Burby, Mark v Koo Khin Yong and Others
[2004] SGHC 194

Case Number : Suit 762/2002

Decision Date : 03 September 2004

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Suresh Nair and Vincent Teh (Allen and Gledhill) for plaintiff; Roslina bte Baba and Linda Low (Ramdas and Wong) for first defendant; Andre Yeap SC and Tan Teck Wang (Rajah and Tann) for second and third defendants

Parties : Burby, Mark — Koo Khin Yong; Pengiran Haji Mohd, Ayub; Pengiran Anak Hajah Damit

Civil Procedure – Pleadings – Plaintiff pleaded numerous versions of his case -Whether defendants' failure to ask for particulars precluded them from alleging that plaintiff's pleaded case was different from plaintiff's case actually presented

Contract – Breach – Documents "subject to contract" – Whether plaintiff could show documents nevertheless enforceable.

Contract – Formation – Whether parties agreed to enter into contract in personal capacities – Whether documents referred to parties as individuals or as corporate entities – Whether contract formed by correspondence

3 September 2004 Judgment reserved.

Judith Prakash J:

Introduction

1 A good summary of this case is contained in the pleadings. In the Statement of Claim, the plaintiff, Mr Mark Burby, is described as being a director and shareholder of CBTL Holdings Ltd ("CBTL"), a company incorporated under the laws of Jersey with its registered office there. The first defendant, Ms Koo Khin Yong (usually referred to by the parties as "Alice"), a Singapore resident, is stated to have acted at all material times in her own capacity as well as that of an agent, representative and/or servant of the second and third defendants, Pengiran Haji Mohd Ayub ("Pg Ayub") and his wife, Pengiran Anak Hajah Damit ("Pg Damit"), who reside in Brunei Darussalam.

2 Paragraph 2 of the Statement of Claim avers that between March 2001 and April 2002, Mr Burby and Ms Koo reached an agreement for the defendants to invest in or provide financing for a project initiated by Mr Burby and his associates. The objective of the project was to develop and operate a chain of "The Coffee Bean and Tea Leaf" cafes in the United Kingdom. By para 3 it was stated that the agreement so reached was partly oral and partly evidenced in writing and that Mr Burby would rely on, *inter alia*, the e-mail messages sent by him and Ms Koo to each other between March 2001 and April 2002, and two other documents. The first of these is referred to as an Approval of Heads of Terms dated 14 December 2001 ("the Approval") and the second as a Term Sheet dated 19 November 2001. The latter was actually signed on 14 December 2001. I shall from time to time hereafter refer to those two documents as "the 14 December documents".

3 By para 4 of the Statement of Claim, it is stated that the express and/or implied terms of the

agreement are that:

(a) The defendants were to invest in the project or finance it by providing funds of up to a total of £7.5m by subscribing for preference shares in CBTL and making shareholders' loans to CBTL.

(b) The defendants were to provide seed funding of £300,000 for the project by paying CBTL £150,000 on 28 December 2001 and a further £150,000 on 11 January 2002.

4 In para 5, it is asserted that Ms Koo had made numerous representations to Mr Burby that the seed funding would be paid in February 2002 and that the defendants were fully committed to the investment. This is followed by an averment in para 6 that Mr Burby had, in reliance on Ms Koo's representations, personally incurred costs and expenses in the setting up of the project. Short particulars of these were given.

5 By para 7, it is averred that in breach of the agreement, the defendants have failed, refused and/or neglected to perform the obligations set out in para 4 and that as a result of that breach, Mr Burby has suffered loss and damage. Mr Burby then makes a claim for specific performance of the agreement and alternatively, damages, interest and costs. Mr Burby has since dropped the claim for specific performance.

6 The three defendants filed a joint Defence. The same solicitor, Ms Roslina Baba of Ramdas & Wong, represented them until part way through the trial when Pg Ayub and Pg Damit instructed another firm of solicitors to act for them. Ms Baba continues to represent Ms Koo.

7 At the start of the joint Defence, the defendants deny para 1 of the Statement of Claim. The first defendant avers that at all material times, she was acting as an agent of Smart Plus International Holdings Ltd ("SPIH"), a company incorporated in the British Virgin Islands on 18 September. She did not act in her own capacity nor did she act as an agent, representative or servant of the other two defendants.

8 In para 2, the defendants aver that Ms Koo had not reached any final, valid, binding and enforceable agreement with Mr Burby for herself and the other two defendants to invest in or provide financing for the project. They assert that Mr Burby, who represented CBTL in the negotiations, was aware that any investment in the project would be made by way of an investment company and not by the defendants in their personal capacities.

9 The defendants also plead that the 14 December documents had been signed by Mr Burby and Ms Koo as representatives of CBTL and SPIH respectively to record the terms of the proposed investment. These documents were made subject to contract and were not intended to create a valid and enforceable agreement between CBTL and SPIH. The defendants also deny that Ms Koo had made the alleged representations to Mr Burby. It was the express intention of the parties that all negotiations were subject to contract. The defendants end by including the usual general traverse of the allegations in the Statement of Claim.

10 From the pleadings therefore, it appears that the main issue to be decided is whether a contract had been concluded between the plaintiff and all three defendants in the manner alleged. Determining this issue could also, possibly, mean determining whether Ms Koo had been acting on behalf of SPIH or whether she had represented herself and the two other defendants individually, and also whether she had had authority from the other two defendants to represent them in their personal capacities.

The facts

The search for an investor

11 Sometime in 2000, Mr Burby and two business associates, one Mr Ali Karahassan and one Mr Peter Machon, decided to obtain a franchise to operate a chain of The Coffee Bean & Tea Leaf outlets in the United Kingdom. Their plan was that the franchise be given by International Coffee & Tea LLC ("the franchisor") to a corporate entity to be called Coffee Bean & Tea Leaf (UK) Pte Ltd ("CBTL UK") and this company would be owned by a holding company to be incorporated in Jersey, *ie*, CBTL. Negotiations with the franchisor were successful. In order to proceed with the project, however, the plaintiff and his associates needed funds to pay the franchise or licence fee and also to obtain premises and equipment and staff for the various The Coffee Bean and Tea Leaf outlets.

12 An investment banker, one Hans Kunz, approached Pg Ayub in late 2000 to find out whether he and his wife, Pg Damit, would be interested in investing in the project. They were considered to be potential investors because they are related to the royal family of Brunei and had been involved in various businesses. Pg Ayub asked Ms Koo whether she would be interested in participating in the project with them. When she said she was, Mr Kunz was referred to her and he then met her and gave her a draft investment proposal. In March 2001, Ms Koo spoke with Mr Burby for the first time. They arranged to meet in Singapore for further discussions. Mr Burby then sent Ms Koo an e-mail to which he attached certain documents including an updated investment proposal. This document was stated to be between "the Founders", who were specified as being Mr Burby, Mr Karahassan and Mr Machon, and "the Investor". The preamble stated that the proposal related to the incorporation and share structure of CBTL, the ultimate holding company in relation to the investment. It was proposed that the Investor acquire 50% of the equity of the holding company and the other 50% would be held by the Founders, the franchisor and Mr Kunz. In the e-mail, Mr Burby signed off as "Mark Burby, Chief Executive Officer, CBTL (Holdings) Ltd". He used the same designation in his next two e-mails to her in which he confirmed arrangements for their meeting. It should be noted that CBTL was not incorporated at that time.

13 On 21 March, Mr Burby and his associates met Ms Koo at her lawyer's office in Singapore. Mr Burby then presented his proposal in further detail. According to Ms Koo, her understanding from the start of the negotiations was that the investment was to be made in CBTL. She said she had made it clear to Mr Burby that if the other two defendants and she were to invest in the project, they would be investing through an investment vehicle of which they would be the shareholders. Hence, throughout the negotiations, the three defendants were referred to as "the Investor".

The memorandum of understanding and subsequent documents

14 Thereafter, there were numerous letters and telephone conversations between Mr Burby and Ms Koo in relation to the proposed investment. Sometime in April, Mr Burby prepared a memorandum of understanding ("MOU") in relation to the investment. A copy of this document was given to Ms Koo. The first few lines of the document read as follows:

> **Memorandum of Understanding** between
>
> **1) Mark Burby** hereinafter referred to as **(MB)**
>
> **2) Ali Karahassan** hereinafter referred to as **(AK)**
>
> **3) Peter Machon** hereinafter referred to as **(PM)**

4) The Investor's Entity to be defined hereinafter referred to as **(The Investor)**

This memorandum of understanding relates to the incorporation and share structure of CBTL Holdings Limited ("CBTL"). These terms are for indicative purposes and notwithstanding any signature will not constitute any legal binding obligation on any person signing these terms.

At the end of the document, the names of the parties were set out and space was provided for their signatures. In relation to the Investor, the rubric adopted was "Investor (Duly authorised representative)". On 9 April, Ms Koo told Mr Burby that she would comment on the MOU after she had been able to discuss it with her lawyers. Due to what she called "time factors", Ms Koo wanted to change some of the terms of the investment.

15 Between April and June 2001, the parties continued to communicate over the telephone and *via* e-mail. In an e-mail dated 25 June, Ms Koo informed Mr Burby that she hoped to provide him with an amended MOU within a week. She did not do so and thereafter, Mr Burby continually pressed Ms Koo for the amended MOU and subsequently for the same to be signed by all parties. By mid July, he was referring to it as "Heads of Terms" rather than as an MOU.

16 In mid August, a new document made its appearance. This superseded the MOU and was entitled "Proposed Investment in CBTL Holdings Limited Term Sheet" ("the Term Sheet"). It was dated 16 August 2001. At the top of each page of this Term Sheet the phrase "Confidential and Subject to Contract" appeared. According to Ms Koo, Mr Burby sent this Term Sheet to her. Mr Burby, however, said that he had not drafted it. He thought Ms Koo's solicitor had drafted it. He referred to a meeting that he had had in Singapore with Ms Koo on 17 August and to a note he had received from her attaching what she called "copy of review Term Sheet from Ros [*ie* Ms Baba]". The parties then met with Ms Baba and went through the Term Sheet. By the time Mr Burby arrived back in the United Kingdom on 19 August, he thought that they had been able to reach an agreement that could allow them to move forward with the establishment of The Coffee Bean & Tea Leaf in the United Kingdom. Ms Koo was equally optimistic. She replied that the parties had moved "a big step to allow ground work to start" for the preparation of the project. She said that she would be returning as early as she could to Brunei for a final meeting with Pg Ayub in relation to the setting up of the business.

17 On 3 September, Mr Burby sent Ms Baba the draft shareholders' agreement. His e-mail stated that changes had been made to it to reflect the provisions in the "Heads of Terms" by which he must have meant the Term Sheet. He said that the articles of association would be sent to her within the next few days. Then Mr Burby went on:

> One change that will require to be made in the draft shareholders agreement is the reference to CBTL Holdings Limited as "the company". The ADA and FA refers to International Coffee & Tea LLC as "the company" and CBTL Holdings Limited as "the developer". For consistency I would like all documents to use the same reference. I have not made the change for now and will make it once I have received your comments.

It should be noted that the shareholders' agreement, following the scheme originally set out in the MOU, was proposed to be made by and amongst a number of parties. The first three parties were Mr Burby, Mr Karahassan and one Mr Jonathan Stobart (in place of Mr Machon), as original shareholders. The fourth party was the franchisor. The sixth party was CBTL. The fifth party, obviously the party representing the interests of Ms Koo and her associates was not given a name but was described as follows:

> [The Investor], of … (hereinafter called "XYZ" which expression where the context so permits

shall include XYZ and its successors or permitted assigns).

In that description the wording "which expression where the context so permits shall include XYZ and its successors or permitted assigns" indicated that the entity described was a corporate entity. Similar phraseology was used after the name of the franchisor. In contrast, after the names of the individuals, like Mark Burby, the phraseology that followed was: "which expression … shall include Mr Burby and his heirs, executors, administrators and permitted assigns".

The revised Term Sheet

18 On 25 September, Mr Burby had a telephone conversation with Ms Koo. During the conversation Ms Koo informed him that she expected to be able to provide him with the signed Term Sheet soon. However, this was not done and Mr Burby continued to press for it. On 19 November, *via* a covering e-mail that was sent jointly to Mr Burby and Ms Koo, Ms Baba sent out a revised draft of the Term Sheet. The covering note said that the draft was subject to Ms Koo's further comments and also stated that the particulars of the "Investor Company" were not with Ms Baba and that Ms Koo should furnish these. Ms Baba asked the parties to confirm that the terms of the revised draft accorded with their intentions.

19 The revised draft had the same title as the original Term Sheet. Every page of it also bore the wording "Confidential and Subject to Contract". The date of the draft was, however, changed to 19 November 2001. The preamble of the revised Term Sheet stated that:

> Smart Plus Investments Limited (the "Investors") are interested in investing in CBTL Holdings Limited (the "Developer"), with the objective of maximizing the returns to the shareholders of the Developer …
>
> The Developer has its registered office in Jersey and is founded by Mr Mark Burby, Mr Ali Karahassan and Mr Jonathan Stobart (collectively referred to as the "Individual Founders") and International Coffee & Tea LLC (collectively with the Individual Founders, known as the Founders).

Signing in Singapore

20 Mr Burby arrived in Singapore on 11 December to meet the franchisor and also to discuss the proposed shareholders' agreement and Term Sheet with Ms Baba and Ms Koo. He and his associates met Ms Koo on that day and discussed the project. They were not able to finalise the shareholders' agreement but, according to Mr Burby, Ms Koo agreed with him that the Term Sheet would be exchanged in Singapore so that the shareholders' agreement could be exchanged in London by the end of January 2002.

21 Ms Koo, on her part, requested Ms Baba to acquire a company to be used as the investment vehicle for the project. On 14 December, the defendants acquired a company that had been incorporated in the British Virgin Islands in September 2001 under registration number 463318. The defendants became the registered shareholders and directors of the company on 21 December. On acquisition, the company was named "Smart Plus Consultants Limited". The defendants intended to change its name to "Smart Plus International Limited" but were not able to acquire that name and in January 2002, the company became SPIH.

22 On 14 December 2001, Mr Burby and Ms Koo met again and the 14 December documents were signed. The contents of both documents are important but I will set these out later so as not to

break up the narrative flow. For the time being, it is only necessary to note that by cl 15 of the Term Sheet, the "Investors" agreed to pay the "Developer" £150,000 within two weeks "after the acceptance of these terms by both parties" and a further sum of £150,000 within 30 days of acceptance.

23 Mr Burby then returned to the United Kingdom. On 16 December, he wrote to Ms Koo and set out the sequence of events that he considered had to take place between then and the end of January 2002. These were:

(a) the Investors' BVI investment company had to obtain a change of name, CBTL had to be incorporated and a UK bank account had to be opened;

(b) a letter of intent and confidentiality agreement with the franchisor had to be concluded;

(c) seed funding of £150,000 had to be provided by 28 December 2001 followed up by another £150,000 by 11 January 2002;

(d) the draft shareholders' agreement already with Ms Baba was to be marked up with comments and returned to Mr Burby;

(e) a marked up copy of the shareholders' agreement was to be reviewed by Mr Burby and the franchisor prior to its return to Ms Baba;

(f) agreements with the franchisor had to be finalised and exchanged;

(g) prior to the end of January 2002, a meeting was to be arranged between all parties in either London or Singapore to finalise and to exchange the shareholders' agreement. Within seven days of exchange, the balance investment of £4.7m was to be drawn down.

24 Mr Burby attached to his e-mail to Ms Koo, a copy of a "corporate family tree". This set out the corporate structure of the companies involved in the project. The operating company was the English entity CBTL-UK. It was wholly owned by CBTL which, in turn, was owned by Mr Burby and his associates, the franchisor and what was described as "Brunei investor". The corporate tree also stated that the Brunei investor was in fact SPIH, a BVI company that had been incorporated for the purpose of investing in the project. The names of the defendants were given as the names of the shareholders of SPIH.

25 Mr Burby then turned his attention to obtaining the incorporation of CBTL in Jersey, an aim that was achieved on 18 January 2002. For this purpose, he corresponded with Ms Baba who in turn corresponded with his Jersey lawyers who required certain information about the defendants as they were the beneficial owners of SPIH and also about Ms Koo and Pg Ayub who were to be executive directors of CBTL. By 13 January 2002, Mr Burby was becoming concerned as he had not received any part of the £300,000 that he had been expecting to arrive by 11 January. He therefore wrote to Ms Koo pointing out that he had anticipated getting the first half of the money on 28 December 2001 and the balance on 11 January 2002, and asking if she would be prepared to deposit the total amount so as to keep the project on schedule. By two letters dated 14 and 24 January, Ms Koo replied that she was aware of the delays relating to the seed funds and indicated that until SPIH had been fully set up, it was a bit difficult for her to send the money. She also wanted to have CBTL's account details as she was not willing to pay money into Mr Burby's personal account. In her second e-mail that was sent in response to Mr Burby's e-mail of 23 January containing CBTL's bank account details, Ms Koo stated that the change of name process should be completed within the next few days and

once that was done:

> … we will proceed to remit all the seed funds in one transaction to the new account which was just provided by you and we will also need to sign the official Head of Terms under the approve [*sic*] BVI company name to replace our last copy which was signed under Smart Plus Investment. The delay for this transaction has no way to be avoid [*sic*] as all investment funds must first be deposited into the BVI investment company before being transfer [*sic*] to CBTL (Holding) Limited.

Where are the seed funds?

26 No money was sent. On 4February, Mr Burby wrote to Ms Koo that he was in desperate need to receive the seed funds immediately. Ms Koo sent him reassuring messages on 5 and 6 February but the funds had still not arrived by 11 February so Mr Burby then sent her a chaser. On 23 February, Ms Koo sent another reply that, in effect, assured him that the funds would be in hand soon. As this message is relied on as a contractual document, I will set out its contents in some detail:

> Dear Mark,
>
> Sorry to hear that you having problem to reach me. … We are fully aware of the urgency of the seed funds and are now prepare for the necessary documents to be sign by three of us before any remittance take place. Today is a public holiday for most of the Asian country … There will be some delay but not long from now which I can assure you for this to take place. We are proceeding ahead for this investment and no one going to chicken out at [t]his stage, which we are all looking forward to celebrate the open ceremony with you guys in London soon.
>
> …
>
> Kind regards,
>
> alice koo

27 Mr Burby was very frustrated by that stage and he was not reassured by Ms Koo's message. He replied to her the same day saying that he had trusted her for some time but positive words were no longer able to sustain the situation and he desperately required reliability. He asked for a date when seed funds would be transferred to CBTL's account. Ms Koo replied on 26 February. She stated that she had been advised that the change of name to SPIH had been completed and that the next step would be for the three defendants to take up their shares in SPIH and open its bank account. She also said that her lawyer had advised her that no transfer of funds could take place until the shareholders' agreement had been signed and that, in itself, could not take place until Mr Burby and his associates had proved that the franchise was in hand. She emphasised that until the paperwork was done properly there would be no transfer of funds. Mr Burby was upset by this message and wrote a long and emotional reply to her emphasising that he had, in the expectation of receiving the seed funds, accelerated the progress of the project and spent significant sums of money. He said that as soon as he received the seed funds, the letter of intent with the franchisor would be signed.

28 On 6 March 2002, Mr Burby and Ms Koo had a telephone conversation. On 12 March he wrote to her asking her to confirm that the seed funds had been wired to his account in accordance with her verbal agreement on 6 March. On 13 March he sent her another message referring to her agreement on 6 March. On 18 March he wrote to her referring to the discussion they had had that day in which she had apparently said that she was sending funds from her private offshore account. On 22 March, Ms Koo said that she would provide Mr Burby with a bank slip once the seed funds had

been transferred and that this was expected to be completed by the following week. Further exchanges of correspondence took place but no money arrived. On 5 April, Mr Burby sent Pg Ayub a fax setting out the history of his negotiations and his frustrations. Subsequently, he also telephoned Pg Ayub. On 11 April he received a letter from Ms Baba stating that Pg Ayub and Pg Damit were unhappy about these telephone calls and asking him to cease calling Pg Ayub. No money was received then or thereafter.

The action

29 This action was started on 2 July 2002. It came up for trial before me on 3 February 2003. The parties got to talking and the trial did not start. It was adjourned *sine die* on the basis that Ms Koo was to furnish Mr Burby with a cheque for £300,000 post-dated to 15 March 2003 and made payable to CBTL. Mr Burby was to discontinue his suit upon the funds being cleared. If, however, the cheque was dishonoured or stopped, Mr Burby would be entitled to apply for the action to be restored for trial without prejudice to any of his claims. At the same time, an agreement was signed between SPIH and CBTL providing for investment by SPIH in the project. In the event, Ms Koo stopped payment on the cheque and, in September 2003, Mr Burby applied for the action to be restored for hearing. The action finally came up for hearing in January this year.

The contents of the documents signed on 14 December 2001

30 In order to understand the submissions it is necessary to have a fairly detailed knowledge of the contents of the 14 December documents. The first of these documents is the Approval which had been drafted by Mr Burby. It reads as follows:

Approval of Heads of Terms

Minute of meeting held on 14 December 2001, held at the InterContinental Hotel Singapore

Present: Representing the Investor – Alice Koo

Representing the Developer – Mark Burby

Resolutions

1. The attached Heads of Terms – 'Exhibit A' were hereby approved by both parties.

2. Investor to use best endeavours to register the proposed change of name from Smart Plus Consultants Limited to Smart Plus Investments Limited in respect of their chosen Investment vehicle (BVI No. 463318) within seven days of the date of this minute. Should the proposed vehicle name not be available the Investor has the absolute right to use a name at its discretion.

3. Developer to use best endeavours to register the development vehicle within seven days of the date of this minute.

4. The dates contained within 'Exhibit A' are effective from the date of signing this minute and both parties will use best endeavours to formally exchange 'Exhibit A' within seven days.

Signed for the Investor – Alice Koo Date: 14-12-2001

Signed for the Developer – Mark Burby Date: 14-12-2001

31 The second document, the "Exhibit A" referred to in the Approval, was the Term Sheet. Each page of the Term Sheet was initialled by Ms Koo and Mr Burby and on the last page Ms Koo's signature appeared against the wording "Signed by _____ for and on behalf of _____" whilst Mr Burby's signature appeared against the wording "Signed by Mark Burby for and on behalf of _____". Thus, neither party had indicated on whose behalf he or she was signing the document.

32 The contents of the signed Term Sheet were almost identical to those of the draft of 19 November 2001. The preamble with the definition of the parties remained as I have set out in [19] above. The wording "Confidential and Subject to Contract" remained at the top of each page. There were only two parties to the Term Sheet, the "Investors" and the "Developer" but the terms "Individual Founders" and "Founders" were defined. The clauses of the Term Sheet remained unchanged with only two exceptions: cl 12(h) was amended by inserting a reference to "International Coffee & Tea LLC" and cl 14 was amended by inserting "31 January 2002" as the proposed completion date. The more important clauses, for present purposes, are as follows:

1. **Investment by the Investors**

The Investors shall invest up to GBP7,500,000, of which GBP2,500,000 shall be through subscription of Series 'A' Redeemable Convertible Preference (RCP 'A') Shares ("Equity Investment") and (a) GBP2,500,000 shall be by way of Shareholders' Loan to the Developer to be made on Completion of the Investment Agreement and (b) subject to fulfilment of certain conditions, a further sum of GBP2,500,000 by way of a Second Shareholders' Loan.

…

2. **Terms of Redeemable Convertible Preference Shares**

2 . 6 Co-Sale Obligation: In the event that the Developer cannot achieve an Exit Event by 31 December 2006, the Investors shall have the option of procuring a purchaser(s) for the entire share capital of the Developer. Upon request by the Investors, the Founders shall procure that the Developer shall sell to such purchaser(s) all its shares in the Developer at the same time as the Investors on such terms and conditions as shall be agreeable to the Founders and Investors.
…

…

2.10 Other Terms & Conditions: …

Other detailed terms and conditions of the RCP 'A' shares are to be spelt out more specifically in the Shareholders Agreement on terms to be agreed between the parties.

…

4. **Founders' Obligations and Undertakings**

The usual warranties and representations pertaining to the financial and business conditions of the Developer are to be specifically spelt out and agreed in the Subscription and Shareholders Agreements.

…

9. **Reserved Matters**

The Developer shall not, without the prior consent of the Investors (such consent not to be unreasonably withheld), inter alia, among other normal operational and/or strategic considerations to be spelt out more specifically in the Agreement:

a. Acquire or dispose of any interest in any subsidiary;

b. Sell or dispose of the whole or a substantial part of the undertaking and goodwill or the assets of the Developer;

c. Increase, reduce or cancel the authorized or issued share capital of the Developer or issue or grant any option over the non-issued portion of the authorised share capital of the Developer; and

d. change in the rights of any class of issued shares;

…

Such considerations are also applicable to the subsidiaries of the Developer.

…

12. **Conditions Precedent for Completion of Investment**

This proposed investment by the Investors in the Developer is subject, inter alia, to the following:

a. Completion of an investment audit on the Developer, and the results of the investment audit being satisfactory to the Investors;

b. No adverse change (as determined by the Investors) in the prospects, operations or financial conditions of the Developer from the date of the audit to the date of completion;

…

h. The execution of the franchise agreement between the owner of the International Coffee & Tea LLC for the business with the Developer.

…

13. **Undertaking, Representation and Warranty**

13.1 Each of the Individual Founders undertakes to continue their employment in the Company for a minimum period of 24 months from the completion date, unless otherwise agreed subsequently or incapacitated through serious injury, illness or death.

…

13.4 The Founders warrant that there shall be no change in their beneficial ownership in the Developer without the Investors' consent. The Founders also warrant that they shall not pledge their Developer shares as collateral to other parties other than a high street bank for the purpose

of personal borrowing to finance acquisition of shares in the share capital of the Developer.

13.5 The Founders undertake that they will not sell or transfer their interest in the Developer without consent of the Investors for a period of three (3) years from the date of completion of the Shareholders' Agreement.

14. **Completion**

The Developer and the Investors would endeavour, on a best effort basis, to complete the investment by 31st January 2002.

15. **Drawdown of Investment**

The Investors shall pay to the Developer as an advance of the Equity Investment a sum of GBP150,000 within two (2) weeks after the acceptance of these terms by both parties and a further sum of GBP150,000 within thirty (30) days after the acceptance of these terms by both parties.

The plaintiff's case

33 In the Closing Submissions made on behalf of Mr Burby, his position was as follows:

(a) the Term Sheet was a valid and binding contract;

(b) alternatively, the Approval, read with the Term Sheet was a valid and binding contract;

(c) in the further alternative, the correspondence up to 23 February 2002, together with the Term Sheet and the Approval, reflected a valid and binding contract under which the defendants were to make the investment in the project on the terms of the Term Sheet;

(d) the parties to the agreement were the plaintiff and the defendants; and

(e) the parties are liable and entitled as direct parties to the contract or as the promoters of SPIH and CBTL.

The pleading point

34 The defendants had various answers to the plaintiff's submissions. Their first point was that the plaintiff's case as stated in the Closing Submissions had not been pleaded and was the last of the many versions of his case that had been put forward in the course of the proceedings as the following summary showed:

(a) The Statement of Claim pleaded that the agreement had been reached between March 2001 and April 2002 and that it was partly oral and partly written and included all e-mail messages between the parties during that period in addition to the 14 December documents.

(b) The plaintiff's Opening Statement filed on 30 January 2003, stated that between March 2001 and April 2002, Ms Koo, on behalf of all three defendants, reached an agreement which was partly oral and partly in writing, with Mr Burby, to invest in the project and which included the signing of "a Heads of Terms dated 14 December 2001". Whilst this paragraph tracked the Statement of Claim, in a later paragraph of the Opening Statement, it was stated that it was the

plaintiff's case that the parties had reached an "in-principle" agreement to negotiate and sign an MOU which would be followed by an initial draw-down of funds and that a shareholders' agreement would be signed after the initial draw-down. The parties had then negotiated the MOU that was signed by Mr Burby and Ms Koo in Singapore on 14 December 2001.

(c) Mr Burby in his affidavit of evidence-in-chief, stated that on or about 8 April 2001, the parties reached an in-principle agreement for the defendants to invest in the project and, by this time, he had already given Ms Koo a copy of an MOU to be signed by the parties. However, due to what she called "time factors", Ms Koo wanted to change some of the terms of the investment so he had worked on refining the terms of the investment to suit the defendants' requirements and, on 11 December 2001, Ms Koo had agreed with him that the Term Sheet would be exchanged in Singapore so that the shareholders' agreement could be exchanged in London by the end of January 2002.

(d) The plaintiff's Supplemental Opening Statement filed on 21 January 2004, by which time the plaintiff had changed lawyers, stated his case to be that he had entered into negotiations with the defendants from March 2001 and managed to secure "the commitment" of the defendants to invest in the project. The terms of the investment were reflected principally in the Term Sheet signed on 14 December 2001 and on the same date, another document, the Approval, had also been signed. The defendants had ignored their obligations under the Term Sheet which was a valid and binding document and enforceable as such.

(e) In the course of proceedings, Mr Nair, counsel for Mr Burby, when asked to state the date on which the agreement between his client and the defendants in their personal capacity was concluded, stated that there were two levels of answers namely:

(i) the agreement was concluded on 14 December 2001 when the 14 December documents were signed; and

(ii) if that was not the case, then the agreement was concluded by 23 February 2002 when Ms Koo sent an e-mail to Mr Burby stating that she was "fully aware of the urgency of the seed funds".

(f) The plaintiff's case, as put to the second and third defendants, was that the 14 December documents were valid and binding agreements between the defendants and the plaintiff and, in any event, by 23 February 2002, such valid and binding agreement existed and the agreement reflected in Ms Koo's e-mail of that date was that the defendants would invest £7.5m in the project on the terms set out in the Term Sheet.

(g) Finally, in the Closing Submissions, the position was that the agreement was constituted by the Term Sheet alone or by the Term Sheet and the Approval, or by both these documents and all the correspondence up to 23 February 2002.

35 It was submitted on behalf of the second and third defendants that the plaintiff's case, as put to the defendants and subsequently presented in his Closing Submissions, had deviated materially and significantly from his case as pleaded in the Statement of Claim. It was further submitted that the plaintiff was bound by his pleadings and that the court was not entitled to make a finding on an issue that had not been pleaded by the plaintiff. The defendants contended that it had not been pleaded that:

(a) the 14 December documents were in themselves valid and binding agreements between

the plaintiff on the one hand and the defendants on the other, in their respective personal capacities;

(b) that the 14 December documents were signed by the first defendant on behalf of the second and third defendants in their personal capacities; or

(c) the agreement between the plaintiff and the defendants was a collateral contract or amounted to a collateral warranty to either the Approval or the Term Sheet and had induced the plaintiff to sign those documents.

36 Taking the third point first, I agree that there has been no pleading of any collateral contract between the parties or any collateral warranty given by the defendants to the plaintiff. It might have made sense, on the facts, for the plaintiff to plead such a collateral contract or warranty so that he could argue that even if the written agreement was between the two companies, nevertheless, there were contractual obligations owing to him personally by the defendants personally. However, he did not take that course. Having failed to plead the existence of a collateral contract or warranty, the plaintiff would not be entitled to rely on the same at this stage. In any event, the plaintiff himself has not made any submissions that such a contract or warranty existed. The issue, therefore, does not arise.

37 The next point in this submission on pleading is a little trickier. The Statement of Claim averred that the contract was partly oral and partly evidenced in writing and made between March 2001 and April 2002. This implied that the contract was concluded around April 2002. The plaintiff's first two submissions, in effect, state that the contract was wholly in writing and contained only in the Term Sheet or, alternatively, in both 14 December documents, and that it was made on 14 December 2001. Is the plaintiff entitled to take this course now? The plaintiff's response was that the defendants' submission was odd because the defendants in their Defence had dealt extensively with the 14 December documents in an endeavour to show that they were subject to contract and were not intended to create binding obligations. Further, the defendants did not ask the plaintiff for particulars of the precise documents being relied on or of the dates during the period between March and April 2002 that were being relied on. As the defendants did not seek to limit the generality of the pleading by particularising them, the defendants must take the consequences of that failure.

38 I do not find the plaintiff's response very satisfactory. The plaintiff has the duty to clearly set out the basis on which his claim is being made. A contract that is wholly in writing is a different creature from a contract that is partly written and partly oral. For one thing, the way in which the contract and its terms are proved is different. Further, the date on which a contract has come into existence is an important matter and must be indicated fairly specifically. A defendant has the right to know the material allegations that are being made against him. He can ask for further particulars if he desires but he does not have a duty to ask for particulars of basic allegations. If he fails to do so, he is not precluded from alleging that the case pleaded is different from the case actually presented. In this case, the Statement of Claim, having stated that the contract was partly in writing and partly oral, did refer to the 14 December documents but in the context that those documents formed part of the agreement but not all of it. The implication to be taken from the Statement of Claim was that the defendants were legally bound from around April 2002 onwards. There was no clear statement that they were bound immediately the 14 December documents were signed. The Statement of Claim may have been pleaded in that way because, at the time it was drafted, it was thought that the phrase "subject to contract" that appeared on the top of the Term Sheet precluded that document from, in itself, constituting the contract, and therefore something else had to occur before the contract came into being. Whatever may be the reason for the phraseology of the Statement of Claim, however, the plain intent of that pleading was that the plaintiff's position for the purpose of the court proceedings,

the position that he had to prove in order to establish liability on the part of the defendants, was that a contract came into existence on the basis of both oral and written communications and that the latter included not only the two documents in question but also the e-mail messages between the parties during the relevant period. It is therefore my judgment that as a matter of strict pleading, the plaintiff is prohibited from contending that the 14 December documents standing alone amount to a legally enforceable agreement. This prohibition does not apply to his alternative stand that the contract is to be gathered from all the correspondence between March 2001 and 23 February 2002 as well as the 14 December documents as that stand more nearly accords with his pleading and I do not think that the fact that he now says the contract was concluded on 23 February 2002, rather than sometime in April 2002, makes much of a difference.

39 In case I am wrong in this finding, however, I will go on to consider whether, assuming this course was allowed by the pleadings, either the Term Sheet alone or both the Term Sheet and the Approval constituted a binding contract.

Is the Term Sheet alone a binding contract?

40 The first reason why the defendants say that the Term Sheet cannot constitute a binding contract is the presence of the phrase "subject to contract" at the top of each page of the document. They point out that that phrase is the classic phrase employed when the parties do not want to be contractually bound. For a binding contract to come into existence, there must be a final and unqualified expression of assent to contract and, *prima facie*, when that phrase is found in a signed document, it means that notwithstanding their signature of the document, the parties thereto did not intend to give such a final and unqualified expression of assent. The phrase has received much judicial attention, most recently in *Compaq Computer Asia Pte Ltd v Computer Interface (S) Pte Ltd* [2004] 3 SLR 316 where the Court of Appeal had to decide whether a letter of award containing the phrase "subject to final terms and conditions being agreed" had contractual force. The court recognised that where the classic term "subject to contract" appeared, no formal contract resulted until some further step was taken unless the circumstances were exceptional. As Chao JA observed at [35]:

> The authorities are almost of one view that the expression "subject to contract" means that until a formal written agreement is drawn and executed between the parties, there would be no binding contract between them. Of course, how a qualifying phrase of this nature should be construed must also depend on the context of the entire document. In *Alpenstow Ltd v Regalian Properties plc* [1985] 2 All ER 545, the court held that there was a binding contract even though the expression "subject to contract" was used because of a very strong and exceptional context.

The court went on to find, after conducting a detailed examination of the letter of award, that the use of the phrase "subject to final terms and conditions being agreed" showed that there had been no final and unqualified expression of assent to contract by the parties so as to constitute a binding contract.

4 1 *Alpenstow Ltd v Regalian Properties plc* [1985] 1 WLR 721; [1985] 2 All ER 545 involved an exchange of letters between the parties whereby a pre**l**existing contract, in which the plaintiffs undertook to give the defendants a first option to purchase land in certain circumstances, was cancelled and replaced by a fresh agreement which was made "subject to contract". The letters contained detailed provisions on how a sale would be effected and the defendants lodged certain cautions in the land registry against the plaintiffs' titles. The plaintiffs subsequently contended that the letters amounted to no more than an agreement to agree and could not constitute a binding contract to convey an interest in the land. This argument was rejected. It was held that on their true

construction, the letters, which constituted a detailed and conscientiously drafted document cancelling and replacing a previous binding agreement, provided a very strong and exceptional context in which the words "subject to contract" should not be given their *prima facie* meaning whereby either party could withdraw before contracts were exchanged in accordance with ordinary conveyancing practice.

42 The conclusion to be drawn from the case law therefore, is that a document containing the clause "subject to contract" will, *prima facie*, not constitute a binding obligation unless there are exceptional circumstances that show that the *prima facie* implication must be displaced. The person who asserts that the *prima facie* implication is not applicable is the one who must prove it. In this case therefore, the onus of establishing the contractual status of the Term Sheet lies on the plaintiff.

43 In order to discharge this onus, the plaintiff relied on various pieces of evidence. He pointed out that when asked in cross-examination whether she had acted on the basis that the 14 December documents were valid and binding, Ms Koo's reply had been, "Yes I agree but it's still subject to contract". When pressed on this point, she said that she agreed that the agreements were valid and binding but asserted that they were still subject to contract. Then, later, when she was asked whether she had made a mistake in stating in her affidavit that in March/April 2002 "no valid and binding agreement had been entered into", Ms Koo said:

> It's the misunderstanding of my full understanding of the signing of the heads of terms on 14 December 2001 which additional legal documents have to be followed. I have such a promise to plaintiff for remittance of funds it's because of his continued pressing. I overlooked my obligations after signing the heads of terms on 14 December 2001, that the shareholders' agreement has to be drawn up.

44 The plaintiff submitted that this showed that the parties intended that the Term Sheet and the Approval would be valid and binding. He submitted that, objectively, that must have been the parties' intention as the Term Sheet imposed immediate obligations. The first such obligation was the obligation imposed by cl 14 which essentially provided that the parties had to use best endeavours to complete the investment by 31 January 2002. The second obligation under cl 15 was that £150,000 was to be paid "within two (2) weeks after the acceptance of these terms by both parties and a further sum of GBP150,000 within thirty (30) days after the acceptance of these terms by both parties". The obligation to pay the seed funds was a "live" obligation and it was acted upon as such. The Approval confirmed the position because it provided in cl 4 that the dates in the Term Sheet were "effective from the date of signing of the minute" which was 14 December 2001.

45 The plaintiff then submitted that the context in which both documents were signed showed that they were final documents intended to have immediate contractual effect. He gave a history of the nine months of negotiations between the parties which included consultations between Ms Koo and Ms Baba and resulted in four draft investment agreements being prepared. The result was that, by 12 December 2001, there was a final Term Sheet approved by the defendants' solicitors that was intended to have immediate contractual effect. Basically, on 8 April 2001, Ms Koo had said that the defendants had agreed in principle but wanted an MOU first followed by the shareholders' agreement. Ms Koo had checked the MOU with Ms Baba and the second and third defendants. Subsequently, the August Term Sheet was prepared based on the MOU. It was a detailed document, seven pages long. In early November, Ms Koo said that she had met the second and third defendants and had told them that the joint venture investment for The Coffee Bean & Tea Leaf was proceeding and then, on 19 November, the fourth draft agreement was sent by Ms Baba to both the plaintiff and Ms Koo. This was the November Term Sheet. That document was almost identical to the final draft signed in December. On 13 December, Mr Burby met Pg Ayub and Ms Koo and, according to him, Pg Ayub said

that he was looking forward to seeing some of the shops in London when he went to visit his children there. By then, the terms of the investment had been finalised.

46 The submissions also dealt with the reason why the Term Sheet still bore the phrase "subject to contract" when it was executed. The plaintiff pointed out that the Term Sheet was not finalised by solicitors. It was finalised on a computer at the business centre of the Inter-Continental Hotel and signed there. Mr Burby explained in cross-examination how it transpired that the words "Confidential and Subject to Contract" were not removed from the final document:

> Q: On 14 December 2001 when the Approval of Heads of Term was signed, it was signed subject to contract[?]
>
> A: I agree that's what the document says. I made final changes to this document such as dates and the insertion of missing information. Those changes were mutually agreed with Ms Koo and these changes were made on the hotel's business centre computer which is where I gave the final examination of the document and pressed "print". The "confidential and subject to contract" was a head which would have been greyed out or not appearing on the screen and therefore it was overlooked. The spirit of the agreement between Ms Koo and myself was that it wasn't subject to contract.

47 It was submitted that Mr Burby's evidence was consistent with the fact that the defendants did not, at any time after the signing of the Term Sheet and prior to the filing of the Defence, suggest that the Term Sheet was not intended to be immediately valid and binding. I find this part of the submissions to be a bit odd since Mr Burby himself did not, between 16 December 2001 and end April 2002, ever say in terms to Ms Koo, "You and Pg Ayub and Pg Damit are in breach of the contract contained in the Term Sheet" and even in the Statement of Claim it was not pleaded that the Term Sheet was intended to be immediately valid and binding.

48 There is no doubt that the parties had been in negotiation for a considerable period before the Term Sheet was signed. Ms Koo had expressed a great deal of interest in the project and had led Mr Burby to believe that Pg Ayub and Pg Damit were equally interested and wanted to proceed with it. Pg Ayub when he met Mr Burby in Singapore in December did not, even on his own evidence, tell Mr Burby that he had no interest in the project. In fact, on Mr Burby's evidence, Pg Ayub was looking forward to seeing the outlets in London when he visited that city. A serious interest in investing in a project does not, however, translate automatically into a contractual commitment. All circumstances have to be considered.

49 There is force in the plaintiff's argument that after extended negotiations, the parties had by end November 2001 ironed out almost all the difficulties. Whilst the shareholders' agreement was still under consideration, there is no evidence that Ms Koo or her solicitor had raised any serious objections to any of its terms. Further, by then the provisions of the Term Sheet itself were no longer in contention. It is also apparent that when the parties met in December, they were in a positive frame of mind. Ms Koo had sent an e-mail stating that they would be partners soon. Mr Burby was looking forward to making progress on the shareholders' agreement and exchanging the Term Sheet, whilst Ms Koo met him three times and also made arrangements for him to meet Pg Ayub. More significantly, she instructed Ms Baba to acquire a shelf company for the defendants. On 14 December itself, after the documents were signed, according to Mr Burby, Ms Koo shook hands with him and said that their relationship had changed since they were now "partners". Ms Koo did not deny this assertion in her evidence though she did say that she had signed the Term Sheet so that Mr Burby would have something to take back with him to London to show his associates while negotiations on the other documents were continuing. Also in favour of the plaintiff's argument is the fact that the

Term Sheet, as signed, provided for the seed funds to be furnished within a specified time schedule and also provided for parties to use their best endeavours to complete the investment (which must have meant the signing of all documents and making further disbursement of investment funds) by 31 January 2002. These appeared to be immediate obligations. Finally, there was the provision in the Approval that the dates contained within the Term Sheet were effective from 14 December 2001.

50 There are, however, also a number of circumstances that militate against a finding that by signing the 14 December documents, the parties intended an immediately binding contract to come into existence between the plaintiff and the defendants personally. First of all, what was the basis on which the parties were negotiating? The plaintiff said that he was negotiating for himself, and Ms Koo was negotiating for herself and for Pg Ayub and his wife in their personal capacities as well. Ms Koo, however, maintained that from the very beginning, although she spoke for herself and the other two defendants, she had made clear to Mr Burby that their investment, if any, would be through an investment vehicle, and therefore, in effect, she was representing the vehicle in negotiating the terms of the various documents.

51 That Mr Burby understood that a corporate vehicle would make the investment was evident from the way that the MOU was drafted in April 2001. As can be seen from [14] above, the fourth party to that document was "The Investor's entity to be defined hereinafter as (The Investor)". So, he knew that Ms Koo and her associates were not proposing to become parties to the investment in their personal capacities. In August 2001, the MOU became a Term Sheet and the first line of this read:

> [Name of Investor's Company] (the "Investors") are interested in investing in CBTL Holdings Limited …

This first line was repeated in the November draft of the Term Sheet. When it came to the actual document that was signed on 14 December 2001, the first line of the same read:

> Smart Plus Investments Limited (the "Investors") are interested in investing in CBTL Holdings Limited …

The change in the first line must have emanated from Mr Burby himself since he was the one who made the final changes to the document before it was signed that day, though, of course, Ms Koo would have given the name Smart Plus Investments Limited to him. Mr Burby knew at that time (as the Approval indicates) that the investment vehicle was not yet named Smart Plus Investments Limited but that the defendants were intending to procure the necessary name change.

52 It is also pertinent that the draft shareholders' agreement, the MOU and the various versions of the Term Sheet that were prepared from April 2001 onwards in relation to this project consistently provided:

(a) that Mr Burby was only one of several founders of CBTL;

(b) the Founders and the defendants' investment vehicle would participate in the project as shareholders of CBTL;

(c) the relationship between the shareholders of CBTL was to be governed by a shareholders' agreement and this agreement was between three individuals, the franchisor as a corporate entity and the defendants' investment vehicle;

(d) these various documents were to be executed by CBTL on the one part and the defendants' investment vehicle on the other, except for the shareholders' agreement which was to be executed, in addition, by three individuals and the franchisor, a wholly independent party.

53 Next, the contents of the Term Sheet itself have to be examined to see whether it was capable of constituting a binding contract between Mr Burby as an individual and the defendants as individuals. There are two clauses that could be construed as indicating an intention to be immediately bound: cll 14 and 15. The stronger of these is cl 15 if it is read together with the Approval. Clause 14 is not so strong because what it requires is an endeavour "on a best effort basis" to complete the investment by a specified date. This is essentially an agreement to do one's best to do certain things. It is not a promise that those things will be achieved. Other provisions of the Term Sheet indicate that that document was not intended to be a binding contract but simply an outline of an agreement that would be constituted once other steps had been taken, those steps being the conclusion of two further documents: the shareholders' agreement and the subscription agreement.

54 In this process of construction, first, under cl 2.6, if the Investors wanted to divest themselves of their investment, the Founders had an obligation to procure a co-sale of their shares in the Developer at the same time. The Founders, however, were not parties to the Term Sheet and could not be bound by it. Second, under cl 2.10, there were other detailed terms and conditions relating to the redeemable convertible preference shares to be taken up by the Investors that had to be spelt out in the shareholders' agreement. Third, under cl 4, the Founders were to give warranties and representations pertaining to the financial and business conditions of the Developer in the subscription and shareholders' agreements and these were to be agreed to. Clause 12 provided eight conditions precedent for the completion of the proposed investment. These included the representations, undertakings, and warranties of the Founders being complied with, true and accurate as of the completion date. Those representations, undertakings and warranties were to be contained in the shareholders' agreement. Clause 9 expressly provided for various operational and strategic considerations to be spelt out more specifically in the shareholders' agreement. Under this clause, the Developer also agreed that it would not do certain things without the consent of the Investors including undertaking new businesses and changing cheque signatories. As, however, the Investors would only have two directors on a board of six, for the Investors to be sure that the Developer would comply with that obligation they would need to have contractually binding agreements to that effect with the other interested parties namely, the Individual Founders and the franchisor. Such an agreement was not contained within the Term Sheet.

55 The shareholders' agreement itself was intended to be amongst six parties, three of whom were individuals. These individuals would, by signing the shareholders' agreement, enter into contractually binding obligations with the Investors and the Developer. The Term Sheet contemplated such contractually binding obligations being accepted by the individuals in the shareholders' agreement and therefore made reference to the obligations of the Founders though these persons were not parties to the Term Sheet and could not be bound by its terms.

56 When all the circumstances are taken into account, it appears plain that despite the presence of cl 14, the Term Sheet was not intended to be a contractually binding document. Rather, it set out the overall scheme of the arrangement between the parties that would fall into place when the shareholders' agreement and the subscription agreement were executed. It was intended as a guide for the detailed contents of these documents that would form the binding obligation between all parties concerned.

Who were the parties to the contract?

57 In any case, for the plaintiff to succeed he must show that the Term Sheet was a contract between himself personally and the defendants personally. There are two questions here and the first of these is whether in view of the contents of the Term Sheet, the party described as "the Developer" could be intended to be Mr Burby himself. The plaintiff pointed out that at the time the Term Sheet was signed, CBTL was not yet incorporated. It could not sign any contracts. It was therefore his intention to enter the Term Sheet in his own personal capacity. If that was the case, Mr Burby should have undertaken drastic amendments to the Term Sheet when he finalised it for signing.

58 As it now stands, assuming that the document is intended to create enforceable obligations, then most of the obligations that the Term Sheet imposes on the Developer are such as only a corporate entity can undertake. Clause 6 provides, for example, that the Developer shall not pay dividends or capitalise its retained earnings without the consent of the Investors. Clause 8 provides for the Developer to deliver budget and financial statements to the Investors and such statements are to include those of the Developer's subsidiaries or affiliated companies if applicable. Under cl 9, the Developer cannot undertake a whole range of actions without the consent of the Investors including selling a substantial part of its undertaking or goodwill or reducing its authorised share capital or changing the rights of any class of its issued shares. The "Developer" in the Term Sheet must be a corporate entity. It cannot be Mr Burby himself. Mr Burby, in any case, would not be in a position, acting alone, to control the actions of the Developer. It does violence to the language of the Term Sheet, and to the intentions expressed by that document, to make Mr Burby the "Developer".

59 Further, all the events that occurred up to the signing of the Term Sheet showed that the Developer was to be a corporate entity incorporated in Jersey by Mr Burby and his friends. Even before the defendants entered the picture, Mr Burby had carried on negotiations with the franchisor and the very first draft franchise agreement given to Ms Koo in early February 2001 was an agreement between the franchisor and CBTL Holdings Limited. No intention of taking the franchise in his personal name was ever evinced by Mr Burby. The investment proposal that Mr Burby sent Ms Koo in March 2001 was for a corporate structure in which the operating company would be CBTL-UK, a wholly owned subsidiary of the Jersey company, CBTL, which would in turn be owned by various individuals, the franchisor and the third party investor for whom Mr Burby was looking. At that stage, Mr Burby quite happily described himself as CEO of CBTL even though that company had not yet been incorporated. As events unfolded, various other documents came into existence as described above, and all of these contemplated that the person owning the operating company would be a corporate entity. In September 2001, Mr Burby sent the draft shareholders' agreement to Ms Baba and told her at the same time that thereafter, CBTL should be referred to in the documents as "the Developer" as that was how it was described in the proposed franchise documents with the franchisor. After that email, all drafts of the Term Sheet referred to CBTL as "the Developer".

60 The second question is, of course, whether the defendants personally became parties to the Term Sheet. Once again, both the face of the document and the factual matrix militate against such a holding. On the face of the document, the Investors were described as Smart Plus Investments Limited. No company of that name existed but the defendants had acquired a BVI company and all parties knew that they wanted to change its name to Smart Plus Investments Limited. The use of the name Smart Plus Investments Limited was completely consistent with the defendants' intention that had been made known to Mr Burby from the beginning that any investment they undertook would be through a corporate vehicle. The draft documents prepared recognised this intention on the part of the defendants and the draft shareholders' agreement and the various versions of the Term Sheet always referred to the proposed investor as if it was a corporate body and not as if it was an individual. Mr Burby himself admitted in cross-examination that there was no provision in the Term

Sheet that provided for personal obligations on his part or on the part of any of the defendants. Ms Koo did not sign any document until she knew that the corporate vehicle had been acquired. She gave the intended name of the vehicle to Mr Burby and he immediately inserted it into the Term Sheet. He did not insert the names of the three defendants into the Term Sheet as he could easily have done had it been the parties' joint intention that they invest directly in the project and make direct commitments to the Developer.

61 In the plaintiff's submissions, various references were made to the conduct of Ms Koo after 14 December 2001 to show that she regarded herself and the other defendants as being bound to the plaintiff from that date onwards. Ms Koo's conduct, however, is equally consistent with a belief that SPIH was contractually bound to CBTL from that date onwards. The conduct that Mr Burby relied on comprised Ms Koo's repeated assurances that the seed funds were on the way and her failure to assert that no contractual bond existed which required such payment. On the other hand, Ms Koo also made it clear from time to time in the months following 14 December 2001 that she was acting for SPIH, that certain things had to be done for SPIH to send the money and that the documentation was not complete. Mr Burby himself recognised that steps had to be taken by SPIH and CBTL in order for the money to be remitted.

62 The facts substantiating the assertion made above are the following. First, on 16 December 2001, in his schedule of items to be accomplished, Mr Burby included the change of name of the investment vehicle, the incorporation of CBTL and the opening of the UK bank account by CBTL. Second, Ms Koo told him in January 2002 that the money could not be sent out until SPIH had been fully set up. By this she meant, as she explained in court, until the company's name had been changed and the account had been established. Third, Ms Koo was not willing to remit any money to Mr Burby's personal account and pressed him for details of CBTL's account. If Mr Burby was the intended counterparty to the contract, there would have been no hesitation in accepting his account details. Fourth, on 23 January, Ms Koo reminded Mr Burby that they needed to sign "an official Head of Terms under the approve[d] BVI company name" in order to replace the 14 December Term Sheet which had been signed using the name of Smart Plus Investment Limited. There could be no plainer indication that in Ms Koo's mind, the Term Sheet, whatever its status as a document having contractual force, was a document between SPIH and the Developer and not a document between the defendants and the Developer. On 23 February, Ms Koo referred to "the necessary documents to be sign[ed] by three of us" and this must have been a reference to banking documents being signed for the purposes of SPIH. On 26 February, Ms Koo told Mr Burby that the change of name to SPIH had been completed and the next step would be for the three defendants to take up their shares in SPIH and open its bank account and that the transfer of funds would not take place until the shareholders' agreement had been signed and the franchise was in hand. Whilst this e-mail may be read as an excuse for the delay in transmission of the funds, the emphasis on steps to be taken in relation to SPIH, again is evidence of Ms Koo's state of mind as to who was the correct party to the contract.

63 Having considered all the circumstances, including Mr Burby's rather feeble explanation as to why the phrase "subject to contract" remained on every page of the signed Term Sheet, I hold that the plaintiff has not discharged the onus on it with regard to that phrase. The Term Sheet was not intended to be an enforceable document as the use of the phrase showed. The contents of the Term Sheet left too much undecided and too much to be assented to by third parties for it to be a complete contract in itself. Finally, the circumstances surrounding the execution of the Term Sheet do not establish unequivocally that when Mr Burby and Ms Koo signed that document, the parties' intention was that it, in itself, would be a binding contract between Mr Burby and the defendants.

The Approval

64 The next issue is whether the signing of the Approval made any difference to the contractual status of the Term Sheet.

65 The plaintiff's answer to this question is a definite "yes" on the basis of the wording of the document. He pointed out that cl 1 of the Approval had expressly stated that the Term Sheet was approved by both parties. The parties who signed the document were Ms Koo who signed against the words "Signed for the Investor" and Mr Burby who signed against the words "Signed for the Developer". The plaintiff argued that the terms of cll 2 and 3 of the document (see [30] above) make it plain that the word "Investor" is a reference to Ms Koo, Pg Ayub and Pg Damit and the word "Developer" is a reference to the plaintiff. As used in this document, the terms "Investor" and "investment vehicle" and "Developer" and "development vehicle" had separate and distinct meanings, "Investor" and "Developer" meaning the individuals and "investment vehicle" and "development vehicle" meaning the companies. The document was drafted by Mr Burby not by solicitors and in ordinary communications between him and Ms Koo, the word "Investor" was used to mean the three defendants and "investment vehicle" was used to describe their company. In cross-examination, Ms Koo had agreed that she had on various occasions referred to herself and the other two defendants as proposed investors. She agreed too that during the course of events from March 2001 when she said "Investors" she had meant herself and the other two defendants but she then went on to qualify that the term had referred to the three of them but only before the company was formed. Ms Koo further agreed, however, that when she wanted to refer to the company she had used the term "investment vehicle".

66 The plaintiff's interpretation of the Approval was that it was a contract that contained the following terms:

(a) that the three defendants would form their investment vehicle within seven days;

(b) that the plaintiff would form the development vehicle within seven days;

(c) after that, a new term sheet would be signed;

(d) in the meantime, the defendants approved the terms of the Term Sheet and agreed that notwithstanding that the vehicles had not been formed, the obligations of the parties ran with immediate effect; and

(e) the obligations of the investment vehicle would be undertaken by the defendants and the plaintiff would undertake the obligations of the development vehicle.

Thereafter, the conduct of the parties showed that they acted on the Approval as if it was a binding agreement in that Mr Burby undertook the formation of CBTL and the defendants undertook the formation of SPIH.

67 The difficulty with the plaintiff's argument is that when the Approval is read as a whole and in context, it does not have the effect of an agreement between two sets of individuals. Mr Burby drafted this document. He was the one who used the term "Developer". He was the one who had insisted that the company, CBTL, be described as the "Developer" in all documents relating to the project for reasons of consistency. The Term Sheet was amended to reflect that insistence. The term "Developer" was used throughout the Term Sheet annexed to the Approval as describing CBTL. It is not logical to infer that Mr Burby would have used the term "Developer" differently when he drafted the Approval. After Mr Burby's e-mail of 3 September, the parties had agreed on a particular meaning to be given to the word "Developer". As stated by the Court of Appeal in *Pacific Century Regional*

Development Ltd v Canadian Imperial Investment Pte Ltd [2001] 2 SLR 443, the court is entitled to look at what the parties to a contract said before it was executed if it is desired to show that the parties negotiated on the basis that the words used bore a particular and agreed meaning. In this case, therefore, I can have regard to the previous correspondence in order to interpret "Developer" as it appears in the Approval.

68 Next, right at the top of the Approval, the list of attendees at the meeting are described as "Representing the Investor – Alice Koo" and "Representing the Developer – Mark Burby". If the intention was that Mr Burby was to be the "Developer" in this document, then he would have written "The Developer, Mark Burby". If "Developer" was meant to refer to Mr Burby personally, then the statement about the capacity in which he was acting was meaningless. At the bottom of the document, it was "Signed for" each of the parties not "Signed by" each of the parties as would have been the case if they were signing in their individual capacities.

69 Also, it was not correct that cl 2 necessarily implied that "the Investor" referred to three individuals because of the undertaking given by the Investor to change the name of the investment vehicle. The evidence showed that on 14 December, there was an existing corporate entity that had been acquired by the defendants for the purposes of the investment. They may not have been registered as its shareholders or directors on that date but they were the persons who owned the entity and who could control what it did. That entity did not have the name that the defendants wanted it to have and it therefore made sense (and was possible) for the entity to agree to use its best endeavours to change its name to the one used in the Term Sheet and also for the parties to recognise that if it could not obtain the desired name it had the right to adopt any other name.

70 There are some ambiguities in the Approval since it does refer to both "Investor" and "investment vehicle" and to "Developer" and "development vehicle" and interpreting the "Investor" as SPIH and "Developer" as CBTL would make the references to the two vehicles otiose. The defendants submitted that since the Approval was drafted by the plaintiff, the *contra proferentem* rule should be applied such that any ambiguity in the language of the document should be interpreted in a manner that was less favourable to him. I agree. Further, the Approval was not drafted as a contract. It was drafted as the minutes of a meeting between the two parties who represented the prospective contracting parties, to wit, SPIH and CBTL. If at all the document discloses any intention to enter legal relations, the intention disclosed is that of SPIH and CBTL. Even if one has to hold that CBTL was not capable of having an intention because it did not exist and therefore the only person who had the intention of contracting with the Investor was Mr Burby himself, this was not the case with SPIH which existed, albeit under a different name, and which was represented by one of the persons who had acquired it.

71 On 14 December 2001, the Term Sheet was a document that envisaged the obligations it referred to being undertaken by corporate parties especially that in the position of the "Developer". The Term Sheet also envisaged that a corporate investor, a corporate developer, three individual founders and one corporate founder would sign the shareholders' agreement. The shareholders' agreement together with the subscription agreement was to create and govern the parties' contractual relationship in relation to the investment. In these circumstances, the Approval cannot, objectively, have been intended to be part of such a contractual relationship. It was simply a comfort document indicating the parties' *bona fides* and intentions to take the necessary steps to further the project.

72 If at all any part of the Approval had contractual effect, it would have been cl 4 whereby the parties agreed that the dates contained in Exhibit A were effective from 14 December 2001 and they would use their best endeavours to exchange Exhibit A within seven days. However, the defendants

were not parties to the Approval. They were not bound by this agreement. Any obligation undertaken thereunder would have been undertaken by SPIH and it would have been the party bound to make payment of the seed funds on the dates specified and to use its best endeavours to complete the investment by 31 January 2002.

Was there a contract reflected in the totality of the documents up to 23 February 2002?

73 The plaintiff's alternative submission was that, viewed as a whole, the correspondence up to 23 February 2002, together with the 14 December documents reflect a valid and binding contract between Mr Burby and the three defendants under which the defendants were to make the investment in the project on the terms of the Term Sheet. The position taken was that the e-mail correspondence exchanged after 14 December 2001 showed clearly that subsequent to the signing of those documents, Ms Koo (and through her, Pg Ayub and Pg Damit) made repeated promises that the seed funds would be paid and that the plaintiff at least, had undertaken best endeavours in relation to the shareholders' agreement. The e-mail of 23 February was particularly important as in it, Ms Koo assured Mr Burby that "we" were proceeding with the investment and that no one was going to "chicken-out" at that stage. In cross-examination, Ms Koo had confirmed that in this e-mail, she was assuring Mr Burby that she herself, Pg Ayub and Pg Damit were going to proceed with the investment. It was put to her that even if the 14 December documents were signed on behalf of SPIH, she had agreed in this e-mail that she and the other two defendants would provide the funds for the project. Her reply was that that was their intention in principle. The plaintiff submitted that in the circumstances, the e-mail was confirmation that the defendants were going to invest in the project on the terms of the Term Sheet and therefore a valid and binding contract had arisen by this date. The defendants' obligation under this contract was to provide financing for this project and the plaintiff's obligation was to develop it in the manner envisaged in the Term Sheet.

74 I do not accept the submission that the correspondence taken as a whole and including all the representations made after 14 December 2001 constituted a contract between Mr Burby as an individual and the defendants as individuals. As I have held, the parties' intentions as expressed in the negotiations, the correspondence and the 14 December documents were that the Investor would be a corporate entity and that that investor would contract with CBTL, the individual founders of CBTL and the franchisor in relation to the terms of the project and the terms of the investment. There is nothing in the correspondence that took place thereafter that clearly negatives this intention and indicates that the new intention was for parties to be bound personally. Mr Burby's own intention after 14 December 2001, as shown by his e-mail of 16 December 2001, was to effect the incorporation of CBTL and the opening of its bank account as quickly as possible so that matters could proceed. He also recognised in that e-mail that the shareholders' agreement would have to be signed by all parties in order for the investment to be drawn down.

75 For their part, the defendants took immediate steps to register themselves officially as the owners and directors of SPIH. Thereafter, Ms Koo had indicated that the funds had to be sent to CBTL and not to Mr Burby personally. She had also stated that SPIH had to open a bank account in order to send the money and that the Term Sheet had to be re-signed. Additionally, she later made it clear that money would not be forthcoming until the shareholders' agreement was signed. In the e-mail of 23 February, she had also referred to "necessary documents to be sign[ed] by three of us before remittance take[s] place". This was obviously a reference to the banking documents that needed to be signed on behalf of SPIH in order for it to make such a remittance.

76 It would be wrong in all the circumstances for me to hold that the correspondence constituted a contract. Whilst in some circumstances a contract can come into existence from correspondence, in this case, the correspondence only took place between two parties and the

contract contemplated was between at least five parties. The contract that the plaintiff pleaded had come into existence was a contract that embodied the provisions of the Term Sheet. As I have pointed out, the Term Sheet envisaged the formal execution of contractual documents by these five parties and the adoption of contractual obligations by individuals and a corporation who were not party to the Term Sheet itself. Further, whilst the Term Sheet envisaged Mr Burby as a party to that contract, his capacity in the contract would be that of an individual founder who bore the same obligations as the other founders whilst it would be CBTL who would be the party described as "the Developer" in the contract and who would take on the "Developer's" obligations. In the circumstances of this case, the contract could not come into existence until all parties had signed the formal documents.

Conclusion

77 In view of the findings I have made above, I need not decide the issues raised in relation to the authority of Ms Koo to bind the other two defendants.

78 In the event, the plaintiff's claim fails and must be dismissed. As regards costs, all three defendants were jointly represented right up to the close of the plaintiff's case on the third day of trial. At that late stage, the second and third defendants instructed separate solicitors to represent them. No application was made to amend the Defence however and the pleaded Defence continued to be the joint Defence that had been filed on behalf of all three of them. In these circumstances, I do not think that it would be correct to make one award of costs in favour of the first defendant and a separate award in favour of the second and third defendants. I therefore order that the plaintiff shall pay the defendants one set of costs only.