IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 43

Civil Appeal No 49 of 2020

Between

(1) Charles Lim Teng Siang
(2) Tay Mui Koon

… *Appellants*

And

(1) Hong Choon Hau
(2) Tan Kim Hee

… *Respondents*

In the matter of Suit 920 of 2018

Between

(1) Charles Lim Teng Siang
(2) Tay Mui Koon

… *Plaintiffs*

And

(1) Hong Choon Hau
(2) Tan Kim Hee

… *Defendants*

Version No 2: 22 Apr 2021 (12:01 hrs)

JUDGMENT

[Contract] — [Discharge] — [Rescission]
[Contract] — [Variation] — [No oral modification clause]

TABLE OF CONTENTS

INTRODUCTION **1**

MATERIAL FACTS **2**

THE PARTIES' CASES **5**

THE APPELLANTS' CASE 5

THE RESPONDENTS' CASE 5

THE HIGH COURT DECISION **7**

THE APPELLANTS' ARGUMENTS ON APPEAL **8**

THE RESPONDENTS' ARGUMENTS ON APPEAL **9**

ISSUES **10**

WHETHER CL 8.1 APPLIES TO AN ORAL RESCISSION **11**

THE LEGAL EFFECT OF CL 8.1 ..... **13**

WHETHER THERE WAS IN FACT AN ORAL RESCISSION **26**

WHETHER THE APPELLANTS ARE ESTOPPED FROM ENFORCING THE SPA **35**

CONCLUSION **36**

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Charles Lim Teng Siang and another
v
Hong Choon Hau and another

[2021] SGCA 43

Court of Appeal — Civil Appeal No 49 of 2020
Sundaresh Menon CJ, Andrew Phang Boon Leong JCA, Judith Prakash JCA, Steven Chong JCA and Belinda Ang Saw Ean JAD
1 March 2021

22 April 2021 Judgment reserved.

Steven Chong JCA (delivering the judgment of the court):

Introduction

1 This appeal arose from a decision of the High Court which held that an agreement for the sale and purchase of shares in a public-listed company had been *orally* rescinded by mutual agreement. Both parties in the court below, in particular the appellants, who one might have expected to have raised the point, did not pay sufficient attention to a boilerplate clause in the agreement which prohibited any "variation, supplement, deletion or replacement of or from" the agreement unless made in writing and signed by or on behalf of both parties. As a result, this issue was not addressed by the Judge below. In this appeal, this clause occupies centre stage.

2 The introduction of this new point gives rise to two interesting issues on appeal. First, does a clause which prohibits "*variation, supplement, deletion or replacement*" unless made in writing and signed by or on behalf of both parties apply to *rescission*? Second, assuming that the oral variation of an agreement has been proved, can the other party rely on such a clause to invalidate the oral variation? This latter question is a vexed question of law which requires an examination of the principle of party autonomy in contract law, its ramifications, and its limit. The question also requires consideration of the difficulties in giving effect to an oral variation in the face of such a clause.

Material facts

3 The first appellant ("Mr Lim") was a relationship manager with United Overseas Bank ("UOB") at all material times. In 2014, he was the beneficial owner of approximately 15.49 million shares in a public-listed company known as PSL Holdings Ltd ("PSL"). Of these, 5.735 million shares were held by his wife, Yvonne Seow Ee Fun ("Ms Seow"), and another 9.755 million shares were held by his mother, the second appellant ("Mdm Tay"), on behalf of Mr Lim. In addition, Mr Lim had three banking clients who also owned PSL shares, namely, Dr Chung Sook Yin ("Dr Chung"), Tan Seung Yuen ("TSY"), and Dr Currie Chiang ("Dr Chiang") who owned not less than 4 million shares, 15.5 million shares, and 5.5 million shares respectively.

4 In 2014, Mr Lim was introduced by one George Lim ("George") to Tedy Teow ("Mr Teow"), who was a wealthy businessman. Discussions ensued and Mr Lim agreed to sell Mr Teow 35 million PSL shares for $10.5 million at 30 cents per share. Mr Teow informed Mr Lim that he would purchase the shares through his associates, the respondents, Hong Choon Hau ("Mr Hong")

Version No 2: 22 Apr 2021 (12:01 hrs)

and Tan Kim Hee ("Mr Tan"). Mr Lim claimed that he had persuaded Dr Chiang, Dr Chung and TSY to sell their respective shares as part of this share transaction. Thereafter, Mr Lim asked a solicitor, Low Chai Chong ("Mr Low"), from Rodyk & Davidson LLP ("Rodyk") (as it then was), to draft the Sale and Purchase agreement ("SPA"). When the draft was done, Mr Low sent the SPA to Mr Lim and to one Bernard Lim Wey Chyuan ("Bernard"), the latter being the point of contact for Mr Teow and the respondents. Bernard then arranged for a meeting between Mr Lim and the respondents. On 17 September 2014, the following persons met at Rodyk's office ("the Rodyk Meeting"):

(a) Mr Lim;

(b) Ms Seow;

(c) the respondents;

(d) Mr Hong's personal assistant, Carrie Lang Cheah Yean ("Carrie");

(e) Bernard;

(f) Mr Low; and

(g) Mr Low's associate, Alvin Liong.

5 At the Rodyk Meeting, Mr Lim and the respondents signed the SPA. The material terms of the SPA were as follows:

(a) Mr Lim and Mdm Tay were to sell the respondents 35 million PSL shares, with Mr Hong and Mr Tan each purchasing 17.5 million shares (cl 2);

(b) The Completion Date would be 17 October 2014 (cl 1.1);

Version No 2: 22 Apr 2021 (12:01 hrs)

(c) The total consideration would be $10.5 million (cl 3.1);

(d) Time shall be of the essence as regards all the times mentioned in the SPA (cl 7.1);

(e) No variation, supplement, deletion or replacement of any term of the SPA shall be effective unless made in writing and signed by or on behalf of each party (cl 8.1); and

(f) The delay or failure to exercise any right, remedy, power or privilege under the SPA shall not constitute a waiver (cl 9.2).

6 After signing the SPA, Mr Lim arranged for the respondents to open private bank accounts with UOB. The intention was for the respondents to transfer monies from their Malaysian bank account to these UOB accounts to facilitate the payment under the SPA. The next day, Mdm Tay went to Mr Low's office and signed the SPA. It is not disputed that the respondents did not, at any time, meet or speak to Mdm Tay in connection with the SPA.

7 Thereafter, the Completion Date passed, but the share transaction was never completed. Instead, from October 2014 until August 2018, Mr Lim continued to serve as the relationship manager for Mr Hong's and Mr Tan's UOB accounts.

8 On 3 May 2018, Mr Lim instructed his solicitors to send a letter to the respondents, demanding compliance with the SPA and threatening legal action ("May 2018 Letter"). The respondents refused, whereupon the appellants filed a writ of summons on 3 September 2018.

Version No 2: 22 Apr 2021 (12:01 hrs)

The parties' cases

The appellants' case

9 The appellants claimed damages for breach of the SPA, as the respondents had wrongfully failed to complete the sale. The respondents had provided various excuses for the non-completion, including Mr Teow's refusal to complete. Mr Lim alleged that he had sought to communicate with Mr Teow and/or the respondents to complete the sale, but to no avail.

10 Mr Lim claimed that the respondents had requested multiple extensions of time, purportedly to take instructions from Mr Teow, and that they had offered to get him involved in other business deals/opportunities as compensation for the delay in the completion. Mr Lim denied that the SPA was rescinded via a telephone call with Mr Hong on 31 October 2014, and asserted that there was in fact no such telephone call.

11 Mdm Tay claimed that she left all matters pertaining to the transaction to Mr Lim, and that she did not know what had happened to the transaction until around 2018 when Mr Lim informed her that it did not go through.

The respondents' case

12 The key to the respondents' defence is an alleged telephone call between Mr Lim and Mr Hong on or about 31 October 2014, during which the SPA was claimed to have been rescinded by mutual agreement.

13 According to Mr Hong, between 28 October 2014 and 31 October 2014, he read announcements from Nordic Group Limited ("Nordic announcements") which caused him to doubt Mr Lim's representation that he owned the

Version No 2: 22 Apr 2021 (12:01 hrs)

35 million PSL shares which formed the subject matter of the SPA. The announcement also led him to realise that, contrary to Mr Lim's representation, the 35 million PSL shares would not allow the respondents to achieve a reverse takeover of PSL. On the evening of 31 October 2014, Mr Hong called Mr Lim and told him that these announcements contradicted what Mr Lim had previously represented to him. Mr Lim then informed Mr Hong that the SPA was cancelled and would no longer be effective. During the telephone call, Mr Hong also told Mr Lim that there was still interest in investing in agarwood and other business deals that Mr Lim might have, and they both agreed that they should instead pursue other business opportunities.

14 Mr Tan corroborated Mr Hong's account. Mr Tan's evidence was that around 31 October 2014, he had indeed been informed of Mr Hong's telephone call with Mr Lim in connection with the Nordic announcements, which led to the mutual rescission of the SPA.

15 The respondents pleaded in the alternative that the appellants were estopped from relying on their legal rights under the SPA.

16 The respondents also pleaded that: (a) they had not agreed to purchase 17.5 million PSL shares each; (b) they had never entered into any agreement with Mdm Tay, whom they had never met; (c) Mr Lim had promised to enter into an addendum agreement to give them free PSL shares but failed to do so; (d) the copy of the SPA adduced by Mr Lim was not authentic and the appellants were unable to produce the original copy; and (e) they had been induced to enter the SPA due to Mr Lim's fraudulent misrepresentations. In particular, Mr Lim had misrepresented that: (a) he owned 35 million PSL shares; (b) this amount of shares would allow the respondents to achieve a reverse takeover of PSL;

Version No 2: 22 Apr 2021 (12:01 hrs)

(c) the respondents would then be able to use PSL as the corporate vehicle to secure a supply of agarwood; and (d) while the listed share price of PSL was at that time only 17 cents per share, it would increase to 60 cents per share after the reverse takeover was completed.

The High Court Decision

17 The Judge issued her grounds of decision in *Lim Teng Siang Charles and another v Hong Choon Hau and another* [2020] SGHC 182 ("*GD*"). She found that: the SPA was authentic and was signed by the respondents (*GD* at [6]); the alleged misrepresentations were not made out (*GD* at [8] to [16]); and Mr Lim had never promised the respondents free shares or an addendum agreement (*GD* at [24] to [25]). These findings are not challenged by the respondents on appeal.

18 However, the Judge accepted the respondents' evidence that the SPA had been rescinded by mutual agreement through a telephone call between Mr Lim and Mr Hong on 31 October 2014 (*GD* at [47], [68]), and that Mr Lim was authorised to act for Mdm Tay, while Mr Hong was authorised to act for Mr Tan (*GD* at [68]). She reasoned as follows:

> (a) The appellants did not serve any notice on the respondents to complete the SPA from the Completion Date of 17 October 2014 all the way till the May 2018 Letter (see [8] above), even though the SPA provided that time was of the essence (*GD* at [48]).
>
> (b) There was no documentary evidence to support Mr Lim's alleged attempts to chase the respondents to complete the transaction. This was in spite of the fact that Mr Lim had communicated with

Version No 2: 22 Apr 2021 (12:01 hrs)

Mr Hong via WhatsApp and email concerning other matters. Mr Lim must also have had the respondents' contact details as he was their relationship manager at UOB. Contrary to Mr Lim's allegation, there was also no evidence that he had tried to chase the respondents to complete the SPA indirectly through George or Bernard (*GD* at [49]).

(c) There were major inconsistencies in Mr Lim's account of events between October 2014 and May 2018 (*GD* at [50] to [52]).

(d) Mr Lim's account of events between October 2014 and May 2018 was contradicted in material aspects by his own witnesses and his own conduct (*GD* at [53] to [63]).

19 In light of the above findings, the Judge found that it was not necessary to make any findings with respect to the estoppel argument (*GD* at [71]).

The appellants' arguments on appeal

20 On appeal, the appellants raised a new argument, namely, that the alleged oral rescission, even if proved, was invalid because it was in contravention of cl 8.1 of the SPA, which required any variation, supplement, deletion or replacement to be in writing and signed by or on behalf of both parties.

21 They argued that in any case, there was in fact no mutual agreement to rescind the SPA, relying on the following reasons:

(a) There was no documentary evidence to support the alleged rescission.

Version No 2: 22 Apr 2021 (12:01 hrs)

(b) The alleged rescission rested on the respondents' bare assertions, but the respondents were not credible witnesses.

(c) The delay in seeking completion of the SPA did not amount to abandonment, even if time was of the essence. The Judge failed to consider the clear terms of the SPA which provided that any delay in exercising any right would not amount to a waiver.

(d) The objective conduct of the parties on or around 31 October 2014 did not evince any rescission of the SPA.

(e) The appellants at all material times had the intention to complete the transaction.

22 In their oral submissions, they further argued that:

(a) Carrie contradicted Mr Hong's evidence that he had informed her of the rescission of the SPA. In addition, there was an entry in Carrie's notebook which suggested that Mr Hong regarded the SPA as still being valid.

(b) The Judge misinterpreted Ms Seow's evidence to mean that the SPA had been cancelled.

The respondents' arguments on appeal

23 The respondents argued that cl 8.1 of the SPA did not apply to *rescission* and that the evidence supported the mutual agreement on 31 October 2014 to rescind the SPA. They relied mainly on the Judge's findings in the *GD*. They also raised the following additional points:

Version No 2: 22 Apr 2021 (12:01 hrs)

(a) Although the Judge found against the respondent on various points ([17] above), she nonetheless accepted that Mr Lim must have spoken to the respondents about the large amount of shares he could sell to them, which in turn would help them to gain control of PSL, and thereby facilitate their purchase and supply of agarwood. Hence, the rejection of the respondents' misrepresentation claim did not affect their credibility.

(b) Mr Hong's evidence about the 31 October 2014 call with Mr Lim was corroborated by records in Carrie's notebook.

(c) Mr Lim acknowledged in re-examination that the SPA was rescinded by mutual agreement.

24 Finally, the respondents argued in the alternative that the appellants were, in any event, estopped from enforcing the SPA.

Issues

25 Based on the parties' arguments, the issues which arise for our determination are as follows.

(a) First, whether cl 8.1 of the SPA applies to an oral rescission.

(b) Second, if it does, what is the legal effect of cl 8.1 on an oral rescission.

(c) Third, whether the Judge had erred in finding that there was in fact an oral agreement between Mr Lim (on behalf of the appellants) and Mr Hong (on behalf of the respondents) to mutually rescind the SPA.

Version No 2: 22 Apr 2021 (12:01 hrs)

(d) Fourth, whether the appellants would have been estopped from enforcing the SPA in any event.

Whether cl 8.1 applies to an oral rescission

26 Clause 8.1 of the SPA is commonly referred to as a no oral modification clause ("NOM clause") and provides that any term in the SPA can only be deleted, replaced, supplemented or varied in writing and signed by or on behalf of all parties. Clause 8.1 provides:

> **Variation of Terms**
>
> No variation, supplement, deletion or replacement of or from this Agreement or any of its terms shall be effective unless made in writing and signed by or on behalf of each Party.

27 The appellants argued that any alleged oral rescission would be invalid as it would be in contravention of cl 8.1 ([20] above). However, the respondents argued that cl 8.1 was not engaged since cl 8.1 only concerned the variation of terms and did not apply to the *rescission* of the SPA.

28 We note that the Judge did not specifically deal with the legal effect of cl 8.1 on the alleged oral rescission. However, we believe that this was in no small part due to the fact that the point was not properly argued by either party in their closing submissions. There was only a cursory mention of this point by the appellants in their closing submissions. Although this is strictly a new point raised by the appellants on appeal, considering the factors set out in *Grace Electrical Engineering Pte Ltd v Te Deum Engineering Pte Ltd* [2018] 1 SLR 76 at [38], we grant leave to the appellants to raise the new argument under O 57 r 9(4)(*b*) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"). The new argument is essentially a point of construction of cl 8.1 and does not require

Version No 2: 22 Apr 2021 (12:01 hrs)

any fresh evidence. There is also no prejudice to the respondents as both parties were able to present full arguments on the legal effect of cl 8.1.

29 In our judgment, it is patently clear that cl 8.1 does not apply to rescission. This is self-evident from the plain language of the clause itself. Clause 8.1 expressly stipulates four particular forms of modifications which must be made in writing – variation, supplement, deletion and replacement. The common denominator underlying all of these four forms of modifications is that the SPA will continue to remain valid and in force. Regardless of whether one varies, replaces, deletes or supplements terms in the SPA, the SPA would still remain to be performed albeit on different terms.

30 Rescission clearly does not fall within the meaning of any of these four terms. Instead, when parties intend for a NOM clause to exclude oral *rescission*, this can be explicitly provided for. For instance, s 2-209 of the Uniform Commercial Code (US) ("UCC") provides:

> A signed agreement which excludes **modification *or* rescission** except by a signed writing cannot be otherwise **modified *or* rescinded**, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party. [emphasis added]

31 By including the term "rescission" as distinct from "modification", the UCC makes it clear that rescission is to be treated *separately* from modification (see also John E Murray Jr, "The Modification Mystery: Section 2-209 of the Uniform Commercial Code" (1987) 32 Vill L Rev 1 at p 5 and footnotes 18 to 20, which explains that a no oral-*modification* statute does *not* prevent a contract from being orally *rescinded*, and also that the earlier versions of s 2-209 of the UCC prior to 1957 did not contain the term "rescission", with the term only added subsequently to preclude oral rescission of contract).

Version No 2: 22 Apr 2021 (12:01 hrs)

32 Counsel for the appellants, Mr Lok Vi Ming ("Mr Lok"), argued at the oral hearing that an oral rescission amounts to "replacing" the SPA with an agreement to rescind, *ie*, that the agreement to rescind is a replacement agreement. In essence, Mr Lok's argument is tantamount to saying that the SPA was "replaced" by an agreement that provided for the rescission of the SPA. However, as we explained to him during the oral hearing, if the SPA was rescinded, there would be nothing left to be performed.

33 Mr Lok also argued that (assuming that the alleged telephone call and conversation did take place), the parties had merely "deleted" the clauses in the SPA which required performance of the share transaction, and such deletion led to the rescission of the SPA. This argument was a misguided attempt to fit the rescission as an "effect" of the deletion. The respondents' case is that the parties mutually agreed to *rescind* the SPA, and not that specific clauses had been *deleted* from the SPA. It is somewhat contrived to speak of a contract to be performed with all its terms "deleted". Mr Lok's "deletion argument" thus suffers from the same incongruity as his "replacement argument". Both are untenable and ignore the plain and ordinary meaning of "replacement" and "deletion".

34 For these reasons, it is clear to us that an oral rescission does not fall within the ambit of cl 8.1.

The legal effect of cl 8.1

35 Given our finding that cl 8.1 is not engaged in the present case, it is strictly not necessary for us to discuss the legal effect of a NOM clause such as cl 8.1. However, as a five-judge *coram* has been specially convened to hear this

Version No 2: 22 Apr 2021 (12:01 hrs)

issue, and as both parties have made submissions on this point, we propose to make some provisional observations.

36 At the outset, it is useful to first set out the purpose of NOM clauses. There are several legitimate commercial reasons why parties may choose to include a NOM clause in their contract: (a) to prevent attempts to undermine written agreements by informal means, such as by raising an alleged defence of oral modification in order to prevent summary judgment; (b) to ensure the certainty of the terms and existence of any modification, since oral discussions are difficult to prove and may also easily give rise to misunderstandings; and (c) such formality makes it easier for corporations to police internal rules which restrict their employees' authority to agree to any variation (*Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] 4 All ER 21 ("*Rock Advertising UKSC*") at [12], [14]).

37 We do not doubt that there may well be legitimate reasons for including a NOM clause in a contract, including those outlined in the preceding paragraph. In fact, it is precisely the benefits of commercial certainty which proponents of a strict approach rely on in support of the rigorous enforcement of a NOM clause. However, those reasons do not offer a legitimate basis to prevent parties from varying a contract orally where such an oral variation can be proved. As we will explain below, it is important to distinguish between the evidential difficulties in proving an oral variation and the conceptual challenges in recognising an oral variation in the face of a NOM clause.

38 It appears to us that there are currently at least three schools of thought in relation to the legal effect of a NOM clause. First, there is the approach taken by the majority in *Rock Advertising UKSC* (with the grounds delivered by

Version No 2: 22 Apr 2021 (12:01 hrs)

Lord Sumption), namely, that a NOM clause will be given full effect such that any subsequent modification to the contract will be deemed to be invalid unless it complies with the formalities stipulated in the NOM clause ("the Sumption approach") (*Rock Advertising UKSC* at [10], [15]). Under this approach, a NOM clause can only be removed by an agreement of the parties which complies with the formalities set out therein. Second, there is the approach developed by Lord Briggs in *Rock Advertising UKSC*, which is similar to the Sumption approach (*Rock Advertising UKSC* at [21]), save that where parties orally agree to depart from a NOM clause, such agreement will be treated as valid ("the Briggs approach") (*Rock Advertising UKSC* at [24]). An oral agreement to depart from a NOM clause can be express or by necessary implication, but should not be lightly inferred in a situation where parties merely agree to an oral variation without express reference to the NOM clause (*Rock Advertising UKSC* at [24], [27]). A strict test should be applied before the court finds that parties had, by necessary implication, agreed to depart from the NOM clause (*Rock Advertising UKSC* at [30]). We elaborate on this further below. Third, there is the approach which this court endorsed in *obiter* in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 ("*Comfort Management*"), namely, that a NOM clause merely raises a rebuttable presumption that in the absence of an agreement in writing, there would be no variation ("*Comfort Management* approach") (at [90]). We should add that the *Comfort Management* approach was adopted from the decision of the English Court of Appeal in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] 3 WLR 1519 ("*Rock Advertising CA*") which was reversed on appeal in *Rock Advertising UKSC*.

39 We should highlight that under all three schools of thought, the doctrine of equitable estoppel is recognised as an exception such that a party may be

Version No 2: 22 Apr 2021 (12:01 hrs)

estopped from enforcing a NOM clause if the other party had acted in reliance on the oral modification to his detriment (*Rock Advertising UKSC* at [16], [30] to [31]; *Comfort Management* at [37]; see also Chow Kok Fong, *Law and Practice of Construction Contracts*, vol 1 (Sweet & Maxwell, 5th Ed, 2018) at para 5.029; *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [57]). Several international instruments have also recognised estoppel as an exception to NOM clauses: see Art 29(2) of the United Nations Convention on Contracts for the International Sale of Goods (1980) (entered into force 1 January 1988) and Art 2.1.18 of the UNIDROIT Principles of International Commercial Contracts (2016) published by the International Institute for the Unification of Private Law (Unidroit), Rome.

40 We begin our analysis by expressing our reservations regarding the Sumption approach. In reversing *Rock Advertising CA*, Lord Sumption's starting point was to treat the rule as applied in *Rock Advertising CA* as having the effect of "overrid[ing] the parties' intention" (*Rock Advertising UKSC* at [11]). We disagree. We note that Lord Briggs expressed a similar disagreement (*Rock Advertising UKSC* at [25]). In our view, there is no question of any overriding of the parties' intention. That proposition assumes that the parties' intention should be fixed at the time when the contract was entered into and overlooks the fact that the parties to any contract are ultimately the master of their own contract and if they decide to orally agree to do away with or depart from a NOM clause, the court should uphold their autonomy to do so.

41 In our view, party autonomy in the context of contracts translates to the following consequences. First, no one is forced to enter into any contract, whether written or oral. Second, and notwithstanding the first consequence outlined above, once a contract is entered into, it attracts certain consequences.

Version No 2: 22 Apr 2021 (12:01 hrs)

In particular, the parties to such a contract bind themselves to the limits as set out therein. Third, the effect of this is that no party can *unilaterally* act contrary to the terms of that agreement.

42 However, while the autonomy of an *individual party* may be bound by the terms of the contract, the parties as a *collective* retain the power and autonomy to vary any aspect of their own agreement so long as they *jointly* agree to do so (see also David Lewis QC and Daniel Bovensiepen, "In a bind? Supreme Court sets out radical new position on the law of contractual variation" (May 2018) at p 2 <https://twentyessex.com/wp-content/uploads/2019/06/Contractual-variation-Rock-Advertising-Ltd-v-MWB-Business-Exchange-Centres-Ltd.pdf> (last accessed 19 March 2021) ("*Lewis*")).

43 With respect, it appears that by his approach, Lord Sumption had conflated the parties' *individual* autonomy with the parties' *collective* autonomy. This led him to suggest, in our view erroneously, that once parties have agreed to a certain set of rules, they cannot *together* agree to change those rules. His proposition that "[t]he real offence against party autonomy is the suggestion that they cannot bind themselves as to the form of any variation, even if that is what they have agreed" (*Rock Advertising UKSC* at [11]) fails to recognise that even if parties had *initially* agreed to certain rules, they can *subsequently* agree to jointly amend those rules (see *eg* James C Fisher, "Contract variation in the common law: A critical response to *Rock Advertising v MWB Business Exchange*" (2018) 47(3) CLWR 196 ("*Fisher*") at pp 198 to 199; see also J W Carter, John Eldrige and Elisabeth Peden, "Agreed Writing Requirements for Contract Variation" (2020) 36 JCL 107 ("*Carter*") at p 115).

Version No 2: 22 Apr 2021 (12:01 hrs)

44 In this connection, we endorse the celebrated dictum of Cardozo J stated more than a hundred years ago in *Beatty v Guggenheim Exploration Co* [1919] 225 NY 380 at 387 to 388:

> Those who make a contract, may unmake it. The clause which forbids a change, may be changed like any other. The prohibition of oral waiver, may itself be waived. 'Every such agreement is ended by the new one which contradicts it' … What is excluded by one act, is restored by another. You may put it out by the door; it is back through the window. Whenever two men contract, no limitation self-imposed can destroy their power to contract again …

45 The above proposition reflects the principle that an *initial* limitation imposed by a NOM clause can be unwound by the same parties at a *later* date. To put it another way, it recognises the more *recent* intention of the parties to vary a contract albeit orally notwithstanding their *earlier* agreement to the contrary. There is long-standing authority in support of Cardozo J's views which have been adopted in Australia (*GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1 at [219] to [222]) and Canada (see *Shelanu Inc v Print Three Franchising Corporation* 64 OR (3d) 533 at [54]), and a corresponding principle has been adopted in Germany (see Andreas Muller, *Protecting the Integrity of a Written Agreement* (Eleven International Publishing, 2013) at pp 300 to 305, as cited in *Rock Advertising UKSC* at [8]).

46 Thus far, the courts have only circumscribed the parties' autonomy to contract in limited situations, such as where the contract is tainted by illegality, or where it is contrary to public policy. It seems to us that there is no legitimate reason to suggest that NOM clauses are *sui generis* and are somehow insulated from the parties' power and capacity to vary the terms of their bargain. This would constitute an unprincipled limitation on the parties' collective autonomy.

Version No 2: 22 Apr 2021 (12:01 hrs)

47 In addition, *Lewis* at p 3 makes a valid point that Lord Sumption's analysis has far reaching consequences in that, taken to its logical conclusion, it may mean that the courts would enforce a clause which stipulates that the contract can never be varied at all, and invalidate all future amendments to such a contract. This would operate as an unjustifiable restriction on the parties' collective autonomy to amend their contract (see also *Fisher* at p 198; Josias Senu and Mahmoud Serewel, "Between a rock and a hard place: no oral modification clauses after *Rock Advertising v MWB*" (2018) 18(2) OUCLJ 151 ("*Senu*") at p 156).

48 In aid of his approach, Lord Sumption relied on the court's treatment of entire agreement clauses in excluding the parties' collateral agreements (*Rock Advertising UKSC* at [14]). However, entire agreement clauses are quite dissimilar from NOM clauses and as rightly pointed out by Lord Briggs, they merely operate to invalidate collateral agreements made *prior* to the time of entering into the contract. They do not prevent parties from *subsequently* entering into an agreement to modify the contract containing the entire agreement clause (*Rock Advertising UKSC* at [28]). As pithily expressed by *Lewis* at p 2 (see also *Fisher* at p 199; *Carter* at p 116; *Senu* at p 156):

> [e]ntire agreement clauses nullify *prior* collateral agreements [to] give effect to the *latest* expression of the parties' intentions. NOM clauses seek to nullify *later* agreement, by giving effect to an *earlier* manifestation of the parties' intentions as to formal requirements [emphasis in original]

49 In further support of his approach, Lord Sumption opined that similar to how formalities may be prescribed by statute, "[t]here is no principled reason why the parties should not adopt the same principle by agreement" (*Rock Advertising UKSC* at [11]). However, such an approach assumes that a NOM clause is equivalent to a statutory rule. As noted in *Carter* at p 115, "the concept

Version No 2: 22 Apr 2021 (12:01 hrs)

asserted by Lord Sumption finds no support in principle or authority. Whatever the subject matter of a contractual provision, it can never have the same force as statute". We agree with *Carter* at p 129 that NOM clauses are merely contractual terms between the parties and there is simply no justification to characterise them as mandatory rules in the manner that one would with a statute. After all, statutory provisions which impose mandatory formalities for contracts are enacted by the legislature to achieve certain policy goals at the expense of party autonomy. Courts therefore have no choice but to give effect to such statutory provisions and to disregard the parties' variation(s) to the contrary. In contrast, in the absence of statutory provisions mandating formalities for contracts, the court should give effect to party autonomy as the paramount consideration, and uphold the parties' oral agreement to depart from a NOM clause, express or implied, if the same can be proved.

50 The Sumption approach seems to be overly concerned with contractual certainty, and seeks to redress the perceived difficulty in proving the existence and terms of an alleged oral variation by excluding the oral variation altogether, even when it has been mutually agreed and, more importantly, proven (*Rock Advertising UKSC* at [12]). However, this perceived difficulty is a question of evidence, which can be suitably addressed by evidential principles instead of contractual ones. The question whether a NOM clause can be relied upon only arises for consideration *after* the party asserting the oral variation is *first* able to prove the disputed oral variation. If the oral variation is not proved, then as far as the court is concerned, there is simply no oral variation to the contract, and it would thus be unnecessary to rely on a NOM clause. However, once proven, there will no longer be any evidential hurdle to speak of. Thus, the question of the legal effect of a NOM clause should not be confused or conflated with any perceived evidential difficulty in proving the oral variation.

Version No 2: 22 Apr 2021 (12:01 hrs)

51 Similar to the Sumption approach, the Briggs approach accepts that parties may "bind themselves contractually as to their future conduct, and that will prevail for as long as one of them desires that this regime shall remain in place". However, there is a significant difference in that Lord Briggs recognised that if both parties agree that they should no longer be bound, then there will be no good reason why "their previous agreement to the contrary [should] stand in their way". The Briggs approach accords with our view as it respects and upholds the parties' collective autonomy to depart from NOM clauses if they decide to do so either by: (a) express agreement; or (b) necessary implication.

52 However, the Briggs approach suffers from one drawback, in that it will not imply that parties had intended to depart from the NOM clause unless it is proven that they had expressly intended to do so, or unless such implication is necessary. In our view, these situations will be very rare, with the result that a NOM clause will practically never be done away with. It is not likely that parties would expressly *orally* agree to depart from the NOM clause because, as Lord Sumption explained, to do so would be to "court[] invalidity with their eyes open" (at [15]). In other words, it is not likely that parties would enter into an oral agreement despite knowing of the NOM clause, because they would be aware that such oral agreement is or could potentially be invalid. Instead, if the parties were cognisant of the formality requirements, they would in all likelihood have simply complied with them.

53 Further, under the Briggs approach, a necessary implication of an intention to depart from a NOM clause may only be inferred where, subsequent to the oral variation, the parties had to urgently perform their modified obligations such that they did not have the time to formalise the oral variation (*Rock Advertising UKSC* at [30]).

Version No 2: 22 Apr 2021 (12:01 hrs)

54 However, if performance was indeed urgent, the parties would have performed the contract as varied, and as a consequence, would have relied, to their detriment, on the oral variation in doing so. Therefore, under the Briggs approach, the facts which would permit the court to draw the necessary implication that the parties had intended to depart from the NOM clause would in most cases also give rise to an estoppel. This very point was acknowledged by Lord Briggs (*Rock Advertising UKSC* at [30] to [31]; see also *Senu* at p 158). Seen in this light, the Briggs approach may not meaningfully add much to the requirements under the doctrine of estoppel, in practical terms. We would, instead, prefer a wider test as to when it can be necessarily implied that the parties had intended to depart from a NOM clause. The test should be whether at the point when parties agreed on the oral variation, they would necessarily have agreed to depart from the NOM clause had they addressed their mind to the question, regardless of whether they had actually considered the question or not.

55 In support of his narrow test of what constitutes a "necessary implication", Lord Briggs drew "a powerful analogy with the way in which the law treats negotiations subject to contract", and pointed out that negotiations subject to contract will not be implied as being abandoned merely because parties reach full agreement, unless such implication is necessary (*Rock Advertising UKSC* at [29]). In our view, the "subject to contract" analogy does not advance Lord Briggs' strict approach because by including such a clause, the parties in the negotiations expressly agree that there shall be *no contract* until and unless a formal contract is signed, whereas a NOM clause seeks to *invalidate* an oral agreement to vary even if such an agreement can be proved. We believe that the treatment of "subject to contract" clauses by the law is in fact a recognition of the collective party autonomy principle.

Version No 2: 22 Apr 2021 (12:01 hrs)

56 Having said that, there is some similarity between the Briggs approach and our approach in *Comfort Management* in that both require rather compelling evidence before the court will find and give effect to an oral variation. The former approach requires the party alleging the oral variation to prove circumstances that justify implying an intention to vary or that there was an express agreement to do away with the NOM clause. The latter approach requires the party alleging oral variation to rebut the presumption that there is no oral variation, and to do so, he would need to adduce more cogent evidence to prove an oral variation. To be clear, this is not intended to operate as a third standard of proof, but merely serves to reflect the inherent difficulty in proving such an oral variation in the face of their express agreement to the contrary as prescribed in the NOM clause. In this regard, there is some parallel between our present observations and our previous observations as regards the inherent difficulty of proving civil fraud: see *Alwie Handoyo v Tjong Very Sumito and another and another appeal* [2013] 4 SLR 308 at [160]. The more inherently improbable a fact is, the more cogent the evidence that is needed to prove that fact.

57 We also note that estoppel may likely be established in most cases where the parties are able to prove such oral variation. While evidence of an oral variation may, in exceptional cases, take the form of independent witness evidence or contemporaneous documents, it would typically be established by the parties' objective conduct in performing the contract as orally varied. For this reason, in most circumstances where an oral variation (which would in itself constitute a clear and unequivocal representation) is proved, the parties should be able to establish detrimental reliance on the oral variation (the act of performing the obligations of the oral variation), and thereby satisfy the doctrine of equitable estoppel.

Version No 2: 22 Apr 2021 (12:01 hrs)

58 We recognise that the *Comfort Management* approach may be construed as treating a NOM clause as having no real effect since the burden of proof would always rest on the party asserting an oral variation to prove the alleged oral variation on a balance of probabilities, independent of a NOM clause. However, the *Comfort Management* approach is entirely consistent with our observations at [50] that the difficulties highlighted by Lord Sumption can and should be resolved by the proper application of evidential principles and not by the law of contract. In line with that observation, once the burden of proof is discharged, the NOM will cease to have legal effect because that would be the *collective* decision of both parties to the contract *ie*, a function of the party autonomy principle in contract law. We should add that Australian law similarly treats a NOM clause as serving an evidential function. In *Mathews Capital Partners v Coal of Queensland Holdings* [2012] NSWSC 462 at [39], Black J observed that a NOM clause "is to be taken into account in interpreting the subsequent conduct of the parties, and it makes it *more difficult to draw an inference* that the parties did intend, by an oral agreement or by emails between their advisers, to vary [their agreement]" [emphasis added]. This "more difficult" threshold is the same difficulty in proving a subsequent oral variation that we have identified at [56] above.

59 Finally, for completeness, we note that Ong Chee Kwan J ("Ong J") in the Malaysian High Court case of *Ng Sau Foong v Rhombus Food & Lifestyle Sdn Bhd & Anor* [2020] 8 MLJ 155 ("*Ng Sau Foong*") had endorsed the Briggs approach, but with a slight modification (at [37]). Ong J held that where the NOM clause was inserted by the lawyers without the parties' instructions, the court should more readily imply from the parties' subsequent oral agreement to modify the contract such that the NOM clause is to be treated as having been

Version No 2: 22 Apr 2021 (12:01 hrs)

done away with (at [37(a)]). In other words, there is no need for the implication to be strictly necessary.

60 With respect, while we agree with Ong J that the parties' subsequent conduct may satisfy the "necessary implication" threshold, we would be slow in drawing distinctions between clauses inserted by the lawyers and clauses inserted by the parties. Contractual interpretation seeks to ascertain the objective intentions of parties as reflected by the express words of the agreement. Parties cannot deny responsibility for terms in the contract by shifting the blame to their lawyers by claiming that those terms were inserted by their lawyers without specific instructions. This line of reasoning, if accepted, would open up an entire pandora's box of cases where parties seek to shirk responsibility for clauses which they claim they did not instruct their lawyers to include. Instead, in the absence of a plea of *non est factum*, parties should be held to have read and agreed to all terms in an agreement signed by them. Further, Ong J reasoned that such implication should be made more readily because the parties were unaware of the NOM clause at the time when they orally agreed to vary their contract (at [37(a)]). However, if this were the case, by the same token, it would follow that the parties could not have intended to depart from the NOM clause, as they could not possibly have addressed their minds to it at the time of the oral variation.

61 For the reasons stated above, we maintain our preference for the *Comfort Management* approach in the treatment of NOM clauses. The principal difference with the Briggs approach is that under our approach, in order for the court to infer that the parties had by necessary implication agreed to depart from a NOM clause, it should not be strictly required for the parties to have specifically addressed their minds to dispense with the NOM clause when

Version No 2: 22 Apr 2021 (12:01 hrs)

agreeing to an oral variation (see [54] above). We should add that subject to this difference, the "express and necessary implication" threshold under the Briggs approach would essentially be the same as our "rebuttable presumption" test. That said, we do not express a conclusive view on this matter as it is not necessary in this case. We may revisit our provisional view when the issue is next squarely before us.

Whether there was in fact an oral rescission

62 We turn to the third issue of whether the Judge had erred in finding that the SPA was rescinded by mutual agreement. The principles governing appellate interference with a trial judge's factual findings are well established (see *Tan Chor Jin v Public Prosecutor* [2008] 4 SLR(R) 306 at [79]). The findings of a trial judge should be taken as *prima facie* correct and should not be disturbed in the absence of sound reasons. An appellate court will be slow to overturn the trial judge's findings of fact unless it can be shown that those findings were plainly wrong or were against the weight of the evidence before the court. If the trial judge's findings of fact are based on his assessment of the witnesses' veracity and credibility, the appellate court should exercise even more restraint in overturning such findings.

63 In our view, the high threshold for appellate intervention has not been met in the present case. We largely agree with the reasoning of the Judge as set out in her *GD*, which we briefly restate.

64 First, the Completion Date had passed without the SPA being completed, and for more than 3.5 years thereafter until the May 2018 Letter, the appellants did not serve any notice to complete on the respondents (*GD* at [48]). The appellants were unable to offer a satisfactory explanation for their complete

Version No 2: 22 Apr 2021 (12:01 hrs)

inaction over the 3.5 years. While Mr Lim claimed to have continually attempted to persuade the respondents to complete, there is not a single shred of evidence to support this (*GD* at [49]). Given the substantial length of time, the fact that Mr Lim had been communicating with the respondents on other matters, and the fact that we live in a day and age where communications are often through digital devices where such communications would leave a digital footprint, the absence of *any* documentary evidence *whatsoever* is a very glaring omission which suggests that Mr Lim did not in fact make any attempt to persuade the respondents to complete.

65 Instead, Mr Lim's testimony about his efforts to contact Mr Teow and the respondents through George, Bernard and one Charles Ng ("Ng") (Mr Teow's personal assistant) was fraught with inconsistencies, as the Judge rightly pointed out (*GD* at [50] to [52]). For instance, his claim about asking Ng to talk to the respondents about the completion was not in his affidavit of evidence-in-chief ("AEIC") but was a "new story" which only emerged on the stand (*GD* at [51]). Mr Lim also contradicted himself by admitting in cross-examination that from 2015 to May 2018, there was no discussion with the respondents about completing the purchase (*GD* at [52]). Further, Mr Lim took multiple inconsistent positions on the stand in relation to what George had told him. He first said that George had told him that he was not able to contact the respondents, then changed his answer to claim that George did not reply to him, and then finally alleged that George had told him that he did not want to get involved (*GD* at [51]). The Judge was thus perfectly entitled to find that Mr Lim's inconsistent evidence demonstrated that "he was making up his evidence as he went along" (*GD* at [52]), and she, correctly in our view, chose to disbelieve Mr Lim's claim that there was no mutual rescission.

Version No 2: 22 Apr 2021 (12:01 hrs)

66 Furthermore, on the stand, Mr Lim came up with a new reason as to why he did not chase the respondents for completion, namely, that he was waiting for the respondents to transfer money to their UOB accounts in Singapore. However, not only was this not stated in Mr Lim's AEIC (*GD* at [52]), the Judge rightly noted that the respondents actually had money in their Singapore UOB bank accounts at a certain point in time, and yet Mr Lim did not ask them to complete (*GD* at [55]). This undermined Mr Lim's evidence. We agree with the Judge that the appellants have not furnished any satisfactory reason to account for their inordinate delay in seeking completion of the SPA. This, in our view, is entirely consistent with the respondents' case that the SPA had been rescinded by mutual agreement between Mr Lim and Mr Hong.

67 Second, Mr Lim's contemporaneous conduct in or around 31 October 2014 (the date of the alleged oral rescission) supported the oral rescission. Prior to and up till 31 October 2014, Mr Lim was desperately trying to make the respondents complete the SPA, as can be gleaned from various text exchanges in which he pleaded with Mr Hong to complete the transaction. However, after 31 October 2014 there were no further text messages. In the absence of a satisfactory explanation to the contrary, it seems to us that this complete "radio silence" was due to the mutual rescission of the SPA on 31 October 2014.

68 Furthermore, instead of asking the respondents to complete the SPA, Mr Lim admitted that he had been offering new business deals to Mr Teow (*GD* at [70]). This is entirely consistent with Mr Hong's account that during the telephone call on 31 October 2014, he had told Mr Lim that there was still interest in other business deals and that they (the respondents and Mr Lim) should instead pursue such other business deals. It was likely that Mr Lim had agreed to rescind the SPA in the hope of other deals with Mr Teow and the

Version No 2: 22 Apr 2021 (12:01 hrs)

respondents (*GD* at [69] to [70]). We agree with the Judge that Mr Lim was aware that Mr Teow was a wealthy individual with extensive business dealings and Mr Lim must have hoped for other future opportunities to make money "off (or with) Mr Teow" (*GD* at [70]). Mr Lim explained that he saw Mr Teow as a "very influential businessman" and described how Mr Teow was very generous and treated him like a "little brother". Thus, Mr Lim would not have wanted to sour his relationship with Mr Teow and the respondents by insisting on the completion of the SPA, as that would have jeopardised any future prospects of money-making opportunities with Mr Teow.

69 Third, the evidence supported the respondents' account that Mr Hong had indeed confronted Mr Lim with the Nordic announcements on 31 October 2014. As stated at [13] and [14] above, the respondents testified that they became aware of the Nordic announcements between 28 October 2014 and 31 October 2014, which made them doubt that Mr Lim owned 35 million PSL shares or that they would be able to obtain a controlling stake in PSL if the SPA was completed; Mr Hong then confronted Mr Lim with these announcements on 31 October 2014. While the Judge found that Mr Lim did not make any misrepresentations to the respondents, she accepted that Mr Lim did speak to the respondents about the possibility of selling them a large amount of shares to help them secure a controlling stake in PSL (at [23(a)] above). We accept that the respondents believed that Mr Lim owned 35 million shares in PSL, and that those shares would have allowed them to have a controlling stake in PSL. This must be so because there would be no other conceivable reason for the respondents to pay such a huge premium for the shares, which were valued at several million dollars above the prevailing market price. The shares were valued at 30 cents per share whereas the open market price at the time of signing the SPA was only about 17 to 18 cents per share. Mr Lim explained that the

Version No 2: 22 Apr 2021 (12:01 hrs)

high premium was due to the difficulty of amassing a large number of shares, since if a buyer started buying shares on the open market, the market price of the shares would have continued to increase as a buyer accumulated the shares. However, had the respondents known that Mr Lim did not own the 35 million shares and was simply going to purchase them from other sources to on-sell the shares to them, it was unlikely that they would have agreed to pay such a premium for the shares.

70 As such, we accept the respondents' evidence that they believed that the 35 million shares would have allowed them to have a controlling stake in PSL. This belief (whether induced by Mr Lim or not) was dispelled when they read the Nordic announcements, which showed that 35 million shares would only amount to about 9% of PSL's shareholding. The fact that the respondents had indeed read the Nordic announcements close to 31 October 2014 is corroborated by Carrie, who testified that sometime between 3 and 6 November 2014, she was told of Mr Hong's discovery of the Nordic announcements which was also sent to her to review.

71 Following the discovery of the Nordic announcements, it would have been natural for Mr Hong to have confronted Mr Lim about this. We accept that this in fact occurred on 31 October 2014 and led to the mutual rescission of the SPA.

72 The appellants argued that the Judge had failed to consider the probative value of Carrie's evidence and her notebook entry. While Mr Hong claimed that he had told Carrie around 1 to 2 November 2014 that the SPA was cancelled, she denied having been so informed by Mr Hong. Instead, Carrie testified that

Version No 2: 22 Apr 2021 (12:01 hrs)

sometime around 3 to 6 November 2014, she was told by Mr Hong that under the SPA, the respondents held 8% of PSL's shares:

> Court: Your notebook. Counsel is saying your notebook entries do not record anything about cancellation of the S&P agreement. Agree, disagree or what?
>
> Witness: Yes, agree.
>
> Interpreter: Your Honour, witness refers to page 13 of the notes.
>
> Court: Yes.
>
> Interpreter: On the left-hand side, the first two entries. Okay. And the answer is that, "**Mr Hong had mentioned to me on the 3rd and on the 6th of November that he knew of the number PSL shares and that we hold 8%.**"
>
> Court: Sorry? "Mr Hong mentioned to me on the 3rd and the 6th November, what, 2014 that he knew of what?
>
> Witness: That **he knew he held 8%.**
>
> Court: **He knew the number of shares in PSL and he held 8%. Who held 8%?**
>
> Witness: **Mr Hong and Mr Tan.**
>
> Court: **Mr Hong mentioned to you on 3rd and 6th November 2014 that he knew the number of shares in PSL and Mr Hong and Mr Tan held 8%?**
>
> Witness: **Yes.**
>
> Q No---
>
> Court: Sorry. So I'm not sure I understand. So what does that mean?
>
> Witness: **Mr Tan and Mr Hong did not say whether the agreement was terminated or not but Mr Hong mentioned about the two points that I said earlier.**
>
> Q Can I refer you to page 193 of 1AB? This is the statistics of shareholdings of 26 PSL for its annual report 2014. You can see at the top:
>
> [Reads] "No. of Issued Shares: 386,721,035 shares"
>
> That corresponds with page 13 of your notebook? "386.72 million shares - PSL", correct?

Version No 2: 22 Apr 2021 (12:01 hrs)

> A Yes.
>
> …
>
> A … Subsequently, **Mr Hong did tell me that he held 8% of the shares and that was around the 3rd to the 6th of November 2014, which was I recorded the note as such.**
>
> Court: Sorry, can you clarify what you mean when you say that Mr Hong told you he and Mr Tan held 8% of the shares and he told you this on the 3rd and the 6th of November 2014? Because when you say, "Mr Hong told me that he and Mr Tan held 8% of the shares", right, my understanding of such a statement is that Mr Hong was telling you he---the two of them had completed the S&P agreement and bought over the shares under the agreement and were in possession of the shares. But in this case, it is not disputed by anyone that the S&P agreement was never completed, right? So can you clarify what do you mean when you say that on the 3rd of November and the 6th of November 2014, Mr Hong told you that he and Mr Tan held 8% of the shares?
>
> Witness: **Mr Hong merely told me that he discovered the Nordic announcement and he sent it to me to take a look. And he told me that he actually only held 8% under the agreement.**
>
> Court: Who only held 8%?
>
> Witness: **Mr Hong and Mr Tan.**
>
> [Emphasis added]

73 In addition, Carrie's notebook entry recorded that "we hold 8%", and also noted that PSL had 386.72 million shares. This notebook entry must have been recorded between 3 and 6 November 2014 because it was sandwiched between the notebook entries for 3 and 6 November 2014.

74 While we agree with the appellants that Mr Hong's account that he had told Carrie about the rescission of the SPA was not borne out by Carrie's evidence, that in itself does not mean that the SPA was not rescinded. Carrie's evidence must be examined in the light of all the other evidence. Further, the

Version No 2: 22 Apr 2021 (12:01 hrs)

notebook entry which stated that "we hold 8%" is at best equivocal on the question of rescission since it was common ground that the respondents did *not* in fact hold 8% of shares at any time as the SPA was never completed. In all likelihood, given that the context of the discussion with Carrie was in connection with the Nordic announcements, it was probably intended to record that the respondents *would have owned* 8% of PSL's shareholding, had the SPA been completed. We do not think it sheds any light on the question of rescission or that it is necessarily conclusive that the SPA had not been rescinded.

75 The appellants also highlighted that the alleged oral rescission was never mentioned in any written correspondence. While this is true, that must be weighed against the complete and inexplicable silence/inaction on the part of the appellants over a period of 3.5 years in failing to seek the completion of the SPA. It may well have been that the respondents saw no need to document the rescission precisely because the appellants had never sought to complete the SPA. In our view, the appellants' inaction is far more damaging and is more consistent with the agreed rescission of the SPA.

76 Our determinations above should suffice to dispose of the appeal. However, for completeness, we should express our disagreement with the Judge on two of her findings in support of the mutual rescission. First, the Judge found that Ms Seow's evidence (that around the time of the Completion Date, Mr Lim had told her that there was "no deal") supported the respondents' version of events (*GD* at [58]). However, Ms Seow's evidence must be understood in context, and does not necessarily support the mutual rescission of the SPA. Her statement arose from a line of questioning in relation to para 9 of her AEIC, where she stated:

Version No 2: 22 Apr 2021 (12:01 hrs)

> I understand that pursuant to the terms in the [SPA], the 35 million PSL Holdings Ltd shares were supposed to have been transferred to the [respondents] by 17 October 2014, but **the [respondents] have failed and/or refused to proceed with the intended purchase despite having signed a [SPA].** [emphasis added]

77 During her cross-examination, she was asked by the Judge as to how she was able to recall that the respondents had failed or refused to proceed. She explained that she had checked with Mr Lim but she "can't remember the exact words that [Mr Lim] [had said to her] but it seems like---like there's no deal".

78 In our view, two points flow from Ms Seow's evidence. First, when she Ms Seow used the phrase "no deal", she was not saying that Mr Lim had told her that the SPA was cancelled. Instead, she was merely explaining her evidence in her AEIC, namely, that she had been informed by Mr Lim that the respondents failed or refused to proceed. Second, if Mr Lim had told her this around the Completion Date on 17 October 2014, she could not possibly have been referring to the alleged rescission since that, according to the respondents' case, only occurred on 31 October 2014.

79 Second, the Judge relied on the fact that Mr Lim had been trading in Mdm Tay's shares to support her finding that the SPA had been rescinded. The Judge found that Mr Lim's conduct in trading Mdm Tay's shares to the extent that her shareholding fell below 9.755 million shares, and the fact that Mr Lim was not even aware that her shareholding had fallen below that number, was inconsistent with Mr Lim's position that he remained bound to sell 35 million shares to the respondents under the SPA, including Mdm Tay's 9.755 million shares (*GD* at [62]).

Version No 2: 22 Apr 2021 (12:01 hrs)

80 However, we do not think that Mr Lim's trading of Mdm Tay's PSL shares necessarily supported the conclusion that the SPA had been rescinded. The plain words of the SPA only required the appellants to sell the respondents 35 million shares and did not specifically require that these shares must necessarily include Mdm Tay's 9.755 million shares. Mr Lim could have obtained the 35 million from any other source, if and when the respondents were willing to complete, and there is no evidence to suggest that Mr Lim would have been unable to complete the sale.

81 While we may disagree with the Judge on these two findings, in our judgment, they do not displace the other more damaging findings made against the appellants' case which are based on the objective evidence before us – see [63]–[71] above. Furthermore, since a major part of the decision hinged on Mr Lim's credibility, this court should be even more hesitant to interfere with the Judge's decision, not having had the benefit of hearing Mr Lim's oral testimony.

82 For these reasons, we affirm the Judge's decision that the parties had orally agreed to a mutual rescission of the SPA via the telephone call on 31 October 2014.

Whether the appellants are estopped from enforcing the SPA

83 Given the above findings, it is not necessary for us to address the estoppel issue, but, for completeness, we make some brief observations.

84 As stated at [39] above, all three schools of thought on the legal effect of a NOM clause recognise estoppel as an exception to the NOM clause.

Version No 2: 22 Apr 2021 (12:01 hrs)

85 We agree with the respondents that even if the oral rescission is deemed to be invalid by operation of the NOM clause, the appellants would, in any event, have been estopped from enforcing the SPA. The oral agreement to rescind the SPA in itself constituted a clear and unequivocal representation by the appellants that they would not enforce the SPA. The respondents relied on this representation and decided not to complete the SPA. This caused them detriment as the publicly listed share price of PSL shares on 3 May 2018 (the date of the May 2018 Letter) had substantially plummeted from the Completion Date price, such that it would now be inequitable for the appellants to enforce the SPA. If Mr Lim had not made the representation, the respondents might well have completed the transaction earlier, and could have on-sold the shares to other parties before the share price plummeted.

Conclusion

86 Accordingly, we find, as a matter of construction, that cl 8.1 does not apply to the rescission of the SPA. Further, the evidence before us is indeed consistent with a mutually agreed oral rescission. In any event, the appellants would have been estopped from enforcing the SPA. The appeal is thus dismissed with costs. Costs should follow the event and we order the appellants to pay the respondents costs fixed at $35,000 inclusive of disbursements. The usual consequential orders will apply.

Sundaresh Menon
Chief Justice

Andrew Phang Boon Leong
Justice of the Court of Appeal

Version No 2: 22 Apr 2021 (12:01 hrs)

Judith Prakash
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Belinda Ang Saw Ean
Judge of the Appellate Division

Lok Vi Ming SC, Qabir Sandhu, Law May Ning (LVM Law Chambers LLC) (instructed), Daryl Ong Hock Chye (LawCraft LLC) for the appellants;
Christopher Woo, Joel Ng and Sujesh Anandan (Quahe Woo & Palmer LLC) for the respondents.

Version No 2: 22 Apr 2021 (12:01 hrs)