IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 86

Suit No 1177 of 2016

Between

Cheong Chee Hwa

… Plaintiff

And

China Star Food Group Limited (formerly known as Brooke Asia Limited)

… Defendant

JUDGMENT

[Contract] — [Breach] — [Best commercial endeavours]
[Contract] — [Contractual terms] — [Implied terms]
[Companies] — [Reverse takeovers]
[Companies] — [Shares] — [Consolidation of shares]
[Financial and Securities Markets] — [Regulatory requirements] — [Listing and public offers] — [Catalist Rules]

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v
China Star Food Group Ltd
(formerly known as Brooke Asia Ltd)

[2019] SGHC 86

High Court — Suit No 1177 of 2016
Belinda Ang Saw Ean J
26, 27, 28 June 2018; 10 August 2018

29 March 2019 Judgment reserved.

Belinda Ang Saw Ean J:

Introduction

1 The plaintiff, Mr Cheong Chee Hwa ("Mr Cheong"), is a shareholder of the defendant company, China Star Food Group Limited ("China Star"), a public company listed on the Catalist Board of the Singapore Exchange Securities Trading Limited ("SGX-ST"). China Star's business operations, which are primarily in the production and sale of sweet potato snack food products, are in mainland China. Mr Cheong currently holds 4,158,000 shares in China Star, equivalent to 1.62% of the issued and fully paid up shares of China Star.

2 Like any reverse takeover ("RTO"), in the present case, the business of China Star Food Holding Pte Ltd ("CSFH") was brought under Brooke Asia

Limited ("BAL"), a company listed on the Catalist Board of the SGX-ST. Upon completion of the RTO, BAL was renamed China Star, and CSFH and its subsidiaries in mainland China became China Star's wholly-owned subsidiaries. In this judgment, the defendant will be referred to as BAL prior to the name change, and as China Star after the name change.

3 Mr Cheong is a pre-RTO investor whose expectations of a handsome return on his pre-RTO investment of S$2 million after CSFH's eventual listing (*ie*, BAL's re-listing) did not materialise. He claims to have lost his capital and return on investment on account of the defendant's breach of contract and that his loss is hardly an investment loss occasioned by investment risks as the defendant has countered in its defence.

4 The parties are at disagreement as to the construction of the contractual documents between them. This judgment will examine whether China Star, as Mr Cheong alleges, owes Mr Cheong a contractual obligation (express or implied) to re-list BAL in order for the BAL/China Star shares to be freely tradeable on the Catalist without undermining Mr Cheong's "potential upside on the value of his 16,632,000 BAL[/China Star] shares (and accordingly his original investment of S$2,000,000)".[1] Another consideration in the determination of this action is whether the "best commercial endeavours" provision has been breached. Central to the dispute is the consolidation of China Star's shares and China Star's subsequent issuance of consolidated placement shares at a price lower than the theoretical consolidated price. Mr Cheong refers to this lower price as having included a steep discount, and argues that the discount is detrimental to his pre-RTO investment. As to whether, in reality, the issuance of the consolidated placement shares to the public at the determined issue price was priced with a steep discount, this judgment will review the

[1] Plaintiff's Opening Statement, at para 6(h).

related relevant documentation disclosed in this action.

5 In the present action, Mr Cheong is represented by Mr Foo Maw Shen ("Mr Foo") and China Star is represented by Mr Joseph Tay Weiwen ("Mr Tay"). Mr Cheong led evidence at the trial; Mr Liang Cheng Wang (Chairman and Chief Executive Officer of China Star) ("Mr Liang") and Mr Mark Liew (Chief Operating Officer of PrimePartners Corporate Finance Pte Ltd, China Star's RTO sponsor) ("Mr Liew") testified on behalf of China Star.

Facts

6 As stated, BAL was a company listed on the Catalist Board of the SGX-ST prior to the RTO described earlier. Its shares were suspended from trading because it became a "cash company" as defined under Rule 1017 of the SGX-ST Catalist Rules (the "Catalist Rules"). BAL was under the threat of being de-listed if it was unable to meet the requirements under the Catalist Rules within 12 months. In other words, it had to acquire new operating businesses before the end of the 12-month period. CSFH was interested in seeking a listing via a RTO and BAL was the target company. Accordingly, through a RTO, CSFH acquired BAL and the operating business of CSFH was effectively brought under BAL. After completion of the RTO, BAL changed its name to China Star.

7 The facts of the case are mainly not in dispute and the parties have helpfully provided a list of agreed facts (the "Agreed Facts"). I will set out the factual background, before explaining the parties' respective case. The narrative below explains the RTO exercise in some detail with reference to the relevant documentation. Notably, in some instances, the language used in the documentation does not amount to firm commitments, but rather assumptions and examples for illustration purposes.

8 On 5 November 2014, BAL entered into a sale and purchase agreement (the "SPA") with all the original shareholders of CSFH (the "Original Vendors"). At this point in time, Mr Cheong had yet to enter the picture. Clauses 2.3 and 2.4 of the SPA provide that the Original Vendors would sell to BAL all the issued and fully paid ordinary shares in CSFH for S$168,000,000 (the "Proposed Acquisition"), which was to be satisfied by BAL issuing and allotting 840,000,000 new and fully-paid ordinary shares in the capital of BAL (the "Consideration Shares") to the Original Vendors in proportion to their equity interest in CSFH at the "Issue Price" defined in cl 1.1 of the SPA. The "Issue Price" for each Consideration Share, as provided under cl 1.1, is S$0.20. Besides the Consideration Shares to be allotted, there are three other categories of shares stipulated under the SPA:

(a) The Arranger Shares (cl 2.5): an arranger fee of S$5.5 million payable was to be fully satisfied at completion by way of issuance and allotment of an aggregate 27,500,000 new shares to the Arranger at the Issue Price (defined in cl 1.1);

(b) The PPCF Shares (cl 2.6): a professional fee of S$700,000.00 payable to PrimePartners Corporate Finance Pte Ltd ("PPCF"), which was China Star's sponsor for the RTO, was to be fully satisfied at completion by way of issuance and allotment of 3,500,000 new shares to PPCF at the Issue Price (defined in cl 1.1); and

(c) The Compliance Placement Shares (cl 2.9): BAL may be required under the Catalist Rules to place out new shares to satisfy the minimum distribution and shareholding spread requirements following completion by way of a compliance placement.

9 Clause 2.9 of the SPA on the Compliance Placement Shares forms a central disagreement between the parties:[2]

> 2.9 **Compliance Placement.** The Parties agree that, in connection with the Proposed Acquisition, the Purchaser may be required under the Listing Rules to place out new Shares to satisfy the minimum distribution and shareholding spread requirements of 15% of the Purchaser's enlarged share capital to be held by 200 public shareholders on Catalist following Completion ("Compliance Placement") and the issue price for any new Shares to be placed out pursuant to a Compliance Placement shall not be less than S$0.20. The Parties also agree that Vendors may also sell such number of their respective Consideration Shares as may be expressly permitted in writing by PPCF and subject always to compliance with the Listing Rules to meet the above requirement.

10 Pausing here, the "Issue Price" in cl 2.4 is defined in cl 1.1 and it is S$0.20 cents. However, the "issue price" in cl 2.9 is not the same as the "Issue Price" in cl 2.4. Clause 2.9 concerns the minimum issue price for RTOs and it duly tracks the admission standard applicable to RTOs.

11 The relevant rules in the Catalist Rules are Rule 406(1) and Rule 1015(3), and it can be seen that cl 2.9 is a reproduction of these Rules:[3]

> **Part III Catalist Admissions**
>
> **406**
>
> A listing applicant seeking admission to Catalist need not meet any minimum operating track record, profit or share capital requirement but is expected to meet the following conditions:
>
> (1) Shareholding Spread and Distribution
>
> (a) The proportion of post invitation share capital in public hands must be at least 15% at the time of listing. …
>
> (b) In the computation of the percentage of shares to be held in public hands, existing public shareholders may be included, subject to an aggregate limit of 5% of the issuer's

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2 Agreed Bundle ("AB") vol 1 63.

3 Defendant's Bundle of Authorities at Tab 1.

> post-invitation issued share capital and provided such shares are not under moratorium. …
>
> (c) The number of public shareholders of the securities must be at least 200.
>
> …
>
> **Part VIII Very Substantial Acquisitions or Reverse Takeovers**
>
> **1015**
>
> (3) For reverse takeover, the incoming business and the enlarged group must comply with the following:
>
> (a) the requirements in Rule 406, Part IX of Chapter 4 … With regard to Rule 406(1), the proportion of share capital in public hands must be at least 15% based on the total number of issued shares excluding treasury shares of the enlarged group. …; and
>
> …
>
> (c) where the consideration for the acquisition of assets by the issuer is to be satisfied by the issue of shares, the price per share of the issuer after adjusting for any share consolidation must not be lower than S$0.20.

12 These Rules should be read together with SGX-ST's guidance note that "[i]ssuers seeking a listing on SGX via a Reverse Takeover (RTO) are expected to comply with the same admission standards as IPO [*ie*, initial public offer] aspirants", and "the S$0.20 minimum issue price for IPOs should also apply to RTOs".[4]

13 Under the SPA, BAL warranted that "…it will use its best commercial endeavours to ensure that all of the Consideration Shares, PPCF Shares and Arranger Shares will be, when issued, duly listed and admitted for trading on the Catalist" in para 5 of Schedule 6 (the "Best Commercial Endeavours Warranty clause").[5]

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4 Defendant's Bundle of Authorities at Tab 2.

5 AB vol 1 107.

14 On 5 November 2014, BAL made an announcement ("the Nov 2014 Announcement") on the Proposed Acquisition and stated the pertinent terms of the SPA, including cl 2.9. The announcement explained that it was expected that the Original Vendors would collectively hold up to approximately 90.8% of the enlarged issued share capital after the issuance and allotment of the Consideration Shares, the Arranger Shares and the PPCF Shares. Thus, BAL would not meet the shareholding spread and distribution requirements set out in Rule 406(1) and Rule 1015(3). As a result, BAL "may be required under the Catalist Rules to place out new ordinary shares in the Company" and further the Original Vendors "may also sell their respective Consideration Shares … to meet the aforesaid requirement".[6] The announcement set out the envisaged shareholding structure of BAL after a compliance placement as follows:

(a) Original Vendors: 840,000,000 shares (81.9% of the enlarged capital);

(b) current shareholders: 53,636,000 shares (5.3% of the enlarged capital);

(c) the Arranger: 27,500,000 shares (2.7% of the enlarged capital);

(d) PPCF: 3,500,000 shares (0.3% of the enlarged capital); and

(e) new public shareholders: 101,000,000 shares (9.8% of the enlarged capital).

A note in the Nov 2014 Announcement draws attention to the 101,000,000 shares as an assumption and explains the assumption in the following manner:[7]

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6 AB vol 2A at Tab 21, p 121.

7 AB vol 2A at Tab 21, p 122.

> Based on the assumption that 101,000,000 Compliance Placement Shares are issued by the Company pursuant to the Compliance Placement and taking into account that the current shareholders of the Company would be considered as public shareholders of the Company under the Catalist Rules.

15 Mr Cheong entered the picture in 2015. On 16 April 2015, Mr Cheong entered into a Convertible Loan Agreement ("CLA") with CSFH and Mr Liang, who is one of the Original Vendors. Pursuant to the CLA, Mr Cheong granted a loan of S$2 million (the "Loan") to CSFH, which would be automatically converted into 1.98% of the shares of CSFH ("Conversion Shares"), calculated to be 64,761 shares, once the shareholders of BAL granted approval for the transactions contemplated by the SPA (cl 5.1(a)). The percentage figure of 1.98% is derived by taking the amount of Loan divided by 60% of the agreed valuation of CSFH (S$168 million). Thus, on automatic conversion of the Loan to CSFH shares, Mr Cheong received a 40% discount based on the agreed valuation of CSFH and its subsidiaries (*ie*, $168 million). These CSFH shares would then have to be sold to BAL for BAL shares (*ie*, the Consideration Shares). Clause 5.1(d) of the CLA provided that the number of BAL shares that would be subject to a moratorium is calculated based on the formula stipulated in Rule 422 of the Catalist Rules. The clause stated that "[f]or the purposes of illustration, based on an issue price of S$0.20 for each BAL Share, the Investor is expected to receive 16,632,000 BAL Shares, of which 6,632,000 BAL Shares would be subject to moratorium for a period of 12 months after completion of the RTO".[8] In this illustration, the issue price of S$0.20 is consistent with the formula, which uses the value of the CSFH (S$168 million) and the number of BAL shares (840 million). The number of shares subject to the moratorium represented the "profit portion of [Mr Cheong's] investment", as per the draft letter of moratorium.[9]

8 AB vol 1 119.

9 AB vol 3C 1258.

16 On the same day, Mr Cheong entered into a Supplemental Agreement to the SPA ("the Supplemental Agreement"). Under the Supplemental Agreement, Mr Cheong would, subject to the automatic conversion under the CLA, become a party to and a vendor under the SPA. If the Loan was converted to CSFH shares, Mr Cheong would receive 16,632,000 shares in BAL (at the Issue Price of S$0.20 per share as defined in cl 1.1 of SPA) in exchange for his Conversion Shares on the date of completion of the SPA. The 16,632,000 shares in BAL represented 1.98% of the Consideration Shares. On the same day, BAL made an announcement stating *inter alia* that the CLA and the Supplemental Agreement have been entered into ("the April 2015 Announcement"). The announcement explained that the proportional distribution of the Consideration Shares (840,000,000 shares) had thus changed, but reiterated that the Consideration Shares would be issued at S$0.20 each, and that the consideration of S$168 million for the Proposed Acquisition remained unchanged.

17 On 26 June 2015, by way of a Notice of Extraordinary General Meeting ("EGM") issued by BAL to its shareholders, BAL informed its shareholders of an upcoming EGM on 20 July 2015, for the purposes of approving and passing various ordinary resolutions, including the following:

(a) the Proposed Acquisition of the entire issued and paid-up capital of CSFH for S$168 million ("the Purchase Consideration");

(b) the proposed allotment and issue at the Issue Price of S$0.20 per share of (i) 840,000,000 Consideration Shares in satisfaction of the Purchase Consideration, (ii) 3,500,000 PPCF Shares, and (iii) 27,500,000 Arranger Shares; and

(c) the proposed allotment and issue of up to 101,000,000 placement shares pursuant to a compliance placement ("the Proposed Compliance Placement").

18 A circular dated 26 June 2015 (the "June 2015 Circular") was also issued by BAL to its shareholders to provide information in relation to the EGM on 20 July 2015. The June 2015 Circular provided, *inter alia*, that the issue price for each Consideration Share was S$0.20, and that following the Proposed Acquisition, the Enlarged Share Capital would be 924,636,000 shares. It further stated that there would be a Proposed Compliance Placement of up to 101,000,000 placement shares. This means that the enlarged number of issued shares after the Proposed Compliance Placement would be 1,025,636,000. Importantly, the June 2015 Circular explained the Proposed Compliance Placement at para 26:[10]

> **26. Proposed Compliance Placement**
>
> The Company is required to comply with Rule 1015(3)(a) read with Rule 406(1) of the Catalist Rules, where at least 15.0% of the issued share capital of the Company must be held in the hands of at least 200 public shareholders. …
>
> On Completion, assuming the allotment and issue of the Consideration Shares, PPCF Shares and Arranger Shares, the Vendors will own approximately 90.85% of the Enlarged Share Capital and approximately 5.8% of the Enlarged Share Capital will be held in the hands of the public Shareholders.
>
> The trading of the Shares on Catalist may be suspended immediately after Completion. The suspension will continue during the period allowed for the placement of the Placement Shares pursuant to the Proposed Compliance Placement and until such time as the requirements under Rule 406(1) of the Catalist Rules are met. In the case where the placement of the Placement Shares is not or is unable to be carried out so as to meet the applicable shareholding spread requirement of the Catalist Rules, the trading of the Shares may continue to be suspended.

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10 AB vol 2A at Tab 40, pp 454–456.

In order to, *inter alia*, meet the shareholding spread and distribution requirements under the Catalist Rules, the Company wishes to undertake the Proposed Compliance Placement.

Terms of the Compliance Placement

The Company will undertake a placement of up to 101,000,000 Placement Shares at no less than the minimum placement price of S$0.20 per Placement Share. As at the Latest Practicable Date, the terms of the Proposed Compliance Placement, including the number of Placement Shares and the placement price, have yet to be finalised pending the entry by the Company into a definitive placement agreement with the placement agents(s) [sic].

…

The Proposed Compliance Placement is *subject to, inter alia, the approval of Shareholders for the allotment and issuance of up to 101,000,000 Placement Shares under the Proposed Compliance Placement on such terms as may be determined by the New Board* including without limitation, the timing of the Proposed Compliance Placement, if any, when it occurs, taking into account various factors, including without limitation and [*sic*] market conditions and prices. Subject to the approval of Shareholders being obtained at the EGM, the price of each Placement Share to be offered under the Proposed Compliance Placement shall be determined by the Board but in any event, shall not be less than S$0.20 per Placement Share.

… *Shareholders should note that the terms of the Proposed Compliance Placement, as well as the timing of the Proposed Compliance Placement, if and when it occurs, will depend on various factors such as market conditions* or such other period of time as may be permitted by the SGX-ST.

…

Use of proceeds

The estimated net proceeds to be raised by the Company pursuant to the Proposed Compliance Placement is approximately S$17.9 million, *based on the assumption that 101,000,000 Placement Shares are issued* at the minimum placement price of S$0.20 per Share and after deducting an [*sic*] estimated expenses in relation to the Proposed Acquisition and Proposed Compliance Placement of approximately S$2.3 million.

[emphasis added in underlined italics; original emphasis in main body of text removed]

The June 2015 Circular defined "Placement Shares" as "[u]p to 101,000,000 new fully-paid Shares to be allotted and issued at no less than the minimum placement price of S$0.20 per Share pursuant to the Proposed Compliance Placement".[11]

19 On 6 July 2015, the Singapore Exchange Limited ("SGX") sent PPCF a listing and quotation notice (the "LQ Notice") that was valid for three months for the listing and quotation of the new shares, *ie*, the Consideration Shares, the Arranger Shares, the PPCF Shares and up to 101,000,000 shares to be issued pursuant to the Proposed Compliance Placement.

20 On 20 July 2015, the resolutions as stated in the June 2015 Circular were approved by BAL's shareholders. In BAL's media release on the same day, it stated that it would undertake a placement of up to 101,000,000 shares "at no less than the minimum placement price of S$0.20 per Placement Share" after the Proposed Acquisition.[12]

21 On 21 July 2015, the automatic conversion under the CLA took place, and Mr Cheong was issued 69,811 shares in CSFH, representing 1.98% of the shareholding of CSFH. The number of shares issued differed from that stated in the CLA (see [15] above) because the total number of shares of CSFH changed, but there was no breach of the CLA because the percentage shareholding stayed the same. Pursuant to cl 5.1(b) of the CLA, upon the automatic conversion, the right of Mr Cheong to repayment of the Loan with interests was extinguished. If it had been the case that the automatic conversion did not take place, cl 3.3 of the CLA provided that CSFH was to repay all outstanding sums of the Loan and simple interest at the rate of 8.0% per annum. Pursuant to cl 2.2(a) of the

11 AB vol 2A at Tab 40, p 248.

12 AB vol 2B 743.

Supplemental Agreement, Mr Cheong became a party to and a vendor under the SPA as a result of the automatic conversion. Upon completion of the RTO on 22 September 2015, Mr Cheong transferred his 69,811 shares in CSFH to BAL, in return for 16,632,000 shares in BAL.

22 At the Annual General Meeting ("AGM") on 22 September 2015, the shareholders of BAL approved an ordinary resolution to give authority to the board to issue new shares whether by way of rights, bonus or otherwise, and to make or grant offers, agreements or options that might require shares to be issued, including but not limited to the creation and issue of options, warrants, debentures or other instruments convertible into shares. BAL changed its name to "China Star Food Group Limited" with effect from 22 September 2015 and its trading counter name to "China Star Food" with effect from 9.00am on 28 September 2015.

23 On 29 September 2015, SGX sent a letter to PPCF informing that the shares allotted and issued pursuant to the completion of the SPA had been listed and quoted on SGX with effect from 29 September 2015. However, trading remained suspended in anticipation of the Proposed Compliance Placement. This trading suspension was foreshadowed in the June 2015 Circular (see [18] above) in relation to the Proposed Compliance Placement. It is helpful to set out again the relevant passage of the June 2015 Circular:

> The trading of the Shares on Catalist may be suspended immediately after Completion. The suspension will continue during the period allowed for the placement of the Placement Shares pursuant to the Proposed Compliance Placement and until such time as the requirements under Rule 406(1) of the Catalist Rules are met. In the case where the placement of the Placement Shares is not or is unable to be carried out so as to meet the applicable shareholding spread requirement of the Catalist Rules, the trading of the Shares may continue to be suspended.

> In order to, *inter alia*, meet the shareholding spread and distribution requirements under the Catalist Rules, the Company wishes to undertake the Proposed Compliance Placement.

24 On 2 October 2015, PPCF wrote to SGX to request an extension of the validity of the LQ Notice, on the basis that due to "unfavorable current market conditions", China Star needed time "to finalize the placement agreement and undertake the Proposed Compliance Placement in order to meet admission requirements in respect of the minimum shareholding spread and distribution".[13] On 6 October 2015, SGX granted an extension till 5 December 2015. In the SGX Announcement dated 15 October 2015 made by China Star on this extension granted, China Star stated that "[d]ue to current weak market conditions, the Proposed Compliance Placement has not been effected as at the date of this announcement".[14]

25 By 14 October 2015, the board of China Star was discussing and considering a share consolidation.[15] Subsequently in November 2015, China Star proposed to consolidate every four of its existing shares into one share (the "Proposed Share Consolidation"), in order to provide flexibility in determining the issue price of compliance placement shares and thereby facilitate the completion of a compliance placement. By a directors' resolution dated 18 November 2015, the directors of China Star approved the proposed share consolidation on the basis that it was in the best interests of China Star. On the same day, China Star announced the Proposed Share Consolidation (the "18 Nov 2015 Announcement"). It is not disputed that this was the first time of any announcement of a share consolidation being contemplated by China Star.[16]

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13 AB vol 3C at Tab 60.

14 AB vol 2B 1016.

15 Notes of Evidence ("NE") 27 June 2018 at p 14.

16 NE 27 June 2018 at p 9.

26 On 25 November 2015, China Star released a Notice of EGM to be held on 11 December 2015 for the purposes of approving the Proposed Share Consolidation.[17] In the circular to its shareholders dated 26 November 2015 (the "Share Consolidation Circular"), the "Proposed Compliance Placement" was defined as "[t]he proposed placement of up to 101,000,000 new fully-paid Shares (or up to 25,250,000 new fully-paid Consolidated Shares) at a minimum placement price of no less than S$0.20 per Share to satisfy the minimum distribution and shareholding spread requirements of the Catalist Rules".[18] The Share Consolidation Circular stated that "[t]he Proposed Share Consolidation will have no impact on the issued and paid-up share capital of the Company" and "has no effect on the Shareholders' funds of the Group". The "Proposed Share Consolidation will not cause any changes to the percentage shareholding of each Shareholder, other than non-material changes due to rounding".[19] The rationale of the Proposed Share Consolidation was stated as follows:[20]

> **2.2 RATIONALE FOR THE PROPOSED SHARE CONSOLIDATION**
>
> …
>
> The Company is required to comply with Rule 1015(3)(a) read with Rule 406(1) of the Catalist Rules, where at least fifteen per cent (15.0%) of the issued share capital of the Company must be held in the hands of at least two hundred (200) public shareholders. Accordingly, the trading of the Shares on Catalist has been suspended since the completion of the Acquisition.
>
> In order to, *inter alia*, meet the shareholding spread and distribution requirements under the Catalist Rules, the Company proposes to undertake the Proposed Compliance Placement. However, *due to prevailing market conditions*, the Proposed Compliance Placement has not been carried out as at the Latest Practicable Date.

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17 AB vol 2B at Tab 95.

18 AB vol 2B at Tab 96, p 1085.

19 AB vol 2B at Tab 96, p 1088.

20 AB vol 2B at Tab 96, p 1088.

> *Under Rule 429 of the Catalist Rules, the issue price of shares offered for subscription or sale for which a listing is sought, is required to be at least S$0.20 each, which also applies to reverse takeovers based on the guidance note issued by the SGX-ST on 1 February 2008. In order to provide flexibility in determining the issue price of the Proposed Compliance Placement and thereby facilitate the completion of the Proposed Compliance Placement, the Company proposes to consolidate every four (4) existing Shares into one (1) Consolidated Share.* For avoidance of doubt, the number of new Consolidated Shares to be issued for the Proposed Compliance Placement after the completion of the Proposed Share Consolidation shall be up to 25,250,000. *For illustrative purposes, based on the issue price of S$0.20 for each Share pursuant to the Acquisition, the theoretical share price of each Consolidated Share will be S$0.80.*
>
> …
>
> **However, Shareholders should note that there is no assurance that the Proposed Share Consolidation will achieve the desired results, nor is there assurance that such results (if achieved) can be sustained in the longer term.**
>
> [emphasis added in underlined italics; original emphasis in bold]

27 On 27 November 2015, PPCF wrote to SGX again to request a further extension of the LQ Notice for two months "to allow time for [China Star] to finalize the placement agreement and lodge the offer information statement in respect of the Proposed Compliance Placement after the completion of the Proposed Share Consolidation on or about 22 December 2015".[21] In the same letter, PPCF explained to SGX that the Proposed Share Consolidation was to provide flexibility in determining the issue price of the placement shares and thereby facilitate the completion of the proposed compliance placement. On 7 December 2015, SGX granted the extension till 5 February 2016.

28 The shareholders of China Star approved the Proposed Share Consolidation at the EGM on 11 December 2015. Subsequently, China Star

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[21] AB vol 3C at Tab 72.

consolidated every four of its existing shares into one share (the "Share Consolidation") and this was completed on 22 December 2015. As a result, Mr Cheong's shares in China Star were reduced from 16,632,000 shares to 4,158,000 shares. Pausing here, Mr Cheong's complaint in this action is not about the consolidation *per se* with a theoretical price of S$0.80 per consolidated share. From his viewpoint, he received on his investment of S$2 million 16,632,000 shares at S$0.20 per share and those shares were to be freely tradable. But when the Share Consolidation was later coupled with the issuance of consolidated placement shares at a price much lower than the theoretical issue price, he ended up with 4,158,000 shares at S$0.2026, instead of S$0.80 per consolidated share. From this perspective, Mr Liew, a witness for China Star, agreed with Mr Foo, counsel for Mr Cheong, that the Share Consolidation had an impact on the shareholders' investments from a valuation perspective but not from a shareholding perspective.[22] As I will explain later in the Judgment, these perspectives have no real bearing on the outcome of the action unless they are grounded on some identifiable contractual obligations that are breached.

29 Returning to the narrative of the facts, on 3 February 2016, PPCF wrote to SGX to request a further two-month extension of the LQ Notice "to allow time for [China Star] to finalize the placement agreement and lodge the offer information statement in respect of the Proposed Compliance Placement".[23] On 12 February 2016, SGX approved the extension till 5 April 2016. This was the third extension granted by SGX.

30 On 15 February 2016, China Star released a SGX announcement on the further extension granted by SGX. The announcement stated, *inter alia*, that the proposed compliance placement had not been effected and that "shortly after

22 NE 27 June 2018 at p 48.

23 AB vol 3C Tab 86.

completion of the Share Consolidation, global capital markets experienced significant market volatility, and the Proposed Compliance Placement had to be postponed due to dampened investor interest".[24]

31 On 6 April 2016, PPCF submitted an additional listing application to SGX for the listing of:

(a) 25,250,000 new placement shares (the "Consolidated Placement Shares") at the issue price of S$0.23 each to be issued and allotted by way of a placement, pursuant to the approval for the Proposed Compliance Placement from the shareholders obtained at the EGM on 20 July 2015 (see [20] above);

(b) 50,500,000 free detachable listed warrants (the "Warrants") carrying the right to subscribe for new shares in the capital of China Star at the exercise price of S$0.33 each to be issued in connection with the Consolidated Placement Shares, pursuant to the general mandate obtained at the AGM on 22 September 2015 (see [22] above); and

(c) up to 50,500,000 new shares to be issued and allotted in connection with the exercise of the Warrants (the "Warrant Shares"), pursuant to the general mandate obtained at the AGM on 22 September 2015.

In the same application, PPCF stated that the underlying value of two warrants was S$0.2074, and the implied net issue price of a Consolidated Placement Share was S$0.2026. PPCF later, by email dated 7 April 2016, corrected the underlying value of two warrants to S$0.0274.[25]

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24 AB vol 2B Tab 115.

25 AB vol 3C at Tab 106.

32 On 11 April 2016, all the directors of China Star, including two major shareholders who held about 72.6% of the shares in China Star combined prior to the compliance placement, approved the allotment and issuance of the Consolidated Placement Shares, the Warrants and the Warrant Shares.

33 On 12 April 2016, SGX approved the listing and quotation of the Consolidated Placement Shares, the Warrants and the Warrant Shares, subject to certain conditions, including "submission of a written undertaking from the Company that it will seek shareholders' ratification for the issuance of the [Consolidated] Placement Shares with Warrants".[26]

34 On 18 April 2016, China Star completed a compliance placement under which it issued 25,250,000 Consolidated Placement Shares with 50,500,000 Warrants, at an issue price of S$0.23 per Consolidated Placement Share, as per the approval from SGX (the "Compliance Placement"). On 20 April 2016, suspension on the trading of China Star's shares was lifted, and the shares resumed trading. The shareholders of China Star ratified the issuance of the Consolidated Placement Shares with the Warrants at the AGM on 29 July 2016 with 99.92% of votes in favour.

35 On 20 April 2017, at the end of the 12-month moratorium on part of Mr Cheong's shares, the trading price of China Star's shares was S$0.13.

The plaintiff's case

36 At the core of Mr Cheong's case is that the Share Consolidation and the Compliance Placement undertaken are in breach of the SPA. Mr Cheong complains that he has sustained losses, because China Star did not issue 101,000,000 shares at S$0.20 in the compliance placement or did not issue the

[26] AB vol 3C at Tab 109.

Consolidated Placement Shares with the theoretical price of S$0.80 per share. In closing submissions, Mr Foo developed the complaint, submitting that the Consolidated Placement Shares were issued at a steep discount (from S$0.80 to S$0.23), which reduced the value of Mr Cheong's shares by about four times. Effectively, as a result of the Share Consolidation, Mr Cheong paid four times (S$0.481) more than his original cost of S$0.12 per share, and he thereby lost or was deprived of the profit element/buffer. In the Agreed Facts, China Star's NTA per consolidated share value was stated as RMB 320.5 cents or approximately S$0.65.

37 According to Mr Cheong, the SPA envisaged the re-listing of BAL with an enlarged number of issued shares of up to 1,025,636,000 following the Proposed Compliance Placement (see [18] above). This means that the value of China Star post-RTO would be S$184,927,000 (shareholding of 924,636,000 multiplied by S$0.20), and the value of China Star after the Proposed Compliance Placement would be S$205,127,200 (shareholding of 1,025,636,000 multiplied by S$0.20). He contends that it was on this basis that the CLA and the Supplemental Agreement were entered into.

38 Mr Cheong's pleaded case is as follows:

(a) China Star breached the obligation under cl 2.9 under the SPA (see [9] above) (and the Supplemental Agreement) to place 101,000,000 shares at a price of S$0.20 each;

(b) China Star breached the Best Commercial Endeavours Warranty clause (see [13] above) in that it failed and/or neglected to undertake its best commercial endeavours to ensure that it would not unilaterally undermine its value and hence the value of the shares issued to Mr

Cheong (at S$0.20 per share), prior to the shares of BAL being re-listed on the Catalist;

(c) China Star breached an implied term that it was not to unilaterally undermine its value and hence the value of the shares issued to Mr Cheong (at S$0.20 per share), prior to the shares of BAL being re-listed on the Catalist.

39 Mr Cheong contends that cl 2.9 of the SPA, consistent with the Nov 2014 Announcement, the June 2015 Circular and the CLA, provided for the compliance placement of 101,000,000 new shares to be issued at a price of not less than S$0.20 per share. In support of his position, he highlights that a consolidation of China Star's shares or an issuance of placement shares with detachable warrants were not contemplated in the SPA, nor in the CLA or the Supplemental Agreement. Since the consolidation was undertaken, China Star had to place new placement shares on a post-consolidation basis at a price of not less than S$0.80 per share. However, the Consolidated Placement Shares were issued at effectively about S$0.05 per share pre-consolidation, which is less than the amount of S$0.20 contemplated in cl 2.9 of the SPA. Mr Foo submits on behalf of Mr Cheong that prior to BAL's re-listing, China Star bore the risk of his investments and had an obligation to guarantee the value of his shares.

40 The same arguments above are relied on in respect of the breach of the Best Commercial Endeavours Warranty clause and the implied term as pleaded.

41 Mr Cheong takes the position that as a result of China Star's breach, the value of China Star became S$51,948,463.40, and the value of his shares

became S$842,410.80. Mr Cheong claims a loss of S$2,483,989.20, representing the difference between a value of S$0.20 per share that he held before the Share Consolidation, and S$0.2026 per share that he held after the Share Consolidation.

The defendant's case

42 China Star disagrees with Mr Cheong's construction of the SPA (and the Supplemental Agreement). Mr Tay argues that there is no express or implied obligation under the SPA or the Supplemental Agreement on China Star to (a) issue a fixed number of shares in a compliance placement, (b) issue the Consolidated Placement Shares at S$0.80 per share, (c) guarantee the value of China Star's shares post-RTO and the value after a compliance placement to be of certain amounts, or (d) guarantee Mr Cheong's shares to be of a certain value. In the same vein, there is no express or implied term that China Star was not to unilaterally undermine its value or the value of Mr Cheong's shares prior to the shares of BAL being re-listed or at all. China Star avers that the value of a listed company is determined by the market and not the company itself.

43 In its pleadings, China Star avers that the "Issue Price" referred to in cl 2.4 of the SPA is not the same as the issue price of placement shares under cl 2.9, and Mr Cheong's case confuses and treats both prices to be the same. Clause 2.9, according to China Star, only imposes an obligation on it to place new shares pursuant to a compliance placement in satisfaction of the Catalist Rules. It submits that the Share Consolidation and the issuance of the Consolidated Placement Shares were undertaken with due regard to the market conditions at the material time, after consultation with PPCF, and in compliance with the Catalist Rules. There is nothing in the SPA or the Supplemental Agreement that prohibits China Star from undertaking the Share Consolidation and issuing the

Consolidated Placement Shares with the Warrants. There is also no obligation to issue the Consolidated Placement Shares at S$0.80 each. By issuing the Consolidated Placement Shares at S$0.23 per share, China Star had complied with cl 2.9 of the SPA and the Catalist Rules to issue the shares at a price not less than S$0.20 each. Even if Mr Cheong's arguments in relation to China Star's obligations were made out, China Star argues that any breach did not cause loss to him because the market would not have supported an issue price higher than S$0.23 per Consolidated Placement Share.

44 In relation to the Best Commercial Endeavours Warranty clause, China Star submits that there is no breach because Mr Cheong's shares have been duly listed on the Catalist for trading. Mr Tay argues that had it not been for the Share Consolidation and the Compliance Placement, China Star would not have been able to comply with the Catalist Rules and would not have been able to resume trading on the Catalist, as required and/or envisaged by cl 2.9 of the SPA and the Best Commercial Endeavours Warranty clause.

45 In relation to the alleged implied term, Mr Tay contends that the term as pleaded by Mr Cheong is vague and unclear. Moreover, there would be an inconsistency between the proposed term and the Best Commercial Endeavours Warranty clause. It would not conduce towards business efficacy to imply such a term, because China Star could not be taken to have fettered its freedom and discretion to seek the requisite approval from its shareholders to carry out a share consolidation or to issue its shares at a lower price in order to complete a compliance placement. The alleged implied term also would not satisfy the officious bystander test.

46 Finally, if it is adjudged to be liable to Mr Cheong, China Star contends that its liability is limited to S$1 million under para 1 of Schedule 7 to the SPA.

The decision

47 I begin with setting out the dispute between the parties in perspective. It concerns the actions taken by China Star subsequent to the completion of the RTO in order to lift the suspension on the trading of its shares. The RTO was successfully completed on 22 September 2015 (see [21] above). Under the CLA, CSFH was "deemed to have successfully completed the Listing upon completion of the RTO" under cl 1.2(a), fulfilling the purpose stated in the recital of the CLA that CSFH intended "to seek a public listing of its shares on the Catalist".[27] It is not disputed that there is no breach of the CLA. The claim pursued by Mr Cheong does not concern the completion of the RTO proper.

48 As the parties' arguments involve the interpretation of contractual documents, I will set out the relevant legal principles before turning to their application to the facts.

The law on interpretation of contractual documents

49 The law on contractual interpretation has been comprehensively set out in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") and *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp Marine*"). The process of interpretation entails ascribing meaning to the parties' contractual or contractually relevant expressions, to objectively ascertain the parties' intentions (*Sembcorp Marine*

[27] AB vol 1 113 and 115.

at [28]). To this end, the court is to have regard to the aim of construction (which is to ascertain the meaning which a contract or other document would convey to a reasonable business person), the objective principle, the whole contract or holistic approach, the external context, the business purpose, the preference for an interpretation that gives lawful effect to the contract and its performance, the *contra proferentem* rule, avoiding unreasonable results, the rule that a specially agreed provision should override an inconsistent standard provision, and the rule that a more precise or detailed provision should override an inconsistent general or widely expressed provision (*Zurich Insurance* at [131]).

50 In *CIFG Special Assets Capital I Ltd (formerly known as Diamond Kendall Ltd) v Ong Puay Koon and others and another appeal* [2018] 1 SLR 170 (at [19]), the Court of Appeal summarised the principles in relation to contractual interpretation as follows: (a) the starting point is that one looks to the text that the parties have used; (b) it is permissible to have regard to the relevant context as long as the relevant contextual points are clear, obvious and known to both parties; (c) the court has regard to the relevant context because it places the court in the best possible position to ascertain the parties' objective intentions by interpreting the expressions used by them in their proper context; and (d) in general, the meaning ascribed to the terms of the contract must be one which the expressions used by the parties can reasonably bear. This has been adopted more recently in *PT Bayan Resources TBK and another v BCBC Singapore Pte Ltd and another* [2019] 1 SLR 30 at [120] and *Lim Sze Eng v Lin Choo Mee* [2019] 1 SLR 414 ("*Lim Sze Eng*") at [60].

Whether there is a breach of cl 2.9 of the SPA

51 Mr Cheong claims that pursuant to cl 2.9 of the SPA, China Star had an obligation to undertake a compliance placement and issue up to 101,000,000

new placement shares at the price of at least S$0.20 per share on an unconsolidated basis (see [39] above). He disagrees that the figure of 101,000,000 was put forward only for purposes of illustration; the figure of 101,000,000 was equivalent to 9.8% of the enlarged share capital of China Star that it had to issue in order to meet the Catalist Rules. Moreover, he claims that the value of China Star *had to be* S$205,127,200 (shareholding of 1,025,636,000 multiplied by S$0.20) after the Proposed Compliance Placement. Thus, the Share Consolidation and the issuance of the Consolidated Placement Shares at S$0.23 were made in breach of cl 2.9 of the SPA (see [9] above). The purport of his claim is that cl 2.9 of the SPA imposes an absolute obligation to place 101,000,000 shares at a price of no lower than S$0.20 ("the absolute obligation argument").

52 This absolute obligation argument is clearly undermined by the express wording of cl 2.9. The clause uses the permissive language of "may" and there is no indication in the clause of the number of shares to be placed at a compliance placement.

53 Thus, Mr Cheong seeks to rely on context to support his interpretation. He relies on the Term Sheet that preceded the signing of the SPA, the Nov 2014 Announcement, the June 2015 Circular, the CLA and the Share Consolidation Circular:

> (a) The appendix to the Term Sheet stated that after completion of the RTO and compliance placement, public shareholders would hold 101,000,000 shares. Mr Liew testified that the figure is a mathematical computation calculated to achieve the outcome of 15% shareholding to be held by public shareholders (taking into account that public shareholders were already holding about 5% of the shares).[28]

(b) In the Nov 2014 Announcement (see [14] above), it was announced that after the Proposed Acquisition and the compliance placement, there would be 101,000,000 shares held by new public shareholders, amounting to 9.8% of the total number of shares. The announcement also stated that the shares to be placed out pursuant to a compliance placement "shall not be less than S$0.20". Mr Cheong would have had sight of this announcement along with the SPA when he signed the CLA and the Supplemental Agreement on 16 April 2015.

(c) The June 2015 Circular (see [18] above) stated that BAL will undertake a placement of up to 101,000,000 placement shares at no less than the minimum placement price of S$0.20 per placement share.

(d) The CLA stated that CSFH intended to seek a public listing of its shares on the Catalist.

(e) The Share Consolidation Circular stated "the theoretical share price of each Consolidated Share will be S$0.80" (see [26] above), without any indication that the price after consolidation would be lower than S$0.80.

54 However, all of these documents do not aid Mr Cheong's case. The Term Sheet specifically stated that the "number of Vendor Shares to be sold at Compliance Placement shall be subject to agreement between the Vendors and PPCF",[29] and that the "Term Sheet represents an outline of the Proposed Acquisition, subject to the [SPA] (and all other necessary legal documentation) to be concluded and executed by the Parties and the presence or absence of any term or condition herein shall not be interpreted as any agreement that such term

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28 NE 27 June 2018 at p 25.

29 AB vol 2A 92.

or condition will or will not exist in the [SPA]".[30] Thus, the Term Sheet does not provide relevant context to aid and establish Mr Cheong's interpretation of cl 2.9. In any case, it is unclear whether Mr Cheong had sight of the Term Sheet when he entered into the CLA and the Supplemental Agreement.

55 The Nov 2014 Announcement itself came with a reservation – there is a note next to the value of 101,000,000, and I repeat, for convenience, the note here:[31]

> (2) Based on the assumption that 101,000,000 Compliance Placement Shares are issued by the Company pursuant to the Compliance Placement and taking into account that the current shareholders of the Company would be considered as public shareholders of the Company under the Catalist Rules.

The reservation or caveat means that China Star did not take on an absolute obligation to place exactly 101,000,000 shares in a compliance placement.

56 The June 2015 Circular (see [18] above) stated that "the terms of the Proposed Compliance Placement, as well as the timing of the Proposed Compliance Placement, if and when it occurs, will depend on various factors such as market conditions". It also stated that the net proceeds of S$17.9 million to be raised pursuant to the Proposed Compliance Placement was "based on the assumption that 101,000,000 Placement Shares [were] issued at the minimum placement price of S$0.20 per share". The circular does not impute a reading of an absolute obligation on China Star to place 101,000,000 shares at S$0.20 each. The June 2015 Circular was issued to the BAL shareholders before the RTO so it is unclear whether Mr Cheong had sight of it at the material time.

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30 AB vol 2A 95.

31 AB vol 2A 122.

57 As explained above, the purpose of the CLA has been duly achieved upon the success of the RTO (see [47] above). It is not relevant to the interpretation of cl 2.9.

58 Mr Liew agreed that the Share Consolidation Circular could be misleading to an inexperienced investor and that additional clarifications would have helped.[32] In any case, given that the price of S$0.80 was referred to as "theoretical" since it was for illustrative purposes, and given the explanation that the Share Consolidation was to provide "flexibility in determining the issue price" and the reservation or caveat in the circular that "there is no assurance that the Proposed Share Consolidation will achieve the desired results", there is no commitment by China Star to issue the Consolidated Placement Shares at S$0.80 per share. Moreover, Mr Cheong agreed on the stand that China Star was not promising that it could conduct the compliance placement at S$0.80 per share.[33]

59 More importantly, the SPA contains the Best Commercial Endeavours Warranty clause (see [13] above), which states that BAL would use its best commercial endeavours to ensure that the shares would be duly listed and admitted for trading on the Catalist. The presence of such a clause means that the obligation under cl 2.9 of the SPA, which is a reproduction of the requirements under Rules 406(1) and 1015(3) of the Catalist Rules governing the conditions necessary for listing (and lifting of suspension on trading), cannot be interpreted as an absolute obligation in terms of what Mr Cheong is arguing for, and I so hold.

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32 NE 27 June 2018 at p 102.

33 NE 26 June 2018 at p 49.

60 I find that there is no absolute obligation that China Star has to place 101,000,000 shares at a price of S$0.20 under cl 2.9 of the SPA and to guarantee that its valuation would be S$205,127,200 after a compliance placement. While I accept that share consolidation was not contemplated at the time of the SPA and the first mention of a share consolidation was on 18 November 2015 (see [25] above), there is no obligation in the SPA that the shares have to be placed on a non-consolidated basis. Therefore, Mr Cheong fails to show that cl 2.9 mandates a placement of 101,000,000 on a non-consolidated basis at a price of S$0.20, and correspondingly fails to show that the Share Consolidation and the Consolidated Placement Shares issued by China Star were in breach of cl 2.9 of the SPA. Mr Cheong's position that the figure of 101,000,000 placement shares was not merely illustrative because it has a mathematical basis (*ie*, it would fulfil the requirement of having public shareholders holding 15% of the shareholding) is not persuasive because it was not the only way of fulfilling the public shareholding requirement, as demonstrated by the Share Consolidation and the issuance of the Consolidated Placement Shares. I should add that Mr Cheong does not seriously dispute that the figure of S$0.80 on a consolidated basis was a theoretical price provided for illustrative purposes, for he agreed on the stand that China Star was not promising that it could conduct the compliance placement at S$0.80 per share.

Whether there is a breach of the Best Commercial Endeavours Warranty clause

61 The Best Commercial Endeavours Warranty clause provides that BAL/China Star will use its best commercial endeavours to ensure that all the Consideration Shares, PPCF Shares and Arranger Shares will be, when issued, *duly listed and admitted for trading* on the Catalist. The interpretation of the Best Commercial Endeavours Warranty clause is in question. Mr Cheong claims

that the clause means that China Star must undertake best commercial endeavours to ensure that it would not unilaterally undermine its value and hence the value of the shares issued to Mr Cheong (at S$0.20 per share), prior to the shares of BAL being re-listed on the Catalist. His position is that the value of China Star was to be S$205,127,200 and the value of his shares was to be S$3,326,400 after the proposed compliance placement, and China Star has to undertake best commercial endeavours not to undermine these values. China Star, on the other hand, takes the position that there is no such obligation, for the clause only requires best commercial endeavours to ensure that the Consideration Shares, *inter alia*, were listed and admitted on the Catalist for trading. Since the Consideration Shares, including Mr Cheong's shares, have been indeed listed and subsequently admitted on the Catalist for trading (which is not disputed), the Best Commercial Endeavours Warranty clause is satisfied.

62 In the context of interpreting a "best endeavours" clause, the Court of Appeal in *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905, set out the following guidelines at [47] (adopted recently in *Lim Sze Eng* at [73]):

> (a) The obligor has a duty to do everything reasonable in good faith with a view to procuring the contractually-stipulated outcome within the time allowed. This involves taking all those reasonable steps which a prudent and determined man, acting in the interests of the obligee … and anxious to procure the contractually-stipulated outcome within the available time, would have taken.
>
> (b) The test for determining whether a "best endeavours" obligation has been fulfilled is an objective one.
>
> (c) The obligor can take into account its own interests.

(d) A "best endeavours" obligation is not a warranty to procure the contractually-stipulated outcome.

(e) The amount or extent of endeavours required is determined with reference to the available time for procuring the contractually-stipulated outcome; the obligor is not required to drop everything and attend to the matter at once.

(f) Where breach of a "best endeavours" obligation is alleged, a fact-intensive inquiry will have to be carried out.

63 Mr Cheong's interpretation, that the Best Commercial Endeavours Warranty clause imposes an additional obligation on China Star to use its best commercial endeavours not to undermine its value below S$205,127,200 post-compliance placement, is untenable. The outcome that China Star wanted to achieve was for the suspension on the trading of its shares on the Catalist to be lifted after complying with the public shareholding requirement as stated in cl 2.9. This outcome is central to the SPA, and is reflected in clauses such as cl 2.9 (see [9] above) and cl 3.1(i), which contemplated *inter alia* the "approval of the SGX-ST for the Proposed Acquisition, being a reverse takeover under Rule 1015 of the Listing Manual" and "the issuance by the SGX-ST of a listing and quotation notice for the Consideration Shares, the Arranger Shares and the PPCF Shares on Catalist".[34] To that end, China Star appointed PPCF as its "Catalist full Sponsor and financial adviser".[35] Whilst lifting the suspension on the trading of the shares was the objective, and bearing in mind the reservation or caveat in the Nov 2014 Announcement (see [55] above), there is nothing in the SPA or the Supplemental Agreement to suggest that there is a specific or

[34] AB vol 1 66.

[35] AB vol 1 60

underlying obligation on China Star to use its best commercial endeavours not to bring its value below S$205,127,200 subsequent to the compliance placement. This cannot be the objective intention of the parties.

64 At the same time, China Star's interpretation is not free of criticism; it does not give sufficient regard to the context, and seems to condone any action taken to realise the trading of the shares.

65 In the circumstances of the present case, the interests of the obligee (Mr Cheong) and the interests of the obligor (China Star) are in fact aligned at the particular point in time when China Star was attempting to complete the compliance placement – it was in the commercial interests of both to see through the lifting of the suspension on the trading of China Star's shares. China Star was at that point made up of the shareholders as specified in Schedule 1 to the SPA (amended to include Mr Cheong), PPCF and the Arranger. In light of the whole contract and the business purpose, a reasonable business person would take the clause to impose an obligation on China Star to act in the common interests of itself and its shareholders when using its best commercial endeavours to list and admit the specified shares for trading. Actions that are relevant to their commercial interests include the price at which shares are placed to the public and the decision to undergo a share consolidation. This interpretation gives the appropriate understanding to the word "commercial", and to the context that some of the shareholders of China Star, including Mr Cheong, were investors seeking to profit from its re-listing and a resumption of trading. Unfortunately for Mr Cheong, his expectation of a handsome return on his investment of S$2 million did not turn out in his favour mainly because of various factors in the prevailing circumstances that dictated the way best commercial endeavours were exercised.

66 For the reasons explained below, I find that the Share Consolidation and the issuance of the Consolidated Placement Shares at S$0.23 per share were commercially necessary and were undertaken in the commercial interests of China Star and its shareholders in the prevailing circumstances, comprising specifically of China Star's financial performance at the material time, the market conditions and the time pressure it was facing. Significantly, the Net Tangible Assets ("NTA") per share values and the Net Asset Value ("NAV") per share of China Star and its Group, and the prevailing market conditions taking into account China Star's price-per-earnings ratio provide strong evidence that share consolidation was necessary to bring the price of each new placement share to the minimum of S$0.20. Contrary to China Star's position, I agree with Mr Foo that the NTA values disclosed in the Share Consolidation Circular cannot be just purely illustrative with no relation to the financial figures of China Star, despite statements to this effect in the Share Consolidation Circular. There has to be some relation to the financials of China Star and its subsidiaries because (a) the unaudited accounts of the Group and (b) the unaudited accounts of China Star were used for the computations. The Group is defined in the Share Consolidation Circular as China Star and its subsidiaries.

67 I begin with the NTA and NAV values. In the board meeting of China Star on 11 November 2015, the board was presented with the unaudited financial results of China Star and its subsidiaries for the second quarter ended 30 September 2015. Although the contents were redacted, the NTA per share values of China Star and the Group as at 30 September 2015 were presented in the Share Consolidation Circular dated 26 November 2015. The NTA per share value of China Star before the Proposed Share Consolidation was stated to be RMB 80.1 cents, while the NTA per consolidated share value was stated to be RMB 320.5 cents. The NTA per share value of the Group was stated to be RMB 27.6 cents and the NTA per consolidated share value of the Group was stated to

be RMB 110.5 cents. The NTA per consolidated share value for China Star is also set out in the Agreed Facts. Mr Foo relies on the NTA value of RMB 320.5 cents in his closing submissions,[36] in addition to his reference to the theoretical value of S$0.80 per Consolidated Placement Share, to make his steep discount argument (see [28] and [36] above).

68 Using the exchange rate of S$1 is to RMB 4.5265 (which is the approximate exchange rate used in the Share Consolidation Circular), the NTA figures in Singapore dollars (rounded to the nearest cent) are as follows:

	Group	**China Star**
NTA per share value before consolidation as at 30 September 2015	S$0.06	S$0.18
NTA per consolidated share value as at 30 September 2015	S$0.24	S$0.71

69 In the SGX announcement dated 13 November 2015, China Star reported on the unaudited financial statement for three months ending on 30 September 2015, referring to the NAV per ordinary share of China Star and that of the Group. The unaudited NAV values also reveal the same financial position as the NTA values. The unaudited NAV per share of the Group as at 30 September 2015 was RMB 29.7 cents (about S$0.066) and that of China Star was RMB 80.1 cents (about S$0.18). Since China Star is a holding company with subsidiaries operating in China, the NTA and NAV figures that better reflect the financial position of China Star should be that from the consolidated financial statements of the Group which take into account the subsidiaries. These would be the NTA and NAV values of the Group, instead of simply those

[36] Plaintiff's Closing Submissions at para 11.1.

of China Star. The NTA per share value of the Group pre-consolidation was only S$0.06 (and the NAV per share was S$0.066) – this did not support the minimum placement price of S$0.20 required by the Catalist Rules. It is only after the consolidation that the NTA per share value and NAV per share would be above the minimum issue price of S$0.20. In any case, the NTA per share value and NAV per share of China Star itself pre-consolidation were also below the minimum issue price of S$0.20 required by the Catalist Rules.

70 This is further supported by the unaudited consolidated financial statement of the Group as at 31 December 2015, which is included in the Offer Information Statement dated 13 April 2016 lodged with SGX. The Offer Information Statement stated that the financial information presented "reflects the historical financial information of the Group after completion of the Acquisition". As at 31 December 2015, the NAV per share (before taking into account the placement shares issued) was RMB 126.20 cents, which is equivalent to S$0.26 (using the exchange rate of S$1 to RMB 4.7911 used in the Offer Information Statement). This NAV per share, which supports a placing of shares at a minimum value of S$0.20, is the NAV per share *post-consolidation*. The NAV per share pre-consolidation would be S$0.065, which would not have supported a placement at the minimum value of S$0.20 per share. Thus, the NAV and NTA values provide strong evidence that the Share Consolidation of four shares into one share was commercially necessary for the compliance placement to be undertaken.

71 Given the above, the share consolidation in the present case was in fact undertaken for the same purpose as the share consolidations undertaken in E2-Capital Holdings Limited and Lereno Bio-Chem Limited. These are examples of other companies undertaking share consolidations presented by China Star. The two companies had to undertake a share consolidation to bring the trading

price of each share to at least S$0.20, because the shares were trading at below S$0.20 per share. The NTA and NAV values in the present case show that a share consolidation was similarly necessary to bring the value of each share to at least S$0.20. The difference between the present case and the cases of E2-Capital Holdings Limited and Lereno Bio-Chem Limited is that in the latter companies, the share consolidations were already contemplated at the point of acquisition of the respective target companies because the companies were aware that the shares were trading at a price below S$0.20.[37] Nevertheless, this timing difference does not show that China Star has breached the SPA. The question is whether China Star acted in its interests and the interests of its shareholders when using its best commercial endeavours to list and admit the specified shares for trading.

72 Second, China Star's claim that the Share Consolidation and the issuance of the Consolidated Placement Shares at S$0.23 per share were necessary in the prevailing market conditions is corroborated by the events that unfolded at the material time. These included the difficulty it faced in finding a placement agent, the delays to the proposed compliance placement due to weak market conditions including a lack of interest in Chinese companies listed on the Catalist, and the extensions sought from SGX to extend the LQ Notice. Mr Cheong, in his pleadings, puts the defendant to strict proof that the valuation of the Consolidated Placement Shares was made with regard to the market conditions of the placement. I find that China Star has discharged the burden of proof on this issue. The difficulty China Star faced has been documented in the minutes of board meetings, the SGX announcements it made, the circulars to shareholders and PPCF's communications with SGX. Due to changes in market conditions from the time of the execution of the SPA to the compliance

[37] AB vol 4A 13; AB vol 4B 21.8.

placement, Mr Liew deposed that investors were only prepared to subscribe for new shares in China Star at a lower valuation. This was resolved by undertaking a share consolidation to provide flexibility, given that the Catalist Rules did not allow for new shares to be issued at below S$0.20 per share.

73 As at 15 September 2015, the timeline prepared by PPCF stated the following, *inter alia*:[38]

S/N	Proposed Date	Event
1.	22 September 2015	Completion of the Proposed Acquisition
2.	23 September 2015	(a) Suspension of trading (b) Execution of Placement Agreement and commence Compliance Placement roadshows and media interviews (c) Release announcement of execution of Placement Agreement
3.	29 September 2015	Trading counter name to change to "China Star Food Group Limited"
4.	*7 October 2015*	*Close and Completion of the Proposed Compliance Placement*
5.	*9 October 2015*	*Listing and quotation of the placement shares and resumption of*

[38] AB vol 2B 884 and 885.

		trading

The proposed timeline was communicated to SGX by email dated 15 September 2015.

74 China Star then sought an extension of the LQ Notice from SGX on 2 October 2015 and SGX granted the extension till 5 December 2015. In the SGX Announcement dated 15 October 2015 made by China Star on this extension granted, China Star stated that "[d]ue to current weak market conditions, the Proposed Compliance Placement has not been effected as at the date of this announcement".[39] It is notable that this was around the same time that the board of China Star was discussing and considering a share consolidation.[40] At the board meeting on 11 November 2015, share consolidation was proposed "in order to provide flexibility in determining the issue price of the proposed compliance placement of shares and thereby facilitate the completion of the proposed compliance placement". The minutes for the same meeting noted that "the ratio of the Proposed Share Consolidation would be depending [*sic*] on the financing status".[41] Similarly in the Share Consolidation Circular dated 26 November 2015, it was explained to the shareholders that the compliance placement had not been carried out "due to prevailing market conditions", and a share consolidation of four shares into one share was proposed "to provide flexibility in determining the issue price of the Proposed Compliance Placement and thereby facilitate the completion of the Proposed Compliance Placement" (see [26] above). On 27 November 2015, PPCF sought for a further extension from SGX (see [27] above).

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39 AB vol 2B 1016.

40 Notes of Evidence ("NE") 27 June 2018 at p 14.

41 AB vol 2B 1034.

75 Subsequently, a new timetable was proposed by PPCF as at 15 January 2016:[42]

S/N	Proposed Date	Event
1.	20 January 2016	Execution of Placement Agreement and commencement of Compliance Placement
2.	22 January 2016	Placement Agent to provide the full list of placees' details to Share Register
3.	*26 January 2016*	*Completion of the Proposed Compliance Placement*
4.	*28 January 2016*	*Listing and quotation of the placement shares and resumption of trading*

76 In the end, this delayed timeline was also not realised (see [29]–[34] above). Even after the Share Consolidation, China Star continued to face problems placing its shares. A board meeting was convened on 13 January 2016 to consider the proposed compliance placement of up to 25,250,000 new ordinary shares. During the meeting, the Chief Finance Officer ("CFO") informed that KGI Fraser Securities Pte Ltd ("Fraser Securities") had expressed interest to be the placement agent, and that the expected date for completion of the proposed compliance placement exercise would be "targeted by 28 January 2016". The board expressed concern that the proposed placement discount was "very steep" and the "expense was too high". In response to a suggestion to consider alternative placement agents, the CFO informed that management "had apparently approached approximately 16 placement agents" but "most of the placement agents show no interest in view of the current economic climate and

42 AB vol 3C 1612.

considering that the Company is a s-chip company", and there was "no response from other potential placement agents after Management made their first approach".[43] Mr Danny Lim, a director present at the meeting, shared his view that because the completion of the proposed compliance placement had been "pending for a long while" and the further extension of the LQ Notice would be expiring on 5 February 2016, in order "to protect the interest of the minor shareholders of the Company", the proposed compliance placement "should be carried out as soon as possible" although the proposed placement commission was "slightly on the high side". This sentiment was supported by Mr Liang. The CFO added that it was "quite challenging to source for potential investors in view of the prevailing weak market condition".[44] After "due discussion and much deliberation", the board unanimously approved the proposed compliance placement in principle. After the board meeting, a list of placement agents that were approached by China Star and the outcomes was annexed to the minutes of the board meetings. The list shows that 16 placement agents were approached by China Star, and among the 16, only Fraser Securities, RHB Securities Singapore Pte Ltd and DBS Vickers Securities (Singapore) Pte Ltd expressed interest. However, RHB Securities Singapore Pte Ltd stated that it could not find investors due to bad market conditions, and DBS Vickers Securities (Singapore) Pte Ltd asked for onerous conditions that were not acceptable to China Star and its major shareholders.

77 Mr Foo points out that the use of the word "apparently" in the board meeting minutes shows that the CFO did not know it for a fact that the management had approached 16 placement agents. He argues that China Star failed to produce documentation, other than the list annexed to the minutes, in

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43 AB vol 2B 1202.

44 AB vol 2B 1203.

relation to its purported efforts to find placees. Upon being questioned on the use of the word "apparently" by Mr Foo, Mr Liang testified that it could be because the CFO was unsure of the exact number of placement agents approached. Mr Liang confirmed that they had listed out the placement agents, and there were definitely at least 16 placement agents that China Star approached.[45] The lack of other documentation was not materially adverse to China Star's position given the consistent picture painted in the minutes of board meetings, in circulars to shareholders, in SGX Announcements, and in PPCF's periodic communications to SGX.

78 More importantly, the poor prevailing market conditions were corroborated by Fraser Securities' decision to postpone the proposed compliance placement "in view of the poor market conditions", and as a result, "the execution of the placement agreement and the arranger agreement would be delayed",[46] as recorded in the minutes of the board meeting held on 28 January 2016. This is objective evidence of the action of a third party in response to the prevailing market conditions.

79 By a SGX announcement dated 15 February 2016, China Star informed that the proposed compliance placement had not been effected because shortly after the completion of the Share Consolidation, "global capital markets experienced significant market volatility, and the Proposed Compliance Placement had to be postponed due to dampened investor interest".[47] By this time, SGX has already extended the LQ Notice three times (see [24], [27] and [29] above). There was clearly time pressure on the board to lift the suspension on trading.

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45 NE 28 June 2018 at p 38.

46 AB vol 2B 1222.

47 AB vol 2B 1282.

80 During the AGM held on 29 July 2016, Mr Koh Eng Kheng Victor, the lead independent director of China Star, responded to a query on why the compliance share placement could not have been done on better terms and valuations as follows:[48]

> … the compliance share placement had been delayed for six months since the Company listed on 22 September 2015 on the Catalist Board of Singapore Exchange via a reverse takeover of Brooke Asia Limited. The delay was primarily due to the weak market condition which was not conducive for such a share placement. Management had made every effort to meet up and negotiate with various investors and financial intermediaries since September 2015 but were not able to seal any agreements until March 2016. The Company was given the terms which Board reviewed, discussed and unanimously concurred to accept. In their deliberation, the Board considered the fact that the compliance placement having been delayed for 6 months already, further extension may not be forthcoming Singapore Exchange Securities Trading Limited [*sic*] which may result in the Company being delisted.

81 In court, Mr Liang's testimony is also consistent with all the above events that took place at the material time:[49]

> We had already been delisted for half a year. I am a major shareholder in the company. I would need to represent the company's interests and the interests of the other shareholders. I needed to ensure that the shares would be tradeable as soon as possible. This has already been the third extension. Time is running short.
>
> …
>
> After the consolidation of the shares, we had to fix it at this price. It was only accepted by the market – this price was accepted – the only price that the market would accept.

82 Mr Liew similarly explained that the valuation of China Star dropped because "a lot of the investors were concerned about taking shares in an S-chip, an S-chip being a China-based company at the time given the fall in the

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48 AB vol 2C 1710.

49 NE 28 June 2018 at pp 54 and 56.

market".[50] This is consistent with the minutes of the board meeting on 13 January 2016 (see [76] above). He deposed that the price-to-earnings ratio of the shares had to be reduced because of the poor market conditions, from 10.2 to 2.55.[51] The price-to-earnings ratio of the shares at the time of acquisition was 10.2, using the audited Net Profit After Tax of S$16,475,665 as at Financial Year 2014 (ended 31 March 2014) and the consideration of S$168 million paid for the acquisition of CSFH (see [8] above).[52]

83 The poor market conditions are further objectively corroborated by the price of China Star's shares after the resumption of trading. The shares traded at S$0.29 on the first day of the resumption of trading on 20 April 2016. The highest traded price from the time of resumption to end 2017 was S$0.435, the price on 26 March 2018 was S$0.072, and the price has seen a general downward trend. The market price of S$0.29 on the first day of the resumption of trading does not support the commercial viability of issuing placement shares at S$0.20 on a non-consolidated basis.

84 Mr Foo submits that there is no evidence how the placement price of S$0.23 came about, and there is no evidence to support Mr Liang's testimony that the proposed price "went from S$0.80 to S$0.50, to S$0.60 to S$0.30 and so on, but there were no investors willing to purchase it at these prices".[53] However, the email from Ms Chong Hui Shan of PPCF to the CFO of China Star dated 19 November 2015 provides contemporaneous documentary evidence that a different price per consolidated share had been considered. The spreadsheet attached to the email (which was not challenged) included figures

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50 NE 27 June 2018 at pp 122 and 123.

51 NE 27 June 2018 at p 110.

52 AEIC of Mark Liew at para 4.2.3.

53 Plaintiff's closing submissions at para 107.

that were calculated based on a consolidation of four shares into one share and a post-consolidation price of S$0.40 per share.[54] Moreover, the consolidation of four shares into one was likely driven by the NTA per share value of the Group (see [69] above), and the need to reduce the price-to-earnings ratio from 10.2 to 2.55 in light of the poor market conditions (see [82] above). It is plausible and reasonable to conclude that the ratio and the price were decided to comply with Rule 1015(3) of the Catalist Rules.

85 Mr Foo also highlights that Mr Liang admitted that he was unable to say what efforts the placement agents made to secure potential placees for the placement shares, and that PPCF did the necessary work for the placement (although he was unsure whether PPCF was the only one).[55] This evidence was seemingly contradicted by Mr Liew, who testified that the placees were found by China Star.[56] In fact, Mr Liew's testimony that China Star found the placees is consistent with Mr Liang's evidence that China Star approached at least 16 placement agents. As for Mr Liang's evidence that he did not know what efforts the placement agents made to secure potential placees, it is understandable since it is the role of the placement agent to find placees.

86 The Share Consolidation and the eventual pricing of the Consolidated Placement Shares were commercially necessary in the prevailing circumstances to comply with Rules 406(1) and 1015(3) of the Catalist Rules so that the suspension on the trading of the shares would be lifted. China Star could be delisted if these actions were not taken. The Share Consolidation and the Compliance Placement were duly approved by the board of China Star, its

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54 AB vol 3C 1543.

55 NE 28 June 2018 at pp 68 and 69.

56 NE 27 June 2018 at p 112.

shareholders and SGX. Considering all the circumstances, these were actions taken in the interests of the China Star and its shareholders.

87 For the reasons stated above, China Star, in consolidating the shares and then issuing the Consolidated Placement Shares at a price of S$0.23 each in the Compliance Placement did not breach the Best Commercial Endeavours Warranty clause.

Implied term in fact

88 The implication of terms in fact is the process by which the court fills a gap in the contract to give effect to the parties' presumed intentions. The standard of implication of terms remains one of necessity; reasonableness is a necessary but insufficient condition for the implication of a term (*Sembcorp Marine* at [82]). The court has to consider whether it is necessary in the business or commercial sense to imply a term in order to give the contract efficacy (the business efficacy test), and whether an officious bystander would have responded "Oh, of course!" had the specific term been put to them at the time of the contract (the officious bystander test) (*Sembcorp Marine* at [101]). It goes without saying that a term that is not reasonable, not equitable, unclear, or that contradicts an express term of the contract, will not be implied (*Sembcorp Marine* at [98]).

Whether there is a gap

89 Mr Cheong contends that there is an implied term that China Star was not to unilaterally undermine its value and hence the value of the shares issued to Mr Cheong (at S$0.20 per share), prior to the shares of BAL being re-listed on the Catalist. However, it is unclear what is the gap in the contract alleged by Mr Cheong. Mr Tay understands Mr Cheong to be saying that the gap is that the

parties did not contemplate a share consolidation. He submits that there is no gap in the first place that needs to be filled by a clause imposing an obligation on China Star to underwrite a loss in value of Mr Cheong's shares. China Star was equipped with the necessary mechanisms to deal with a situation where it could not issue its shares at S$0.20 on an unconsolidated basis. China Star could convene a shareholders' meeting to approve a share consolidation and to subsequently approve a compliance placement at a lower price attractive to investors which at the same time satisfies the minimum requirements under the Catalist Rules. There is no need for additional terms to be implied.

90 Mr Tay's submission that China Star could avail itself of the mechanisms under company law is a submission that goes towards the test of business efficacy, and not to the prior question of whether there is a gap in the SPA. I am of the view that the parties did not contemplate undertaking a share consolidation in any situation, and there is a gap in the SPA. This is buttressed by Mr Liew's agreement in his cross-examination that the bargain with Mr Cheong had been proceeded with on the premise that share consolidation was not contemplated. Mr Liew agreed that a share consolidation was not contemplated in any of the documents before 18 November 2015 to which Mr Cheong was a party, and not contemplated when the Consideration Shares were issued on 22 September 2015.[57] Evidentially, the parties did not think about a share consolidation in the event of market volatility and market sentiment toward S-chip shares affecting the compliance placement under cl 2.9 of the SPA.

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[57] NE 27 June 2018 at pp 10–11.

The business efficacy test and the officious bystander test

91 I agree with Mr Tay's submission that China Star could avail itself of the mechanisms under company law and there is no necessity to imply any term to fill the gap created by the non-contemplation of a share consolidation. This is exactly what happened. China Star sought approval from its board and its shareholders in approving the Share Consolidation and the Compliance Placement. Approval was also granted by SGX.

92 I also find that an officious bystander would not give an emphatic affirmation to the proposed term. The term in effect imposes an obligation on China Star to maintain its value at S$205,127,200 (see [37] above) in all circumstances prior to resumption of trading, including in circumstances where the market changes. This is unreasonable, and an officious bystander would not affirm the term in the absence of any express stipulation in the contract between the parties. This is even more so given that the obligation imposed by the proposed implied term goes against the best endeavours obligation under the Best Commercial Endeavours Warranty clause and the permissive language used in cl 2.9 of the SPA. There is no warranty to procure the trading of the shares on the Catalist; all the more, it cannot be a warranty that the shares would be priced at a certain amount just prior to resumption of trading. The proposed implied term would erode China Star's commercial freedom to comply with the Catalist Rules to lift the suspension on the trading of its shares.

93 Thus, Mr Cheong fails to establish that the proposed term should be implied.

Conclusion

94 The plaintiff has failed to show that there is any breach of the SPA or

the Supplemental Agreement, and also failed to prove the implied term he alleges. Thus, there is no need to discuss the arguments of the parties in relation to the limitation of damages.

95 Accordingly, the action is dismissed. Given that China Star is the successful party and costs normally follow the event, China Star shall have the costs of the action, to be taxed if not agreed. If there has been an Offer To Settle, parties are to inform the Court of their respective positions in writing within 14 days from the date of the judgment.

Belinda Ang Saw Ean J
Judge

Foo Maw Shen, Ng Hui Min and Loh Chiu Kuan (Dentons Rodyk & Davidson LLP) for the plaintiff;
Joseph Tay Weiwen and Chng Yan (Shook Lin & Bok LLP) for the defendant.