IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 263

Suit No 152 of 2017

Between

Nanyang Medical Investments Pte. Ltd.

… *Plaintiff*

And

(1) Leslie Kuek Bak Kim
(2) Cheong Choi Shoon Sarah
(3) Aesthetic Alchemy Pte. Ltd.

… *Defendants*

A N D

Between

(1) Leslie Kuek Bak Kim
(2) Cheong Choi Shoon Sarah
(3) Aesthetic Alchemy Pte. Ltd.

… *Plaintiffs in Counterclaim*

And

Nanyang Medical Investments Pte. Ltd.

… *Defendant in Counterclaim*

GROUNDS OF DECISION

[Contract] — [Contractual terms] — [Express terms] — [Interpretation]
[Contract] — [Contractual terms] — [Admissibility of evidence]
[Contract] — [Contractual terms] — [Penalty clause]
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v
Kuek Bak Kim Leslie and others

[2018] SGHC 263

High Court — Suit No 152 of 2017
Mavis Chionh JC
6-8, 12 June, 30 July 2018; 5 September 2018

28 November 2018

Mavis Chionh JC:

Background

1 The Plaintiff in this case is an investment holding company. Its director is one Fan Hanxi, ("Dr Fan"), who is also one of its shareholders. The 1st Defendant is a plastic surgeon with his own practice in Singapore. The 2nd Defendant is his wife. The 3rd Defendant is a company incorporated by the 1st and 2nd Defendants as a corporate vehicle for running a private plastic surgery practice. Both the 1st and 2nd Defendants are its directors. At the time the present suit was filed, the Plaintiff, the 1st Defendant, and the 2nd Defendant were all shareholders of the 3rd Defendant, with the Plaintiff holding 11.54% of the shares, and the 1st and 2nd Defendants holding the remaining shares in equal proportions.

2 The Plaintiff became a shareholder of the 3rd Defendant pursuant to a Share Sale Agreement ("the Share Sale Agreement"[1]) which the Plaintiff, and the 1st and 2nd Defendants, entered into on 13 February 2015. Under this Share Sale Agreement, the 1st and 2nd Defendants transferred to the Plaintiff 11.54% of the shares in the 3rd Defendant upon the Plaintiff paying the agreed purchase price of $1.5m. At that point in time, Dr Fan had valued the 1st Defendant's plastic surgery business at $13m.[2]

3 On the same date (*ie*, 13 February 2015), the parties also entered into the following other agreements:

(a) Shareholders' Agreement between the Plaintiff and all three Defendants ("the Shareholders' Agreement");[3]

(b) Two separate Put Option Agreements (collectively, "the Put Option Agreements" or "the POAs") – one between the Plaintiff and the 1st Defendant,[4] another between the Plaintiff and the 2nd Defendant;[5] and

(c) Two separate Call Option Agreements (collectively, "the Call Option Agreements" or "COAs") – one between the Plaintiff and the 1st Defendant,[6] another between the Plaintiff and the 2nd Defendant.[7]

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[1] Agreed Bundle of Documents Volume VI ("6ABD") pp 4122 – 4148.

[2] See transcript of 6 June 2018, 22:1 to 22:3; also 87:26.

[3] 6ABD pp 4149 – 4175.

[4] 6ABD pp 4176 – 4185.

[5] 6ABD pp 4186 – 4194.

[6] 6ABD pp 4195 – 4204.

[7] 6ABD pp 4205 – 4214.

4 The Plaintiff filed the present suit to seek firstly an order of specific performance to compel the 1st and 2nd Defendants to purchase its shares in the 3rd Defendant at the price of $1.2m; or alternatively, an award of damages in the sum of $1.2m. The Plaintiff asserted that it had exercised its put options in respect of these shares on 25 August 2016, pursuant to cl 2.2 of the POAs. Under cll 2.3 and 3 of the POAs, the 1st and 2nd Defendants were obliged to purchase its shares at 80% of the aggregate purchase price paid by the Plaintiff (which came to $1.2m), but the 1st and 2nd Defendants had failed to do so.

5 Secondly, the Plaintiff also sought in this suit an order of specific performance to compel the Defendants to pay it a sum of $35,952.18 which it claimed represented its share of the total dividends of $311,544 declared by the 3rd Defendant for the year ending 31 January 2016.

6 The Defendants denied the validity of the Plaintiff's put option notices. The Defendants asserted that on 4 September 2015, they had notified the Plaintiff of the occurrence of a Default Event as defined in the COAs: namely, the "failure of the [Plaintiff] to refer (through itself and / or Nanyang Travel Planner Pte Ltd [a related company] … at least sixty (60) clients to the [3rd Defendant] within a consecutive six (6)-month period from the date of [the COAs]". The Defendants asserted that the Plaintiff had itself admitted the occurrence of the Default Event, as well as the consequence of such a Default Event, which was that the 1st and 2nd Defendants were entitled to exercise their respective call options – pursuant to cll 2 and 3 of the COAs – to purchase the Plaintiff's shares in the 3rd Defendant for $1. Subsequently, on 6 May 2016, the 1st and 2nd Defendants exercised their respective call options under the COAs to purchase the Plaintiff's shares for $1. The effect of this exercise by the two Defendants of their call options was to terminate the POAs, pursuant to cl 7(iii) of the POAs. As the Plaintiff had failed to execute the relevant share

transfer forms forwarded by the Defendants, the 1st and 2nd Defendants counterclaimed in the present suit for an order of specific performance to compel the Plaintiff to transfer its shares to them for the price of $1 (payable by each Defendant).

7 As to the Plaintiff's claim in relation to its share of the dividends declared by the 3rd Defendant, the Defendants stated that the sum of $311,544 represented the total dividends declared for the financial periods ended 31 January 2015 and 31 January 2016 respectively, and that the sum was broken down as follows:

(a) $261,544 for the period ended 31 January 2015;

(b) $50,000 for the period ended 31 January 2016.

8 The Defendants asserted that as the Plaintiff had become a shareholder of the 3rd Defendant only on 13 February 2015, it was entitled only to share in the $50,000 dividends for the period ended 31 January 2016, which worked out to a sum of $5,769.24.

9 At the conclusion of the trial, I dismissed the Plaintiff's claims and allowed the Defendants' counterclaim for an order of specific performance to compel the transfer of the Plaintiff's shares to the 1st and 2nd Defendants for $1 (per Defendant). As the Plaintiff has filed an appeal against my decision, I am setting down my reasons in these written grounds.

The competing claims in relation to the disposal of the Plaintiff's shares in the 3rd Defendant

The relevant contractual clauses

10 I will first address the Plaintiff's claim and the Defendant's counter-claim in relation to the disposal of the Plaintiff's shares in the 3rd Defendant. Parties were agreed that the central dispute concerned whether, on 6 May 2016, the 1st and 2nd Defendants could have validly issued call option notices to purchase the Plaintiff's shares for $1. I will refer to the exercise of such call options as "***default call options***". If this question were to be answered in the affirmative, it meant that the Plaintiff could not have validly exercised its put options on 25 August 2016 because the POAs would have been terminated upon the valid exercise of the two Defendants' call options – as provided by cl 7(iii) of the POAs (which I set out below).[8] On the other hand, if the question were to be answered in the negative, the Defendants' objections to the Plaintiff's exercise of its put option on 25 August 2016 fell away. Much of the argument in this trial thus revolved around the interpretation of the contractual clauses which delineated the scope of the 1st and 2nd Defendants' right to exercise their call options on 6 May 2016 on the basis of a "Default Event" as defined in the COAs.

11 For ease of reference, I set out below the relevant clauses from the COAs:

> **1 DEFINITIONS**
>
> 1.1 The following words and phrases, wherever used in this Agreement, shall have the following meanings:
>
> …
>
> "Call Option" shall mean the right of the

[8] 6 ABD p 4189.

	Purchaser to purchase from the Grantor, on the terms and subject to the conditions contained in this Agreement, the Call Option Shares at the Exercise Price
"Call Option Period"	shall mean the period of twenty-four (24) months from the date of this Agreement, or such other period as may be mutually agreed between the Parties;
...	
"Completion Date"	shall mean the date falling ten (10) Business Days after the date of the Notice, or such other date as may be mutually agreed between the Parties;
"Default Event"	shall mean such failure of the Grantor to refer (through itself and/or Nanyang Travel Planner Pte. Ltd.) (regardless of whether any agreement is ultimately entered into with) at least sixty (60) clients to the Company within a consecutive six (6)-month period from the date of this Agreement;
"Default Period"	shall mean the period of six (6) months from the date of this Call Option (which shall run concurrently with the Call Option Period);

...

2 CALL OPTION

2.1 In consideration of the sum of S$1.00 only paid by the Purchaser to the Grantor (the receipt, adequacy and sufficiency of which the Grantor acknowledges), the Grantor hereby irrevocably grants the Purchaser the right to exercise the Call Option at any time during the Option Period (or the Default Period, as the case may be) over the Call Option Shares.

2.2 The Call Option may only be exercised by the Purchaser in respect of all of the Call Option Shares (and not part

thereof only), by serving on the Grantor a Notice during the Option Period (or the Default Period, as the case may be). The Notice, upon being served by the Purchaser, may not be withdrawn except with the written consent of the Grantor.

2.3 The Grantor shall, upon service of the Notice by the Purchaser, sell to the Purchaser (or his designated nominee, as shall be informed in writing to the Grantor) the Call Option Shares at the Exercise Price.

3 EXERCISE PRICE

The aggregate Exercise Price for the Call Option Shares shall be as follows:

(a) should there be non-occurrence of the Default Event, based on the higher of either:

(i) 120% of the aggregate price paid by the Grantor at the relevant date(s) on which it had purchased the Call Option Shares (the "Acquisition Date(s)"), LESS all accumulative dividends since received by the Grantor from the Acquisition Date(s) up to the date of exercise of the Call Option; or

(ii) the purchase price offered by an unrelated third party for the Call Option Shares in relation to a proposed purchase of the entire (and not part thereof only) issued and paid-up share capital of the Company, and

(b) on the occurrence of a Default Event, at S$1.00.

…

7 DURATION OF OBLIGATIONS

This Agreement shall terminate upon the earlier of:

(i) the expiry of the Option Period;

(ii) the exercise of the Call Option by the Purchaser; or

(iii) the exercise of the Put Option by the Grantor.

12 I also set out below the relevant clauses from the Shareholders' Agreement and the POAs:

Shareholders' Agreement

9 CALL OPTION AND PUT OPTION

9.1 The Parties hereby agree and undertake that as soon as practicable after Completion:

(i) in consideration of (ii) below, the Original Shareholders and the Investor shall enter into a call option agreement, in substantially the form as set out in Schedule B hereto (the "Call Option Agreement"), pursuant to which the Investor shall grant the Original Shareholders the right but not the obligation to purchase all the shares held by the Investor at the relevant point in time either (a) upon the occurrence of an event of default (as defined in the Call Option Agreement) during a period of 6 months from the Completion Date; or (b) at any time during a period of 24 months from the Completion Date, at the relevant agreed exercise prices; and

(ii) in consideration of (i) above, the Original Shareholders and the Investor shall enter into a put option agreement, in substantially the form as set out in Schedule C hereto (the "Put Option Agreement"), pursuant to which the Original Shareholders shall grant the Investor the right but not the obligation to require the Original Shareholders to purchase all the shares held by the Investor at the relevant point in time, at any time during a period of 24 months from the Completion Date, at the relevant agreed exercise price,

(collectively, the "Options").

Put Option Agreement

1 DEFINITIONS

1.1 The following words and phrases, wherever used in this Agreement, shall have the following meanings:

…

"Completion Date"	shall mean the date falling ten (10) Business Days after the date of the Notice, or such other date as may be mutually agreed between the Parties;
…	
"Put Option"	shall mean the right of the

	Investor to sell to the Purchaser, on the terms and subject to the conditions contained in this Agreement, the Put Option Shares at Exercise Price;
"Put Option Period"	shall mean the period of twenty-four (24) months commencing from the date of this Agreement, or such other period as may be mutually agreed between the Parties;

…

2 PUT OPTION

2.1 In consideration of the sum of S$1.00 only paid by the Investor to the Purchaser (the receipt, adequacy and sufficiency of which the Purchaser acknowledges), the Purchaser hereby irrevocably grants the Investor the right to exercise the Put Option at any time during the Option Period over the Put Option Shares.

2.2 The Put Option may only be exercised by the Investor in respect of all of the Put Option Shares (and not part thereof only), by serving on the Purchaser a Notice during the Option Period. The Notice, upon being served by the Investor, may not be withdrawn except with the written consent of the Purchaser.

2.3 The Purchaser shall, upon service of the Notice by the Investor, become bound to purchase from the Investor the Put Option Shares at the Exercise Price.

3 EXERCISE PRICE

The aggregate Exercise Price for the Put Option Shares shall be at 80% of the aggregate price paid by the Investor at the relevant date(s) on which it had purchased the Put Option Shares (the "Acquisition Date(s)"), LESS all cumulative dividends since received by the Investor from the Acquisition Date(s) up to the date of exercise of the Put Option.

…

7 DURATION OF OBLIGATIONS

This Agreement shall terminate upon the earlier of:

(i) the expiry of the Option Period;

(ii) the exercise of the Put Option by the Investor; or

(iii) the exercise of the Call Option by the Purchaser.

The Plaintiff's claim in relation to the disposal of its shares in the 3rd Defendant

The Plaintiff's case in summary

13 The "Call Option Period" under the COAs was defined as "the period of twenty-four (24) months from the date of this Agreement". The "Exercise Price" for the "Call Option Shares" differed depending on whether or not the call option was exercised on the occurrence of a Default Event (as defined by the COAs): see cll 3(a) and (b) of the COAs. If there was no Default Event, then the Exercise Price would be the higher of either 120% of $1.5m (being the purchase price paid by the Plaintiff for its 11.54% shareholding) or the purchase price offered by an unrelated third party for the Call Option Shares: see cl 3(a). On the other hand, in the event of "occurrence of a Default Event", the Exercise Price of $1 for the shares would apply: see cl 3(b).

14 As noted earlier, the COAs defined a Default Event as the "failure of the [Plaintiff] to refer (through itself and/or Nanyang Travel Planner Pte Ltd [a related company] … at least sixty (60) clients to the [3rd Defendant] within a consecutive six (6)-month period from the date of [the COAs]" – that is, within the period between 13 February 2015 and 13 August 2015. The Plaintiff did not deny that a Default Event had indeed occurred in this case: as at 13 August 2015, it had referred only 20 clients to the 3rd Defendant.[9] However, according to the Plaintiff, in order for the Exercise Price of $1 to apply, the 1st and 2nd Defendants had to exercise their call options *strictly within the consecutive six-month period from the date of the COAs; that is, within the six-month period ending on 13 August 2015*. The two Defendants' exercise on 6 May 2016 of

[9] [47] of the 1st Defendant's AEIC.

their call options to purchase the Plaintiff's shares for $1 was, according to the Plaintiff, "invalid and/or of no effect".[10]

15 Whilst the Plaintiff decried the attempt by the Defendants to rely on "pre-contractual" documents such as the earlier drafts of the various agreements in the interpretation of the relevant contractual clauses,[11] the Plaintiff itself cited the Term Sheet signed by the Defendants and Nanyang Ventures Pte Ltd ("Nanyang Ventures") on 18 June 2014 in support of its position.[12] As an aside, it should be explained that Nanyang Ventures is a majority shareholder of the Plaintiff. Nanyang Ventures was the entity involved in the pre-contractual negotiations with the Defendants, but Dr Fan decided to incorporate Nanyang Medical Investments Pte Ltd (the Plaintiff in these proceedings) on 1 October 2014 to serve as his "investment vehicle to hold shares of other future collaborations of this nature";[13] and Nanyang Medical Investments Pte Ltd subsequently became the contracting party to the various agreements with the Defendants. According to the Plaintiff, the Term Sheet showed that a "Non-Default Call Option" could be exercised within the entire 24-month period from the date of the COAs whereas a "Default Call Option" could only be exercised "immediately upon an event of default".[14]

16 Alternatively, the Plaintiff claimed that following the occurrence of the Default Event, the 1st and 2nd Defendants had – in the course of email and other exchanges – undertaken and/or promised not to exercise "[their] call options on

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[10] See [24] of the Plaintiff's Reply and Defence to Counterclaim (Amendment No. 2) dated 24 August 2017.

[11] See [11] of Plaintiff's Reply and Defence to Counterclaim (Amendment No. 2).

[12] Tab 5, pp 146 to 151 of Dr Fan's AEIC.

[13] [58] of Dr Fan's AEIC.

[14] See [9(d)] of Plaintiff's Reply and Defence to Counterclaim (Amendment No. 2).

the basis of the Default Event"; and that they were accordingly "prevented, precluded and / or estopped" from doing so.[15]

17 Further and/or in the alternative, the Plaintiff claimed that it had come to a "Settlement Agreement" with the 1st and 2nd Defendants as a result of an exchange of emails on 24 and 25 August 2016.[16] The Plaintiff claimed that pursuant to this Settlement Agreement, notwithstanding the 6 May 2016 call option notices issued by the 1st and 2nd Defendants, they were to purchase the Plaintiff's shares "pursuant to the Put Option Agreements" – that is, at the purchase price of $1.2m (80% of the purchase price paid by the Plaintiff for the shares). According to the Plaintiff, the effect of the Settlement Agreement was "to preserve parties' respective rights and obligations under the Put Option Agreements". Hence, even if the "Purported Default Call" of 6 May 2016 was valid at the time it was exercised, the effect of the Settlement Agreement was to "render the Purported Default Call subsequently invalid, and reinstate the Put Option Agreements and the rights and obligations of the parties therein".

18 Further and/or in the alternative, the Plaintiff contended that cl 2, read with cl 3(b) of the COAs is "oppressive and / or unconscionable and / or comprise penalty clauses, and are thereby void or unenforceable or liable to be set aside" by the court, or "otherwise of no legal effect by way of the common law".[17]

The Defendants' case in summary

19 The Defendants disagreed with the Plaintiff's contention that the default call options had to be exercised within the first six months from the date of the

[15] See [25] of the Plaintiff's Reply and Defence to Counterclaim (Amendment No. 2).

[16] See [26] of the Plaintiff's Reply and Defence to Counterclaim (Amendment No. 2).

[17] See [30] of the Plaintiff's Reply and Defence to Counterclaim (Amendment No. 2).

COAs. As the COAs defined a Default Event as the Plaintiff's failure to refer at least 60 clients to the 3rd Defendant in these first six months, parties could only determine whether a Default Event had occurred when the six-month period had expired on 13 August 2015. It was illogical, if not impossible, for the 1st and 2nd Defendants to purport to exercise their call options based on the occurrence of a Default Event before the expiry of the six-month period. Moreover, the COAs defined the Call Option Period as the period of 24 months from the date of the said agreements, and nothing in the COAs stipulated that a call option based on the occurrence of a Default Event could only be exercised within the first six months from the date of the COAs. According to the 1st and 2nd Defendants, upon the occurrence of a Default Event, they had between 14 August 2015 and 13 February 2017 to exercise their call options to purchase the Plaintiff's shares for $1 under cl 3(b) (the latter date being the last day of the 24-month period from the date of the COAs).

20 Just as the Plaintiff had attempted to rely on the Term Sheet of 18 June 2014 in support of its arguments on the period in which a call option based on a Default Event could be validly exercised, the Defendants too cited the Term Sheet – as well as the earlier drafts of their various agreements – as evidence of the understanding between the parties. According to the Defendants, the commercial bargain struck between the parties even before 13 February 2015 included provision for the 1st and 2nd Defendants to buy back Nanyang Ventures' shares in the 3rd Defendant for $1 if it could not refer at least 60 patients within the six months from the signing of the agreements. This commercial bargain recognised that the "value proposition and commercial justification" for the 1st Defendant's agreement to collaborate with Nanyang Ventures was the latter's purported ability to grow the 1st Defendant's business through its referral of a "steady stream of patients from China". Indeed, according to the Defendants, the figure of 60 patients within the first six months

was substantially lower than Nanyang Ventures' original representation that it would be able to "refer a conservative estimate of 20 patients per month" with each spending an average of $5,000 to $8,000 on plastic surgery and cosmetic treatments.[18]

21 As to the period in which the Defendants were entitled to exercise default calls to buy back the Plaintiff's shares for $1, the defence pointed out that the earlier drafts of the various agreements had provided for a "Call Option Agreement" and a "Default Call Option Agreement" which were separate and distinct documents.[19] (Nanyang Ventures was listed as the contracting party on behalf of Dr Fan in these agreements because, as mentioned above at [15], it was initially contemplated that Nanyang Ventures would be the party contracting with the Defendants.) The draft Call Option Agreement provided that in or before the end of the Call Option Period, the 1st and 2nd Defendants would have the option to purchase the investing party's shares at either 120% of the original purchase price paid for the shares or a firm price offered by an unrelated third party (whichever was the higher).[20] Under the draft Call Option Agreements, the Call Option Period was stated to be "the 24 months [from] the date of this option". The draft Default Call Option Agreement provided that in the event of the default, the 1st and 2nd Defendants would have the option to purchase Nanyang Ventures' shares at $1.[21] Under the draft Default Call Option Agreement, a "default" was defined as being a failure by Nanyang Ventures to refer 60 or more patients to the 3rd Defendant within a consecutive period of six months from the date of the agreement. The Call Option Period in the draft Default Call Option Agreement was also stated to be "24 months [from] the date

[18] See [17]-[19] of the Defendants' Defence and Counterclaim (Amendment No. 2).

[19] 1 ABD pp 564 to 621.

[20] 1 ABD pp 567 to 571.

[21] 1 ABD pp 572 to 576.

of this option" – which was the same period stated for the Call Option Period under the draft Call Option Agreement. In subsequent discussions with the Plaintiff's lawyers, M/s Shook Lin & Bok LLP ("Shook Lin"), the draft Call Option Agreement and the draft Default Call Option Agreement were merged into a single document named the Call Option Agreement ("COA"). However, this merging of the two documents did not (according to the Defendants) result in any change to the duration of the Call Option Period for default calls: it continued to be 24 months from the date of the COA.

22 The Defendants denied that they had in any way agreed that the Plaintiff's failure to refer at least 60 patients within the six months from the date of the COAs should not constitute a Default Event for the purpose of the 1st and 2nd Defendants' exercise of their call options pursuant to cl 2.2 read with cl 3(b). The Defendants also denied that these clauses constituted a penalty clause or that they were in any way oppressive or unconscionable. Instead, the Defendants contended that the Plaintiff's conduct subsequent to 6 May 2016 demonstrated that it was aware that the 1st and 2nd Defendants were entitled to exercise their call options to purchase its shares for $1, and it was seeking their "indulgence not to exercise this right as yet" while it tried to refer more patients to the 3rd Defendant (albeit without any eventual success).[22]

23 Finally, the Defendants denied that the parties had entered into any settlement agreement in relation to the 1st and 2nd Defendants' exercise of their call options and/or the Plaintiff's right to exercise the put options. They also asserted that the discussions and correspondence between the parties between May 2016 and August 2016 were "conducted on a without prejudice basis", and thus "inadmissible at law".

[22] See [39] of the Defendants' Defence and Counterclaim (Amendment No. 2).

24 In the circumstances, the 1st and 2nd Defendants contended that they had on 6 May 2016 validly exercised their rights to purchase the Plaintiff's shares for $1 pursuant to cl 2.2 read with cl 3(b) of the COAs, and that the Plaintiff's purported put option notice of 25 August 2016 was consequently invalid.

The Plaintiff's claim in relation to the disposal of its shares in the 3rd Defendant

The evidence adduced

25 I will next set out the evidence adduced by the parties before explaining the findings of fact and law which I made.

26 The Plaintiff called Dr Fan and Chee Tet Choy Andy ("Chee") as witnesses. Like Dr Fan, Chee is a director of Nanyang Ventures.

27 The Defendants called the following witnesses:

(a) the 1st Defendant;

(b) Lu Anqi ("Anqi"), who was previously the Vice-President of Nanyang Ventures and who acted as the Plaintiff's representative in most of the negotiations with the 1st Defendant both prior to and after the signing of the various agreements on 13 February 2015; and

(c) Kam You Kin ("Kam"), an accountant who acted as the 1st Defendant's advisor during the Defendants' dealings with the Plaintiff and with Nanyang Ventures.

The Plaintiff's evidence

Dr Fan

28 Dr Fan stated that prior to entering into the various agreements with the Defendants on 13 February 2015, he had already built up an "extensive" network within the tourism industry in China through one of his companies, Yoyo (Beijing) Travel Services Co., Ltd ("Yoyo").[23] Sometime between 2010 and 2011, Dr Fan decided to venture into investing in medical tourism between Singapore and China. The plan was for Yoyo to advertise the medical products and services offered by a Singapore clinic to the high net worth individuals in China. Yoyo, together with Nanyang Ventures, would also provide concierge services and travel packages to facilitate the patients' visit to the said Singapore clinic.[24] Dr Fan hired Anqi as a Vice-President of Nanyang Ventures to source for clinics in Singapore which would be interested in such a business collaboration with Yoyo and Nanyang Ventures. Anqi suggested the 1st Defendant, and Dr Fan gave her the go-ahead to negotiate with the 1st Defendant on the terms of the proposed collaboration.[25] In cross-examination, Dr Fan agreed that based on his own "expertise" as a "sophisticated investor",[26] he had valued the 1st Defendant's clinic at $13m.[27]

29 In his affidavit of evidence in chief ("AEIC"), Dr Fan referred to the Term Sheet signed by the Defendants and Nanyang Ventures on 18 June 2014 as a document which set out "the parties' broad expectations and key indicative terms regarding the proposed collaboration". In particular, according to Dr Fan,

[23] [8] to [11] of Dr Fan's AEIC.

[24] [17] of Dr Fan's AEIC.

[25] [18] of Dr Fan's AEIC.

[26] See transcript of 6 June 2018, 20:28 to 20:31.

[27] See transcript of 6 June 2018, 22:1 to 22:10.

the Term Sheet showed that parties contemplated two different mechanisms for the exercise of call options: one to be exercised "pursuant to an event of default ('Default Call Option')" and one to be exercised "in any other event ('Non-Default Call Option')". "Crucially", according to Dr Fan, the Term Sheet showed that the 24-month period for the exercise of the Call Options "only applied to exercises of the Non-Default Call Option".[28]

30 Sometime in July 2014, Shook Lin was engaged by Nanyang Ventures to negotiate and draft the agreements between the parties. Dr Fan left negotiations to Anqi and Shook Lin. He was given periodic updates by Anqi and kept abreast of key developments.[29]

31 Prior to the signing of the various agreements on 13 February 2015, a number of draft agreements were discussed and exchanged between the parties. On 5 August 2014, the Defendants' representative Melissa Hee forwarded a set of draft agreements ("the August 2014 drafts"). Dr Fan found the August 2014 drafts "unfair to [Nanyang Ventures], insofar as the call option agreements were concerned",[30] because they appeared to provide that the "Default Call Option" would be "exercisable at any time within 24 months from the date of execution" of the call option agreements. Dr Fan said he would not have agreed to such a position because "it would not have been a commercially prudent investment".[31]

32 According to Dr Fan, "Shook Lin substantially amended the August 2014 drafts and in particular, clarified the Call Option mechanism". Dr Fan

[28] [34] to [35] of Dr Fan's AEIC.

[29] [39] to [40] of Dr Fan's AEIC.

[30] [41] of Dr Fan's AEIC.

[31] [44] of Dr Fan's AEIC.

opined that the new drafts of the COAs and the POAs circulated by Shook Lin on 25 November 2014 had made it clear that:

> (a) the Default Call Option can only be exercised by the 1st and 2nd Defendants within six months from the date of the agreement; and
>
> (b) the Non-Default Call Option can be exercised by the 1st and 2nd Defendants at any time within 24 months from the date of the agreement.[32]

33 Dr Fan claimed that throughout the negotiations with the Defendants, he was "cognizant" of the "heavy penalty" the Plaintiff would have to pay if it failed to refer 60 patients to the 3rd Defendant within six months (the "60 Patients Requirement"): namely, that it would have its shares bought back by the 1st and 2nd Defendants for $1. According to Dr Fan, he was "prepared to take this risk" because he realised that agreeing to the 60 Patients Requirement would "give the 1st and 2nd Defendants the assurance and / or confidence" that he was "serious about seeing this business collaboration succeed", and he also believed there was "much more to be gained from the profit-sharing agreement that was encapsulated in the Shareholders' Agreement". Moreover, given his "extensive network in China", he did not foresee any problems in meeting the 60 Patients Requirement, especially since the agreements between the parties did not require a minimum spend by each patient referred. Indeed, the Plaintiff was not even restricted to referring patients from China: any patients referred would count towards the 60 Patients Requirement, "regardless of nationality". "Most importantly", he was of the view that the "Default Call Option was only exercisable within a period of 6 months" such that his "'risk window' was only for a short period of 6 months".[33]

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[32] [51] of Dr Fan's AEIC.

34 Dr Fan also claimed that patients referred to the 3rd Defendant "would always schedule their appointments approximately 2 weeks in advance", such that "by late July 2015", it would have been "already apparent to the 1st and 2nd Defendant[s] that the Plaintiff would not be able to reach the 60 Patient[s] Requirement". In his AEIC, he postulated that it was "open to the 1st and 2nd Defendant[s] from late July 2015 onwards to exercise the Default Call Option".[34]

35 Sometime in September 2015, Dr Fan became aware that a Default Event had occurred. He was informed by Anqi of an email sent by the Defendants' representative Melissa Hee on 4 September 2015.[35] This email noted that as at 4 September 2015, the total number of patients referred to the 3rd Defendant stood at 27. The email referred to cl 3(b) of the COAs, and stated that based on cl 3(b), the 1st and 2nd Defendants had the right to purchase the Plaintiff's shares in the 3rd Defendant at $1. The email concluded by asking if there were "any active marketing programs in progress to meet the number of referral of the remaining patients".

36 Dr Fan claimed that the contents of the above email were conveyed to him over the phone by Anqi who told him "that the Plaintiff was in default and that the 1st and 2nd Defendants' representative had raised this as an issue". He claimed that she did not mention the possibility of the shares being bought back for $1, and that at that point, his main concern was that the 1st and 2nd Defendants would terminate the agreements between them "by exercising the *Non-Default Call Option*" [emphasis added]. He wanted to "carry on with the cooperation" with the Defendants.[36] He therefore instructed Anqi to write to the

[33] [56] of Dr Fan's AEIC.

[34] [60] of Dr Fan's AEIC.

[35] Tab 11, p 558 of Dr Fan's AEIC.

1st Defendant to explain the reasons why the Plaintiff had not met the 60 Patients Requirement. This led to Anqi's email of 6 September 2015 to Melissa Hee, the 1st Defendant, and Kam.[37] In this email, Anqi thanked Melissa Hee for "the gentle reminder" and stated that the Plaintiff had "tried [its] best to achieve [its] commitment within the six months period", but it had met with "some unforeseeable difficulties", including the tightening of immigration rules and the consequent rejection of "a lot of visa [applications] for [the Plaintiff's] guests". The email concluded by stating that the Plaintiff had opened up "many distribution channels", that there would be "more patients coming in the near future", that the Plaintiff wished "to seek [the 1st Defendant's] understanding" and recognition of its efforts, and that it would "continue with more diversified and active marketing programs in acquiring more patients".

37 On 9 September 2015, Anqi also sent the 1st Defendant a Whatsapp message in which she stated: "… we are still trying to meet the 60 patients commitment. Please allow us sometime till end October".[38] The 1st Defendant replied: "No problem. I appreciate your efforts."

38 According to Dr Fan, based on the above communications, the 1st and 2nd Defendants had "clearly represented that they would refrain from exercising [their] call options, so long as the Plaintiff agreed to undertake marketing efforts to refer more Chinese patients to the 3rd Defendant". It was in the light of these "representations" that the Plaintiff had "proceeded to engage in diversified and active marketing programs in order to refer more patients to the 3rd Defendant and meet the 60 patient target referral". Dr Fan cited a Nanyang Ventures marketing video as the evidence of these alleged efforts.[39] He said he "thought

[36] See transcript of 7 June 2018, 14:25 to 14:28.

[37] Tab 12, p 560 of Dr Fan's AEIC.

[38] Tab 13, p 563 of Dr Fan's AEIC.

both parties [had] arrived at an understanding" after Anqi's email of 6 September 2015 because he did not receive any "official documents" from the Defendants "to buy back the shares from [the Plaintiff]", and because the Plaintiff continued to refer further patients to the 3rd Defendant "for a very long time".[40] Around 24 March 2016, the Plaintiff eventually managed to refer a total of 60 patients to the 3rd Defendant.

39 However, on 6 May 2016, the 1st and 2nd Defendants issued call option notices whereby they claimed – in the share transfer forms enclosed with the notices – to be acquiring the Plaintiff's shares for $1 (per defendant).[41] Dr Fan was overseas at the time but his staff telephoned him to inform him of the call option notices;[42] and he discussed the notices with both Chee and Doreen Chong ("Doreen", another Nanyang Ventures employee).[43] Dr Fan took the view that the Defendants had "not exercised the [call option] right under the default conditions".[44] He left it to Chee to handle the matter. On 25 August 2016, the Plaintiff served put option notices on the 1st and 2nd Defendants. The notices stated that the Plaintiff was exercising the put options under cl 2.2 of the POAs in respect of all of the Plaintiff's shares in the 3rd Defendant.[45]

40 On 2 September 2016, the 1st Defendant wrote to Dr Fan[46] stating that he and the 2nd Defendant had "already validly exercised [their] Call Options on

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[39] Tab 14, p 565 of Dr Fan's AEIC.

[40] See transcript of 6 June 2018, 72:28 to 73:29.

[41] Tab 16, pp 573 to 580 of Dr Fan's AEIC.

[42] See transcript of 6 June 2018, 77:27 to 78:6.

[43] See transcript of 6 June 2018, 78:27 to 79:13.

[44] See transcript of 6 June 2018, 80:10.

[45] Tab 19, pp 586 to 588 of Dr Fan's AEIC.

[46] 7 ABD p 4575.

6 May 2016" and that the POAs "would therefore have been terminated and [are] not valid pursuant to clause 7 of the POA". The letter ended by requesting that the Plaintiff sign and return the share transfer forms attached to the Defendants' call option notices of 6 May 2016.

41 The Plaintiff responded on 3 October 2016,[47] claiming that at the time of the exercise of its put options on 25 August 2016, it had not been aware of the exercise by the 1st and 2nd Defendants of their call options. In cross-examination, Dr Fan agreed that as at 25 August 2016 and later at 3 October 2016, he had actually been aware of the Defendants' exercise of their default call options – but he insisted that their default call option notices were "not legally valid".[48]

Chee

42 Chee is a lawyer with his own practice who specialises in corporate finance. According to Chee, he was invited to join Nanyang Ventures as a director in July 2016 because Dr Fan needed someone "able to provide an overview on the legal aspects of [Nanyang Ventures'] projects and investments" – including the investment by the Plaintiff in the 3rd Defendant.[49]

43 On 16 August 2016, Chee and Doreen met with the 1st Defendant. The 1st Defendant informed both of them that the Plaintiff had failed to refer 60 patients to the 3rd Defendant within six months of the COAs, and stated that he and the 2nd Defendant had already issued call option notices based on this Default Event. Chee claimed that he told the 1st Defendant that he did not know

[47] 7 ABD pp 4616 to 4617.

[48] See transcript of 6 June 2018, 81:29 to 83:24.

[49] [8] and [10] of Chee's AEIC.

about this but that in any event, "the Default Call Option Notices were served out of time and the 1st and 2nd Defendants no longer had the right to buy the Shares back for $1".[50] The discussion then moved on to the 1st Defendant's plans for an initial public offering ("IPO") together with some other doctors. The 1st Defendant's proposal involved the 1st and 2nd Defendants exercising their default call option and buying the Plaintiff's shares back for $1, proceeding to sell these shares back to the Plaintiff for $1, and parties then proceeding to "discuss and negotiate new agreements" which would "still include the Plaintiff's obligation to refer patients to the 3rd Defendant".

44 Chee informed the 1st Defendant that he would speak to Dr Fan about the proposal. The next meeting with the 1st Defendant took place on 22 August 2016. At this second meeting, Chee told the 1st Defendant that the Plaintiff was "considering selling the Shares" back to him and the 2nd Defendant, "although not at the full purchase price" of $1.5m. Chee claimed that the 1st Defendant replied that he was "open to this proposal",[51] and would discuss the matter with the 2nd Defendant, but that the Plaintiff would need to "revert to him" to "confirm" that it would be selling its shares back to him.[52]

45 Following the above meeting, Chee discussed the matter further with Dr Fan and Doreen. Pursuant to their discussion, Doreen emailed the 1st and 2nd Defendants on 24 August 2016.[53] This email stated the following:

> Dear Dr Kuek
>
> Thanks for taking the time to meet with us last week and on Monday, and also to share with us your upcoming IPO plans.

[50] [26] of Chee's AEIC.

[51] [28] of Chee's AEIC.

[52] See transcript of 7 June 2018, 37:1 to 37:18.

[53] 7 ABD p 4540.

> We have discussed the matter internally and after much consideration, we have decided to sell the shares back to yourself and [the 2nd Defendant] in accordance with the Put Option Agreements.
>
> Thank you for your kind understanding and we wish you all the best for your IPO.

46 On 25 August 2016, the 1st Defendant replied as follows:

> Thank you for your email.
>
> I am disappointed to hear that [the Plaintiff] no longer wishes to continue as shareholders of [the 3rd Defendant].
>
> I accept your decision.
>
> We will follow according to the terms and conditions as laid out and agreed upon in our shareholder's agreement.
>
> I or my representatives will revert to you in due course.

47 Chee claimed that the above emails showed "a settlement agreement had been reached between parties".[54] As such, the Plaintiff served the put option notices on 25 August 2016.

48 Chee was aware of the letter from the 1st Defendant dated 2 September 2016, the Plaintiff's response of 3 October 2016, and the 1st Defendant's further letter of 12 October 2016. In this letter of 12 October 2016, the 1st Defendant reiterated that the Plaintiff had failed to refer 60 patients "within the Default Period" (that is, the period of 6 months from the date of the COAs), and had "accepted" that the Defendants could exercise their call options "for $1.00 as a result of [the Plaintiff's] default".[55] The 1st Defendant also reminded the Plaintiff that it had "asked for indulgence", that it had been indulged by the Defendants "repeatedly" for "the sake of goodwill", and that its actions in denying receipt of the call options while purporting to issue put options reflected

[54] [33] of Chee's AEIC.

[55] 7 ABD pp 4618 to 4619.

"bad faith". The letter concluded with the statement that the Defendants were "ready, willing and able to proceed with [their] Call Options" but that on a "without prejudice basis", they were "willing to meet and discuss an amicable resolution to the current situation".

49 The Plaintiff responded to the above letter on 20 October 2016.[56] *Inter alia*, the Plaintiff stated that if the Defendants were "unwilling to accept the already reduced price set out in the Put Option", they should give their "counter-proposal for the price at which [they would] be willing to acquire [the] Shares and/or the time frame within which [they would] be able to make the payment". According to Chee, this suggestion by the Plaintiff was a "final gesture of goodwill". However, there was no reply from the 1st and 2nd Defendants.

The Defendants' evidence

1st Defendant

50 The 1st Defendant was the main defence witness. He deposed that he was approached by Anqi – then Vice-President of Nanyang Ventures – in February 2014.[57] Nanyang Venture's proposal for a collaboration with the 1st Defendant – as set out in an email from Anqi to the 1st Defendant on 28 February 2014[58] – was that Nanyang Ventures would "invest and buy into 15%" of the 1st Defendant's practice while sharing in the running costs and profits "in the same proportion". Nanyang Ventures would also take charge of marketing efforts in China, while charging a "10% marketing and administrative fee on the price of treatments for the patients" they referred. The 1st Defendant would continue running his own practice but would have to relocate his clinic from

[56] 7 ABD pp 4620 to 4621.

[57] [12] to [15] of 1st Defendant's AEIC.

[58] Tab LK-14, pp 83 to 84 of 1st Defendant's AEIC.

Gleneagles Hospital to the Orchard area. Anqi informed the 1st Defendant that Nanyang Ventures enjoyed a "wide network" in China which would enable it to refer "a steady stream of patients from China to Singapore for cosmetic treatments and/or plastic surgery". Anqi represented that Nanyang Ventures would be "comfortable" referring an estimated "20 patients per month from China, with an average spend of S$5,000 to S$8,000 per patient".

51 The 1st Defendant was interested in the prospect of a steady stream of new patients and of being able to tap on the potential in the China market. He saw this as being "the value proposition of a collaboration with Nanyang Ventures". At the same time, he recognised that Nanyang Ventures might not live up to its promises, especially since it did not have a "specific track record in aesthetics medicine".[59] The 1st Defendant was concerned that in any collaboration with Nanyang Ventures, he should be able to exit from such collaboration at no loss to himself if Nanyang Ventures failed to "live up to its bargain", as he did not want to be "trapped" with a shareholder who would profit from his hard work while failing to contribute to his practice. He conveyed to Anqi, therefore, his concern that Nanyang Ventures "needed to show [him] its commitment to this proposal, and its confidence in adding value to and growing [his] business".[60]

52 After the meeting with Anqi, the 1st Defendant asked his accountant, Kam, to help him in negotiations with Nanyang Ventures. He also incorporated the 3rd Defendant as the intended investment vehicle.

53 On 18 June 2014, the 1st and 2nd Defendants signed a finalised Term Sheet, with Anqi representing Nanyang Ventures.[61] The Term Sheet was

[59] [17] to [18] of 1st Defendant's AEIC.

[60] [19] of 1st Defendant's AEIC.

intended *inter alia* to "describe the general terms and conditions" of Nanyang Ventures' potential investment into the 3rd defendant. The 1st Defendant sought to rely on it in support of his case. In particular, he asserted that although the target number of patient referrals by Nanyang Ventures had not yet been fixed at the time of signing of the Term Sheet, the definition of "events of default" captured "the importance of Nanyang Ventures' *performance* of its patient referral obligations" [emphasis in original].[62] According to him, the Term Sheet was signed on the basis of the agreement which the Defendants had reached with Nanyang Ventures shortly beforehand; namely, that the 1st and 2nd Defendants "would be entitled to buy back Nanyang Venture' shares in [the 3rd Defendant] for S$1.00 upon an event of default by Nanyang Ventures".[63]

54 In July 2014, the 1st Defendant held further discussions with Anqi on the issue of patient referrals by Nanyang Ventures. Their discussions resulted in a "commercial bargain" being struck between the Defendants and Nanyang Ventures: it was "agreed that Nanyang Ventures must refer a target number of *at least* 60 patients to [the 3rd Defendant] within a consecutive period of 6 months" [emphasis in original]. If Nanyang Ventures failed to meet this "low threshold of 60 patient referrals within 6 months, this would be an event of default which would give [the 1st and 2nd Defendants] the right to buy all of Nanyang Ventures' shares in [the 3rd Defendant] for S$1.00".[64] This commitment by Nanyang Ventures was important to the 1st Defendant as he needed clear terms by which to "judge and quantify" Nanyang Ventures' performance; and he expected further growth in patient numbers as they started tapping into the China market. It was for these reasons that he undertook the

[61] 1 ABD pp 200 to 205.

[62] [24] of 1st Defendant's AEIC.

[63] [26] of 1st Defendant's AEIC.

[64] [33] of 1st Defendant's AEIC.

costs , and the risks of uprooting and relocating his clinic from Gleneagles Hospital to Mount Elizabeth Novena, as required by Nanyang Ventures.[65] These costs and risks were both monetary and non-monetary in nature, because apart from the monetary costs of moving and setting up his clinic in a new location, he also had to suffer the consequences of re-establishing himself among a larger pool of plastic surgeons at Mount Elizabeth Novena and of the loss of an established network of contacts at Gleneagles Hospital[66].

55 Further discussions were held between Kam and Nanyang Ventures' lawyers Shook Lin on the drafting of the Shareholders' Agreement and other agreements. At no time during these discussions did Nanyang Ventures or Shook Lin raise concerns about the 60 Patients Requirement.

56 The Shareholders' Agreement, COAs, POAs, and other related agreements were signed on 13 February 2015. The Plaintiff replaced Nanyang Ventures as the contracting party in these agreements, acquiring 11.54% of the entire paid-up capital of the 3rd Defendant for an agreed consideration of $1.5m. In the COAs, Nanyang Travel Planners was added as another entity (besides the Plaintiff) that could refer patients to the 3rd Defendant for the purposes of the 60 Patients Requirement. The 1st Defendant understood the COAs to provide firstly, that a "Default Event" would be constituted by a failure on the part of the Plaintiff and/or Nanyang Travel Planners to refer at least 60 patients within six months from 13 February 2015; and secondly, that on the occurrence of the Default Event, the Defendants' contractual right to buy back the Plaintiff's shares for $1 would crystallise.[67] Once their right to buy back the shares for $1 had crystallised, the 1st and 2nd Defendants had the full Call

[65] [34] of 1st Defendant's AEIC; see also transcript of 8 June 2018, 9:14 to 9:23.

[66] [29] to [32] of 1st Defendant's AEIC.

[67] [43] of 1st Defendant's AEIC.

Option Period of 24 months from 13 February 2015 (*ie*, up to 13 February 2017) to exercise the default call.[68]

57 As it turned out, by 13 August 2015, the Plaintiff had only referred 20 patients to the 3rd Defendant. On 4 September 2015, the Defendants' representative Melissa Hee emailed Anqi, noting that the Plaintiff had referred only 27 patients as at 4 September 2015, and that based on cl 3(b) of the COAs, the 1st and 2nd Defendants now had the right to purchase the Plaintiff's shares at $1. Anqi's reply of 6 September 2015 was an admission by the Plaintiff of its failure to meet the target patient referral figure and of the Defendants' entitlement to exercise the Default Call. It was clear to the 1st Defendant that in this email, the Plaintiff was seeking the Defendants' understanding that it was still trying to refer more patients, as well as their indulgence not to effect the share buy-back at $1.[69] This was followed by Anqi's Whatsapp message of 9 September 2015 which asked that the Plaintiff be allowed "sometime till end October" to "meet the 60 patient commitment".[70] As the Plaintiff claimed to have opened up new distribution channels, the 1st Defendant decided to adopt a "wait and see" approach.[71] This did not change the fact that a Default Event had occurred. All it meant was that the Defendants would hold back from immediately exercising the default call, and he made this clear to Anqi at all times.[72]

58 By end-October 2015, although the Plaintiff had managed to refer an additional 29 patients, it had still not attained a total of 60 referrals. At a meeting

[68] [58] of 1st Defendant's AEIC; see also transcript of 8 June 2018, 18:3 to 18:12.

[69] Tab LK-20, p 549 of 1st Defendant's AEIC.

[70] Tab LK-21, p 542 of 1st Defendant's AEIC.

[71] [53] of 1st Defendant's AEIC.

[72] See transcript of 8 June 2018, 20:8 to 21:9.

in October 2015, Anqi conveyed the Plaintiff's request that it be given more time "to 'prove itself'".[73] The 1st Defendant was undecided, but also at the same time not prepared to waive the right to exercise the Default Call. He therefore suggested to Anqi that "as a first step", the 1st and 2nd Defendants would exercise the default call, and upon receiving the shares back from the Plaintiff, hold the shares "in escrow" pending the parties' negotiation of "a fresh business arrangement" and new "targets" for the Plaintiff. If the Plaintiff met these new targets, the shares held "in escrow" would be sold back to it at $1.[74]

59 Anqi agreed to communicate this proposal to Dr Fan. However, the Plaintiff did not revert on the proposal. In early April 2016, the 1st Defendant realised that the Plaintiff had only referred 58 patients to the 3rd Defendant in the entire period between 13 February 2015 and end-March 2016. He also realised that many of these patients had come for consultation and not for cosmetic procedures, and that the consultation fees they paid ($120 to $180 each) was nowhere near the average spend of $5,000 to $8,000 previously mooted by the Plaintiff. He met Anqi on 13 April 2016 to discuss the proposal he had made in October 2015, but the meeting did not result in any firm commitments from the Plaintiff.[75] In the circumstances, he decided to exercise the default call. The 1st and 2nd Defendants' default call notices were served on the Plaintiff on 6 May 2016. The 1st Defendant believed that he had taken the necessary steps to put in place the mechanism for the $1 buy-back of the shares, as the notices enclosed the share transfer forms which had already been signed by him and the 2nd Defendant.[76]

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[73] [54] of 1st Defendant's AEIC.

[74] [56] of 1st Defendant's AEIC.

[75] [60] of 1st Defendant's AEIC.

[76] See transcript of 8 June 2018, 27:21 to 27:29.

60 According to the 1st Defendant, the Plaintiff was worried upon receiving the default call notices. Whilst it was clear that Dr Fan hoped to negotiate a higher buyback price for the Plaintiff's shares,[77] another meeting between the 1st Defendant and Anqi in July 2015 did not result in any figures from the Plaintiff. The 1st Defendant told Anqi that his previous proposal – whereby the Plaintiff's shares would be held "in escrow" after being bought back for $1 and then transferred back to it at $1 if it met fresh targets – was still on the table. Anqi agreed to convey this to Dr Fan.[78]

61 In end-July/early August 2016, the 1st Defendant found himself with the opportunity for a potential IPO in Hong Kong involving several doctors. He decided to check if the Plaintiff wanted to "buy in" to the proposed IPO. This was without prejudice to his existing right to the transfer at $1 of the shares in respect of which he and the 2nd Defendant had exercised default calls. At the two meetings with Chee and Doreen in August 2016, he shared with them the opportunity presented by the potential IPO. At the same time, he reminded them that the Plaintiff's shares in the 3rd Defendant already belonged to him and the 2nd Defendant pursuant to their default call notices. Neither Chee nor Doreen disputed this. He told them that having regard to the IPO opportunity, he was open to entering into a new agreement with the Plaintiff if it wanted to buy back the shares.

62 Chee and Doreen told the 1st Defendant that they would get back to him. When he received Doreen's email of 24 August 2016, he understood her to be referring to the potential IPO he had shared with them, and not to the Defendants' default calls.[79] When he replied to Doreen on 25 August 2016

[77] See transcript of 8 June 2018, 38:15 to 38:30.

[78] [68] to [69] of 1st Defendant's AEIC.

[79] [76] of 1st Defendant's AEIC.

stating that he "accepted [the Plaintiff's] decision", he meant that he accepted its decision not to participate in the IPO. His statement that he was "disappointed to hear that [the Plaintiff] no longer wishes to continue as shareholders" of the 3rd Defendant was a response to its decision not to participate in the IPO, because the discussion at the August meetings had involved "the mechanism" by which the Plaintiff could participate in the IPO, and one proposed mechanism was for it to "come in again as shareholders" of the 3rd Defendant.[80] The statement in his own email of 25 August 2016 that parties would "follow according to the terms and conditions as laid out and agreed upon in [their] shareholders' agreement" meant that parties would "just go back to [their] original agreements" – which provided for the Defendants' rights under the default calls.[81] To him, the statement meant the same thing as saying there was nothing more to discuss in view of the Defendants' prior valid exercise of the default calls. After all, in the preceding months, the Plaintiff's position – as demonstrated through its conduct and through Anqi's representations – had been one of acceptance of the valid exercise of the default calls; and Dr Fan had been fully aware of the default calls whilst "trying to negotiate his way out of it".[82]

63 When the Plaintiff sent put option notices on 25 August 2016, the 1st Defendant was shocked to see that it had suddenly changed its tune. According to the 1st Defendant, the Plaintiff's "reliance on the Put Options was false", and this was evinced in its letter of 20 October 2016 when it suggested that he give a "counter-proposal for the price at which [he was] willing to acquire [the

[80] See transcript of 8 June 2018, 26:27 to 26:31.

[81] [81] of 1st Defendant's AEIC.

[82] [80] of 1st Defendant's AEIC.

Plaintiff's] Shares" if he was "unwilling to accept" the put option price. This showed that the Plaintiff was just "trying to negotiate out of its own failures".[83]

Anqi

64 Anqi confirmed that when she approached the 1st Defendant in February 2014 to discuss the possibility of Nanyang Ventures investing in his practice, there was rising interest from Nanyang Ventures' clients and partners in China in aesthetic treatments, and Dr Fan wanted to grow the company's medical tourism business. Dr Fan agreed with Anqi that the 1st Defendant would be a good strategic partner for Nanyang Ventures.[84]

65 At their first meeting, Anqi told the 1st Defendant that Nanyang Ventures wanted to buy into a percentage of his practice, and that this would benefit his practice because of "the many patients that [Nanyang Ventures] would refer to him".[85] For its part, Nanyang Ventures would enjoy dividends on its shareholding whilst also earning patient referral fees and revenue from travel concierge services provided to patients from China. Anqi recalled that during these discussions, the 1st Defendant was very concerned about whether Nanyang Ventures would be able to bring in patients or whether he would end up "stuck" with a business partner who could not benefit his business.[86]

66 In June 2014, parties signed the Term Sheet which provided for the 1st and 2nd Defendants to "exercise an option to call on Nanyang's shares at S$1.00 on the occurrence of an event of default".[87] There followed negotiations over

[83] [84] of 1st Defendant's AEIC.

[84] [3] to [6] of Anqi's AEIC.

[85] [8] of Anqi's AEIC.

[86] [9] of Anqi's AEIC.

[87] [10] of Anqi's AEIC.

the various draft agreements. The versions discussed prior to the signing of the finalised agreements included a draft Default Call Option Agreement in which the default event was defined as "[Nanyang Ventures] fail[ing] to refer 60 or more patients to [the 3rd Defendant] for treatment within a consecutive period of 6 months from the date of this agreement".[88] Anqi discussed these patient referral numbers with Dr Fan, and both felt that this was a figure they were comfortable with achieving. The default call exercise price of $1 was not even discussed between them at this stage as it was something they had already considered when agreeing to the term sheet.[89] In addition, as seen earlier, the draft Default Call Option Agreement provided for a 24-month Call Option Period similar to the Call Option Period provided under the draft Call Option Agreement which dealt with non-default calls.[90]

67 Anqi explained that the Plaintiff was not able to refer the minimum 60 patients to the Defendants within the six-month period from the date of the COAs because it experienced a number of difficulties, including problems in obtaining visas for patients to travel from China to Singapore. When Anqi received Melissa Hee's email of 4 September 2015 stating that the Plaintiff had failed to meet its patient referral commitment and that the Defendants now had the right to purchase the Plaintiff's shares at $1, this was in line with her understanding of the Defendants' rights under the COAs.[91]

68 Anqi discussed the above matters with Dr Fan, who was "quite affected emotionally that [the 1st Defendant] wanted to exercise the Call Option and buy back [the Plaintiff's] shares".[92] Dr Fan asked her to talk to the 1st

[88] 1 ABD pp 572 to 576.

[89] [11] of Anqi's AEIC.

[90] 1 ABD pp 567 to 571.

[91] [15] of Anqi's AEIC.

Defendant to tell him that the Plaintiff would keep trying to refer more patients to him. She confirmed that she had a meeting with the 1st Defendant on 13 April 2016, at which – pursuant to instructions from Dr Fan – she informed the 1st Defendant that the Plaintiff wanted to carry on the partnership with him, that the Plaintiff would "try its best to refer more patients to him in order to 'prove [itself]'", and that they "hoped very much that he would not exercise his right to buy back [the Plaintiff's] shares". Anqi also confirmed that the 1st Defendant had reserved his right to exercise the default call while expressing willingness to "listen to other proposals on how to continue the business relationship on [an]other platform".[93]

69 By the time the 1st and 2nd Defendants exercised the default calls, Anqi was no longer working in Nanyang Ventures. Dr Fan and her colleagues were aware of the Default Call notices, and she herself returned to the office to help deal with the matter. In cross-examination, she agreed that after the service of the default call notices, there were still discussions between the Plaintiff and the 1st Defendant on "whether there could be a better solution".[94] In mid-July 2014, she met with the 1st Defendant to discuss how best to proceed. By then, the Plaintiff recognised that the Defendants "had the right to exercise the Call Option", which was why Dr Fan wanted her to help negotiate with the 1st Defendant for a higher purchase price for the Plaintiff's shares. Anqi recalled that the 1st Defendant proposed a figure out of "goodwill", though she could not recall what figure it was, and that he also proposed that parties enter into a new agreement. She reported these proposals to Dr Fan.[95] Thereafter, she was no longer involved in the matter.

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[92] [18] of Anqi's AEIC.

[93] [17] of Anqi's AEIC.

[94] See transcript of 12 June 2018, 10:20 to 10:23.

[95] [20] of Anqi's AEIC.

Kam

70 Kam is the 1st Defendant's accountant and a manager at the firm BMI Intelligence Singapore ("BMI"). He gave evidence that the 1st Defendant emailed him on 1 March 2014 about Nanyang Ventures' investment proposal. Kam assisted the 1st Defendant to draft a Term Sheet which the parties signed in mid-June 2014 after several round of discussions and amendments. Kam then assisted the 1st Defendant to draft the various agreements while his BMI colleague Melissa Hee assisted Shook Lin with the due diligence exercise vis-à-vis the 1st Defendant's practice. As seen earlier, the draft agreements forwarded to Nanyang Ventures in August 2014 included a draft Call Option Agreement and a draft Default Call Option Agreement. According to Kam, the draft Default Call Option Agreement made it clear that a default event would be constituted by the investing party's failure to refer at least 60 patients within a consecutive six-month period from the date of the agreement (what Kam called the "60/6 Obligation", and which I have termed the 60 Patients Requirement at [33] above). It was also made clear that on the occurrence of a default event, the Defendants would have the option to purchase all of the investing party's shares for $1 within 24 months from the date of the agreement.

71 The draft agreements forwarded by BMI in August 2014 went through several rounds of negotiations and amendments. These amendments did not affect the 60 Patients Requirement. Moreover, although Shook Lin subsequently merged the draft Call Option Agreement and the draft Default Call Option Agreement into a single Call Option Agreement, this revised document continued to be entirely consistent with the 60 Patients Requirement.[96]

[96] [12] to [16] of Kam's AEIC.

72 Following the Plaintiff's failure to meet their patient referral commitment, Melissa Hee emailed the Plaintiff on 4 September 2015 to put on record the fact that the 1st and 2nd Defendants' rights to exercise the default calls had arisen. Sometime in April 2016, Kam was informed by the 1st Defendant that the Plaintiff had failed to refer at least 60 patients to him despite more than a year having passed from the signing of the agreements. On 13 April 2016, he and the 1st Defendant met with Anqi. At the meeting, the 1st Defendant made it clear that while he was open to "a new business arrangement with [the Plaintiff] based on new targets", he "would not compromise on his right to exercise the Default Call". On its part, the Plaintiff wanted to carry on working with the Defendants, but no firm landing was reached on any new business arrangement. Shortly thereafter, the 1st and 2nd Defendants exercised the default calls on 6 May 2016.

73 Kam was present at the first meeting which the 1st Defendant held with Chee and Doreen in August 2016. He confirmed that at this meeting, the 1st Defendant reminded Chee and Doreen that the Defendants had already exercised the default calls and that the Plaintiff's shares belonged to them. The 1st Defendant told Chee and Doreen that he was "considering a new business arrangement" and wanted to know if the Plaintiff was "interested to come along", so that he could "re-align and re-configure the business". Neither Chee nor Doreen raised any issues about the validity of the Defendants' default calls, nor did they mention exercising put options.[97]

[97] [25] of Kam's AEIC.

On the competing claims in relation to the disposal of the Plaintiff's shares in the 3rd Defendant

The key issue in contention: whether the Defendants' default call notices were valid

74 As stated earlier, parties were agreed that in respect of the disposal of the Plaintiff's shares in the 3rd Defendant, the key issue in contention was the validity of the 1st and 2nd Defendants' exercise of the default calls on 6 May 2016. If the Defendants' default call notices were valid, then the Plaintiff could not have validly exercised its put options on 25 August 2016 – because the POAs would have been terminated upon the valid exercise of the Defendants' call options. On the other hand, if default call notices were invalid, then the Defendants' objections to the Plaintiff's exercise of its put option on 25 August 2016 fell away.

75 The key task I faced, therefore, was the interpretation of the contractual clause(s) relevant to the Defendants' exercise of the default calls. I explain below why I arrived at an interpretation that favoured the Defendants' case. I start by summarising the principles which Singapore courts have adopted to guide our approach to the task of contractual interpretation.

The Singapore courts' approach to contractual interpretation

76 Our Court of Appeal ("CA") has in a number of cases comprehensively summarised the law on contractual interpretation in Singapore. In *Ang Tin Yong v Ang Boon Chye and another* [2012] 1 SLR 447 ("*Ang Tin Yong*") at [11], the CA stated the following:

> Clearly, an objective approach must be taken to determine the intentions of the contracting parties as expressed in the document. What must be sought is the meaning that the contract conveys to a reasonable person having the background knowledge that would have been reasonably available to him.

> A holistic approach must be taken and regard must be had to the commercial purpose of the contract and circumstances in which the contract was made …

77 In *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 ("*Yap Son On*"), the CA elaborated at [30]:

> [T]he purpose of interpretation is to give effect to the objectively ascertained expressed intentions of the contracting parties as it emerges from the contextual meaning of the relevant contractual language. Embedded within this statement are certain key principles: (a) first, in general both the text and context must be considered … ; (b) second, it is the *objectively ascertained intentions of the parties* that is relevant, not their subjective intentions … ; and (c) third, the object of interpretation is the verbal expressions used by the parties and so, *the text of their agreement is of first importance* …
>
> [emphasis in original]

78 The CA in *Yap Son On* went on to lay down the following guiding principles (at [37] to [39]):

> 37 … Among the powerful insights that the modern contextual approach provides, as stated by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 ("*ICS*"), is that the meaning of a word should not be confused with the meaning that would be conveyed by the use of that word in a document. The former, as he said, was "a matter of dictionaries and grammars"; the latter is the proper domain of contractual interpretation, which is about discerning the meaning that the expressions in the document would convey to a reasonable person with the relevant background knowledge …
>
> 38 However (and this is where we come back to the importance of the text), in ascertaining the meaning that the words of a contract would convey to a reasonable person with the relevant background knowledge, the words used by the parties occupy primacy of place. In *Arnold v Britton* [2015] 2 WLR 1593, Lord Neuberger of Abbotsbury PSC (with whom Lord Sumption and Lord Hughes JJSC) agreed) explained the reason for this as follows (at [17]):
>
> > … The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and *save perhaps in a very unusual case, that meaning is most obviously to be gleaned from*

> *the language of the provision*. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision. [emphasis added]
>
> 39 The verbal expressions in a contract are the vehicle through which meaning if conveyed. As we recently observed in *Lucky Realty Co Pte Ltd v HSBC Trustee (Singapore) Ltd* [2016] 1 SLR 1069 at [2], "absent the text, the contract cannot be constructed out of context alone" …

79 In considering the primacy of the contractual text and the interaction between text and context, the CA in *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd)* [2015] 2 SLR 1187 ("*Y.E.S. F&B*") noted that whilst there might often be more than one immutable meaning to words, and *a fortiori*, to phrases, it was "not inconceivable that the *text* itself might be *plain and unambiguous inasmuch as it admitted of one clear meaning*" [emphasis added]. This would also mean that there is a "*coincidence* between both text and context inasmuch as there is nothing untoward in the context which militates against what is the plain language of the text itself" [emphasis in original]: *Y.E.S. F&B* at [31].

80 The CA in *Y.E.S. F&B* proceeded to observe (at [31]) that if, however, the meaning of the text concerned was plain and unambiguous but would lead to an absurd result "based on the objective evidence available (this would include, in a commercial case, arriving at a result which demonstrated an absence of business common sense)", then the court concerned would have to undertake a very careful analysis of the text and context in order to ascertain whether the text was indeed plain and unambiguous. This was because if the text was in fact plain and unambiguous, giving effect to it would usually not (simultaneously) engender an absurd result; generally, the law ought to lead to a just and fair result (as opposed to an absurd one). The important caveat in all

this, however, was that whilst both text and context tended to interact with each other, there had to be a balance struck: the context could not be utilised as an excuse by the court concerned to *rewrite* the terms of the contract according to its (*subjective*) view of what it thought the result ought to be in the case at hand. The CA highlighted once more the significance of the objective evidence in the following terms (at [32]):

> To this end, the court must always base its decision on *objective* evidence. More specifically, whilst there is a need to avoid an absurd result, the aim cannot be pursued at all costs; it must necessarily give way if the objective evidence clearly bears out a ***causative connection*** between the absurd result or consequences on the one hand and the intention of the parties at the time they entered into the contract on the other … Put simply, the court ***must*** ascertain, based on ***all the relevant objective evidence***, ***the intention of the parties at the time they entered into the contract***. In this regard, the courts should ***ordinarily*** start from the working position that the parties did not intend that the term(s) concerned were to produce an absurd result. *However*, this is *only* a *starting point – and no more*. [emphasis in original]

81 In *Lucky Realty Co Pte Ltd v HSBC Trustee (Singapore) Ltd* [2016] 1 SLR 1069 ("*Lucky Realty*"), the CA agreed with the Judge below that the contextual approach to contractual interpretation was to be carried out by starting with the parties' words in the specific part of the contract in question (at [38] and [49]). The second step was to consider the rest of the contract. The third step was to consider extrinsic evidence. In respect of the last, it is clear that "ambiguity is no longer a prerequisite for the court's consideration of extrinsic material … [and] neither is absurdity or the existence of an alternative technical meaning": *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") at [130]. Nonetheless, the admissibility of extrinsic evidence for the purpose of contractual interpretation remains subject to a number of restrictions. The CA in *Yap Son On* summarised these restrictions as follows (at [42]):

> (a) The pleading requirements set out at [73] of *Sembcorp Marine*, which require the nature, particulars, and effect of the extrinsic evidence sought to be used to be pleaded with specificity.
>
> (b) The exclusionary provisions of the EA [Evidence Act (Cap 97, 1997 Rev Ed)], chiefly those found at ss 95 and 96, which act as an absolute bar to the admissibility of extrinsic evidence in certain cases (see *Sembcorp Marine* at [65(c)].
>
> (c) The continued bar against the admissibility of parol evidence of the drafters' subjective intentions at the time of the conclusion of the contract outside situations in which there is latent ambiguity (see *Sembcorp Marine* at [59] and [65(d)].
>
> (d) The general requirement that the extrinsic evidence sought to be admitted must be relevant, reasonably available to all the contracting parties, and relate to a clear or obvious context (see *Zurich Insurance* at [132(d)].

82 Two categories of extrinsic evidence, in particular, have been the subject of reservations expressed by the CA: prior (*ie*, pre-contract) negotiations and subsequent (*ie*, post-contract) conduct. In respect of the former, the CA in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp Marine*") noted academic commentary favouring a departure from "the seemingly blanket exclusionary rule against the admissibility of prior negotiations" (at [75]). That said, the CA expressly limited its decision on this point in the following terms:

> We prefer to leave for another occasion the consideration of whether this argument is to be accepted in principle; and if so, whether evidence of prior negotiations should nonetheless be excluded as irrelevant or unhelpful for the policy reasons set out by Lord Hoffman in *Chartbook* … or on the ground that it may amount to parol evidence of subjective intent and not fall within ss 97 to 100 of the EA. Whichever way that may eventually be resolved, any further attempt to rely on such material should be made with full consciousness of the concerns already expressed and in compliance with the pleading requirements we have just prescribed.

83 In *Xia Zhengyan v Geng Changqing* [2015] 3 SLR 732 ("*Xia Zhengyan*"), the CA had to interpret a clause ("cl 1") in an agreement for the

sale and purchase of shares to determine whether the Respondent was contractually obliged to transfer to the Appellant legal ownership of the shares in all the relevant entities of her business (referred to as "the Apple Plus business"). The CA found that there was such an obligation on the Respondent's part, and in so finding, it referred *inter alia* to previous drafts of the agreement and held that evidence of these previous drafts was consistent with its analysis of cl 1 of the agreement. It is crucial to note, however, that the CA took pains to make it clear that its analysis of cl 1 was "in fact sufficient, in and of itself, to resolve the issue being considered … (centring around the interpretation of cl 1)", and that "the evidence of the prior drafts [performed] more of a *confirmatory* (and, hence, supplementary) function compared to situations where the evidence of prior negotiations plays a pivotal role" [emphasis in original]: *Xia Zhengyan* at [68]. Referring to the passage cited above from *Sembcorp Marine*, the CA also noted (at [69]):

> (W)hether or not there should – in the Singapore context – be a principle that evidence of prior negotiations ought to be generally admissible is a legal issue that is still an open question and … caution should therefore be exercised in this particular regard … The precise legal status (in particular, the limits (if any) and/or safeguards) of a situation involving evidence of prior negotiations remains to be worked out in a future case (when full argument has been heard), although there ought, in our view, to be no difficult in satisfying the three requirements set out in *Zurich Insurance* where the situation concerned … is extremely clear *and*, in any event, in a case such as the present, the evidence of prior negotiations merely serves as a *confirmatory* (and hence, complementary as well as subsidiary) function. Much would, of course, depend very much on the precise facts before the court. [emphasis in original]

84 As to evidence of subsequent conduct, the CA in *Xia Zhengyan* also sounded a note of caution, pointing out that it had already observed in *Zurich Insurance* (at [132](d)) that "the relevance of subsequent conduct remains a controversial and evolving topic that will require more extensive scrutiny by

this court at a more appropriate juncture": *Xia Zhengyan* at [73]. In *Xia Zhengyan*, the court held (at [74]) that "even if it were accepted that there was no blanket prohibition against the admissibility of such evidence", the respondent's attempt in that case to rely on evidence of the appellant's post-contract failure to enforce her strict legal rights was largely without merit, as such omission on the Appellant's part was probably "a result of ignorance of the legally-prudent course she should take", as opposed to an understanding that there was no obligation on the Respondent's part to transfer all her shares in the Apple Plus business.

85 It is also useful at this juncture to recap the "usual canons and techniques of contractual interpretation" which a court will draw upon in deciding the exact interpretation to be assigned to the provisions of a contract. These have been summarised by the CA in *Zurich Insurance* (some of these interpretive canons having been subsequently reiterated in the cases cited above) (at [131]):

> *The aim of construction*
>
> First, the aim of the exercise of construction of a contract or other document is to ascertain the meaning which it would convey to a reasonable business person.
>
> *The objective principle*
>
> Secondly, the *objective principle* is therefore critical in defining the approach the courts will take. They are concerned usually with the expressed intentions of a person, not his or her actual intentions. The standpoint adopted is that of a reasonable reader …
>
> *The holistic or 'whole contract' approach*
>
> Thirdly, the exercise is one based on the *whole contract* or an *holistic approach*. Courts are not excessively focused upon a particular word, phrase, sentence, or clause. Rather the emphasis is on the document or utterance as a whole.
>
> *The contextual dimension*
>
> Fourthly, the exercise in construction is informed by the *surrounding circumstances* or *external context*. Modern judges

> are prepared to look beyond the four corners of a document, or the bare words of an utterance. It is permissible to have regard to the *legal, regulatory, and factual matrix* which constitutes the background in which the document was drafted or the utterance was made.
>
> *Business purpose*
>
> Fifthly, within this framework due consideration is given to the *commercial purpose* of the transaction or provision. The courts have regard to the overall purpose of the parties with respect to a particular transaction, or more narrowly the reason why a particular obligation was undertaken.
>
> *Lawful effect*
>
> Sixthly, a construction which entails that the contract and its performance are lawful and effective is to be preferred.
>
> Contra proferentem
>
> Seventhly, where a particular species of transaction, contract, or provision is one-sided or onerous it will be construed strictly against the party seeking to rely on it.
>
> *Avoiding unreasonable results*
>
> Eighthly, a construction which leads to very unreasonable results is to be avoided unless it is required by clear words and there is no other tenable construction.
>
> *Specially negotiated terms*
>
> Ninthly, a specially agreed terms should override an inconsistent standard provision which has not been individually negotiated.
>
> *General provisions versus precise provisions*
>
> Tenthly, a more precise or detailed provision should override an inconsistent general or widely expressed provision.
>
> [emphasis in original]

The relevant clauses in the COAs

86 Applying the above principles to the present case, it was clear that in determining the parties' intention vis-à-vis the issue of when the 1st and 2nd Defendants could exercise the default calls, the first port of call must be the relevant clauses in the COAs.

87 Although the Plaintiff placed great weight on cl 9.1 of the Shareholders' Agreement[98] as allegedly providing for the parties' rights in respect of the call and put options, a plain reading of cll 9.1(i) and (ii) showed that the clauses were intended to provide for an obligation on the part of the contracting parties to enter into *separate* call option agreements and put option agreements which would then govern their rights to exercise such options. Thus, in cl 9.1(i), it was stipulated that the parties agreed and undertook that "as soon as practicable" after completion of the Shareholders' Agreement, "the [1st and 2nd Defendants] and [the Plaintiff] shall enter into a call option agreement, in substantially the form as set out in Schedule B [to the Shareholders' Agreement]". The recitals to the COAs themselves expressly stated that the Plaintiff (referred to as the "Grantor" of the call options) and the 1st and 2nd Defendants (referred to as the "Purchaser" of the call options) had agreed to enter into the COAs "on the terms and subject to the conditions set out" in the said agreements, and that the Defendants' call options would be "exercisable in accordance with the terms contained in this Agreement".[99]

88 Turning to the provisions of the COAs, the following were the most pertinent to the present case:

> 1 DEFINITIONS
>
> 1.1 The following words and phrases, wherever used in this Agreement, shall have the following meanings:
>
> …
>
> | | |
> |---|---|
> | "Call Option" | shall mean the right of the Purchaser to purchase from the Grantor, on the terms and subject to the conditions contained in |

[98] 6 ABD pp 4163 to 4164.

[99] 6 ABD pp 4195.

	this Agreement, the Call Option Shares at the Exercise Price
"Call Option Period"	shall mean the period of twenty-four (24) months from the date of this Agreement, or such other period as may be mutually agreed between the Parties;
…	
"Default Event"	*shall mean such failure of the Grantor to refer (through itself and/or Nanyang Travel Planner Pte. Ltd.) (regardless of whether any agreement is ultimately entered into with) at least sixty (60) clients to the Company within a consecutive six (6)-month period from the date of this Agreement*;
"Default Period"	shall mean the period of six (6) months from the date of this Call Option (which shall run concurrently with the Call Option Period);
…	

2 CALL OPTION

2.1 In consideration of the sum of S$1.00 only paid by the Purchaser to the Grantor (the receipt, adequacy and sufficiency of which the Grantor acknowledges), the Grantor hereby irrevocably grants the Purchaser the right to exercise the Call Option at any time during the Option Period (or the Default Period, as the case may be) over the Call Option Shares.

2.2 The Call Option may only be exercised by the Purchaser in respect of all of the Call Option Shares (and not part thereof only), by serving on the Grantor a Notice during the Option Period (or the Default Period, as the case may be). The Notice, upon being served by the Purchaser,

> may not be withdrawn except with the written consent of the Grantor.
>
> 2.3 The Grantor shall, upon service of the Notice by the Purchaser, sell to the Purchaser (or his designated nominee, as shall be informed in writing to the Grantor) the Call Option Shares at the Exercise Price.
>
> 3 EXERCISE PRICE
>
> The aggregate Exercise Price for the Call Option Shares shall be as follows:
>
> (a) should there be non-occurrence of the Default Event, based on the higher of either:
>
> (i) 120% of the aggregate price paid by the Grantor at the relevant date(s) on which it had purchased the Call Option Shares (the "Acquisition Date(s)"), LESS all accumulative dividends since received by the Grantor from the Acquisition Date(s) up to the date of exercise of the Call Option; or
>
> (ii) the purchase price offered by an unrelated third party for the Call Option Shares in relation to a proposed purchase of the entire (and not part thereof only) issued and paid-up share capital of the Company, and
>
> (b) on the occurrence of a Default Event, at S$1.00.
>
> [emphasis added in italics]

89 On a plain reading of the above clauses, it was clear that they provided for the following:

> (a) A call option could be exercised by the 1st or 2nd Defendant serving on the Plaintiff a notice during the Call Option Period – which was defined as the period of 24 months from the date of the COAs (13 February 2015). The Call Option Period overlapped with the "Default Period", which was defined as the period of six months from the date of the COAs. A call option notice could be exercised within the Default Period as well. This was the meaning achieved by the words "the right to exercise the Call Option at any time during the Option Period (*or the*

Default Period, as the case may be) over the Call Option Shares" [emphasis added] in cll 2.1 and 2.2.

(b) Whilst a call option may be exercised at any time during the 24-month Call Option Period, including the Default Period constituted by the first six months, the aggregate Exercise Price for the Call Option Shares would differ depending on whether or not a Default Event had occurred (see cl 3).

(c) If no Default Event had occurred, the aggregate Exercise Price would be either 120% of the aggregate purchase price paid by the Plaintiff for the shares (less all dividends received by the Plaintiff up to the date of exercise of the call options), or the purchase price offered by an unrelated third party for the shares in relation to a proposed purchase of the 3rd Defendant's entire issued and paid-up share capital (whichever was the higher of the two) (see cl 3(a)).

(d) If a Default Event had occurred, the aggregate Exercise Price for the Call Option Shares would be $1 (see cl 3(b)).

90 A Default Event occurred when the Plaintiff failed to refer to the 3rd Defendant at least 60 patients within a consecutive six-month period from the date of the COA (13 February 2015). Put another way, this meant that the Plaintiff had the full six months from the date of the COA in which to achieve the minimum 60 referrals. It was not disputed that the last day of this six-month period was 13 August 2015. Whether or not a Default Event had occurred, therefore, could only be determined upon the expiry of this six-month period: that is, *after* 13 August 2015, and not before. This was the only coherent and sensible interpretation of the words underscored in italics above.

91 In its Reply and Defence to Counter-claim (Amendment No 2), the Plaintiff pleaded that the 1st and 2nd Defendants could only exercise default call options to acquire its shares at $1 "immediately upon an event of default".[100] This, according to the Plaintiff, meant that the default call options were "only exercisable within the Default Period" of six months from the COAs.[101] In his AEIC, Dr Fan took the position that "by late July 2015", it should already have been "apparent to the 1st and 2nd Defendant[s] that the Plaintiff would not be able to reach the 60 Patient[s] Requirement"; and that it was therefore open to them "from late July 2015 onwards to exercise the Default Call Option". In its closing submissions, the Plaintiff claimed that the Defendants "could also have served" the default calls on the last day of the six-month Default Period, that is, "on 13 August 2015".[102] Alternatively, so the Plaintiff claimed, "by 3 August 2015 … it would have been apparent to the 1st and 2nd Defendants that the Plaintiff would not have been able to meet its patient referral targets" with "only 20 patients" referred as at that date.[103]

92 In my view, the proposition that the Defendants were required to serve their call option notices before the actual expiry of the Default Period – whether "by late July 2015" or "on 13 August 2015" or "by 3 August 2015" – was devoid of merit. The Plaintiff's interpretation must be rejected for the simple reason that the meaning it sought to ascribe to the term "Default Event" was not one which the contractual language could reasonably bear. The Plaintiff's interpretation meant that one would be able validly to say – for example – that 20 patient referrals by 3 August 2015 would qualify as a "Default Event". Yet,

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[100] [9(d)] of the Reply and Defence to Counter-claim (Amendment No. 2), Tab H of the Plaintiff's Set Down Bundle ("PSDB").

[101] [24] of the Reply and Defence to Counter-claim (Amendment No. 2).

[102] [82] to [83] of the Plaintiff's Closing Submissions.

[103] [85] of the Plaintiff's Closing Submissions.

when one looked at the contractual clause in which the Default Event was defined, it expressly required that there must have been "failure by [the Plaintiff] … to refer … at least sixty (60) clients to the Company within a consecutive six (6)-month period from the date of this Agreement". Something had clearly gone wrong with the language if the Plaintiff were correct in claiming that 20 patient referrals by 3 August 2015 could also constitute a Default Event under this definition. To quote the CA from its judgment in *Yap Son On* (at [31]), "(w)hile the court is entitled to depart from the plain and ordinary meaning of the expression used, there is a limit to what the court can legitimately do in the name of interpretation." Whether or not this limit has been transgressed is, as the CA put it, "sometimes a matter of nicety", but in this case (as in *Yap Son On*), "the line was plainly crossed here" (*Yap Son On* at [31]). The unambiguous – indeed, peremptory ("*shall* mean" [emphasis added]) – reference to "at least sixty (60) clients to the Company within a consecutive six (6)-month period from the date of this Agreement" simply did not leave wriggle room to argue that failure to refer a certain number of patients by a date *prior to* the expiry of the six months could also constitute a Default Event.

93 The Plaintiff's conception of the "Default Event" was not only contrary to the plain words of the relevant contractual clauses; it would go against good commercial sense, in that it would expose the parties to intolerable uncertainty about when a certain number of referrals might be deemed sufficient to trigger default calls before the expiry of the Default Period. This was all the more so because in the Plaintiff's formulation, the number of patients which could signify such failure was not expressly or clearly pre-determined. In this connection, I noted the approach of the CA in *Ang Tin Yong*, where the court – in construing a retirement deed between the respondent and the other partners to a partnership – rejected an interpretation of the deed which would entitle the respondent to retain some interest in the partnership even after executing the

retirement deed, noting that such a construction "would go against good commercial sense and the plain terms of the Deed" (*Ang Tin Yong* at [13]). In the same vein, I concluded that the Plaintiff's interpretation would violate good commercial sense in the uncertainty and confusion it would introduce into the parties' contractual arrangements.

94 The Plaintiff argued that if default call options entitling the Defendants to acquire its shares for $1 could be exercised after the six-month Default Period, this "would render the references to '*Default Period*' in clauses 2.1 and 2.2 of the Call Option Agreements wholly superfluous and otiose" [emphasis in original].[104] The Plaintiff did not explain the basis for this proposition, and, with respect, I found it to be devoid of merit as well. On a plain reading of cll 2.1, it was apparent that the words "the right to exercise the Call Option at any time during the Option Period (or the Default Period, as the case may be) over the Call Option Shares" were intended to make it clear that the Defendants could exercise call options at any time during the 24-months Call Option Period, without waiting to see if a Default Event had occurred (*ie*, without waiting for the Default Period to expire). Similar language was used in cl 2.2. As cl 3 went on to make clear, however, the price at which they would be able to acquire the shares would differ substantially, depending on whether or not a Default Event had occurred. There was thus nothing "superfluous" or "otiose" about the references to "Default Period" in cll 2.1 and 2.2.

95 As alluded to earlier, the Plaintiff also argued that cl 9.1(i) of the Shareholders' Agreement provided support for its proposition that default call options were only exercisable within the six months from the date of the COAs. The Plaintiff relied on the following phrase:

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[104] [73] of the Plaintiff's Closing Submissions.

> … the right … to purchase all the shares held by [the Plaintiff] at the relevant point in time either (a) upon the occurrence of an event of default (as defined in the Call Option Agreement) during a period of 6 months from the Completion Date; or (b) at any time during a period of 24 months from the Completion Date, at the relevant agreed exercise prices …

According to the Plaintiff, this phrase – and the word "during" in particular – meant that default call options could only be exercised within the six months from the date of the COAs.

96 I have earlier made it clear that in ascertaining parties' intention on the issue of when the Defendants could exercise the default call options, the first port of call must be the relevant clauses of the COAs which were expressly stated to be the agreements providing for the terms and conditions on which call options could be exercised. Conversely, cl 9.1(i) of the Shareholders' Agreement was the provision which created the contractual obligation for the parties to enter into these separate agreements.

97 This did not mean that I disregarded cl 9.1(i) of the Shareholders' Agreement in interpreting the COA provisions. Following the contextual approach to contractual interpretation, I did examine the said clause in considering the exact interpretation to be assigned to cll 2.1, 2.2, and 3(b) of the COAs. I did not find that cl 9.1(i) provided any support for the Plaintiff's case. I would point out that the Plaintiff's argument that cl 9.1(i) provided for "*2 'relevant point(s) in time'* during which the 1st and 2nd Defendants may exercise their call options" [emphasis added][105] regrettably misquoted the provision. Clause 9(1)(i) expressly provided for a singular "relevant *point* in time" [emphasis added]: the Plaintiff itself added the letter "s" in parentheses" in the closing submissions. In my view, the phrase "at the relevant point in

[105] [64] of the Plaintiff's Closing Submissions.

time" was with reference to the holding of shares by the Investor (the Plaintiff), and not the exercise of call options, having regard to the relevant sentence in which this phrase appeared: "the right but not the obligation to purchase all the shares held by the Investor at the relevant point in time".

98 Leaving aside the submission that cl 9.1(i) provided for "*2 'relevant point(s) in time'* during which the 1st and 2nd Defendants may exercise their call options" [emphasis added], much of the Plaintiff's remaining arguments on cl 9.1(i) hinged on the use of the word "during" in cl 9.1(i):

> … either (a) upon the occurrence of an event of default (as defined in the Call Option Agreement) *during* a period of 6 months from the Completion Date; or (b) at any time *during* a period of 24 months from the Completion Date, at the relevant agreed exercise prices … [emphasis added]

According to the Plaintiff, the use of the word "during" must mean that a *default call option* could only be exercised "during" the six months from the completion of the COA, because it would not make sense to speak of the *default event* – premised as it were on the 60 Patients Requirement – occurring "during" this 6-month period.

99 The Plaintiff's argument failed to address the following. Firstly, as I have noted, cl 9.1(i) clearly pointed to the COAs as the source of parties' rights and obligations insofar as the exercise of call options was concerned; hence, for example, the reference to the COAs as the source of definition of an "event of default" for the purposes of exercises of call options. Secondly, the Plaintiff's argument ignored the fact that the definition of the "Default Event" in the COAs – read in conjunction with cll 2.1, 2.2, and 3 of the COAs – made it impossible both as a matter of law and of logic to say that a Default Event had occurred until the first six-month period had expired, and not before. In the circumstances, the above sentence was at best ambiguous: it certainly could not

amount to an unambiguous stipulation that a default call option be validly exercisable only within the first six months from the COAs.

100 I would add, in any event, that the COA clauses were specifically drafted to provide for the terms on which call options could be exercised: insofar as cl 9.1(i) could be said to be inconsistent with the provisions of the COA, the COA provisions must prevail. I refer in this respect to the tenth canon of contractual interpretation elucidated by the CA at [131] of *Zurich Insurance* (see above at [85]).

Parties' attempts to rely on extrinsic evidence in interpreting the relevant contractual clauses

101 In approaching the interpretation of the relevant contractual clauses in this case, parties have also sought to rely on extrinsic evidence in the form of pre-contractual negotiations and (in the Defendants' case) post-contractual conduct. Before I address the key pieces of extrinsic evidence cited by the parties, two preliminary points should be made.

102 Firstly, it must be remembered that the COAs and the other agreements were *not* documents drafted by laypersons. Although early drafts had apparently emanated from Kam and his BMI colleagues (who are not lawyers), there is no dispute that the final versions executed by the parties were drafted by the Plaintiff's lawyers, Shook Lin. As such, this was not a case in which one would "eschew the strict construction of the structure and language" of the relevant contractual clauses (*Xia Zhengyan* at [50]). As the CA indicated in *Yap Son On* (at [74]), where the contract in question was drafted by lawyers, one would generally expect them to have expressed themselves with "the exactitude that might be expected of experienced legal draftsmen". As I noted earlier, in *Yap Son On* (at [74]), the CA also took pains to explain that its remarks in *Xia*

Zheng Yan – that the court should "eschew the strict construction" of the contractual language and adopt instead a "more common-sense approach that considers the reasonable and probable expectations that parties would have had" (*Xia Zheng Yan* at [50]) – were to be understood in the context of the facts in that case, where the contract in dispute had been drafted in Mandarin by laypersons.

103 Secondly, both the Plaintiff and the Defendants have attempted to rely at one point or another on witnesses' stated opinions of how the relevant contractual clauses should be understood.[106] Insofar as these were attempts to rely on parties' subjective intentions to elucidate the meaning of the relevant contractual language, they were impermissible and had to be disregarded: *Yap Son On* at [30] and [64].

104 As to the Defendants' attempt to rely on evidence of subsequent conduct, given the reservations expressed by the CA about the feasibility of relying on such evidence (see *Zurich Insurance* at [132(d)], *Y.E.S. F&B* at [74], and *Xia Zhengyan* at [73]), I was not inclined to give this evidence any weight. Bearing in mind the CA's injunction in *Zurich Insurance* that any extrinsic evidence sought to be admitted must be relevant, reasonably available to all the contracting parties and relate to a clear or obvious context, it was apparent that the evidence of subsequent conduct cited by both sides failed to satisfy – at the very least – the third of these requirements. The Defendants sought to rely on Anqi's email of 6 September 2015 as an "admission'" by the Plaintiff of the Defendants' right to exercise default call options,[107] and on the apparent absence of any protests by the Plaintiff after being served with the Defendants' default

[106] [80(a)] of the Plaintiff's Closing Submissions; [43] to [45] of the Defendants' Closing Submissions..

[107] [27] to [32] of the Defendants' Closing Submissions.

call notices.[108] In my view, however, the 6 September 2015 email was somewhat equivocal. Although it referred to the "difficult situations" the Plaintiff had found itself in, promised "more diversified and active marketing programs", and requested the 1st Defendant's "understanding" and recognition of its "effort", it also completely skirted around the issue of the Defendants' right to buy-back its shares for $1.

105 As to pre-contractual negotiations, I did not find the email evidence cited by both sides to be compliant with the requirements of the contextual approach as elucidated in the cases discussed earlier at [81] to [84]. Insofar as both sides sought to argue that the way in which the prior drafts of the various agreements developed demonstrated either that the default call option had to be exercised within the first six months from completion of the agreement, or that it was exercisable only upon the expiry of the six months until the end of the 24 months from completion, it was by no means clear that such reliance on prior drafts would be permitted as a matter of course. I refer in this respect to the observations of the CA at [60] of *Xia Zhengyan*. It should also be noted that in *Xia Zhengyan*, the CA opined that the evidence of the prior draft agreements was consistent with its analysis of the disputed cl 1, but caveated that this evidence performed "more of a *confirmatory* (and, hence, supplementary) function compared to situations where the evidence of prior negotiations plays a pivotal role" [emphasis added] (*Yap Son On* at [68]). The CA in *Xia Zhengyan* was able to take such an approach because it had found that the contractual language was sufficient in and of itself to resolve the dispute over the interpretation of cl 1.

[108] [60] to [65] of the Defendants' Closing Submissions.

106 The CA's observations in *Xia Zhengyan* as to what might suffice for evidence of prior negotiations to be admissible, and its reference to the English case of *A&J Inglis v John Buttery & Co* (1873) 3 App Cas 552 ("*Inglis*"), were also instructive. *Inglis* was a case concerning a contract for works on a ship for a fixed sum of £17,250. In the draft contract circulated between the shipbuilders and the shipowners, the following provision on iron work was set out: "Iron work. – The plating of the hull to be carefully overhauled and repaired, *but if any new plating is required the same to be paid for extra*…" [emphasis added]. Subsequently the agent for the shipowners wrote to the shipbuilder to ask that the latter "erase all the stipulations after the word 'repaired'", stating that the shipbuilders understood their draft agreement clearly to stipulate "that the sum of £17,250 covers lengthening, new engines, &c., and all repairs and alterations necessary to class the steamer A1 100 at Lloyds". The shipbuilder agreed to the proposed deletion, and before the contract was signed, the stipulation was deleted by an ink line across it, with the added authentication of a marginal note stating "fourteen words deleted". The marginal note was also signed by both parties. The CA in *Xia Zhengyan* (at [69]) described *Inglis* as an "extremely clear" case where there would have been "no difficulty in satisfying the three requirements set out in *Zurich Insurance*". The same could not be said of the evidence of pre-contractual negotiations cited by the present parties.

107 Indeed, in respect of some of the evidence cited by the Plaintiff, it was not clear to me that the evidence even existed. I noted, for example, that the Plaintiff claimed that in the negotiations preceding the signing of the 13 February 2015 agreements, "in proposing their amendments to the August 2014 drafts by BMI, Shook Lin proposed a shorter time period for the exercise of the Default Call Options".[109] As far as I could see from the email evidence adduced,

[109] [67] of the Plaintiff's Closing Submissions.

there was no such proposal expressly put forward by Shook Lin, nor did the Plaintiff point to any email containing such a proposal.

108 It appeared that all that the Plaintiff meant was that Shook Lin had made amendments to the drafts forwarded by BMI which included amendments to the drafts providing for call options – but this was very different from a specific assertion that "Shook Lin proposed a shorter time period for the exercise of the Default Call Options". Indeed, as mentioned earlier, the draft Default Call Option Agreement forwarded by BMI made it clear that a default event would be constituted by the investing party's failure to refer at least 60 patients within a consecutive six-month period from the date of the agreement, and that on the occurrence of a default event, the Defendants would have the option to purchase the investing party's shares for $1 within 24 months from the date of the agreement. Nowhere in the email correspondence following the transmission of this earlier draft was there a statement by Shook Lin that the period available for the exercise of such a default call option was to be shortened to the first six months from the date of the merged COA.

109 As for the finalised Term Sheet which the Defendants sought to rely on,[110] its terms were insufficiently clear to permit me to say that it related to a "clear and obvious context" insofar as the issue of exercise of default calls was concerned. In particular, whilst referring in general terms to "Events of Default", the finalised Term Sheet did not define what would amount to a "Default Event" entitling the Defendants to "exercise the Call Option… to call the shares to purchase from [the Plaintiff] at S$1". Moreover, as the Plaintiff pointed out, there were a number of material changes to the terms stated in this Term Sheet. Notably, the shift from a proposed subscription for "new ordinary

[110] [49] to [55] of the Defendants' Closing Submissions.

shares … upto [*sic*] 15% of the total enlarged share capital" of the 3rd Defendant,[111] to the eventual agreement for the 1st and 2nd Defendants collectively to sell the Plaintiff "30 ordinary shares they [held]" in the 3rd Defendant "representing approximately 11.54% of the entire issued and paid-up share capital of [the 3rd Defendant]".[112] Although the Defendants cited *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 1094 ("*Sheng Siong Supermarket*") as an authority for the acceptance of evidence of term sheets in contractual interpretation, it must be highlighted that in *Sheng Siong Supermarket*, the High Court found (at [50]) that the "term sheet" in question was "more than merely evidence of prior negotiations" and "[captured] the intentions of the parties as they stood post-negotiation". The same could not be said of the Term Sheet in the present case.

110 I did, however, find the extrinsic evidence of the commercial purpose of the parties' transaction to be consistent with the Defendants' interpretation of the relevant contractual clauses. On the evidence before me, including the undisputed portions of Anqi's evidence and Dr Fan's own testimony in cross-examination, parties were from the outset clear as to the value proposition each was bringing to the table. For the Plaintiff, the 1st Defendant's successful medical practice represented the platform Dr Fan needed to launch his "long-term plan" to venture into medical tourism between Singapore and China.[113] This represented the Defendants' "value proposition" to the Plaintiff (to use the Defendants' expression). For the 1st Defendant, the promised stream of patient referrals from Nanyang Ventures' network of high net-worth clients in China represented the attractive prospect of tapping into the "great potential in the

[111] 1ABD at p 200.

[112] 6ABD at p 4152.

[113] [17] of Dr Fan's AEIC.

China market".[114] This represented the Plaintiff's "value proposition" to the Defendants. It was for these reasons that each side was prepared to undertake upfront a certain amount of risk. In the 1st Defendant's case, this was the risk of uprooting his clinic from its established location at Gleneagles Hospital, with the attendant monetary and non-monetary costs,[115] as well as the risk of partnering with an entity whom he had not previously dealt with and which had no track record in the local aesthetics medicine sector.[116] In the Plaintiff's case, this was the risk of having its shares bought back at the default exercise price of $1 should it fail to refer at least 60 patients to the 3rd Defendant within the first six months from the completion of the agreements.

111 In this connection, Dr Fan himself admitted in cross-examination that he had been "very confident" of being able to achieve more than 60 patient referrals[117] – a sentiment echoed by Anqi in her evidence.[118] In other words, while Dr Fan recognised that the default call mechanism represented a risk for the Plaintiff, it was apparent that at the point of entering into the various agreements, he believed it was a risk the Plaintiff could comfortably undertake. Importantly, moreover, it should be noted that neither the COAs nor any of the other agreements required that there be any minimum spend per each of the 60 patients referred. Indeed, cl 1 of the COAs expressly stipulated that for the purposes of defining the "Default Event", the referral of patients by the Plaintiff (or Nanyang Travel Planner) to the 3rd Defendant was to be without regard to "whether any agreement [was] ultimately entered into" with the patients referred. On its own admission, the Plaintiff did not foresee or expect the

[114] [17] of the 1st Defendant's AEIC.

[115] [29] to [32] of the 1st Defendant's AEIC.

[116] [18] of the 1st Defendant's AEIC.

[117] See transcript of 6 June 2018, 69:16 to 60:27

[118] [11] of Anqi's AEIC.

problems it later encountered, such as difficulties in obtaining visas for its Chinese patients to travel to Singapore. It would appear that Dr Fan himself had also hoped that the Defendants would "be understanding" even if a Default Event occurred[119]. With respect, however, all this meant was that the Plaintiff had - on hindsight - made a bad bargain. The fact that the business venture had not turned out to be the success the Plaintiff originally hoped for could not warrant the court straining or straying beyond the confines of the contractual language agreed by the parties.

112 There is one final point I should address in this section. In its reply submissions, the Plaintiff sought to focus attention on the Defendants' Further and Better Particulars ("FBPs") filed on 26 October 2017 pursuant to the Plaintiff's request; specifically, to the following responses:

> 7. **Under paragraph 36 of the [Defence and Counter-claim]**
>
> a. Of the allegation
>
> "*As a result, the Default Event occurred and the 1st and 2nd Defendants' right to purchase all of the Plaintiff's shares in the 3rd Defendant for S$1.00 crystallised.*"
>
> Requests:
>
> Please state:
>
> i. The exact date at which the Default Event allegedly occurred; and
>
> ii The exact date at which "the 1st and 2nd Defendants' right to purchase all of the Plaintiff's shares in the 3rd Defendant for S$1.00 crystallised."
>
> Answers:
>
> i. 13 August 2015.

[119] See transcript of 6 June 2018, 87:23 to 88:2

ii. 13 August 2015.

[emphasis in original]

113 The Plaintiff had two main arguments about the above responses in the FBP, both of which were raised for the first time in its reply submissions.[120] First, the Plaintiff argued that the Defendant's interpretation at trial of the contractual clauses relating to the default call mechanism was inconsistent with its pleaded case. Second, the Plaintiff argued that the above responses in the FBPs actually "supports" the Plaintiff's case. I did not find any merit in either argument.

114 As a fundamental point, whilst the Plaintiff in its Reply Submissions stated that it was "open" to the 1st and 2nd Defendants to exercise their default call options on 13 August 2015, this statement did not accurately reflect the Plaintiff's case – which was that the default call options could only be exercised *at the very latest on 13 August 2015*. To put it another way, the above arguments failed to recognise that the key issue in contention between the parties was whether, assuming a Default Event had occurred, the 1st and 2nd Defendants could validly exercise default call options to acquire the Plaintiff's shares for $1 after 13 August 2015 – or whether default call options exercised after 13 August 2015 were out of time and thus invalid. The Defendants have consistently pleaded the former position, from the first Defence and Counter-claim filed on 16 March 2017,[121] to the Defence and Counter-claim (Amendment No 2) filed on 24 July 2017.[122] I did not find this position to have been substantively altered or contradicted by the responses in the FBP. Thus, for example, having regard

[120] [4] to [20] of the Plaintiff's Reply Submissions.

[121] [56] to [58] of the Defence & Counter-claim of 16 March 2017, Tab B of the Plaintiff's Set Down Bundle.

[122] [26(a) to (d)] the Defence and Counter-claim (Amendment No. 2) of 24 July 2017, Tab G of the Plaintiff's Set Down Bundle.

to the definition of "Default Event" in the COAs, it would not be inconsistent to say that if the Plaintiff failed by the end of the day on 13 August 2015 to refer at least 60 patients, this failure would constitute the occurrence of a Default Event on 13 August 2015 (albeit at the end of that day) – *and* that the window of time in which the Defendants could exercise the default call options was immediately thereafter, on 14 August 2015 up to the end of the last day of the 24-month period (*ie*, 13 February 2017).

115 In any event, the purpose of a party furnishing particulars of its pleadings is really to ensure that the opposing party is clear as to the case it has to meet and is not unfairly caught by surprise at trial (see *Singapore Civil Procedure 2018* vol I (Foo Chee Hock editor-in-chief) (Sweet & Maxwell, 2018) at para 18/12/12). This was not a case where the Plaintiff suddenly found itself faced with an entirely different defence case at trial. It was obvious that the Plaintiff was always clear as to the case it had to meet – as seen for example from its Reply and Defence to Counter-claim (Amendment No 2),[123] its opening statement,[124] and its closing submissions.[125]

116 It appeared to me that what the Plaintiff was really trying to say was that if the Defendants conceded that the default call options could in fact be exercised on 13 August 2015 itself, then the Plaintiff's interpretation of the clauses relating to the default call mechanism – namely, that they permitted default call options to be exercised only within the first six months from the date of the COAs – was not so "unworkable" or absurd after all. It was not clear to me from the responses in the FBP that such concession was made by the

[123] See for example [23] to [25] of the Reply and Defence to Counter-claim (Amendment No. 2), Tab H Plaintiff's Set Down Bundle.

[124] [16(a)], [23] to [25] of the Plaintiff's Opening Statement.

[125] [52,], [58] to [87] of the Plaintiff's Closing Submissions.

Defendants. However, even assuming for the sake of argument that such concession had been made, for the reasons explained in [89] to [100], I found that the contractual language of the relevant clauses simply could not bear the meaning which the Plaintiff said it did.

Summary of my decision on the interpretation of the contractual clauses relating to default call options

117 To sum up this section: for the reasons explained in [74] to [116], I rejected the Plaintiff's argument that the 1st and 2nd Defendant could only exercise their default call options within the first six months from the date of the COAs, and that the default call option notices of 6 May 2016 were invalid. The 1st and 2nd Defendant could exercise default call options and invoke the exercise price of $1 if and when a Default Event as defined in the COAs had occurred. A Default Event as defined in the COAs occurred only if and when the Plaintiff was unable to refer at least 60 patients to the 3rd Defendant within the first six months from the date of the COAs – which meant that the 1st and 2nd Defendants had to wait until the expiry of this six-month period (*ie*, up to the end of the last day in that period, 13 August 2015) before they could say that a Default Event had occurred which entitled them to exercise default call options. Once a Default Event had occurred, they had the entire Call Option Period as defined by the COAs (*ie*, 24 months from the date of the COAs) in which to exercise the default call options. Accordingly, and for the reasons set out above, the 1st and 2nd Defendants' default call option notices of 6 May 2016 were not "out of time" and certainly not invalid. This also meant that the Plaintiff's purported put option notices of 25 August 2016 were invalid, because the POAs would have been terminated upon the exercise by the Defendants of the call options on 6 May 2016: see cl 7(iii) of the POAs.[126]

[126] 6 ABD p 4189.

On the Plaintiff's alternative argument that cll 2 and 3(b) of the COAs amounted to unenforceable penalty clauses

118 I will next deal with the Plaintiff's alternative argument that the Defendants' exercise of default call options pursuant to cll 2 and 3(b) of the COAs were invalid because these provisions amounted to penalty clauses which should not be enforced. I did not accept this argument and I explain below my reasons.

119 At the outset it should be stated that this was a rather odd argument for the Plaintiff to make. Considering that the COAs were vetted and drafted by the Plaintiff's own lawyers, one would have thought it quite improbable (to say the least) for its lawyers to have drafted a penalty clause (operating against itself) into the agreement. In this respect I refer to the judgement of the Supreme Court of the United Kingdom ("UKSC") in *Cavendish Square Holding BV v Makdessi and another appeal* [2016] AC 1172 ("*Cavendish Square*"), in which Lord Neuberger of Abbotsbury PSC and Lord Sumption JSC had specifically observed (at [35]):

> In a negotiated contract between properly advised parties of comparable bargaining power, the strong initial presumption must be that the parties themselves are the best judges of what is legitimate in a provision dealing with the consequences of breach.

120 Nevertheless, I did consider carefully cll 2 and 3(b), and the parties' submissions on whether they amounted to a penalty clause. Insofar as the governing principles in this area were concerned, parties were agreed that the *locus classicus* was *Cavendish Square*. It will be useful to consider the principles stated by the UKSC in the following extract from the judgement of Lord Neuberger PSC and Lord Sumption JSC. Having stated that a contractual

provision could not be a penalty unless it was a provision operating on a breach of contract, their Lordships stated (at [12] to [16]):

> 12 … As a matter of authority the question is settled in England by the decision of the House of Lords in *Export Credits Guarantee Department v Universal Oil Products Co* [1983] 1 WLR 399 ("*ECGD*"). Lord Roskill, with whom the rest of the committee agreed, said, at p 403:
>
> > "perhaps the main purpose, of the law relating to penalty clauses is to prevent a plaintiff recovering a sum of money in respect of a breach of contract committed by a defendant which bears little or no relationship to the loss actually suffered by the plaintiff as a result of the breach by the defendant. But it is not and never has been for the courts to relieve a party from the consequences of what may in the event prove to be an onerous or possibly even a commercially imprudent bargain."
>
> 13 This principle is worth restating at the outset of any analysis of the penalty rule, because it explains much about the way in which it has developed. There is a fundamental difference between a jurisdiction to review the fairness of a contractual obligation and a jurisdiction to regulate the remedy for its breach. Leaving aside challenges going to the reality of consent, such as those based on fraud, duress or undue influence, the courts do not review the fairness of men's bargains either at law or in equity. The penalty rule regulates only the remedies available for breach of a party's primary obligations, not the primary obligations themselves. This was not a new concept in 1983, when *ECGD* was decided. It had been the foundation of the equitable jurisdiction, which depended on the treatment of penal defeasible bonds as secondary obligations … And it provided the whole basis of the classic distinction made at law between a penalty and a genuine pre-estimate of loss, the former being essentially a way of punishing the contract-breaker rather than compensating the innocent party for his breach …
>
> 14 This means that in some cases the application of the penalty rule may depend on how the relevant obligation is framed in the instrument, i e whether as a conditional primary obligation or a secondary obligation providing a contractual alternative to damages at law. Thus, where a contract contains an obligation on one party to perform an act, and also provides that, if he does not perform it, he will pay the other party a specified sum of money, the obligation to pay the specified sum is a secondary obligation which is capable of being a penalty;

> but if the contract does not impose (expressly or impliedly) an obligation to perform the act, but simply provides that, if one party does not perform, he will pay the other party a specified sum, the obligation to pay the specified sum is a conditional primary obligation and cannot be a penalty.
>
> 15 … [T]he classification of terms for the purpose of the penalty rule depends on the substance of the term and not on its form or on the label which the parties have chosen to attach to it …
>
> 16 Payment of a sum of money is the classic obligation under a penalty clause … However, it seems to us that there is no reason why an obligation to transfer assets (either for nothing or at an undervalue) should not be capable of constituting a penalty …

121 Locally, the analysis applied by the UKSC in *Cavendish Square* has been endorsed by our High Court: see for example *Allplus Holdings Pte Ltd and others v Phoon Wui Nyen (Pan Weiyuan)* [2016] SGHC 144 ("*Allplus*") and *iTronic Holdings Pte Ltd v Tan Swee Leon & anor* [2016] 3 SLR 663 ("*iTronic*"). The facts of the latter case are especially helpful for illustrative purposes.

122 *iTronic* involved convertible loan agreements by which the plaintiffs agreed to extend loans to the defendant to assist his bid to list his company. In return, the plaintiffs were granted the option of converting the value of the loans to shares in the said company upon its successful listing. In the event that the listing did not materialise by a stated date, the defendant was to repay the principal loans together with certain compensation sums. When the listing did not materialise, the plaintiffs sued for repayment of the loans and the compensation sums. Having found that the monies in question had not in fact been repaid, the High Court also considered the issue of whether the compensation sums amounted to penalties. Applying the reasoning of the UKSC in *Cavendish Square*, the High Court held (at [169] to [173]) that notwithstanding the label "Compensation Sum", the said "compensation sums"

were not actually stipulated as a remedy for a breach of a primary obligation. This was because the agreement between the parties did not impose any obligation on the defendant (whether expressly or impliedly) to procure listing on the stock exchange by the stated date. Since there was no obligation to list, it followed that the failure to list by the stated date was not an event of breach. Since the defendant's repayment obligation did not arise upon an event of breach, it was not a secondary obligation. Instead, the defendant's repayment obligation was better characterised as a conditional primary obligation which crystallised upon the occurrence of an event, that is, the failure of the company to list by the stated date. Upon this occurrence, the convertible loan agreements reverted to simple loan agreements under which the defendant was contractually obliged to repay what he had borrowed. Seen in this context, it was evident that the "compensation sums" were "intended as interest to compensate – even if rather generously – the plaintiffs for the loss of use of their money (*ie*, the cost of money)" (*iTronic* at [173]). These "compensation sums" therefore constituted part of the defendant's primary obligation to repay the debt owed to the plaintiff; and in the circumstances, the rule against penalties did not bite.

123 Applying the above analysis to the present facts, the Plaintiff had the onus of persuading me that cll 2 and 3(b) of the COAs amounted to a secondary obligation which was capable of being a penalty. However, apart from making the general assertion that these clauses were "secondary obligations" because their purpose was to "state the consequence of non-compliance with the primary obligation on the Plaintiff to refer 60 patients to the 3rd Defendant within 6 months from the date of" the COAs,[127] the Plaintiff's written submissions did not engage in any real analysis of the said clauses.

[127] [120] of the Plaintiff's Closing Submissions.

124 Having reviewed cll 2 and 3(b), and also having considered the other provisions of the COAs, I accepted the Defendants' submission that these clauses did not amount to a penalty clause.[128] The COAs did not impose (whether expressly or impliedly) a contractual obligation on the Plaintiff to refer at least 60 patients to the 3rd Defendant within the first six months from the date from the agreements. To put it another way, failure by the Plaintiff to refer at least 60 patients to the 3rd Defendant within the first six months would not constitute an event of breach under the COAs. The COAs simply provided – via cll 2 and 3(b), read together with the definition of "Default Event" in cl 1 – that if the Plaintiff did not refer at least 60 patients to the 3rd Defendant within the first six months, the 1st and 2nd Defendants would be entitled to exercise call options to acquire the Plaintiff's shares at the price of $1; and in the event that they did exercise such call options, the Plaintiff would have to transfer its shares to them for $1. The obligation to transfer its shares to the 1st and 2nd Defendants upon their exercising the call options was therefore a conditional primary obligation; and being a conditional primary obligation, it could not be a penalty.

125 Having made the above findings, I did not find it necessary to deal with the Defendants' submissions on the application of the *Dunlop* test.[129]

126 At the end of the day, it appeared to me that Dr Fan's real grievance arose from his perception that the failure to refer 60 patients within the first six months had been caused by "objective reasons" rather than anything of the Plaintiff's own doing; and he felt therefore that the Defendants ought to have appreciated "the effort and hard work" actually put in by the Plaintiff.[130] As I

[128] [88] of the Defendants' Closing Submissions.

[129] [91] to [102] of the Defendants' Closing Submissions.

[130] See transcript of 6 June 2018, 64:9 to 64:16.

observed earlier, however, what this really came down to was that the commercial bargain he had struck with the Defendants turned out far less favourably for the Plaintiff than originally envisaged – but as Lord Roskill pointed out in *ECGD* (as cited in *Cavendish Square* above at [120]), "it is not and never has been for the courts to relieve a party from the consequences of what may in the event prove to be an onerous or possibly even a commercially imprudent bargain."

On the Plaintiff's alternative argument that parties had concluded a valid and binding Settlement Agreement by August 2016

127 The Plaintiff's next alternative argument was that parties had, by August 2016, concluded a valid and binding Settlement Agreement. According to the Plaintiff, the email dated from Doreen to the Defendants, and the 1st Defendant's email of 25 August 2016, constituted a Settlement Agreement, the terms of which were as follows:[131]

> (a) Notwithstanding the Call Option Notices served on 6 May 2016, the Plaintiff would sell its shares in the 3rd Defendant back to the 1st and 2nd Defendants pursuant to the Put Option Agreements; and
>
> (b) The 1st and 2nd Defendants would purchase the Plaintiff's shares in accordance with the terms and conditions contained in the Agreements.

128 In this connection, I should first state that although the Defendants objected to the admissibility of these two emails on the ground that they had both been marked "without prejudice", I agreed with the Plaintiff that "without prejudice" communications were admissible "to determine whether there was a compromise reached and, if so, what the terms of that concluded compromise agreement were": see *Quek Kheng Leong Nicky and another v Teo Beng Ngoh and others and another appeal* [2009] 4 SLR(R) 181 at [23] to [24] of the CA's

[131] [88] of the Plaintiff's Closing Submissions.

judgement. Having considered the evidence, however, I did not accept the Plaintiff's argument that it disclosed a Settlement Agreement. I will explain my reasons.

129 Both the Plaintiff and the Defendants cited *Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 ("*Gay Choon Ing*") as the authority for the elements of a valid compromise agreement (or "Settlement Agreement", to use the Plaintiff's expression). In *Gay Choon Ing*, the CA – citing, *inter alia*, David Foskett, *The Law and Practice of Compromise* (Sweet & Maxwell, 6th Ed, 2005) – set out the following requirements (at [43] to [71]):

> 43 [A] compromise is essentially founded on contract. Before a compromise can be reached between two parties, there must, of necessity, be an *actual or potential dispute* between parties that can be disposed of …
>
> 46 [A] compromise will not arise unless certain requirements are fulfilled; these include … what is, in fact, traditionally required under the general common law of contract, *viz*, an identifiable agreement that is complete and certain, consideration, as well as an intention to create legal relations …
>
> 47 *First*, there must be an identifiable agreement, which is complete and certain. Essentially, this means that negotiations between the parties must have crystallised into a contractually-binding agreement in which there is no uncertainty as to the terms of the contract concerned. The traditional tools of analysis centre around the concepts of offer and acceptance …:
>
> > An offer, capable of being converted into an agreement by acceptance, must consist of a definite promise to be bound, provided that certain specified terms are accepted
>
> …
>
> > An acceptance is a final and unqualified expression of assent to the terms of an offer.
>
> …
>
> 64 Another pre-requisite is that of consideration …

> 66 Very generally put, consideration signifies a return recognised in law which is given in exchange for the promise sought to be enforced …
>
> 67 On a more specific and precise level, the traditional definition adopted is the 'benefit-detriment analysis'. It also functions as a practical approach …
>
> 71 There is also the requirement that there be an intention to create legal relations on the part of the parties concerned. Put simply, it must be demonstrated that there was an intention on the part of both parties that the transaction entered into was to *have legal effect* before a valid contract can be said to have been formed. Put another way, the parties must have intended that, if a disagreement arose or the contract was not honoured subsequently, the aggrieved party could invoke the assistance of the court.
>
> [emphasis in original]

130 Based on the Plaintiff's own case, I found that it could not cross even the first hurdle of showing the existence of an actual or potential dispute. The Plaintiff did not in the course of the trial and its closing submissions elaborate on the nature of the alleged dispute which it claimed the parties reached a compromise on via their emails of 24 August and 25 August 2016. Logically, if the Plaintiff's case as to a compromise or Settlement Agreement were to make sense, there must have been a dispute regarding the validity of the 1st and 2nd Defendants' default call option notices of 6 May 2016. The Plaintiff appeared to accept this implicitly since it claimed that the first term of the Settlement Agreement was that "*(n)otwithstanding the Call Option Notices served on 6 May 2016*, the Plaintiff would sell its shares in the 3rd Defendant back to the 1st and 2nd Defendants pursuant to the Put Option Agreements" [emphasis added]. Unfortunately for the Plaintiff, however, it had also asserted *vide* its letter of 3 October 2016 to the Defendants that it was "not aware" of the "purported exercise" by the 1st and 2nd Defendants of their call options at the time it issued its put option notices on 25 August 2016, and that it had only "recently retrieved" the letter of 6 May 2016 sent by BMI in relation to the

default call options. This letter of 3 October 2016 was in response to the 1st Defendant's letter of 2 September 2016 asserting the validity of the default call notices, and which called for the Plaintiff's execution of the share transfer forms forwarded with those notices.

131 From the above, it was plain that just taking the Plaintiff's own assertions at face value, its case was internally inconsistent. If the Plaintiff had in fact been unaware of the default call option notices at the point in time it issued its put option notices on 25 August 2016, there could not logically have been any dispute in existence between the parties over the validity of those default call option notices at the time the emails of 24 August and 25 August 2016 were exchanged.

132 I must add, though, that I did not actually accept that the Plaintiff was unaware of the default call option notices until shortly before it sent the letter of 3 October 2016. In cross-examination, Dr Fan admitted that he was informed of the default call option notices around 6 May 2016, via a telephone call from his staff.[132] I noted that in his testimony, Chee claimed that he and Doreen were both unaware off the default call option notices at their meeting with the 1st Defendant on 16 August 2016.[133] However, I did not find Chee's testimony credible. Firstly, Dr Fan's admission that he had been informed of the default call option notices around 6 May 2016 was consistent with Anqi's testimony that she had seen the letter from BMI sometime in May 2016 when she returned to the office, and that she had informed Dr Fan about it.[134] Anqi was not challenged on this part of her testimony. Secondly, the affidavit filed by Doreen Cheong on 26 October 2017 in connection with the Defendants' application for

[132] See transcript of 6 June 2018, 77:27 to 79:13.

[133] See transcript of 7 June 2018, 48:20 to 49:18.

[134] See transcript of 12 June 2018, 11:8 to 11:25.

security for costs in Summons No 4717 of 2018 also conceded the service of the default call option notices on 6 May 2016 while seeking to raise issues as to their validity. Oddly, the Plaintiff elected not to call Doreen, even though it was not disputed that she was still its employee, and was physically available in Singapore. Thirdly, if Chee and Doreen had been told by the 1st Defendant about the default call option notices on 16 August 2016 (as Chee himself admitted), it seemed incredible that they should have left it until *after* the Plaintiff's purported exercise of the put options on 25 August 2016 before they "retrieved" the default call option notices.

133 On the evidence before me, I concluded that the Plaintiff was in fact aware of the exercise by the 1st and 2nd Defendants of their default call options on 6 May 2016. This was why – according to Anqi – she had several discussions with the 1st Defendant between May/June 2016 and July 2016 to try to "negotiate for a higher figure i.e. more than $1, to be paid to Nanyang for their shares".[135] Tellingly, the Plaintiff actually agreed with this portion of Anqi's testimony.[136] Contrary to what the Plaintiff appeared to assume, the fact that there were such negotiations did not demonstrate the existence of a dispute between the parties regarding the validity of the default call option notices. Rather, *it was apparent that the Plaintiff did not challenge the validity of the Defendants' exercise of default call options, but was hoping to persuade the 1st Defendant to pay something more than $1 for the shares*. If the Plaintiff had indeed disputed the validity of the Defendants' exercise of default call options, it was unbelievable that instead of saying so, they should have entered into "negotiations" for "a higher figure" than $1.

[135] [20] of Anqi's AEIC; see also transcript of 12 June 2018, 12:4 to 12:24.

[136] See transcript of 12 June 2018, 12:18 to 12:24.

134 As to the two meetings involving the 1st Defendant, Chee, and Doreen on 16 August and 22 August 2016, these did not support an argument that the parties had been in dispute over the validity of the Defendants' exercise of default call options. Even on Chee's evidence, the main purpose of these meetings was to discuss the 1st Defendant's plans for the 3rd Defendant's IPO. It should also be remembered that Chee himself recounted the terms of the 1st Defendant's IPO plans as follows: the 1st and 2nd Defendants would purchase the Plaintiff's shares in the 3rd Defendant for $1; they would then sell these shares back to the Plaintiff for $1 so that the Plaintiff could remain shareholders of the 3rd Defendant and profit from its IPO; and at the same time parties would negotiate new agreements for their business collaboration, including new terms for patient referrals by the Plaintiff. *On Chee's evidence, therefore, the 1st Defendant's IPO plans were premised on the Defendants' entitlement to acquire the Plaintiff's shares for $1 before selling them back to the Plaintiff for $1*.[137] Whilst Chee claimed that he informed the 1st Defendant that the default call notices were "out of time", I did not find any credibility in these claims. If Chee had been so certain that the default call notices were out of time, it was unbelievable that he should nonetheless have agreed to convey the 1st Defendant's IPO plans to Dr Fan instead of pointing out to the 1st Defendant that the very premise for his IPO plans was non-existent.

135 Even assuming for the sake of argument that the Plaintiff could prove a dispute with the Defendants over the validity of the default call notices, it was clear that it could not prove "an identifiable agreement" that was "complete and certain". The Plaintiff argued that Doreen's 24 August 2016 email constituted the "settlement offer" which was accepted by the 1st Defendant's email of 25 August 2016. However, the 24 August 2016 email said nothing at all about the

[137] [27] of Chee's AEIC; see also [97] of the Plaintiff's Closing Submissions.

default call notices of 6 May 2016. Instead, it merely thanked the 1st Defendant for sharing his IPO plans before stating that the Plaintiff had decided "after much consideration" to sell its shares back to the 1st and 2nd Defendants "in accordance with the Put Option Agreements". It was not possible to read this email as communicating an offer that a terms of the proposed compromise should be that "*(n)otwithstanding the Call Option Notices served on 6 May 2016*, the Plaintiff would sell its shares in the 3rd Defendant back to the 1st and 2nd Defendants pursuant to the Put Option Agreements" [emphasis added]. Nor was it possible to read the 1st Defendant's email of 25 August 2016 as an acceptance of such a term: indeed, his email also made no mention of the default call notices nor even of the POAs.

136 Moreover, having regard to the fact that Doreen's email of 24 August 2016 had started with her thanking him for sharing his IPO plans and had closed with her wishing him "all the best for [his] IPO", there was a plausible basis for the 1st Defendant's perception that the email exchange of 24 August and 25 August 2016 had been in relation to his IPO proposal.[138] As for Doreen's reference to selling the shares back under the POAs, the 1st Defendant testified that although he was taken by surprise, he believed that the Plaintiff would not be able to exercise their put options because the terms of their agreements provided for the POAs to be terminated once the Defendants exercised their call options, and that was why his reply to Doreen stated that they would "follow according to the terms and conditions" of their "shareholder's agreement". This might not have been the most ideal response from a litigation perspective, but I had to bear in mind the fact that the 1st Defendant was not legally represented at this stage. The bottom-line remained, in any event, that the 24 and 25 August 2016 email exchange could not in any way be said to constitute a clear offer on

[138] See transcript of 8 June 2018, 25:4 to 26:2.

the one hand of a compromise subject to certain specified terms, and a "final and unqualified" assent on the other hand to such terms.

137 As for the other elements of consideration and an intention to create legal relations, these were not dealt with in the Plaintiff's closing submissions, and I did not find them to be made out on the basis of the evidence adduced.

138 For the reasons set out above, I rejected the Plaintiff's alternative argument that parties had – via the email exchange of 24 August and 25 August 2016 – entered into a valid and binding Settlement Agreement.

On the Plaintiff's alternative argument that the 1st and 2nd Defendants were estopped from exercising the default call options

139 The Plaintiff also argued in the alternative that the 1st and 2nd Defendants were estopped from exercising the default call options. In its Reply and Defence to Counter-claim (Amendment No 2), the Plaintiff pleaded that the 1st and 2nd Defendants had "promised not to exercise the call option on the basis of the Default Event, provided that the Plaintiff continued to make efforts to refer the remaining patients to the 3rd Defendant".[139] I did not accept this alternative argument, and I explain below my reasons.

140 Parties were agreed that, in law, the Plaintiff had to establish the following elements in order for a promissory estoppel to be established (see *Oriental Investments (SG) Pte Ltd v Catallal Investments Pte Ltd* [2013] 1 SLR 1182 ("*Oriental Investments*") at [83] to [91]):

(a) the 1st and 2nd Defendants had made a clear and unequivocal promise to the Plaintiff that they would not enforce their strict legal

[139] [25(b)] of the Plaintiff's Reply and Defence to Counter-claim, Tab h of the Plaintiff's Set Down Bundle.

rights with regard to the exercise of the default call options, so long as the Plaintiff "continued to make efforts to refer the remaining patients";

(b) the 1st and 2nd Defendants had made this promise with the intention that it be relied on by the Plaintiff;

(c) the Plaintiff did in fact rely on the promise and altered its position as a result; and

(d) it was inequitable for the 1st and 2nd Defendants to go back on their word in all the circumstances.

141 In respect of the first element of the alleged promissory estoppel, the Plaintiff relied on the following:

(a) After the occurrence of the Default Event, the 1st and 2nd Defendants did not stop the Plaintiff from engaging in "more diversified and active marketing programs" to acquire more patients for the 3rd Defendant.[140]

(b) There was an exchange of Whatsapp messages between Anqi and the 1st Defendant on 6 December 2015, in which Anqi had stated that the Plaintiff was "still trying to meet the 60 patients commitment" and requested the 1st Defendant to "allow [it] sometime till end October". The 1st Defendant had replied: "… No problem. I appreciate your efforts."

(c) The Plaintiff referred 37 new patients to the 3rd Defendant between September 2015 and May 2016. The 1st and 2nd Defendants did not exercise the default call options in that period, until 6 May 2016.

[140] [33] to [42], [115] pf the Plaintiff's Closing Submissions.

142 I did not find the above to be sufficient basis for finding that the 1st and 2nd Defendants had made a clear and unequivocal promise not to exercise the default call options. Although the Plaintiff cited *Oriental Investments* in support of its argument of a promissory estoppel, the facts of that case were patently different and distinguishable from the Plaintiff's.

143 In *Oriental Investments*, the plaintiff – who was a tenant of the defendant landlord – had erected certain structures on the tenanted premises without the requisite approval of the Urban Redevelopment Authority. In offering to renew the first tenancy, the defendant included in the second tenancy a condition precedent that the unauthorised structures had to be removed prior to the renewal of the tenancy. This was not done. The defendant subsequently informed the plaintiff that there was no valid renewal of the first tenancy, re-entered the premises to take vacant possession, and dismantled the unauthorised structures. In the claim brought by the plaintiff for (*inter alia*) wrongful repudiation of the second tenancy, an issue arose as to whether the defendant was estopped from relying on the condition precedent without first giving the plaintiff an opportunity to remedy the breach in order to satisfy the condition precedent.

144 Philip Pillai J, in finding for the plaintiff, noted that the defendant had not taken any steps during the first tenancy to enforce a clause in that tenancy agreement (cl 3.7) which prohibited any alterations and additions without prior consent from the landlord. Pillai J noted that although the defendant had sent the plaintiff a letter on 20 November 2006 purporting to put on record its objections to the plaintiff's breach of cl 3.7 and reserving "all rights to terminate" the tenancy", there had been inaction on the Defendant's part after sending this letter. Pillai J held that such silence or mere inaction would not ordinarily amount to a clear and unequivocal promise by a party to refrain from

insisting on its strict legal rights. In this case, however, he held that there was a strong and unequivocal promise, firstly, because he believed the evidence of the plaintiff's director, who testified that the defendant's general manager had expressly assured him that the 20 November 2006 letter was merely "to serve as a record" and had "no real consequences" (*Oriental Investments* at [86]). Moreover, Pillai J noted that not only was the defendant "generally nonchalant" about the unauthorised structures, the defendant's general manager had actively recommended a contractor to the plaintiff for the erection of these structures, and had also been very much involved in assisting the plaintiff to apply for approvals for the structures.

145 In this case, the conduct described above at [141(a)] and [141(c)] really amounted to no more than silence and inaction. As for the Whatsapp exchange, the Whatsapp message from Anqi merely requested the 1st Defendant to allow the Plaintiff some time "till end October" to try to refer more patients, and the 1st Defendant's statement "No problem" was specifically in response to this request. I did not find it possible to read this statement as an unambiguous promise that he and the 2nd Defendant would avoid exercising the default call option "provided that the Plaintiff continued to make efforts to refer the remaining patients to the 3rd Defendant".

146 The Plaintiff's own conduct following the issuance of the 6 May 2016 notices was also inconsistent with its having received a clear and unequivocal promise by the Defendants not to exercise the default call option "so long as the Plaintiff continued to make efforts to refer patients".[141] Upon being served with these notices, the Plaintiff did not protest that the Defendants had gone back on their purported promise. On the contrary, Anqi's evidence – which the Plaintiff

[141] [115] of the Plaintiff's Closing Submissions.

did not dispute – was that she held several discussions with the 1st Defendant between May/June 2016 and July 2016 to try to "negotiate for a higher figure i.e. more than $1, to be paid to Nanyang for their shares".[142]

147 In any event, even assuming the evidence relied on by the Plaintiff sufficed to prove a clear and unequivocal promise by the Defendants not to exercise the default call options, the Plaintiff was unable to prove the second element of reliance. In this respect, the Plaintiff claimed that it had acted in reliance on the purported promise by engaging in "more diversified and active marketing programs" to acquire more patients for the 3rd Defendant. However, the only item which Dr Fan cited to demonstrate the Plaintiff's "more diversified and active marketing programs" was a marketing video[143] which was eventually shown to have been produced in April/May 2015 – well before the purported "promise" by the Defendants. When confronted in cross-examination with evidence that the said video had been uploaded on YouTube as early as 3 May 2015, Dr Fan conceded that the video must have been made "roughly" within the period April/May 2015. He also stated that Anqi and Doreen were the persons who "would be able to answer questions about the video". However, the Plaintiff elected not to call Doreen as a witness, and when Anqi was asked about the video, she confirmed that it was produced in April 2015.[144] Clearly, therefore, the marketing video could not have been undertaken in reliance of any purported promise by the Defendants not to exercise the default call options.

148 As to the Plaintiff's claim that the continued referral of patients to the 3rd Defendant demonstrated its "reliance" on the purported promise by the

[142] [20] of Anqi's AEIC; see also transcript of 12 June 2018, 12:4 to 12:24.

[143] [72(a)] of Dr Fan's AEIC.

[144] See transcript of 12 June 2018, 2:21 to 4:7.

Defendants not to exercise default calls, I found this claim to be unsustainable on the evidence adduced. In order to show "reliance", the Plaintiff had to show that it had changed its position on the faith of the purported promise, by doing or omitting to do something which it would otherwise have not done or omitted to do as the case may be: see for example the Privy Council's decision in *Emmanuel Ayodeji Ajayi v RT Briscoe (Nigeria) Ltd* [1964] 1 WLR 1326 at pp 1330 to 1331. As I have earlier noted, the referral of patients to the 3rd Defendant was the value proposition which the Plaintiff brought to the commercial bargain struck with the Defendants. Moreover, the Plaintiff has not refuted the Defendants' assertion[145] that it would have benefited from the referral of patients because of referral fees earned from the patients referred and revenues from concierge services provided to patients travelling from China to Singapore. The Plaintiff did not explain how, in these circumstances, the continuing referral of patients after 13 August 2015 could be said to represent a change in its position. On the evidence adduced, I did not find that it could.

149 As for the last element of a promissory estoppel (*ie*, that it must be inequitable for the promisor to go back on his word), the Plaintiff did not explain in its closing submissions how this requirement was made out in its case.[146] Case law and academic commentary have suggested that this requirement may be met by evidence of detrimental reliance by the promisee, or evidence of dishonesty by the promisor in inducing the promisee to act on his promise, or improper behaviour on the promisor's part (such as the exercise of undue pressure on a promisee whom the promisor knew to be financially vulnerable): see in this regard *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at paras 4.086 to 4.087. The

[145] [8] of Anqi's AEIC

[146] [117] of the Plaintiff's Closing Submissions.

Plaintiff did not argue that any such element existed in this case. Again, on the evidence adduced, I did not find any such element to be shown.

150 For the above reasons, I rejected the Plaintiff's alternative argument that the 1st and 2nd Defendants were estopped from exercising the default call options.

Summary of my decision on the competing claims in relation to the disposal of the Plaintiff's shares in the 3rd Defendant

151 From the outset, parties were agreed that with regard to their competing claims vis-à-vis the disposal of the Plaintiff's shares in the 3rd Defendant, the key issue for determination was the validity of the 1st and 2nd Defendants' exercise of default call options on 6 May 2016. For the reasons explained in [74] to [116], I found that the 1st and 2nd Defendants' exercise of the default call options was valid, and that pursuant to cll 2 and 3(b) of the COAs, the Plaintiff was obliged to sell its shares back to them at the aggregate exercise price of $1. The POAs were terminated upon the Defendants' exercise of the default call options on 6 May 2016, and the Plaintiff's purported exercise of put options on 25 August 2016 was thus invalid.

152 Accordingly, I dismissed the Plaintiff's claim for specific performance to compel the 1st and 2nd Defendants to comply with its put option notices and to purchase its shares for $1.2m. I allowed the 1st and 2nd Defendants' counterclaim for specific performance of their default call options notices of 6 May 2016, as prayed for in prayer 1 at page 46 of the Defence & Counterclaim (Amendment No 2).

On the Plaintiff's claim to the sum of $35,952.18 as its share of total dividends declared by the 3rd Defendant for the year ending 31 January 2016

153 Finally, I deal with the Plaintiff's other claim, which was for specific performance to compel payment by the Defendants of a sum of $35,952.18. The Plaintiff argued that this sum represented its pro-rated (*ie*, 11.54%) share of the total dividends of $311,544 declared by the 3rd Defendant "for the year ended 31 January 2016".[147] It cited in support of its claim cl 11.2 of the Shareholders' Agreement, which provided as follows:

> Any dividends of the [3rd Defendant] shall be distributed to Shareholders in proportion to their *pro-rata* shareholdings in the [3rd Defendant].

154 I did not find the above claim to be satisfactorily proven, and I explain below my reasons.

155 The Defendants contended that it was incorrect of the Plaintiff to represent that "dividends in the sum of $311,544" had been declared "for the year ended 31 January 2016". This was because the sum of $311,544 actually represented the total dividends declared for the *financial periods ended 31 January 2015 and 31 January 2016 respectively*, *per* the following breakdown:[148]

(a) $261,544 for the period ended 31 January 2015;

(b) $50,000 for the period ended 31 January 2016.

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[147] [123] of the Plaintiff's Closing Submissions.

[148] [50] to [55] of the Defence and Counter-claim (Amendment No. 2), Tab G of the Plaintiff's Set Down Bundle; also [88] of the 1st Defendant's AEIC.

156 In its Reply and Defence to Counter-claim (Amendment No 2), the Plaintiff issued a bare denial of the above assertions.[149] However, the Defendants have adduced in evidence the directors' resolution dated 5 February 2015 declaring "an Interim Dividend of S$261,544.00" to be "payable to the 'Class A' shareholders [of the 3rd Defendant] whose names appear on the Register of Members on 31 January 2015", and another directors' resolution dated 31 January 2016 declaring "an Interim Dividend of $50,000.00" to be "payable to the 'Class A' shareholders whose names appear on the Register of Members on 31 January 2016".[150] In the course of the trial, the Plaintiff has given me no reason to disbelieve the authenticity of this documentary evidence. Nor has the Plaintiff disputed that its name was not in the 3rd Defendant's Register of Members as at 31 January 2015, since it only became a shareholder of the 3rd Defendant on 13 February 2015.

157 In these circumstances, the onus fell on the Plaintiff to explain why it should be entitled to dividends declared for the financial period ended 31 January 2015, *ie*, the period when it was not a shareholder of the 3rd Defendant. No explanation was offered either in the Plaintiff's Closing Submissions,[151] or in its Reply Submissions. Accordingly, I did not find any basis for finding that the Plaintiff was entitled to a pro-rated share of the entire dividends of $311,544.

158 I did consider whether the Plaintiff should be awarded a pro-rated share of the dividend of $50,000 declared for the financial period ending 31 January 2016. In this connection, however, I was confronted with the conundrum that this alternative claim was not pleaded by the Plaintiff, nor was it argued for at

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[149] [40] of the Reply and Defence to Counter-claim (Amendment No. 2), Tab H of the Plaintiff's Set Down Bundle.

[150] Tab LK-27, pp 598 to 604 of 1st Defendant's AEIC.

[151] [122] to [123] of the Plaintiff's Closing Submissions.

any point during the trial. Furthermore, even putting aside this procedural obstacle, the Plaintiff's case presented a further conundrum.

159 In his AEIC, Chee asserted that based on the 3rd Defendant's Annual Report dated 31 August 2016,[152] the dividends declared for both financial periods appeared to be in excess of the 3rd Defendant's profit after tax in each period. This was because for the financial periods ended 31 January 2015 and 31 January 2016, the net profits after tax were $131,905 and $48,520 respectively, whereas the dividends declared for the financial periods ended 31 January 2015 and 31 January 2016 were $261,544 and $50,000 respectively.[153] Chee asserted that the "dividends paid by the 3rd Defendant for each of the financial years *exceeded* the net profit after tax for each of the financial years" [emphasis in original], and that the "act of the payment of such dividends [was] akin to the *unauthorised return of capital*" [emphasis added].[154] By this, I understood him to be referring to the general rule in s 403(1) of the Companies Act (Cap 50, 2006 Rev Ed) that dividends may not be paid unless there are profits available for that purpose (see *Woon's Corporations Law* (Walter Woon SC, gen ed) (LexisNexis, 2016) at paras 1055 to 1100.

160 The Defendants' witness, Kam, attempted to refute Chee's allegations of unauthorised return of capital, claiming that the issue had eventually been cleared up with the auditors in the finalisation of the 3rd Defendant's accounts. Unfortunately, his testimony on this aspect of the case was vague and unsatisfactory. At one point he claimed that the figure of $261,544 was "interim dividends based on management accounts", and that at the time these

[152] See Tab 20, pp 595 to 622 of Dr Fan's AEIC for the 3rd Defendant's Annual Report for the year ended 31 January 2016; and specifically p 601 for the net profits after tax.

[153] [39] to [40] of Chee's AEIC.

[154] [41] of Chee's AEIC.

management accounts were reviewed, there "were sufficient profits made for the dividends to be made up from".[155] Strangely, however, these management accounts were not adduced in evidence. Moreover, while Kam repeatedly stated that "[t]he dividend issue [had] been resolved" with the auditors,[156] he failed to provide any coherent explanation as to how the issue was "resolved".

161 In my view, however, the unsatisfactory quality of Kam's testimony on this aspect of the case actually worked to the Plaintiff's disadvantage. If the Plaintiff was indeed correct in asserting that the Defendants had engaged in the unauthorised return of capital and thereby caused the 3rd Defendant to incur "a stark deficit",[157] it seemed anomalous that the court should nevertheless be asked in effect to sanction this unauthorised return of capital by ordering part of the monies to be shared with the Plaintiff. In other words, the Plaintiff's own stated position, *ie*, that the dividend payments were akin to an unauthorised return of capital, appeared to be at odds with its seeking an order that it be given a share of these "unauthorised" dividend payments. The Plaintiff has not attempted to explain this conundrum either in its Closing Submissions or in its Reply Submissions.

162 For the reasons stated at [153] to [157], I dismissed the Plaintiff's claim for specific performance to compel payment by the Defendants of a sum of $35,952.18. The Plaintiff not having pleaded an alternative claim for a pro-rated share of the $50,000 dividend declared for the financial period ending 31 January 2016, and in light of the reasons stated at [158] to [161], I also declined to make an order in the alternative for the Plaintiff to be paid a pro-rated share of the said $50,000.

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[155] See transcript of 12 June 2018, 25:8 to 27:26.

[156] See transcript of 12 June 2018, 27:4 to 27:26.

[157] [41] of Chee's AEIC.

Costs

163 After I had given judgement and awarded costs to the Defendants, the Defendants disclosed that they had on 26 January 2018 served an Offer to Settle ("OTS") on the Plaintiff.[158] The terms of the OTS were as follows:

(a) The Defendants shall pay the Plaintiff a total of $100,000 in full and final settlement of the suit ("the Settlement Sum");

(b) The Plaintiff shall transfer its shares in the 3rd Defendant to the 1st and 2nd Defendants within three days from receipt of the Settlement Sum; and

(c) The Plaintiff shall discontinue the suit within three days from receipt of the Settlement Sum.

164 The Plaintiff did not dispute that having rejected the OTS and having failed to obtain a judgement on more favourable terms, it was obliged to pay the Defendants costs on the standard basis up to the date to the date of the OTS and costs on an indemnity basis thereafter: see O 22A r 9(3) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

165 As parties were unable to agree on the quantum of costs to which the Defendants should be entitled, I heard submissions on the matter. In my view, this was legally not a very complex matter, nor were there any novel legal issues involved. Evidentially, it was also not particularly complex or dense. The trial lasted only four days, although I should add that this was primarily due to the reasonable and co-operative approach taken by both counsel. Taking into consideration the legal and factual issues involved, the length of the trial, the

[158] See Annex A of the Defendants' Skeletal Submissions on Costs dated 3 September 2018.

amount of work done, and the provisions of O 22A r 9(3), I fixed costs at $120,000 (plus disbursements agreed at $8,500).

Mavis Chionh Sze Chyi
Judicial Commissioner

Eugene Singarajah Thuraisingam, Syazana Binte Yahya and Teo Sher Min (Eugene Thuraisingam LLP) for the plaintiff;
Ho Pei Shien Melanie, Lim Xian Yong, Alvin and Chia Shi Jin (WongPartnership LLP) for the defendants.