

IN THE SUPREME COURT OF MAURITIUS

In the matter of:

1. **Swan Life Ltd** of Swan Centre, 10 Intendance Street, Port Louis
2. **Swan Securities Ltd** of Swan Centre, 10 Intendance Street, Port Louis

Plaintiffs

v/s

Kriti Udaysingh Taukoordass of 4th Floor, Unicorn Centre, Frere Felix de Valois Street, Port Louis

Defendant

And

In the presence of:

1. **The Financial Services Commission** of FSC House, 54 Cybercity, Ebène
2. **ENL Land Ltd** of ENL House, Vivea Business Park, Moka
3. **Rogers and Company Limited** of No. 5, President John Kennedy Street, Port Louis
4. **New Mauritius Hotels Limited** of Beachcomber House, Botanical Garden Street, Curepipe

Third Parties

PLAINT WITH SUMMONS

1. The Plaintiff No.1, Swan Life Ltd ("**Swan Life**"), is a public company listed on the Development & Enterprise Market of the Stock Exchange of Mauritius Ltd (the "**SEM**"). Swan Life forms parts of the Swan Group, a conglomerate established in 1855 and which provides a full range of non-banking financial solutions from general insurance, life assurance, pension and actuarial services, pension administration, investment advisory, to wealth management and securities trading for corporate clients and individual customers.
2. The Plaintiff No. 2, Swan Securities Ltd ("**Swan Securities**"), is a company licensed by the Third-Party No. 1 to provide stockbroking services and is a member of the Swan Group. It was established in 1989 at the same time as the SEM was launched. It is one of the leading investment dealers in Mauritius with both institutional and retail clients that rely on Swan Securities to provide expert advice on a wide range of trading and research advisory services.
3. The Defendant, Mr Krit Udaysingh Taukoordass ("**KT**"), is a partner of Mazars' Mauritius firm, an accounting and auditing firm. KT was purportedly appointed under section 44A of the Financial Services Act 2007 ("**FSA 07**") as Investigator to look into whether "*there may have been a breach of the Securities Act and the Securities (Takeover) Rules 2010 in relation to the transactions, concerning the shares of New Mauritius Hotels Ltd*", by Plaintiff No.1 along with the Third-Parties No. 3 and 4.
4. The Third-Party No.1, the Financial Services Commission ("**FSC**"), is the integrated regulator for the non-bank financial services sector and global business. Established in 2001, the FSC is mandated under FSA 07 and has as enabling legislations the Securities Act 2005, the Insurance Act 2005 and the Private Pension Schemes Act 2012 to license, regulator, monitor and supervise the conduct of business activities in these sectors.
5. The Third-Party No.2, ENL Land Ltd ("**ENL Land**"), is a public company listed on the Official List of the SEM since 27 December 1989. With a market capitalisation of Rs 12 billion, ENL Land together with its subsidiaries operate in the agro-industry, property, land and investment,

commerce and industry, hospitality and leisure, financial services, and logistics segments. On 01 February 2016, ENL Land amalgamated with ENL Investment Ltd.

6. The Third-Party No. 3, Rogers and Company Limited (“**Rogers**”), is a public company listed on the Official List of the SEM since 1990. Rogers is an international services and investment company with expertise in financial technology, hospitality, logistics, and property. Rogers is a subsidiary of ENL Land.
7. The Third-Party No. 4, New Mauritius Hotels Limited (“**NMH**”), is a public company listed on the Official List of the SEM since 1996. NMH is the biggest and oldest hotel group in Mauritius. It owns and operates eight resorts in Mauritius, one in Seychelles and one in Morocco under the ‘*Beachcomber*’ brand, totalling 2,077 available room keys. It also operates an in-flight catering business and 5 tour operating companies around the world.

Transactions in shares of NMH in 2016 by Swan Life, ENL Land and Rogers

Swan Life

8. The Swan Group had been investing in NMH for a long time. Since 2014, it has been investing more heavily in NMH. The rationale for the investment is that NMH has a strong brand name and possesses key assets in strategic locations and also in anticipation of the recovery in the tourism sector.
9. On 22 December 2014, Swan General Ltd (“**Swan General**”) purchased 384, 615 ordinary shares of NMH at Rs. 78.00 (Rs. 30 million) and Swan Life purchased 2,168,166 ordinary shares of NMH at Rs. 78.00 (Rs. 169 million). The seller of these blocks of shares was Kingston Asset Management (“**KAM**”) of the Taylor Smith Group. This represented a stake of 1.58% in NMH.
10. The table below provides a summary of the shareholding of the Swan General and Swan Life in NMH prior to the 2016 transactions.

	Swan General	Swan Life
Shares Held in NMH	762,155	11,762,504
% Held in NMH	0.47%	7.29%

11. On 16 February 2016, in line with its investment strategy, Swan Life acquired 7,615,269 ordinary shares of NMH (representing 1.57%) from KAM at a price of Rs 29 per share. The transaction took place on the crossing board of SEM.
12. On 18 February 2016, Swan Life acquired an additional 9,700,000 ordinary shares of NMH (representing 2.0%) from Taylor Smith & Sons Limited (“**TSL**”) of the Taylor Smith Group at a price of Rs 29 per share. This transaction also took place on the crossing board of SEM.

ENL and Rogers

13. Separately, on 16 February 2016, ENL Land and Rogers acquired ordinary shares in NMH as follows:
 - (a) ENL Land acquired 14,451,061 ordinary shares at Rs 29.55 per share from Promotion & Development Ltd (“**PAD**”) and 5,886,228 ordinary shares at Rs 29.05 per share from TSL;
 - (b) Rogers acquired 5,548,939 ordinary shares at Rs 29.55 per share from PAD and 2,278,547 ordinary shares at Rs 29.05 per share from TSL.
14. On 17 February 2016, ENL Land acquired 184,350 preference shares in NMH at prices ranging between Rs 10.65 and Rs 12.75 per preference share, including 108,764 preference shares from TSL. These preference shares did not grant voting rights.

15. On 18 February 2016, ENL Land and Rogers, further acquired 3,612,765 and 1,387,235 preference shares respectively in NMH, at Rs 14.30 per preference share from PAD.

Transactions in shares of NMH in 2017 by ENL Land and Rogers

16. On 19 January 2017, ENL Land and Rogers purchased an additional 715,000 ordinary shares in NMH, *pro rata* their existing shareholding in NMH. By acquiring those additional ordinary shares, the shareholding of ENL Land and Rogers in NMH taken together exceeded the 30% shareholding threshold under the Securities (Takeover) Rules 2010 (the “**Takeover Rules**”).
17. Consequently, on 19 January 2017, ENL Land and Rogers made a joint public announcement that they would proceed with a mandatory offer for the remaining shares in NMH, pursuant to Rule 12(1)(d) of the Takeover Rules.
18. On 27 January 2017, ENL Land and Rogers issued a joint communiqué to inform the shareholders of NMH and the public of the key dates of the mandatory offer.

FSC investigation following press allegations relating to dealings in shares of NMH in 2016

19. On or about 20 February 2017, Swan Life was informed by ENL Land that the FSC, in response to certain allegations reported in the press relating to dealings in shares of NMH in 2016, had sought certain clarifications from ENL Land and Rogers on the acquisitions of shares in NMH by Swan Life, ENL Land and Rogers, with a purported view to obtain or consolidate effective control of NMH. Representatives of ENL Land and Rogers further attended a meeting at the offices of the FSC in connection with the above subject matter. Immediately following the said meeting, ENL Land and Rogers wrote jointly to FSC to confirm that they did not control Swan Life and its investment decisions. ENL Land and Rogers further confirmed that there was, neither at that time nor at the time of the 2016 acquisitions, any agreement or understanding, whether formal or informal pursuant to which ENL Land and Rogers on the one hand and Swan Life on the other hand cooperated to obtain or consolidate effective control of NMH.
20. Subsequently, the FSC issued a communiqué on 20 February 2017 (the “**February Communiqué**”) headed “*New Mauritius Hotels Limited (‘NMH’)*” in which it informed “*the public that, from the evidence gathered so far and the materials available on record, it [did] not consider that any breach of the Securities (Takeover) Rules 2010 has taken place.*”
21. Following the issuance of the February Communiqué, ENL Land and Rogers proceeded to complete their mandatory offer. On 31 March 2017, ENL Land and Rogers issued a joint communiqué to announce the outcome of the mandatory offer.

Complaint by Sunnystars Resorts Holdings Ltd

22. On 22 and 26 March 2017 respectively, Sunnystars Resorts Holding Ltd (“**Sunnystars**”), through its attorney, Ms Komadhi Mardemootoo, wrote to the FSC, alleging that Swan Life, ENL Land and Rogers had breached Rule 33(1)(b) of the Takeover Rules and section 94(3) of the Securities Act 2005 following their respective acquisition of shares in NMH in 2016.
23. In its letters, Sunnystars requested the FSC to suspend the mandatory offer made by ENL Land and Rogers and, further institute an investigation to look into the acquisition of shares in NMH by Swan Life, ENL Land and Rogers in 2016.
24. Ms Mardemootoo also sent the FSC a ‘*mise en demeure*’ on Sunnystars’ behalf, repeating its allegations and enjoining the FSC to accede to its prayers as stated in its letters.

Appointment of KT as Investigator

25. On 31 March 2017, the Board of the FSC issued another communiqué (the “**March Communiqué**”), informing the public that it had, under section 44A of FSA 07, appointed KT as Investigator “*to carry out a special investigation into whether there may have been a breach of the Securities Act and the Securities (Takeover) Rules 2010 in relation to the transactions, concerning the shares of New Mauritius Hotels Limited, by Rogers and Company Limited, ENL Land Ltd and Swan Life Ltd.*”
26. On 04 April 2017, Louis Rivalland, the Chief Executive Officer of Swan Life (“**LR**”), at an informal meeting with KT, informed the latter of the willingness of Swan Life to collaborate with KT. In that respect, as agreed at the informal meeting, Swan Life communicated to KT various documents which the latter had requested.

Conflict of interest involving KT

27. On 10 April 2017, the legal adviser of Swan Life wrote to the Acting Chief Executive of the FSC regarding an actual or potential conflict of interest involving KT pertaining to a previous dispute involving Swan Life, the salient features of which are set out below:
 - (a) For the period 01 January 2010 to 31 December 2014, Anglo Mauritius Assurance Society Ltd (now Swan Life) leased office space in a building called ‘Old Swan Building’ to Mazars. KT is a partner of Mazars’ Mauritius firm. KT gave notice of termination of the lease in July 2014.
 - (b) In August 2010, KT introduced Apostle International Management Services Ltd (“**AIMS**”) to Swan Life. AIMS was also looking to rent office space in the aforesaid building. KT was, at all material times, privy to the discussions pertaining to the rent and other rental conditions.
 - (c) By virtue of a lease agreement dated 15 October 2010, Swan Life leased to AIMS an area of 2,220 square feet on the first floor of the aforesaid building together with the fixtures and fittings, to be used as office spaces as well as one uncovered parking space.
 - (d) The lease was for a period of 5 years, from 15 October 2010 to 14 October 2015, for and in consideration of a monthly rent of Rs 48,840 (excluding VAT) for the premises and a monthly rent of Rs 3,000 (excluding VAT) for the parking space.
 - (e) As from May 2012, AIMS failed to pay the monthly rent.
 - (f) On 27 July 2013, Mr Robert Gallet, a senior manager of Swan Life, wrote to two directors of AIMS as well as KT, giving notice of the termination of the lease agreement with AIMS and requiring AIMS to vacate the aforementioned building at the latest on 31 December 2013. Mr Robert Gallet further informed the above parties of the growing indebtedness of AIMS.
 - (g) On 20 August 2013, Swan Life served a notice ‘*mise-en-demeure*’ on AIMS formally requiring the latter to pay the sum of Rs 1,047,420, due as at 01 July 2013 in respect of the lease agreement, together with any amount outstanding as at the date of the notice. Despite the notice, AIMS failed to settle the amount due and outstanding to Swan Life.
 - (h) On 18 October 2013, Swan Life applied for a ‘*writ habere facias possessionem*’ against AIMS for an order requiring AIMS to quit, leave and vacate the premises.
 - (i) The application was resisted by AIMS. At paragraph 6.1 of an affidavit dated 28 January 2014, AIMS’s representative, Mr Vijay Anundee, stated that Mazars is a sister company of AIMS. KT is a partner of Mazars’ Mauritius firm.

- (j) On 09 October 2014, AIMS was ordered by the Judge to quit, leave and vacate Swan Life's premises by 31 December 2014.
 - (k) On 21 November 2014, Swan Life initiated legal action concerning the same premises before the Commercial Division of the Supreme Court by way of plaint with summons praying for a judgement condemning and ordering AIMS to pay to my client the sum of Rs 2,411,731.75 together with all sum or sums that may become due for the running month or months plus interests up to the date of final payment, with costs.
 - (l) At the hearing of the case, Counsel representing AIMS made a statement to the Court offering to pay Swan Life the sum of Rs 1,205,865.80 in full and final satisfaction of the claim, out of which Rs 700,000 had already been paid and the balance of Rs 505,865.80 would be paid by 22 August 2015. No order was made as to costs. Counsel then appearing for Swan Life then moved for judgement as per the agreement reached between the parties with no order as to costs.
 - (m) Despite the settlement reached in court on 28 July 2015, AIMS still owed an amount of Rs 330,865.80 to Swan Life as at 05 October 2015 and Swan Life had to serve a statutory demand on AIMS requesting the later to pay the outstanding amount.
 - (n) The outstanding amount was settled on 23 October 2015 and AIMS vacated the premises in December 2014.
28. In view of the history of dispute between Swan Life and AIMS, a company directly associated with Mazars, hence KT, and in order to ensure that Swan Life is fairly treated, the legal adviser of Swan Life, in his letter to the Acting Chief Executive of the FSC dated 10 April 2017, enjoined the FSC not to continue the investigation with KT as Investigator as the circumstances created an obvious perception (at the very least) of bias.
 29. In a letter dated 11 April 2017, the legal adviser further requested KT to postpone the depositions of the representatives of Swan Life pending the stand of the FSC as to this conflict of interest.
 30. Despite being in receipt of both letters, KT refused to entertain Swan Life's objection as to this conflict of interest and proceeded with his investigation.
 31. At a meeting held on 12 April 2012, the legal adviser of Swan Life again raised the issue of conflict of interest with KT. The latter replied that he had received no communication from the FSC and that he, therefore, did not consider it to be a live issue.
 32. The above shows a lack of good faith and impartiality on KT's part presumably arising from his previous, acrimonious litigation against Swan Life.

The conduct of the investigation by KT

33. At the start of the meeting held on 12 April 2012 to which LR was convened, LR was cautioned by KT and the latter went on to state that he was not administering a formal caution to LR and that he was still in an early stage of his investigation which he described as a 'fact finding stage'. (underlining is ours)
34. KT's statement confirmed that the point at which an investigation under section 44A of FSA 07 was yet to be reached, which is consistent with Swan Life's position that there was in fact no proper basis for an investigation.
35. LR was provided with a copy of KT's instrument of appointment issued by the Acting Chief Executive of the FSC under section 44A of FSA 07.

36. Thereupon, the legal adviser of Swan Life drew KT's attention to the fact that the instrument of appointment did not conform to the requirements of section 44A of FSA 07 inasmuch it did not lay down the basis of his mandate in that it failed to specify the breach (or breaches) of the relevant Acts which the Acting Chief Executive of the FSC believes, acting on reasonable grounds, has (have) been committed, or is (are) likely to be committed by Swan Life.
37. After conferring with his legal adviser for some ten minutes, KT stated that he was enquiring into breaches of Rule 33 of the Takeover Rules when read in conjunction with section 94 of the Securities Act 2005 as well as breaches of the Securities Act and the Takeover Rules '*as a whole*' in respect of dealings in shares of NMH in February 2016 '*as [his] mandate requires*'.
38. The legal adviser of Swan Life informed KT that to the extent that there was an irregularity in connection with his appointment (which at that point in time Swan Life was minded to challenge), Swan Life was not prepared to answer any further questions at this stage. KT took it that LR was refusing to answer his questions.
39. On 18 April 2017, the legal adviser of Swan Life wrote to the FSC (with copy to KT), again drew its attention to the invalidity of KT's appointment but stated that it was not the intention of Swan Life to protract the investigation. He therefore requested the FSC to specify the alleged breaches of the relevant Acts which justified KT's appointment under section 44A of FSA 07 in order to enable the investigation to proceed and Swan Life to assist KT. Separately, the legal advisor of the Plaintiffs reminded the FSC of the complaint regarding the conflict of interest involving KT.
40. As at the date of this Complaint, Swan Life has received no reply from the FSC in response to its various letters or to its challenge concerning KT's impartiality. Moreover, Swan Life and its related entities have not been contacted by KT since 12 April 2017.
41. Swan Life avers that:
- (a) it has received no reply to its request to be made aware of what new facts (if any) have prompted KT's investigation in the first place, given the public statement in the February Communiqué that no breach of the Takeover Rules had been found;
 - (b) although there is no indication of any attempt by the FSC to scope KT's mandate as required by section 44A of FSA 07 (of which KT was specifically informed), KT proceeded on a frolic of his own as regard the conduct of his investigation.
42. Accordingly, Swan Life, in breach of its fundamental right to fairness and due process, has been made the subject of an investigation without being provided with the facts giving rise to it, the substance of the complaints made against it, the nature of the investigation, or even KT's terms of reference.
43. In addition to the matters set out above concerning KT's lack of impartiality, KT, knowing that his appointment was not in conformity with section 44A of FSA 07, has made an abuse of his position and proceeded with his investigation in circumstances which were clearly improper and unsatisfactory.

KT's "final" report

44. While Swan Life had been labouring under the impression that the FSC was considering the issues raised above, between 26 May 2017 and 04 June 2017, various press and media reports made reference to the so-called '*NMH Saga*' and in the course of which it had not only been stated that KT had submitted its "final" report on his investigation to the Acting Chief Executive of the FSC but also that KT had made findings of serious breaches by Swan Life, Swan Securities, ENL Land and Rogers. This was compounded by a news bulletin on Radio 1 on 31 May 2017 where it was reported that a board member of the FSC would have confirmed « *sous le couvert*

de l'anonymat que le rapport est à l'étude ... [et] a voulu nous rassurer qu'il faudra s'attendre à des sanctions dans cette affaire » (underlining is ours).

45. The relevant extracts of certain newspapers are also reproduced below.

45A. Article published in Week End newspaper on 28 May 2017 entitled “NMH Saga: une note loin d’être réglée”

Cinq délits présumés sous la Securities Act, dont “insider dealing” et “market rigging”, “flagged” contre Rogers & Co Ltd, ENL, Swan Securities et NMH

Posture compromettantes pour Hector Espitalier-Noël, Gilbert Espitalier-Noël, Philippe Espitalier-Noël, Colin Taylor, Louis Rivalland et le notaire Jean-Pierre Montocchio.

Le 12 avril 2017, Louis Rivalland, Chief Executive de Swan, avait refusé de répondre aux questions du Special Investigator de la FSC ou de soumettre des documents réclamés. (underlining is ours)

Au-delà des conclusions accablantes au sujet des infractions aux dispositions de la Securities Act, le fait le plus troublant est le quasi-refus de collaboration des directeurs de Rogers & Co Ltd, ENL Land Ltd, avec un chiffre d'affaires aggloméré de plus de Rs 21 milliards, et le groupe Swan, gérant des primes d'assurance de l'ordre de Rs 6 milliards, et la New Mauritius Hotels Ltd avec un turn-over de Rs 10 milliards.

Toutefois, les premiers éléments d'informations qui ont transpiré après la présentation PowerPoint du rapport au board de jeudi dernier tendent à confirmer des infractions multiples aux dispositions des Securities (Takeover) Rules pour avoir bloqué de manière intentionnelle un takeover bid, délit présumé reproché à Hector Espitalier-Noël, Chief Executive Officer du groupe, au notaire Jean-Pierre Montocchio, à Colin Taylor et à Louis Rivalland. (underlining is ours)

A ce stade, l'élément confirmé dans le dossier est le refus de coopération et de collaboration de la part des principaux protagonistes avec le Special Investigator en vue de faire la lumière sur des zones d'ombre dans cette affaire. Pour étayer cet aspect de l'enquête, des recoupements d'informations effectués auprès des sources concordantes font état du bras de fer entre le Special Investigator et le Chief Executive Officer de Swan, Louis Rivalland, au sujet de l'audition de ce dernier. Ces mêmes sources avancent que les dessous de cet épisode sont révélateurs à plus d'un titre. (underlining is ours)

Le stand du CEO de Swan était qu'il n'était pas disposé à répondre aux questions de Kriti Taukoordass ou encore de lui remettre les documents exigés. (underlining is ours)

45B. Article published in BIZweek on 02 June 2017 entitled “Les six infractions selon Taukoordass”

Tous les protagonistes sont suspendus à l'opinion de Me Desire Basset, qui a pour mission de valider le rapport d'enquête soumis par Kriti Taukoordass dans l'affaire NMH. Ce dernier affirme, dans son Executive Summary, que “Rogers and Company Limited, ENL Land Ltd and Swan Life Ltd are, at this stage, refusing to collaborate in the investigation without a response from the FSC”. (underlining is ours)

Il souligne plus loin que “this report represents the evidence which has been collected so far with the major caveat that due process requires that this evidence be put to the persons concerned. Once their versions are obtained the conclusions may be different”. (underlining is ours)

LES SIX INFRACTIONS

Cela s'apparenterait à "acting in concert" selon certaines personnes, alors que pour d'autres, les principaux protagonistes auraient dû faire une offre obligatoire à cette époque, estimant qu'ils auraient dépassé le seuil de 30%.

Qu'est-ce qui gêne le plus dans le rapport commandité par la FSC ?

Selon nos recoupements, Taukoordass est d'avis qu'ENL Land, Rogers et Swan Life auraient enfreint les règles suivantes :

- The mandatory offer rule – Rule 33 of the Securities Takeover Rules, whether read on its own or in connection with section 94 of the Securities Act – « Mandatory Offer »;
- Rule 11 of the Securities (Takeover) Rules – "No frustrating action";
- Section 111(1)(b) of the Securities Act (Insider Dealing) – "Insider dealing prohibited – counsel, procure or cause another person to deal in the securities mentioned in paragraph (a)";
- Section 111(1)(c) of the Securities Act (Insider Dealing) – "Insider dealing prohibited – disclose the information, otherwise than in the proper performance of that person's employment, office or profession, to another person, where the person knows or ought to have known that the information was inside information";
- Section 114 of the Securities Act – "Market rigging";
- Section 116 of the Securities Act – "False and Misleading Conduct in Relation to Securities".

45C. Article published in Week End newspaper of 04 June 2017 entitled "NMH Saga: la Swan se veut rassurante!"

Le Special Investigation Report épingle le group Swan pour infractions à l'Insurance Act et la Private Pension Scheme Act avec des investissements de Rs 502 millions, dévalués de Rs 105 millions en moins de 48 heures en février 2016. (underlining is ours)

Les premières indications demeurent que le Special Investigator aurait également épingle la Swan pour des infractions aux dispositions sous l'Insurance Act et la Private Pension Scheme Act. (underlining is ours)

Les conséquences du rachat conjoint par Rogers & Co Ltd et ENL Land Ltd avec le concours passif du Group Swan de ces 4,6 millions d'actions appartenant à PAD, au groupe Taylor et à Kingston sont multiformes, soit préservé leurs chances pour assurer un plus grand contrôle du groupe NMH en prévision de la conversion des actions de préférence de NMH à partir du début de l'année prochaine,

A la décharge du groupe Swan, les données boursières vérifiées et vérifiables indiquent que pour les trois années précédant 2016, cette compagnie d'assurance n'était nullement intéressée à faire l'acquisition des actions de NMH même si la tendance des cours était nettement inférieure aux Rs 29 proposées. A la prochaine occasion d'audition, Louis Rivalland devra convaincre les autorités pourquoi depuis 2014 avec la société Kingston offrant ses titres à vendre en bloc, la compagnie d'assurance n'avait montré aucun intérêt et pourquoi soudainement l'Investment Committee du groupe devait décider lors d'une réunion d'urgence le 15 Février 2016 d'engloutir Rs 502 millions dans des actions de NMH à la bourse en une minute. (underlining is ours)

Avec le refus catégorique du NPF de se rendre complice du jeu du tandem Rogers/ENL Land Ltd et en dépit d'une offre d'achat de 10 millions de titres de NMH en date du 12 février 2016, le groupe Swan se présentait comme l'allié de charme pour cette opération. Pour cause : cette compagnie d'assurance dispose des ressources financières pour déboursier d'un seul coup Rs 500 millions avec un Investment Committee sous l'influence de Louis Rivalland pour agir dans l'urgence. (underlining is ours)

Une autre zone d'ombre, qui attend éclaircissement du Chief Executive Officer de la Swan est comment justifier la pilule amère de payer une prime de 16% pour ces actions de NMH, avec le groupe Swan encourant une Fair Value Loss de Rs 102 millions en 48 heures et probablement une perte sèche de Rs 139 millions si la Mandatory Offer de Rs 21 de Rogers et d'ENL Land Ltd, valide jusqu'au 27 mars dernier, avait été exécutée. (underlining is ours)

Sur le plan stratégique, le groupe Swan ne tire aucun avantage de ses Rs 502 millions de placements. (underlining is ours)

La séquence de cette transaction boursière des 16 et 18 février 2016 pourrait également constituer un sujet de gros embarras pour le groupe Swan...L'engagement pris était que Rogers et le groupe ENL étaient déterminés à mettre le grappin sur les blocs d'actions mis en vente par PAD, Taylor Smith, et Kingston et a aucun moment il n'était officiellement question du groupe Swan. (underlining is ours)

Le groupe Swan a été inclus dans le deal pour contourner un autre grave problème, soit une Mandatory Offer à Rs 29.55 par action, susceptible de peser lourd dans les bilans financiers des acquéreurs. (underlining is ours)

Toutefois, aujourd'hui, le groupe Swan, qui n'a fait que permettre à Rogers et au groupe ENL Land Ltd d'assurer un contrôle effectif de NMH avec 40,20 des actions en attendant de passer à 55% au début de l'année prochaine, avec la conversion des titres de préférence, est sous la menace d'infractions à l'Insurance Act et à la Private Pension Scheme Act. A moins que les arguments mis en avant par la Swan soient des plus convaincants. Techniquement, avec ces placements de Rs 502 millions décidés le 15 février 2016, les intérêts des clients des polices d'assurance auraient été relégués au second plan pour favoriser des actionnaires majoritaires de NMH Ltd, d'autant plus que les termes du deal étaient à première vue « not economically sound ». (underlining is ours)

46. From the tenor of the articles reproduced above and the concordance between those articles it is clear that the press has reproduced extracts from KT's report. Moreover, the circulation of extracts of the report on the internet and in the media at large has given rise to a trial by the press and a foregone conclusion of guilt. Accordingly, the findings of KT and the leakage of his report have caused and are causing serious prejudice to Swan Life and Swan Securities. As at date neither the FSC nor KT has rectified any of the allegations made in the extracts of the report on the internet and the media at large.
47. On 31 May 2017, the legal adviser of Swan Life wrote to the Board of the FSC informing the latter that the allegations that Swan Life had refused to collaborate with KT were patently wrong as the circumstances in which Swan Life had taken exception to KT's appointment and mandate were fully documented and known to the FSC.
48. Swan Life also took strong objection to allegations that it and/or its related entities had committed certain offences by purporting to block a takeover and/or engage in market rigging, the more so since it had neither been confronted to those accusations by KT nor had it been given an opportunity to present its case at all.

49. To put an end to all speculation that arose as a result of the leakage of KT's report to the public, Swan Life enjoined the FSC to communicate with the public to bring Swan Life's trial by the press to an end and, more importantly, to set the record straight.
50. On 31 May 2017, the FSC issued a communiqué to the effect that KT had submitted a report dated 19 May 2017 and made a presentation to the Board of the FSC on 25 May 2017. The communiqué further states that the FSC has sought the views of its legal adviser on the findings of the report. Upon receipt of the legal opinion, the FSC will take appropriate action, if any, as deemed necessary under the law.
51. The fact remains and is that KT's 'report' was submitted to the FSC without engaging with *inter alia* Swan Life and Swan Securities depriving them of the opportunity to put their version across and refute the allegations made by KT against them.
52. In that respect, KT is, according to media reports at large, understood to have submitted a "*final*" report wherein he would have stated that his report was according to evidence gathered "*so far*" and that "*it was not unreasonable to anticipate applications to the Court to prevent further progress with the enquiry. Hence the decision to issue this report based on information gathered to date and with the major caveat that (i) the findings are interim and may change in the light of the versions of the Acquirers [ENL Land, Rogers and Swan Life], once these versions become available and (ii) for the investigation to be complete and in accordance with the requirement of due process, the substance of this report will need to be put to the Acquirers and the relevant members of the board of NMH*". The Plaintiffs verily believe that the "report" neither mentions nor addresses any of the facts, objections and observations raised by the Plaintiffs in the course of the investigation, another stark illustration of the bad faith of the Defendant in obliterating arguments advanced against himself and his modus operandi, thus displaying an incomplete picture to the authorities and thereby willingly misdirecting the FSC.
53. Swan Life's inescapable conclusion based on the aforementioned statement by KT in his report is that the latter acted in utter bad faith and malice by choosing to rely on incomplete and unchallenged evidence to make findings of serious breaches against Swan Life, ENL Land and Rogers, the more so when KT knew fully well that the conduct of his investigation had been undertaken in breach of the fundamental right of fairness and due process.
54. Moreover, by being the subject of an investigation without being provided with the facts giving rise to it, the substance of the complaints made against it, the nature of the investigation, or even KT's terms of reference, Swan Life avers that KT's report is not only incomplete but the conclusions made therein are unjustified and should not have been made.
55. Swan Life is further comforted in its above view following the communiqué issued by the SEM on 06 June 2017 (the "**SEM Communiqué**") confirming that the transaction effected in the preference shares of NMH on 17 February 2016 were made in compliance with the provisions of the SEM's ATS Schedule of Procedures. In so doing, the SEM clearly rejected the findings of KT with regards to the allegations and findings of market rigging contained his report against Swan Life and Swan Securities.

Bad faith, 'abus de droit' and 'faute'

56. The Plaintiffs aver that the acts and doings of KT constitute bad faith, '*abus de droit*' and '*faute*', which can be particularised as follows:
 - (a) knowing that his appointment was not in conformity with section 44A of FSA 07, hence unlawful, KT nonetheless rushed with his investigation;
 - (b) knowing that he was conflicted, KT nonetheless proceeded with his investigation in a partial and biased manner;

- (c) KT failed to comply with the basic requirement of fairness by rushing to make spurious allegations against Swan Life and Swan Securities knowing fully well that (i) Swan Life and Swan Securities had not been given an opportunity to respond to those allegations; and (ii) had Swan Life and Swan Securities been given an opportunity to respond to those allegations, the findings contained in his report could well have been different;
- (d) KT made spurious allegations against Swan Life and Swan Securities in bad faith knowing that due process in his own words “*requires that evidence be put to the persons concerned*”;
- (e) KT in his own words stated that “*once their versions are obtained the conclusions may be different*”;
- (f) KT, being on notice that his appointment was not in conformity with section 44A of FSA 07, made an abuse of his position and proceeded hurriedly and maliciously with his investigation in circumstances which were clearly improper and unsatisfactory;
- (g) KT acted in complete disregard of the basic rules of procedural fairness and due process and/or was grossly negligent and/or acted in bad faith in the conduct of his investigation;
- (h) KT’s allegations of market rigging against Swan Life and Swan Securities were made out of sheer incompetence and/or gross negligence and/or bad faith inasmuch as he could have closed that chapter of his investigation by seeking the views of the SEM as the SEM Communiqué demonstrates;
- (i) KT was grossly negligent in failing to seek the views of the SEM when any reasonable investigator would have first and foremost sought the views of SEM and/or in bad faith ignored the views of the SEM on the subject matter, which views would have clearly demonstrated that Swan Life and Swan Securities had not engaged in any form of market rigging whatsoever as alleged in his report;
- (j) KT failed to carry appropriate due diligence exercises into all the circumstances of his investigation and/or seek and/or act on proper legal advice on matters which were beyond his remit and competency, made findings of serious breaches including against Swan Life and Swan Securities in circumstances where the evidence before him fell short of establishing even a *prima facie* case; and
- (k) KT acted recklessly in submitting an incomplete report to the FSC for its consideration.

Damage caused to the Plaintiffs

57. Through his ‘*faute*’ as particularised above, KT has caused significant and ongoing damage to the Plaintiffs which the Plaintiffs value at Rs 300 million representing Rs 150 million for each of the Plaintiffs.

Prayers

58. The Plaintiffs prays from this Honourable Court for a judgment ordering the Defendant to pay to:
- (a) Swan Life Ltd, the Plaintiff No. 1, the sum of Rs. 150 million together with interest as from the date of service of the Plaint to that of final payment; and
 - (b) Swan Securities Ltd, the Plaintiff No. 2, the sum of Rs. 150 million together with interest as from the date of service of the Plaint to that of final payment.

WITH COSTS

Under all legal reservations.

Dated at Port Louis, this day of June 2017.

Georges Ng Wong Hing SA
Of 702, Chancery House,
Lislet Geoffroy Street, Port Louis.
Attorney for Plaintiffs Nos. 1 and 2

YOU, the said Defendant and Third Parties, are hereby summoned to appear before the Supreme Court of Mauritius situate at Jules Koenig Street, Port Louis, on the day of June 2017 at 9.30 a.m. to answer to the abovenamed Plaintiffs in the above matter.

TAKE NOTICE YOU, the above named Defendant and Third Parties that the Plaintiffs in this case propose to adduce as evidence the document hereunder specified and that the same day be inspected by you, your Attorney or Agent at the office of the undersigned Attorney-at-Law on any working days during office hours and that you are hereby required to assist that such document which is an original has been written, signed or executed as it purports to have been given all just exceptions as to the admissibility of the said document as evidenced by this case.

Documents

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| 1. | First communique of FSC | 20 February 2017 |
| 2. | Second communique of FSC | 31 March 2017 |
| 3. | Third communique of FSC | 31 May 2017 |
| 4. | Sunnystar letter | 22 March 2017 |
| 5. | Sunnystar letter | 26 March 2017 |
| 6. | Letter from the legal adviser of Swan Life | 10 April 2017 |
| 7. | Letter from the legal adviser of Swan Life | 11 April 2017 |
| 8. | Letter from the legal adviser of Swan Life | 18 April 2017 |
| 9. | Letter from the legal adviser of Swan Life | 31 May 2017 |
| 10. | Article published in Week-End | 28 May 2017 |
| 11. | Article published in Bizweek | 02 June 2017 |
| 12. | Article published in Week-End | 04 June 2017 |
| 13. | Communiqué of the Stock Exchange of Mauritius on trading in the preference shares of New Mauritius Hotels | 06 June 2017 |