IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 104

Suit No 326 of 2018

Between

(1) Tembusu Growth Fund II Ltd
(2) Tembusu Investment Management Co., Ltd

… *Plaintiffs*

And

(1) Yee Fook Khong
(2) Tan Chin Loke Eugene

… *Defendants*

Between

Yee Fook Khong

… *Plaintiff in Counterclaim*

And

(1) Tembusu Growth Fund II Ltd
(2) Tembusu Investment Management Co., Ltd

… *Defendants in Counterclaim*

JUDGMENT

[Contract] — [Breach] — [Remoteness of damages]
[Contract] — [Contractual terms] — [Rules of construction]
[Contract] — [Contractual terms] — [Express terms]
[Equity] — [Estoppel] — [Promissory estoppel]

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Tembusu Growth Fund II Ltd and another
v
Yee Fook Khong and another

[2020] SGHC 104

High Court — Suit No 326 of 2018
Ang Cheng Hock J
19–23 August, 28 November 2019, 10 January 2020

20 May 2020 Judgment reserved.

Ang Cheng Hock J:

1 This case arises from an investment made in a business in China and the arrangements made between the parties for the investor to realise his investment. Parties entered into a series of agreements to facilitate the investor's exit, but disputes have arisen as to what parties' obligations actually entail. The issues that are raised before me include questions as to contractual interpretation, promissory estoppel, causation of loss and remoteness of damages.

Facts

The parties

2 The first plaintiff is a Singapore-incorporated private equity fund in the

business of investing in companies across Asia.[1] It is managed by Tembusu Partners Pte Ltd ("Tembusu"). Andy Lim ("Mr Lim") is the Chairman of Tembusu and also a member of its investment committee.[2]

3 The second plaintiff is a China-incorporated company in the business of providing consulting services.[3] It is wholly owned by Tembusu. The second plaintiff and its employees also help to manage and oversee the first plaintiff's investments in China.

4 The first defendant is an entrepreneur who has various interests in online media companies in Hong Kong and China.[4] He is the founder of OOB Media HK Ltd ("OOB HK"), a company incorporated in Hong Kong. He is the sole director and holder of 96% of the share capital of OOB HK.

5 OOB HK is an investment holding company and has an associated company incorporated in China known as OOB Media (Sichuan) Co., Ltd ("OOB Sichuan").[5] OOB Sichuan is listed on the National Equities Exchange and Quotations ("NEEQ") exchange in Beijing, China. OOB HK holds shares in OOB Sichuan through its wholly-owned subsidiary incorporated in China known as Tone Rich (Shanghai) Co., Ltd ("Tone Rich").

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1 Affidavit of evidence-in-chief ("AEIC") of Andy Lim dated 28 June 2019 ("AL") at [3].

2 AL at [1].

3 AL at [5].

4 AEIC of Yee Fook Khong dated 27 June 2019 ("YFK") at [1.2.4].

5 YFK at [1.2.5].

6 The second defendant is the Chief Executive Officer of Metro Education Pte Ltd ("Metro"), a Singapore-incorporated company that is in the business of providing tertiary education services in China.[6] The second defendant is the registered owner of about 33% of the total share capital in Metro, of which 13.8% of the total share capital is held on trust for the first defendant.[7] The second defendant is a party to this action only because he signed an agreement where he agreed to a charge of the first defendant's 13.8% beneficial shareholding in Metro as security for the latter's payment obligations.

Background to the dispute

7 From 2012 to 2014, the first plaintiff invested in OOB HK pursuant to a subscription agreement, which was later supplemented, and eventually became an approximately 38.64% shareholder in OOB HK.[8] Then, on 28 January 2014, the first plaintiff entered into a Convertible Loan Agreement with OOB HK (the "Convertible Loan Agreement"), under which the first plaintiff provided a loan of RMB 5 million to OOB HK with a maturity period of 12 months.[9] The Convertible Loan Agreement provided that the first plaintiff could elect to convert the loan of RMB 5 million into shares of OOB HK, at a pre-agreed valuation, by 31 March 2014.[10] Failing such conversion, OOB HK was required to repay the loan and accrued interest to the first plaintiff by the stipulated repayment date of 12 months from 28 January 2014. As it transpired, the first plaintiff elected not to convert the loan into equity, but OOB HK did not repay

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6 AEIC of Tan Chin Loke Eugene dated 1 July 2019 ("TCLE") at [2.1].

7 YFK at [1.2.7(c)].

8 YFK at [2.1.4].

9 YFK at [3.1.1].

10 YFK at [3.1.3]

the loan and accrued interest by the due date.[11] No explanation was provided for why OOB HK failed to make repayment of the loan.

8 Pursuant to an agreement in Chinese titled "Entrusted Shareholding Agreement" dated 15 June 2015, it was agreed that the first plaintiff's 38.64% shareholding in OOB HK would be converted to a proportionately equivalent amount of shares in OOB Sichuan.[12] In this way, the first plaintiff's shareholding in OOB HK was "transferred" to a shareholding in OOB Sichuan. The first plaintiff's shares in OOB Sichuan were held by the second plaintiff. OOB Sichuan was listed on the NEEQ in September 2015.

9 On 12 October 2015, the first plaintiff and the first defendant entered into a "Share Transfer Agreement", under which the first defendant agreed to buy 90% of the second plaintiff's shareholding in OOB Sichuan for the sum of S$10 million, payable in RMB at the equivalent exchange rate.[13] It is not in dispute that this agreement was not performed.

10 On 24 June 2016, the first plaintiff and OOB HK signed a Loan Extension Agreement to extend the payment deadline of the RMB 5 million and accrued interest due to the first plaintiff from OOB HK to 31 December 2016 (the "Loan Extension Agreement").[14] The Loan Extension Agreement was signed because of OOB HK's continued failure to pay back the RMB 5 million loan owing under the Convertible Loan Agreement.[15] The Loan Extension

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11 YFK at [3.1.5].

12 YFK at [3.2].

13 YFK at [3.3].

14 YFK at [3.4].

15 YFK at [3.4.1].

Agreement also provided for the interest rate to be increased to 20% per annum in the event that payment was not made by the extended deadline.

11 By December 2016, OOB HK had *still* not paid the sums due to the first plaintiff under the Convertible Loan Agreement, as amended by the Loan Extension Agreement. On 16 December 2016, the second plaintiff and the first defendant entered into another agreement titled the "Shares Sale and Purchase Agreement" ("the SSP Agreement").[16] Under this agreement, the second plaintiff agreed to sell its shares in OOB Sichuan to the first defendant for the sum of S$10 million. These shares were held by the second plaintiff on behalf of the first plaintiff. The sum of S$10 million was broken down into instalments to be paid in RMB at monthly intervals throughout 2017, with a further sizable payment of S$4.41 million, being the last instalment, due before 25 December 2017.[17] It was provided in the SSP Agreement that this instalment of S$4.41 million was made up of "*the balance payment of the SGD 10mn, purchase price of shares + RMB 5mn, loan + interest*".

12 It was also provided at clauses 4 and 5 of the SSP Agreement respectively as follows:

> 4. The shares are effectively sold to the purchaser with the signing of the agreement and the seller agrees to effect and do everything needed to officially transfer the shares when given notice to do so by the purchaser.
>
> [and]
>
> 5. The purchaser will charge the shares back to Tembusu once the share transfers are registered and they will remain charged until such time those shares are paid in full.

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16 YFK at [3.5].

17 Annexure A to the SSP Agreement.

13 The reason given by the first defendant for these clauses was that he had told the plaintiffs that he needed all the second plaintiff's shares in OOB Sichuan in order to use them as collateral to raise funding to make payment to the plaintiffs.[18] However, at the same time, the plaintiffs were not willing to make an outright transfer because they would then lose their security for the repayment. Hence, the mechanism as set out in clauses 4 and 5 was agreed to in the SSP Agreement. It also bears noting that there is an acceleration clause in that agreement (at clause 6), which provides for all the instalment payments to become due and payable immediately upon default of any instalment payment.

14 In all, the first defendant made 9 separate payments to the second plaintiff from December 2016 to August 2017.[19] All, except for the first payment of RMB 50,000, fell substantially short of the amount due under each instalment as provided for in the SSP Agreement. The parties are at loggerheads as to who is at fault for these short payments, and whether the second plaintiff was in breach of the SSP Agreement by failing to transfer all its shares in OOB Sichuan to the first defendant as required by clause 4 of that agreement. The details of the opposing positions of the parties will be dealt with later in the course of this judgment.

15 On 7 July 2017, the plaintiff's Chinese lawyers sent a letter to the first defendant demanding payment of the sum of RMB 10,375,000, being the amount allegedly then due to the plaintiffs.[20] In response, the first defendant

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18 YFK at [3.5.5].

19 YFK at [3.6.14].

20 Agreed Bundle ("AB") at p 235.

made five separate payments to the second plaintiff totalling the sum of RMB 1 million.[21]

16 In late August and early September 2017, the parties, including the second defendant, met to negotiate the terms of a new agreement.[22] This was at the insistence of the plaintiffs.[23] The first defendant was asked to provide a payment schedule that would reflect a realistic possibility of compliance.[24] While negotiations were in progress, OOB Sichuan shares were suspended from trading on the NEEQ on 11 September 2017 at the request of the first defendant.[25] The suspension was lifted only on 29 December 2017.[26]

17 Eventually, the plaintiffs and defendants entered into an agreement, which was called a "Term Sheet" dated 20 September 2017 (the "Term Sheet"). It was not disputed that the agreement was executed in counterparts in Singapore and China on that date and that the parties did not physically meet to sign the agreement.[27]

18 Under the Term Sheet, the first defendant agreed to pay the plaintiffs the amount of RMB 33,375,000 plus S$4.41 million in instalments as it had already agreed to purchase the shares in OOB Sichuan from the second plaintiff.[28] A

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21 AB at pp 238 to 248.

22 YFK at [3.9.3]

23 See P4, and Transcript of 22 August 2019 at Page 64, Lines 5 to 12.

24 AL at [74].

25 Transcript of 22 August 2019 from Page 92, Line 13 to Page 93, Line 13.

26 Transcript of 22 August 2019 at Page 93, Line 1.

27 Transcript of 22 August 2019 at Page 90, Lines 6 to 8.

28 AB at p 263.

schedule was annexed to the Term Sheet and set out the instalments payable at monthly intervals starting on 30 September 2017 and ending on 30 December 2018. The monthly instalments ranged from RMB 500,000 to RMB 7 million, with many of the instalments being in the amount of RMB 1 million. The last instalment was the sum of RMB 10,875,000 plus S$4.41 million.[29]

19 It was also provided under the Term Sheet that the defendants agreed to a charge being created over the first defendant's 13.8% shareholding in Metro, which was held on trust by the second defendant, to secure payment of the "Outstanding Amount". This was defined as the amount due at any time under the schedule of instalment payments in Annex A to the Term Sheet. The Outstanding Amount would be immediately due and payable to the plaintiffs if the payment schedule was not adhered to.

20 After the execution of the Term Sheet, the first defendant made payment of the first two instalments in September and October 2017.[30] Thereafter, he made payment of RMB 500,000 on 29 November 2017, RMB 100,000 on 5 January 2018, RMB 14,781 (a late interest payment) on 1 February 2018 and RMB 50,000 on 14 February 2018.[31] All these payments from November 2017 to February 2018 fell significantly short of the instalment amounts that were due under the payment schedule in the Term Sheet.

21 On 28 February 2018, the plaintiffs' Singapore lawyers sent a letter to the first defendant to demand payment of the amounts of RMB 30,275,000 and

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29 NB this is the sum of RMB 11,375,000 plus S$4.41 million, subtracting RMB 500,000 for the deposit.

30 AB at pp 268 to 270.

31 AB at pp 276 to 283.

S$4.41 million, which sums were said to add up to the Outstanding Amount due from the first defendant.[32] The second defendant was copied on this letter. Following this, the first defendant made payments to the second defendant of RMB 100,000 on 23 March 2018 and RMB 100,000 on 4 April 2018.

22 On 29 March 2018, the plaintiffs commenced these proceedings against the defendants. The plaintiffs claim payment of RMB 30,025,000 and S$4.41 million from the first defendant. Against both defendants, the plaintiffs seek an order that they "deliver up" the first defendant's 13.8% shareholding in Metro.[33]

The parties' cases

23 The plaintiffs' case is that the first defendant has breached the Term Sheet by not making payment of the instalments in accordance with the schedule.[34] As a consequence of this default, the Outstanding Amount under the Term Sheet is now due from the first defendant.

24 Against the first and second defendants, the plaintiffs claim that, by virtue of the agreement to charge the first defendant's 13.8% of the share capital of Metro to the plaintiffs, the defendants are now obliged to "deliver up" the said shares to the plaintiffs.

25 The defendants have raised two defences to the claim. The first is that the first defendant does not have to pay the instalments under the schedule to the Term Sheet because the plaintiffs have not transferred all the OOB Sichuan

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32 Exhibit AL-13.

33 Statement of Claim (Amendment No. 1) at [37(3)].

34 See Statement of Claim (Amendment No. 1).

shares held by the second plaintiff to the first defendant.[35] In other words, the transfer of the OOB Sichuan shares is a *condition precedent* to the first defendant's payment obligations. The Term Sheet merely has the effect of *varying* the SSP Agreement by adjusting the quantum and timing of the instalments, but does not do away with the plaintiffs' obligation under clause 4 of that agreement to *first* transfer all its OOB Sichuan shares to the first defendant. The defendants describe this defence as the "variation defence".[36]

26 The second defence is based on promissory estoppel (the "estoppel defence").[37] The defendants allege that, on the day of the signing of the Term Sheet, that is, 20 September 2017, the second plaintiff's representatives verbally assured the defendants that the provisions of the Term Sheet would not be enforced against them. According to the defendants, they were told that the Term Sheet was entered into simply to provide Tembusu's investment committee with "additional comfort".[38]

27 I should mention at this point that, even though the defendants described their case as being "twofold" in their closing submissions,[39] *three* defences – the "variation defence", the "estoppel defence", *and the "incorporation defence"* – were referred to in their reply closing submissions.[40] On a closer reading, it appears that the "incorporation defence" is in effect an argument that the plaintiff remains bound by clause 4 of the SSP Agreement, and therefore has

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35 YFK at [1.3.2(b)].

36 Defendants' Closing Submissions ("DCS") at [4.3].

37 YFK at [1.3.2(a)].

38 Bundle of Pleadings at p 26.

39 DCS at [2.1.2].

40 Defendants' Reply Closing Submissions ("DRCS") at [3], [4], and [5].

the same effect as the "variation defence" outlined at [25] above. The chief distinction between the "incorporation defence" and the "variation defence" is on *how* clause 4 of the SSP Agreement continues to bind the plaintiffs, and it is therefore unsurprising that, in the defendants' *own* closing submissions, what eventually morphed into the separate "incorporation defence" was initially merely a subset of the "variation defence".[41] Given that both the "incorporation defence" and "variation defence" rely on the continued operation of clause 4 of the SSP Agreement, I will address them together below when dealing with the obligations under the Term Sheet.

28 The first defendant also raises a counterclaim against the plaintiffs. He seeks an order that the OOB Sichuan shares be transferred to him from the plaintiffs in accordance with clause 4 of the SSP Agreement.[42] Additionally, he claims that the plaintiffs' failure to transfer the OOB Sichuan shares to him has resulted in him suffering loss in the form of lost profits. This is because, had the shares been transferred to him, then, as the majority shareholder of OOB Sichuan, he would have been in a position to negotiate a trade sale of OOB Sichuan and made a profit from the sale. In terms of quantum of damages, the first defendant claims that the plaintiffs are liable to him in the amount of RMB 63.18 million, or in the alternative, RMB 16.51 million.[43]

29 In reply, the plaintiffs' case is that the Term Sheet "*supersedes and amalgamates*" the parties' various obligations under the previous agreements,

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41 DCS at [4.4].

42 Defence and Counterclaim (Amendment No. 3) from [25] to [27].

43 DCS at [7.5.5].

including the SSP Agreement.[44] The Term Sheet did not include an obligation for the plaintiffs to transfer their OOB Sichuan shares to the first defendant before payments fall due from him under the payment schedule. The plaintiffs' position is that they will voluntarily effect the transfer of the OOB Sichuan shares after they have received full payment of the total Outstanding Amount as set out in the Term Sheet.[45]

30 The plaintiffs also deny that they had made any promises or assurances to the defendants that the Term Sheet would not be enforced against them.

31 As for the first defendant's counterclaim, the plaintiffs argue that the Term Sheet had superseded clause 4 of the SSP Agreement, and further contend that there was no "genuine agreement, understanding or ability by the 1st Defendant to embark on the trade sale".[46] As such, the plaintiffs deny that they can be liable for any loss of profits allegedly suffered by the first defendant.

Issues

32 From the parties' respective cases, it is clear that I have to decide the following issues.

33 First, I have to decide whether the first defendant has breached the Term Sheet in failing to make the instalment payments set out in its payment schedule. In deciding this issue, I will also have to consider the validity of the defendants' response to the allegation of breach of contract, that is, whether the plaintiffs

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44 Plaintiff's Closing Submissions ("PCS") at [86] to [88].

45 PCS at [137].

46 Reply and Defence to Counterclaim (Amendment No. 3) at [29A] and [30].

have an obligation to transfer their OOB Sichuan shares to the first defendant *before* he is obliged to make payment in accordance the Term Sheet's payment schedule. In other words, were the plaintiffs required to comply with a *condition precedent* to the first defendant's payment obligations?

34 Second, I have to decide whether the plaintiffs are estopped from enforcing the Term Sheet against the defendants. This includes the question of whether the plaintiffs are estopped from insisting on the Metro shares, belonging beneficially to the first defendant, being handed over to them.

35 Third, I have to decide whether the first defendant's counterclaim against the plaintiffs for loss of profits should be allowed, and if so, for how much.

36 It is to these issues that I now turn.

The obligations under the Term Sheet

Legal principles on contractual interpretation

37 The Court of Appeal observed in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich*") at [1] that the primary task of the Court when interpreting contractual terms is to "give effect to the parties' intentions objectively in the face of conflicting subjective interpretations advanced by ingenious counsel". Specifically, the Court of Appeal accepted at [131] a number of "canons and techniques of contractual interpretation". Two such canons referred to (at [131] of *Zurich*) are particularly apposite in the present case:

> […]

> *The contextual dimension*
>
> Fourthly, the exercise in construction is informed by the *surrounding circumstances or external context*. Modern judges are prepared to look beyond the four corners of a document, or the bare words of an utterance. It is permissible to have regard to the *legal, regulatory, and factual matrix* which constitutes the background in which the document was drafted or the utterance was made.
>
> *Business purpose*
>
> Fifthly, within this framework due consideration is given to the *commercial purpose* of the transaction or provision. The courts have regard to the overall purpose of the parties with respect to a particular transaction, or more narrowly the reason why a particular obligation was undertaken.
>
> [Emphasis in original].

38 The role of the contextual background in contractual interpretation was further elucidated by the Court of Appeal in *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd)* [2015] 5 SLR 1187. At [32], the Court of Appeal observed that the text of the contract should be the "first port of call" in interpreting contractual terms. However, where there exist rival meanings applicable to the text, the Court of Appeal at [30] endorsed its earlier decision in *Fairview Developments Pte Ltd v Ong & Ong Pte Ltd* [2014] 2 SLR 318 at [47] that:

> …the court must, in carrying out its role of giving effect to the objective intentions of the contracting parties, consider the relevant contractual, contextual and commercial background against which the document containing the disputed words and phrases came about. …

39 The upshot of these oft-cited cases is that when the court interprets the terms of a contract, proper contextual background to the contract is of central importance, particularly where the contractual terms are open to multiple interpretations. This is all the more so in a contract between commercial parties for a "commercial purpose" (see [37] above).

40 On the instant facts, the Term Sheet does not expressly address the issue of whether or not clause 4 of the SSP Agreement persists and continues to be binding on its terms, or if it has been modified in scope or meaning. Those specific questions are left unanswered. In the circumstances, it is the contextual background to the contract which may illuminate those issues, and it is to that which I now turn.

The contextual background to the Term Sheet

41 In determining whether the parties had intended for the plaintiffs' OOB Sichuan shares to be transferred to the first defendant as a necessary pre-condition that had to be satisfied before the first defendant had any obligation to make payment to the plaintiffs, a consideration of the key events leading to the execution of the Term Sheet is required. This is so that one can better understand the contextual background to the Term Sheet, and thereby ascertain, objectively, the intentions of the parties.

42 There is no real dispute that the first defendant had defaulted in his obligation to repay the loan of RMB 5 million and accrued interest to the first plaintiff. This was a long-overdue obligation, as can be seen by the fact that the Convertible Loan Agreement required full payment by OOB HK by January 2015, and there having been a default on payment all the way until one and a half years later in June 2016, when the parties executed the Loan Extension Agreement.[47] This Loan Extension Agreement extended the time for full repayment to the end of 2016. The repayment obligation was not an obligation owed solely by OOB HK to repay the loan to the first plaintiff. The first defendant had provided a guarantee to the first plaintiff to secure the payment

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47 AB at p 165.

obligations of OOB HK.[48] Hence, a key consideration when one examines the reasons for the SSP Agreement and the later Term Sheet is that the first defendant was *himself* bound to repay OOB HK's loan to the first plaintiff.

43 The next point of note is that parties were looking for a way for the plaintiffs to exit the investment in the first defendant's business. The first defendant is a private equity fund with a limited duration and it must have impressed upon the first defendant the need for it to realise its investment within a specified period of time. Indeed, the first defendant admitted that he knew that the first plaintiff had a "limited lifespan" as a fund, and that he was aware that the first plaintiff was seeking an "exit strategy" to achieve returns on its investments.[49] Hence, in order for the plaintiffs to exit the investment in the first defendant's business, the first plaintiff's shareholding in OOB HK was, by the Entrusted Shareholding Agreement of June 2015, effectively converted into an equivalent amount of shares in OOB Sichuan, which at that time was shortly to be publicly listed on the NEEQ.[50] Not only that, by the parties entering into the Share Transfer Agreement of 12 October 2015, it is clear that the first defendant had agreed to facilitate the first plaintiff's exit by buying its stake in OOB Sichuan for the amount of S$10 million. However, this sale did not take place. The reasons for this were never fully explored at the trial. But, at the same time, it is not disputed that *neither* OOB HK *nor* the first defendant made payment of the amount due to the first plaintiff under the Convertible Loan Agreement, which then led to the Loan Extension Agreement being signed in June 2016.

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48 AB at pp 80 to 96. See also AL at [45] to [48].

49 YFK at [3.3.5].

50 AB at p 157.

44 It was under these circumstances that the parties entered into the SSP Agreement, which provided for the first defendant to buy the plaintiffs' OOB Sichuan shares at the price of S$10 million and also to repay the loan of RMB 5 million and the accrued interest on this loan.[51] The payment was to be in instalments. The key provision in this agreement is clause 4, which requires the second plaintiff to transfer all the OOB Sichuan shares to the first defendant upon the latter giving notice for such transfer. Parties are in agreement as to the reason for this clause. Specifically, the first defendant had informed the plaintiffs that he needed them to transfer all their OOB Sichuan shares to him so that he could use them as collateral to raise funding to pay the amounts due to the plaintiffs.[52] The plaintiffs were willing to agree to such a transfer, but at the same time, they wanted security over the OOB Sichuan shares transferred to the first defendant until the amounts due to them were paid in full.[53] Hence, clause 5 of the SSP Agreement required the first defendant to charge the transferred OOB Sichuan shares back to the plaintiffs to secure his payment obligations.

45 What then transpired between the parties in relation to the OOB Sichuan shares held by the second plaintiff is key to the question of the proper interpretation of the obligations set out in the Term Sheet.

46 Less than two weeks after the execution of the SSP Agreement, the first defendant sent an email on 30 December 2016 to the plaintiffs' representatives, Ding Zheng Wu ("Mr Ding"), Caleb Wong ("Mr Wong") and Mr Lim, to inform

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51 AB at p 169.

52 AL at [42].

53 Transcript of 19 August 2019 from Page 106, Line 24 to Page 107, Line 12.

them that he had paid RMB 50,000 as the first instalment required under the agreement, and he asked the plaintiffs to "*effect the share transfer*".[54] The first defendant argues that this is the notice under clause 4 of the SSP Agreement, which in turn obligates the plaintiffs to transfer their OOB Sichuan shares to him.

47 Mr Lim's evidence is that he did not regard this as the notice envisaged by clause 4. According to him, this was not an "official notice".[55] However, Mr Ding, who was at the material times the general manager of the second plaintiff,[56] agreed under cross-examination that this email of 30 December 2016 triggered the plaintiffs' obligation to transfer the OOB Sichuan shares.

48 I accept the defendants' position that this email of 30 December 2016 constitutes the notice required by clause 4 of the SSP Agreement to be given by the first defendant for the transfer of the OOB Sichuan shares. There is no particular form of notice required by the clause, and I therefore cannot accept Mr Lim's evidence that "official notice" was needed, whatever that meant. In any event, Mr Ding conceded that he regarded the email as the notice required by clause 4, and that the plaintiffs were prepared to carry out the transfer as mandated by that clause.[57]

49 I now come to the reasons the transfer did not take place. As already mentioned, the OOB Sichuan shares were listed on the NEEQ. For the plaintiffs to transfer the shares to the first defendant, the first defendant has to have a

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54 AB at p 173.

55 Transcript of 19 August 2019 at Page 85, Lines 16 to 18.

56 AEIC of Ding Zheng Wu ("DJW") at [1].

57 Transcript of 20 August 2019 at Page 65, Lines 15 to 21.

securities account to receive those shares.[58] He must make payment for those shares from that securities account to the transferor's securities account. It is common ground that these are NEEQ requirements. Hence, the first defendant had to provide the plaintiffs with his intended recipient account details, and the payment that would correspond with the shares being transferred. The information about the payment would determine the price at which the transaction was recorded as being transacted in the market.

50 As would be immediately apparent, the terms of the SSP Agreement did not cater for these NEEQ requirements. It required a transfer of all of the OOB Sichuan shares without any corresponding payment.[59] The first defendant was then required to make the payments in accordance with the payment schedule in the agreement. Simply put, while the agreement provided for the shares to be sold to the first defendant, the method of transfer and how the NEEQ requirements were to be satisfied were all left unstated.

51 Mr Ding's evidence was that he was waiting for the first defendant's instructions as to how the transfer of the OOB Sichuan shares would be effected.[60] He contended that the first defendant had to tell the plaintiffs about the recipient account details, but had not done so. Also, and more critically, the first defendant did not *want* the plaintiffs to transfer all the shares immediately,

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58 Transcript of 19 August 2019 at Page 86, Lines 3 to 9. See also AEIC of Cheng Bo ("CB") at CB-1, p 20, [18]. NB: While the first defendant referred to such an account as a "brokerage account" when under cross-examination, the defendants' expert witnesses specifically used the term "securities account", and the translation provided at p 23 of the AEIC of Dong Wenhao ("DWH") of the NEEQ Regulations at Arts 74 to 78 refers to a "securities account" instead of a "brokerage account".

59 SSP Agreement at Clause 4.

60 Transcript of 20 August 2019 from Page 66, Line 23 to Page 67, Line 25.

without any payment, because that would be reported in the market as a transfer at "zero consideration" and might cause the share price of OOB Sichuan to collapse. As such, Mr Ding explained that the first defendant told the plaintiffs not to carry out the share transfer until he instructed them to do so. The first defendant was thinking of a solution to get the shares transferred without affecting the share price in the market.[61] According to Mr Ding, it was the first defendant's choice as to how the share transfer was priced and the plaintiffs were simply waiting for Mr Ding's instructions as to the transfer.[62]

52 On the first defendant's instructions, two trades were executed for OOB Sichuan shares after the SSP Agreement. In January 2017, the first defendant asked for the transfer of 7,000 shares to him from the second plaintiff and paid the sum of RMB 525,000.[63] This trade was carried out on 26 January 2017 and the NEEQ reported it as a transaction at the market price of RMB 75 per share. Then, on 26 May 2017, another trade was executed where the first defendant paid RMB 100,000 for the transfer of 1,000 shares.[64] This was priced at RMB 100 per share. As explained by Mr Ding, the first defendant decided these prices and the number of shares to be transferred.[65] Mr Ding's evidence in this respect was not seriously challenged.[66]

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61 Transcript of 20 August 2019 at Page 66 Lines 10 to 14.

62 Transcript of 20 August 2019 at Page 90, Lines 13 to 17, see also Page 70, Lines 19 to 23.

63 DJW at [15].

64 DJW at [15].

65 Transcript of 20 August 2019 at Page 75, Lines 5 to 12.

66 Transcript of 20 August 2019 at Page 79, Lines 5 to 8.

53 In my view, the evidence showed that it was the first defendant's choice as to what price he wanted the shares transferred to him. If the shares were priced too low, that might cause the OOB Sichuan share prices to fall drastically, and the first defendant did not want this to happen because, on his own evidence, he was looking for either an opportunity to sell OOB Sichuan, or to raise financing on the back of OOB Sichuan shares that he had. Further, parties were in agreement that the NEEQ regulations were changed in March 2017 to prohibit any share transfers at "zero consideration".[67] Hence, the OOB Sichuan shares could *not* have been transferred by the plaintiffs to the first defendant without any payment after March 2017.[68] In this sense, I accept the plaintiffs' argument that clause 4 of the SSP Agreement had been rendered practically inoperable because the OOB Sichuan shares could not be transferred to the first defendant without the latter making payment for them. In cross-examination, the first defendant agreed with the suggestion that the change in the regulations rendered clause 4 inoperable.[69]

54 The defendants argue that the plaintiffs were nonetheless in breach of clause 4 of the SSP Agreement because they did not transfer the OOB Sichuan shares immediately after the first defendant gave notice to the plaintiffs on 30 December 2016. This transfer could have been carried out without any consideration *before* the NEEQ regulations were amended in March 2017.[70] By failing to do so before the regulations were changed, the plaintiffs were in breach of their obligation under clause 4.

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67 Exhibit DWH-2 of DWH at p 3.

68 Transcript of 28 November 2019 at Page 14, Lines 11 to 16.

69 Transcript of 21 August 2019 at Page 128, Lines 10 to 14. See also from Page 122, Line 23 to Page 123, Line 15.

70 Transcript of 21 August 2019 at Page 128, Lines 10 to 14.

55 I am unable to accept this contention. As explained above (at [51]), the evidence before me established quite clearly that the first defendant and the plaintiffs had been in discussions as to how to effect the share transfer, and it was agreed between parties that it was up to the first defendant to arrange for the transfers by determining when they would take place, at what price, and for how many shares.[71] The first defendant admitted under cross-examination that, from January to March 2017, he had been discussing with the plaintiffs how to effect the transfer of the OOB Sichuan shares within the confines of the NEEQ regulations.[72] There was never any discussion about a transfer of the shares at no consideration. There is also no letter, email, or any correspondence by the first defendant to the plaintiffs accusing them of being in breach of clause 4 of the SSP Agreement during this time. After the NEEQ regulations were amended in March 2017, the shares could no longer be transferred at "zero consideration". This meant, in my view, that clause 4 was effectively inoperable. The first defendant himself admitted in his oral evidence that the amendment to the NEEQ regulations caught the parties out, and that the circumstances had changed because of this.[73]

56 The defendants next argue that, from January 2017, the first defendant and the plaintiff had agreed to an "informal arrangement" for the OOB Sichuan shares to be transferred by the second plaintiff to the first defendant in small batches, but that this was on a goodwill basis, without prejudice to the first defendant's rights against the plaintiffs under clause 4 of the SSP Agreement.[74]

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71 Transcript of 20 August 2019 at Page 68, Lines 4 to 15.

72 Transcript of 21 August 2019 at Page 103, Lines 7 to 11.

73 Transcript of 21 August 2019 at Page 127, Lines 9 to 11.

74 YFK at [3.6].

The first defendant elaborated on this informal arrangement in his affidavit of evidence-in-chief ("AEIC") by stating that the plaintiffs had agreed to return the moneys that he paid to them after each small batch share transfer so that he could effect further small batch share transfers.[75] In other words, the moneys would be "recycled" or "round-tripped" back to the first defendant after each transfer. But, according to the first defendant, the plaintiffs refused to carry out the informal arrangement after initially agreeing to it. Specifically, the plaintiffs declined to route the moneys back to the first defendant because of concerns about the capital gains tax they would pay.[76] Hence, according to the defendants, the plaintiffs remained in breach of clause 4 of the SSP Agreement.

57 The plaintiffs' Messrs Lim and Ding both adamantly denied that there was an informal arrangement for the transfer of small batches of shares, or that there was any agreement to return the moneys back to the first defendant after each small batch share transfer. Mr Ding's evidence is that the first defendant had suggested the "recycling" of moneys so that the same moneys could be used repeatedly for transfers of small batches of shares, but that he had rejected this suggestion outright because it would have been an "illegal arrangement" under Chinese law.[77] It would also not pass the audit checks of the second plaintiff. According to the plaintiffs, it was really up to the first defendant to come up with an acceptable solution to the difficulty he faced in raising the funds he needed to pay for the small batch transfer of shares at prices that he felt should be transacted on the NEEQ and made public to the market.[78]

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75 YFK at [3.6.2].

76 YFK at [3.6.16] and [3.6.12].

77 Transcript of 20 August 2019 from Page 101, Line 23 to Page 102, Line 6. See also DJW at [23] to [26].

78 Transcript of 20 August 2019 at Page 76, Lines 3 to 13.

58 I found the first defendant's evidence as to the purported informal arrangement and "recycling" of the moneys paid to be highly unsatisfactory. This is for several reasons. First, it had been pleaded in the defence that it was the plaintiffs that came up with the suggestion of this informal arrangement.[79] However, the first defendant admitted under cross-examination that he was the one who had come up with the idea in the first place.[80]

59 Second, there is nothing in writing that supports the argument that the parties had agreed to this informal arrangement involving the "recycling" of moneys. There is nothing in the emails, letters or text exchanges between the parties to that effect. On the contrary, in an email dated 1 March 2017, the first defendant wrote to Mr Ding to state that he was "*working out the funds required and the best way to do the share transfer with our sponsor broker and hope to resume the transactions soon.*"[81] If there had been an agreement to "recycle" moneys for multiple small batch share transfers, the first defendant would not have to work out how much funds were required for each transfer of shares, and simply could have paid the plaintiffs any amount, and then asked for the return of the moneys back to him for a further transfer of the same number of shares. Any such discussion or planning about this alleged agreement to "recycle" moneys paid to the plaintiffs was conspicuously absent from the documentary evidence. Also, there was in evidence a WeChat exchange between the first defendant's assistant and one of the plaintiffs' staff that showed that it was in fact the first defendant who was dictating the number of shares to be transferred

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79 Defence and Counterclaim (Amendment No. 3) at [15A].

80 Transcript of 21 August 2019 at Page 107, Lines 15 to 25, and Page 124, Lines 7 to 8.

81 AB p 189.

and the price per share.[82] This shows quite clearly that it was the first defendant who was pulling the strings as to when the share transfers in small batches would take place, and the price at which the shares would be transferred and how many shares would be transferred. There was also no mention whatsoever of any return of moneys in this WeChat exchange.

60 Third, the evidence of the first defendant was that he had been looking to raise financing to pay for each small batch share transfer. The first defendant's own evidence was that in May 2017, he had pledged 8.47% of OOB Sichuan (a total of 340,000 shares) to raise RMB 15 million for the share transfer.[83] If the plaintiffs had in fact agreed to "recycle" his payments back to him, there would be no need for him to look for such financing.

61 As for the first defendant's claim that the plaintiffs were not willing to perform the SSP Agreement and transfer all the OOB Sichuan shares to him because of tax reasons, I find that this cannot stand up to scrutiny. The first defendant's evidence meandered on this point. While he said initially that the plaintiffs did not want to transfer the shares *because* they did not want to pay capital gains tax,[84] he then claimed, in his oral evidence, that the tax concerns arose because of the plaintiffs' failure to transfer the shares *in the first place*.[85] Then, in another part of his oral evidence, the first defendant accepted that that the plaintiffs had in fact indicated that they were prepared to pay capital gains

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82 AB p 199-204.

83 Transcript of 21 August 2019 at Page 132, Lines 9 to 11. See also Page 133, Lines 7 to 11. See also AB from pp 329 to 344.

84 YFK at [3.6].

85 Transcript of 22 August 2019 from Page 25, Line 11 to Page 26, Line 12.

taxes if such taxes were properly incurred.[86]

62 I found the plaintiffs' evidence on the tax concerns more consonant with the facts. The plaintiffs gave evidence that they were prepared to pay any capital gains tax that was duly and properly incurred, but they baulked at paying the additional capital gains tax which was incurred as a result of the first defendant setting the transfer price at RMB 75 per share and then RMB 100 per share during the two small batch transfers in the first half of 2017.[87] This was significantly higher than the agreed price for these shares, which was RMB 10 million for all the shares, or approximately RMB 48 per share. Hence, the plaintiffs raised tax concerns with the first defendant. These tax concerns arose as a result of the prices at which the first defendant wanted the plaintiffs to transfer the shares.

63 Relying on the contextual background as outlined above, I find that, first, parties had come to the view that the OOB Sichuan shares could not be transferred to the first defendant over the NEEQ without any consideration, as had been contemplated by clause 4 of the SSP Agreement. Second, the first defendant was seeking alternative ways to effect the transfer over the NEEQ and wanted the plaintiffs to wait for his instructions.

64 This contextual background dovetails with a plain reading of the SSP Agreement. In the SSP Agreement, clause 4 was not prescribed as a condition precedent to the first defendant's payment obligations. There is a stipulated start date of end-December 2016 for the instalment payments, but the OOB

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86 Transcript of 22 August 2019 at Page 23, Lines 8 to 11.

87 AL at [60].

Sichuan shares were only to be transferred *on notice being given* (as explained above at [46] to [48])[88]. The obligations for payment of moneys and transfer of shares were not expressed as dependent obligations. Therefore, it appears to me that, while clause 4 required the second plaintiff to effect a transfer of the OOB Sichuan shares, the payments due from the first defendant were *not* made subject to the shares being transferred to him first. This is an important point because much of the defendants' case rests on their proffered interpretation of the SSP Agreement that the transfer of the shares is a condition precedent to the performance of the first defendant's payment obligations.

65 In fact, I find that the first defendant considered himself bound to comply with the payment schedule under the SSP Agreement even *without* the corresponding transfer to him of any shares. This might have been because he acknowledged, at least tacitly, that the inability to transfer the whole of the OOB Sichuan shares to him was not through any fault of the plaintiffs. But, the more likely explanation is that he was fully aware that his obligation to make payments in accordance with the payment schedule was not subject to the second plaintiff first transferring the OOB Sichuan shares to him. It is the first defendant's own conduct that demonstrates this most clearly, as explained below.

66 On 3 July 2017, the first defendant made a payment of RMB 500,000 to the second plaintiff.[89] This was a payment directly to the second plaintiff's bank account and not to its securities account, which strongly suggests that the moneys were *not* paid in expectation of any transfer of shares from the plaintiffs.

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88 AB at p 169, clause [4].

89 AB pp 233, 234.

The first defendant seeks to explain this away by claiming, in his AEIC, that the plaintiffs had asked him to make payments into the second plaintiff's bank account instead of using secondary market trades.[90] This would, on the first defendant's evidence, allow for the circumvention of NEEQ trading rules, which did not allow trades at more than 50% below the market price. This explanation struck me as implausible for three reasons. First, the first defendant could not produce any evidence beyond his bare allegation in his AEIC that the plaintiffs had requested for payments to be made into the second plaintiff's bank account instead of its securities account. No emails, message records, or written correspondence evidence this assertion. Second, I do not see how transfers to the second plaintiff's bank account would have obviated the need under the NEEQ trading rules for there to have been *also* a payment of moneys to the second plaintiff's securities account that corresponded to the share transfer. The first defendant would *still* have had to effect a transfer to the plaintiffs' securities account in order for the share transfer to have a price reflected for it.[91] Third, and most puzzlingly, if the first defendant was in fact of the view that a transfer of moneys to the second plaintiff's bank account could *somehow* circumvent the NEEQ trading rules prohibiting transfers at more than 50% below the market price, there is no reason why the *entire* share transfer could not have been carried out this way. That the first defendant did not even *raise* this possibility indicates to me that this was not a genuine concern, and that the explanation by the first defendant as to why the moneys were transferred to the second plaintiff's bank account (and not its securities account) is not a credible one.

67 Putting aside the issue of which of the second plaintiff's accounts the

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90 YFK at [3.6.12].

91 Exhibit DWH-2 of DWH at p 3.

first defendant paid moneys into, the first defendant had sent an email to the plaintiffs on 26 June 2017 to inform them that the payment of RMB 500,000 (eventually made on 3 July 2017) would be effected, and for the plaintiffs to expect another payment of RMB 1 million by the end of July 2017.[92]

68 When referred to this email of 26 June 2017, the first defendant tried to explain that he was making these payments only because he expected the plaintiffs to return the moneys to him so that he could do small batch transfers of shares.[93] But, he claimed that, after receiving this email, in the period between 26 June 2017 and 3 July 2017, Mr Ding told him over the phone that the plaintiffs would not be transferring him any more OOB Sichuan shares.[94] The first defendant was explicit in stating thus, and repeated this claim more than once in his oral evidence.[95] When asked why then he would proceed on 3 July 2017 to *still* make payment of RMB 500,000 to the plaintiffs despite having already been told that the plaintiffs would not be transferring any shares, the first defendant incredibly changed his evidence to say that he was only told of the plaintiffs' refusal to transfer any more shares to him *after* he had made the payment of RMB 500,000.[96] When confronted with his *volte-face*, the first defendant somewhat conveniently indicated that he it had been "quite a while" since these exchanges, and could not provide a more compelling explanation.[97] These inconsistencies in the first defendant's evidence did him no credit at all.

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92 AB at p 232.

93 Transcript of 22 August 2019 at Page 41, Lines 3 to 17.

94 Transcript of 22 August 2019 at Page 40, Lines 6 to 14.

95 Transcript of 22 August 2019 at Page 40, Lines 15 to 18; Page 41 Lines, 18 to 21.

96 Transcript of 22 August 2019 from Page 41, Line 22 to Page 43, Line 25.

97 Transcript of 22 August 2019 at Page 43, Lines 17 to 25.

69 Following this, as already recounted (see above at [15]), the plaintiffs' Chinese lawyers sent the first defendant a letter on 7 July 2017 demanding that he make payment of the outstanding instalment payments in accordance with the schedule in the SSP Agreement. The first defendant then made a series of payments to the second plaintiff's bank account, not its securities account. These payments were made in the course of a month: RMB 300,000 on 28 July, RMB 100,000 on 1 August, RMB 100,000 on 2 August, RMB 200,000 on 3 August, RMB 100,000 on 7 August and RMB 200,000 on 24 August 2017.[98] In my judgment, the first defendant's conduct in making this series of payments is telling in showing that he considered himself obligated to continue making payments to the plaintiffs of the outstanding amounts regardless of whether the OOB Sichuan shares had been transferred to him.

70 While I appreciate that the first defendant may have planned to raise financing from the OOB Sichuan shares that were transferred to him in order to pay the plaintiffs, this turned out not to be possible for two reasons. First, as already described, the OOB Sichuan shares could not be transferred outright without any corresponding payment over the NEEQ. Second, clause 5 of the SSP Agreement required the OOB Sichuan shares transferred to the first defendant to be charged in favour of the plaintiffs in order to secure payment of the outstanding amounts. That being the case, it was completely unclear to me how the first defendant proposed to raise financing on the transferred shares when they were supposed to be charged to the plaintiffs. On this point, the first defendant gave a rather preposterous answer when he claimed, during the course of his oral evidence and for the first time, that clause 5 of the SSP Agreement

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98 AB at pp 238 to 248.

was never intended by the parties to be performed.[99] I find such evidence to be self-serving, all too convenient, and completely unsupported by any written evidence.

The proper interpretation of the Term Sheet

71 It was in the above circumstances that the parties then came to execute the Term Sheet. When one considers the contextual background, it becomes clear which of the rival contentions by the plaintiffs and the defendants as to the proper interpretation of the Term Sheet should be accepted.

72 The plaintiffs submit that the Term Sheet was intended to consolidate the various debts due from the first defendant and provide him with a realistic payment schedule that he could comply with.[100] Also, the parties intended to "decouple" the payment obligations owed by the first defendant from any transfer of the plaintiffs' OOB Sichuan shares to the first defendant.[101] As such, the Term Sheet only focused on the payments from the first defendant and said nothing about the transfer of the OOB Sichuan shares to him. According to the plaintiffs, the OOB Sichuan shares would be transferred to the first defendant after he had made full payment of the Outstanding Amount, in a manner as determined by the first defendant that was acceptable to the plaintiffs.[102]

73 On the other hand, the defendants submit that the Term Sheet is merely a variation of the SSP Agreement in that all it does is to alter the payment

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99 Transcript of 22 August 2019 from Page 60 Line 2 to Page 61 Line 2.

100 AL at [74].

101 PCS at [88].

102 PCS from [134] to [137].

schedule by giving more time for the first defendant to make payment.[103] It does not detract from the plaintiffs' obligation under clause 4 of the SSP Agreement to transfer the OOB Sichuan shares *before* the first defendant is obliged to make payment. Put another way, according to the defendants, the obligation to transfer the OOB Sichuan shares to the first defendant is a *condition precedent* to his payment obligations under the Term Sheet. Since the shares were not transferred, the first defendant's payment obligations never kicked in.

74 The circumstances leading to the execution of the Term Sheet make it clear that the defendants' position is an untenable one. This is for the following reasons.

75 First, and most fundamentally, as I have already explained (at [64]), the proper interpretation of the SSP Agreement does not support the defendants' argument that the clause 4 was a condition precedent to the first defendant's payment obligations in that agreement. Hence, the defendants' entire case on the *incorporation* of clause 4 into the Term Sheet or that the Term Sheet is simply a *variation* of the SSP Agreement fails at the very first hurdle because clause 4 was never a condition precedent to the payment obligations of the first defendant in the first place.

76 Second, as has been explained above (at [53]), it is clear that parties had come to the shared understanding that clause 4 of the SSP Agreement was practically inoperable after March 2017. I accept Mr Ding's evidence that, even prior to March 2017, the plaintiffs were willing and ready to transfer the OOB Sichuan shares, but had been asked not to by the first defendants. The plaintiffs

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103 DCS at [4.3].

were requested not to transfer their OOB Sichuan shares to the first defendant over the NEEQ before March 2017 because, amongst other reasons, the first defendant wanted to determine the price at which the shares were to be transferred so that the trading price of the OOB Sichuan shares would not be affected (see [53] above). Then, the change in the NEEQ regulations in March 2017 made it no longer possible for parties to even entertain the idea of transferring the shares at no consideration. As I have found, the first defendant subsequently tried to think of solutions to the problem of how the shares could be transferred, and it is clear that he was in control of the process of when and how the shares would be transferred. From the plaintiffs' perspective, they were not concerned about the mechanics of the process, save that they did not wish to pay unnecessary capital gains tax that might be incurred if the price set by the first defendant for each transfer was too high.

77 Third, it is not disputed that the first defendant had decided, on its own, to suspend the OOB Sichuan shares from trading while the negotiations on the Term Sheet were in progress with the plaintiffs. The counter was suspended on 11 September 2017 and it remained so until 29 December 2017.[104] The Term Sheet was executed by the parties on 20 September 2017, whilst the counter was still suspended from trading. Given these facts, I find that the parties could not possibly have intended to subject the first defendant's payment obligations to the transfer of the OOB Sichuan shares to the first defendant. It is noteworthy in this regard that the first defendant was due to make his first three instalment payments on 30 September, 30 October and 30 November 2017 respectively. It would be inconsistent with the timing in the schedule of payments to insist that the plaintiffs had to effect the transfer of the shares *before* the payments were

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104 Transcript of 22 August 2019 from Page 92, Line 13 to Page 93, Line 13.

due and while the share counter was suspended from trading. One cannot simply ignore the trading status of the OOB Sichuan shares at the time of the agreement. It was impossible to transfer the shares at that time. I therefore do not accept that the parties had intended for share transfer obligations to apply at a time where the transfer of shares was *not even possible*.

78 Fourth, it must be borne in mind that the Term Sheet was precipitated by the threat of legal action by the plaintiff, through their Chinese lawyers. The first defendant did not reply to the Chinese lawyers' letter to state that it was the plaintiffs who were in breach of their obligations in failing to transfer the OOB Sichuan shares. Instead, as already mentioned above (see [15]), the first defendant made further payments to the second plaintiff, without any corresponding written demand for the transfer of more shares. Not only that, in the Term Sheet, the first defendant agreed to provide security for his indebtedness in the form of the Metro shares. I find that it would have been incongruous for the first defendant to have agreed to provide security if he was not at that time obligated to make any payments to the plaintiffs until the OOB Sichuan shares were transferred to him. If that transfer had to take place before any payment, those transferred OOB Sichuan shares could have been charged as security to the plaintiffs, as was what was envisaged under clause 5 of the SSP Agreement. The provision of security in the form of the Metro shares sheds light on the intent of the parties in executing the Term Sheet, which must have been that the first defendant was obliged to make payment in accordance with the payment schedule regardless of whether any shares in OOB Sichuan were transferred by the plaintiffs. This reflects the reality of the situation at that time, which was that the parties could not work out a way to carry out the transfer for the OOB Sichuan shares to the first defendant over the NEEQ without any corresponding payment.

79 Finally, it is also relevant that it was the first defendant who came up with the payment schedule to be included in the Term Sheet.[105] It was the first defendant that proposed the payment dates and amounts, and this was largely accepted by the plaintiffs.[106] This makes it quite clear that the Term Sheet was in essence an extension of time granted to the first defendant to make payment of what he had agreed to pay the plaintiffs. There is nothing in the correspondence leading to the Term Sheet's execution where the parties even discussed or mentioned the transfer of the OOB Sichuan shares as a pre-condition to the payment obligations. I find that, if it was indeed the case that the share transfer was a condition precedent, the first defendant would have at least mentioned this in the negotiations in written communication of some sort.

80 Given all the circumstances, I find that the contextual background to the Term Sheet shows that the plaintiffs are right that the agreement for the first defendant to make the instalment payments in accordance with the schedule was **not** conditional on the transfer of the OOB Sichuan shares to the first defendant. It cannot be said that the Term Sheet was merely a variation of the SSP Agreement given the intentions of the parties when the Term Sheet was entered into, nor can it be contended that clause 4 of the SSP Agreement was *somehow* incorporated into the Term Sheet. As I have found, the parties were of the view that clause 4 of the SSP Agreement was practically inoperable, and they wanted to enter into the Term Sheet to extend the time granted to the first defendant to make payment. In other words, the Term Sheet superseded the SSP Agreement.

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105 AB at p 257.

106 AB at pp 254 to 256.

The conduct of the parties subsequent to the Term Sheet

81 My conclusions in relation to the proper interpretation of the Term Sheet are buttressed by the conduct of the parties *subsequent* to the Term Sheet being entered into. The case law in relation to the value of subsequent conduct in contractual interpretation makes clear that, subject to certain caveats, post-contractual conduct can be an aid in the interpretation of contractual terms. In fact, I have already extensively referred to the parties' post-contractual conduct as an aid in interpreting the SSP Agreement (see for example, [66] above).

82 In *Hewlett-Packard Singapore (Sales) Pte Ltd v Chin Shu Hwa Corinna* [2016] 2 SLR 1083 ("*Hewlett-Packard*") at [56], the Court of Appeal stated that:

> … we are not endorsing a blanket prohibition on the use of subsequent conduct. Like the question of the admissibility of prior negotiations, the question of the admissibility of subsequent conduct remains an open one that should be decided on a more appropriate occasion … We do, however, reiterate that any such evidence must satisfy the tripartite requirements of relevancy, reasonable availability and clear and obvious context mentioned in *Zurich Insurance* …

83 In the subsequent case of *Ngee Ann Development Pte Ltd v Takashimaya Singapore Ltd* [2017] 2 SLR 627 ("*Ngee Ann Development*"), the Court of Appeal referred to subsequent conduct to determine the parties' agreement on the meaning of a term of the contract at [86], observing that these events "reflect[ed] the parties' understanding" of how a particular term was to be put into effect. The position in *Ngee Ann Development* utilising subsequent conduct as an aid to contractual interpretation was highlighted in *Centre for Laser and Aesthetic Medicine Pte Ltd v GPK Clinic (Orchard) Pte Ltd and others and another appeal* [2018] 1 SLR 180 at [51], where the Court of Appeal observed that subsequent conduct in contractual interpretation was permissible but is "in

general only of relevance if the subsequent conduct provides *cogent evidence* of the parties' agreement at the time when the contract was concluded." [emphasis in original].

84 Subsequent conduct was also found to be an aid to interpretation in this court's decision of *Solomon Alliance Management Pte Ltd v Pang Chee Kuan* [2019] 4 SLR 577 at [73] as it satisfied the tripartite requirements of relevancy, reasonable availability, and clear or obvious context. I am satisfied that the tripartite requirements are met on the instant facts in relation to the Term Sheet as well. The parties' behaviour subsequent to the agreement of the Term Sheet is relevant in that it sheds light on what the parties had regarded their obligations *vis-à-vis* each other under the Term Sheet to entail. This provides a further basis for determining what the parties' objective intentions were when the Term Sheet was entered into. The requirement that information as to the post-contractual conduct be reasonably available is also satisfied, given that both parties engaged in correspondence with each other regarding payment, and with the first defendant having made payments in accordance with the terms the Term Sheet. Finally, given that the Term Sheet expressly prescribed payment obligations between the parties, I accept that the subsequent conduct of the parties in this case related to that clear and obvious context. Accordingly, the subsequent conduct of the parties is an appropriate aid to contractual interpretation of the Term Sheet on the instant facts.

85 For completeness, I note that I saw no reason why the interpretation of the SSP Agreement could not also be assisted by reference to the parties' subsequent conduct. The tripartite requirements outlined in *Zurich* ([37] *supra*) and referred to in *Hewlett-Packard* are also met. In particular, the parties' subsequent conduct is relevant insofar as it illustrates not only what the parties believed their obligations in the SSP Agreement to be, but also how the parties

subsequently recognised that certain obligations, such as those in clause 4, were rendered inoperable. This necessarily involves consideration of what clause 4 had *initially* been envisaged as requiring. Second, the requirement that information as to the post-contractual actions be reasonably available is also satisfied, given that the parties' conduct after the signing of the SSP Agreement were mostly documented in their correspondence. Further, given that the SSP Agreement expressly prescribed obligations on both the signatories, I am satisfied that the subsequent conduct of the parties related to that clear and obvious context. The subsequent conduct of the parties could therefore be of assistance in contractual interpretation of the SSP Agreement, as has been done above at, for example, [66] above.

86 I pause at this point to note that subsequent conduct cannot be used to support an interpretation that is in direct contradiction to the express terms: *Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 at [88]. This does not appear to be an impediment in this case given that there are no express terms prescribing the interaction between clause 4 of the SSP Agreement and the Term Sheet itself.

87 A review of the conduct of the parties after the Term Sheet was executed supports my findings at [80] above. The first defendant complied with his obligations to make payment for the months of September and October 2017.[107] He did not immediately seek the lifting of the trading suspension and ask the plaintiffs to transfer their shares. In fact, even after the shares resumed trading on 30 December 2017, there is no written evidence to show that the first defendant asked for the shares to be transferred to him. The counter was then

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107 AB at pp 268 to 274.

suspended again from trading from 18 January 2018 to 15 April 2018, and after a short period where trading resumed, it was suspended again on 3 May 2018.[108]

88 After receiving the letter dated 28 February 2018 from the plaintiff's Singapore lawyers demanding payment (see [21] above), the first defendant made two *further* payments to the plaintiffs on 23 March and 4 April 2018 of RMB 100,000 each without any complaint.[109] At the time of these payments, there was no demand by the first defendant for the plaintiffs to transfer all their OOB Sichuan shares, nor was there any request in writing for shares to be transferred in small amounts. Any transfer would have not have been possible in any event given that the counter was suspended from trading at the time of these payments.[110]

89 The first defendant's previous lawyers then sent a letter to the plaintiffs on 10 May 2018 demanding that the plaintiffs transfer to him the OOB Sichuan shares *immediately*.[111] But, as admitted by the first defendant under cross-examination, this demand could not have been complied with because it was impossible for the shares to be transferred since the counter was at that time suspended.[112] Given this, I am left to conclude that this was not a genuine demand for transfer of the shares, but a tactical response of some sort to the plaintiffs' demand for full payment and to these legal proceedings, which had started by then.

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108 Transcript of 22 August 2019 at Page 96, Lines 12 to 15. See also AB at pp 293 to 295.

109 AB at pp 285 to 286, and pp 289 to 292.

110 AB at pp 293 to 295.

111 AB at pp 299 to 300.

112 Transcript of 22 August 2019 at Page 124, Lines 2 to 6.

90 In my judgment, the conduct of the parties subsequent to the signing of the Term Sheet is entirely consistent with the first defendant having assumed an obligation to make payments in accordance with the Term Sheet's payment schedule, which superseded the prior arrangements in the SSP Agreement and which is not contingent on any transfer of the OOB Sichuan shares to him.

The first defendant's need to raise financing on the OOB Sichuan shares

91 The first defendant has submitted that he needed the OOB Sichuan shares to be transferred to him so that he could use the shares to raise financing in order to pay the plaintiffs.[113] He claims that the plaintiffs are well aware of this and shared this understanding. Hence, according to him, the only sensible interpretation of the Term Sheet is that it merely varied the SSP Agreement by giving him more time to pay, and the plaintiffs were still obliged to transfer the OOB Sichuan shares to him so that he could use them to raise the funds he needed for payment.

92 I find it difficult to accept the first defendant's arguments in this regard. From the plaintiffs' perspective, it was the first defendant who had to find a way to raise financing in order to fulfil his payment obligations. As Mr Lim testified, it was really up to the first defendant to look for financing, and the plaintiffs did not particularly care how he did it.[114] The existence of clause 5 of the SSP Agreement, which required the first defendant to charge the transferred OOB Sichuan shares to the plaintiffs to secure payment of his outstanding payment obligations, is also inconsistent with any shared understanding that the first defendant intended to raise funds on the transferred shares. After all, if the

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113 YFK at [3.5.5].

114 Transcript of 19 August 2016 at Page 95, Lines 19 to 23.

intent of the parties is that the transferred shares were going to be charged in favour of the plaintiffs, it is unclear to me how the first defendant intended to raise any financing on the back of these shares. The defendants have not provided a sufficient explanation to me as to how both can be achieved.

93 I deal here with the evidence of Jiang Kai, an expert witness for the defendants, who claims that the first defendant would "have obtained RMB 46,023,500 financing on the OOB Sichuan Shares in or around 16 December 2016 to June 2017". By way of background, Jiang Kai is a financier and President of a hedge fund based in Shanghai, China.[115] The explanation for how this figure was reached is at [21] of Jiang Kai's expert report,[116] and is reproduced for ease of reference here:

> … [The first defendant] pledged 340,000 shares of OOB Sichuan to obtain RMB 15,000,000 financing in May 2017. It is quite likely that he would have obtained per share financing at the same rate for all the 1,043,200 OOB Sichuan Shares, as they were only 25.2% of the total shares in OOB Sichuan. Financiers would normally be willing to take any percentage of shares in a company below 50% … Therefore, financiers would likely have been prepared to take all OOB Sichuan Shares, while the per share rate of financing usually remains unchanged. Therefore, we can assume that if [the first defendant] obtained and pledged Tembusu's 1,043,200 OOB Sichuan Shares, he would have obtained **RMB 46,023,500** in financing at that time. …
>
> [Emphasis in original].

The obvious difficulty with Jiang Kai's reasoning in this regard is clear – like is not being compared with like. In particular, the 340,000 shares of OOB Sichuan, which the first defendant had pledged for the sum of RMB 15,000,000

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115 JK at [1].

116 JK-1 at p 19. (NB that there is an error in the numbering of paragraphs at [10] and [11] of JK-1 – those two paragraph numbers are repeated.)

were *not already encumbered*, unlike the 1,043,200 shares held by Tembusu. The 1,043,200 OOB Sichuan shares held by Tembusu, even if transferred to the first defendant, were to be charged *to the second plaintiff* immediately after their transfer under the terms of clause 5 of the SSP Agreement. It is obvious that shares which are *already charged* to another person will not be as valuable as collateral when compared to the unencumbered 340,000 shares Jiang Kai refers to. Further, Jiang Kai merely asserts that "[f]inanciers would normally be willing to take any percentage of shares in a company below 50%" without providing any basis as to why they would be willing to keep the per share rate of financing unchanged.

94 Accordingly, I am unable to accept Jiang Kai's evidence that the first defendant would have been able to raise enough money to meet all his payment obligations under the Term Sheet on the back of the 1,034,200 *already-charged* OOB Sichuan shares the second plaintiff held. As the Court of Appeal observed in *Armstrong, Carol Ann (executrix of the estate of Peter Traynor, deceased, and on behalf of the dependents of Peter Traynor, deceased) v Quest Laboratories Pte Ltd and another and other appeals* [2020] 1 SLR 133 at [92]:

> … The ultimate consideration in deciding whether to reject or accept expert evidence … is driven by, among other things, considerations of consistency, logic and coherence, and with a powerful focus on the objective evidence before the court.

I am not satisfied that the expert evidence cited above is of assistance to this court given the logical difficulty I have outlined at [93] above.

95 I should also add that the first defendant, through OOB HK and Tone Rich, holds a substantial stake in OOB Sichuan of around 37.7% even without

any transfer of shares from the second plaintiff.[117] That being the case, the first defendant has not been able to explain why financing cannot be raised from the other shares in OOB Sichuan that he indirectly owns and controls. After all, it is his own evidence that he has managed to raise financing from pledging 8.47% of OOB Sichuan (see [60] above).

96 At the end of the day, whatever the first defendant's plans to raise funds may have been, he had contractually bound himself to the Term Sheet, which required him to make payment of certain instalments on specific dates. More importantly, he had bound himself at a time when the shares simply *could not* have been transferred to him by the plaintiffs because the counter was suspended.[118] In these circumstances, I am unable to agree with the interpretation of the Term Sheet advanced by the defendants.

The transfer of the OOB Sichuan shares to the first defendant

97 I turn to the question of the OOB Sichuan shares that currently remain in the hands of the second plaintiff. The Term Sheet, which I have found supersedes the SSP Agreement, makes no express provision for the transfer of those shares to the first defendant. The only reference to shares is a short statement that the first defendant "has agreed to purchase the said shares of OOB Media (Sichuan) Company Limited".[119] This is perhaps unsurprising given that the Term Sheet is itself described in its very first line as "summariz[ing] the terms for the restructuring of the amounts owing by the [first defendant] to

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117 Supplementary AEIC of Yee Fook Khong at Exhibit YFK-21, at p 50.

118 AB at pp 293 to 295.

119 AB at p 263.

Tembusu", without saying anything about the transfer of the shares.[120] Nonetheless, I do note that the plaintiffs have taken the position that they will transfer the OOB Sichuan shares to the first defendant after he has made full payment.[121]

98 Given the Term Sheet's express reference to the purchase of shares in OOB Sichuan, it must be the case that the parties to the Term Sheet had contemplated the issue of the transfer of shares, but chose nonetheless not to deal with that in the Term Sheet by including a term to provide for the transfer. In other words, the parties consciously left the issue of the transfer of the shares unaddressed in their agreement. This in turn raises the question of whether or not there might be an implied term in the Term Sheet that deals with this issue of the transfer of the shares. In this regard, it must be remembered that there is no basis for the incorporation of clause 4 of the SSP Agreement given my finding (above at [74] to [80]) that the clause had been rendered practically inoperable by the change to the NEEQ regulations and as such, the parties could not have intended to incorporate such a clause.

99 In *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp Marine*"), the Court of Appeal held at [93] that:

> In the light of these observations, we summarise our views on the implication of terms into a contract. First, this process is best understood as an exercise in giving effect to the parties' *presumed* intentions. It is presumed because the parties have not expressed any words, which are capable of bearing the meaning sought to be achieved by the implied term. Were there to be any express words, that would be a matter of

120 AB from pp 263 to 267.

121 PCS at [137].

> interpretation, not implication … It is thus an exercise in filling the gaps in the contract. But in doing so, it is of paramount importance that the courts do so with due regard to what the *parties* would be presumed to have intended.
>
> [emphasis in original]

100 The Court of Appeal went on to summarise the three-step process by which the implication of terms is to be considered at [101] as follows:

> It follows from these points that the implication of terms is to be considered using a three-step process:
>
> > (a) The first step is to ascertain how the gap in the contract arises. Implication will be considered only if the court discerns that the gap arose because the parties did not contemplate the gap.
> >
> > (b) At the second step, the court considers whether it is necessary in the business or commercial sense to imply a term in order to give the contract efficacy.
> >
> > (c) Finally, the court considers the specific term to be implied. This must be one which the parties, having regard to the need for business efficacy, would have responded "Oh, of course!" had the proposed term been put to them at time of the contract. If it is not possible to find such a clear response, then, the gap persists and the consequences of that gap ensue.

101 Applying this approach, there is no room for the implication of any term into the Term Sheet regarding the transfer of the OOB Sichuan shares held by the second plaintiff.

102 First, since the SSP Agreement, the parties had been dealing with the question of how the transfer of the shares should be effected. As already mentioned, express reference is made to the purchase of OOB Sichuan shares in the Term Sheet. As such, it is quite clear to me that the parties clearly contemplated the gap in the Term Sheet, in that it did not expressly deal with the transfer of the OOB Sichuan shares, but elected to leave the gap present in the agreement. This is obvious from the fact that the Term Sheet, in its own

words, described itself only as "summariz[ing] the terms for the restructuring of the amounts owing by the [first defendant] to Tembusu" without reference to the transfer of the shares. The obligation to pay the moneys was intended to be separate and not contingent on the obligation to transfer the shares. *Sembcorp Marine* at [95] is particularly instructive in this regard:

> In our view, scenario (a) [where the parties did not contemplate the issue at all and so left a gap] is the only instance where it is appropriate for the court to even *consider* if it will imply a term into the parties' contract …
>
> [Emphasis added in italics]

It is therefore not open to this Court to imply a term into the Term Sheet, given the clear evidence that parties did contemplate the issue of the transfer of shares when they executed the Term Sheet, but chose to leave it silent on this issue.

103 Second, it is not at all clear what specific term can be implied given that there is no evidence that the parties were in consensus, at the time of the execution of the Term Sheet, as to the terms of such transfer. Many issues appear to be unresolved. For example, would the OOB Sichuan shares be transferred without any condition that the transferred shares should be charged to the plaintiffs? Would the transfer of all the shares take place straight away once a method of transfer which complied with the NEEQ regulations was identified, or would the plaintiffs be required to procure a transfer only after full payment of the Outstanding Amount? Would the shares be transferred in small batches, and if so, when? Other issues left unaddressed went towards questions of whether the amount which had to be transferred from the first defendant to the plaintiffs before the transfer was effected was the full Outstanding Amount, or only the portion of the Outstanding Amount, which stemmed from consideration for purchase of the OOB Sichuan shares under the Share Transfer Agreement. These are just some of the many unanswered questions. This

underscores the Court of Appeal's observation at [101(c)] of *Sembcorp Marine* that:

> Finally, the court considers the specific term to be implied. This must be one which the parties, having regard to the need for business efficacy, would have responded "Oh, of course!" had the proposed term been put to them at time of the contract. *If it is not possible to find such a clear response, then, the gap persists and the consequences of the gap ensue.*
>
> [Emphasis added in italics]

The instant facts appear to be such a situation where "the gap [in the Term Sheet] persists and the consequences of the gap ensue".

104 These uncertainties probably explain why the parties did not plead or submit on the viability of an implied term in the Term Sheet relating to the transfer of the OOB Sichuan shares. At the time of the trial, the parties appeared to still be in a state of limbo where the OOB Sichuan shares were "stuck" with the plaintiffs and could not be transferred for no consideration under the NEEQ regulations. That being the case, it is really up to the plaintiffs and the first defendant to work with their Chinese lawyers and other advisers to come up with an agreed method for the transfer of the OOB Sichuan shares that complies with the NEEQ regulations, and is reasonably acceptable to the parties.

Are the plaintiffs estopped from enforcing the Term Sheet?

The law on promissory estoppel

105 The law on promissory estoppel is fairly well-established, and all parties are in agreement that in order to successfully raise promissory estoppel as a defence, the defendants had to prove the following elements (see for example *Nanyang Medical Investments Pte Ltd v Kuek Bak Kim Leslie and others* [2018]

SGHC 263 at [140]; *Oriental Investments (SH) Pte Ltd v Catalla Investments Pte Ltd* [2013] 1 SLR 1182 at [83]):

(a) first, there must be a clear and unequivocal representation by the promisor, whether by words or conduct, that it will not enforce its strict legal rights;

(b) second, the promisee must act in reliance on the promise and suffer detriment as a result; and

(c) third, it must be "inequitable" for the promisor to resile from his promise.

106 Further, the party asserting the estoppel must properly plead the representation that it is relying on. In particular, details such as when and where the representation took place, who it was spoken by, and the content of the representation should be made clear in order to give the party defending the estoppel allegation fair notice as to the case he has to meet: *Low Heng Leon Andy v Low Kian Beng Lawrence (administrator of the estate of Tan Ah Kng, deceased)* [2018] 2 SLR 799 at [49]. Further, in *Fundamental Investors Pte Ltd v Palm Tree Investment Group Pte Ltd* [2020] SGHC 73 at [79], the High Court found that the defendant shifted from its pleaded defence that the representation it relied on took the form of the plaintiff's *words* to a fresh defence at trial of the representation having been by the plaintiff's *conduct*. Vincent Hoong J held this to be sufficient grounds in and of itself to reject the fresh defence.

107 The importance of properly pleading the details of the estoppel relied on was also explained by the Court of Appeal in *V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422 in the context of proprietary estoppel. At [38],

the Court of Appeal outlined the general rule that parties are bound by their pleadings and the court is precluded from deciding on a matter that the parties have decided not to put in issue. This reflects the basic concern that a party seeking to resist the assertion of an estoppel should know the case that he has to meet, and that key details of the estoppel should be fully pleaded.

Analysis of the evidence on the question of estoppel

108 The defendants' pleaded case is that, on the day of the signing of the Term Sheet, 20 September 2017, the plaintiffs' Messrs Ding and Wong and Ms Cecia Sheng had made oral representations by way of verbal assurances *in person* to both defendants that the Term Sheet was simply to give Tembusu's investment committee "additional comfort".[122] Further, it was represented that there was no intention to take possession of the Metro shares as security or enforce the Term Sheet against the defendants.

The first defendant's account of the alleged representation

109 Under cross-examination, the first defendant conceded there was actually no face-to-face meeting between the defendants and the plaintiffs' representatives on 20 September 2017, which was the day the Term Sheet was signed.[123] This is already plainly inconsistent with his pleaded case. The first defendant then *belatedly* claimed in his oral evidence that he had made a phone call to Mr Ding on the day of the signing where the verbal assurances purportedly made earlier were repeated to him.[124] However, the first defendant

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122 YFK at [3.9.3] to [3.9.9]. See also Defence and Counterclaim (Amendment No. 3) at [18A].

123 Transcript of 21 August 2019 at Page 73, Lines 16 to 20.

124 Transcript of 21 August 2019 at Page 74, Lines 5 to 7. See also Page 75, Lines 8 to 16.

never mentioned any discussion over any phone call on 20 September 2017 in his AEIC. It was also not mentioned in his affidavit of 26 July 2018, which was for the purpose of showing cause why summary judgment should not be granted against the defendants. I find that these omissions throw serious doubt on whether a representation was ever made by Mr Ding to the defendants on that day.

110 To make things worse, this new version that there was a phone discussion on 20 September 2017 where verbal assurances were made was not even put to Mr Ding when he was cross-examined by counsel for the defendants. That being the case, it is simply not open to the defendants to rely on this alleged phone discussion on 20 September 2017: *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [17], referencing the rule in *Browne v Dunn* (1893) 6 R 67.

111 The defendants' inconsistent evidence concerning the alleged representation not to enforce the Term Sheet does not end there. In the first defendant's AEIC, he stated that it was in or around September 2017 that the plaintiffs' representatives approached him to ask for "*further security in order to secure the transfer of the OOB Sichuan Shares to [him]*".[125] I struggle to make sense of what exactly this statement means. But, leaving that aside, according to the first defendant, it was at the time of this approach when the plaintiffs made the alleged oral representation that the Term Sheet, which was being proposed, would not be enforced. The first defendant then arranged a further meeting, in or around "early September 2017", at a café below the second plaintiff's office in Shanghai, for the second defendant to be introduced

125 YFK at [3.9.1] and [3.9.2].

to the plaintiffs' representatives.[126] During this meeting where the issue of the security over the first defendant's Metro shares was discussed, it is claimed that the plaintiffs' Messrs Ding and Wong again represented that "*the [plaintiffs] would never enforce the agreement against [the first defendant] or [the second defendant]*" (emphasis in original in underline).[127]

112 Under cross-examination, the first defendant admitted that this meeting at the café actually took place on 25 August 2017, and not in early September 2017.[128] He claimed that the plaintiffs' representatives had also assured him at that meeting that the plaintiffs would be proceeding with the informal arrangement of transferring small batches of shares to him and returning the moneys he paid for those shares. However, a contemporaneous email record of what was discussed at that meeting sent by Mr Wong to the defendants on 26 August 2017 showed that this issue of the transfer of shares was never discussed at that meeting.[129] Also, there is nothing in the email that hints at *any* assurances given to the defendants that the proposed Term Sheet would not be enforced against them. Instead, the email noted that the parties had discussed on 25 August 2017 that the security was to be provided by way of the Metro shares and that the first defendant would come up with a payment schedule for the plaintiffs to consider. There was no reply email from either of the defendants which referred to any assurances that the Term Sheet would not be enforced, or that parties would transfer shares in small batches, or that the plaintiffs would "recycle" the first defendant's payments back to him.

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126 YFK at [3.9].

127 See YFK at [3.9.2].

128 Transcript of 22 August 2019 from Page 65, Line 19 to Page 66, Line 8.

129 Exhibit P-4.

The second defendant's account of the alleged representation

113 As for the second defendant, his evidence was that he had told the plaintiffs' representatives at the meeting on 25 August 2017 at the café that he was not willing to charge any part of the Metro shares that were registered in his name to secure the first defendant's obligations.[130] But, Messrs Ding and Wong verbally assured him that the plaintiffs would *never* enforce the security against him, and so he relented. In his oral evidence, the second defendant was adamant that he was initially dead-set against providing the Metro shares as security.[131] This was because there was only two registered shareholders in Metro, himself and Yidu Consulting Co Ltd.[132] He did not want the risk of another person becoming a shareholder in Metro and upsetting his other shareholder, which held the majority of the shares in Metro.[133]

114 I note that, despite the claim that the second defendant's serious concerns about granting a charge over the Metro shares were only allayed by the plaintiff's representations that they would never enforce their security, this alleged representation was never mentioned in any email or correspondence between the plaintiffs and him. As already referred to above (see [112]), the plaintiffs' Mr Wong sent an email on 26 August 2017 to both defendants to record what they had discussed at the meeting on 25 August 2017. The first part of the email was specifically addressed to the second defendant and it stated that he had agreed to provide security over the portion of the Metro shares that

130 TCLE at [3.1] and [3.2].

131 TCLE at [3.1.3].

132 Transcript of 22 August 2019 at Page 166, Lines 4 to 25.

133 Transcript of 22 August 2019 at Page 177, Lines 3 to 13.

was beneficially owned by the first defendant.[134] There was no mention of any assurance that the security would never be enforced. If it were true that such an assurance had been made, the lack of any mention of this in the email from Mr Wong would surely have set off alarm bells in the second defendant's mind that something was not quite right.

115 Instead, the second defendant replied to Mr Wong's email a few days later on 29 August 2017.[135] He did *not* mention the assurance that the Term Sheet would not be enforced, which he claimed was the *only* reason he agreed to the charge over the Metro shares. Instead, the second defendant mentioned in his email reply that he would be meeting with his lawyers shortly to discuss matters and would come back with any comments. I would add that the second defendant would surely have been advised by his lawyers that it would not be prudent to agree to a charge over the Metro shares in the Term Sheet without recording the verbal assurance in writing in another document. That he nonetheless proceeded to execute the Term Sheet, suggests to me that the second defendant's evidence on the representation made by the plaintiffs is less than credible.

116 I should note for completeness that the second defendant claims that he ultimately never discussed the Term Sheet with his lawyers.[136] This appears to be inconsistent with his email of 29 August 2017, but little turns on this point in any case – the second defendant's complete silence in his contemporaneous email on the purported representation, which was allegedly the *only* reason he

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134 See Exhibit P-4.

135 See Exhibit P-5.

136 Transcript of 22 August 2019 at Page 197, Lines 18 to 20.

agreed to the Term Sheet, is simply deafening.

117 The second defendant also gave evidence that, when he received drafts of the Term Sheet from the first defendant in mid-September 2017, he was concerned from reading the recitals in the drafts which stated explicitly that *"[t]he [p]arties hereby agree that the provisions in this Term Sheet shall be binding and shall create legally binding obligations between the [p]arties*".[137] This plainly contradicted any alleged representation that had been made to him. He then spoke to the first defendant, who then assured him that Mr Ding had promised the first defendant again that the Term Sheet would not be enforced. Given the hearsay nature of this evidence, I find it to be of little value in deciding whether the plaintiffs had assured the second defendant at the time when the Term Sheet was signed that the document would never be enforced. The second defendant did not himself speak to any of the plaintiffs' representatives after he received the first draft of the Term Sheet from the first defendant up to the time he executed it on 20 September 2017. He therefore could not provide any direct evidence of any purported representations from the plaintiffs in relation to the Term Sheet drafts.

118 In contrast to the defendants' rather malleable evidence, the plaintiffs' evidence on the issue of the alleged representation was clear and consistent. Mr Ding's evidence was that he had no authority to make representations to the defendants about not enforcing the Term Sheet.[138] Authority on such matters lay with Tembusu's investment committee. Mr Ding also maintained his evidence throughout that, in any event, he never assured the defendants that the

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137 Transcript of 22 August 2019 at Page 199, Lines 15 and 16.

138 DJW at [27].

Term Sheet would not be enforced against them, whether on 20 September 2017 or at any other time.

119 I would add that Mr Ding's evidence is also more consonant with commercial reality and the undeniable fact that the plaintiffs wanted to get paid and exit their investment from the first defendant's business. It would make no sense whatsoever for the plaintiffs to insist on the execution of the Term Sheet, which provided a new payment schedule and added security in the form of the Metro shares, and at the same time assure the defendants that such an agreement (and in particular the added security) was not worth the paper it was written on. It is also illogical to say that the Term Sheet was just to appease Tembusu's investment committee if it was truly intended to be a dead letter. I cannot understand how the investment committee would be appeased in such a situation.

The plaintiffs' failure to conduct due diligence on Metro

120 I should add that the defendants also rely on the fact that the plaintiffs did not carry out any due diligence on Metro, for example, by asking for and examining Metro's financial statements to determine how much the first defendant's 13.8% beneficial shareholding in Metro might be worth before deciding to accept those shares as security for the first defendant's payment obligations.[139] It is argued that this suggests that the plaintiffs did not really intend to enforce the security against the defendants, especially since Mr Lim had allegedly rejected shares in Metro as security in the past.[140]

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139 DCS at [3.4.7].

140 YFK at [2.1.6].

121 The plaintiffs' responses to this argument are fairly clear and straightforward. Mr Ding gave evidence that the first defendant had told him that the 13.8% shareholding in Metro was worth at least S$6 million.[141] Mr Ding thought that the shares would be acceptable as security, but understood that the final decision lay with Tembusu's investment committee. He does not know whether his colleagues with the first plaintiff in Singapore carried out any due diligence on Metro. As for Mr Lim, his evidence is that he did not think that the Metro shares were adequate security at all, but those shares were what the first defendant was prepared to offer, and having some security was better than having none at all.[142]

122 On balance, I do not think that the argument concerning due diligence on Metro makes much headway for the defendants on the issue of estoppel. There may be many reasons the plaintiffs did not do any due diligence on Metro, such as the fact that they knew that a minority stake in Metro, a private limited company, could not be worth very much. The point really is that this stake in Metro was what was offered by the first defendant when the plaintiffs demanded some security. The plaintiffs were prepared to accept the offer, since it was obviously better than having no security at all, other than the OOB Sichuan shares they still held. It is a stretch to say that the failure to do due diligence on Metro can *somehow* evidence a shared intention not to enforce the Term Sheet.

123 Finally, I note that the defendants' conduct subsequent to the Term Sheet being executed is also completely inconsistent with them having received representations that the agreement would not be enforced. The first defendant

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141 Transcript of 21 August 2019 at Page 11, Lines 7 to 13.

142 Transcript of 19 August 2019 from Page 188, Line 24 to Page 189, Line 10,

continued to make payments to the second plaintiff even after receipt of a letter from the plaintiffs' lawyers on 28 February 2018 threatening to enforce the Term Sheet. He did not reply to the plaintiffs to remind them of the alleged representation. The first time that the first defendant even *raised* the issue of a representation and an estoppel was not even in the first version of the defence filed by the defendants in these proceedings. It was raised *only* in the first defendant's show cause affidavit dated 26 July 2018 when the plaintiffs applied for summary judgment against the defendants. No explanation has been provided by the defendants for this delay in raising what would have been an obvious answer to the claim by the plaintiffs. I can only conclude that the estoppel argument was an afterthought raised by the defendants to delay judgment.

124 For the above reasons, I find that the defendants have not discharged their burden of showing that the plaintiffs had made a representation that the Term Sheet would not be enforced. As such, the defence of promissory estoppel fails.

The first defendant's counterclaim

125 The pleaded counterclaim by the first defendant is for damages arising from the plaintiffs' breach of the SSP Agreement by failing to transfer the OOB Sichuan shares to him. This claim is fundamentally flawed for several reasons.

126 First, as I have already found (at [80] above), the plaintiffs did not breach the SSP Agreement by failing to transfer the OOB Sichuan shares to the first defendant. From the time of the execution of that agreement, the first defendant had dictated the mechanics of how the shares would be transferred to him. He did not want them to be transferred to him at no consideration because doing so

would affect the market price of OOB Sichuan shares. The subsequent amendment to the NEEQ regulations in March 2017 effectively rendered clause 4 inoperable. From the evidence, it is clear that the parties had agreed that the first defendant would come up with an acceptable way for all the OOB Sichuan shares to be transferred from the plaintiffs to him.[143] This was not done by the time the Term Sheet was entered into, and that agreement superseded the SSP Agreement. In my view, it is entirely up to the parties now to come to a mutually acceptable way for the OOB Sichuan shares to be transferred to the first defendant.

127 Second, in any event, when one analyses the first defendant's evidence in more detail, it will be apparent that the first defendant's real complaint is that he *lost a chance* to do a trade sale of OOB Sichuan, and *not* that there were an offer that was made to him at that time which he could not accept because he did not have the plaintiffs' OOB Sichuan shares. There are several problems with this. For starters, the pleaded case is *not* that the first defendant had lost an opportunity to sell OOB Sichuan in a trade sale, but that there was a loss of profits *caused* by the failure to transfer the shares.[144]

128 Another insurmountable problem is that the first defendant's AEIC is bereft of any evidence of any *specific* opportunities to conduct a trade sale of OOB Sichuan. There is no evidence of any approaches by any interested party, or any suggested price or proposed terms. There is also no documentary evidence adduced of any such matters. Instead, all we have is the first defendant's evidence that he was talking to some potential counterparties, but

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143 Transcript of 20 August 2019 at Page 68, Lines 4 to 15.

144 See Defence and Counterclaim at [25] to [29].

the talks could not progress because he did not have the majority shareholding in OOB Sichuan without the shares from the plaintiffs.[145] That being the case, leaving aside that the fact that it was not pleaded, the state of evidence means that the first defendant's claim for a loss of chance cannot possibly succeed.

129 This conclusion is fortified by the holding of the majority of the Court of Appeal in the seminal case of *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd and another* [2005] 1 SLR(R) 661 at [139], where a two-stage test in relation to ascertaining an actionable loss of a chance was outlined:

> … First, did the breach on the part of the defendant cause the plaintiff to lose a chance to acquire an asset or a benefit? Second, was the chance lost a real or substantial one; or putting it another way, was it speculative? …

The position that evidence must be adduced to show causation of the loss of chance, and to show that any lost chance is real or substantial, is buttressed by several cases that followed, notably *MK Distripark Pte Ltd v Pedder Warehousing & Logistics (S) Pte Ltd* [2013] 3 SLR 433 at [54] to [58], and *Sports Connection Pte Ltd v Asia Law Corp and another* [2015] SGHC 213 at [20] to [22] and [92] to [97].[146] Given the limited state of the evidence raised by the first defendant in his AEIC (see [128] above), I am not satisfied that any purported breach by the plaintiffs can even be said to have caused the first defendant to have lost a chance to make a profit. Even if I am mistaken on this, I am not satisfied that any chance lost was real or substantial, particularly given

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145 YFK at [4.1.5].

146 NB that the judgment in *Sports Connection Pte Ltd v Asia Law Corp and another* [2015] SGHC 213 is in fact reported at [2015] 5 SLR 453, but the paragraphs from [92] to [97] are not included in the reported judgment.

the absence of documentary evidence on these matters.

130 Finally, I am unable to see how the opportunity to sell OOB Sichuan in a trade sale can be said to be a loss that is a natural and probable consequence of the failure to transfer the plaintiffs' OOB Sichuan shares pursuant to clause 4 of the SSP Agreement.

131 In *Out of the Box Pte Ltd v Wanin Industries Pte Ltd* [2013] 2 SLR 363 at [47], the Court of Appeal indicated that the assessment of whether a particular loss claimed was too remote involved ascertaining, in light of the defendant's knowledge and the circumstances in which that knowledge arose, whether that loss would "have been considered by a reasonable person in the situation of the defendant at the time of the contract to be foreseeable as a not unlikely consequence that he should be liable for". On the facts, the first defendant has simply not established on the evidence that the plaintiffs knew or ought to have known that he was in negotiations with any specific interested party to sell away OOB Sichuan. All that the Mr Lim and Mr Ding appeared to be aware of was that the first defendant hoped to effect a trade sale, not that there was any realistic possibility of one.[147] Mr Lim in fact gave evidence that the first defendant raised numerous plans and proposals in the past, but that nothing had come out of them.[148] In my judgment, the damages sought by the first defendant in its counterclaim are too remote. The requirement that loss caused is not too remote must be assessed in light of the entirety of the circumstances, and is not satisfied simply because a *possibility* had previously been raised.

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147 Transcript of 20 August 2019 at Page 24, Lines 4 to 24, and Transcript of 21 August 2019 from Page 28, Line 2 to Page 29, Line 20.

148 Transcript of 20 August 2019 at Page 24, Lines 4 to 24.

132 For the above reasons, I find that there is no merit to the first defendant's counterclaim.

Conclusion

133 For all the above reasons, I allow the plaintiffs' claim and dismiss the first defendant's counterclaim. As such, I order the first defendant to pay the sums of RMB 30,025,000 and S$4,410,000 that are due under the Term Sheet to the plaintiffs.

134 The plaintiffs are also entitled to interest on the sums at [133] at the rate of 5.33% from the date of the writ until the date of this judgment.

135 As for the Metro shares, the Term Sheet quite clearly evinces the parties' intention that the first defendant's 13.8% beneficial shareholding in Metro is to be made available as security for the payment of the Outstanding Amount. As such, I find that the Term Sheet has the effect of creating an equitable charge over the 13.8% of Metro beneficially owned by the first defendant. As the Court of Appeal observed in *SCK Serijadi Sdn Bhd v Artison Interior Pte Ltd* [2019] 1 SLR 680 ("*SCK*") at [22]:

> … [A]n equitable charge may arise whenever property is "expressly or *constructively* made liable, *or specially appropriated* to the discharge of a debt or some other obligation" … Yet, the paradigmatic example of a "charge" is that it is an instrument which creates security for a debt – *ie*, an instrument which gives a creditor a right to resort to certain property in the event of a default of repayment. Thus, in *National Provincial and Union Bank of England v Charnley* [1924] 1 KB 431, Atkin LJ remarked (at 449 – 450):
>
> > It is not necessary to give a formal definition of a charge, but I think there can be no doubt that where in a transaction for value both parties evince an intention that property … shall be made available as security for the payment of a debt, and that the creditor shall have

> a present right to have it made available, there is a charge …
>
> [Emphasis in original]

Further, at [25] of *SCK*, the Court of Appeal specifically observed that:

> … Where the equitable charge is used to create security for repayment, the creditor is usually given the right to resort to the property or have it sold *if the debt is unpaid* … [U]pon default the creditor gains an accrued right to resort to the charged property for satisfaction of the debt …
>
> [Emphasis in original, citations omitted]

136 The question then is whether having the right to "resort" to the Metro shares includes being able to seek an order for the Metro shares to be "delivered up" by having the physical share certificates handed over. I am of the view that it does. In *Beale et al on The Law of Security and Title-based Financing* (3rd Ed., Oxford University Press) at [18.33], the authors suggest that:

> … [T]here are a number of ways an equitable mortgagee or chargee can obtain possession. The most usual is by an express power to take possession … Possession can be taken with the consent of the mortgagor or charger, *or by an order of the court*, either directly for possession or for the appointment of a receiver who will have the power to take possession.
>
> [Emphasis added]

It is therefore open to the court to make an order for the chargee to be handed possession of the share certificates. In any event, the defendants have also accepted in their submissions that it is open to the court to make an order for the "delivery up" of the 13.8% of Metro owned by the first defendant should the Court adopt the plaintiffs' interpretation of the Term Sheet.[149] Accordingly, I order that the share certificates representing 13.8% of the shareholding of Metro

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149 DCS at [6.2.1].

are to be handed over by the defendants to the plaintiffs as continuing security for the Outstanding Amount.

137 I shall deal separately with the issue of costs.

Ang Cheng Hock
Judge

Daniel Chia Hsiung Wen, Ker Yanguang and Wong Ru Ping Jeanette (Morgan Lewis Stamford LLC) for the plaintiffs;
Chan Ming Onn David, Zhang Yiting and Lin Ruizi (Shook Lin & Bok LLP) for the defendants.
