST*
  - b) *Money is then put into an SPV*
  - c) *Money is then released from SPV to buy IPO shares once the book build and settlement process has been completed by the IPO Lead Manager / Underwriter*
2. *We can add to the Escrow Agreement the 5% upside as above.*

84. On 22 November 2017, Mr Kingston sent Mr Wang an email attaching a draft escrow agreement.<sup>129</sup> The covering email said:<sup>130</sup>

*The new escrow process has been set out in the Introduction, the 5% upside has been manifested in clause (7.6), as well as the oversight and top-up mechanics (7.4) and reporting obligations (7.5).*

*Let's chat in the morning.*

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<sup>128</sup> CB1562.

<sup>129</sup> Kingston 1 [131] at CB172; CB1563-1574.

<sup>130</sup> CB1563.

85. The terms referred to in Mr Kingston's 22 November 2017 email were amendments to the draft escrow agreement sent from Mr Kingston to Mr Wang on 12 November 2017.<sup>131</sup> The "Introduction" was amended, and clauses 7.4, 7.5 and 7.6 were added to the draft escrow agreement that had been attached to Mr Kingston's 12 November 2017 email. Clause 7.6 dealt with the contract for upside, which stated:<sup>132</sup>

*Payment to Lender at Maturity of Loan Agreement: At the maturity of the Loan Agreement, which is eighteen (18) months from the Loan Date, the Escrow Agent must ensure that in addition to the Loan Principal of HK\$100,000,000, that 5% of the gain in the value of the initial HK\$100,000,000 parcel of TGO shares is paid by the Borrower to the Lender before the Borrower can access the Completion Security.*

86. The escrow proposal did not ultimately proceed, for reasons which are not explained by the evidence.

#### **The alleged Lee Gardens meeting on 23 (or 24) November 2017**

87. By paragraph [2.11] of his defence,<sup>133</sup> Mr Kingston alleges that on 24 November 2017, during a meeting with him at Lee Garden Two, Causeway Bay in Hong Kong, Mr Wang and Mr Li said that:

- (a) they were sorry for all of the changes since August to the investment structure for the deal, but it was their job to match up the investment opportunity with the most accessible capital within China Taiping;
- (b) the latest change from a corporate loan to personal loan was only an “*internal change*” to enable a loan to be proved faster, because it would avoid KYC complexities; and

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<sup>131</sup> CB7567-7577.

<sup>132</sup> CB1568.

<sup>133</sup> CB 18. Note that the pleaded allegation is expressed as “On 24 November 2017”, not “On or about 24 November 2017”.



- (c) the loan would create no personal liability for Mr Kingston or affect his personal credit rating or borrowing capacity.
88. That was the pleaded allegation that Mr Kingston took to this trial. It has not been amended since 26 October 2021.
89. In his witness statement dated 9 November 2021, Mr Kingston again asserted that this alleged meeting occurred on 24 November 2017.<sup>134</sup>
90. The documents produced by Mr Guo in his witness statement of 17 December 2021 show that Mr Li had a ticket for an 8:00 am flight to Beijing on 23 November 2017<sup>135</sup> which he evidently used because he claimed and was reimbursed the cost of it.<sup>136</sup> He also received an invoice for Beijing hotel accommodation on 24 November 2017<sup>137</sup> which presumably related to the preceding night, and submitted a receipt showing that he was in a taxi in Beijing at 12:52pm on 24 November 2017.<sup>138</sup>
91. On 23 and 24 May 2022, Mr Wang was cross-examined by leading counsel for Mr Kingston. It was put to Mr Wang that “*Mr Kingston has given evidence that on 24 November 2017 he met with you and Mr Li in person at Lee Garden Two*”.<sup>139</sup>
92. The agreed chronology filed by the parties on 27 May 2022 refers to this alleged meeting (noting that the plaintiff does not agree that it occurred) as having been on “~24 Nov 17”.
93. In the rival lists of issues filed by the parties, CIG’s list refers to the alleged meeting as having been “*on 24 November 2017*” while Mr Kingston’s list places the meeting “*on or around 24 November 2017*”.
94. Mr Kingston’s written outline of opening dated 27 May 2022 refers at [34] to Mr Kingston’s having flown to Hong Kong on 23 November 2017. In the next

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<sup>134</sup> Kingston 1 [134] at CB 173.

<sup>135</sup> CB 1876.

<sup>136</sup> CB 1872.

<sup>137</sup> CB 1873.

<sup>138</sup> CB 1875.

<sup>139</sup> Wang XX, Day 2 T74:19-21 at CB 15103.

sentence the submission contends that “*He attended a meeting with Li Xudong and Andy Wang*” but it does not expressly fix the date of the alleged meeting.

95. On Monday, 6 June 2022, leading counsel for Mr Kingston opened the case on the basis that the meeting had occurred either on 23 or 24 November,<sup>140</sup> and that Mr Kingston’s evidence would be that Mr Li told him at the meeting that he had shifted his flight to be able to meet with Mr Kingston.<sup>141</sup> This was the first time that it had been suggested that:

- (a) Mr Li had shifted his flight and;
- (b) he had told Mr Kingston so.

96. In his oral evidence, Mr Kingston said that the meeting occurred on 23 November 2017 at about 7:30 or 8:00pm.<sup>142</sup> He said that at the meeting Mr Li had told him that he had moved his flight to see Mr Kingston before going to see the chairman<sup>143</sup> and that, “*When I heard from Mr Wang that you were coming here in person I wanted to wait and see you before I go to Beijing to see the chairman*”.<sup>144</sup> Mr Kingston said that the meeting was fairly hurried because “*I had just got off of a plane and I think that he was off to one so it was a fairly short encounter*”.<sup>145</sup> This was the first time that it had been suggested that the meeting was certainly held on 23 November 2017, and that it had not been held on 24 November 2017.

97. At trial CIG tendered a copy of Mr Li’s boarding pass for his 8:00am flight on 23 November 2017 from Hong Kong to Beijing.<sup>146</sup>

98. CIG submits that Mr Kingston should be held to his pleaded case that any such meeting occurred on 24 November 2017, not 23 November 2017. It follows that no

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<sup>140</sup> T 198:18-20.

<sup>141</sup> T 198: 29-31.

<sup>142</sup> T 415:17-416:7.

<sup>143</sup> T 418:2-4.

<sup>144</sup> T 418:8-11.

<sup>145</sup> T 418:27-30.

<sup>146</sup> CB15381-15383.

such meeting can have occurred because the contemporaneous documentary record shows unequivocally that Mr Li was in Beijing for the whole of 24 November 2017.

99. Alternatively, the change in Mr Kingston’s account of the timing of the meeting, and his evidence that Mr Li supposedly said he had moved his flight, have all the hallmarks of a recent invention devised to overcome the impact of the documentary evidence produced by Mr Guo. This is shown by:

- (a) the firmness of Mr Kingston’s original commitment to the date of 24 November 2017 in his defence and witness statement;
- (b) the fact that, when Mr Wang was cross-examined on 24 May 2022, neither the date of 23 November 2017 nor the alleged statement by Mr Li that he had moved his flight was put to Mr Wang – indeed, it was firmly put to Mr Wang by leading counsel for Mr Kingston that the meeting had been on 24 November 2017.<sup>147</sup> This is a remarkable omission for a proposition of fact so critical to Mr Kingston’s credit. The Court should infer that Mr Kingston’s counsel were neither aware that Mr Kingston would change his account of the timing of the meeting, nor of his intended evidence that Mr Li said he had moved his flight, until after 24 May 2022;
- (c) the gradual slide on 27 May 2022, in the lead-up to trial, by way of (A) a tilda (~) in the chronology, (B) the insertion of the words “or around” in Mr Kingston’s list of issues (to which insertion CIG objected), and (C) the absence of any specific date of the meeting in Mr Kingston’s outline opening submission;
- (d) the continuation of that slide in leading counsel’s oral opening to say that the meeting was “either” on 23 November or 24 November;
- (e) Mr Kingston’s firm adoption of the date of 23 November for the first time in his oral evidence, which CIG submits reflects:

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<sup>147</sup> CB 15103:19-21. See also Mr Wang’s evidence in chief at CB14917 – 14918.

- (i) a tactical decision by Mr Kingston to withhold from CIG (and apparently, at least until after 24 May 2022, from his counsel<sup>148</sup>) the change in his case—to claim that the meeting occurred on 23 November and that Mr Li said he had moved his flight to Beijing—until it was too late for CIG to put these matters to Mr Wang or to source third-party evidence such as the passenger manifest;
  - (ii) consciousness on the part of Mr Kingston that his pleaded case about the alleged meeting with Mr Li and Mr Wang and the account of it in his witness statement were false;
  - (iii) consciousness on the part of Mr Kingston that his new evidence about the date of the alleged meeting with Mr Li and Mr Wang and about Mr Li having reported having moved his flight was also false and was susceptible to disproof if CIG were afforded time to obtain documentary evidence for that purpose;
- (f) Mr Kingston's evidence that he informed his solicitors that the conversation took place on 23 November 2017 after he read Mr Guo's statement of 17 December 2021,<sup>149</sup> notwithstanding that this significant change was neither notified in his amended defence of 15 February 2022 nor in any other document filed by him (other than elliptically in pre-trial papers) before his leading counsel opened his case.

100. In any event, the question is put beyond doubt by the boarding pass, which shows unequivocally that, on 23 November 2017, Mr Li took the 8:00 am flight from Hong Kong to Beijing, and that he was not in Hong Kong by the time Mr Kingston arrived there late that afternoon.<sup>150</sup>

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<sup>148</sup> Given the cross-examination of Mr Wang at CB 15103:19-21.

<sup>149</sup> T490:3; 489:9-14, 491:17-24.

<sup>150</sup> T 415:18-19.

101. Moreover, Mr Wang was firm in his evidence that he never discussed personal liability with Mr Kingston.<sup>151</sup> Nor was it put to Mr Wang that at the alleged meeting on 24 November 2017 he told Mr Kingston that he would have no personal liability.
102. Further, even if (improbably) there had been a meeting around that time, it is implausible that either Mr Li or Mr Wang would have given Mr Kingston any such assurance as he alleges, that the loan would create no personal liability for Mr Kingston. This is so because:
- (a) there is no reference whatsoever to any such assurance in the extensive record of written communications between Mr Kingston and CIG officers;
  - (b) even after receiving formal demands from Ashurst, Mr Kingston did not refer to any such assurance or make any protest that they were inconsistent with any such assurance;
  - (c) Mr Wang consistently denied having said any such thing or having discussed personal liability with Mr Kingston at any stage;
  - (d) neither Mr Wang nor Mr Li had authority to provide Mr Kingston with any such assurance;
  - (e) for the reasons explained above, if Mr Kingston had no personal liability, then CIG could never have recovered its money under the Loan Agreement at all. It is utterly implausible that the parties could have reached such a nonsensical agreement.
103. Mr Kingston's account of the alleged meeting on 24 November 2017 (or 23 November 2017) should be rejected. No such meeting occurred and no such representations as Mr Kingston alleges were made at (or around) that time.

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<sup>151</sup> CB 14936:12-20; 15094: 17-19.

## Entry into SA1

104. On 25 November 2017, Mr Wang sent an email to Mr Kingston attaching a number of documents including a loan agreement application form for a personal borrower.<sup>152</sup> Later that day, Mr Wang sent a further email to Mr Kingston attaching a draft supplementary agreement in Chinese with the subject "Loan supplementary agreement for translation asap".<sup>153</sup> Mr Kingston's evidence was that he used Google Translate to translate the supplementary agreement from Chinese to English.<sup>154</sup>
105. On 28 November 2017, Mr Kingston says he telephoned Mr Wang to ask for his assistance to complete the paperwork Mr Wang had sent by email on 25 November 2017.<sup>155</sup> In the witness box, Mr Kingston accepted that Mr Wang went through the loan agreement with him; not just the application form, as he claims in his witness statement.<sup>156</sup> Mr Kingston inserted details in the various fields in the loan agreement.<sup>157</sup> Mr Kingston read, understood and signed the loan agreement.<sup>158</sup>
106. Mr Kingston's evidence is that Mr Wang told him to leave section 3 blank as the repayment provisions would be dealt with in the supplementary agreement.<sup>159</sup> The next day, 29 November 2017, Mr Wang told Mr Kingston the repayment section needed to be filled in.<sup>160</sup>
107. Mr Kingston claims that he then noted that the supplementary agreement would deal with the repayment mechanism and stressed that, "*I'm not repaying anything as we discussed yesterday. Has that changed?*", to which he says Mr Wang replied "*No it hasn't changed but we just need to fill this out to keep the admin people happy.*"<sup>161</sup>

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<sup>152</sup> Kingston 1 [136] at CB173; CB1575-1620.

<sup>153</sup> Kingston 1 [138] at CB174; CB1621-1627.

<sup>154</sup> Kingston XX T492:31-493:15.

<sup>155</sup> Kingston 1 [142] at CB174-175.

<sup>156</sup> Kingston XX T495:7-10.

<sup>157</sup> Kingston XX T496:30-498:18.

<sup>158</sup> Kingston XX T498:17-18.

<sup>159</sup> Kingston 1 [142] at CB174-175.

<sup>160</sup> Kingston 1 [147] at CB176.

<sup>161</sup> Kingston 1 [147] at CB176.

108. It is unlikely any such thing was said by Mr Wang. Mr Kingston acknowledged that the agreement he completed contained numerous terms that stated that the customer had to repay the loan.<sup>162</sup> Mr Kingston also agreed that Mr Wang never said the loan did not have to be repaid.<sup>163</sup>

109. Mr Kingston testified that, on 3 December 2017, Mr Wang walked through SA1 and explained key terms, including the collateral, and the default consequences. Mr Kingston agreed that he understood the terms of SA1.<sup>164</sup> Mr Kingston says that Mr Wang spoke about the default consequences and said:<sup>165</sup>

*While this won't be an issue during the loan term given that the loan will fund all its interest, you need to ensure the GrowthOps shares can be warehoused or sold at maturity, because in a worst-case scenario where the facility can't be repaid on maturity, China Taiping will take ownership of all [the pledged] shares.*

110. It was put to Mr Kingston, and he agreed, that Mr Wang also spoke to him about the method of repayment.<sup>166</sup> It was also put to Mr Kingston that Mr Wang told him that the method of repayment would depend, at maturity, on whether the loans could be repaid through security and whether or not the security was enough. Mr Kingston said he could not recall that conversation.<sup>167</sup>

111. Mr Wang's evidence was that he discussed methods of repayment with Mr Kingston and that methods of repayment could take a number of forms. For instance, if there were enough collateral, that could be one of the options for paying back the loan and there would be no need to go beyond the security pool. However, Mr Wang said, more than once, that any such arrangement would require the approval of the

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<sup>162</sup> Kingston XX T501:25-502:16.

<sup>163</sup> Kingston XX T502:17-19.

<sup>164</sup> Kingston XX T510:23-517:12.

<sup>165</sup> Kingston 1 [162] at CB179-180.

<sup>166</sup> Kingston XX T517:16-17.

<sup>167</sup> Kingston XX T517:18-22.

committee and consensus between the parties.<sup>168</sup> The following exchange between leading counsel for Mr Kingston and Mr Wang is one such instance:<sup>169</sup>

*Q. Mr. Kingston was told and the committee had approved that the loan could be repaid from the collateral without looking to him personally to repay it; is that correct, Mr. Wang?*

*A. Asking for the question – the translation to be repeated. Because it's quite a long-worded question.*

*First of all, using the collateral to pay off the loan by ways such as selling the collateral to the market or Taiping buying the collateral, et cetera, this would be one of the ways for making the repayment. However, having said that, there is one assumption here or precondition, so to speak. In order to do so, there would need to be obtaining the approval from the committee as well as reaching an agreement with the borrower so that the post-investment team as well as the risk control could intervene and start taking relevant actions of disposal.*

112. Mr Kingston disputed Mr Wang's evidence that the method of repayment would depend on whether or not the security was sufficient to repay the loan.<sup>170</sup> Mr Kingston claimed that Mr Wang told him that, in the event of default, all that CIG would do was take all of the collateral.<sup>171</sup>
113. For the reasons discussed earlier in these submissions, the Court should not accept Mr Kingston's evidence. Nevertheless, a lot of that evidence does not ultimately matter given Mr Kingston's position that Mr Wang represented to Mr Kingston that the non-recourse nature of the loan would be recorded in the Supplementary Agreement.<sup>172</sup>
114. Mr Kingston's evidence was:
- (a) he only read the Loan Agreement "at a high level";<sup>173</sup>

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<sup>168</sup> Wang XN, Day 1 T18:9-19, T23:22-24:7 at CB14908 and CB14913-14914.

<sup>169</sup> Wang XN Day 2 T108:9-109:2 at CB15137-15138.

<sup>170</sup> Kingston XX T517:18-518:8.

<sup>171</sup> Kingston XX T518:13-19.

<sup>172</sup> E.g., Kingston XN T414:21-23; 518:20-23.

<sup>173</sup> Kingston XX T498:24-27.



- (b) he understood, however, that the Loan Agreement and the Supplementary Agreement were to be read together, with the latter to prevail in the event of inconsistency;<sup>174</sup>
- (c) Mr Kingston actively negotiated the terms of SA1 including by making “tracked” amendments to the Chinese language version using Microsoft Word;<sup>175</sup>
- (d) not only had Mr Wang walked him through the agreement but Mr Kingston had himself read the Supplementary Agreement and understood its key terms.<sup>176</sup>

115. It follows, therefore, that Mr Kingston must have been well aware that there was no provision in the Supplementary Agreement of the sort Mr Kingston claims was promised to him. The following passage in Mr Kingston’s cross-examination puts the matter beyond doubt: <sup>177</sup>

*And you say that you understood that the supplementary agreement was going to deal with repayment and recourse and whether or not you were personally liable, correct?---That is what I was told, yes.*

*And there is no provision in the supplementary agreement saying that China Insurance Group would have no recourse to you, is there?---That is right.*

*And there is no provision in the supplementary agreement that says China Insurance Group would have no recourse beyond the security pool, is there?---In this – in the – you mean SAI?*

*In any of the supplementary agreements?---Can you rephrase the question please?*

*There are no provisions in any of the security agreements that says China Insurance Group will have no recourse beyond the security pool?---I don’t believe that wording was used.*

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<sup>174</sup> Kingston XX T500:7-9; 512:9-12.

<sup>175</sup> Kingston XX T507:13-510:22; 514:11-12.

<sup>176</sup> Kingston 1 [162] at CB179; Kingston XX T506:9; T511:7; T512-516.

<sup>177</sup> Kingston XX T518:20–519:7.

*And there was no provision saying that you Mr Kingston will have no personal liability?---That is my understanding.*

### **Loan Application and Standard Terms**

116. On 28 November 2017, Mr Kingston completed a “Loan Agreement Application Form (Individuals)” for a personal loan of HK\$100,000,000 from CIG.<sup>178</sup> Mr Kingston’s personal details as “Customer” included:
- (a) his home address in Drummond Street, Carlton, Victoria;
  - (b) his country of citizenship as Australia;
  - (c) his employer, Sargon Capital Ltd;
  - (d) his salary of A\$16,666 per month (ie A\$200,000 pa) and other income as A\$300,000 pa;
  - (e) his bank account as an account with ICBC at its Central Branch in Hong Kong.
117. Mr Kingston also completed a “Loan Agreement – Loan Schedule”, which he signed as individual customer and as guarantor.<sup>179</sup> The Loan Agreement – Loan Schedule again stated Mr Kingston’s address in his handwriting as Drummond Street, Carlton, Victoria, and provided:
- (a) for a Principal Amount of Credit of HK\$100,000,000;
  - (b) a Date of the Loan of 6 December 2017;
  - (c) that “*The Customer must repay the Amount Owning under this Agreement [on or before 1.5 years] from the Date of the Loan*”;
  - (d) an interest rate of 8.1%;
  - (e) that “*Interest accrues daily is payable quarterly in arrears and is calculated on actual days elapsed*”;

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<sup>178</sup> CB417–426.

<sup>179</sup> CB504-529.

- (f) a Loan purpose for which “*The Amount of Credit must be used*” of “*Investment in IPO on ASX*”;
- (g) a Repayment Date of 6 June 2019 and that the “Customer must make one repayment”, on the first Repayment Date;
- (h) “*that the offer in this Loan Schedule is made to the Customer in Hong Kong. By signing the offer below the Customer acknowledges and agrees that the Loan Agreement has been negotiated and completed in Hong Kong*”;<sup>180</sup>
- (i) *that “if there is an Event of Default, the Finance Company may demand immediate payment of the Amount Owing, including immediate repayment of the outstanding Amount of Credit”*.<sup>181</sup>

118. The loan agreement entered into by Mr Kingston and CIG comprised:

- (a) the “Loan Agreement – Loan Schedule” referred to in paragraph 117;
- (b) (forming part of the same document) a set of standard terms titled “Loan Agreement – Terms and Conditions”;<sup>182</sup>
- (c) at the time of each of the four advances made by CIG to Mr Kingston, a set of bespoke commercial terms entitled “Supplementary Agreement” (**SA1**,<sup>183</sup> **SA2**,<sup>184</sup> **SA3**<sup>185</sup> and **SA4**<sup>186</sup> respectively and, collectively with the standard terms, the **Facility Agreement**).

119. The Loan Agreement - Terms and Conditions<sup>187</sup> contained standard terms to the following effect:

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<sup>180</sup> CB 506.

<sup>181</sup> CB 506.

<sup>182</sup> CB 510-529.

<sup>183</sup> CB 530-535 (Chinese) and 536-542 (English).

<sup>184</sup> CB 543-550 (Chinese) and 551-558 (English).

<sup>185</sup> CB 559-577 (Chinese) and 578-589 (English).

<sup>186</sup> CB 590-613 (Chinese) and 615-639 (English).

<sup>187</sup> CB 510-529.

- (a) *Encumbrance* means any right or interest of any kind given by way of security (including, for example, a mortgage, pledge) or other security interest securing any obligation of any person (clause 1);
- (b) *Event of Default* has the meaning given in clause 32.1 (clause 1);
- (c) *Finance Company* means China Insurance Group Finance Company Limited (clause 1);
- (d) *Security* means any Encumbrance granted in favour of the Finance Company to secure the Customer's obligations under the Loan (clause 1);
- (e) the Loan must be used for the purpose set out in the Loan Schedule (clause 2.2);
- (f) the Customer agrees to pay interest to the Finance Company on the Amount of Credit owing as at the Repayment Date at the applicable Interest Rate (clause 4.1);
- (g) in addition to any other Security the Finance Company requires, the Finance Company holds the benefit of the Customer's assets including the Collateral as security for the total Amount Owing and any amount which the Customer may owe the Finance Company in the future (clause 23.1);
- (h) without limiting the Finance Company's other rights, the Finance Company may set off any such amounts against, or apply the Security created by this clause as security for, any obligations the Customer owes to the Finance Company (clause 23.2);
- (i) the Customer represents and warrants that it has entered into this Agreement without relying on the Finance Company (in whatever capacity) or their advisers or on any representation, warranty, statement, undertaking or conduct of any kind made by any of them or on their behalf except as expressly set out in this Agreement (clause 31(j)(i));
- (j) there is an Event of Default if:

- (i) the Customer fails to perform or observe any obligation under this Agreement in a material respect, including an obligation to pay an amount on time;
- (ii) the Customer does not pay interest, fees or other amounts due under this Agreement, (clause 32.1 (a) & (b));
- (k) where there is an Event of Default, the Finance Company may take any action it considers appropriate to enforce this Agreement or any Security (clause 33.1);
- (l) time is of the essence in respect of the Customer's obligations to pay any money (clause 41.2);
- (m) the Finance Company is not liable for any Loss caused by the exercise or attempted exercise of, failure to exercise, or delay in exercising, a right or remedy, whether or not caused by the Finance Company's negligence (clause 43.4);
- (n) the Customer agrees to make any payments under this Agreement without set-off or counterclaim and free and clear of any withholding or deduction for Taxes, unless that is prohibited by Law, in immediately available funds (clause 48.1);
- (o) this Agreement is governed by the laws of Hong Kong (clause 59.1).

### **SA1 and its key terms**

120. SA1 is dated 6 December 2017 and was entered into by Mr Kingston (referred to as "Party A"), CIG (referred to as "Party B") and Trimantium International Holdings Pty Ltd as IPO shares subscriber (referred to as "Party C").<sup>188</sup> The purpose of the HK\$100 million advance under SA1 was for a HK\$87 million investment by Trimantium International Holdings in the forthcoming IPO of GrowthOps, and the setting aside of HK\$13 million for interest. SA1 formed part of and supplemented

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<sup>188</sup> CB 530-535 (Chinese) and CB536-542 (English).

the Loan Agreement, and the terms of SA1 prevailed in the event of any inconsistencies between the terms of SA1 and the Loan Agreement or any other loan documents.<sup>189</sup>

121. SA1 contained terms to the following effect:

- (a) Mr Kingston shall provide no less security than the mortgage of:
  - (i) HK\$300 million market value of Sargon's common stock (**Stock I**);
  - (ii) HK\$87 million GrowthOps shares listed on the Australian Stock Exchange (**Stock II**) held by Party C;
  - (iii) 100% of the shares in Party C (**Stock III**);
  - (iv) HK\$13 million in cash stored in bank account (**Margin Account**) in the name of Mr Kingston for the payment of interest;
  - (v) any other asset that CIG accepts as security at its absolute discretion, collectively referred to as the "**Collateral**" (clause 1);
- (b) Mr Kingston promises that within five business days he will pay the funds through to Party C and finally remit it to the underwriter of GrowthOps for the public account for stock subscription and invest in GrowthOps (clause 3(2));
- (c) if GrowthOps shares fail to complete a listing on the ASX within six months, or do not find an acceptable alternative that is approved by CIG, the money should be returned within five working days to Party C's share trading account to repay the Loan to CIG (clause 3(3));
- (d) if there are any remaining funds (excluding the part of the deposit) for the subscription to GrowthOps, Mr Kingston can use the cash to purchase Sargon shares and hold the shares in custody of CIG in the same manner as for Stock I (clause 3(4));

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<sup>189</sup> CB 536, Recitals paragraphs 3 and 4.

- (e) Mortgage ratio: the current mortgage rate is 25%, that is the value of the principal of the Loan divided by the Collateral (clause 4);
- (f) the Loan interest rate is the Bank of China prime rate (currently 5.0%) +3.1% (clause 6);
- (g) the Loan has a term of 18 months. Interest accumulates daily, and is paid monthly, and the interest settlement date is the last business day of each month. Mr Kingston's cash deposit in Mr Kingston's Hong Kong bank account will be used to pay the interest automatically (clause 7);
- (h) in the borrowing period, CIG has the right, with 60 days advance notice to Mr Kingston, to request an early repayment (clause 7);
- (i) repayment of principal and outstanding interest payables and other approved payables are paid on the maturity date of the Loan (clause 8);
- (j) Mr Kingston must maintain the approved holding levels in the Margin Account on the last trading day of each month (clause 9);
- (k) Normal Position Value refers to the outstanding balance of the Loan divided by Margin Value, where Mr Kingston shall endeavour to, at all times, keep equal to or below 100%, and Margin Value means (the number of Stock II shares in the Party C security account x the Stock II Price + Stock I valuation plus Margin) x the Mortgage Ratio (clause 9);
- (l) if Stock II is suspended on the Australian Stock Exchange, CIG may call Mr Kingston either by phone or by email, requesting Mr Kingston to deposit the cash within the time allowed by CIG within the next five business days or deposit the money or other collateral approved by CIG to the Margin Account, in order to maintain the Normal Position Value. If it fails to timely deposit according to the above provisions, CIG may immediately liquidate without further notice to Mr Kingston (clause 10);

- (m) Mr Kingston shall ensure that all times there is enough cash in the Margin Account for interest (and other amounts due) to be deducted by CIG on the loan repayment dates (clause 10);
- (n) if the Normal Position Value is greater than or equal to 105%, CIG can call Mr Kingston either by phone or by email, requiring Mr Kingston to provide sufficient collateral or cash within the next Business Day to maintain the Margin Account at the Normal Position Value (clause 11(2));
- (o) if the Normal Position Value is greater than or equal to 120%, if Mr Kingston fails to provide enough funds or the collateral recognised by CIG, CIG may immediately liquidate it without further notification to Mr Kingston (clause 11(3));
- (p) if Mr Kingston fails to repay the Loan principal and interest on the loan maturity date, if Mr Kingston cannot repay the principal and interest within 20 working days of breach of contract, CIG shall directly obtain all collateral under this Supplementary Agreement (clause 11(4));
- (q) this Supplementary Agreement is governed by and construed in accordance with the laws of Hong Kong SAR (clause 16);
- (r) in the event there is any inconsistency between the Chinese version and English version of this Supplementary Agreement then the Chinese version shall prevail (clause 18).



## Dealings following SA1

122. On 6 December 2017, pursuant to SA1, CIG advanced HK\$100 million to Mr Kingston by depositing that sum into his ICBC bank account.<sup>190</sup> Following that deposit:
- (a) On 15 January 2018, Mr Kingston withdrew HK\$90 million from his ICBC bank account.<sup>191</sup> Immediately following that withdrawal, the balance of Mr Kingston's ICBC bank account was HK\$10,399,230.63.<sup>192</sup>
  - (b) The sum of HK\$90 million was converted into Australian dollars and, on 17 January 2018, the sum of A\$14,358,647.10 was credited to TCFM bank account with ANZ.<sup>193</sup> Prior to this transfer, TCFM's bank account had a zero balance.
  - (c) On 19 January 2018, a further sum of A\$5,660,000 was deposited into TCFM's bank account.<sup>194</sup> These funds did not originate from Taiping.
  - (d) On 19 January 2018, approximately A\$20 million was withdrawn from TCFM's bank account and used to apply for shares in GrowthOps.<sup>195</sup> Mr Kingston's evidence is that TCFM lent A\$20 million to Asia Selangor to enable it to subscribe for shares in GrowthOps.<sup>196</sup>
123. In early January 2018, Mr Kingston and Mr Wang discussed the prospect of a further loan to Mr Kingston that would replicate SA1.<sup>197</sup> On 16 January 2018, a meeting of

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<sup>190</sup> Guo 1 [12(a)] at CB96; CB666; Kingston 1 [173] at CB182.

<sup>191</sup> Kingston 1 [174] at CB182.

<sup>192</sup> CB14337.

<sup>193</sup> Kingston XX T558:15-21; CB14405.

<sup>194</sup> CB14405.

<sup>195</sup> Kingston XX T558:6-27.

<sup>196</sup> Kingston XX T559:6-8.

<sup>197</sup> Kingston 1 [185] at CB183-184.

the Margin Committee was held to consider a further loan to Mr Kingston.<sup>198</sup> The materials provided to the Margin Committee stated (among other things):<sup>199</sup>

*At present, one of the main cornerstone investors of GrowthOps Company is in business competition with GrowthOps. In order to seize market share, this investor subscribed for more shares (accounting for about 20% of the overall issued shares. In order to ensure the smooth development of the future business of GrowthOps, Mr. Phillip plans to replace this investor, and then sell its shares to the local fund after the GrowthOps is listed (according to the regulatory requirements in Australia, funds can only subscribe for shares of listed companies, and cannot participate in subscribing for new shares). For this reason, Mr. Phillip specially proposed to replicate the previous equity pledge loan project and raise another 100,000,000 HK dollars from our company with the same pledging structure by using stocks of Sargon and GrowthOps.*

124. On 19 January 2018, Mr Wang sent an email to Mr Kingston attaching a draft of Supplementary Agreement 2 in Chinese—the covering email said *"This agreement is mostly the same as the last agreement..."*.<sup>200</sup> Mr Kingston's evidence is that Mr Wang told him over the phone that the proceeds of SA2 would be used in the same way as SA1, with HK\$87 million to purchase shares in GrowthOps and HK\$13 million set aside to pay 18 months' worth of interest.<sup>201</sup>
125. On 20 January 2018, Forci Alternative Strategies Pty Ltd (**Forci**) was incorporated and applied for A\$17 million worth of shares in the GrowthOps IPO.<sup>202</sup> Mr Kingston agreed in cross-examination that he arranged the incorporation of Forci and that the sole director of Forci when it applied for shares in GrowthOps was Maria Di Vincenzo, Mr Kingston's wife's grandmother, who was born in 1938.<sup>203</sup>

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<sup>198</sup> CB1899-1912.

<sup>199</sup> CB1892.

<sup>200</sup> Kingston 1 [190] at CB184; CB1917-1925.

<sup>201</sup> Kingston 1 [191] at CB184-185; Kingston XX T525:30-526:3.

<sup>202</sup> Kingston 1 [194] at CB185.

<sup>203</sup> Kingston T547:27-548:24; CB14681.

126. On 23 January 2018, Mr Kingston sent an email to Mr Wang attaching an English draft of SA2.<sup>204</sup> The covering email said:

*I have translated this to English – can you please review?*

Mr Kingston's evidence is that he had performed this translation using Google Translate.<sup>205</sup>

127. On 24 January 2018, Mr Kingston sent an email to Mr Wang attaching a "Confirmation of Application" in respect of the GrowthOps IPO.<sup>206</sup> That document included the following details:

- (a) the "Application Name" was "Trimantium International Holdings Pty Limited";
- (b) the "Pending Application Amount" was "\$14,358,647.00";
- (c) the "Application Date" was 21/01/2018.

128. This was to give the appearance, consistently with SA1, that the funds advanced would be used by Mr Kingston for Trimantium International Holdings to acquire shares in GrowthOps. Mr Kingston accepted under cross-examination that Trimantium International Holdings in fact subscribed for only A\$7,945,000-worth of shares "about two months later".<sup>207</sup> Under cross-examination, Mr Kingston claimed, for the first time, that the allocation of shares between the special purpose vehicles had changed at Mr Wang's initiative.<sup>208</sup> This assertion is not supported by any documentary evidence. The funds advanced by CIG pursuant to SA1 had already been used by Asia Selangor to subscribe for shares in GrowthOps on 19 January 2018.<sup>209</sup>

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<sup>204</sup> Kingston 1 [207] at CB187; CB2050-2057.

<sup>205</sup> Kingston 1 [207] at CB187; Kingston XX T526:29-527:3.

<sup>206</sup> Kingston 1 [210] at CB188; CB2071-2072.

<sup>207</sup> Kingston XX T562:4-10.

<sup>208</sup> Kingston XX T562:11-18.

<sup>209</sup> See paragraph 122(d).

129. On 25 January 2018, Mr Kingston sent an email to Mr Wang, attaching a loan application form he had completed on behalf of Asia Selangor.<sup>210</sup> Mr Kingston inserted his own name and details as director of Asia Selangor.<sup>211</sup> However, Mr Kingston was never a director of Asia Selangor.<sup>212</sup> Mr Kingston's evidence is that Mr Wang called him to say that it would not be necessary to submit a new application.<sup>213</sup>
130. On 25 January 2018, Mr Wang sent an email to Mr Kingston attaching a further marked up draft of SA2 in Chinese and in English which now included Asia Selangor as a party.<sup>214</sup> The covering email said "*Please sign on these versions*".<sup>215</sup>

### **SA2 and its key terms**

131. On 25 January 2018, SA2 was executed by Mr Kingston on behalf of all parties other than CIG.<sup>216</sup> The parties to SA2 are Mr Kingston (referred to as "Party A"), CIG (referred to as "Party B") and, as IPO shares subscribers Trimantium International Holdings Pty Ltd (referred to as "Party C") and Asia Selangor Investments Pty Ltd (referred to as "Party D").<sup>217</sup> Mr Kingston conceded in cross-examination that he signed as a director of Asia Selangor despite never having been a director of Asia Selangor.<sup>218</sup> Nor was Mr Kingston a director of Trimantium International Holdings at the time SA2 was executed. Mr Kingston had ceased to be a director of Trimantium International Holdings on 19 January 2018.<sup>219</sup>
132. The purpose of the further advance of HK\$100 million under SA2 was a further HK\$87 million investment in the GrowthOps IPO, but through Asia Selangor Investments Pty Ltd, and the setting aside of a further HK\$13 million for interest.

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<sup>210</sup> Kingston 1 [211] at CB188; CB2079-2116.

<sup>211</sup> Kingston XX T527:21-31; CB2082.

<sup>212</sup> CB14641-14650; Kingston XX T531:3-4.

<sup>213</sup> Kingston 1 [212] at CB188.

<sup>214</sup> Kingston 1 [213] at CB188; CB2118-2136.

<sup>215</sup> CB2118.

<sup>216</sup> CB548-549 (Chinese) and CB556-557 (English).

<sup>217</sup> CB 543-550 (Chinese) and CB551-558 (English).

<sup>218</sup> Kingston XX T530:5-531:4.

<sup>219</sup> CB14740.

SA2 supplemented and formed part of the Loan Agreement and SA1, and the terms of SA2 prevailed in the event of any inconsistencies between the terms of SA2, SA1, the Loan Agreement or any other loan documents.<sup>220</sup>

133. SA2 contained terms to the following effect:

- (a) Mr Kingston shall provide no less security than the mortgage of:
  - (i) HK\$360 million market value of Sargon's common stock (**Stock I**);
  - (ii) HK\$87 million GrowthOps shares listed on the Australian Stock Exchange (**Stock II**) held by Party D and 100% of the shares in Party D (**Stock III**);
  - (iii) HK\$13 million in cash stored in bank account (**Margin Account**) in the name of Mr Kingston for the payment of interest;  
  
collectively referred to as the "**Collateral**", and
  - (iv) any other asset that CIG accepts as security at its absolute discretion, (clause 1);
- (b) the Collateral as defined in SA2 cannot be used to satisfy the Collateral as defined in SA1. With SA2 in force, CIG must provide a total of HK\$200 million loan to Mr Kingston, and Mr Kingston must maintain a total of HK\$860 million of Collateral or any other asset that CIG accepts as security (clause 1);
- (c) Mr Kingston promises that within five business days he will pay the funds through to Party D and finally remits it to the underwriter of GrowthOps for the public account for stock subscription, invests in GrowthOps and provides the remittance advice after completing the remittance (clause 3(2));
- (d) if GrowthOps shares fail to complete a listing on the Australian Stock Exchange within six months, or do not find an acceptable alternative that is

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<sup>220</sup> CB551, Recitals paragraphs 1 and 2.

approved by CIG, the money should be returned within five working days to Party D's share trading account to repay the Loan to CIG (clause 3(3));

(e) further terms identical to those described in paragraphs 121(g) to (r) above.

134. The advance of funds under SA2 is dealt with in paragraph 147 below.

### **Promissory Note 1**

135. From January to early February 2018, Mr Wang and Mr Kingston exchanged a number of emails regarding a further proposed loan of HK\$500 million, which was to be structured as a promissory note.<sup>221</sup>

136. On 9 February 2018, TTIM and Taiping Trustees executed a promissory note with a Principal Amount of HK\$500 million (**Promissory Note 1**). Sargon executed Promissory Note 1 as Obligor.<sup>222</sup>

137. The following documents were also executed on 9 February 2018:

(a) General Security Deed between TTIM as Grantor and Taiping Trustees as Secured Party;<sup>223</sup>

(b) General Security Deed between TCFM as Grantor and Taiping Trustees as Secured Party.<sup>224</sup>

138. Clause 2(g)(i) of Promissory Note 1 set out a mechanism by which TTIM could issue a Drawdown Request to Taiping Trustees:<sup>225</sup>

*Conditions precedent to Drawdown Request: On and from the end of the Deposit Period (or if earlier the date the Holder delivers a notice under clause 2(e)), the Company may, at any time, make an application to the Holder in writing to utilise*

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<sup>221</sup> Kingston 1 [182] at CB183; CB1878; Kingston 1 [196] at CB 185; CB1926-1939; Kingston 1 [197] at CB185-186; CB1940-2041; Kingston 1 [202] at CB186; CB2043-2057; Kingston 1 [203] at CB186-187; CB2073-2076; Kingston 1 [205] at CB187; CB2077-2078; Kingston 1 [221] at CB189; CB2208-2264; Kingston 1 [223] at CB189; CB2354; Kingston 1 [226] at CB190; CB2355; Kingston 1 [227] at CB191; CB2356-2377; Kingston 1 [232] at CB191-192; CB2382-2384.

<sup>222</sup> Kingston 1 [233] at CB192; CB9043-9056.

<sup>223</sup> CB14341-14372.

<sup>224</sup> CB14373-14404.

<sup>225</sup> CB9044.

*the Principal Amount held in the Escrow Account (“**Drawdown Request**”). The Company must at the time of delivering the Drawdown Request provide the Holder with sufficient details of the proposed purpose and use of the funds together with any supporting information that the Holder (acting in its sole discretion) requires having regard to the intended use and purpose of the Principal Amount. Where the proposed use of the Principal Amount is related to an acquisition of an interest in another entity, trust or fund then the Company must also provide the Holder with financial and legal due diligence documentation in form and substance satisfactory to it.*

139. Clause 2(g)(ii) provided that Taiping Trustees could approve, reject or request further information in respect of a Drawdown request.<sup>226</sup>
140. Clause 2(g)(vi) provided that the Drawdown Request mechanism did not apply to transactions relating to Madison and Escala, which had been conditionally pre-approved by Taiping Trustees:<sup>227</sup>

***Pre-approved Transactions:** For the avoidance of doubt, clause 2(g)(ii) does not apply to the transactions relating to Madison Financial Group Pty Limited and Escala Partners Ltd ("**Transactions**") which have been pre-approved by the Holder. The Holder's pre-approval under this clause is subject to the following conditions having been satisfied or, in the case of the condition in clause 2(g)(vi)(3), the Holder has received sufficient evidence that it will be satisfied on the proposed completion date for the Transactions:*

141. Clause 2(g)(vi)(3) set out one of the conditions of pre-approval:<sup>228</sup>

*(3) delivery to the Holder, in form and substance satisfactory to it, of a first-ranking Security Interest in favour of the Holder in a form and substance satisfactory to the Holder at its absolute discretion over all of the shares acquired in connection with the Transactions immediately following completion of the Transaction together with any title documents and executed blank share transfer forms required by the Holder and evidence of completion of all other approval processes that the Holder determines (acting reasonably) are required by law*

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<sup>226</sup> CB9045.

<sup>227</sup> CB9045.

<sup>228</sup> CB9045-9046.

142. On 14 February 2018, TCFM and TTIM executed a Share Sale Deed for the purchase by TTIM (as trustee for the Trimantium Taiping Investment Fund I) of 333,334 Seed Preference Shares in Sargon for A\$50,000,100.<sup>229</sup>
143. On 20 February 2018, TTIM submitted a Drawdown Request for A\$50,000,100 to fund the acquisition by TTIM of 333,334 Seed Preference Shares in Sargon. The drawdown was approved by Taiping Trustees on the same day.<sup>230</sup>
144. On 21 February 2018, TCFM and TTIM completed the sale of 333,334 Seed Preference Shares in Sargon. The sum of A\$50,000,100 received by TCFM pursuant to the Share Sale Deed was deposited into an ANZ term deposit for a fixed term until 14 March 2018.<sup>231</sup>
145. On 5 March 2018, Mr Kingston sent an email to Mr Wang attaching a copy of a Share Purchase Agreement between SCAH as Buyer, Pharos Financial Group Pty Ltd and FPWS Pty Ltd as Sellers, and Sargon as Guarantor.<sup>232</sup> On 10 April 2018, the parties completed the Madison share sale.<sup>233</sup>
146. On 14 April 2018, Mr Kingston sent an email to Mr Wang, stating (among other things):<sup>234</sup>

*In the meantime, on April 10th, 2018, with Taiping's permission, we have acquired 100% of the shares in Madison Financial Group and have pledged those shares to Taiping, with original share certificates posted via registered post to Taiping in Hong Kong. This adds approximately A\$3.5 billion of AUM to Sargon.*

## **The GrowthOps IPO**

147. On 1 February 2018, pursuant to SA2, CIG advanced HK\$100 million to Mr Kingston by depositing that sum into Mr Kingston's ICBC bank account.<sup>235</sup> On

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<sup>229</sup> Kingston 1 [237] at CB192; CB2385-2401.

<sup>230</sup> Kingston 1 [239] at CB193; CB2404-2406.

<sup>231</sup> Kingston 1 [240]-[241] at CB193.

<sup>232</sup> Kingston 1 [246] at CB194; CB2913-3011.

<sup>233</sup> Kingston 1 [247] at CB194.

<sup>234</sup> Kingston [248] at CB194-195; CB3225.

<sup>235</sup> Guo 1 [12(b)] at CB97; CB677; Kingston 1 [215] at CB188.



6 February 2018, Mr Kingston withdrew the sum of HK\$79,000,000 and, after converting that sum to Australian dollars, paid it into TCFM's bank account.<sup>236</sup> The sum of A\$12,783,171.52 was credited to that account on 7 February 2018.<sup>237</sup>

148. On 7 February 2018, Mr Kingston obtained a bank statement for his ICBC bank account, which showed an account balance of HK\$26,820,459.56. Mr Kingston signed the statement and delivered the original to Mr Wang together with "Confirmation of Application" receipts for subscriptions by Asia Selangor and Trimantium International Holdings in the GrowthOps IPO.<sup>238</sup>
149. Mr Kingston admitted under cross-examination that he delivered the signed ICBC bank account statement to Mr Wang to demonstrate that he had complied with SA1 and SA2 by setting aside HK\$26 million to make interest payments.<sup>239</sup> However, five days later, on 12 February 2018, Mr Kingston transferred HK\$20 million out of his ICBC bank account.<sup>240</sup>
150. On 7 February 2018, the sum of A\$12,783,171 was withdrawn from TCFM's bank account.<sup>241</sup> On 13 February 2018, a further sum of A\$1,216,900 was withdrawn from TCFM's bank account.<sup>242</sup> Under cross-examination, Mr Kingston said that those two sums were paid to Pattani which used that money to subscribe for shares in GrowthOps.<sup>243</sup>
151. On 16 March 2018, GrowthOps commenced trading on the ASX, having raised A\$70 million at a price of \$1 per share.<sup>244</sup> As at 16 March 2018:

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<sup>236</sup> Kingston 1 [216] at CB188; CB14407.

<sup>237</sup> CB14405.

<sup>238</sup> Kingston 1 [217] at CB188-189; CB2379.

<sup>239</sup> Kingston XX T557:11-13.

<sup>240</sup> Kingston XX T557:29-558:2; CB14409.

<sup>241</sup> Kingston XX T559:24-28; CB14405.

<sup>242</sup> CB14412.

<sup>243</sup> Kingston XX T560:3-6.

<sup>244</sup> Kingston 1 [250] at CB195.

- (a) Mr Kingston held a relevant interest in 24,846,256 shares in GrowthOps (26.2% of shares on issue) through Trimantium Capital and trusts of which Mr Kingston was a beneficiary;<sup>245</sup>
- (b) Asia Selangor held 20,000,000 shares in GrowthOps (21.08% of shares on issue) which it had acquired through the IPO;<sup>246</sup>
- (c) Forci held 17,000,000 shares in GrowthOps (17.92% of shares on issue) which it had acquired through the IPO;<sup>247</sup>
- (d) Pattani held 14,000,000 shares in GrowthOps (14.76% of shares on issue) which it had acquired through the IPO;<sup>248</sup>
- (e) Trimantium International Holdings held 7,945,570 shares in GrowthOps (8.38% of shares on issue) which it had acquired through the IPO.<sup>249</sup>

152. It follows that Asia Selangor, Forci, Pattani and Trimantium International Holdings collectively funded A\$58,945,570 of the A\$70 million raised in the IPO (namely, approximately 84.2% of funds raised).

153. From the funds raised in the IPO:

- (a) Trimantium Capital received A\$618,000 as consideration for the sale of shares in KDIS (a company founded by Mr Kingston)<sup>250</sup> to GrowthOps in the form of 50% cash and 50% convertible redeemable preference shares;<sup>251</sup>
- (b) Trimantium Capital received A\$2,900,000 in the form of repayment of a loan from Trimantium Capital to GrowthOps;<sup>252</sup>

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<sup>245</sup> Kingston XX T546:18-547:9; CB14414-14416.

<sup>246</sup> Kingston 1 [250] at CB195; CB14417-14418.

<sup>247</sup> Kingston 1 [250] at CB195; CB14419-14420.

<sup>248</sup> Kingston 1 [250] at CB195; CB14421-14422.

<sup>249</sup> Kingston 1 [250] at CB195; CB14423-14424.

<sup>250</sup> Kingston XX T429:2-3.

<sup>251</sup> Kingston XX T562:31-563:9.

<sup>252</sup> Kingston XX T563:14-18.

- (c) It was intended that "An entity associated with [Mr Kingston]" would receive A\$500,000 in the form of repayment of a loan from that entity to Bryden Hammer Ltd, the vendor of Digital Moshi (a company sold to GrowthOps). Mr Kingston claimed not to know whether that money was ever received.<sup>253</sup>

154. Further, as a result of the IPO, Mr Kingston held a relevant interest of 26.2% of the issued shares in a company – GrowthOps – that had raised A\$70 million.

### Discussions regarding SA3

155. In late March and early April 2018, Mr Kingston and Mr Wang discussed a further supplementary agreement which became SA3. Mr Kingston's evidence is that Mr Wang said that SA3 would effectively be the same as SA1 and SA2 with HK\$175 million being used to repay TCFM for the GrowthOps IPO subscription shortfall, which TCFM had met from its own funds including from the sale of seed preference shares in Sargon, and HK\$25 million being used to fund interest.<sup>254</sup>

156. On 9 April 2018, the Lending Business Management Committee (formerly the Margin Committee) met and considered a proposed further loan of an additional HK\$200 million to Mr Kingston secured by his ordinary and preferred shares in Sargon.<sup>255</sup> The proposal was approved.<sup>256</sup>

157. From 12 to 18 April 2018, a number of marked up Chinese drafts of SA3 were sent by Mr Wang and Sonia Chan of Taiping Financial Holdings to Mr Kingston.<sup>257</sup>

158. On 19 April 2018, Mr Kingston emailed Mr Wang headed "Confirmation of Chinese contract 'SA3'" saying, "*I confirm that I and all parties to the Chinese version of the*

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<sup>253</sup> Kingston XX T563:19-25.

<sup>254</sup> Kingston 1 [251]-[252] at CB195-196; Kingston XN T393:21-394:3.

<sup>255</sup> The Margin Committee materials are at CB3108-3125.

<sup>256</sup> CB3133-3147 esp. at CB3141 and CB3146.

<sup>257</sup> Kingston 1 [262] at CB197; CB3150-3179; Kingston 1 [263] at CB197-198; CB3180-3189; Kingston 1 [264] at CB198; CB3211-3224; Kingston 1 [265] at CB 198; CB3228-3336.

*'SA3' contract have had the document translated, are fully aware of the content and approve the contents of the document'*.<sup>258</sup>

### **Alleged representation on 20 April 2018**

159. In his defence, Mr Kingston alleges that around 20 April 2018:<sup>259</sup>
- (a) Mr Kingston spoke by telephone with Mr Wang and said that he was concerned that CIG's standard lending terms gave CIG the right to demand an early repayment on 2 business days' notice and so create a default entitling it to take possession of all of the pledged collateral, which was more than 4 times the value of the loans; and
  - (b) Mr Wang replied that CIG would have no recourse to Mr Kingston in relation to the Supplementary Agreements, and that he would check that the Supplementary Agreements did allow for reasonable time to sell the collateral or otherwise to raise funds to enable any early repayment and provide email confirmation to CIG.
160. The pleaded allegation is not established on Mr Kingston's evidence. The only evidence of a telephone conversation on 20 April 2018 between Mr Kingston and Mr Wang is the telephone discussion referred to in paragraph 269 of Mr Kingston's witness statement<sup>260</sup> – evidence that Mr Kingston was required to give orally but did not. Thus, according to Mr Kingston's own evidence, no representation to the effect alleged (ie "that CIG would have no recourse to Mr Kingston") was made by Mr Wang on that occasion. As there had been no attempt by Mr Kingston to prove the pleaded allegation, he was not cross-examined on the alleged representation.
161. The evidence was that, at that time, Mr Kingston raised with Mr Wang his concerns that the timeframe in which CIG could demand early repayment (on 60 days' notice) and in which CIG could take all the collateral in event of a default (an extra

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<sup>258</sup> CB3337.

<sup>259</sup> ADC, [3.21.9] – [3.22].

<sup>260</sup> CB199.

20 business days) was too short. Mr Wang said he would make enquiries to revise the proposal and come back to Mr Kingston.<sup>261</sup>

162. On the same day (20 April 2018), Mr Wang responded by email.<sup>262</sup> The email stated (among other things):<sup>263</sup>

*Pursuant to clause 3 of the SA3, you, being Party A, shall procure the deposit and mortgage of Shares 1 and 2 (as defined in the SA3) (i.e. 1 million ordinary shares and 475,000 preferred shares of Sargon) with us, being Party B, within 5 business days from the date of the SA3. This is one of the events of default as set out in clause 3. Clause 3 also explicitly sets out that if there is any event of default, we may sell or deal with any or all mortgaged shares in order to perform our rights under the Loan Agreements (as defined in the SA3) without giving any prior notice. Kindly note that this right has already been setting out in clause 23.3 of the Original Loan Agreements (copies of the same are reattached herewith for your ease of reference). **You may also refer to clauses 32 and 33 of the Original Loan Agreements for reference.***

*Furthermore, pursuant to clause 11(4) of the SA3, we may obtain all collateral under the SA3 **if you fail to repay the principal and interest** on the loan maturity date. Failing to repay the principal and interest when due is an event of default which sets out in clauses 32.1(a) and 32.1(b) of the Original Loan Agreements.*

*[Emphasis added.]*

163. It follows that, instead of proving that Mr Wang represented to Mr Kingston at this time that CIG would have no recourse to Mr Kingston in relation to the Supplementary Agreements, the only probative evidence points in the other direction—Mr Wang's email informed Mr Kingston that, upon default, CIG would rely on clause 33 of the Original Loan Agreements which entitled it to "*take any action it considers appropriate to enforce this Agreement*".<sup>264</sup>

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<sup>261</sup> Kingston XX T541:23–542:16.

<sup>262</sup> Kingston 1 [271] at CB199; Kingston XX T542:17–543:3.

<sup>263</sup> CB3366.

<sup>264</sup> CB523

### SA3 and its key terms

164. At 10:27 am on 20 April 2018, Mr Kingston emailed pre-executed share sale agreements for ordinary and preference shares in Sargon to Mr Wang, as part of the security package for a further secured loan, on the condition that Mr Wang would send Mr Kingston the email confirmation he had promised to send through.<sup>265</sup>
165. At 1:17 pm on 20 April 2018, Mr Wang:<sup>266</sup>
- (a) emailed Mr Kingston a final Chinese-language version of SA3 for his perusal and execution; and
  - (b) confirmed that, during the term of the loan agreements, CIG would only require early repayment by giving 60 days' prior notice.
166. SA3 is dated 20 April 2018 and was entered into by:
- (a) Mr Kingston (“Party A”);
  - (b) CIG (“Party B”);
  - (c) four “GrowthOps Shares Subscribers” (Trimantium International Holdings Pty Ltd (“Party C”), Asia Selangor Investments Pty Ltd (“Party D”), Forci Alternative Strategies Pty Ltd (“Party E”) and Pattani Private Capital Pty Ltd (“Party F”));
  - (d) the four respective sole shareholders of the “GrowthOps Shares Subscribers” (the **Ultimate GrowthOps Shareholders**); and
  - (e) two shareholders in Sargon (being Trimantium Capital Pty Ltd (**TCPL**) and Trimantium Capital Funds Management Pty Ltd (**TCFM**)).<sup>267</sup>
167. The purpose of SA3 was to provide working capital for Sargon, the expansion of its insurance business and the purchase of preferred shares in Sargon from other

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<sup>265</sup> ADC, [3.21.10].

<sup>266</sup> ADC, [3.21.11].

<sup>267</sup> CB 559-577 (Chinese) and CB578-589 (English).

shareholders.<sup>268</sup> SA3 supplemented and formed part of the Loan Agreement, SA1 and SA2 and the terms of SA3 prevailed in the event of any inconsistencies between the terms of SA3, SA2, SA1, the Loan Agreement or any other loan documents.<sup>269</sup>

168. SA3 contained terms to the following effect:

- (a) CIG agrees to lend additional HK\$200 million to Mr Kingston. CIG has agreed to lend HK\$400 million in total to Mr Kingston (clause 1);
- (b) regarding the total loan amount Mr Kingston must provide no less than HK\$1.6 billion share pledge as security to CIG (clause 1);
- (c) the updated security list is as follows:
  - (i) 1 million ordinary shares in Sargon directly or indirectly held by Mr Kingston or TCPL (**Share 1**);
  - (ii) 475,000 preference shares in Sargon directly or indirectly held by Mr Kingston or TCFM (**Share 2**);
  - (iii) 120,000 preference shares in Sargon issued to TCFM by way of call for capital (**Call for Capital**) (**Share 3**);
  - (iv) 58,950,000 ordinary shares in GrowthOps directly or indirectly held by Party C, D, E, F or Ultimate GrowthOps Shareholders (**Share 4**) and 100% shares in Party C, D, E and F held by the Ultimate GrowthOps Shareholders (**Share 5**);collectively referred to as the “**Shares**” or “**Collateral**”, and
- (v) any other asset that CIG accepts as security at its absolute discretion, (clause 1);

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<sup>268</sup> CB3141.

<sup>269</sup> CB578, Recitals paragraphs 1 and 2.

- (d) Mr Kingston guarantees that he will complete the Call for Capital within 20 business days from the date of the advance of the loan (clause 3(3));
- (e) if the Call for Capital does not complete within 2 months from the date of this SA3, Share 3 will be stored in paper form at CIG's place and Mr Kingston must repay HK\$100 million loan amount to Mr Kingston within 5 business days (clause 3(4));
- (f) Mortgage ratio: the current mortgage ratio is 25%. The estimated completion date for Call for Capital is 25 April 2018. The share price for both Sargon's ordinary shares and preference shares will increase from A\$150 to \$A165 (based on the latest valuation). Total value of security will become HK\$2 billion, and the mortgage ratio will be approximately 20% at that time. CIG may update the mortgage ratio at any time (clause 4);
- (g) the Loan interest rate on and before the date of this SA3 is the Bank of China prime rate (currently 5.0%) +3.1%, that is, the interest rate is currently 8.1%. After the date of this SA3, the loan interest rate will be the Bank of China prime rate (currently 5.0%) + 2% = 7% (clause 6);
- (h) the Loan provided by CIG has changed to a term of 24 months from the date of this SA3. If Mr Kingston does not provide written notice to terminate the loan agreement a month before the expiry of the loan term, the term will extend to a further 12 months automatically (clause 7);
- (i) interest accumulates daily on the total loan amount, and the interest is changed to be paid quarterly. The interest settlement date is the last business day of each quarter (clause 7);
- (j) Mr Kingston will not repay the principal amount or terminate the loan agreement within 12 months from the date of this SA3. After this 12 month period, Mr Kingston can terminate the loan agreement within one month (clause 7);
- (k) during the term of the loan agreement, CIG has the right, with 60 days prior notice to Mr Kingston, to request an early repayment (clause 7);



- (l) CIG can monitor and calculate the value of the Collateral at any time until Mr Kingston repays the principal and interest of the Loan and other approved payables. Mr Kingston, Parties C, D, E & F and the Ultimate GrowthOps Shareholders and the Sargon Shareholders must maintain the approved holding levels on the last trading day of each month (clause 9);
- (m) other terms in relation to collateral and margin call requirements, similar to clause 9 to 12 of SA1 (see paragraph 121 above), modified to take into account the additional parties and stock provided as security under SA3;
- (n) if Mr Kingston, Parties C, D, E, F, the Ultimate GrowthOps Shareholders or the Sargon Shareholders fails to repay the loan and interest, it constitutes a breach of contract, and if they cannot repay the principal and interest within 20 business days from the date of the breach, CIG is entitled to take possession of Collateral immediately without further notice (clause 11(4));
- (o) this Supplementary Agreement is governed and interpreted in accordance with Hong Kong law (clause 16);
- (p) in the event there is any inconstancy between the Chinese version and English version (if any) of this SA3 then the Chinese version shall prevail (clause 18).

169. The advance of funds under SA3 is dealt with in paragraph 175 below.

## **Promissory Note 2**

170. On 27 April 2018, Mr Kingston executed on behalf of Sargon:<sup>270</sup>

- (a) a General Security Deed;<sup>271</sup> and
- (b) a Deed of Guarantee,<sup>272</sup>

in favour of Taiping Trustees, pursuant to which Sargon guaranteed TTIM's repayment obligations to Taiping Trustees (including under Promissory Note 1) and

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<sup>270</sup> Kingston 1 [280] at CB201-202.

<sup>271</sup> CB14428-14459.

<sup>272</sup> CB14460-14473.

granted a security interest to Taiping Trustees over all of Sargon's present and after-acquired property to secure Sargon's guarantee.

171. On 28 April 2018, Sargon and TTIM entered into a HK\$190 million promissory note with the consent of Taiping Trustees (**Promissory Note 2**), pursuant to which TTIM on-lent to Sargon a sum of HK\$190 million which had been advanced by Taiping Trustees pursuant to Promissory Note 1.<sup>273</sup>
172. Clause 2(g)(vi) replicated the same clause set out in Promissory Note 1, but added the underlined words:<sup>274</sup>

***Pre-approved Transactions:** For the avoidance of doubt, clause 2(g)(ii) does not apply to the transactions relating to Madison Financial Group Pty Limited and Escala Partners Ltd ("**Transactions**") which have been pre-approved by the Holder and the Ultimate Lender. The Holder's and the Ultimate Lender's pre-approval under this clause is subject to the following conditions having been satisfied or, in the case of the condition in clause 2(g)(vi)(3), the Holder (acting solely in accordance with the instructions of the Ultimate Lender) has received sufficient evidence that it will be satisfied on the proposed completion date for the Transactions:*

173. Clause 2(g)(vi)(3) also replicated the same clause set out in Promissory Note 1, but added the underlined words and deleted the struck-through words:<sup>275</sup>

*(3) delivery to the Holder and Ultimate Lender, in form and substance satisfactory to it (which will be satisfactory if it is satisfactory to the Ultimate Lender), of a first-ranking Security Interest in favour of the ~~Holder~~ Ultimate Lender in a form and substance satisfactory to the ~~Holder at its absolute discretion~~ Ultimate Lender over all of the shares acquired in connection with the Transactions immediately following completion of the Transaction together with any title documents and executed blank share transfer forms required by the*

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<sup>273</sup> CB14478-14491.

<sup>274</sup> CB14481.

<sup>275</sup> CB14481.

~~Holder~~ Ultimate Lender and evidence of completion of all other approval processes that the ~~Holder~~ Ultimate Lender determines (acting reasonably) are required by law

174. On 2 May 2018, A\$31,129,285 was drawn down by Sargon under Promissory Note 2.<sup>276</sup>

### Dealings following SA3

175. On 20 April 2018, CIG advanced HK\$200 million to Mr Kingston by depositing that sum into his ICBC bank account.<sup>277</sup> There are inconsistencies in Mr Kingston's evidence as to how these funds were applied. Mr Kingston's witness statement initially stated:

*A\$31 million (HK \$175 million) was used to reimburse TTIM for its payment of the GrowthOps IPO shortfall that had been used to enable Pattani and Forci to subscribe for GrowthOps shares in the IPO.*<sup>278</sup>

176. Mr Kingston changed his evidence in the witness box, stating that:<sup>279</sup>

*the first reference to Pattani is Trimantium International Holdings and I think we can probably just scratch this and say 'it is to enable short fall [in] the SPV subscription monies for the IPO'.*

177. The initial reference to Pattani was clearly erroneous. Mr Kingston admitted that Pattani used the funds advanced under SA2 (i.e., not SA3) to subscribe for shares in the GrowthOps IPO.<sup>280</sup> And it is unlikely that the sum of A\$31 million was advanced to Trimantium International Holdings and Forci to invest in the GrowthOps IPO—Forci invested A\$17 million and Trimantium International Holdings invested A\$7,945,570 into the IPO.<sup>281</sup>

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<sup>276</sup> Kingston 1 [281]-[282] at CB202.

<sup>277</sup> Guo 1 [12(c)] at CB 97; CB686.

<sup>278</sup> Kingston 1 [274] at CB201.

<sup>279</sup> Kingston XN T394:15-21.

<sup>280</sup> Kingston XX T560:3-6.

<sup>281</sup> See paragraph 151.

178. In late May 2018, Mr Kingston discussed with Mr Wang an opportunity for Taiping to acquire 36 Class A Units in the TSIT from an entity controlled by Rene Eichenberger called SCOF. 36 Class A Units in the TSIT corresponded to an equity exposure to 171,000 Seed Preference Shares in Sargon.<sup>282</sup>
179. Mr Kingston's evidence is that Mr Wang said that Taiping would not be able to complete a direct equity purchase or another supplementary agreement in time, but the money from Promissory Note 2 could be temporarily redrawn and used to purchase the 36 Class A units before being refunded by a further supplementary agreement.<sup>283</sup>
180. On 11 July 2018, Sargon made a Drawdown Request under Promissory Note 2 for A\$37,001,715.64, which was approved by Taiping Trustees.<sup>284</sup>
181. On 12 July 2018, Dragon Shield was incorporated with TTIM as its sole shareholder and Mr Kingston as its sole director as a special purpose vehicle to acquire and hold the 36 Class A Units in the TSIT.<sup>285</sup>
182. On 16 July 2018, TTIM advanced A\$28,512,028 to SCOF on behalf of Dragon Shield to complete Dragon Shield's purchase of 36 Class A Units in the TSIT.<sup>286</sup>
183. In early July 2018, Mr Kingston and Mr Wang met in Hong Kong and then Shanghai to plan SA4. Mr Kingston's evidence is that he said that SA4 would need to cover, among other things, the interest shortfall under SA3 and that Mr Wang said that Taiping would make interest on SA1 to SA3 "payment in kind" (which expression appears to have been used by Mr Wang and Mr Kingston to mean that interest would be capitalised).<sup>287</sup> Regardless of whether or not this conversation occurred, SA4 did not convert interest on SA1 to SA3 to "payment in kind".<sup>288</sup>

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<sup>282</sup> Kingston 1 [301] – [302] at CB205.

<sup>283</sup> Kingston 1 [303] – [305] at CB205.

<sup>284</sup> CB3536-3543.

<sup>285</sup> Kingston 1 [319] at CB209; CB14653.

<sup>286</sup> Kingston 1 [325] at CB211.

<sup>287</sup> Kingston 1 [312] – [316] at CB207.

<sup>288</sup> See paragraphs 334 to 338.

184. On 24 September 2018, the Lending Committee met and considered a proposed further loan of an additional HK\$253 million to Mr Kingston secured by ordinary and preferred shares in Sargon and 62.14% of the equity in GrowthOps.<sup>289</sup> The proposal was approved.<sup>290</sup>
185. On 27 September 2018, Ms Zhou sent an email to Mr Kingston attaching the signing pages for SA4 without the contract itself.<sup>291</sup> Later that day, Mr Kingston replied to Ms Zhou's email attaching the executed signature pages for SA4.<sup>292</sup> Ms Zhou then sent a further email to Mr Kingston attaching the execution version of SA4 in Chinese.<sup>293</sup>
186. SA4 was only ever executed in Chinese. On 30 September 2018, Mr Wang sent an English version of SA4 to Mr Kingston.<sup>294</sup>
187. On 12 October 2018, Mr Wang sent a further email to Mr Kingston, stating:<sup>295</sup>

*Please see below the Eng version of the contract for your confirmation. Once confirmed with all signing parties from your end, please kindly arrange signing and send over the signature pages.*

188. Mr Kingston responded to Mr Wang's email on 12 October 2018:<sup>296</sup>

*I confirm this version of the English contract.and [sic] I have the signatures in my possession – what should I do with them Andy? Send you a scan first?*

### **SA4 and its key terms**

189. SA4 is dated 28 September 2018 and was entered into by:

(a) Mr Kingston (“Party A”);

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<sup>289</sup> The Margin Committee materials are at CB 3990-4029.

<sup>290</sup> CB4030-4060 esp. at CB4058.

<sup>291</sup> CB4061-4075.

<sup>292</sup> CB4076-4088.

<sup>293</sup> CB4090-4136.

<sup>294</sup> CB 4137.

<sup>295</sup> CB4189.

<sup>296</sup> CB4189.

- (b) CIG (“Party B”);
- (c) four “GrowthOps Shares Subscribers” (Trimantium International Holdings Pty Ltd (“Party C”), Asia Selangor Investments Pty Ltd (“Party D”, Forci Alternative Strategies Pty Ltd (“Party E”) Pattani Private Capital Pty Ltd (“Party F”));
- (d) the four respective sole shareholders of the “GrowthOps Shares Subscribers” (the **Ultimate GrowthOps Shareholders**);
- (e) three shareholders in Sargon (TCPL, Trimantium limited (**TL**) and TCFM);  
and
- (f) TTIM.<sup>297</sup>

190. The purpose of SA4 was to provide working capital for Sargon prior to its proposed listing on the ASX, with potential strategic value to CIG in the form of creditor’s rights to convert debt to equity post-listing.<sup>298</sup> SA4 supplemented and formed part of the Loan Agreement, SA1, SA2 and SA3 and the terms of SA4 prevailed in the event of any inconsistencies between the terms of SA4, SA3, SA2, SA1, the Loan Agreement or any other loan documents.<sup>299</sup>

191. SA4 contained terms to the following effect:

- (a) CIG agrees to provide an additional loan of HK\$253 million to Mr Kingston (**This Loan**). CIG has agreed to lend HK\$653 million in total to Mr Kingston (**Total Loan**) (clause 1.3);
- (b) in respect of the Total Loan, all parties agree to provide CIG not less than a total of HK\$1.866 billion stock collateral;
- (c) the updated security list is as follows:

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<sup>297</sup> CB 590-613 (Chinese) and CB615-639 (English).

<sup>298</sup> CB 4011, CB4047 and CB4059. CIG’s proposed equity investment in Sargon is discussed in paragraph 300 below.

<sup>299</sup> CB 616, Recitals paragraphs 1 and 2.

- (i) Mr Kingston or TCPL indirectly or directly holds 1 million ordinary shares of Sargon (representing 50% of the total issued ordinary shares of Sargon), as at the date of SA4, its market value is approximately HK\$941 million (**Stock A**);
  - (ii) Mr Kingston or TL indirectly or directly holds 140,000 ordinary shares of Sargon, as at the date of SA4, its market value is approximately HK\$132 million (**Stock B**);
  - (iii) Mr Kingston or TL indirectly or directly holds 200,000 ordinary shares of Sargon, as at the date of SA4, its market value is approximately HK\$188 million (**Stock C**);
  - (iv) Mr Kingston or TCFM indirectly or directly holds 304,000 preference shares of Sargon, as at the date of SA4, its market value is approximately HK\$286 million (**Stock D**);
  - (v) Mr Kingston or TCFM indirectly or directly holds 171,000 preference shares of Sargon, as at the date of SA4, its market value is approximately HK\$161 million (**Stock E**);
  - (vi) Party C, D, E, F or GrowthOps upper shareholders directly or indirectly holds 58.95 million ordinary shares of GrowthOps (representing 62.14% of the total issued ordinary shares of GrowthOps), as at the date of SA4, its market value is HK\$436 million (**Stock F**) and 100% of the total issued shares of each of Party C, D, E and F are mortgaged to CIG (**Stock G**);
  - (vii) Mr Kingston or TTIM indirectly or directly holds 120 ordinary shares of Dragon Shield Holdings Pty Ltd (**Stock H**);
- collectively referred to as the “**Stock Pool**” or “**Collateral**”, and
- (viii) any other stock or cash that CIG accepts as appropriate at its absolute discretion (clause 1.4);

- (d) Mr Kingston undertakes and guarantees that more than half of the utilisation amount (being not less than HK\$126 million) shall be used for the daily operations and business development of Sargon and GrowthOps (clause 3(2));
- (e) Mr Kingston undertakes and guarantees that within three months of the utilisation date under this SA4, he shall procure completion of Sargon's acquisition from Australia Executor Trustees Ltd through Sargon's wholly-owned subsidiary Sargon CT Holdings Pty Ltd for shares in certain named companies (clause 3(3));
- (f) Mortgage ratio: the current mortgage ratio is approximately 30.55%. It is expected that after the successful completion of AET Acquisition and the Pre-IPO financing of Sargon, the valuation of ordinary shares and preference shares of Sargon will rise last round's financing of A\$165 per share to A\$340 per share (which is the last valuation price) the value of the Collateral will be updated to approximately HK\$3.948 billion and the actual mortgage rate will be approximately 16.54% (clause 4);
- (g) the interest rate of the Original Loan (being HK\$400 million) is the Bank of China prime rate (currently 5.0%) + 2%, that is, the interest rate is currently 7%. The interest rate of This Loan (being HK\$253 million) is 5.5% (clause 6);
- (h) the term of the Original Loan (being HK\$400 million) is updated to 36 months from the date of SA3 (ending 19 April 2021). Interest accumulates daily, paid quarterly, and the interest settlement date is the last business day of each quarter (clause 7);
- (i) Mr Kingston agrees not to repay the principal of the Original Loan or terminate the Loan Agreement within 12 months from the date of SA3. After 12 months from the date of SA3, Mr Kingston may, by providing one month advance written notice to CIG, to propose termination of the Loan Agreement and repay the principal and interest of the Original Loan and other payables (clause 7);



- (j) during the term of the Original Loan, CIG has the right, by providing 60 days advanced notice to Mr Kingston, to request an early repayment by Party A (clause 7);
  - (k) the term of This Loan (being HK\$253 million) is 24 months from the date of the utilisation notice to be provided by Mr Kingston to CIG pursuant to this SA4. Interest accumulates daily, paid semi-annually, and the interest settlement date is the last business day of each half year. Mr Kingston agreed not to repay the principal of This Loan or terminate the Loan Agreement within 12 months from the date of this SA4 (clause 7);
  - (l) during the term of This Loan, CIG has the right, by providing 60 days advance notice to Mr Kingston, to request an early repayment by Mr Kingston (clause 7);
  - (m) “without [CIG]’s prior written approval and confirmation on collateral adequacy, [Mr Kingston] shall promise and undertake to make repayments in the following order:
    - (i) paying off the total principal and any outstanding interest of this loan and any other amounts payable; and
    - (ii) paying off the total principal and any outstanding interest of the Original Loan and any other amounts payable.
- [Mr Kingston] undertakes and warrants that he will not give priority to the repayment of the Original Loan and its outstanding interest and other amounts payable before this loan and its outstanding interest and other amounts payable are fully repaid” (clause 7);<sup>300</sup>
- (n) the Original Loan (being HK\$400 million) shall be repaid in cash on maturity for principal, interest and other payables (clause 8);

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<sup>300</sup> As translated by the expert Mr Gang Wang at CB 387.

- (o) This Loan (being HK\$253 million) shall be repaid in cash on maturity. Mr Kingston undertakes and guarantees that he will pay CIG (a) principal, (b) interest, (c) a premium and (d) other payables. The foregoing premium refers to: Mr Kingston shall or shall procure any of his direct or indirect affiliates to sell or transfer Stock E in any form and use 60% of the proceeds (after deducting (i) principal (being HK\$253 million); and (ii) interest (including all paid and unpaid interest under this Supplementary Agreement) to pay CIG (clause 8);
- (p) Mr Kingston, Parties C, D, E & F, the GrowthOps upper shareholders, the Sargon shareholders and the Dragon Shield shareholders must maintain the normal position value on the last trading day of each month (clause 9);
- (q) “Normal Position Value” refers to the outstanding balance of the Loan divided by Margin Value, where Mr Kingston shall endeavour to, at all times, keep equal to or below 100% (clause 9);
- (r) “Margin Value” means (the number of GrowthOps shares in stock accounts x the Price of GrowthOps shares) + Stock A valuation + Stock B valuation + Stock C valuation + Stock D valuation + Stock E valuation) x the Mortgage Ratio (clause 9);
- (s) “Stock Price” means the stock price determined by CIG in its absolute discretion based on the market price of the relevant day. If the relevant stock is suspended, its contribution to the Margin Value can be calculated as zero (clause 9);
- (t) if stock collateral is suspended on the Australian Stock Exchange, CIG may notify Mr Kingston, Parties C, D, E & F, the GrowthOps upper shareholders, the Sargon shareholders and the Dragon Shield shareholders in writing, by phone, or by email, requesting them to deposit cash or other collateral approved by CIG within the next five business days and within the time allowed by CIG at its absolute discretion to the Margin Account, in order to maintain the Normal Position Value. If it fails to timely deposit according to

the above provisions, CIG may immediately liquidate without further notice (clause 10);

- (u) Mr Kingston, Parties C, D, E & F, the GrowthOps upper shareholders, the Sargon shareholders and the Dragon Shield shareholders must maintain the normal position value from time to time on each settlement date and line of credit loans repayment date. If the normal position value is not maintained they authorize CIG to sell any stock collateral and use the proceeds to sale (net of expenses) to pay principal and interest payable of the Loan and/or other payables, without further notice. The amount of shares sold by CIG should try to be the minimum level that sufficient to pay the principal and interest payable of the loan and/or other payables (clause 10);
- (v) if the Normal Position Value is greater than or equal to 105%, CIG may require Mr Kingston, Parties C, D, E & F, the GrowthOps upper shareholders, the Sargon shareholders and the Dragon Shield shareholders in writing, by phone or by email to provide sufficient collateral or cash at its absolute discretion within the next three Business Day to maintain the Margin Account at the Normal Position Value (clause 11(2));
- (w) if the Normal Position Value is greater than or equal to 120%, if Mr Kingston, Parties C, D, E & F, the GrowthOps upper shareholders, the Sargon shareholders and the Dragon Shield shareholders fail to provide enough funds or the collateral recognised by CIG, CIG may immediately liquidate it without further notification. If the amount of the proceeds (net of expenses) is not sufficient to repay the Loan principal and all interest payable and other approved amounts payable, Mr Kingston, Parties C, D, E & F, the GrowthOps upper shareholders, the Sargon shareholders and the Dragon Shield shareholders must repay the outstanding debts within the same business day (clause 11(3));
- (x) if Mr Kingston, Parties C, D, E & F, the GrowthOps upper shareholders, the Sargon shareholders and the Dragon Shield shareholders fail to repay the Loan principal and interest on the loan maturity date, then immediately constitute an

event of default. If Mr Kingston, Parties C, D, E & F, the GrowthOps upper shareholders, the Sargon shareholders and the Dragon Shield shareholders still unable to repay the principal and interest within 20 business days from the date of event of default, CIG shall directly obtain all collateral without further notice (clause 11(4));

- (y) CIG shall recover collateral / guarantee by telephone or email. CIG need only contact Mr Kingston who represents the other shareholders. Mr Kingston, Parties C, D, E & F, the GrowthOps upper shareholders, the Sargon shareholders and the Dragon Shield shareholders must deposit cash or other collateral within the time allowed by CIG at its full discretion in accordance with clauses 10 and 11 above. If the Margin Account is not returned to the Normal Position Value or is interrupted/inaccessible for any reason or if Mr Kingston cannot be contacted, CIG is authorised to close out the position without further notice (clause 12);
- (z) this Supplementary Agreement is governed and interpreted in accordance with Hong Kong law (clause 16);
- (aa) in the event there is any inconstancy between the Chinese version and English version (if any) of this SA3 then the Chinese version shall prevail (clause 18).

### **HK\$253 million payment and application**

- 192. Under SA4, on 18 October 2018, CIG advanced HK\$253 million to Mr Kingston by depositing that sum into his ICBC bank account.<sup>301</sup>
- 193. On 19 October 2018, Mr Kingston transferred HK\$200 million to TCFM's bank account.<sup>302</sup> Mr Kingston's evidence was that HK\$161 million of the HK\$253 million advanced pursuant to SA4 was to be used to repay TTIM for funding Dragon Shield's acquisition of 36 Class A Units in the TSIT.<sup>303</sup>

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<sup>301</sup> Guo 1 [12(d)] at CB97; CB690.

<sup>302</sup> Kingston 1 [356] at CB216.

<sup>303</sup> Kingston 1 [342] at CB214; see paragraph 182.

## Interest invoices and payments

194. CIG's practice was to issue invoices to Mr Kingston for interest that accrued in respect of the Facility Agreement. Towards the end of each accrual period, Emily Chan of the Accounts Department at Taiping Financial Holdings sent the interest invoices by email to Mr Kingston' Trimantium email address (phil@trimantium.com). The subject line of each email stated the principal sum lent, the words "Loan Interest Payment" and the relevant interest period and the body of the email referred to an interest "invoice" attached.<sup>304</sup>
195. The invoices attached to each email<sup>305</sup>:
- (a) were addressed to Mr Kingston at his address in Carlton, Victoria;
  - (b) had the subject "Re: Loan Interest Payment";
  - (c) contained a "Debit Note No" and "Invoice Date"; and
  - (d) set out the interest period, the sum of interest that accrued in each month in the interest period and the total interest payable by Mr Kingston.
196. Between 27 December 2017 and 22 March 2019, CIG issued nine invoices to Mr Kingston for interest that accrued on the SA1-3 HK\$400 million loan.<sup>306</sup> Mr Kingston paid each of these invoices.<sup>307</sup> Four of the invoices were issued after SA3 and three were issued after Mr Kingston raised the 'payment in kind' issue (see paragraph 207 below).
197. On 24 April 2019, Ms Chan sent an email to Mr Kingston attaching the first interest invoice for the HK\$253 million loan<sup>308</sup>. The subject of the email read "*HK\$253M*

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<sup>304</sup> See, e.g., email from Ms Chan to Mr Kingston dated 27 December 2017 with subject "HKD100M Loan Interest Payment (Dec 2017)" at CB693. Further examples are at CB697, CB701, CB705, CB709, CB711, CB715, CB722, CB727, CB732, CB741, CB746 and CB766.

<sup>305</sup> CB694, CB698, CB702, CB706, CB710, CB712, CB716, CB724, CB729, CB733, CB742, CB747 and CB767.

<sup>306</sup> CB694, CB698, CB702, CB706, CB710, CB712, CB716, CB724 and CB729.

<sup>307</sup> CB695, CB699, CB703, CB707, CB713, CB718, CB725 and CB730 (English translations at CB696, CB700, CB704, CB708, CB714, CB720, CB726 and CB731).

<sup>308</sup> CB13241; Kingston XX at T565:22-25.

*Loan Interest Payment (October 2018 – April 2019)*". The invoice was in the sum of HK\$7,543,761.31, for interest that accrued from 18 October 2018 (the date the sum of HK\$253 million was advanced to Mr Kingston)<sup>309</sup> to 30 April 2019.<sup>310</sup>

198. Between 24 April 2019 and 1 May 2019, GrowthOps' share price dropped approximately 23%, from 56 cents per share to 43 cents per share.<sup>311</sup>

199. On 2 May 2019, Ms Zhou sent the following email to Mr Kingston:<sup>312</sup>

*We notice that the share price of TGO AU Trimantium GrowthOps has fallen for three consecutive trading days. The stock has fallen by 37.5% year-to-date.*

*Could you please give us some information and business development updates?  
Thank you.*

	Date	Last Price	Net Change	% Change
Tu	04/30/19	.50	-.02	-3.85%
Mo	04/29/19	.52	-.04	-7.14%
Fr	04/26/19			
Th	04/25/19			
We	04/24/19	.56	-.05	-8.20%

200. Later that day, Ms Zhou sent Mr Kingston a further email:<sup>313</sup>

*We notice today's share price has suddenly dropped by 14%. Could you please give us some explanation about the stock volatility which is required by our risk control team. Thank you.*

	Date	Last Price	Net Change	% Change
We	05/01/19	.43	-.07	-14.00%
Tu	04/30/19	.50	-.02	-3.85%
Mo	04/29/19	.52	-.04	-7.14%
Fr	04/26/19			
Th	04/25/19			
We	04/24/19	.56	-.05	-8.20%

<sup>309</sup> CB688.

<sup>310</sup> Kingston [378] at CB220. A copy of the invoice is at CB13242.

<sup>311</sup> CB13244.

<sup>312</sup> CB13244-13245.

<sup>313</sup> CB13244.

201. Mr Kingston responded to Ms Zhou that evening:<sup>314</sup>

*Market volatility on very small trades is normal in Australia - please wait a few weeks until after the Australian Federal Election (May 18th) and you should see the spot price return to the intrinsic price. The market has been very strange in recent weeks.*

*The volume weighted average price is well over \$1.00 since we went public (the issue price), so we are highly confident it will return there soon.*

202. On 10 May 2019, Ms Zhou sent an email to Mr Kingston chasing payment of the invoice issued on 24 April 2019. The email re-attached a copy of the invoice.<sup>315</sup>

203. On 13 May 2019, Mr Kingston responded to Ms Zhou's email:

*Wasn't this loan supposed to be a PIK interest instrument? I assumed that's why you hadn't send any invoices through since October.*

*Can you send me the executed documents so I can confirm?*

204. Mr Kingston conceded during cross-examination that this assumption was mistaken. He accepted that CIG issued the first interest invoice on the HK\$253 million loan in April 2019 because the monies lent under SA4 had been advanced to Mr Kingston in October 2018 and interest was payable half yearly.<sup>316</sup>

205. On 15 May 2019, Ms Zhou sent a further email to Mr Kingston chasing payment of the invoice issued on 24 April 2019. The email re-attached a copy of the invoice and stated:<sup>317</sup>

*Please see attached and also make the interest payment no later than 20 May. Please note according to our latest internal investment risk classification rules, if interest payment is overdue for more than 30 days, it will be re-classified as "Suspicious assets".*

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<sup>314</sup> CB13244.

<sup>315</sup> CB4671-4672.

<sup>316</sup> Kingston XX at T566:8-17.

<sup>317</sup> CB13314 and CB13365.

206. Ms Zhou's email also attached copies of the Chinese and English versions of SA4.<sup>318</sup>

207. On 20 May 2019, Mr Kingston responded to Ms Zhou:<sup>319</sup>

*Because we thought this was a PIK instrument we haven't been prepared for the interest payment - it wasn't in our cash flow model or banking system.*

*Can you give me two weeks please to arrange the wire out of HK? I will fly over ASAP.*

*Can you also please confirm the bank details for this payment? As this is the first payment on this facility I don't have the bank details setup and it takes a few days for them to set up a new account.*

208. On 21 May 2019, Ms Zhou sent the following email to Mr Kingston:<sup>320</sup>

*Well noted about the situation, according to our asset quality classification guideline, this loan will be defined as "Suspicious loan" for now. Please kindly make sure interest will be paid ASAP so we can switch the loan status back to "normal".*

*Also, the bank detail has already been provided through previous email in the attached "debit note". Thank you.*

209. On 24 May 2019, Ms Zhou sent a further email to Mr Kingston:<sup>321</sup>

*Understood there were some technical issues regarding your bank account set-up but just a kind reminder to MUST pay for the interest of HKD7,543,761.31 for the HKD253m loan ASAP or an EOD may potentially be triggered.*

*Also, please see below the email from our risk team urging us to submit the following financial information. Thank you.*

210. The information requested by the risk team included, among other things, financial information about Sargon and its assets.<sup>322</sup>

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<sup>318</sup> CB13316-13364.

<sup>319</sup> CB4679.

<sup>320</sup> CB4683-4684.

<sup>321</sup> CB4686.

<sup>322</sup> CB4922.



211. Later that day, Mr Kingston responded to Ms Zhou, "*Are these materials required when we're going to repay all of the loans in 60-90 days at the Sargon IPO?*".<sup>323</sup>

212. Ms Zhou responded:<sup>324</sup>

*Can you please provide information on progress / timetable of the IPO? If a prospectus is ready, we can use that instead. Or we will need at least the financial information for those referred companies. Thank you.*

213. Mr Kingston then emailed Ms Zhou, "*OK – will have a large email package to you by Tuesday COB*".<sup>325</sup>

214. On 28 May 2019, Ms Zhou chased Mr Kingston again for payment of the interest invoice issued on 24 April 2019:<sup>326</sup>

*Noted with many thanks. Looking forward to receiving those files.*

*Also, just a kind reminder that please make sure the interest will LAND before this Friday (31 May) when we need to submit monthly project asset grading form. Thank you.*

215. On 28 May 2019, Mr Kingston sent an email to Ms Zhou attaching the latest draft prospectus for Sargon, a presentation prepared by KPMG entitled "Acquisition Summary", Sargon's audited financial statements for the year ended 30 June 2018 and a Sargon presentation entitled "High-level growth strategies".<sup>327</sup>

216. Also on 28 May 2019, Mr Kingston sent Ms Zhou an email which attached a term sheet for an offer for investment. He also said:<sup>328</sup>

***HIGHLY CONFIDENTIAL AND NOT FOR DISTRIBUTION***

*Sargon is likely taking in \$140 million of new capital from Ontario Teachers Pension Plan (as well as other parties) in the coming 7-10 days (see attached), and as such, my travel to get to HK is going to be delayed until this*

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<sup>323</sup> CB4688.

<sup>324</sup> CB4689.

<sup>325</sup> CB4690.

<sup>326</sup> CB4691.

<sup>327</sup> CB4692-4911.

<sup>328</sup> CB4912-4918.

*process has been completed. I will endeavour to get my bank to fix the wire as quickly as possible.*

217. Later that day, Ms Zhou sent a further email to Mr Kingston chasing payment of the interest:<sup>329</sup>

*Noted with thanks. We will keep the materials highly confidential.*

*Besides, could you please confirm whether the interest will be received within this week or what is the expected time of settlement. Could you please send us the confirmation once you send the instruction to the bank. Thank you*

218. Mr Kingston did not respond to Ms Zhou's email of 28 May 2019.

219. On 29 May 2019, Ms Zhou forwarded to Mr Kingston an email from Ms Sonia Chan, Legal Counsel at Taiping Financial Holdings. Ms Chan's email stated, among other things, that Mr Kingston's failure to pay the sum of HK\$7,543,761.31 of interest on the HK\$253 million for the period 18 October 2018 to 30 April 2019 constituted an Event of Default. The email demanded that Mr Kingston pay the outstanding interest within 2 business days and stated that, if Mr Kingston failed to do so, CIG would be "entitled to take imminent action to exercise our rights under the relevant agreements (including but not limited to demand payment of all amounts owing to us under the relevant agreements (i.e. principal of HK\$653 million loan plus all of the relevant interests))."<sup>330</sup>

220. Later that day, Mr Kingston responded:<sup>331</sup>

*This is very disappointing to receive given the particular circumstances and is a major setback for our corporate relationship*

*Can you please urgently send me a draft of the media release you will put out to retract this media statement about the AUM?*

*<https://www.tpsec.com.hk/en/information/news/detail/1095>*

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<sup>329</sup> CB4919.

<sup>330</sup> CB4924-4925.

<sup>331</sup> CB4989.

221. Mr Kingston then sent a further email to Ms Zhou.<sup>332</sup>

*I have managed to cancel my meetings and booked my flights. This interest payment will 100% be in your account by end of the month.*

*I am extremely unhappy with Taiping and how you have handled this when it was your error on the invoice in the first place. The economic and personal costs of this are very high in this critical time before my IPO and it will take 30 hours of my time in travel and logistics. I hope it was worth it to you.*

222. On 30 May 2019, Mr Kingston paid the outstanding interest on the HK\$253 million loan for the period 18 October 2018 to 30 April 2019.<sup>333</sup>

#### **PIK interest on SA4 error**

223. Mr Kingston’s evidence is that Mr Wang said that CIG would make interest on SA1 to SA3 “payment-in-kind” as an alternative to advancing more funds to cover the additional interest on the extension of SA1 to SA3. Mr Kingston said he understood Mr Wang’s reference to “payment-in-kind” to mean that interest would be capitalised, namely, accrue during the term and fall due for payment at the same time as the principal.<sup>334</sup>

224. Ultimately, Mr Kingston’s case is that what was said to him about interest on SA1 to SA3 was dealt with in clause 7 of SA4. Therefore, this issue falls to be determined upon the proper construction of clause 7. However, the allegation that Mr Wang told Mr Kingston that CIG would make interest on SA1 to SA3 “payment-in-kind” should be rejected for the following reasons.

225. From the time SA4 was entered into, Mr Kingston paid interest on SA1 to SA3, which fell due for payment quarterly.<sup>335</sup> Mr Kingston’s evidence<sup>336</sup> that he simply assumed that Ms Bonnie Tran of TCFM would make interest payments on SA1 to

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<sup>332</sup> CB4990.

<sup>333</sup> CB735.

<sup>334</sup> Kingston 1 [314] – [315] at CB207. Mr Kingston amended paragraph 314 in evidence in chief at Kingston XC T395 – 396.

<sup>335</sup> See, for example, Kingston 1 [375] at CB219. See also the schedule of payments referred to Guo 1, Annexure B at CB 108.

<sup>336</sup> Kingston 1 [279] at CB201, [369] at CB219, [376] at CB 219, [405] at CB226.

SA3 should be rejected because, except for copies to various China Taiping officers, CIG's invoices setting out the precise amount of interest were emailed to Mr Kingston alone.<sup>337</sup> At the very least, he must have forwarded them to Ms Tran. When Mr Kingston missed the first interest payment under SA4 (for the period October 2018 to April 2019),<sup>338</sup> Ms Zhou emailed him asking him to make the interest payment and he replied "*Wasn't this loan supposed to be a PIK interest instrument?*"<sup>339</sup> Mr Kingston said that "*[b]ecause we thought this was a PIK instrument we haven't been prepared for the interest payment – it wasn't in our cash flow model or banking system.*"<sup>340</sup> However, the true position was likely to be that he was concerned, having raised with Mr Wang that the money set aside for interest payments was running low.<sup>341</sup>

226. Mr Kingston had asked to see the agreements.<sup>342</sup> Mr Kingston says he realised he made an error in relation to SA4.<sup>343</sup> However, if he genuinely thought interest on SA1 to SA3 was to be payment in kind, he would have mentioned it immediately (CIG was chasing payment and threatened to classify the loan as a "suspicious loan"<sup>344</sup>) and not made any further interest payments under SA1 to SA3.<sup>345</sup>
227. Mr Kingston must have turned his mind to what Mr Wang allegedly said about interest on SA1 to SA3 and the proper construction of clause 7 of SA4. He agreed that it would have been reasonable to immediately put a stop to the interest payments,

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<sup>337</sup> CB12785, CB4667, CB13376.

<sup>338</sup> Kingston 1 [378] at CB220.

<sup>339</sup> Kingston 1 [380] – [381] at CB220.

<sup>340</sup> Kingston 1 [386] at CB221.

<sup>341</sup> Kingston 1 [385] at CB221.

<sup>342</sup> See paragraph 203.

<sup>343</sup> Kingston XX T566:16-26.

<sup>344</sup> Kingston 1 [380] – [398] at CB220-224.

<sup>345</sup> The interest payment for SA1 to SA3 for April to June 2019 was paid on 3 July 2019: Kingston XX T570:24-571:29.

raise it with CIG or pay under protest.<sup>346</sup> However, he did none of those things and raised the issue for the first time in his defence.<sup>347</sup>

228. Mr Kingston's evidence that the interest payments on SA1 to SA3 were meant to be 'payment-in-kind' should be rejected. It is not supported by the objective facts and is inconsistent with his conduct at the time.

### **October 2019 Taiping visit and communications about interest, early termination and default**

229. On 19 September 2019, Ms Zhou sent an email to Mr Kingston chasing financial information and verification of GrowthOps' collateral. Ms Zhou's email also said:<sup>348</sup>

*Also, our new head of alternative investment is planning a trip to visit you and Sargon in mid-October, to discuss TAIPING Greater Bay Fund's equity investment in Sargon and further cooperation. Shall we schedule a call next week to discuss?*

230. Later same day Mr Kingston responded:<sup>349</sup>

*That is great news. Sargon is on track to become the largest pension trustee in the world, so it makes sense to have a stronger relationship between Taiping and Sargon. We also have a lot of investors wanting to invest at the moment, who are strategic and significant global financial organisations. It would be good to have Taiping as an equity holder, sooner rather than later!*

*I'll respond to your document list shortly. October is good for me. Sargon has a launch event in Sydney on October 16th, perhaps we could time it around that and you could attend our Sydney launch event?*

231. Also on 19 September 2019, Ms Chan sent an email to Mr Kingston which attached an invoice for interest that accrued on the HK\$400 million loan during the period 1

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<sup>346</sup> Kingston XX T569:1-16.

<sup>347</sup> Kingston XX T569:17-570:12. Although Mr Kingston said he thought he raised the issue shortly after the receivership appointment, he did not refer to a specific communication and it was not taken up with him in re-examination.

<sup>348</sup> CB5068.

<sup>349</sup> CB5072.

July to 30 September 2019. The invoice was in the sum of HK\$7,252,036.89 and fell due for payment on 30 September 2019.<sup>350</sup>

232. On 23 September 2019, Ms Zhou sent an email to Mr Kingston concerning interest on Promissory Note 1 and the Facility Agreement:<sup>351</sup>

*Below please kindly find the accrued interest for **Sargon's 500 million HKD secured P note**. The total amount is HKD10,082,191.78, and bank details are as follow. Also kindly remind the due date for this interest payment is 30th of September.*

...

*Also for **400 million HKD personal loan**, according to the email which Emily has sent to you last Thursday, the total interest amount is HKD7,252,036.89. Please help to arrange the payment before 30th of September. I also attach the debit note for your easy instruction.*

233. Ms Zhou's email re-attached a copy of the invoice that Ms Chan sent to Mr Kingston on 19 September 2019.<sup>352</sup>

234. On 4 October 2019, Mr Kingston sent an email to Ms Zhou and Mr Yi Kai Huang:<sup>353</sup>

*Please see the receipts for the payments on 30th September 2019 attached that have been stopped by the bank's compliance department due to KYC/AML reasons. I've had a few discussions with the bank given my relationship (as a ANZ Private Bank customer) and unfortunately, they require the information below in order to process the payments. They will be sending the money back to me shortly, I am working on using another bank as a back-up if you cannot provide this information below. This is quite embarrassing for me and I'm in the middle of a public roadshow for Sargon, so it's a busy time. I apologise for delayed communication.*

*Please see below information for our KYC and AML requirements. I know it's a long list but I assume they'll have a lot of this information off the shelf.*

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<sup>350</sup> CB5069-5070.

<sup>351</sup> CB5077.

<sup>352</sup> CB5078.

<sup>353</sup> CB5081-5082.

...

235. Mr Kingston's email attached two ANZ payment advices:<sup>354</sup>
- (a) The first advice was for payment from TCFM to Taiping Trustees in the sum of HK\$10,082,191.78 with the description "Sargon". This sum corresponds with the sum in Ms Zhou's request for interest on Promissory Note 1 in her email of 23 September 2019 (referred to at paragraph 232 above).
  - (b) The second advice was for payment from TCFM to CIG in the sum of HK\$7,252,036.89 with the description "Phillip Kingston". This sum corresponds with the invoice for payment of interest on the HK\$400 million loan attached to Ms Chan's email of 19 September 2019 (referred to at paragraph 229 above).
236. On 10 October 2019, Ms Zhou sent an email to Mr Kingston, copying Mr Wang and Ms Liu, concerning Taiping's visit to Sydney, stating:<sup>355</sup>
- We would like to attend Sargon's launch event on next Wednesday (16th). Could you please tell us the detailed information about the location and time?*
- More importantly, on 17th, next Thursday, we would like to have a deep discussion with you to talk about the future potential cooperation between Taiping and Sargon. Please advice [sic] your office address and your availability.*
237. On 16 October 2019, Mr Wang, Ms Liu and Ms Chen attended Sargon's event in Sydney. According to Mr Kingston, the purpose of the event was "to announce the launch of Sargon's suite of technology products to the wider market".<sup>356</sup>
238. Also on 16 October 2019, Ms Chan sent an email to Mr Kingston which attached an invoice for interest that accrued on the HK\$253 million loan during the period

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<sup>354</sup> CB5083-5084.

<sup>355</sup> CB5088.

<sup>356</sup> Kingston 1 [430] at CB231.

1 May 2019 to 31 October 2019. The invoice was in the sum of HK\$7,147,270.14 and fell due for payment on 31 October 2019.<sup>357</sup>

239. On 17 October 2019, Mr Kingston met with officers from Taiping, including Mr Wang, Ms Chen and Ms Liu at Sargon's offices in Sydney. According to Mr Kingston, the following topics were discussed:<sup>358</sup>

- (a) the delay to Sargon's IPO;
- (b) the reason why the Complectus acquisition failed;
- (c) capital raising initiatives to be undertaken by Sargon, including private equity options, and whether these initiatives could be used to repay Taiping's loan to Sargon; and
- (d) the KYC and AML issues raised by Mr Kingston.

240. On 21 October 2019, Mr Huang sent an email to Mr Kingston:<sup>359</sup>

*As discussed between you and our senior management team, the outstanding issues are listed below:*

- 1. ANZ's feedback on LOC conditional on KYC/AML clearance of Taiping Trustee*
- 2. Accountant's letter or email regarding withholding tax*
- 3. TGO shareholding structure to confirm no change of collaterals*
- 4. Compliant check on APRA approval for use of fund from overseas*
- 5. Sargon's latest legal ownership structure*
- 6. Auditor's report of Sargon for FY2019*
- 7. SPA for Sargon's acquisitions*

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<sup>357</sup> CB5089-5090

<sup>358</sup> Kingston 1 [432]-[445] at CB231-234.

<sup>359</sup> CB5092



*8. The outstanding interests are HKD7252036.89 for 400m personal loan and HKD10082191.78 for Sargon's 500m HKD secured P note.*

*We are starting the issue of Termination of the loan agreement and P note, and we'll send the draft of TS to you ASAP.*

*In addition, kindly remind you that another interest due of HKD7147270.14 for 253m personal loan is required to pay before Oct. 31st.*

*Please reply us on these outstanding issues ASAP. Any other problems, please feel free to let us know.*

241. On 23 October 2019, Mr Kingston responded to Mr Huang. His email said, among other things:<sup>360</sup>

*3) I haven't heard back from ANZ yet on the letter of credit and am working on an alternative payment method which I hope to resolve in the next couple of days. I need to book flights to go to the bank in person to make the wire transfer.*

242. On 1 November 2019, Ms Zhou sent an email to Mr Kingston chasing payment of interest:<sup>361</sup>

*Could you please confirm that whether the interest for 253M loan has been paid yesterday according to the invoice attached sent to you by Emily. Besides, could you please advise the process for the payment of interest for the 400M personal loan and 500M Sargon P note. Thank you.*

243. Ms Zhou's email attached a copy of the interest invoice for the sum of HK\$7,147,270.14 for the period 1 May 2019 to 31 October 2019 in respect of the HK\$253 million loan that Ms Chan sent to Mr Kingston on 16 October 2019 (referred to at paragraph 238 above).<sup>362</sup> Mr Kingston did not respond to this email.

244. On 5 November 2019, Mr Huang sent an email to Mr Kingston:<sup>363</sup>

*Enclosed please find the Term Sheet of early termination agreement for your reference. In addition, we cannot provide KYC/AML documents needed by ANZ*

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<sup>360</sup> CB5098.

<sup>361</sup> CB5107.

<sup>362</sup> CB5108.

<sup>363</sup> CB5110.

*yet because there are too many of documents. More importantly, the requirement of APRA reporting may affect the KYC/AML investigation. Would you please make the interest payment through your bank account in HK?*

245. Mr Huang's email attached draft term sheets entitled:<sup>364</sup>

- (a) "Early Termination Agreement -- Term Sheet. 400 million Personal Loan – Phillip James Kingston";
- (b) "Early Termination Agreement – Term Sheet. 253 million Personal Loan – Phillip James Kingston"; and
- (c) "Early Termination Agreement – Term Sheet. Sargon 500 million Secured Promissory Note".

246. Each of the draft term sheets had a section entitled "Outstanding Interest" which set out interest payable to 31 January 2020 in respect of the:

- (a) HK\$400 million loan:

*Total Outstanding Interest: **HKD\$17,147,626.63** (Form 2019.7.1 to 2020.1.31)*

*Breakdown as shown below:*

- 1) HKD\$ 7,252,036.89 (Form 2019.7.1 to 2019.9.30)*
  - 2) HKD\$ 7,379,142.43 (Form 2019.10.1 to 2019.12.31)*
  - 3) HKD\$ 2,516,447.32 (Form 2020.1.1 to 2020.1.31)*
- (indicative on actual)*

- (b) HK\$253 million loan:

*Total Outstanding Interest: **HKD\$10,778,533.71** (Form 2019.5.1 to 2020.1.31)*

*Breakdown as shown below:*

- 1) HKD\$ 7,147,270.14 (From 2019.5.1 to 2019.10.31)*
  - 2) HKD\$ 3,631,263.57 (From 2019.11.1 to 2020.1.31)*
- (indicative on actual)*

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<sup>364</sup> CB5111-5113.

- (c) Sargon HK\$500 million secured promissory note:

*Total Outstanding Interest: HKD\$ 23,561,643.84 (Form 2019.7.1 to 2020.1.31)*

*Breakdown as shown below:*

- 1) HKD\$ 10,082,191.78 (Form 2019.7.1 to 2019.9.30)*
  - 2) HKD\$ 10,082,191.78 (Form 2019.10.1 to 2019.12.31)*
  - 3) HKD\$ 3,397,260.27 (Form 2020.1.1 to 2020.1.31)*
- (Pro-rata basis, indicative on actual)*

247. Mr Kingston did not respond to Mr Huang's email of 5 November 2019.

248. On 14 November 2019, Mr Huang sent a further email to Mr Kingston concerning the outstanding interest:<sup>365</sup>

*It has been a long time since we've been in touch. As the outstanding interest is still outstanding, we may downgrade this project. It may lead to serious consequences.*

*Could you please advise the process of interest payment for the loan of 653m HKD and 500m HKD Sargon's secured P Note?*

249. On 15 November 2019, Mr Huang sent an email to Mr Kingston concerning an article in the Australian Financial Review reporting on Sargon's proposal to raise a convertible note. Mr Huang also said:<sup>366</sup>

*Lastly, kindly note that the interests of HKD653m loan and the HKD 500m secured P note are still outstanding. Our team is under very high pressure. Please make the interest payment ASAP, or we cannot get approvals to do anything of your requirements. Moreover, our legal may send you a formal EOD letter.*

250. On 16 November 2019, Mr Kingston responded:<sup>367</sup>

*To confirm our position:*

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<sup>365</sup> CB5120.

<sup>366</sup> CB5210.

<sup>367</sup> CB5213.

*1) Sargon is not raising a convertible note at all any more. Please disregard the media speculation in the AFR and The Australian newspapers*

*2) It is illegal for me to pay you until I have your KYC/AML information and I need an update on this please when you have time.*

*3) I cannot raise any capital to refinance our arrangements until the security over TCFM is released (which you shouldn't have - it was only there for a short time in 2018)*

### **The \$4.4 million payment**

251. On 2 December 2019, Ms Minna Zhang of Ashurst, the solicitors acting for Taiping Trustees and CIG, sent an email to Mr Kingston attaching four letters of demand. One of the letters was addressed to Mr Kingston and concerned the Facility Agreement. The other three letters were addressed to TCFM, TIM and Sargon respectively and concerned Promissory Note 1.<sup>368</sup>
252. The letters stated that the outstanding interest constituted events of default and demanded payment of such interest by 10 December 2019 in the following sums:
- (a) Promissory Note 1: HK\$10,082,191.78, being the sum set out in Ms Zhou's email to Mr Kingston of 23 September 2019 (see paragraph 232 above), plus further interest to 30 November 2019 in the sum of HK\$6,684,931.51.<sup>369</sup>
  - (b) SA1-3: HK\$7,252,036.89, being the sum of the invoice that Ms Chan had sent to Mr Kingston on 19 September 2019 (see paragraph 231 above), plus an incorrect demand for default interest in the sum of HK\$4,839,776.83.<sup>370</sup>
  - (c) SA4: HK\$7,147,270.14, being the sum of the invoice that Ms Chan had sent to Mr Kingston on 16 October 2019 (see paragraph 238 above), plus an incorrect demand for default interest in the sum of HK\$1,178,581.32.<sup>371</sup>

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<sup>368</sup> CB5215-5231.

<sup>369</sup> CB5216, CB5220 and CB5224.

<sup>370</sup> CB5228-5229.

<sup>371</sup> CB5228-5229.

253. On 6 December 2019, Mr Kingston responded to Ms Zhang in the following terms:<sup>372</sup>

*As we have advised your client on numerous occasions, when we learnt that the underlying beneficiaries have changed and presumably the controlling influences, we asked to be informed of our new counterparties. Your client has refused to provide this information despite numerous follow-ups over a period of months.*

*We have been advised that under the sanctions laws, it is a strict liability offence to not take reasonable precautions and conduct due diligence on our counterparties.*

...

*We remain ready and able to pay the interest payments once we have received the requested information.*

254. Later that day, Ms Zhang responded by email to Mr Kingston, saying that Ashurst was not aware of any sanctions law in Australia relevant to the lending of money which would prevent Mr Kingston from paying Taiping Trustees and CIG. The email went on to say that even so, Taiping Trustees and CIG would be happy to receive the outstanding interest demanded in the letters of 2 December 2019 to a trust account held by Ashurst. Ms Zhang also reminded Mr Kingston that, as stated in Ashurst's letters dated 2 December 2019, the payments must be made by 10 December 2019.<sup>373</sup>

255. On 9 December 2019, Mr Kingston sent an email to Ms Zhang saying, "*It seems that this ought to be a matter for your compliance team. We will make that payment to your trust account if I don't hear from you by 6pm today*".<sup>374</sup>

256. David Greenberg of Ashurst responded to Mr Kingston:<sup>375</sup>

*Can you please provide us with a copy of your remittance advice once when these payments have been made so we can ask our accounts payable team to look out for these payments.*

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<sup>372</sup> CB5236.

<sup>373</sup> CB5237.

<sup>374</sup> CB5270.

<sup>375</sup> CB5271.

*In accordance with our letters dated 2 December 2019 the payments must be completed by on or before 10 December 2019. Our clients reserve their rights to take further action in the event that these remittances are not provided before this deadline.*

257. On 9 and 10 December 2019, Mr Kingston and Mr Greenberg exchanged emails concerning the currency in which payment could be made, the exchange rate that would apply and the basis on which money would be held on trust by Ashurst.<sup>376</sup>

258. On 10 December 2019, Mr Kingston sent an email to Mr Greenberg:<sup>377</sup>

*OK David. I didn't hear from you in time (by 3pm) and the transfer has already gone in AUD.*

...

*I haven't authorised any wires for the claimed charges over and above the interest invoices as this is in dispute and subject to ongoing discussions with Taiping, only the three invoices as they were sent to me by Taiping which is approx.. A\$4.4 million.*

259. On 11 December 2019, Mr Greenberg sent an email to Mr Kingston saying that the money had not arrived in Ashurst's trust account and requesting a copy of the remittance advice.<sup>378</sup> Shortly afterwards, Mr Kingston sent an email to Mr Greenberg which attached a Deposit Receipt from ANZ bank for the payment of A\$4.4 million.<sup>379</sup>

260. On 11 December 2019, Mr Huang sent an email to Mr Greenberg which instructed Ashurst to transfer the sum of A\$4.4 million in accordance with the details set out in the attachment to his email, which were as follows:<sup>380</sup>

*Sargon P note (Principle: HKD500m):*

*Bank (銀行): China CITIC Bank International Limited*

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<sup>376</sup> CB5272-5273.

<sup>377</sup> CB5278.

<sup>378</sup> CB5279.

<sup>379</sup> CB5280.

<sup>380</sup> CB5281 and CB5298.

*Account Name ( 账户名称):Taiping Trustees Limited*

*Account No. ( 戶口號碼): 694-1652314-00*

*Taiping Trustees Address: Unit 3, 19/F, No.18 King Wah Road, Hong Kong.*

*Swift Code: KWHKHKHH*

*Interest to transfer: HKD 10,082,191.78*

***Loan to Phillip Kingston(Principle: HKD653m):***

*Beneficiary: China Insurance Group Finance Company Limited*

*Beneficiary Bank: Bank of China (Hong Kong) Ltd.*

*Beneficiary Bank Address: 2A Des Voeux Road, Central, Hong Kong*

*Beneficiary Account No.: 01287512448797*

*Swift Code: BKCHHKHH*

*Interest to transfer: the remaining in your trust account*

261. On 12 December 2019, Ashurst transferred:<sup>381</sup>
- (a) A\$1,876,494.05 (HK\$10,082,191.78) to Taiping Trustees; and
  - (b) A\$2,523,505.97 (HK\$13,491,688.24) to CIG.
262. On 13 December 2019, CIG received the sum of HK\$13,491,688.24 and recorded this payment in its ledger with description "Temporary receipt from AUSTRALIA company".<sup>382</sup>

## **Demands**

263. On 19 December 2019, Ms Zhang sent an email to Mr Kingston which attached a letter addressed to Mr Kingston concerning both the Facility Agreement and Promissory Note 1. The letter stated that there had been failure to pay the interest requested in Ashurst's letters of 2 December 2019 in full even when credit was given for the \$4.4 million payment made by Mr Kingston on 11 December 2019. The letter

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<sup>381</sup> Ashurst's trust account records are at CB5301-5321.

<sup>382</sup> CB773.

also proposed the appointment of investigating accountants to Sargon, TIM and TCFM.<sup>383</sup>

264. Also on 19 December 2019, Ms Zhang sent a separate email to Mr Kingston which attached a letter marked "Without Prejudice". The letter set out the interest payments that remained outstanding under the Facility Agreement and Promissory Note 1 as follows:<sup>384</sup>

<b>Loan Agreement</b>	<b>Interest Amount</b>	<b>Description</b>
HKD\$653,000,000 Loan Agreement – Original Loan	HKD\$7,271,733.01	<ul style="list-style-type: none"> <li>• Interest payment for quarter ending 31 December 2019.</li> <li>• Default interest payable for late payment of interest accrued for quarter ending 30 September 2019.</li> </ul>
HKD\$653,000,000 Loan Agreement – Loan	HKD\$907,618.79	<ul style="list-style-type: none"> <li>• Interest payable for half year ending on 31 October 2019.</li> </ul>
HKD\$500,000,000 Secured Promissory Note	HKD\$10,286,636.22	<ul style="list-style-type: none"> <li>• Interest payable for quarter ending on 31 December 2019.</li> <li>• Default interest payable for late payment of interest accrued for quarter ending 30 September 2019.</li> </ul>

<sup>383</sup> CB5377-5379.

<sup>384</sup> CB5380-5382.



265. The letter also invited Mr Kingston to put forward a proposal as to how the outstanding interest would be discharged.<sup>385</sup>
266. Mr Guo gave evidence during cross-examination that he relied on Ashurst's letter of 2 December 2019 at CB5228-5229 and Ashurst's "without prejudice" letter of 19 December 2019 at CB5381-5382 to form the view expressed at paragraph 17 of his witness statement, namely that:<sup>386</sup>
- (a) HK\$7,252,036.89 of Mr Kingston's payment received by CIG was applied towards "Q3 interest" (July to September 2019) that accrued on the HK\$400 million loan. Mr Guo said he inferred from Ashurst's "without prejudice" letter of 19 December 2019 that Q3 interest had already been paid.
  - (b) HK\$6,239,651.35 of Mr Kingston's payment received by CIG was applied towards interest that accrued on the \$253 million loan for May to October 2019. Mr Guo said he inferred this from Ashurst's "without prejudice" letter of 19 December 2019 which said that "970 thousand interest" was "remaining to be paid".
267. On 30 December 2019, Mr Huang sent an email to Mr Kingston:<sup>387</sup>

*Please arrange the following interest payment:*

- 1. The accrued interest for Sargon's 500 million HKD secured P note. The total amount is HKD 10,286,636.22.*
- 2. The accrued interest for HKD 400 million Phillip's personal loan. The total amount is HKD 7,271,733.01.*
- 3. The outstanding interest for last interest payment. The total amount is HKD 907,618.79.*

*Please transfer the interest to ASHURST's trust account before December 31st, 2019.*

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<sup>385</sup> CB5382.

<sup>386</sup> Guo XX at T374:19-375:9.

<sup>387</sup> CB5383.

268. Also on 30 December 2019, Mr Kingston sent an email to James Marshall of Ashurst, which attached a letter headed "Without Prejudice and Confidential".<sup>388</sup> The letter said, among other things:

- (a) Since Taiping's meeting with Mr Kingston on 17 October in Sydney, significant work had been undertaken to refinance the facilities in full, well ahead of their repayment date, in accordance with the wishes expressed by Taiping on that day.
- (b) Sargon was anticipating an IPO in the latter half of 2019, which did not come to fruition due to market conditions. Had this proceeded, it is likely that TIM would have paid the principal amount owing under the facilities at that time.
- (c) TIM noted that any enforcement action under the facilities was likely to significantly prejudice TIM's ability to repay some or all of the amounts owing under the facilities, due to the fact that TIM's assets are substantially tied to the equity value of Sargon, and whose value would likely deteriorate accordingly.
- (d) While Taiping may have certain entitlements under the facilities to take enforcement action, in Mr Kingston's view, such action would severely prejudice the ability for Taiping to recover some or any of the amounts owing or which would be owing under the facilities.
- (e) A negotiated outcome in relation to the amounts which may become payable in the short term, as well as an agreed hiatus or waiver in relation to any enforcement action, would enable Mr Kingston to progress the refinancing of the facilities and would enable repayment of the facilities well ahead of their maturity date in 2021.

269. On 9 January 2020, Mr Kingston sent an email to Mr Wang to update him on the refinancing. Mr Wang replied that he would forward Mr Kingston's email to the responsible team.<sup>389</sup>

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<sup>388</sup> CB5384-5386.

<sup>389</sup> CB5430-5435.

270. On 9 January 2020, Mr Huang chased Mr Kingston about the outstanding interest:<sup>390</sup>

*Please pay the outstanding interest before Jan.14th,2020. The details of the outstanding interest are as follows:*

*a. The accrued interest for Sargon's 500 million HKD secured P note. The total amount is HKD10,286,636.22.*

*b. The accrued interest for HKD 400 million Phillip's personal loan. The total amount is HKD 7,271,733.01.*

*c. The outstanding interest for last interest payment. The total amount is HKD 907,618.79.*

271. Mr Huang's email also requested audit and valuation reports for TIM and/or Sargon.

272. On 10 January 2020, Mr Kingston responded to Mr Huang, *"I'll come back to you on this shortly"*.<sup>391</sup>

273. On 14 January 2020, Mr Kingston sent a further email to Mr Huang, *"Just need a few more days given EOY and Christmas period, staff are still on leave"*.<sup>392</sup>

274. On 20 January 2020, Mr Greenberg sent an email to Mr Kingston attaching four letters of demand addressed to Mr Kingston, Sargon, TCFM and TIM respectively.<sup>393</sup>

275. The letter of demand addressed to Mr Kingston demanded payment of the principal, outstanding interest and enforcement costs pursuant to clauses 7.5 and 33.1 of the Loan Agreement,<sup>394</sup> identifying the following events of default:<sup>395</sup>

- (a) On 31 December 2019, failure to pay CIG the sum of HK\$7,271,733.01, being interest then due and payable to CIG under the HK\$400 million loan; and

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<sup>390</sup> CB5438.

<sup>391</sup> CB5439.

<sup>392</sup> CB5452.

<sup>393</sup> CB5455-5466.

<sup>394</sup> CB5457.

<sup>395</sup> CB5456.

- (b) On 31 December 2019, failure to pay CIG the sum of HK\$907,618.79, being interest then due and payable to CIG under the HK\$253 million loan.
276. The letters of demand addressed to Sargon, TIM and TCFM cited the following events of default in respect of Promissory Note 1:<sup>396</sup>
- (a) On 4 October 2019, failure by TIM to pay interest under clause 2(b) of the secured note for the quarter ending 30 September 2019 in full; and
- (b) On 31 December 2019, failure by TIM to pay the sum of HK\$10,286,636.22, being interest payable under the secured note for the quarter ending 31 December 2019 and default interest then payable for late payment of interest accrued for the quarter ending 30 September 2019,
- and demanded repayment of the secured monies and interest recoverable by Taiping Trustees, warning that, if payment was not made, Taiping may exercise its rights immediately and without further notice.<sup>397</sup>
277. On 20 January 2020, Mr Huang sent an email to Mr Kingston attaching two proposed standstill letters. The first letter was addressed to Mr Kingston concerning the Facility Agreement and the second letter was addressed to TIM, TCFM, Sargon and Mr Kingston concerning Promissory Note 1. Mr Huang's email requested that the standstill letters be signed and returned by 23 January 2020.<sup>398</sup>

### **Appointment of receivers**

278. On 29 January 2020, Taiping Trustees appointed Jason Preston and Shaun Fraser of McGrathNicol as receivers and managers of TCFM, TIM and Sargon Capital. On that day, Mr Fraser sent an email to Mr Kingston attaching formal notices of appointment. The email said:<sup>399</sup>

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<sup>396</sup> CB5459, 5462 and 5465.

<sup>397</sup> CB5460, 5463 and 5466.

<sup>398</sup> CB5467-5497.

<sup>399</sup> CB5502-5508.

- (a) the appointment "follows recent discussions and correspondence with Ashurst";
- (b) Mr Fraser and Mr Preston would like to meet with Mr Kingston as soon as possible to discuss the appointment; and
- (c) the preliminary objective of the appointment was to gather information in relation to the secured creditors' security, to understand the financial position of the group and to understand Mr Kingston's plans and progress towards raising capital and refinancing the facilities provided by Taiping Trustees.

279. Later that day, Mr Kingston replied to Mr Huang's email of 20 January 2020. The email, which was headed "without prejudice" and "urgent", said:<sup>400</sup>

*I have just seen this email after some very disappointing news that Taiping has appointed external receivers to Sargon Capital. This will be all over the newspapers in Australia and New Zealand in the next 24 hours and is going to severely damage the value of Sargon.*

*I have attached a screenshot of how this appears to the public and all of our clients on the ASIC website.*

*I am unsure why you have done this as it significantly damages the ability for us to refinance the facilities. As I notified you in writing, we are in close negotiations to refinance the whole facility with Taiping. This is now going to be very difficult.*

*Having now seen these standstill letters, we are comfortable with them. Once this is in the media, however, it will be difficult to come back from.*

*Can you please call me urgently to try to stop this before the media is aware of the external administration? +852 9386 7191. Clients will start leaving as soon as it is public and our licences may be in jeopardy in 3 countries.*

280. On 30 January 2020, Mr Fraser sent an email to Mr Kingston:<sup>401</sup>

- (a) referring to a discussion on 29 January 2020;

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<sup>400</sup> CB5511.

<sup>401</sup> CB5513.

- (b) saying that, notwithstanding Mr Kingston's email to Taiping on 29 January 2020, the nature of the work to be undertaken by the receivers had not changed; and
- (c) requesting preliminary information as a matter of urgency.

281. Also on 30 January 2020, Mr Kingston, in his capacity as CEO of Sargon, sent a letter to Mr Wang, copying Mr Fraser, describing the likely consequences of the appointment of receivers. The letter proposed that the receivership be suspended for a period of 10 business days to allow the parties to negotiate, in good faith, to either reach a settlement or enter into an acceptable standstill agreement.<sup>402</sup>

### Correspondence with Gilbert + Tobin

282. On 1 February 2020, Ashurst sent a letter to Mr Peter Bowden of Gilbert+Tobin, who was advising the board of Sargon (including Mr Kingston) in connection with issues arising from the appointment of receivers.<sup>403</sup> The letter said that Taiping was prepared to suspend the receivership for a period of 10 business days (**Suspension Period**) on the terms which were set out in the letter and to issue a press release informing the market that that had occurred. The letter then said:<sup>404</sup>

2. *Release of this press release is conditional upon payment of the following amounts by on or before 5pm Sydney time on 3 February 2020:*
  - a. *the sum of HKD\$10,286,636.22, being the interest specified in our letter to Sargon dated 20 January 2020 with respect to the Secured Promissory Note. The amount of AUD\$744,250.39 in the Sargon Capital Pty Ltd Westpac bank account with account number ending in -956 was frozen by the receivers. This amount will be credited towards this payment of interest so that your client will only need to pay the balance; and*
  - b. *the sum of HKD\$7,272,733.91 and HKD\$907,618.79 being the interest specified in our letter to Mr Kingston on 20 January 2020 with respect to the CIG Loan Agreement.*

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<sup>402</sup> CB5522

<sup>403</sup> Kingston 1 [516] at CB254.

<sup>404</sup> CB5532-5533.

283. On 2 February 2020, Gilbert+Tobin responded to Ashurst's letter. The letter said that the companies were unable to agree to making payment of the amounts specified in paragraph 2 of Ashurst's letter by 5:00pm (Sydney time) on 3 February 2020, and put forward an alternative proposal of steps to be taken during the Suspension Period.<sup>405</sup>
284. On 13 February 2020, Mr Kingston sent an email to Mr Wang, Mr Huang, Ms Liu, Ms Zhou and other officers of Taiping attaching a letter that was marked "without prejudice" and written in Chinese.<sup>406</sup> The letter said, among other things, that Mr Kingston was very sorry for some matters that had occurred recently and asked that Taiping "*spare me an opportunity to have a direct and effective communication in good faith with senior officials of your company with decision-making powers so that it may be highly likely that all debts owing to your company be repaid on time*".<sup>407</sup>

## VARIOUS FACTUAL MATTERS

### Incorporation of the SPVs

285. The evidence is that Mr Kingston was responsible for the incorporation of each of Trimantium International Holdings,<sup>408</sup> Asia Selangor,<sup>409</sup> Pattani,<sup>410</sup> and Forci.<sup>411</sup> However, except for Trimantium International Holdings, Mr Kingston was not a director of any of the SPVs and did not have any interest in those companies at the time of the GrowthOps IPO:

- (a) The sole director and secretary of Asia Selangor has been Vonny Tjhin since its incorporation.<sup>412</sup> The sole shareholder of Asia Selangor has always been Ms Tjhin as trustee of the Selangor Trust No. 1 and Mr Kingston's evidence is

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<sup>405</sup> CB5536-5537.

<sup>406</sup> CB14875. An English translation is at CB14876.

<sup>407</sup> CB14876.

<sup>408</sup> Kingston XX T555:2-8.

<sup>409</sup> Kingston XX T527:21-25.

<sup>410</sup> Kingston XX T554:9-12.

<sup>411</sup> Kingston XX T547:27-28.

<sup>412</sup> CB14643.

he did not have an interest in that trust.<sup>413</sup> Ms Tjhin was Mr Kingston's colleague and was the general manager of KDIS, a company founded by Mr Kingston.<sup>414</sup>

- (b) The sole director and secretary of Pattani has been Thananchanok Thaicharoen since its incorporation,<sup>415</sup> who has always been the sole shareholder of Pattani as trustee of the Pattani Private Trust.<sup>416</sup> Mr Kingston's evidence is he did not have an interest in that trust.<sup>417</sup> Mr Kingston's evidence is that Thananchanok Thaicharoen was a property developer he knew from London, with whom he had business associations.<sup>418</sup>
- (c) The sole director, secretary and shareholder of Forci at its incorporation and at the time that Forci applied for shares in GrowthOps was Maria Di Vincenzo, Mr Kingston's wife's grandmother who was born in Italy in 1938.<sup>419</sup> Ms Di Vincenzo held those roles from 20 January 2018 until 5 February 2018, but was replaced by Akshita Lad for 11 days from 5 – 16 February 2018, who was then replaced by Nattiya Pothong.<sup>420</sup> Ms Pothong was director and secretary of Forci from 16 February 2018 until 29 March 2019.<sup>421</sup> Ms Pothong held shares in Forci as trustee of the Pothong Family Trust. Mr Kingston's evidence is that he did not hold an interest in that trust.<sup>422</sup> Mr Kingston's evidence is that he had never met Ms Pothong, who was a friend of Ms Thaicharoen.<sup>423</sup>
- (d) Mr Kingston was a director and secretary of Trimantium International Holdings at the date of its incorporation on 27 November 2017 until

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<sup>413</sup> CB14644; Kingston XX T531:20-25.

<sup>414</sup> Kingston XX T531:15-21.

<sup>415</sup> CB14665.

<sup>416</sup> CB14667; Kingston XX T554:2729.

<sup>417</sup> Kingston XX T554:2729.

<sup>418</sup> Kingston XX T549:30-550:4; T554:18-26.

<sup>419</sup> Kingston T547:27-548:24; CB14681.

<sup>420</sup> CB14681.

<sup>421</sup> CB14681.

<sup>422</sup> Kingston XX T551:9-11.

<sup>423</sup> Kingston XX T549:23-24.



19 January 2018, when Mr Kingston's business associate, Aron D'Souza, became sole director and secretary.<sup>424</sup> Trimantium Limited was the sole shareholder in Trimantium International Holdings until 14 March 2018, when it was replaced by Louis Holbrook Company Pty Ltd, a company controlled by Mr D'Souza.<sup>425</sup> Trimantium Limited was a company incorporated in Hong Kong of which Mr Kingston was the sole shareholder and director.<sup>426</sup>

286. During the course of Mr Kingston's cross-examination, the following exchange occurred:<sup>427</sup>

*China Taiping left you to establish the special purpose vehicles, didn't they?--- Yes.*

*And you did not want it to appear that you had control of the special purpose vehicles because that would mean that you would have to disclose that in the prospectus, correct?---Ah I did not want to appear to have control because I did not have control.*

*Now would you answer my question please. You did not want to have control of the special purpose vehicles because if you did you would need to disclose that in the GrowthOps prospectus wouldn't you?---That is a legal question I don't know.*

*You completed a notice of substantial shareholding for the GrowthOps prospectus didn't you?---For myself yes I did.*

*And you understood the effect and purport of that document when you signed it?-- -Yes.*

*And you understood that if you held shares in GrowthOps before the prospectus was lodged you would need to disclose that to the ASX didn't you?---Yes.*

*And you did not want to have an interest in the special purpose vehicles because you would have to disclose it in the [prospectus] prior to the GrowthOps lodgement date and for the purposes of the listing, correct?---There is a lot of questions in that. I - I did not have a beneficial interest so I did not disclose one.*

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<sup>424</sup> CB14740-14741; Kingston T555:4-10.

<sup>425</sup> CB14741-14742; Kingston XX T555:11-13.

<sup>426</sup> Kingston XX T445:3-6.

<sup>427</sup> Kingston XX T533:25-535:2.

*And you did not want to have to disclose a beneficial interest, did you?---Um I - I don't know - I did not want to have a beneficial interest, I did [not] have one, I did not disclose one.*

*You knew that if you as the founder of GrowthOps were going into a prospectus with 100 percent of the shares in your name it would look like you were the only person who had faith in your company, correct?---In that hypothetical situation that would look very strange indeed.*

*Yes, and for the purposes of subscriptions for the GrowthOps IPO the more diverse the subscription the better it would look, correct?---Probably, yes.*

*And so that is why when you establish these special purpose vehicles you used people that were associated with you, correct?---No.*

287. Despite Mr Kingston's denial, the objective evidence points to an unusual IPO, in which some 84.2% of the A\$70 million raised came from subscriptions made by the SPVs<sup>428</sup> in circumstances where:
- (a) The SPVs had been incorporated by Mr Kingston even though he did not hold shares in them or have any formal management control as a director.
  - (b) The SPVs' only purpose was to subscribe in GrowthOps shares in circumstances where those subscriptions were wholly funded by advances from TCFM, using a combination of its own funds and funds advanced by CIG to Mr Kingston pursuant to the supplementary agreements.<sup>429</sup>
  - (c) Mr Kingston executed SA2 in his personal capacity and as a director of Trimantium International Holdings and Asia Selangor, despite not being a director of either company at the time.<sup>430</sup> Mr Kingston also submitted a loan application form on behalf of Asia Selangor, and inserted his own name and details as "director" of Asia Selangor despite not being a director of Asia Selangor at that time either.<sup>431</sup>

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<sup>428</sup> See paragraph 152.

<sup>429</sup> Kingston XX T552:2-11; paragraph 291 below.

<sup>430</sup> Kingston XX T530:5-531:4; CB14740.

<sup>431</sup> Kingston XX T527:21-31; CB2082

- (d) Forci subscribed for A\$17 million worth of shares in GrowthOps while Ms Di Vincenzo was sole director, secretary, and shareholder of Forci.<sup>432</sup> Ms Di Vincenzo was Mr Kingston's wife's grandmother. She was born in Italy and was 79 years old at the time.
- (e) Mr Kingston ceased to be a director of Trimantium International Holdings on 19 January 2018 (i.e. two days before Trimantium International Holdings applied for shares in the IPO),<sup>433</sup> and ceased to be a shareholder in Trimantium International Holdings on 14 March 2018 (i.e. two days before Trimantium International Holdings received shares in the IPO).<sup>434</sup>
- (f) Although Mr Kingston did not ostensibly own or control the SPVs, they provided the GrowthOps shares allotted to them as security for the loans taken out by Mr Kingston from CIG.<sup>435</sup>

288. Mr Kingston was well aware of his disclosure obligations. On 14 November 2017 he received advice in the following terms from James Hutton of MinterEllison:<sup>436</sup>

*2. Assuming that you are, by any calculation, below the 20% takeovers threshold, you also need to carefully manage your substantial shareholder notification requirements once the company is listed. Substantial shareholding notification starts at the 5% level and then continues at 1% increments, up or down. Substantial shareholder notices are notoriously complex disclosure documents and, again, a proper analysis would need to be undertaken to make sure from day one of the listing that you are properly disclosing any relevant interests.*

*3. Disclosure to the board – the board should receive (and have documented) a full disclosure of any of your relevant relationships with the third party clients who are investing in the IPO so that these can be recorded, whether in their own right or through material personal interest notices to the extent that they are in fact constituting material personal interests for you as a director. **The Board needs to be comfortable that the third party client relationships are no more than that otherwise, to the extent not already disclosed in the prospectus,***

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<sup>432</sup> Paragraph 285(c).

<sup>433</sup> Paragraphs 127, 285(d).

<sup>434</sup> Paragraphs 151; 285(d).

<sup>435</sup> Kingston XX T535:3-13.

<sup>436</sup> CB7581-7583.

*additional prospectus disclosure may become necessary if any new material arrangements between you and the third party clients have arisen since the prospectus was lodged. KWM will have covered off your pre-existing Director interests in the prospectus due diligence (ie including any fees and interests you have in relation to the formation or the promotion of GrowthOps and its IPO – s711 of the Corps Act) but you need to keep abreast of any additional fees or interests (if any) that arise from the third party client participation in the IPO. (Emphasis added)*

289. As a substantial shareholder with a 26.2% relevant interest in GrowthOps,<sup>437</sup> Mr Kingston stood to benefit from a rise in the market price of its securities. This would only happen if the market viewed the IPO as a success. By Mr Kingston's own admission, it was desirable that the subscriptions appear to be "diverse" and it would have looked "strange" if he had been the only person who seemed to have faith in his company.
290. These circumstances give rise to an inescapable inference that Mr Kingston incorporated the SPVs as part of a scheme to make the GrowthOps IPO appear to be a success. When the unusual nature of the involvement of the SPVs was put to Mr Kingston in cross examination, he suggested that the SPVs had a loan from TCFM to pay for their shares. However, this was the first time this explanation was given and it has not been verified by any documents.<sup>438</sup>

### **Listing of Trimantium GrowthOps**

291. The effect of Mr Kingston's evidence is that the majority of the funds advanced to him as borrower by CIG pursuant to SA1, SA2 and SA3 were used by Trimantium International Holdings, Asia Selangor, Pattani and Forci to subscribe for shares in the GrowthOps IPO as follows:
- (a) **Trimantium International Holdings:** SA1 contemplated that Trimantium International Holdings would subscribe for HK\$87 million worth of shares in the GrowthOps IPO.<sup>439</sup> Trimantium International Holdings *applied* for

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<sup>437</sup> Kingston XX T546:18-547:9; CB14414-14416.

<sup>438</sup> Kingston XX T552:2-9.

<sup>439</sup> Kingston XX T562:4-6.

A\$14,358,647 worth of shares on 21 January 2018, but in fact subscribed for A\$7,945,570 worth of shares "two months later".<sup>440</sup> Asia Selangor had already used the funds from SA1 to subscribe for shares in the GrowthOps IPO. Trimantium International Holdings' subscription was funded using TCFM's own funds and (according to Mr Kingston) TCFM was reimbursed by SA3.<sup>441</sup>

- (b) **Asia Selangor:** SA2 contemplated that Asia Selangor would subscribe for HK\$87 million worth of shares in the GrowthOps IPO.<sup>442</sup> In fact, Asia Selangor applied for A\$20 million worth of shares in GrowthOps on 19 January 2018, which was more than HK\$87 million,<sup>443</sup> and pre-dated the execution of SA2—Asia Selangor's subscription was funded in part by funds advanced by CIG pursuant to SA1 (approximately A\$14,358,000) and in part by TCFM's own money.<sup>444</sup>
- (c) **Pattani:** Mr Kingston's evidence is that Mr Wang informed him that Pattani's subscription in the GrowthOps IPO would need to be funded by money from Promissory Note 1, and then refunded by SA3.<sup>445</sup> Pattani subscribed for A\$14 million worth of shares in GrowthOps.<sup>446</sup> Mr Kingston conceded in cross-examination that Pattani's subscription was actually funded by moneys advanced by CIG pursuant to SA2.<sup>447</sup>
- (d) **Forci:** Mr Kingston's evidence is that Mr Wang informed him that Forci's subscription in the GrowthOps IPO would need to be funded by money from

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<sup>440</sup> Kingston 1 [210] at CB188; CB2071-2072; Kingston XX T561:26-562:10.

<sup>441</sup> Kingston XC T393:29-394:1; Kingston XC T394:15-21

<sup>442</sup> Kingston XX 558:3-5.

<sup>443</sup> Kingston XX T558:6-11.

<sup>444</sup> Kingston XX T558:12-559:9.

<sup>445</sup> Kingston 1 [230] at CB191.

<sup>446</sup> Kingston 1 [250] at CB195; CB14421-14422.

<sup>447</sup> Kingston XX T559:13-560:6.

Promissory Note 1, and then refunded by SA3.<sup>448</sup> Forci subscribed for A\$17 million worth of shares in the GrowthOps IPO.<sup>449</sup>

292. While there are discrepancies between the intended use of funds advanced by CIG pursuant to the supplementary agreements and the way in which those funds were actually deployed, it is not in dispute that:<sup>450</sup>
- (a) Trimantium International Holdings acquired 7,945,570 shares in the GrowthOps IPO;
  - (b) Asia Selangor acquired 20,000,000 shares in the GrowthOps IPO;
  - (c) Pattani acquired 14,000,000 shares in the GrowthOps IPO; and
  - (d) Forci acquired 17,000,000 shares in the GrowthOps IPO.
293. GrowthOps commenced trading on 16 March 2018, having raised A\$70 million in the IPO.<sup>451</sup> Trimantium International Holdings, Asia Selangor, Pattani and Forci collectively funded A\$58,945,570 of the A\$70 million raised in the IPO.<sup>452</sup>
294. Mr Kingston in his defence denies that the funds advanced by CIG pursuant to the Facility Agreement were to his benefit.<sup>453</sup> However, this is not the case.
295. The funds advanced by CIG were invested by the SPVs into the GrowthOps IPO. Of those funds:
- (a) Trimantium Capital (Mr Kingston's company) received A\$618,000 as consideration for the sale of shares in KDIS (a company founded by

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<sup>448</sup> Kingston 1 [230] at CB191.

<sup>449</sup> Kingston 1 [250] at CB195.

<sup>450</sup> Paragraph 151.

<sup>451</sup> Kingston 1 [250] at CB195.

<sup>452</sup> Paragraph 152.

<sup>453</sup> ADC [26(d)(i)].

Mr Kingston)<sup>454</sup> to GrowthOps in the form of 50% cash and 50% convertible redeemable preference shares;<sup>455</sup>

- (b) Trimantium Capital received A\$2,900,000 in the form of repayment of a loan from Trimantium Capital to GrowthOps;<sup>456</sup>
- (c) It was intended that "An entity associated with [Mr Kingston]" would receive A\$500,000 in the form of repayment of a loan from that entity to Bryden Hammer Ltd, the vendor of Digital Moshi (a company sold to GrowthOps). Mr Kingston did not know whether that money was ever received.<sup>457</sup>

296. In addition to the direct benefits that Mr Kingston obtained from the payment of IPO proceeds to his associated entities, Mr Kingston was also the largest shareholder in GrowthOps (albeit indirectly through his interests in companies and trusts), holding a relevant interest in 24,846,256 shares in GrowthOps (26.2% of shares on issue) as at 16 March 2018.<sup>458</sup> It follows that Mr Kingston benefitted from any increase in the value of GrowthOps.

297. The GrowthOps prospectus displayed GrowthOps' balance sheet as at 30 June 2017, together with a projected balance sheet following completion of the IPO, including:<sup>459</sup>

- (a) total assets of A\$20.5 million, which were projected to rise to A\$76.2 million;
- (b) total equity of A\$6.8 million, which was projected to rise to A\$58.6 million.

298. A\$47.8 million from the proceeds of the IPO was to be used to pay vendors of businesses that GrowthOps acquired as part of the IPO.<sup>460</sup> These acquisitions contributed to a significant expansion in the value of the GrowthOps business to the benefit of Mr Kingston. Indeed, the value of Mr Kingston's stake in the projected

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<sup>454</sup> Kingston XX T429:2-3.

<sup>455</sup> Kingston XX T562:31-563:9.

<sup>456</sup> Kingston XX T563:14-18.

<sup>457</sup> Kingston XX T563:19-25.

<sup>458</sup> Kingston XX T546:18-547:9; CB14414-14416.

<sup>459</sup> CB14233.

<sup>460</sup> Kingston XX T562:23-30; CB14271.

equity of GrowthOps (26.2% of A\$58.6 million) was more than double the value of all of the equity in GrowthOps prior to completion of the IPO (A\$6.8 million).

299. Mr Kingston also benefitted from the opportunity to sell his shares in GrowthOps on the ASX following the IPO. The market value of Mr Kingston's shares at the IPO price of \$1 per share was close to A\$25 million. GrowthOps' share price appreciated in value following the IPO,<sup>461</sup> before deteriorating.<sup>462</sup> Mr Kingston's shares were subject to voluntary escrow arrangements following the completion of the IPO.<sup>463</sup> Those voluntary escrow arrangements ended on 5 September 2018.<sup>464</sup> After that date, Mr Kingston was free to sell his shares in GrowthOps. Whether Mr Kingston chose to sell down his shareholding in GrowthOps is not relevant to the question of benefit; it is enough that he had the opportunity to do so.

### **The proposed equity investment in Sargon**

300. Mr Kingston alleges that CIG entered into SA1 to SA4 in order to enable Taiping subsequently to acquire an equity interest in Sargon. CIG admits that in entering into SA1 to SA4 it contemplated a future possible acquisition of an equity interest in Sargon, but otherwise denies the allegation.<sup>465</sup>
301. From the outset, Taiping recognised the potential for a partnership or “cooperation relationship” between Sargon and Taiping.<sup>466</sup> The relationship was to be mutually beneficial to both parties.
302. Mr Kingston was required to provide collateral as security for the loans, comprising shares in Sargon and GrowthOps. Taiping’s internal documents refer to Sargon stock

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<sup>461</sup> CB3122.

<sup>462</sup> Kingston XX T572:6-12.

<sup>463</sup> CB14280-14281.

<sup>464</sup> CB14855.

<sup>465</sup> ADC [3.7.1], [3.15.1], [3.23.1] and [3.33.1]; Amended Reply [3.7.1], [3.15.1], [3.23.1] and [3.33.1].

<sup>466</sup> See for example CB 1540 at 1542 and 1544.



having “strategic value” to Taiping and that Taiping was considering a shareholding in Sargon to realise long-term strategic cooperation.<sup>467</sup>

303. Taiping’s objective was consistent along the way, and is conveniently summarised in the materials provided to the Lending Committee to consider the fourth tranche, advanced under SA4, in the following terms. A direct equity investment was considered likely to be difficult (due to FIRB and for other reasons).<sup>468</sup> Investing before the listing of Sargon would enable Taiping to benefit from the uplift of a successful listing.<sup>469</sup> Taiping’s plan was “*to participate in shareholding of Sargon by locking the equity in the form of creditor’s rights*”.<sup>470</sup> This must have been a reference to converting creditor’s rights in the form of debt into equity by negotiation, because the materials refer to “*Sargon[’s] promises to start the conversion of equity shares invested directly by us at any time upon our requests after the listing is completed.*”<sup>471</sup> Thus, the project would lock equity investment through bonds (or debt) and such investment would “*bind the long-term strategic cooperation relationship*”.<sup>472</sup>
304. Sargon’s proposed listing in early 2019 was delayed. By October 2019, the listing was further postponed to mid to late 2020.<sup>473</sup> Mr Kingston was keen for Taiping to invest in Sargon “sooner rather than later”,<sup>474</sup> but he never demanded the investment or complained that it had not occurred as promised.
305. By November 2019, Taiping had proposed early repayment of Promissory Note 1 and the Facility Agreement,<sup>475</sup> but was internally considering converting the HK\$253

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<sup>467</sup> CB1540 (Materials for the Margin Committee meeting on 16 November 2017) at CB1544; CB1892 (Materials for the Margin Committee meeting on 16 January 2018) at CB1896-1897; CB3118 (Materials for the Lending Committee (formerly the Margin Committee) meeting on 9 April 2018) at CB3119 and CB3125; CB4010 (Materials for the Lending Committee meeting on 24 September 2018) at CB4011.

<sup>468</sup> CB4011.

<sup>469</sup> CB4011 and CB4023.

<sup>470</sup> CB4011.

<sup>471</sup> CB4011.

<sup>472</sup> CB4011 and CB4047.

<sup>473</sup> Kingston 1 [435] at CB232.

<sup>474</sup> Kingston 1 [420] at CB229, CB5072.

<sup>475</sup> CB5110-5113.

million debt under the fourth tranche of Mr Kingston's personal loan to equity.<sup>476</sup> There is no evidence as to what became of this proposal.

306. Mr Kingston alleges that CIG entered into SA1 to SA4 "*in order to enable China Taiping subsequently to acquire an equity interest in Sargon*". Although it is not entirely clear what is meant by the allegation, it does not rise to an obligation or commitment. Whatever it means, the allegation is not established on the evidence. Rather, the evidence shows that Taiping contemplated a future possible acquisition of an equity interest in Sargon which, however, did not eventuate. Ultimately, Sargon and Mr Kingston defaulted under their respective loans and Taiping took steps to enforce its rights.

#### PHILLIP KINGSTON

307. It is submitted that Mr Kingston's evidence should be treated with caution. Aspects of his evidence discussed above are unsatisfactory—in particular, his shifting position in relation to the Lee Gardens meeting on 24, then 23 November 2017. Mr Kingston's evidence in relation to the alleged representation in mid November 2016 is not credible. The lack of credible evidence on key matters is fatal to Mr Kingston's case. That matter, in conjunction with other unsatisfactory evidence and matters relevant to credit, means Mr Kingston's evidence should be treated with caution. This section discusses further instances of Mr Kingston's testimony which are not conveniently dealt with above.
308. In his witness statement, Mr Kingston stated (regarding the Oyster & Chop dinner) that the "*China Taiping representatives (again, I cannot remember exactly who) proposed that a special purpose vehicle (SPV) would be loaned the money until the GrowthOps shares were sold*".<sup>477</sup> In the witness box he recalled that Mr Li made that statement and that Mr Wang translated.<sup>478</sup>

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<sup>476</sup> CB5073.

<sup>477</sup> Kingston 1 [104] at CB167.

<sup>478</sup> Kingston XN T405:14; XX T463:27.

309. It is common experience that memories fade over time rather than improve. It seems more likely that the inconsistency was due to Mr Kingston forgetting what he had written in his witness statement and tailoring his evidence to suit his case.
310. On 25 November 2017, Mr Wang requested that Mr Kingston translate SA1 to English. Mr Kingston's evidence, given in chief, was that he did so using Google Translate.<sup>479</sup> Under cross-examination, Mr Kingston denied that he must have had assistance and held to his evidence that he used Google Translate to convert a legal agreement for the loan of a significant sum of money from Chinese to English.<sup>480</sup>
311. Then, when asked how he was able to make "tracked" amendments to the Chinese language draft of SA1, Mr Kingston persisted with this unlikely story, insisting that he had used Google Translate to change the document from Chinese to English, amended the English version, then used Google Translate to change it back—a claim which, even if feasible, is improbable.<sup>481</sup> Common sense suggests that a document that is machine-translated from its original language and then machine-translated back will not perfectly match the original save only for amendments inserted into the translated version.
312. Another example of Mr Kingston's willingness to invent is supplied by his evidence in relation to the \$4.4 million payment. In his email to Ashurst of 10 December 2019, Mr Kingston stated:<sup>482</sup>
- I haven't authorised any wires for the claimed charges over and above the interest invoices as this is in dispute and subject to ongoing discussions ...*
313. Under cross-examination, Mr Kingston made the nonsensical claim that his reference to the "three invoices" concerned the sums set out in a draft term sheet for early repayment sent to him by Mr Huang<sup>483</sup> but the "*claimed charges over and above the interest invoices*" were derived from Ashurst's letters of 2 December 2019

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<sup>479</sup> Kingston 1 [160] at CB179.

<sup>480</sup> Kingston XX T493:3-15.

<sup>481</sup> Kingston XX T508:6-509:4.

<sup>482</sup> CB5278.

<sup>483</sup> Kingston XX T588:26.

(concerning overdue interest on the promissory note and the personal loan).<sup>484</sup> The “three invoices” cannot possibly have been a reference to the sums in the draft term sheet; in no way were these “invoices”. These words plainly referred to the two invoices for interest on SA1-SA3 and SA4 and to the email notifying the interest payable on Promissory Note 1,<sup>485</sup> the total amount of which exceeded A\$4.4 million by only a relatively small amount. The significance of this is explained in further detail at paragraphs 339 and following below.

314. Mr Kingston's willingness to invent was also demonstrated by his evidence about the double pledging of the Madison securities. On 14 April 2018, Mr Kingston sent an email to Mr Wang reporting that:<sup>486</sup>

*... we have acquired 100% of the shares in Madison Financial Group and have pledged those shares to Taiping, with **original share certificates** posted via registered post to Taiping in Hong Kong ... [Emphasis added.]*

315. When cross-examined about the same securities being later pledged to Diversa, Mr Kingston claimed that the pledge "*was a temporary one until promissory note 2 was signed*" whereupon they were "*torn up*" because "*they were just certified copies*" and "*we always had the originals in the Sargon offices*".<sup>487</sup>
316. When Mr Kingston was taken to Promissory Note 2 to show that the pledge was not intended by that instrument to be temporary, Mr Kingston claimed (improbably) that the drafting was "*a copy and paste error from the prior version*".<sup>488</sup> Then, when shown evidence that Taiping had possession of the original share certificates until the Madison securities were sold by SCAH's receivers, Mr Kingston claimed that that was contrary to his understanding, and that someone from Sargon's "*legal team*" (which was led by his wife as General Counsel) had told him otherwise.<sup>489</sup>

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<sup>484</sup> Kingston XX T589:25.

<sup>485</sup> At CB746-748, CB766-768 and CB749 respectively.

<sup>486</sup> CB3225.

<sup>487</sup> Kingston XX T620:24-621:29.

<sup>488</sup> Kingston XX T641:17

<sup>489</sup> Kingston XX T646:12; 643:22

317. Mr Kingston's conduct in relation to the CIG loans also suggests a willingness to mislead. For example, on 7 February 2018, he sent a copy of a bank statement for his ICBC Account to CIG showing a balance of HK\$26,820,459.56.<sup>490</sup> Under cross-examination, he admitted that he did so to demonstrate that he had complied with SA2 by setting aside money to make the interest payments.<sup>491</sup> However, by 12 February 2018, he had withdrawn most of the money.<sup>492</sup>
318. Similarly, on 4 October 2019, when he was being pressed by CIG to make overdue interest payments, Mr Kingston sent an email in the following terms:<sup>493</sup>

*Please see the receipts for the payments on 30th September 2019 attached that have been stopped by the bank's compliance department due to KYC/AML reasons. I've had a few discussions with the bank given my relationship (as a ANZ Private Bank customer) and unfortunately, they require the information below in order to process the payments. They will be sending the money back to me shortly, I am working on using another bank as a back-up if you cannot provide this information below. This is quite embarrassing for me and I'm in the middle of a public roadshow for Sargon, so it's a busy time. I apologise for delayed communication.*

319. By this stage, Mr Kingston was clearly playing for time. That communication was quite obviously intended to convey that ANZ had proactively stopped the payments for "KYC/AML reasons" and that Mr Kingston was trying to find a way to transmit the money. However, under cross-examination, he admitted that it was he who had caused the bank to stop the payment.<sup>494</sup>

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<sup>490</sup> Kingston 1 [217] at CB188.

<sup>491</sup> Kingston XX T557:11.

<sup>492</sup> Kingston XX T557:29-558:2; CB14409.

<sup>493</sup> CB5081.

<sup>494</sup> Kingston XX579:11-17.

## PROPER CONSTRUCTION OF THE FACILITY AGREEMENT

### Legal principles

320. The Hong Kong law experts agree that the general legal principles of construction that apply to contracts in the nature of the Facility Agreement are as follows:<sup>495</sup>
- (a) the overriding objective of contractual interpretation is to give effect to what a reasonable person would have understood the parties to mean;
  - (b) the contract has to be construed in the proper context and purpose, with regard to (i) the agreement as a whole, (ii) the practical objects of the contract, and (iii) the factual and legal background that is objectively or reasonably known to the parties at the time of the agreement;
  - (c) the context of the contract is taken in its widest sense, including “absolutely anything” which would affect the way that the contractual language would be understood by a reasonable person, except for (i) previous negotiations of the parties, and (ii) their declarations of subjective intent.

### Issues arising in relation to the proper construction of the Facility Agreement

321. The matters in dispute raise the following issues in relation to the proper construction of the Facility Agreement:
- (a) Whether the Facility Agreement required Mr Kingston to repay the loan and interest.
  - (b) Whether, under clause 11(4) of the Supplementary Agreements, CIG’s sole recourse was to obtain the collateral in the event that an Event of Default was not remedied within 20 business days.<sup>496</sup>

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<sup>495</sup> Joint Expert Report of Charles Manzoni QC and Laurence Li SC, CB14135-14168, see Question 2, CB14140, referring to the principles set out in Mr Manzoni QC’s report dated 10 September 2021, paragraphs 36 – 39, CB272–273.

<sup>496</sup> ADC [19(b)], [19(b1)].

- (c) Whether clause 7 of SA4 (fourth paragraph) had the effect that interest payments in respect of the 1<sup>st</sup> to 3<sup>rd</sup> tranches (the loans under SA1 to SA3) were not due for payment until principal and interest on the loan under SA4 was fully repaid.<sup>497</sup>

### **Mr Kingston's obligation to repay the loan and interest**

322. At every stage, the Facility Agreement terms cast a clear personal obligation on Mr Kingston to pay periodic interest and to repay the principal and outstanding interest at the end of the term. Clause 7 of SA4 sets out the term of the loans and stipulates that interest on the Original Loan accumulates daily and is payable quarterly and interest on This Loan accumulates daily and is payable semi-annually. Clause 7 of SA4 further provides that Mr Kingston agrees not to repay the loans within 12 months, but after 12 months, Mr Kingston may by providing one month advance written notice to CIG, propose termination and repay the principal, interest and other payables under the Loans. Clause 7 of SA1 to SA3 are in similar terms. Clause 8 of SA1 to SA4 further requires the loans to be repaid on maturity.
323. Time was made of the essence by clause 41(2) of the Standard Terms. Nothing in any of the Supplementary Agreements overrides or varies that provision.
324. At every stage, the Facility Agreement terms conferred a right on CIG to call for early repayment of the loan on 60 days' notice. This right was provided under clause 7 of SA1 to SA4, which varied the standard terms contained in the Loan Agreement - Terms and Conditions<sup>498</sup> under which CIG otherwise had a right to terminate the loan agreement and require repayment of the Amount Owing within 2 business days.<sup>499</sup>

### **Clause 11(4) did not restrict CIG's right to recourse to the collateral**

325. Mr Kingston says that clause 11(4) had the effect that the failure to pay interest that was due and payable did not constitute "Events of Default". Alternatively, by reason

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<sup>497</sup> ADC [12.2].

<sup>498</sup> CB510-529.

<sup>499</sup> Clauses 7.4 and 34 at CB514 and CB523.

of clause 11(4), CIG's sole recourse was to obtain the collateral in the event that an Event of Default was not remedied within 20 business days.<sup>500</sup>

326. On 9 November 2017, Mr Kingston received CIG's standard terms and a proposed supplementary agreement for a corporate loan. From early in the piece, Mr Kingston understood that the loan documentation would comprise standard terms and conditions and a supplementary agreement.<sup>501</sup> At that point in time, the agreements provided to Mr Kingston contemplated that CIG could terminate and require repayment of the loan within 2 business days and, that if there was an event of default, the customer was obliged to repay the amount owing within 2 business days and CIG could take action and deal with the security.<sup>502</sup>
327. Prior to entering into SA1, Mr Kingston raised with Mr Wang two concerns: first, that he needed more time to repay if CIG requested early repayment<sup>503</sup> and, second, he wanted more time in the event of a failure to repay before CIG could take the security.<sup>504</sup>
328. SA1 addressed Mr Kingston's concerns in the following ways:
- (a) By the final sentence of clause 7, which Mr Kingston agreed was inserted because he asked for more time if CIG requested early repayment.<sup>505</sup> Instead of requiring repayment in 2 business days, clause 7 provides that CIG has the right, with 60 days' advance notice to Mr Kingston, to request an early repayment.
  - (b) By clause 11(4), which gave Mr Kingston 20 working days from any failure to repay before CIG could obtain the collateral. The precise wording of clause 11(4) varied over the course of the successive supplementary agreements, but

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<sup>500</sup> ADC [19(b)], [19(b1)].

<sup>501</sup> CB1375-1435; Kingston XX T466:4-29.

<sup>502</sup> Clauses 7.4, 7.5, 23, 32 and 33 of the standard terms of the Loan Agreement – Terms and Conditions (corporate) CB1402 at CB1406, CB1411 and CB1415.

<sup>503</sup> Kingston XX T506:9-20.

<sup>504</sup> Kingston XX T506:21-23.

<sup>505</sup> Kingston XX T514:7-12.



was always to the same effect. In SA4, clause 11(4) provides that a failure to repay on maturity is an event of default and if the principal and interest is not paid within 20 working days from the date of event of default, CIG shall directly obtain all collateral under the supplementary agreement.

329. Clause 11(4) was inserted in response to Mr Kingston’s request for time to repay. Further, on its proper construction, clause 11(4) does not restrict CIG’s right in the event of an Event of Default to recourse to the collateral under the supplementary agreement.
330. To the extent that clause 11(4) refers to CIG “directly obtain[ing] all collateral”, it has to be construed in the context of the agreement as a whole including its surrounding clauses, which contain various notification requirements before CIG could exercise rights in respect of the security.
- (a) The security is set out in clause 1 and comprises listed and unlisted stock. For the listed stock (GrowthOps shares), shares are to be held in a share trading account under the name of the shares subscriber and CIG has the right to dispose of the stock and trade the stock under clauses 10, 11 and 12 of the supplementary agreements.<sup>506</sup>
  - (b) Clause 10 of the supplementary agreements applies if GrowthOps shares are suspended on the ASX, in which case CIG may require further cash or collateral to be deposited, failing which CIG may immediately liquidate the stock without further notice.
  - (c) Clauses 11(1) to (3) of the supplementary agreements apply if the Normal Position Value exceeds certain amounts. Depending on the exceedance, warning notices are to be sent or further collateral or cash is required to meet the margin requirements of the loan. If insufficient collateral is provided, CIG may immediately liquidate the collateral without further notice.

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<sup>506</sup> Final paragraph of clause 1, SA1 (CB537), second last paragraph of clause 1, SA2 (CB552), final paragraph of clause 1, SA3 (CB581), final paragraph of clause 1.4, SA4 (CB618). Under SA3 and SA4, CIG could also “deal with part or all of the pledged shares in accordance with the Loan Documents.”

- (d) Clause 11(4) of SA4 is in two parts. First, it provides that a failure to repay on the loan maturity date is an Event of Default. Second, if the loan principal and interest is unpaid 20 business days after default, CIG shall directly obtain all collateral without further notice.
- (e) Clause 12 provides that CIG may recover collateral by telephone or mail, using Mr Kingston's contact details, and cash or other collateral is to be provided within the time allowed by CIG in its full discretion in accordance with clauses 10 and 11 and, if the margin requirements are not met or Mr Kingston is not contactable, CIG may close out / sell the shares without further notice.<sup>507</sup>

331. Clauses 11(1) to (3) and 12 set out a regime for CIG to provide notice before closing out to meet the margin requirements under the loan.<sup>508</sup> Clause 11(4) does away with the requirement for CIG to provide notice before obtaining the collateral in the event of an Event of Default, and if principal and interest remain unpaid for 20 business days after default. It does not restrict CIG's rights if there is an Event of Default. If an Event of Default occurs, CIG also has the right under clauses 23 (Security – set off) and 33.1 (Enforcement action). Moreover, there are numerous other clauses that confirm Mr Kingston's obligation to repay the loan.

332. Therefore, the construction of clause 11(4) contended for by Mr Kingston is untenable. Furthermore, Mr Kingston's case is that the supplementary agreement was to deal with repayment and recourse and whether or not Mr Kingston was personally liable. However, as Mr Kingston agreed, there is no provision in the supplementary agreement that says CIG would have no recourse to Mr Kingston personally or that CIG would have no recourse beyond the security pool or that Mr Kingston would have no personal liability.<sup>509</sup>

333. Clause 11(4) of the Supplementary Agreements entitles CIG, if default in repayment continues for 20 days, to take possession of all collateral or security. As a matter of

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<sup>507</sup> "Close out" is used in clause 12 in SA1 and SA2, and "sell" is used in SA3 and SA4.

<sup>508</sup> Mr Kingston said he understood the margin call requirements at T541:23-30.

<sup>509</sup> Kingston XX T518:20–519:7.

Hong Kong law, the clause does not entitle CIG to retain the full value of the collateral if it exceeds the outstanding liabilities.<sup>510</sup>

**Clause 7 of SA4 does not prohibit payment of principal and interest on SA1 to SA3 until SA4 is fully repaid**

334. The fourth paragraph of clause 7 of the Chinese version of SA4, as translated by Mr Gang **Wang**, is set out in paragraph 191(m) above.<sup>511</sup> One difference between the Chinese and English versions of clause 7(4) is that where the Chinese version refers to interest, it refers to “*outstanding interest*”. CIG submits the proper construction of clause 7 of the English and the Chinese version of SA4 is the same; however, the Chinese version is clearer and demonstrates that Mr Kingston’s construction—that clause 7 of SA4 prohibits periodic repayments under SA1 to SA3 until SA4 is fully repaid—is untenable.

335. On its proper construction, clause 7 of SA4 prioritises the repayment of principal and outstanding interest in respect of the HK\$253 million loan over that of the SA1-SA3 HK\$400 million loan. That makes commercial sense given that the interest rate on the HK\$253 million loan was lower than that on the HK\$400 million loan. But in no way does this part of clause 7 absolve Mr Kingston from the obligation to continue to make periodic interest payments on each loan during its respective term. This is so for the following reasons:

- (a) the provision must be read in its proper context having regard to the Facility Agreement as a whole.<sup>512</sup> The first paragraph of clause 7 of SA4 states that interest on the HK\$400 million loan (ie, SA1 to SA3) accumulates daily and is paid quarterly. It is not possible to read the prioritising part of clause 7 in the way that Mr Kingston seeks to do without depriving the interest provision in the first paragraph of clause 7 of all meaning and effect. That is to ignore the context, contrary to the relevant canon of construction;

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<sup>510</sup> Manzoni Report at [65], CB279.

<sup>511</sup> As translated by the expert Mr Gang Wang at CB387.

<sup>512</sup> As the experts agree: see the report of Mr Manzoni QC at [37] (CB273), agreed by Mr Li SC in the Joint Report at [2] (CB14140).

- (b) correctly translated, it is principal and *outstanding* interest that is prioritised, not interest accruing due in the usual periodic way;
  - (c) the construction contended for by Mr Kingston would work a commercial nonsense. It makes no sense that upon advancing an additional UK\$253 million, CIG should give Mr Kingston a repayment holiday on an existing HK\$400 million loan. That is especially so when CIG had lent Mr Kingston the money to make the periodic interest payments on the SA1 and SA2 advances.
336. It is notable also that Mr Kingston’s contention that the 4<sup>th</sup> paragraph of clause 7 of SA4 had the effect that interest payments in respect of the 1<sup>st</sup> to 3<sup>rd</sup> tranches (the loans under SA1 to SA3) were not due for payment until principal and interest on the loan under SA4 was fully repaid was raised for the first time in Mr Kingston’s defence. It is evident from their conduct at the time that, during the life of the loan under SA4, neither party understood clause 7 to have the effect for which Mr Kingston now contends.
337. Mr Kingston’s evidence is that Mr Wang said that CIG would make interest on SA1 to SA3 “payment-in-kind” as an alternative to advancing more funds to cover the additional interest on the extension of SA1 to SA3. Mr Kingston said he understood Mr Wang’s reference to “payment-in-kind” to mean that interest would accrue on SA1 to SA3 but that the interest payments would be deferred.<sup>513</sup>
338. While no criticism could be made if it was simply a matter of not appreciating the proper construction of the agreement, Mr Kingston’s construction of clause 7 is not open. Further, Mr Kingston did not raise his contention in relation to the construction of clause 7 after letters of demand and notices of an event of default were sent.<sup>514</sup> This further suggests Mr Kingston’s case about the purpose and meaning of clause 7 is a contrivance.

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<sup>513</sup> Kingston 1 [314] – [315] at CB207. Mr Kingston amended paragraph 314 in evidence in chief at T395–396.

<sup>514</sup> Kingston XX T599:1-22. Letters of demand and notices of events of default were sent on 2 December 2019 (Kingston 1 [464] at CB238) and 20 January 2020 (Kingston 1 [502] at CB250).

## APPLICATION OF THE \$4.4 MILLION PAYMENT

339. Mr Kingston asserts that the A\$4.4 million payment he made to Ashurst's trust account on 11 December 2019 was in respect of the three amounts of interest set out in the draft term sheet for early repayment of Promissory Note 1 which was sent by Mr Huang to Mr Kingston on 5 November 2019 (at CB5113). This is a fabrication.
340. The document is entitled "Early Termination Agreement – Term Sheet". An extract follows:

<b>Company</b>	Trimantium Taiping Investment Management Pty Ltd (ACN 624 073 196) in its own capacity and as trustee of the Trimantium Taiping Investment Fund I
<b>Obligor</b>	Sargon Capital Pty Ltd (ACN 608 799 873)
<b>Holder</b>	Taiping Trustees Limited
<b>Principal Amount</b>	HKD\$500,000,000
<b>Outstanding Interest</b>	Total Outstanding Interest: <b>HKD\$ 23,561,643.84</b> (Form 2019.7.1 to 2020.1.31) Breakdown as shown below: 1) HKD\$ 10,082,191.78 (Form 2019.7.1 to 2019.9.30) 2) HKD\$ 10,082,191.78 (Form 2019.10.1 to 2019.12.31) 3) HKD\$ 3,397,260.27 (Form 2020.1.1 to 2020.1.31) (Pro-rata basis, indicative on actual)
<b>Repayment Date</b>	2020.1.31
<b>Other terms</b>	the Holder shall release any security it holds in relation to the Amount Owning(Principal Amount) or the terms of P Note within

341. Some of the components of "Total Outstanding Interest" referred to in the Terms Sheet are sums which, as at 11 December 2019, had not fallen due for payment. It is also material that 31 January 2020 is nominated to be the proposed "Repayment Date". And although the proposed terms provide for early repayment (for a fee), there is no evidence that, as at 11 December 2019, the parties had agreed the proposed terms—the document remained a proposal.
342. In his email to Ashurst on 10 December 2019, Mr Kingston said:<sup>515</sup>

*I haven't authorised any wires for the **claimed charges over and above the interest invoices** as this is in dispute and subject to ongoing discussions with*

<sup>515</sup> CB5278.

*Taiping, only the three invoices as they were sent to me by Taiping which is approx.. A\$4.4 million. (emphasis added).*

343. Mr Kingston's reference to "three invoices" could only be a reference to:
- (a) The SA1-SA3 invoice that Ms Chan sent to Mr Kingston on 19 September 2019 (at CB5069 to CB5070);
  - (b) The email from Ms Zhou to Mr Kingston on 23 September 2019 setting out the interest falling due in respect of Promissory Note 1 (at CB5077); and
  - (c) The SA4 invoice that Ms Chan sent to Mr Kingston on 16 October 2019 (at CB5089-5090).
344. The draft term sheet is not an invoice. To describe the components of the payout figure (some of which had not fallen due) as "invoices" is a stretch, to put it mildly. When it was put to Mr Kingston that he had not received any other interest invoices at that point in time which had not been paid, he responded "I don't think so".<sup>516</sup>
345. Mr Kingston's email also said that he had not "authorised any wires for the claimed charges over and above the interest invoices as this is in dispute". It was suggested to Mr Kingston that he was referring to the default interest charges claimed by Taiping—a proposition which Mr Kingston denied.<sup>517</sup> Mr Kingston's evidence is inconsistent with the objective evidence that the only "claimed charges over and above the interest invoices" at that point in time was the default interest on Promissory Note 1 and the Facility Agreement demanded in Ashurst's letters of 2 December 2019 (at CB5216-5231).
346. Moreover, the Ashurst letters of demand sought payment of interest which had fallen due for payment and which, by 2 December 2019, was up to 12 weeks late. It is improbable that Mr Kingston would have caused TIM to discharge a liability for interest which had yet to fall due at a time when another facility was in default.

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<sup>516</sup> Kingston XX at T587:3-14.

<sup>517</sup> Kingston XX at T587:15-18.

347. Mr Kingston's conduct post-payment of the A\$4.4 million is also inconsistent with the proposition that the payment was in respect of the sums in the draft term sheet. A number of letters and emails exchanged between Ashurst and/or Taiping and Mr Kingston were consistent only with the proposition that the payment had been applied to the "three invoices" properly identified above, namely:

- (a) Ashurst's "without prejudice" letter of 19 December 2019 pointing out that Mr Kingston had short-paid interest and demanding payment of the interest that remained outstanding, including interest for the quarter ending 31 December 2019 on Promissory Note 1 (see paragraphs 264 to 265 above);<sup>518</sup>
- (b) Mr Huang's email of 30 December 2019 seeking payment of outstanding interest on both facilities (see paragraph 267 above).<sup>519</sup> Mr Huang chased Mr Kingston again in respect of the outstanding interest on 9 January 2020 (see paragraph 270 above);<sup>520</sup> and
- (c) Ashurst's letters of demand dated 20 January 2020 to Mr Kingston and the corporate entities which notified events of default for outstanding interest and called for repayment of principal and outstanding interest on both facilities.<sup>521</sup> One of the events of default identified in the letter was failure to pay interest on Promissory Note 1 which fell due on 31 December 2019 (see paragraphs 274 to 276 above).<sup>522</sup>

348. Mr Kingston did not respond to any of this correspondence to point out that—as he now asserts—interest for the quarter ending 31 December 2019 on Promissory Note 1 had supposedly already been paid, or to dispute the application of the A\$4.4 million payment to the Facility Agreement invoices.

349. Mr Kingston gave evidence that, when he read Ashurst's "without prejudice" letter of 19 December 2019, it was not clear to him how the A\$4.4 million had been applied

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<sup>518</sup> CB5381-5382.

<sup>519</sup> CB5383.

<sup>520</sup> CB5438.

<sup>521</sup> CB5455-5466.

<sup>522</sup> CB5459, CB5462 and CB5465.

and which loans were outstanding.<sup>523</sup> If this were true (it is submitted that it is not), it could have been expected that Mr Kingston would have enquired how the payment had been applied. Mr Kingston accepted during cross-examination that he did not at any time ask Ashurst how the A\$4.4 million had been applied.<sup>524</sup>

350. On 20 January 2020, Taiping issued draft standstill letters to TCFM, TIM, Sargon and Mr Kingston in which Taiping set out the terms upon which Taiping would not take enforcement action during a standstill period that would expire on 30 April 2020.<sup>525</sup> The standstill period was made conditional on there being no further events of default in relation to Promissory Note 1.<sup>526</sup> Again, Mr Kingston did not respond to Taiping to point out that there had been no event of default on Promissory Note 1 because interest for the quarter ending 31 December 2019 had already been paid.

351. On 1 February 2020, Ashurst wrote to Gilbert+Tobin, the solicitors acting for Mr Kingston, Sargon, TIM and TCFM. Paragraph 2 of Ashurst's letter states:<sup>527</sup>

*Release of this press release is conditional upon payment of the following amounts by on or before 5pm Sydney time on 3 February 2020:*

*a. the sum of HKD\$10,286,636.22, being the interest specified in our letter to Sargon dated 20 January 2020 with respect to the Secured Promissory Note.*

352. On 2 February 2020, Gilbert+Tobin responded to Ashurst's letter to say that the companies were unable to agree to pay the amounts specified in paragraph 2 of Ashurst's letter.<sup>528</sup> Mr Kingston's evidence was that he saw and approved the letter before it was sent.<sup>529</sup> Gilbert+Tobin's letter did not say that the sum of

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<sup>523</sup> Kingston XX at T595-596.

<sup>524</sup> Kingston XX at T596:18-20.

<sup>525</sup> CB5467-5497.

<sup>526</sup> CB5469 and CB5487.

<sup>527</sup> CB5532.

<sup>528</sup> CB5536.

<sup>529</sup> Kingston XX at T601:28-31 and T601:



HK\$10,286,636.22 had already been paid; nor did it dispute Taiping's entitlement to appoint a receiver on the basis that interest payments were up to date.

353. Mr Kingston gave evidence that he spent the weekend with his lawyers and told them that no interest was outstanding on Promissory Note 1 when the receivers were appointed.<sup>530</sup> When it was suggested to Mr Kingston that, if he had held the position that interest was up to date, it would have been asserted in Gilbert+Tobin's letter, he responded "*I do not know, you would have to ask our lawyers*".<sup>531</sup> It is improbable that experienced lawyers would not have challenged the appointment of receivers if there was an arguable basis for doing so.
354. Mr Kingston also said that Gilbert+Tobin "*did not want to take a strong position without having seen the trust accounts and how it was applied*".<sup>532</sup> If this were true, one would expect, at the very least, that Gilbert+Tobin would have asked for copies of the accounting ledgers in their letter to Ashurst. But they did not do so.
355. Finally, Mr Kingston seeks to rely on two internal transfers from CIG to Taiping Trustees on 31 December 2019 and 6 January 2020 in the sums of HK\$10,054,644.81 and HK\$27,546.97 respectively to support the proposition that his payment to Ashurst's trust account was exclusively in respect of Promissory Note 1.
356. Mr Guo gave evidence that he asked his colleague Edward Tam, an officer of the Finance Department, why these transfers were made. Mr Tam told Mr Guo that, because both loans were in default after September 2019 and the company had suffered quite significantly, a commercial decision was made to make an accounting adjustment to Taiping Trustees.<sup>533</sup>
357. The intercompany transfer between CIG and Taiping was purely an internal matter and could not affect the scope of the liabilities between the parties, which had accrued under the Facility Agreement or Promissory Note 1. That matter was to be

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<sup>530</sup> Kingston XX at T602:31-603:7 and T604:2022.

<sup>531</sup> Kingston XX at T603:15-18.

<sup>532</sup> Kingston XX at T604:23-605:9.

<sup>533</sup> Guo RXN at T383:23-384:11.

determined pursuant to the terms of the contracts to lend. Moreover, the subsequent re-allocation of accounts has not been visited on Mr Kingston in these proceedings, because CIG's pleaded claim reflects his own actual contemporaneous nomination of the purpose for which the A\$4.4 million payment was being made. CIG's instructions in relation to the allocation of the A\$4.4million was clear (see paragraph 260 above). CIG's position credits Mr Kingston personally with the benefit of the A\$4.4 million to the extent that it discharged the invoices under SA1 to SA3 and SA4, unlike Mr Kingston's position, which seeks to attribute the entirety of the A\$4.4 million payment to Promissory Note 1 and relies on fabricated representations and a contorted construction of SA4 to seek to avoid liability for his personal loans.

#### **WHY THE ESTOPPEL DEFENCE FAILS**

358. The estoppel defence was mentioned but not explained in Mr Kingston's written outline opening.<sup>534</sup> It was mentioned but, again, not explained by Mr Kingston's counsel in oral opening.<sup>535</sup>
359. The defence pleads at [3.46(b)] that CIG by words or conduct referred to in paragraphs [2.5(c)], [2.8(c)], [2.11(c)] and [3.21.9(b)] of the defence conveyed an unequivocal promise or assurance to Mr Kingston that he would not be personally liable to repay the money lent by CIG or that CIG would not recover from him the money lent or exercise its rights, duties or powers to do so. The defence then pleads at [3.46(c) & (d)] that Mr Kingston relied upon that promise and was induced to alter his position on the faith of it, so that it would be inequitable or unconscionable for CIG to act inconsistently with the promise; and accordingly CIG is estopped from contending that Mr Kingston is personally liable or from seeking to recover from him the moneys lent.
360. To establish a basis for promissory estoppel, the words or conduct of the defendant must be clear and unambiguous: *Legione v Hately* 152 CLR 406 at 435–437. Further, the conduct of the plaintiff in relying to his detriment on the defendant's words or conduct must be reasonable: *Summer Hill Business Estate Pty Ltd v Equititrust Ltd*

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<sup>534</sup> Defendant's Outline Opening Submission dated 27 May 2022 at [21(a)].

<sup>535</sup> T 138:3-5.

[2010] NSWSC 170 at [42]; *re Motasea Pty Ltd* (2014) 97 ACSR 589 at [25];  
*Priestley v Priestley* [2017] NSWCA 155 at [141]-[159].

361. In *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, Brennan J at 428-429 identified the matters that it is necessary for a plaintiff to prove in order to establish an equitable estoppel:

*... (1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise.*

362. Brennan J also said at 427:

*... the object of the principle can be seen to be the avoidance of that detriment and the satisfaction of the equity calls for the enforcement of a promise only as a means of avoiding the detriment and only to the extent necessary to achieve that object. So regarded, equitable estoppel does not elevate non-contractual promises to the level of contractual promises and the doctrine of consideration is not blown away by a side-wind.*

363. In *Commonwealth v Verwayen* at (1990) 170 CLR 374 at 413, Mason CJ observed that:

*... there must be a proportionality between the remedy and the detriment which is its purpose to avoid. It would be wholly inequitable and unjust to insist upon a disproportionate making good of the relevant assumption.*

364. Note also the caution expressed by Kirby P in *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582 at 585:

*The Court has before it two groupings of substantial commercial enterprises, well resourced and advised, dealing in a commercial transaction having a great value ... This is not, of itself, a reason for denying them the beneficial application of the principles developed by equity. But it is a reason for scrutinising carefully*

*the circumstances which are said to give rise to the conclusion that an insistence by the appellants on their legal rights would be so unconscionable that the Court will provide relief from it.*

*At least in circumstances such as the present, courts should be careful to conserve relief so that they do not, in commercial matters, substitute lawyerly conscience for the hard headed decisions of business people.*

365. And in *Summer Hill Business Estate Pty Ltd v Equititrust Ltd* [2010] NSWSC 776 Pembroke J at [31]–[40] emphasised the need for caution and careful scrutiny before invoking estoppel in cases involving sophisticated business people – which Mr Kingston certainly was.
366. Applying these principles, the estoppel defence fails at almost every step. Six propositions are advanced.
367. *First*, for the reasons described above (see paragraphs 38 to 5553, 70 to 82, 87 to 103 and 159 to 163), there was no representation or assurance to the effect alleged by Mr Kingston, that he would have no personal liability to repay the loan.
368. *Secondly*, even if some such representation was made, it was insufficiently clear to found an estoppel. There is no written record of it or of the words in which it is said to be have been expressed. We have only the assertions of Mr Kingston, which are unreliable. The Court is left to guess at the extent of the supposed abrogation of personal liability and the circumstances in which it might take effect. Did it mean that Mr Kingston had no personal obligation under the Loan Agreement at all? Did it mean that he had an obligation of some sort—say to make repayments—but that the obligation could not be enforced against him, in which case it is difficult to see how it could be characterised as an obligation at all. Did it mean that his obligation to make repayments would cease upon a default by him in making repayments? None of these questions has so far been answered in Mr Kingston’s case.
369. *Thirdly*, even if a representation was made, Mr Kingston did not rely on it:
- (a) As outlined above at paragraph 78, Mr Kingston's estoppel claim is underpinned by his evidence that, on 16 November 2017, Mr Wang represented to Mr Kingston that "*the exact thing he said to me is that ... there*

*would be no personal liability and that would be dealt with in the supplementary agreements".*<sup>536</sup> Under cross-examination Mr Kingston conceded that SA1 did not contain any term which provided that CIG would not have any recourse to Mr Kingston beyond the security pool. Nor did it contain any term stating that Mr Kingston would have no personal liability.<sup>537</sup> And yet, notwithstanding that the representation, as he would have it, had been falsified, he proceeded to enter into the agreement.

- (b) The email of 20 April 2018,<sup>538</sup> which Mr Kingston received before he signed SA3, made it clear that CIG could take enforcement action against Mr Kingston if there was an event of default. Even if the representation had not been falsified at the point of entry into SA1, CIG was resiling from it at this time. Nonetheless, Mr Kingston proceeded to execute SA3 and subsequently SA4, any previous illusion as to personal liability having been dispelled.
- (c) There is no evidence of anything Mr Kingston said or did, prior to the filing of his defence, which supports his having relied on any such representation. If he had relied on it, he would have said so at some point, and certainly no later than when he received—and responded to—the demands from Ashurst on 2 December 2019 and 20 January 2020.

370. *Fourthly*, it was not reasonable for Mr Kingston to rely on any such representation. Mr Kingston was well aware that Mr Wang, and for that matter Mr Li, lacked the personal authority to bind CIG. Mr Kingston understood that that authority was reposed in the Margin Committee. By the same token, it is evident that CIG did not intend Mr Kingston to rely on any such representation. There is nothing in any of CIG's records to suggest that any CIG officer was aware of any such representation, much less the Margin Committee that actually had authority to bind CIG.

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<sup>536</sup> Kingston XN T414:21.

<sup>537</sup> Kingston XX T518:20–519:7.

<sup>538</sup> CB 3366, discussed above at paragraphs 159 to 163.

371. *Fifthly*, to defeat CIG’s contractual rights by application of the doctrine of promissory estoppel would be to defeat consideration by a side-wind. Mr Kingston’s case, if successful, would essentially leave CIG without the consideration for which it contracted in entering into the Loan Agreement and SA1 to SA4. Further, it would leave Mr Kingston not only with the money he borrowed but the evident benefit that he derived from the application of the HK\$653 million loan funds by way of subscription to the GrowthOps IPO. Thus, the relief sought by Mr Kingston is disproportionate to the detriment he claims. It leaves Mr Kingston with the benefit of almost A\$58 million having been subscribed for shares in his A\$70 million GrowthOps IPO, and CIG without the ability to recover its money from him.
372. *Sixthly*, as has been emphasised in authorities referred to above, the Court should be slow to intervene by way of the doctrine of estoppel in a detailed and carefully drawn contract between commercial entities. In *Summer Hill Business Estate Pty Ltd v Equititrust Ltd* [2010] NSWSC 776, Pembroke J at [35] said:

*Each case will depend on its own facts. But speaking generally, the imposition of an estoppel to suspend or abrogate the valuable legal rights of one party is not something that is lightly found. This is particularly so in a formal legal relationship, between arms length commercial parties, where their rights and obligations are carefully and extensively set out and formally documented. The quality of the evidence, the commercial reality, the inherent probabilities and the detriment to the plaintiff, must indicate that there is good reason why the defendant should be prevented from having the full benefit of the bargain to which it originally agreed. In such a case, an essential unfairness will be evident, demonstrating the appropriateness of finding an estoppel. But whether an estoppel should be granted depends on well developed principles, not merely on notions of unfairness or unconscionability: Tanwar Enterprises Pty Ltd v Cauchi (2003) 217 CLR 315 at 324–5.*

373. Here, sophisticated businesspeople operating at arms’ length have entered a formal legal relationship by way of a written contract with a series of successive written supplementary agreements in which their rights and obligations are carefully and extensively set out and formally documented. The quality of the evidence relied on by Mr Kingston in support of the alleged estoppel is very poor indeed. It depends on the implausible and commercially unrealistic assertions—which in respect of the alleged 24 November 2017 meeting have been positively proven to be false—of a

single witness who lacks credibility; it is contradicted by a credible witness, being Mr Wang; and it is entirely unsupported by anything in the extensive and detailed documentary record. It is inherently improbable and unbelievable, and no unfairness or unconscionability is shown.

374. For these reasons Mr Kingston's estoppel case should be dismissed.

#### **WHY THE MISLEADING OR DECEPTIVE CONDUCT CASE FAILS**

375. Mr Kingston alleges<sup>539</sup> that CIG has engaged in misleading or deceptive conduct in contravention of s 12DA(1) of the *ASIC Act 2001* in the issuing of invoices, in the making of demands for interest that he asserts was not or would not become due on the dates referred to in the invoices and demands, and in alleging events of default and that CIG was accordingly entitled to demand immediate repayment of principal in respect of SA1 to SA4.

376. Section 12DA(1) provides that a person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.

377. "Trade or commerce" is defined in s 12BA as "trade or commerce within Australia or between Australia and places outside Australia".

378. The meaning of "financial service" is governed by s 12BAB of the *ASIC Act 2001*. Section 12BAB(1)(b) provides that a person provides a financial service if they "deal in a financial product". Section 12BAB(7) provides that "issuing a financial product" constitutes dealing in a financial product.

379. What then is a "financial product"? Section 12BAA(7)(k) provides that a credit facility within the meaning of the regulations is a financial product. Regulation 2B(1)(a) of the *ASIC Regulations 2001* provides that the provision of credit for any period, with or without prior agreement between the credit provider and the debtor,

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<sup>539</sup> Defence at [21.2], [21.3] CB 58.

and whether or not both credit and debt facilities are available, is a credit facility for paragraph 12BAA(7)(k) of the *ASIC Act*.

380. The first problem with the claim for misleading and deceptive conduct is that it depends on establishing that the demands referred to were for amounts that were not due, or that would not become due on the dates referred to in the demands. This in turn depends on the success of:

- (a) Mr Kingston's arguments about the construction of clause 7 of SA4; and
- (b) Mr Kingston's arguments about the characterisation and attribution of the payment of A\$4.4 million on 11 December 2019.

These arguments are addressed above at paragraphs 334 to 357. For the reasons given there, they cannot succeed.

381. The second problem is that Mr Kingston's allegation of consequent loss or damage<sup>540</sup> remains unsubstantiated and unquantified. No case of loss or damage was opened. Some general assertions are set out in Mr Kingston's witness statement at [522],<sup>541</sup> but these are unsupported by any documentary evidence or valuation evidence. This evidence provides an entirely inadequate basis for the Court to conclude that Mr Kingston has suffered loss or damage.

382. Further, Mr Kingston's case does not show or explain how the sending of demands by CIG—assuming for the sake of argument that the demands were for amounts not due or not becoming due on the dates referred to as he asserts—caused any such loss or damage. His witness statement complains (at [522]) of alleged reduction in value of his shareholding in Sargon and loss of salary as CEO of Sargon. Such losses, if they occurred, cannot have been caused by a mere sending of incorrect demands by CIG.

383. Finally, the relief that Mr Kingston seeks is not damages under s 12GF for the loss or damage he asserts but a declaration under s 12GM(1) of the *ASIC Act 2001* that the

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<sup>540</sup> Defence at [21.5] CB 60.

<sup>541</sup> CB 257.



Loan Agreement and SA1 to SA4 are void *ab initio* or from such later date as the Court determines. This is extraordinarily ambitious in the context of a loan of HK\$653 million where the debt outstanding bears no relationship to any loss or damage alleged. No justification for such exorbitant relief has been advanced.

384. For these reasons the claim for misleading or deceptive conduct contrary to s 12DA(1) of the *ASIC Act 2001* must be dismissed.

#### **WHY THE UNCONSCIONABLE CONDUCT CASE FAILS**

385. Mr Kingston alleges<sup>542</sup> that, in respect of SA1 to SA4, by demanding payment of principal and interest, asserting events of default and pursuing this proceeding, CIG has engaged and is continuing to engage in conduct that is, in all the circumstances, unconscionable, in contravention of section 12CB(1) of the *ASIC Act 2001*.

386. Section 12CB(1)(a) provides that a person must not, in trade or commerce, engage in conduct in connection with the supply or possible supply of financial services to a person, engage in conduct that is, in all the circumstances, unconscionable.

387. As noted above, “trade or commerce” is defined in s 12BA as “trade or commerce within Australia or between Australia and places outside Australia”.

388. Mr Kingston's allegation fails at the threshold. Section 12CB(2)(a) provides:

*This section does not apply to conduct that is engaged in only because the person engaging in the conduct:*

*(a) institutes legal proceedings in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition;*

389. The conduct relied upon in the defence at [21.4] falls within the exemption. Demanding repayment and asserting events of default are necessary precursors to litigation in relation to the supply of the financial services or product.

390. It might be observed that Mr Kingston has not sought to rely upon the conduct in the particulars to constitute the breach, no doubt because to do so would necessarily

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<sup>542</sup> Defence at [21.4] CB 59.

require him to rely upon conduct that he claims, in his MLO case, to be conduct taking place entirely abroad (and in particular in Hong Kong).

391. What is “unconscionable conduct” for the purpose of section 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth)?

392. The applicable standard is a statutory standard rather than an equitable standard. The statutory requirement that the conduct be assessed “in all the circumstances” and the non-exhaustive list of matters to which the Court may have regard (in s 12CC(1)) “indicate that neither the boundaries nor the content of the equitable doctrine are defining or limiting features”.<sup>543</sup> The statutory concept is broader.<sup>544</sup>

393. In *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, Allsop CJ said:

*In any given case, the conclusion as to what is, or is not, against conscience may be contestable. That is inevitable given that the standard is based on a broad expression of values and norms. Thus, any agonised search for definition, for distilled epitomes or for shorthands of broad social norms and general principles will lead to disappointment, to a sense of futility, and to the likelihood of error. The evaluation is not a process of deductive reasoning predicated upon the presence or absence of fixed elements or fixed roles. It is an evaluation of business behaviour (conduct in trade or commerce) as to whether it warrants the characterisation of unconscionable, in the light of the values and norms recognised by the statute.*<sup>545</sup>

394. The subjective state of mind of the alleged contravener, whether by reference to actual knowledge or what it ought to have known, is relevant but is not the only focus

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<sup>543</sup> *Australian Competition and Consumer Commission v Medibank Private Ltd* (2018) 267 FCR 544 at [233]; *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* (2020) 275 FCR 57 at [362].

<sup>544</sup> *Australian Competition and Consumer Commission v Medibank Private Ltd* (2018) 267 FCR 544 at [237], [239]; and see s 12CB(4)(a); *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 at [83] per Gageler J and at [295] per Edelman J.

<sup>545</sup> *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at [304] (a case on s 12CB of the ASIC Act); approved in *Unique International College Pty Ltd v Australian Competition and Consumer Commission* (2018) 266 FCR 631 at [179]; *Australian Competition and Consumer Commission v Medibank Private Ltd* (2018) 267 FCR 544 at [240].

of enquiry, which is directed to the broader concept of a normative notion of conscience requiring an objective value judgment on behaviour.<sup>546</sup>

395. Labels such as “moral obloquy” or “a high level of moral obloquy” are a gloss on the statutory text and should be eschewed.<sup>547</sup>

396. In *Unique International College Pty Ltd v Australian Competition and Consumer Commission* (2018) 266 FCR 631, the Full Court of the Federal Court said:

***To behave unconscionably should be seen, as part of its essential conception, as serious, often involving dishonesty, predation, exploitation, sharp practice, unfairness of a significant order, a lack of good faith, or the exercise of economic power in a way worthy of criticism. None of these terms is definitional. The Shorter Oxford Dictionary on Historical Principles (1973) gives various definitions including ‘having no conscience, irreconcilable with what is right or reasonable’. The Macquarie Dictionary (1985) gives the definition of ‘unreasonably excessive; not in accordance with what is just or reasonable’. (The search for an easy aphorism to substitute for the words chosen by Parliament (unconscionable conduct) should not, however, be encouraged: see *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at [262]). These are descriptions and expressions of the kinds of behaviour that, viewed in all the circumstances, may lead to an articulated evaluation (and criticism) of unconscionability. It is a serious conclusion to be drawn about the conduct of a business person or enterprise. It is a conclusion that does the subject of the evaluation no credit. This is because he, she or it has, in a human sense, acted against conscience. The level of seriousness and the gravity of the matters alleged will depend on the circumstances. Courts are generally aware of the character of a finding of unconscionable conduct and take that into account in determining whether an applicant has discharged its civil burden of proof.***<sup>548</sup>

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<sup>546</sup> *Australian Competition and Consumer Commission v Medibank Private Ltd* (2018) 267 FCR 544 at [247]; *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* (2020) 275 FCR 57 at [373].

<sup>547</sup> *Australian Competition and Consumer Commission v Medibank Private Ltd* (2018) 267 FCR 544 at [240]-[243]; *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 at [91] per Gageler J and per Nettle & Gordon JJ at [152], but see Keane J contra at [118]-[120]; *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* (2020) 275 FCR 57 at [370].

<sup>548</sup> *Unique International College Pty Ltd v Australian Competition and Consumer Commission* (2018) 266 FCR 631 at [155]. Emphasis added by a different Full Bench in *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* (2021) 285 FCR 133 at [88]. Passage quoted with approval by Allsop CJ in *Good Living Company Pty Ltd v Kingsmede Pty Ltd* (2021) 284 FCR 424 at [6].

397. In *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1, Gageler J said that:

*conduct proscribed by the section as unconscionable is conduct that is so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct that is offensive to conscience.*<sup>549</sup>

398. In the same case, Kiefel CJ and Bell J said:

*The values that inform the standard of conscience fixed by s 12CB(1) include ... certainty in commercial transactions, honesty, the absence of trickery or sharp practice, fairness when dealing with customers, the faithful performance of bargains and promises freely made and 'the protection of those whose vulnerability as to the protection of their own interests places them in a position that calls for a just legal system to respond for their protection, especially from those who would victimise, predate or take advantage'.*<sup>550</sup>

399. A vexed question is whether, to establish statutory unconscionability outside cases of systematic conduct, it is necessary to demonstrate the unconscientious taking advantage of a special disadvantage. Section 12CB(4)(b) provides that:

*This section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour ...*

400. Thus s 12CB(4)(b) has been held to have the consequence that, in cases of systematic conduct, special disadvantage of an individual is not a necessary component of the prohibition: *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 per Keane J at [121]-[122], Nettle & Gordon JJ at [232], Edelman J at [293] (though Nettle, Gordon and Edelman JJ were in dissenting minority as to the outcome of the appeal).<sup>551</sup>

401. As to cases of conduct that is not part of a system of conduct:

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<sup>549</sup> *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 at [92] per Gageler J.

<sup>550</sup> *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 at [14] per Kiefel CJ & Bell J.

<sup>551</sup> See also *Australian Competition and Consumer Commission v Medibank Private Ltd* (2018) 267 FCR 544 at [251].

- (a) in *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1, Keane J (at [121]-[122]) said that it was implicit in the notion of unconscionability that the impugned conduct would effect a disadvantage on its victims, while Edelman J (at [295]) suggested that statutory unconscionability does not require special disadvantage, or the taking advantage of that special disadvantage, at all. None of the other justices considered the question and Kiefel CJ and Bell J expressly declined to do so (at [48]);
- (b) but in *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* (2021) 285 FCR 133 a Full Bench analysed the question at considerable length and came to a strongly expressed view that the taking of advantage of a special disability is not an essential ingredient of statutory unconscionability: at [4], [80]-[93];
- (c) that view has since been applied in *Ali v Australian Competition and Consumer Commission* (2021) 394 ALR 227 at [234].

402. Finally, it should be noted that the *Briginshaw* standard applies. In *Unique International College Pty Ltd v Australian Competition and Consumer Commission* (2018) 266 FCR 631, Allsop CJ said:

*Unconscionability is a serious issue to which the terms of section 140 (2) of the Evidence Act 1995 (Cth) are relevant. Some assertions of unconscionability will be more serious than others. That is inevitable due to the fact- and context-specific evaluation that it is necessary to undertake by reference to the values recognised by the statute.*<sup>552</sup>

403. In alleging unconscionable conduct contrary to s 12CB(1) of the ASIC Act, Mr Kingston must clear a high bar. He fails to do so for the following reasons.

404. *First*, for the reasons explained above,<sup>553</sup> CIG was entitled to demand that Mr Kingston make the periodic repayments required under SA1 to SA4 and to call up

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<sup>552</sup> *Unique International College Pty Ltd v Australian Competition and Consumer Commission* (2018) 266 FCR 631 at [126] and see also at [155] (a case on s 21 of the ACL).

<sup>553</sup> See paragraphs 334 to 357.

the principal when he failed to do so. There is nothing unconscionable in a creditor demanding payment by a debtor or pursuing its claim in this Court.

405. *Secondly*, although s 12CC(1) of the ASIC Act does not limit the matters to which the Court may have regard for the purpose of determining whether a person has contravened s 12CB(1), it is notable that in respect of none of the matters listed in paragraphs 12CB(1)(a) to (l) is there any basis to find unconscionable conduct on the part of CIG. Although that feature of the case is not determinative, it means that Mr Kingston must go outside the usual aspects of a commercial relationship that may indicate unconscionable conduct in order to make out his case.
406. *Thirdly*, even if for some reason CIG was not entitled to make demands for repayment, in no way did its conduct, whether in making demands, or in calling up the principal, or in pursuing its claim in this proceeding, approach the degree of seriousness required for conduct to contravene the section. It is plain that CIG has acted in good faith throughout, pursuing in a proper manner what it believes—both subjectively and reasonably—to be its legal rights. CIG’s conduct shows, for example, a complete absence of “*dishonesty, predation, exploitation, sharp practice, unfairness of a significant order, a lack of good faith, or the exercise of economic power in a way worthy of criticism*”. In no way can its conduct be described as “*having no conscience, irreconcilable with what is right or reasonable*”.
407. Applying the *Briginshaw* standard, in no way could this Court be comfortably satisfied that CIG’s conduct meets the level of seriousness, reprehensibility or culpability at which s 12CB(1) is directed.
408. *Fourthly*, for the reasons described above in relation to misleading or deceptive conduct, Mr Kingston’s allegation of loss or damage in consequence of CIG’s alleged unconscionable conduct falls short. It does so both on the lack of evidence of actual loss and damage, and in seeking to establish a causal nexus between CIG’s conduct and the types of loss that Mr Kingston seeks to prove.
409. The paucity of the evidence of any actual loss or damage is addressed above at paragraph 381.

410. As to causation, Mr Kingston's case does not show or explain how CIG's demanding principal and interest, asserting events of default, or pursuing this proceeding, could have caused the losses of which he complains (in his witness statement at [522]) of alleged reduction in the value of his shareholding in Sargon and loss of salary as CEO of Sargon. Such losses, if they occurred, cannot have been caused by CIG's merely demanding principal and interest, asserting events of default, and pursuing this proceeding.
411. Indeed, Mr Kingston's case relates these alleged losses more to the appointment of receivers to Sargon. Obviously that appointment was made by Taiping Trustees under the terms of Promissory Note 1, and not by the plaintiff CIG, which was never a party to Promissory Note 1, and never had any contractual relationship or dealings with Sargon.
412. Mr Kingston's case therefore seeks to tie CIG in to the appointment of receivers Sargon by Taiping Trustees. It does so by:
- (a) alleging acquiescence on the part of CIG in the actions of Taiping Trustees in paragraphs 20A.1 and 20A.3 of the defence and particulars (vii) & (viii) subjoined to paragraph 21. 4 of the defence;
  - (b) including reference to the actions of Taiping Trustees in particulars (vii) to (x) subjoined to paragraph 21.4 of the defence – impermissibly so because these particulars therefore do not correspond with the pleading, and trespass outside its scope; and
  - (c) eliding the actions of Taiping Trustees with CIG in demanding payment under Promissory Note 1, appointing receivers to Sargon, TTIM and TCFM, imposing a condition on suspension of the receiverships, and allegedly seeking to terminate the Loan Agreement and SA1 to SA4 and Promissory Note 1 in particular (x) to paragraph 21.4 of the defence.
413. The attempt to do so must fail, for the following reasons. First, it is not at all clear how there can be said to have been any acquiescence on the part of CIG.

Acquiescence in another's act imports not only knowledge,<sup>554</sup> but also a right to object or prevent that act and a standing by or failure to exercise that right. In *Duke of Leeds v Earl of Amherst* (1846) 2 Ph 117 at 123; 41 ER 886 at 888, Lord Cottenham LC said:

*If a party, having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. That is the proper sense of the word acquiescence. In that sense, however, there is no acquiescence here, for the act was done when the present duke was a minor, and when, if he had knowledge or means of knowledge – and he does not appear to have been of an age for that – nothing of acquiescence can be imputed to him.*

414. In *Orr v Ford* (1989) 167 CLR 316, Deane J said at 337-8:

*Strictly used, acquiescence indicates the contemporaneous and informed (knowing) acceptance or standing by which is treated by equity as “assent” (ie consent) to what would otherwise be an infringement of rights (cf *Dann v Spurrier* (1802) 7 Ves Jun 231; 32 ER 94; *Life Association of Scotland v Siddal. Cooper v Greene* 3 De GF & J 58; 45 ER 800; *Cashman v 7 North Golden Gate Gold Mining Co* (1897) 7 QJLJ 152 at 153). The word is commonly also used to refer: (i) to a representation by silence of a type which may found an estoppel by conduct (see, eg, *Mitchell v Homfray* (1881) 8 QBD 587 at 591, 593; or (ii) to acceptance of a past wrongful act in circumstances which give rise to an active waiver of rights or a release of liability (see, eg, *Brunyate, Limitations of Actions in Equity*, (1932), pp 188–9; *Hanbury and Maudsley, Modern Equity*, 12th ed (1985), pp 621–2); or (iii) to an election to abandon or not enforce rights: (see, eg, per *Lindley LJ, Allcard v Skinner* (1887) 36 Ch D 145 at 186-9).*

415. There was no acquiescence in (alleged) wrongful conduct on the part of CIG here. Even if the actions of Taiping Trustees were found to be wrongful (even though Taiping Trustees is not a party, which must impose a significant obstacle to such a finding) there is no basis to suggest that CIG had any right to interfere to prevent them. The Court simply is not in a position to make any finding that Taiping Trustees' conduct was wrongful. Further, counsel for CIG have been unable to locate

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<sup>554</sup> *Life Association of Scotland v Siddal: Cooper v Greene* (1861) 3 DeG F & J 72 at 74; 45 ER 800 at 806; *Re Morish* [1939] SASR 305 at 316; *Group Four Industries Pty Ltd v Brosnan* (1992) 8 ACSR 463 at 506.



any decision in which acquiescence has been held to constitute, or even alleged to constitute, statutory unconscionable conduct.

416. As to the imposition of conditions on the suspension of the receiverships, this refers to the 1 February 2020 letter from Ashurst to Gilbert+Tobin on behalf of Sargon, TTIM and TCFM.<sup>555</sup> The conditions in the letter were the payment of outstanding instalments in respect of Promissory Note 1 and SA1 to SA4. These conditions were entirely reasonable in all the circumstances.
417. The allegation that CIG sought to terminate the Loan Agreement and SA1 to SA4 and Promissory Note 1 is misconceived. It relies on the communications referred to in paragraphs 13A.1 and 14.1 of the defence which are, respectively, the email dated 21 October 2019 from Andy Yi Kai Huang to Mr Kingston<sup>556</sup> and his further email dated 5 November 2019 attaching draft terms sheets for a proposed early termination of SA1-SA4 and Promissory Note 1.
418. This was not “conduct to terminate” these loans as asserted in the defence.<sup>557</sup> This was no more than a proposal for an agreed early termination of them. Indeed Mr Kingston himself describes Mr Huang’s 5 November 2019 email in his defence at [14.1] as containing “*draft* term sheets for the *proposed* early termination of [SA1-SA3, SA4 and Promissory Note 1]” (emphasis added). This proposal would have required Mr Kingston and Sargon’s agreement before it could have proceeded. No such agreement was reached. Indeed neither Mr Kingston nor Sargon ever responded to this proposal.
419. It is rather remarkable that Mr Kingston nonetheless seeks (incorrectly, for reasons explained in this submission at paragraphs 339 to 357) to characterise the \$4.4 million payment on 11 December 2019 as being pursuant to the terms sheet for the proposed early termination of Promissory Note 1, as if Sargon had accepted that proposal, while at the same time accusing CIG of unconscionable conduct in sending the self-same proposal. Mr Kingston must at the very least decide whether he wishes

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<sup>555</sup> CB 5531-5533, and see Gilbert & Tobin’s reply dated 2 February 2020 at CB 5536-5537.

<sup>556</sup> CB 5092.

<sup>557</sup> Defence at particular (x) to paragraph 21.4; CB 60.

to approbate or reprobate the terms sheets for the proposed early termination of the loans.

420. Finally, as with his allegation of misleading or deceptive conduct, the relief that Mr Kingston seeks is not damages under s 12GF for the loss or damage he asserts but a declaration under s 12GM(1) of the *ASIC Act 2001* that the Loan Agreement and SA1 to SA4 are void *ab initio* or from such later date as the Court determines. Again, the debt outstanding bears no relationship to any loss or damage alleged. No justification for such exorbitant relief has been advanced.

421. For these reasons the claim for unconscionable conduct must be dismissed.

#### **WHY THE SET-OFF DEFENCE FAILS**

422. Mr Kingston's defence alleges at [22.1] that, if he is indebted to CIG, he is entitled to set off any amount that CIG has realised from the enforcement of any of the securities referred to in paragraphs 3.8(f), 3.16(g), 3.24(i) and 3.34(i) of the defence (being the securities referred to respectively in SA1, SA2, SA3 and SA4).

423. The defence of set-off was not opened. Presumably it is not pressed.

424. If it were to be pressed, the short answer to it would be that there is in truth no set off here. A set off may arise from a cross-claim or counterclaim or a debt or obligation owed by the creditor to the debtor. Any realisation by CIG from enforcement of any of the securities referred to in paragraphs 3.8(f), 3.16(g), 3.24(i) and 3.34(i) of the defence could not give rise to any such claim or debt in the hands of Mr Kingston.

425. It may be that what was intended to be relied on was the rule against double recovery or double satisfaction, though this is not pleaded. The rule against double satisfaction was explained by Gummow and Hayne JJ in *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635 at [55]-[62]. At [58] their Honours referred with approval to the description of *Morris v Robinson*<sup>558</sup> given by Viscount Simon LC in *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 20:

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<sup>558</sup> *Morris v Robinson* (1824) 3 B&C 196; 107 ER 706.

*There, cargo belonging to the plaintiffs had been improperly sold during the course of a voyage. There were thus two lines of remedy which the plaintiffs could pursue. They first brought an action against the shipowners for breach of their duty as carriers, with a count in trover. They recovered a verdict, but they did not enter up judgment and there had been no actual satisfaction of their claim. Instead, they brought another action against different defendants — namely, an action for conversion against the purchasers who had bought the cargo. It was held by the Court of King's Bench that the former action was no bar, and that the defendants in the second action were liable for their act in purchasing the plaintiff's goods. Bayley J, in giving judgment, observed: "If concurrent actions had been brought, that against the owners could not have barred the other; why then should it have that effect because they have been brought at different times? If indeed the plaintiffs were to recover the full value of the goods in each action, a Court of Equity would interfere to prevent them from having a double satisfaction, but there is nothing in the former action which can, in a Court of Law, prevent the recovery in this."*

426. But there is no evidence of any realisation by CIG from any enforcement of any of the securities. It follows that there is no basis in the evidence for reducing, whether by way of the rule against double satisfaction, or by way of set-off, the amount of CIG's claim against Mr Kingston.

427. Further, clause 46.1 of the Loan Agreement Terms and Conditions<sup>559</sup> provides that:

*The Customer agrees to make any payments under this Agreement without set-off or counterclaim and free and clear of any withholding or deduction for Taxes, unless that is prohibited by Law, in immediately available funds.*

428. The effect of clause 46.1 is that, even if there were any basis for a set-off or counterclaim by Mr Kingston against CIG, this would not affect Mr Kingston's obligation, as between himself and CIG, to pay to CIG the full amount owing under the Loan Agreement. In this situation, if anyone were entitled to a set-off or recovery in respect of any proceeds of realisation of the securities, it would be the third-party security-providers, not Mr Kingston as principal debtor.

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<sup>559</sup> CB 526.

## WHY THE MLO DEFENCES FAIL

### The issue between the parties

429. Mr Kingston's pleaded case alleges breaches of sections 18(1) and (2), 22(1) and 25(2) of the MLO.
430. CIG understands that Mr Kingston no longer presses sections 22(1) and 25(2) as those sections were not addressed in opening submissions.<sup>560</sup>
431. The issue between the parties is therefore whether the Facility Agreement, as varied by each Supplementary Agreement, is void and unenforceable by the operation of section 18(1) of the MLO.<sup>561</sup> A separate issue, concerning whether the plaintiff is entitled to restitution of the funds lent, is separately addressed below at paragraphs 458 to 463.

### The legislation and the principles of construction

432. Section 18 provides:
- (1) *No agreement for the repayment of money lent by a money lender or for the payment of interest on money so lent, and no security given to any money lender in respect of any such agreement or loan, shall be enforceable unless—*
    - (a) *within 7 days after the making of the agreement, a note or memorandum in writing of the agreement is made in accordance with subsection (2) and signed personally by the borrower, and a copy of such note or memorandum is given to the borrower at the time of signing; and*
    - (b) *there is included in or attached to such copy a summary, in such form as may be prescribed, of such provisions of this Part and Part IV as may be prescribed,*

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<sup>560</sup> See paragraphs 129 to 135 of the defendants' outline of opening submissions.

<sup>561</sup> Defence [3.31], [3.42] at CB37, 45.

*and no such agreement or security shall be enforceable if it is proved that the note or memorandum was not signed by the borrower before the money was lent or the security was given.*

- (2) *The note or memorandum shall contain all the terms of the agreement and in particular shall set out—*
- (a) *the name and address of the money lender;*
  - (b) *the name and address of the borrower;*
  - (c) *the name and address of the surety, if any;*
  - (d) *the amount of the principal of the loan in words and figures;*
  - (e) *the date of the making of the agreement;*
  - (f) *the date of the making of the loan;*
  - (g) *the terms of repayment of the loan;*
  - (h) *the form of security for the loan, if any;*
  - (i) *the rate of interest charged on the loan expressed as a rate per cent per annum, or the rate per cent per annum represented by the interest charged as calculated in accordance with Schedule 2; and (Amended 69 of 1988 s. 15)*
  - (j) *a declaration as to the place of negotiation and completion of the agreement for the loan.*
- (3) *Notwithstanding subsection (1), if the court before which the enforceability of any agreement or security comes in question is satisfied that in all the circumstances it would be inequitable that any such agreement or security which does not comply with this section should be held not to be enforceable, the court may order that such agreement or security is enforceable to such extent, and subject to such modifications or exceptions, as the court considers equitable.*

433. The experts agree that the principles of statutory construction are correctly stated in the Manzoni Report [19]-[27] and, with some qualifications, in the Li Report [16]-[22].<sup>562</sup> In broad terms:
- (a) The Court considers the meaning of the words, giving them their natural and ordinary meaning but also having regard to their context and purpose.
  - (b) In so doing, the Court seeks to ascertain the intention of the legislature as expressed in the language of the statute.
  - (c) The relevant provisions are read together and in the context of the whole statute as a purposive unity in its appropriate legal and social setting.
  - (d) Prefatory materials (including law reform reports and explanatory memoranda) are admissible as to the purpose of the statute, including the mischief to which the statute was aimed.
  - (e) Courts construe statutory provisions to avoid absurdities, where necessary.
434. The experts also agreed, in relation to the power of the Court under section 18(3) to enforce the agreement:<sup>563</sup>
- (a) To mitigate the harshness of a strict application of the MLO, the Court will take into account all circumstances when exercising its statutory discretion to decide whether a lending agreement which breaches the MLO should nevertheless be enforced.
  - (b) In so doing, the MLO should be applied to strike a fair balance between money lender and borrower, having regard both to the terms of the ordinance as well as the agreement they have reached.
435. Section 18(3) is addressed further below.

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<sup>562</sup> Joint Report [1] at CB14138.

<sup>563</sup> Joint Report [1] at CB14138; Manzoni Report [26]-[27] at CB269-270; Li Report [22] at CB338.

## The MLO does not apply to SA1-SA4

436. The experts agree that the MLO would only apply to this case if:<sup>564</sup>
- (a) the lender was carrying on or holding out as carrying on business as a money lender in Hong Kong; and
  - (b) the proper law of the loan agreement is Hong Kong law.
437. The experts disagree, however, as to whether there is a third condition, namely that the borrower should either be an individual in Hong Kong or have a sufficient connection with Hong Kong.<sup>565</sup>
438. Mr Manzoni's view that such a connection is required is underpinned by the decision of Hunter J in *Hong Kong Shanghai (Shipping) Ltd v The Owners of the Ships of Vessels "Cavalry" Panamanian Flag* [1987] HKLR 287 in which his Honour opined that the *Money Lenders Ordinance 1911* (the predecessor to the MLO):<sup>566</sup>
- ... is plainly directed to domestic transactions. Its apparent social purpose is to prevent the exploitation of Hong Kong citizens by Hong Kong loan sharks ...*
439. In *China Merchants Bank v Minvest International Limited* HCA 9070/2000, 29 September 2001, Chu J cited *Hong Kong Shanghai (Shipping)* and said, about the MLO:
- In my view, the new Money Lenders Ordinance retains the same objective. There is nothing in its provisions which suggests that the new Ordinance intends to supervise and regulate money lending activities outside Hong Kong ...*
440. Mr Manzoni correctly notes that neither case discusses whether the MLO would apply if the borrower had no connection with Hong Kong.<sup>567</sup> He accepts that the choice of law clause may itself provide a sufficient basis for applying the MLO.<sup>568</sup>

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<sup>564</sup> Joint Report [3] at CB14140.

<sup>565</sup> Joint Report [3] at CB14140-14141.

<sup>566</sup> Manzoni Report [46]-[49] at CB275-276.

<sup>567</sup> Manzoni Report [50] at CB276.

<sup>568</sup> Manzoni Report [52] at CB277.

However, he concludes that, arguably, a Hong Kong Court would require such a connection.

441. Mr Li disagrees with Mr Manzoni and seeks to distinguish *Hong Kong Shanghai (Shipping)* and *China Merchants Bank* on the facts. He argues:<sup>569</sup>

- (a) that the statutory purpose of protecting Hong Kong citizens from exploitation by loan sharks would be achieved "by curbing oppressive lending practices in Hong Kong in general";
- (b) that the criminalisation by section 24 of loans imposing interest rates which exceed 60% evidences an intention to apply to all loans made in Hong Kong; and
- (c) the term 'substantial connection with Hong Kong' is not really practicable.

442. It is respectfully submitted that Mr Manzoni's view is to be preferred. The experts agree that the statute should be construed in accordance with its statutory purpose. If that purpose is to protect Hong Kong citizens then it makes no sense for the Court to be concerned with protecting a foreigner.

443. Mr Kingston's position on the issue of connection with Hong Kong is set out in Assumption E in the letter of instruction to Mr Li SC, namely, that at all relevant times:<sup>570</sup>

*Mr Kingston was a British and Australian citizen who maintained residences in Australia and Hong Kong, was a director of at least one Hong Kong company, had a Hong Kong mobile phone, had a Hong Kong bank account, and for the majority of the period was a Hong Kong tax payer, primarily employed in Hong Kong and held a Hong Kong residency and Hong Kong ID card linked to his employment.*

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<sup>569</sup> Joint Report [3] at CB14140-14142.

<sup>570</sup> Li Report, Annexure A at CB370.



444. However, the evidence was:

- (a) At the time Mr Kingston applied for the loan under SA1, by his own admission, he resided in Australia. In his loan application, he provided an address in Carlton, Australia on the loan application form and tendered certified copies of his Australian passport and Victorian Driver Licence in support of the application.<sup>571</sup> He also disclosed on his loan application that he was employed by an Australian company and was remunerated in Australian dollars—and this had not changed by the time of SA4.<sup>572</sup>
- (b) Although Mr Kingston has tendered in evidence a residential tenancy agreement for the period February 2017 to February 2019, there is no evidence he resided in or was a taxpayer in Hong Kong at the relevant time (see further below)—his admission against interest is stronger evidence of the true position.<sup>573</sup> Indeed, when he visited Hong Kong in November 2017, he stayed at the Four Seasons Hotel.<sup>574</sup>
- (c) Mr Kingston has not tendered any direct evidence that he was employed in Hong Kong or that he received a regular income in Hong Kong prior to 28 September 2018 (the date of SA4). Although Mr Kingston has tendered a letter from the Inland Revenue Department in Hong Kong requesting that he file a tax return for the financial year 1 April 2018 to 31 March 2019,<sup>575</sup> there is no evidence that he did in fact file a tax return, or, if he earned income in Hong Kong that year, the nature and quantum of any such income, the point in the Hong Kong financial year at which any such income commenced, and whether he was continuing to earn the income at the time he entered into SA4. Moreover, any income earned in Hong Kong must have post-dated SA1 to SA3.

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<sup>571</sup> CB418, CB502 and CB503.

<sup>572</sup> CB417-428.

<sup>573</sup> CB14169-14172.

<sup>574</sup> Kingston XX T415:20-25.

<sup>575</sup> CB14534.

- (d) The inference from the totality of the evidence is that Mr Kingston's bank account was established only to enable him to receive the loan funds from CIG, which he borrowed for use in Australia.<sup>576</sup>
- (e) The copy of the Hong Kong ID card tendered by Mr Kingston discloses that the card was issued on 23 January 2019, which was after he had entered into SA4.<sup>577</sup>

445. Moreover, it is common ground that:

- (a) the proceeds of the loan were intended to be used in Victoria—the purpose of the loan was to enable Mr Kingston or his nominees to acquire securities to be issued in an IPO in Victoria and which were to be listed for quotation on the Australian Securities Exchange;<sup>578</sup>
- (b) the lender made the loan in connection with a corporate strategy to invest abroad and in particular in Australia.<sup>579</sup>

446. When the totality of the circumstances are considered, it is clear that, but for the choice of law clause, the jurisdiction with the most natural connection with the contract of loan is not Hong Kong but Victoria.

447. It follows that the MLO does not apply to this transaction. It was never the intention of the Hong Kong legislature for that statute in effect to operate extraterritorially to regulate a loan that, in truth, was made to an Australian in Australia and for Australian purposes.

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<sup>576</sup> Under SA1 & SA2, for subscribing for shares in an IPO: cl 3(2) of SA1 and SA2 at CB537 and CB553; under SA3, for the purpose of funding a call for capital by subscribing for shares in Sargon: cl 3(3) at CB582; and under SA4, for working capital for GrowthOps & Sargon and to acquire other entities: cl 3(2) & 3(3) CB619.

<sup>577</sup> CB14517.

<sup>578</sup> Under SA1 & SA2, for subscribing for shares in an IPO: cl 3(2) of SA1 and SA2 at CB537 and CB553; under SA3, for the purpose of funding a call for capital by subscribing for shares in Sargon: cl 3(3) at CB582; and under SA4, for working capital for GrowthOps & Sargon and to acquire other entities: cl 3(2) & 3(3) CB619. See also Kingston 1 [155] at CB711 (and exhibit at CB1792-1793), [162] at CB179 and [168] at CB181, and CB1540, CB1892 and CB3122-3123.

<sup>579</sup> CB1361, CB1543, CB1895, CB3118, CB3121, CB3124 and CB4010-4011.

### The discretion in section 18(3) of the MLO

448. If the submission above is not accepted, a Hong Kong Court would nonetheless enforce the Loan Agreement and SA1 to SA4. Although it is common ground that section 18(1) was contravened, the contraventions were trivial.
449. Section 18(1) requires the lender to provide the borrower with a note or memorandum of the agreement which contains the details set out in s 18(2). The note or memorandum must be signed by the borrower within 7 days after the making of the agreement and a copy must be given to the borrower at the time of signing.
450. A MLO note was signed by Mr Kingston on 28 November 2017<sup>580</sup> but (as is common ground) the Facility Agreement fell short of the requirements of ss 18(1) and (2) in the following ways:
- (a) None of SA1 to SA4 sets out the amount of principal in words *and* figures. The agreements set out the principal in either words or figures but not both.<sup>581</sup>
  - (b) None of SA1 to SA4 sets out the rate of interest charged on the loan expressed as a rate per cent per annum. Although the interest rate is stated, the experts agree that the "Premium" would be treated by a Hong Kong Court as forming part of the interest rate.<sup>582</sup> The agreements, however, identify the Premium.<sup>583</sup>
451. The evidence is that Mr Kingston was a sophisticated borrower. There is no evidence that he did not understand how much principal he had been lent or the interest and Premium which would be charged.<sup>584</sup>
452. Section 18(3) of the MLO provides the Court with a discretion to enforce the agreement to the extent it considers equitable if it "is satisfied that in all the circumstances it would be inequitable" not to enforce the agreement.

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<sup>580</sup> CB436.

<sup>581</sup> CB504, CB552, CB580, CB617.

<sup>582</sup> CB14152.

<sup>583</sup> See clause 8 of SA4 at CB621.

<sup>584</sup> Kingston XX at T420:20-21.

453. The experts agree that this discretion is a wide one which is exercised having regard to all the circumstances and to the statutory policy to protect unsophisticated borrowers from exploitation by money lenders.<sup>585</sup> They also agree that the following principles would inform this Court's exercise of the discretion:<sup>586</sup>

- (a) The nature and seriousness of the breach—If the breach in question is only trivial, the Court may be inclined to enforce the loan save and except for any charges or payments in breach of the MLO. On the other hand, if the Court finds the lender to be dishonest and unscrupulous in making a deliberate and sophisticated attempt to evade the various controls imposed by the MLO, it may seek to strip the lender of all commercial benefits.
- (b) Knowledge and experience of the borrower—If the Court finds that the borrower realised and understood the nature and operation of the loan, it is likely to be inclined to enforce the loan.
- (c) Operation of the loan—Even if certain terms of the loan agreement do not comply with the MLO, the Court would consider whether the non-compliant terms were enforced by the lender and assess whether and how the breach may have affected the borrower in practice.
- (d) Prejudice to the parties—The Court will look at whether the breach of the MLO has had any practical consequences to the borrower. Whether the borrower has suffered any prejudice flowing from the statutory breaches is regarded by the Court as a "key consideration". The Court will also take into account the fact that, if it were to hold the loan agreement unenforceable, the lender would lose the entire outstanding principal plus accrued interest, and the borrower may be allowed a windfall. It is therefore unlikely to refuse to enforce the loan all together.

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<sup>585</sup> Joint Report [9] at CB 14156.

<sup>586</sup> Joint Report [9] at CB 14156 and Manzoni Report [101] at CB287-289.

454. Mr Li agrees with Mr Manzoni and further opines that the key considerations are the sophistication of the borrower and whether any prejudice flows from the statutory breaches.<sup>587</sup>

455. The relevant circumstances of this case are:

- (a) Mr Kingston was experienced in business and sophisticated. He agreed during cross-examination that he describes himself as an "entrepreneur and engineer".<sup>588</sup>
- (b) Mr Kingston read the agreements before he signed them.<sup>589</sup> He also actively negotiated the terms of the agreements.<sup>590</sup>
- (c) No prejudice flowed from the breaches which are merely technical. CIG advanced HK\$653 million to Mr Kingston at rates of interest that a Hong Kong Court would not consider to be exorbitant.<sup>591</sup>

456. Moreover, Mr Kingston's own expert, Mr Li, expressed the following opinion:<sup>592</sup>

*[103] In the present case, a number of circumstances would tend heavily in favour of enforcement of the Agreements:*

- (1) Mr Kingston is a sophisticated businessperson who is able to look after his own financial interests. He should have been aware of the terms of the bargain that he was getting into.*
- (2) Mr Kingston says that he was required to sign some of the Agreements when he was only given blank execution pages, and that some of the Agreements were only given to him in Chinese which he was unable to read. But it is not said that Mr Kingston was pressured*

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<sup>587</sup> Li Report at [97]-[103], CB 353-356; Joint Report at [9], CB 14156; see also the cases cited by Mr Li SC at [97]-[102].

<sup>588</sup> Kingston XX at T420:20-21.

<sup>589</sup> Kingston XX at T425:17-20.

<sup>590</sup> See, e.g. Kingston 1 [159] at CB179 (and exhibit at CB1806-1815), Kingston 1 [206]-[207] at CB187 (and exhibits at CB2042 and 2050-2057), Kingston 1 [258] and [260] at CB197 and Kingston 1 [312]-[313] at CB207.

<sup>591</sup> Manzoni Report [145] at CB 300.

<sup>592</sup> CB356-358.

*to sign the Agreements without knowing and without an opportunity to ascertain the terms.*

- (3) Mr Kingston was provided with English copies of at least some of the Agreements when he executed them, suggesting that any omission to give him an English copy was not an intentional evasion of s.18 of the MLO. Moreover, when he was eventually given English copies of the various Agreements, this did not lead to complaints.*
- (4) It is not inherently wrong or unfair or unethical for a lender to obtain or even insist on collateral with value exceeding or even far exceeding the amount advanced. This is especially the case for shares the value of which is often uncertain and/or can fluctuate.*
- (5) Further, as I have noted, clause 5 of the SAs allow Mr Kingston to withdraw excess collateral.*
- (6) As to the Premium Arrangement, I have noted above it appears akin to a profit-sharing mechanism. Mr Kingston suffers no additional risk by having to pay the Premium, since the obligation to pay only arises if there are residual proceeds after deducting the principal and interest payable under SA IV from the proceeds of sale of "Stock E". In fact Mr Kingston himself would be entitled to a share of the profit, without exposing himself to further risk.*

*[104] Mr Kingston made clear to CIGF that he would be unable to repay the loan given his financial circumstances. Hardship may be an aspect of inequity in deciding whether to allow enforcement of a loan agreement which violates the MLO. But it is significant only if the lender has somehow exploited the hardship.*

*[105] ...*

*[106] The fact that Mr Kingston made clear to CIGF he would be unable to repay is not, strictly speaking, hardship. I am also unaware of how CIGF may be said to have exploited Mr Kingston's situation. It may be that Mr Kingston overextended himself; it may even be that CIGF knew or should suspected so. But for the Court to take this into account as a factor against enforcement, some fault on the part of CIGF would have to be articulated.*

457. Ultimately, the MLO issue is a red herring. Mr Kingston's own expert opined, on the basis of the facts Mr Kingston instructed him to assume, that the loan agreements would be enforced against Mr Kingston. The only circumstances in which, in Mr Li's view, a Hong Kong Court would not enforce the agreement would be if, in effect,

Mr Kingston makes out his estoppel defence, whereupon the MLO issues become mere surplusage.

## RESTITUTION

458. Alternatively to its claims under the Loan Agreement, if for any reasons the Loan Agreement is unenforceable or void, CIG claims restitution of the amounts lent to Mr Kingston.
459. It is common ground that CIG advanced HK\$653 million to Mr Kingston. If the Loan Agreement is unenforceable or void, this represents money had and received by Mr Kingston to the use of CIG.
460. Using the modern language, Mr Kingston has been enriched by the receipt of HK\$653 million advanced by CIG. The enrichment was at the expense of CIG, in that it was CIG's money that was advanced. The enrichment was in circumstances where it is plain that no gift was intended and that at all times CIG operated on the basis that the Loan Agreement was enforceable according to its terms. It follows<sup>593</sup> that, to the extent it has not already been repaid, it would be unjust for Mr Kingston to retain the money he received.
461. That extent is the amount of the advances, HK\$653 million, less the amounts of the repayments made since as set out in Annexure B to the witness statement of Mr Guo dated 10 September 2021,<sup>594</sup> which total HK\$59,967,777.54. This leaves an amount recoverable by way of restitution of HK\$593,032,222.46.
462. In defence of CIG's alternative claim for restitution, Mr Kingston raises four points. He says that:
- (a) paragraph 27 of the statement of claim does not specify or identify a vitiating or unjust factor;<sup>595</sup>

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<sup>593</sup> See eg *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 174 CLR 353 at 367-368, 375-379.

<sup>594</sup> CB 108.

<sup>595</sup> Defence at [27], CB 62.

- (b) as a result of the uses of the amounts advanced pleaded in paragraph 26(d) of the defence, he changed his position in good faith;<sup>596</sup>
- (c) because of the illegality of pleaded in paragraphs 3.13, 3.21, 3.31 and 3.42 (which refer to the MLO), the plaintiff is not entitled to claim restitution of the money the subject of the Loan Agreement;<sup>597</sup> and
- (d) he relies on his estoppel defence.<sup>598</sup>

463. The estoppel defence must fail for the reasons set out above. As to the other defences sought to be raised by Mr Kingston:

- (a) there is no need to prove “unjustness” over and above the mistake. The fact that the payments were caused by a mistake is sufficient to give rise to a prima facie obligation on the part of the payee to make restitution.<sup>599</sup> Further, even the complete failure to plead that moneys had been paid under a mistake was not an obstacle to recovery on the part of a mistaken payer in *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 174 CLR 353 (at 367);
- (b) there was no relevant change of position by Mr Kingston. A change of position must be adverse to the recipient<sup>600</sup> or to his or her detriment on the faith of the receipt.<sup>601</sup> Here, that means that Mr Kingston must satisfy the Court that he believed the advances by CIG did not need to be repaid, in other words that they were a gift. For the reasons discussion above, Mr Kingston cannot have had such a belief;
- (c) as to alleged illegality, the only provision of the MLO now relied on by Mr Kingston is s 18. This section provides, in substance, that no agreement for the repayment of money lent by a money lender or for the payment of interest

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<sup>596</sup> Defence at [28(a)], CB 62.

<sup>597</sup> Defence at [28(b)], CB 62.

<sup>598</sup> Defence at [28(c)], CB 62.

<sup>599</sup> *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 174 CLR 353 at 379.

<sup>600</sup> *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662 at 673; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 174 CLR 353 at 384-385.

<sup>601</sup> *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 174 CLR 353 at 385.



on money so lent shall be enforceable unless the requirements set out in ss 18(1) and (2) are satisfied. In *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, French CJ, Crennan and Kiefel JJ said (at [34]):

*The outcome of a restitutionary claim for benefits received under a contract which is unenforceable for illegality, will depend upon whether it would be unjust for the recipient of a benefit under the contract to retain that benefit. There is no one-size-fits-all answer to the question of recoverability. As with the question of recoverability under a contract affected by illegality the outcome of the claim will depend upon the scope and purpose of the relevant statute. The central policy consideration at stake, as this Court said in Miller, is the coherence of the law. In that context it will be relevant that the statutory purpose is protective of a class of persons from whom the claimant seeks recovery. Also relevant will be the position of the claimant and whether it is an innocent party or involved in the illegality.*

Here the evident purpose of the provision is to prohibit lending by money lenders without the provision of the information mandated by s 18. Insofar as there was a failure to provide all of that information, for the reasons explained in paragraphs 448 to 457 above, in all the circumstances it would be inequitable that the Loan Agreement should be held to be unenforceable. It follows that CIG should be entitled to recover at least the principal advanced to Mr Kingston.

## **CONCLUSION**

464. For the reasons set out above, CIG is entitled to judgment for the full outstanding principal and interest under the Facility Agreement which, at the time of the trial, stood at HK\$765,022,298.40, with interest continuing to accrue. Alternatively, if for any reason the Facility Agreement is not enforceable, CIG seeks restitution in the amount of HK\$593,032,222.46, plus statutory interest. CIG also seeks its costs.