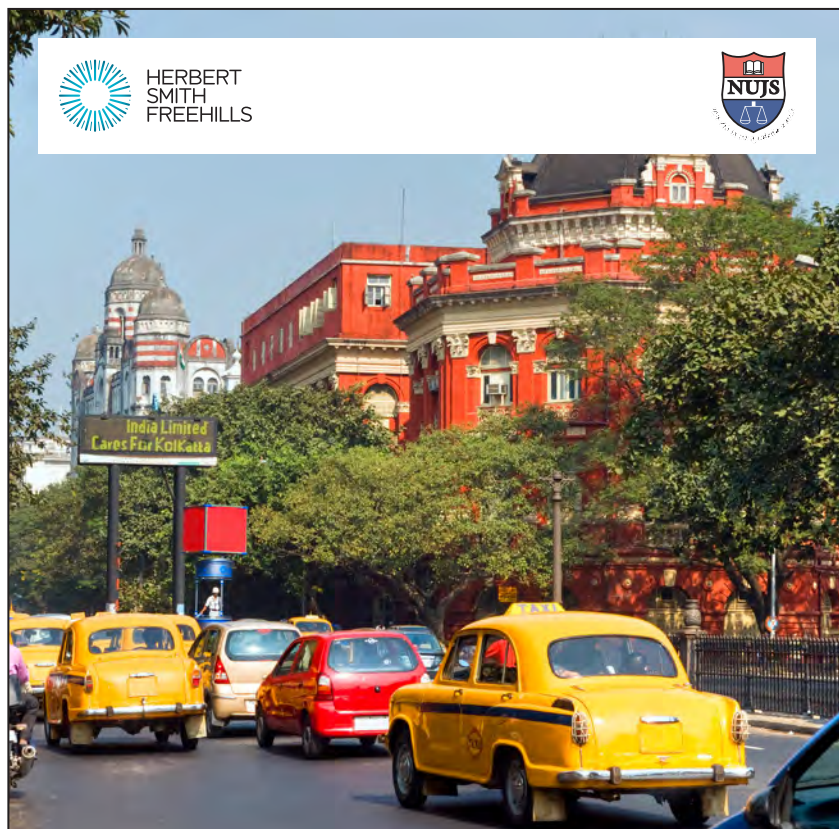


2017 - Problem Nine

Author - Umakanth Varottil



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Overview

Winning team

National Law Institute
University, Bhopal
*Vaishali Vidnod, Meher Tandon,
Sakshi Rai*

Runners up team

Gujarat National Law
University, Gandhinagar
*Ifrah Shaikh, Dhruv Malhotra,
Aarathi M Krishna*

Best speaker

Dhruv Malhotra
Gujarat National Law
University, Gandhinagar

Best memorandum

National Law University, Delhi
*Neeraj Nainani, Namita Varghese,
Sanjana Ravjani*

THE NINTH NUJS-HERBERT SMITH FREEHILLS NATIONAL CORPORATE LAW MOOT COURT COMPETITION

FRIDAY 03 - SUNDAY 05 MARCH 2017

The WB National University of Juridical Sciences
Dr Ambedkar Bhavan
12, LB Block, Sector III, Salt Lake City
Kolkata 700 098

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Appeal No. 1

Stunt Organization, Inc. (Appellant) v. Stunt IndiaReal Properties Limited, (Respondents) IndiaReal Investments Limited, Roxy Investment Private Limited, Tulip Holdings Limited & The Reserve Bank of India

Appeal No. 2

Stunt Organization, Inc. (Appellant) v. Stunt IndiaReal Properties Limited, (Respondents) Mr. Arun Kelkar, Ms. Laila Kelkar, IndiaReal Investments Limited, Kelkar Developments Private Limited, Roxy Investment Private Limited & Cya Consulting Services Limited

1. At the turn of the century, the real estate market in India witnessed exponential growth. It has been reported that property prices in premium locations went up by 6 to 10 times between 2002 and 2013. This boom also created immense wealth for several real estate barons in India. One such is Mr. Arun Kelkar, a home-grown Mumbai business tycoon with a keen eye and successful hand in the real estate business. His projects under the banner "IndiaReal" are a top-draw among the well-heeled from Bollywood to Dalal Street. Some of his marquee multi-storeyed projects, which are by "invitation only", were lapped up in a matter of days despite the steep (and arguably unrealistic) frenzy-driven pricing. As one can clearly imagine, Mr. Kelkar was a man of no small ambition, and sought to scale greater heights. He set his mind on building India's tallest and finest multi-storeyed housing complex with state-of-the-art facilities that were unparalleled in the country, replete with maximum automation and reliant substantially on the "Internet of things". For this purpose, Mr. Kelkar entered into negotiations with Mr. Farzan Ahmed, the owner of a fairly large piece of land on Carter Road, Mumbai, for an outright purchase with a view to constructing his dream project.
2. Despite his lofty aspirations, Mr. Kelkar was blessed with a virtue: he was firmly grounded to reality. He realized that in order to pull off his dream project, he needs to approach potential partners, given that a project of this nature was never attempted before in India. His thoughts went back circa 2010 when he visited New York with a delegation of the Indian Chamber of Commerce. During this visit, he had a rather curious meeting with one of the most flamboyant real estate tycoons in the United States (**US**), Mr. Ronnie Stunt. Although Mr. Kelkar was seated next to Mr. Stunt during dinner, he was unsuccessful in having a meaningful business discussion, as Mr. Stunt dominated the conversation largely with tales about how he was most astute businessman in the world. Even when Mr. Kelkar managed to get a word in, it was about how his wife Ms. Laila Kelkar was an ardent fan of the clothing line managed by Mr. Stunt's daughter, Uraska. More than being embarrassed

about this, Mr. Kelkar berated himself about the lost opportunity of having initiated possible business collaborations with Mr. Stunt's organization, which clearly carried huge brand value not just in the US, but also around the world. Mr. Kelkar was determined to rectify the situation now.

3. In early 2012, Mr. Kelkar contacted Mr. Ronnie Stunt enquiring whether his Stunt Organization, Inc. would be interested in collaborating with him for a potential real estate development project in India. During a telephonic conversation, Mr. Stunt seemed rather distracted and mumbled something about his "presidential ambitions" and that, much as he admired India and its people, he did not have the time for Mr. Kelkar. Fortunately for Mr. Kelkar though, Mr. Stunt referred him to Ms. Joanne Kellaway, the international business development manager for the Stunt Organization. Unlike Mr. Stunt, who seemed to lack patience, Ms. Kellaway immediately delved into the nitty gritty of the proposed Carter Road project and demonstrated keen interest in Stunt Organization's participation in the project. In a few days, she flew down to India with a team of managers and also external lawyers and accountants to conduct due diligence and to explore possible ways to structure a collaboration.



4. After several days of negotiations, a deal was struck between Stunt Organization, Inc. (**SOI**) and IndiaReal Investments Limited (IL), Mr. Kelkar's investment holding company (which he held jointly with his wife, Laila, with seven other family members holding a negligible stake). Pursuant to discussions, Mr. Kelkar incorporated a company in Mumbai by the name of Stunt IndiaReal Properties Limited (**SIPL**). The main object of SIPL was to "develop residential and commercial real estate and construction projects in the Greater Mumbai Metropolitan Region". SIPL was capitalized such that the SOI held 49% shares, while IIL held 51% shares. Of the 51% shares held by IIL, five shares were held by certain Kelkar family members as nominees for IIL. In order to obtain the 49% shares, SOI invested Rs. 490 crores with an issue price of Rs. 1,000 per share. IIL's shares in SIPL were issued at a much lower price of Rs. 100 per share in recognition of the local expertise that Mr. Kelkar would bring into the project. SOI's investment into SIPL was made in compliance with policies relating to foreign direct investment (FDI) in India, and the Carter Road project met with all the conditions required for FDI, about which there is no doubt.
5. Prior to so capitalizing SIPL, a joint venture agreement (**JVA**) was entered into on 18 August 2012 between SOI, IIL and SIPL in order to formalize the arrangements between the parties. Note, however, that due to some discrepancies that were subsequently discovered in the signature of Mr. Kelkar (signing on behalf of IIL) on certain pages of the JVA, the entire JVA was re-executed on 4 October 2013, merely by way of abundant caution. On 25 August 2012, SOI and IIL made their respective investments such that SIPL was fully capitalized. Under the JVA, the board of directors of SIPL was to consist of three nominees of IIL and two nominees of SOI. IIL nominated Mr. Arun Kelkar, Ms. Laila Kelkar and their personal tax advisor Mr. Shekhar Gandhi. SOI nominated Ms. Kellaway and its Asia business head, Mr. Stan Cannon. Some of the key terms and conditions of the JVA are contained in **Annex A**. The specific terms and conditions of the JVA were not incorporated into the articles of association of SIPL, which adopted Table A of the Companies Act, 1956, and thereafter Table F of the Companies Act, 2013. On 18 August 2012, along with the execution of the JVA, SOI also entered into a royalty agreement with SIPL by which SIPL was granted a non-exclusive licence to use the word "Stunt" in connection with the Carter Road property. In consideration for such a licence, SIPL was to pay a royalty of 5% of its net profits (after tax) to SOI once the property was fully developed. This was particularly important for SIPL since the Carter Road project was proposed to be marketed as "Stunt Kala".

6. On 31 August 2012, SIPL entered into an Agreement for Sale with Farzan Ahmad for purchase of the Carter Road property upon which "Stunt Kala" was to be built. Under the terms of the Agreement for Sale, Farzan Ahmad agreed to transfer the Carter Road property to SIPL at a price of Rs. 400 crores. The execution of the sale deed and registration of the sale was subject to the satisfaction of certain conditions precedent, including obtaining the permission of the Brihanmumbai Municipal Corporation (**BMC**) for use of the land for construction of a housing complex. Under the terms of the Agreement for Sale, Farzan Ahmad carried the primary responsibility for obtaining the permission of the BMC. Accordingly, he made an application to BMC in the requisite format and provided all the necessary information.
7. In the meanwhile, planning was underway between SOI and Mr. Kelkar for development of the Carter Road property. They engaged ERP Consultants, a reputed architectural firm based in Singapore, for drawing up a plan for the building. Similarly, other consultants too were engaged for this purpose. SOI, as a significant investor in SIPL and a substantial contributor to the project, sent in a team of surveyors and engineers to study the property and the building plans. On 4 December 2012, SIPL entered into a services contract with Cya Consulting Services Limited, a leading information technology (IT) company promoted by the well-known Cya Group. Under this contract, Cya was to provide a suite of IT services, both hardware and software, to bring alive the automation aspects of the "Stunt Kala" project that distinguishes it from other projects around the country. Under this contract, SIPL paid Cya an advance of Rs. 25 crores.
8. Despite all these preparations and the excitement surrounding the Carter Road project, some amount of frustration began creeping in at a pretty early stage. For months together, Mr. Ahmed undertook constant efforts to obtain the requisite permission of the BMC to proceed with the project and the sale of the Carter Road property to SIPL. However, no progress was forthcoming. The officials of BMC appeared to be in no mood to grant their permission to the project. Mr. Kelkar too accompanied Mr. Ahmed for several meetings with BMC officials, but to no avail. At the same time, the officials of SOI at its Manhattan headquarters began to get hot under the collar. They were running out of patience. Much to their dismay, the project got considerably delayed. Mr. Kelkar too began seeing his dreams go up in smoke. Added to this was the considerable negative press the project began receiving, which had a major impact in terms of a downturn in the enquiries from prospective customers.
9. In order to keep SOI at bay, at least temporarily, Mr. Kelkar decided that it might be better for SIPL to waive the condition precedent (of obtaining BMC permission) under the agreement for sale with Mr. Farzan Ahmed. At least if SIPL has ownership of the property, it could have some value, and could take over pursuit of the BMC permission process directly instead of

approaching it through Mr. Farzan. After consultation with SOI officials, the board of SIPL decided unanimously to waive the condition under the agreement of sale. On 10 July 2014, a sale deed was executed and the property was acquired by SIPL from Mr. Farzan Ahmed, and it was registered in the name of SIPL. In turn, SIPL made payment of 90% of the consideration, with the balance being held back in escrow until BMC permission was obtained. However, this transaction only brought some temporary optical reprieve. BMC remained unmoved, and hence project implementation could not be commenced.

10. At this stage, Mr. Kelkar decided that he needed to take immediate steps to salvage the situation. Any further delays could only erode his investment in SIPL. Moreover, it would also cause further damage to his already straining relationship with SOI. He decided that it might be preferable for IIL and SOI to liquidate their investments in the Carter Road property. Unbeknown to SOI, Mr. Kelkar began scouting for potential buyers of the Carter Road property. After making enquiries among his social circles in Mumbai, he was able to spark some interest in Mr. Ralph Mendonza, a hotelier from Goa with a bank of hotel properties in leading tourist hotspots in the tiny state. Mr. Mendonza had earlier eyed the Carter Road property, but was unable to snatch it before Mr. Kelkar, who demonstrated an early mover advantage. Mr. Mendonza, with his persuasive abilities and proximity to the corridors of power, was confident of swinging the BMC permission in his favour, and was therefore keen to take over the property. Despite an increase in property prices in the Carter Road area over the previous 2 to 3 years, Mr. Mendonza made his final offer at Rs. 400 crores due to the difficulties with obtaining BMC permission. Moreover, Mr. Mendonza imposed only one significant condition in that, rather than acquire the Carter Road property from SIPL, he would like to acquire the entire share capital of SIPL from its current shareholders. These shares, he proposed, would be acquired by Roxy Investment Private Limited (**Roxy**), his personal investment holding company.
11. On 26 August 2015, IIL issued a "Sale Notice" to SOI under section 8.5(b) of the JVA indicating its intention to sell its entire 51% shares in SIPL to Roxy at a price of Rs. 400 per share. The Sale Notice also contained the requisite particulars required by the said provision of the JVA. SOI was not at all surprised to receive the Sale Notice. In fact, SOI were themselves considering ways of exiting from the SIPL investment, and the Sale Notice came as a welcome measure. On 4 September 2015, SOI responded to the Sale Notice by indicating to IIL of its intention to exercise the Tag Along Rights under the JVA. Of course, SOI would be taking a straight 60% loss on its investment, but that was preferable to holding on to an investment that was rapidly deteriorating in value. Early action was better than no action. In any event, notwithstanding Mr. Stunt's boastful talk about his business acumen, SOI is not a stranger to failed business ventures and bankruptcies.

12. While things appeared to be moving along smoothly towards a sale of shares of SPIL held by IIL and SOI to Roxy, it was Mr. Mendonza's trusted accountant who put a spoke in the wheel. He advised Mr. Mendonza to conduct a valuation of SPIL before proceeding with the acquisition, for which purpose KC Jargon, a leading global investment bank, with a specialization in real estate business, was appointed. KC Jargon's valuation, based on a combination of discounted cash flow, book value and other commonly recognized methods, ascribed a value of no more than Rs. 200 per share of SPIL. Based on the advice received from his accountant, Mr. Mendonza was willing to buy shares held by IIL at Rs. 400 per share and those held by SOI at Rs. 200 per share. This was completely unacceptable to SOI as it was inconsistent with the terms of the JVA. However, Mr. Mendonza explained that his hands were tied and that he was unable to pay SOI more than Rs. 200 per share without obtaining the prior approval of the Reserve Bank of India (**RBI**). He insisted that SOI obtain RBI approval for the sale at Rs. 400 per share. On 8 October 2015, SOI made an application to the RBI seeking permission for a sale of its shares at Rs. 400 per share. On 15 November 2015, SOI received a letter from the RBI rejecting its application, and refusing to accord its approval for the sale of the shares at any price beyond that arrived at by an appropriate chartered accountant or investment banker.
13. In the meanwhile, the shrewd businessman that he is, Mr. Mendonza decided to go ahead and acquire IIL's shares first, so as to obtain control of the company. On 30 November 2015, IIL transferred its shares in SIPL to Roxy at a price of Rs. 400 per share. At a full board meeting held the same day, the shares were duly registered in the name of Roxy despite the vociferous protestations of SOI's nominee directors who were present at the meeting. At the same meeting, three nominees of Mr. Mendonza were appointed to the board of SIPL, immediately after which the IIL nominees resigned. Mr. Kelkar himself felt victimized because while he was willing to fulfill his contractual obligations under the JVA, his hands were tied due to regulatory issues as opposed to his own failures. Mr. Mendonza continued to extend an olive branch to SOI by still offering to buy their shares at Rs. 200 per share, and warning them that they are unlikely to get a better deal due to regulatory problems, if not for anything else. But, SOI was incensed by this turn of events, and decided to consult their lawyers to prevent further damage.
14. It was indeed well-known that Mr. Mendonza had a strong presence in Macau as he owned the Tulip Casino through his company Tulip Holdings Limited (**THL**) incorporated there. SOI's lawyers advised that the transaction may be structured offshore such that SOI's 49% shares in SIPL be purchased by THL at the equivalent of Rs. 400 per share. However, Mr. Mendonza flatly refused to discuss this proposal any further, as it had



adverse tax and regulatory implications to him, although he refused to elaborate on those implications despite repeated quizzing by SOI's lawyers. SOI's lawyers suspect, although they do not have sufficient proof, that THL may be a front for laundering the money belonging to certain crime syndicates operating from Goa, and hence Mr. Mendonza's hesitation to involve THL in the purchase of SIPL shares. Out of the goodness of his heart, Mr. Kelkar too tried to intervene to persuade Mr. Mendonza to acquire the shares through THL, but was unsuccessful. Mr. Mendonza insisted that he would only buy the shares through Roxy, or not at all. After all, he could afford to dictate terms as he had SOI wrapped around his little finger by enjoying majority control over SIPL.

15. In January 2016, SOI initiated a civil suit in the original side of the Bombay High Court against IIL and Roxy. SOI sought for a direction from the Court against Roxy, or alternatively THL, compelling it to purchase SOI's shares in SIPL at a price of Rs. 400 per share. In the alternative, it sought damages to the tune of Rs. 196 crores against IIL for breaching the JVA. These claims were vehemently denied by IIL and Roxy. While the case was being heard, the RBI impleaded itself as a party and argued against grant of relief to SOI as it would be contrary to the laws of India. A single judge of the Bombay High court denied relief to SOI. On appeal, a division bench of the same court affirmed the decision of the single judge. Against this, SOI preferred an appeal to the Supreme Court, which has been admitted as Appeal No. 1.

16. While the aforesaid litigation was underway, on the advice of their lawyers and with their assistance, SOI began investigating deeper into the affairs of SIPL. To their sheer surprise, they were also approached by Mr. Shekhar Gandhi who could not bear to witness SOI's dismal state of affairs with their SIPL investment. Considering himself to be a whistle-blower and in order to keep his own conscience intact, although at the risk of being labelled a turncoat and a traitor by Mr. Kelkar, he spilled the beans to SOI and their lawyers regarding certain previous occurrences in SIPL. He drew the attention of Ms. Joanne Kellaway and Mr. Stan Cannon to a board meeting way back on 16 August 2014 wherein Mr. Kelkar laid before the board a possible acquisition by SIPL of a piece of property adjacent to the Carter Road property that could potentially constitute an annex to the main property and could house a bunch of small villas. Mr. Kelkar also mentioned that unlike the main property, the annex for the villa project had all the necessary approvals from BMC, and hence the construction could be commenced almost immediately upon acquisition. Joanne and Stan vividly remember the discussion at the board meeting where they questioned the need for SIPL to invest in the annex when the main project itself was in peril, with uncertainty as to its future as well as timing. Hence, the board had unanimously decided not to take up the villa project. However, what was unknown to SOI and its nominee directors was that the land for the proposed annex was immediately thereafter acquired by Kelkar Developments Private Limited (**KDPL**), a company established and co-owned entirely by Mr. Arun Kelkar and Ms. Laila Kelkar. KDPL was able to obtain a significant loan from a bank for acquiring the land for the proposed villa project. It began construction of the villa project in early 2015, which was an instant success, with all the villas being bought at a huge premium by elite customers. The villas were also able to command a significant premium due to its proximity to the potential, but promising, new development in the form of "Stunt Kala". At present, KDPL is said to have earned profits of about Rs. 75 crores. Even though the Kelkars were not bound by any non-compete clause in the JVA, SOI felt cheated by this new relegation.
17. Mr. Gandhi came up with another stunning expose: it was that Ms. Laila Kelkar held 10% shares in Cya, which was providing IT services to SIPL for the Stunt Kala project. The Kelkars had not mentioned a word about this to SOI or to its nominee directors on SIPL. At the same time, it is true that the contract between SIPL and Cya, under which Cya was also paid a hefty advance, was placed before and approved by the board of SIPL, but not before stoking some level of controversy. Joanne and Stan were rather sceptical about Cya's abilities to undertake and successfully complete a sophisticated IT contract of the nature required for the "Stunt Kala" project, and they had sought more information and assurances about Cya, which were not forthcoming. Hence, while the contract with Cya was approved by SIPL's board, it was not a unanimous decision, with Joanne and Stan deciding to abstain from voting rather than to put their seal of approval to a

proposal that was accompanied with half-baked information. Similarly, when the proposal to enter into a contract with Cya was placed before the shareholders' meeting of SIPL, SOI abstained from voting. Nevertheless, the contract with Cya was approved by the requisite majority of the board and shareholders of SIPL in spite of SOI's and their nominees' abstention.

18. SOI's lawyers were also able to ascertain from Mr. Gandhi that IIL was starved of funds back in 2012 and was barely able to purchase its shares in SIPL pursuant to the terms of the JVA. It was Mr. Gandhi who arranged for a bridge funding of Rs. 30 crores from a non-banking finance company (**NBFC**) owned by Mr. Harshadbhai Patel, a Dalal Street operator. The funding was provided by the NBFC to IIL on 20 August 2012. Soon after IIL made the investment in SIPL, it began defaulting on the rather hefty interest it owed to Mr. Patel's NBFC. This was turning out to be somewhat of an embarrassment to Mr. Kelkar, who was keen to maintain a stellar reputation in the financial markets which provided most of the clientele for his projects. Hence, with the assistance of his wife, who held a significant shareholding in Cya, he persuaded Cya to pay the Rs. 25 crores it received as an advance from SIPL, as a loan to IIL (repayable over a three-year period). The loan was disbursed by Cya to IIL on 14 January 2013, which was in turn used to pay back an equivalent amount of the amount borrowed from Mr. Patel's NBFC. Since then, IIL has honoured all its commitments relating to payments due to Mr. Patel's NBFC as well as to Cya. Finally, once IIL liquidated its holdings in favour of Roxy in November 2015, it repaid all its financial obligations owed to Mr. Patel's NBFC as well as to Cya, none of which now remains outstanding.
19. When Mr. Ronnie Stunt was briefed on the goings on with relation to SIPL and the "Stunt Kala" project, he was apoplectic with rage. He is known not to be taken for granted in his business dealings. Deprived of sleep upon hearing the bad news from India, he unleashed a tweet-storm in the wee hours of the next morning from his Manhattan penthouse brooding to his 15 million followers on Twitter. The Kelkars and Mr. Mendonza were at the receiving end, earning monikers such as "Krooked Kelkar", "Lyn' Laila", "nasty woman" and "bad hombre Mendonza". Known for being trigger-happy when it comes to litigation, he immediately instructed his managers to "sue the hell out of" the fraudsters in India.



20. Accordingly, in January 2016, SOI filed a civil suit in the original side of the Bombay High Court against various parties and for various causes as follows:
- SOI alleged that Mr. Arun Kelkar and Ms. Laila Kelkar had breached their duties as directors of SIPL by establishing KDPL and earning profits therein, and sought that all profits received by KDPL be paid over to SIPL, or alternatively be held in trust for SIPL;
 - SOI sought to treat the contract entered into between SIPL and Cya as void, and for Cya to hand over all monies received under the contract back to SIPL; and
 - SOI sought to invalidate the issue of shares by SIPL to IIL on 25 August 2012, as being in violation of applicable laws. This SOI did so as a measure of last resort in order to ensure that, if successful on this count, it will be able to wrest full control over SIPL from Mendonza.
21. The defendants in the above suit vehemently resisted SOI's claims, including on the ground that SOI was not acting in the interests of SIPL, but rather in their own interests. Moreover, Mr. Stunt's conduct of publicizing the events had the effect of defaming the Kelkars and Mr. Mendonza, and tarnishing their reputation, due to which their business activities have been adversely affected. Although a single judge of the Bombay High Court granted leave to SOI to bring the suit, she heard it on merits and denied relief to SOI. On appeal, a division bench of the same court affirmed the decision of the single judge. Against this, SOI preferred an appeal to the Supreme Court, which has been admitted as Appeal No. 2.
22. Appeal Nos. 1 and 2 are being heard together by the Supreme Court.

Annex A

Extracts from the Joint Venture Agreement
dated 18 August 2012

8.5 SOI Tag-Along Rights

- (a) In the event that ILL proposes to transfer the shares held by it or a part thereof (the **ILL Sale Shares**) to a third party in one or more transactions, SOI shall have pro-rata tag-along rights, exercisable at its sole discretion, to participate in such Transfer, in the manner specified in Section 8.5(b) below (**Tag Along Rights**).
- (b) Upon identifying a third party to acquire Shares held by them or any part thereof (the **Purchaser**), ILL shall communicate the same to SOI setting out the following details in relation to the third party's offer (the **Sale Notice**):
- (i) price per Share;
 - (ii) number of Shares proposed to be Transferred (the **Offered Shares**);
 - (iii) identity and material particulars regarding the Purchaser; and
 - (iv) material terms and conditions for the proposed Transfer.

SOI shall, within a period of 30 (thirty) days from the date of receipt of the Sale Notice, be entitled to exercise its Tag Along Rights and offer Shares held by it (the **Tag Along Shares**) pro rata to the Shares proposed to be Transferred by ILL to the Purchaser. The Transfer of the ILL Sale Shares to the Purchaser shall be conditional upon such Purchaser acquiring the Shares offered by SOI in exercise of its Tag Along Rights on terms no less favourable than those offered by such third party to ILL. SOI shall be paid the same price per Tag Along Share and the sale shall be effected on terms no less favourable as are received by ILL.

- (c) ILL shall not complete the sale of any of its Shares unless the Purchaser has purchased the Tag Along Shares (pursuant to sub-section (b) above) in accordance with the provisions of this Section 8.2. In the event that the sale of the Tag Along Shares in accordance with the provisions of this Section 8.2 is not permissible for regulatory reasons, ILL shall work with SOI in good faith to arrive at an appropriate solution such that the provisions of this Section 8.2 shall be given full effect.
- (d) The provisions of this Section 8.5 shall apply so long as SOI owns at least 25% of the Share Capital of the Company.