IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 45

Suit No 362 of 2018

Between

(1) LOH CHIANG TIEN
(2) LOH YONG LIM

… *Plaintiffs*

And

SAMAN DHARMATILLEKE

… *Defendant*

EX TEMPORE JUDGMENT

[Contract] – [Action in debt] – [Breach of contract] – [Frustration]

Loh Chiang Tien and another
v
Saman Dharmatilleke

[2020] SGHC 45

High Court — Suit No 362 of 2018
Vinodh Coomaraswamy J
29, 30 October 2019; 10 February 2020

28 February 2020

Vinodh Coomaraswamy J (delivering the judgment of the court *ex tempore*):

1 This action arises out of a series of dealings between the plaintiffs and the defendant between March 2011 and January 2012. The defendant was then a shareholder of and the sole director of Innovative Nano Systems Pte Ltd ("INS"). The plaintiffs were then interested in investing in INS.

2 The plaintiffs' claims in this action can be broadly categorised as falling under three separate heads:

a) $375,000 ("Share Agreement Claim")[1];

[1] Statement of Claim (Amendment No 3) at para 12(a).

b) $14,000 ("Repayment Claim")[2];

c) $33,458 ("Exhibition Claim")[3].

3 Having considered the parties' submissions, including the written submissions filed by both parties after the oral submissions on 10 February 2020, and for the reasons which follow, I dismiss the Share Agreement Claim and the Exhibition Claim but allow the Repayment Claim.

The Share Agreement Claim

4 The Share Agreement Claim arises from an agreement dated 25 March 2011 between the second plaintiff and the defendant ("the Agreement"). The Agreement was drafted by Mr Tan Wee Tin ("Mr Tan").[4] Under the Agreement, the second plaintiff agreed to lend $375,000 to the defendant in exchange for the defendant agreeing to subscribe for and then transfer to the second plaintiff shares worth $375,000 in INS on or before 24 April 2011. The principal terms of the Agreement are as follows:[5]

> This simple agreement is made between [the defendant] of INS and [the second plaintiff] on the 25th March 2011, whereas both parties mutually agreed to the following:
>
> (a) [The defendant] wishes to borrow and [the second plaintiff] agrees to make an interest-free friendly loan of S$375,000 (dollars three hundred and seventy five thousand) to enable [the defendant] to inject new capital in INS.
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> …
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> (c) Within a period of 30 days (thirty days) from the date of this agreement, [the defendant] agrees to sell and [the second

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2 Statement of Claim (Amendment No 3) at paras 12(c) to 12(f).

3 Statement of Claim (Amendment No 3) at paras 12(g) to 12(h).

4 Statement of Claim (Amendment No 3) at paras 12(g) to 12(h).

5 Agreed Bundle of Documents Vol 1 at pgs 16 – 17.

> defendant] and/or his nominee agrees to purchase shares in INS from him equivalent to 10% (ten percent) of INS's existing share capital for S$375,000 thereby [the defendant] discharges the above borrowing.
>
> (d) [The defendant] will agree to pass the relevant director's resolution to put into effect the transfer of shares in (c).

5 The second plaintiff duly lent the $375,000 to the defendant by a cheque dated 11 April 2011[6]. However, the defendant failed to transfer 10% of the shares in INS to the second plaintiff or his nominee before the expiry of the 30-day period in clause (c) of the Agreement, *ie* by 24 April 2011.[7]

6 The defendant convened an emergency general meeting of INS in January 2011 to pass the necessary resolutions approving a rights issue which had the effect of increasing INS's shares capital and increasing the shares of INS held by the defendant. It was out of these shares that the defendant was to transfer 10% of INS to the second plaintiff under the Agreement

7 In May 2011, two shareholders of INS commenced Originating Summons 404 of 2011 ("OS 404"). The relief which they sought in OS 404 was to cancel the rights issue and any sale of the rights shares by the defendant. In August 2011, the court hearing OS 404 ordered that the rights issue be cancelled and that the sale of the rights shares be cancelled ("Order of Court").[8]

8 The defendant failed to transfer 10% of INS to the second plaintiff as he was obliged to do under the Agreement. The defendant therefore breached the Agreement.

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6 Statement of Claim (Amendment No 3) at para 9.

7 Statement of Claim (Amendment No 3) at para 9A.

8 First Plaintiff's Affidavit of Evidence in Chief at pg 33, LCT-9.

9 Counsel for the plaintiffs, Mr P Padman ("Mr Padman") argues that the second plaintiff is entitled to recover from the defendant the $375,000 paid under the Agreement on four grounds:[9]

a) as damages for breach of the Agreement;

b) as a debt;

c) as a sum payable by the defendant under s 2(2) of the Frustrated Contracts Act (Cap 115, 2014 Rev Ed) ("FCA") on the basis that the Order of Court in OS 404 frustrated the Agreement;

d) on a restitutionary claim as a sum recoverable upon a total failure of consideration.

10 At the outset, I deal with a point raised by counsel for the defendant, Mr RS Wijaya ("Mr Wijaya"). He argues that Share Agreement Claim must fail because the second plaintiff implicitly waived his right to recover the $375,000 from the defendant when both plaintiffs elected to make further advances to the defendant in anticipation of a future joint venture.

[9] Notes of Evidence, 29 October 2019 at p 55(11) to 55(13).

11 I reject Mr Wijaya's argument that the plaintiffs' further advances to the defendant give rise to a waiver by election. First, the plaintiffs at no time faced a choice between two inconsistent contractual rights. Second, even if they did, the plaintiffs' actions are insufficiently clear to evince an intention to elect between two such rights.

12 The Court of Appeal in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 made clear that a waiver by election requires a party to a contract making a clear and unequivocal choice between two inconsistent rights (at [54]):

> This doctrine concerns a situation where a party has a choice between two inconsistent rights. ***If he elects not to exercise one of those rights, he will be held to have abandoned that right if he has communicated his election in clear and unequivocal terms to the other party***. He must also be aware of the facts which have given rise to the existence of the right he is said to have elected not to exercise. Once the election is made, it is final and binding, and the party is treated as having waived that right by his election: see *The Kanchenjunga* at 397–398, which was approved by this court in *Chai Cher Watt v SDL Technologies Pte Ltd* [2012] 1 SLR 152 at [33].
>
> [emphasis added in bold and italics]

13 I do not accept that the second plaintiff was ever faced with two inconsistent rights. "Right" here means a legal right, *ie* one carrying a correlative obligation. In the context of this case, "right" can only mean a contractual right arising from or out of the Agreement. When the defendant breached the Agreement, the second plaintiff had the right to enforce the defendant's secondary obligations arising from his breach of contract. But the choice of advancing further sums to the defendant had nothing to do with the parties' rights and obligations under the Agreement. The advances took place entirely outside the contractual context of the Agreement. Making those advances could in no way be the second plaintiff's exercise of a contractual right under the Agreement. That also means that there is no inconsistency sufficient

to ground a waiver by election between pursuing the defendant for his breach of the Agreement and advancing further sums to the defendant outside the context of the Agreement.

14 I also accept that the later correspondence between the parties with respect to the possibility of a joint venture and incorporating a new company was distinct from matters relating to INS and to the Agreement.[10] Indeed, there is evidence that the second plaintiff continued to ask the defendant to return the moneys owing under the Agreement even during these unconnected dealings.[11]

15 Further, on the facts before me, there is no evidence that the second plaintiff ever communicated to the defendant an election to waive his right to pursue the defendant for his breach of the Agreement. I accept the second plaintiff's evidence that the reason for the plaintiffs' later advances to the defendant was because they took a calculated risk that those advances would enhance their prospects of recovering the $375,000. The advances are not an indication, let alone a clear and unequivocal one, that they waived the right to recover the $375,000.

16 Ultimately, the defendant's bare assertions that the plaintiffs "were not concerned with the sum of $375,000"[12] or that they were "no longer interested in the advance of $375,000.00 since there was no money left in [INS]"[13] are insufficient to engage the doctrine of waiver by election. Indeed, as the second plaintiff and the defendant both accept that liability under the Agreement rests with the defendant personally and not with INS – who was not even a party to

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[10] Notes of Evidence, 29 October 2019 at p 74(6) to 74(13).

[11] Notes of Evidence, 30 October 2019 at pgs 22(29) to 23(11).

[12] Defendant's Affidavit of Evidence in Chief at para 41.

[13] Defence (Amendment No 2) at para 10f.

the Agreement – the fact that INS had no money would have been wholly irrelevant to the defendant's obligations under the Agreement and any decision the second plaintiff might have made to pursue or to waive those obligations.

Breach of contract

17 The second plaintiff's primary basis for the Share Agreement Claim is as damages for breach of contract. The defendant failed to transfer 10% of INS's shares to the second plaintiff by 24 April 2011. The defendant was therefore in breach of clause (c) of the Agreement. The second plaintiff's cause of action for a breach of contract accrued on 24 April 2011. The second plaintiff commenced this action on 11 April 2018, more than six years after the cause of action accrued. Mr Wijaya therefore argues that the action is *prima facie* time-barred under s 6(1)(a) of the Limitation Act (Cap 163, 1996 Rev Ed).

18 Mr Padman argues that the defendant made later payments which constitute part-payments resulting in a fresh accrual of a cause of action under s 26(2) of the Limitation Act. This argument is misconceived in so far as it relates to a claim in damages. Section 26(2) applies only to "a cause of action … to recover any debt or other liquidated pecuniary claim". A claim in damages is not a claim to recover a debt or other liquidated pecuniary claim. Section 26(2) cannot assist the second plaintiff on his claim in damages.

19 The second plaintiff's claim in damages for a breach of the Agreement is not only *prima facie* time barred but is in fact time-barred.

20 At this point, I observe that I find that the second plaintiff has suffered no recoverable loss by reason of the defendant's breach of contract. This is not a reason for dismissing the second plaintiff's claim. This finding – if the second plaintiff's claim in damages were not time-barred – would entitle the second

plaintiff to enter judgment against the defendant but limited to nominal damages. I make this point because it demonstrates the commercial pointlessness of the second plaintiff's claim.

21 Mr Padman submits that the second plaintiff has suffered loss and damage quantified at $375,000 as a result of the defendant's breach. I do not accept that he has.

22 The *prima facie* measure of damages in contract is as follows: "where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed" (*Robinson v Hartman* (1848) 1 Exch 850 at 855). Where a promisor's breach has caused the promisee to lose something that the promisee would have gained *but for the breach*, the promisee's loss is *prima facie* the value of the benefit that the promisor failed to deliver or provide. This is known as the promisee's expectation loss.

23 In this case, if the defendant had transferred 10% of INS to the second plaintiff in compliance with the Agreement on or before 24 April 2011, the Agreement would have become an executed contract. However, soon after, the Order of Court would have cancelled the shares and the sale to the second plaintiff entirely. In effect, the position the second plaintiff would be in if the Agreement had been performed would have been to have his bargained-for benefit nullified by court order.

24 Moreover, even if the transfer had not been nullified, the INS shares would also have soon after become worthless. INS went into insolvent

liquidation in February 2013.[14] The second plaintiff has led no evidence on which I can assess the value of INS shares on 24 April 2011, the date of the breach, or at any point after that date until February 2013, by which time it was manifest that the shares were worthless. If it had been necessary to make a finding on the value of the INS shares as at 24 April 2011, in the absence of any evidence from the second plaintiff to the contrary, my finding would be that they were already by then worthless because of the financial difficulties that INS was facing and the internal shareholder conflict which afflicted the company. On that basis, under the expectation loss metric, the second plaintiff would recover nothing at all.

25 The alternative measure of damages in contract is the promisee's reliance loss. A claim for reliance loss allows a promisee to recover from the promisor the costs and expenses which the promisee incurred in reliance on the promisor's performing his obligations under the contract, where such costs and expenses are then wasted by the promisor's breach. A promisee cannot, however, elect reliance loss as the measure of its damages if it has made a bad bargain (*C & P Haulage v Middleton* [1983] 1 WLR 1461). The burden is on the promisor to prove that the bargain was a bad one (*Commonwealth Bank of Australia v Amann Aviation Pty Ltd* (1991) 17 CLR 64).

26 As the learned authors of *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) ("*The Law of Contract in Singapore"*) explain at para 21.052, this limitation on the recovery of reliance loss is to prevent overcompensating promisees. A promisee who has made a bad bargain would not have recovered its reliance expenditure in full even if the promisor had performed its obligations under the contract. When the contract is

[14] Notes of Evidence, 30 October 2019 at p 7(10) to 7(27); First Plaintiff's Affidavit of Evidence in Chief at para 11.

breached, to compensate that promisee by an award of its reliance loss would put the promisee in a position better than it would have been in had the contract been performed.

27 Undoubtedly, the second plaintiff could frame his claim in damages for breach of contract as a claim for his reliance loss in the alternative to his claim for expectation loss. That would be a claim to recover the amount of money which the second plaintiff paid to the defendant under the Agreement, *ie* $375,000. However, as the second plaintiff made a bad bargain, in that he agreed to lend $375,000 in exchange for what I have found to be worthless shares on 24 April 2011, the second plaintiff is unable to recover the $375,000 in damages as reliance loss either.

28 In any event, this analysis is unnecessary for my decision. The claim for damages arising from the breach of the Agreement remains time-barred as stated at [19] above.

An action in debt

29 The second plaintiff's alternative basis for the Share Agreement Claim is a claim in debt, or a claim for a fixed sum as it is sometimes called. This claim is also unsustainable.

30 An action in debt is conceptually distinct from an action for damages. They arise in different circumstances and are subject to different considerations. Indeed, *The Law of Contract in Singapore* states at para 23.042:

> Where an action for a fixed sum is brought, there is no need to consider concepts such as remoteness and/or mitigation of damages. Nor, in most cases, is there a need for quantification or assessment. Those concepts are irrelevant. Remoteness and mitigation issues are only relevant in claims for unliquidated damages for breach of a contractual term. This should be

> obvious once we appreciate that **the action for a fixed sum or debt has nothing to do with *compensation*. Such a claim simply allows the innocent party to recover what was promised to him, and is not a "money-substitute" for it.** To use Lord Diplock's language of primary and secondary obligations [in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827], **the action for a fixed sum enforces performance of the primary obligation of payment, as specified by the contracting parties in their contract; whereas an action for damages enforces performance of the *secondary* obligation to pay damages which is imposed *by law* when a contractual promise is breached by one of the contracting parties**.
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> [emphasis in original in italics; emphasis added in bold]

31 In other words, an action for a fixed sum, if it succeeds, compels the defendant to do exactly what the contract requires. The judicially-imposed remedy is performance of the promisor's primary obligation under the contract.

32 But the defendant's primary obligation under the Agreement was not to repay a fixed sum of $375,000 to the second plaintiff. There is certainly no express term in the Agreement to that effect. The only express primary obligation which the defendant had under the Agreement is set out in clause (c). That clause requires the defendant to transfer 10% of INS to the second plaintiff. Indeed, it would have been a clear breach of the Agreement for the defendant to repay $375,000 to the second plaintiff instead of transferring those shares. There is also no express obligation in the Agreement obliging the defendant to return the $375,000 to the second plaintiff *if* he fails to transfer the shares pursuant to clause (c). And the second plaintiff does not suggest that there is any implied obligation that the defendant repay $375,000 to the second plaintiff. There is therefore no contractual basis for the second plaintiff's claim in debt.

33 Even if I am wrong to find that the Agreement gives rise to no claim in debt, I agree with Mr Wijaya's submission that the second plaintiff's claim in debt is *prima facie* time-barred.

34 Mr Padman responds by arguing that the defendant made later payments which constitute part-payments of the $375,000 advanced under the Agreement, resulting in a fresh accrual of a cause of action under s 26(2) of the Limitation Act. The thrust of Mr Padman's argument lies in the fact that (a) the first plaintiff entered into another agreement – in other words, separate from the Agreement – with the defendant on 25 March 2011 at the behest of the second plaintiff; (b) the funds paid by both plaintiffs pursuant to both agreements to the defendant on 25 March 2011 all came from the same source; and (c) repayments amounting to $40,000 which the defendant later made to the first plaintiff were not directed at any specific debt which the defendant owed to either plaintiff. Therefore, Mr Padman argues, all the repayments should be credited generally to the plaintiffs so as to engage s 26(2) in connection with the Agreement rather than to a particular debt owed to a particular the plaintiff.

35 I reject this argument. The defendant's later payments were made to discharge other debts arising under separate agreements which the defendant *specifically* entered into with the first plaintiff.[15]

36 The evidence does show that the first plaintiff entered into his separate agreement with the defendant on 25 March 2011 on the second plaintiff's instructions.[16] The evidence also shows that the source of both plaintiffs' payments pursuant to their respective agreements dated 25 March 2011 was their company, Panweld Holdings Limited. The fact remains, however, that the parties were careful to draw clear distinctions between the identities of the contracting parties.

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15 Notes of Evidence, 30 October 2019 at p 68(11) to 68(14).

16 Notes of Evidence, 29 October 2019 at p 16(1) to 16(11).

37 For example, the parties structured a separate and specific investment agreement as between the first plaintiff and INS.[17] Under the terms of that agreement, the first plaintiff was to pay $425,000 to INS in exchange for a 5% equity interest in INS's enlarged share capital. After the Order of Court cancelled the rights shares, it was INS who made a repayment of $414,375 towards discharging that liability, and it did so to the first plaintiff and not to the second plaintiff.[18] The first plaintiff's own repeated assertion that there was a distinction drawn between the two agreements entered into on 25 March 2011 also supports this finding.[19]

38 The defendant's repayments amounting to $40,000 were also specifically made to the first plaintiff pursuant to loans made by the first defendant. None of the repayments were directed at the loan made by the second plaintiff.

39 Thus, the second plaintiff's claim in debt is not only *prima facie* time barred but is in fact time-barred.

Frustration

40 The second plaintiff's further alternative basis for the Share Agreement Claim is a claim under s 2(2) of the FCA. That section provides that when a contract has been frustrated, that "all sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid". Mr Padman

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17 Notes of Evidence, 29 October 2019 at p 26(15) to 26(28).

18 First Plaintiff's Affidavit of Evidence in Chief at para 26.

19 Notes of Evidence, 29 October 2019 at p 24(20) to 24(27).

submits that the Order of Court was a supervening event which rendered the Agreement impossible to be performed, thereby engaging the doctrine of frustration and s 2(2) of the FCA.

41 The law on frustration is well-established. The Singapore Court of Appeal in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal* [2007] 4 SLR(R) 413 ("*RDC*") cited the House of Lords' decision in *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 969 with approval, emphasising that the doctrine of frustration may be invoked only if the alleged frustrating event is an external one, beyond the control of both contracting parties (at [59]):

> Frustration occurs whenever the law recognises that *without the default of either party,* a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing *radically different* from that which was undertaken by the contract.
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> [emphasis in original in italics]

42 I reject Mr Padman's submission that the Order of Court frustrated the Agreement. I say that for a number of reasons.

43 First and most important is the fact that the Agreement was incapable of performance even before the alleged frustrating event, *ie* the Order of Court, occurred. As mentioned at [0] above, the Agreement obliged the defendant to transfer 10% of INS to the second plaintiff as his primary obligation under the Agreement within 30 days of the Agreement being signed, *ie* on or before 24 April 2011. The defendant failed to transfer the shares on or before 24 April 2011. That was a clear breach of the Agreement.

44 Further, this breach rendered it impossible for the defendant ever to perform his obligations under the Agreement. The defendant's breach was a breach of a contractual time limit. Once that contractual time limit expired

without the defendant having performed, the defendant could thereafter never perform *within that contractually stipulated time limit*. The defendant's performance of the Agreement was impossible from 25 April 2011 onwards, given the time-delimited nature of the defendant's obligation and as a result of his own breach. No doubt the defendant could attempt to transfer shares on or after 25 April 2011. That is the point that Mr Padman makes in his further submissions dated 14 February 2020. But that would not have been contractual performance under the Agreement. Even Mr Padman acknowledges that that would be "late performance".[20] The second plaintiff would have been contractually entitled to reject any such attempt, even if time is not of the essence under the contract.

45 The result is that, on and after 25 April 2011, the defendant could transfer the shares to the second plaintiff not by way of contractual performance under the Agreement but only with the second plaintiff's consent, whether secured: (i) as a matter of goodwill; (ii) pursuant to a contractual variation of the Agreement; or (iii) pursuant to an entirely new contract.

46 Understood properly, on these facts, the Order of Court did not make it impossible for the defendant to perform the Agreement. The contract became impossible to perform because of the defendant's own failure to perform his time-delimited primary obligation under the Agreement before the time expired.

47 Arguing that a supervening event has frustrated a contract carries with it an implicit argument that the supervening event was causative or has causal relevance to performance being impossible. As Hobhouse J *in J Lauritzen AS v Wijsmuller BV (The Super Servant Two*) [1989] 1 Lloyd's Rep 148 notes at 155:

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[20] Plaintiffs' Supplemental Submissions, 14 February 2020, at para 5.

"if the impossibility only comes about because the promisor makes some choice or election, then it is that choice or election which causes the alleged impossibility, not any antecedent event". Although the language Hobhouse J employed here is one of "choice or election", the underlying principle is broader than that and may be understood as encompassing any action of the promisor which causes the impossibility.

48 The key point remains that if one party's action has in fact made it impossible for the contract to be performed before a particular event occurs, there is no longer room to characterise that particular event as having frustrated the contract. To put it briefly: it is not possible for an event to frustrate a contract if it had already become impossible for the contract to be performed before the event takes place.

49 On the facts of our case, it is the defendant's breach of the Agreement in failing to transfer 10% of INS to the second plaintiff on or before 24 April 2011 rather than the Order of Court which made it impossible for the defendant to perform his obligation under the Agreement.

50 The alternative basis for my holding that the Order of Court did not frustrate the Agreement is because the Order of Court was an event which was foreseeable when the parties entered into the Agreement. For one, the defendant gave evidence that INS had been facing severe liquidity problems as early as late 2010.[21] These problems led to the defendant calling an EGM on 7 January 2011 where a resolution was passed for a rights issue of 55,555,600 new shares in order to raise additional capital. The rights issue intensified the pre-existing

[21] Notes of Evidence, 30 October 2019 at p 7(10) to 7(11).

grievances and disputes which the other shareholders of INS had with the defendant.[22]

51 This was a fact known to the second plaintiff before the parties entered into the Agreement. The second plaintiff viewed Mr Tan as being integral in engineering a plan alongside the defendant to help the defendant increase his shareholding in INS through a rights issue.[23] This would also have been undoubtedly clear to the defendant, who was one of the two largest shareholders of INS, a director and managing director of INS and its Chief Technology Officer in March 2011.[24] The risk of shareholder unhappiness resulting from the dilution of the dissenting shareholders' shares must have been apparent to the defendant. The looming possibility of litigation to challenge or nullify the resolutions passed at the EGM was foreseeable by the parties on 25 March 2011. Indeed – although it is not necessary for this part of my analysis to make a finding which goes this far – this scheme seems to have been devised in order to entrench the defendant's control of INS and to marginalise the other shareholders. No doubt, that is why OS 404 succeeded. Certainly, it was at the very least foreseeable for the second plaintiff as well as the defendant on 25 March 2011 that a shareholders' dispute would arise to challenge the rights issue, resulting in OS 404 being filed in May 2011 and the Order of Court being made in August 2011.[25]

52 Moreover, the events leading up to the Order of Court were within the reasonable control of the defendant in so far as OS 404 was concerned. The first

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[22] Notes of Evidence, 29 October 2019 at p 68(5) to 68(13).

[23] Second Plaintiff's Affidavit of Evidence in Chief at para 20.

[24] Notes of Evidence, 30 October 2019 at p 7(14) to 7(32).

[25] Tan Wee Tin's Affidavit of Evidence in Chief at para 18.

defendant in OS 404 was the defendant himself. The second defendant in OS 404, was INS. INS was controlled and managed by the defendant at that time. The defendant therefore played a crucial part in the events which led up to OS 404, in defending OS 404 and in the events which resulted in the Order of Court.[26] I therefore do not consider that OS 404 and the Order of Court which resulted from it was a supervening event outside the control of the defendant.

53 The purpose of the law of frustration is to release contracting parties from a contractual bargain that has been rendered radically different from that which the parties agreed to when they made their bargain. This suggests strongly that the supervening event must be outside both the contemplation and control of the parties. The Order of Court was neither.

54 In light of this, the claim based on frustration fails. The Agreement was not frustrated. The second plaintiff cannot recover the $375,000 under s 2(2) of the FCA.

Total failure of consideration

55 The second plaintiff's further alternative basis for the Share Agreement Claim is a restitutionary claim for money paid on a total failure of consideration. This claim too fails.

56 One of the requirements for establishing a total failure of consideration – or a total failure of basis as it is sometimes also called – is that the contract has ceased to be operative (*Guinness plc v Saunders* [1990] 2 AC 663 at 697). The reason for this, as stated by Professor Graham Virgo in *The Principles of the Law of Restitution* (Oxford University Press, Third Edition), is to provide a

[26] Notes of Evidence, 30 October 2019 at pgs 26(7) to 27(31).

"safeguard against the abuse of the law of restitution by undermining the law of contract" (at 314). The law of restitution has no place in re-allocating risks which have been allocated by the parties' agreement under a contract which remains operative. As Lord Goff of Chieveley succinctly put it in *Pan Ocean Shipping Co Ltd v Creditcorp Ltd* [1994] 1 WLR 161 (at 164) in the context of an operative clause in the contract:

> As between shipowner and charterer, there is a contractual regime which legislates for the recovery of overpaid hire. ***It follows that, as a general rule, the law of restitution has no part to play in the matter; the existence of the agreed regime renders the imposition by the law of a remedy in restitution both unnecessary and inappropriate.***
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> [emphasis added in bold and italics]

57 For this alternative basis, Mr Padman relies on the same facts that ground his claim under the FCA.[27] In other words, the sole ground on which Mr Padman relies on to argue that the Agreement has been brought to an end so as to enable the second plaintiff's restitutionary claim to succeed is that the Order of Court terminated the Agreement by frustration. However, I have already rejected that argument at [54] above. Mr Padman puts forward no alternative basis to wipe away the contract so as to permit recovery on a total failure of consideration. The restitutionary claim must therefore fail.

58 Moreover, it cannot even be said that the defendants' breach of clause (c) of the Agreement has brought the Agreement to an end. A breach of contract brings a contract to an end if and only if:

> (a) "the consequences of the breach are such as to deprive the innocent party of substantially the whole benefit that it was intended that the innocent party should obtain from the contract" (*RDC* at [107]); and

[27] Plaintiffs' Supplemental Submissions, 14 February 2020, at para 10.

(b) the aggrieved party accepts the repudiatory breach by "communication or conduct [which] clearly and unequivocally conveys to the repudiating party that the aggrieved party is treating the contract as at an end" (*Vitol SA v Norelf Ltd* [1996] AC 800 at 810).

59 The defendant's failure to transfer the INS shares at all is undoubtedly a repudiatory breach of contract. The failure deprived the second plaintiff of substantially the whole of the benefit that the parties intended he should to obtain from the Agreement. But Mr Padman concedes that the second plaintiff has never accepted the defendant's repudiatory breach of contract. The contract therefore continues in existence, never having been terminated in any way.

60 The position therefore is that the Agreement remains operative. It is the Agreement and the law of contract which governs the allocation of risks between the second plaintiff and the defendant.[28] The second plaintiff's claim restitution of the $375,000 as money paid upon a failure of basis fails.

The Repayment Claim

61 The Repayment Claim arises from four loans which the plaintiffs allege they made to the defendant. These loans comprise $10,000 lent by the first plaintiff and $44,000 lent by the second plaintiff. These loans are evidenced by four handwritten letters signed and dated by the defendant in which he expressly acknowledges these advances as loans:[29]

a) $10,000 loan made by the second plaintiff to the defendant, dated 31 August 2011;

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[28] Oral Closing Submissions on 10 February 2020.

[29] Defence (Amendment No 2) at para 13.

b) $8,000 loan made by the first plaintiff to the defendant, dated 3 January 2012;

c) $32,000 loan made by the first plaintiff to the defendant, dated 4 January 2012;

d) $4,000 loan made by the first plaintiff to the defendant, dated 19 January 2012.

62 The defendant readily admits that the documents all bear his signature and accepts the authenticity and validity of these acknowledgments.[30] He also admits that he received these sums from the plaintiffs[31] but denies that he received them as loans. He says instead that these were *ex gratia* payments for due diligence work in a proposed joint venture between the plaintiffs and himself.[32]

63 I am satisfied that these advances were in fact loans from the plaintiffs to the defendant. I do not accept the defendant's assertion that these were not loans but *ex gratia* payments. This is plainly contradicted by the documents signed by the defendant acknowledging them to be loans. For example, the letter of acknowledgment dated 31 August 2011 provides that "I, Saman Dharmatilleke, received S$10,000.00 (ten thousand) as a loan from Mr Loh Yong Lim".[33] The defendant conceded at trial that he understood the legal obligation of repayment arising out of a loan and that he was not forced to sign

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30 Notes of Evidence, 30 October 2019 at p 64(6) to 64(10).

31 Defence (Amendment No 2) at para 13.

32 Defendant's Affidavit of Evidence in Chief at para 43.

33 Agreed Bundle of Documents Vol 1 at pg 136.

the letters of acknowledgment.[34] His attempt now to disclaim what he signed simply fails.

64 Moreover, the defendant specifically told the plaintiffs that the repayments which he made were made towards the advances evidenced by the acknowledgment letters.[35] That suggests that he did in fact believe that he was obliged to repay these advances as loans from the plaintiffs, as he acknowledged expressly in the letters of acknowledgment.[36]

65 The defendant made three part-payments totalling $40,000 of the loans extended by the first plaintiff.[37] The outstanding balance on the first plaintiff's loan is therefore $4,000. The defendant has made no part-payments of the loans extended by the second plaintiff. The defendant therefore still owes $10,000 to the second plaintiff.

66 The plaintiffs are entitled to judgments for these sums respectively.

The Exhibition Claim

67 The Exhibition Claim relates to two primary advances amounting to just under $29,469 and $3,990. The plaintiffs allege these advances are loans which they made to the defendant in January 2012 to cover expenses which he and his associates incurred in attending the Consumer Electronics Show in San Francisco and the Mac World Exhibition in Las Vegas. Mr Padman submits that

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[34] Notes of Evidence, 30 October 2019 at p 61(1) to 61(12).

[35] Notes of Evidence, 30 October 2019 at p 68(11) to 68(14).

[36] Notes of Evidence, 30 October 2019 at p 75(15) to 75(16).

[37] First Plaintiff's Affidavit of Evidence in Chief at paras 69, 70 and 75; Defendant's Affidavit of Evidence in Chief at para 51.

these expenses were in fact loans by the plaintiffs to the defendant for the defendant's benefit.

68 The defendant's position is that these advances were not loans and were actually part of the plaintiffs' due diligence expenses. This is because the defendant was already familiar with the market and potential buyers and that it was the plaintiffs who wanted the defendant to attend the Consumer Electronics and Mac World exhibitions in Las Vegas.[38]

69 I do not accept that these advances were loans to the defendant. It is clear from the degree of formality in the dealings between the plaintiffs and the defendant on the 25 March 2011 agreements and in connection with advances underlying the Repayment Claim that the parties quite conscientiously ensured that their legal obligations were reduced into writing and signed by the parties.[39]

70 They adopted this degree of formality presumably and undoubtedly to ensure that there was documentary evidence of what had been agreed in the event of any later dispute. In particular, I bear in mind that the plaintiffs required the defendant to sign the four acknowledgments specifically to avoid the type of argument which the defendant is now raising in respect of this final head of claim.[40]

71 If the parties agreed that these two advances amounting to $29,469 and $3,990 were loans, I would have expected the plaintiffs to have recorded that in letters of acknowledgment and to have required the defendant to sign them. After all, this was the course they followed with respect to the Repayment

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[38] Defendant's Affidavit of Evidence in Chief at para 56.

[39] Notes of Evidence, 30 October 2019 at p 62(1) to 62(6).

[40] Notes of Evidence, 29 October 2019 at pgs 48(15) to 50(7).

Claim. The inference I draw that these advances were not loans is especially strong because these advances were made at or around the same time as the advances underlying the Repayment Claim *ie*, in January 2012, but were treated so differently.

72 The burden of proof in this action rests on the plaintiffs. The plaintiffs have not adduced any evidence to explain satisfactorily why, if these advances were in fact loans, the plaintiffs treated them so differently from the advances underlying the Repayment Claim.

73 As the first plaintiff himself concedes, there are no similar letters of acknowledgment from the defendant regarding these advances. And there is similarly no document, letter or correspondence showing that these advances were in fact loans to the defendant from the plaintiffs.[41]

74 I therefore find that the plaintiffs have failed to discharge their burden of proof of demonstrating that the Exhibition Claim was in fact a loan made by the plaintiffs and accepted by the defendant as such. The Exhibition claim therefore fails.

Conclusion

75 For the reasons stated above, I allow the plaintiff's Repayment Claim but dismiss the Share Agreement Claim and the Exhibition Claim.

76 I will now hear the parties on costs.

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[41] Notes of Evidence, 29 October 2019 at p 36(1) to (5).

Vinodh Coomaraswamy
Judge

P Padman and Lim Yun Heng (KSCGP Juris LLP) for the plaintiffs;
Ravana Sivanathan Wijaya (R S Wijaya & Co) for the defendant.