Yeoh Wee Liat *v* Wong Lock Chee and another suit
[2013] SGHC 153

Case Number : Suit No 724 of 2011/G and Suit No 762 of 2011/V

Decision Date : 20 August 2013

Tribunal/Court : High Court

Coram : Quentin Loh J

Counsel Name(s) : William Ong, Tan Xeauwei, Felicia Tan and Joseph Tay (Allen & Gledhill LLP) for the plaintiff in Suit 724 of 2011/G; Lim Ker Sheon and Wee Qian Liang (Characterist LLC) for the plaintiff in Suit 762 of 2011/V; David Chan, Koh Junxiang and Christine Ong (Shook Lin & Bok LLP) for the defendant.

Parties : Yeoh Wee Liat — Wong Lock Chee

Contract

20 August 2013 Judgment reserved.

Quentin Loh J:

1 Yeoh Wee Liat ("Yeoh") and HRT Corporation Pte Ltd ("HRT") are the plaintiffs in Suit No 724 of 2011 and Suit No 762 of 2011 respectively. Wong Lock Chee ("Wong") is the defendant in both suits. The main question in these suits is the rightful percentage of shares held by each of the parties in a company, Next Capital Pte Ltd ("NCPL"). The answer depends on what the parties agreed and whether the plaintiffs have paid for their shares.

The background

2 HRT's sole director is one Phuah Bee Lee ("Phuah"). However, at all material times it was represented in its dealings by Phuah's husband, Richard Kuah Ah Eng ("Richard"). HRT is wholly owned by two of Richard's sisters. Richard, Yeoh and Wong were longstanding friends and business associates who had entered into numerous investments together. NCPL is a company in the restaurant business. It wholly owns a Chinese restaurant known as Jin Shan Lou and holds an indirect interest in a Japanese restaurant known as Hide Yamamoto. Both of these restaurants are at the Marina Bay Sands ("MBS"). The genesis of NCPL and its business model must be briefly explained to provide context for the parties' arguments.

3 Sometime in late 2007 or early 2008, Richard, Yeoh and Wong were in talks with two Japanese individuals, Junichiro Yamada and Yamamoto Hidemasa ("the Japanese investors"), on the possibility of setting up a Japanese restaurant at MBS. Wong had been pursuing the possibility of leasing a unit at MBS for this purpose. This bore fruit in April 2009 when MBS offered a lease to NCPL ("the first lease") for the operation of a Japanese restaurant. NCPL was at that time a shell company with a paid-up capital of $2, and its sole shareholder was a company known as Mataban Development Pte Ltd. Mataban was wholly owned by Wong, who in turn held 45% of the shares on trust for Phuah. Because MBS required that NCPL's share capital be increased to $500,000, Wong arranged for Mataban to inject the necessary funds into NCPL in September 2009. Thereafter, NCPL had a total of 500,000 shares with a value of $1 each.

4 Two subsidiary companies of NCPL were then incorporated, Next Capital Holdings Pte Ltd

("NCHL") and Next Capital JV Pte Ltd ("NCJV"). NCPL held 50% of NCHL's shares, with the remaining 50% held by the Japanese investors. NCHL in turn owned 10.2% of NCJV, with the remainder of the shares held by a broader set of investors. It was NCJV that actually operated Hide Yamamoto. It paid a marked-up rent to NCPL for the first lease as well as management fees to NCHL. As can be seen, the parties' financial outlay was limited to rent and associated costs, and they were only exposed to the profits and losses of Hide Yamamoto through the small indirect stake in NCJV. They also had limited involvement in the day-to-day running of the restaurant. The parties refer to this low-risk, consistent return, business model as the earning of "dry money".

5 In July 2009, MBS offered NCPL the lease of a second unit for the operation of a Chinese restaurant ("the second lease"). The original intention of the parties was also to use this lease to earn "dry money". To this end, negotiations with various groups of potential investors, both local and foreign, were initiated. These continued up to April or May 2010 but eventually came to nought. In April 2010, Wong asked Richard and Yeoh to allow him to run the Chinese restaurant himself. They agreed, and Wong has been managing Jin Shan Lou since.

6 Mataban remained NCPL's sole shareholder until 6 January 2010. On that day, share transfer forms reflecting the transfer of 122,500 shares in NCPL (24.5% of the total) from Mataban to each of the plaintiffs were executed by Wong as the director of Mataban. [note: 1] These transfers were witnessed by Yeoh and Phuah respectively. The remaining 255,000 shares (51%) were transferred to Wong. [note: 2] In May 2010, 105,000 shares (21%) were transferred from Wong to his wife, Christina Tay ("Christina"), leaving 150,000 shares in Wong's name.

The parties' cases

7 According to the plaintiffs, the parties had initially agreed for the ownership of NCPL to be split equally between them. [note: 3] This agreement was subsequently varied: Yeoh and HRT were to hold 33% of NCPL's shares each and the remaining 34% was to be held by Wong. [note: 4] Further, under the varied agreement, they were to contribute to the share capital of NCPL in proportion to their shareholdings. Therefore, Yeoh and HRT were to contribute $165,000 each, while Wong was to contribute $170,000. The plaintiffs seek to enforce this agreement.

8 In contrast, Wong claims that there was no binding agreement on the terms asserted by the plaintiffs. Instead, he asserts that there was initially an "understanding", which he says was not legally binding, that the ownership and profits of NCPL were to be split equally between the parties. This was premised on NCPL executing the "dry money" business model. However, that understanding no longer had any effect when he, Wong, undertook to secure financing for the company and the plaintiffs agreed for him to run Jin Shan Lou. Wong pleads that the parties therefore agreed that he would own 51% of the shares and have majority control of NCPL, with the remaining shares split equally between the plaintiffs. Under this agreement, he was to contribute $255,000 to the share capital of NCPL and the plaintiffs $122,500 each. The share transfer forms executed on 6 January 2010 were in accordance with this agreement. Wong also pleads that Yeoh has not paid in full for his shares, while HRT has failed to pay for them at all.

The agreement

Events prior to 6 January 2010

9 As the parties did not commit their agreement to writing, they rely on oral and circumstantial evidence to prove their respective cases. Turning first to the events prior to the transfer of shares

from Mataban to the parties on 6 January 2010, I am satisfied that there is sufficient evidence that the parties had come to a contractually binding agreement sometime in September 2009 for the plaintiffs each to hold 33% of NCPL's shares and for Wong to hold the remaining 34% ("the September agreement").

10 First, there was substantial contemporaneous correspondence that had made reference to such a distribution. On 25 September 2009, Wong sent Richard an email asking him to have Yeoh pay $166,000 towards NCPL's share capital. [note: 5] He repeated the request in another email to Richard the next day, although this time the amount specified was $166,666. [note: 6] This corresponds to one-third of NCPL's share capital and suggests that Wong was acting on the assumption that Yeoh would be entitled to one-third of NCPL's shares.

11 On 28 September 2009, Richard sent an email to NCPL's company secretary, Strategic Alliance Corporate Services Pte Ltd ("SAC"), with instructions for Yeoh and HRT each to hold 33% of the shares and for Wong to hold the remaining 34%. [note: 7] Yeoh and Wong were both copied in this email and neither commented on it, indicating that Richard's instructions were consistent with the parties' shared expectations. Draft share transfer forms were prepared in accordance with these instructions and sent to Wong the next day, although these were eventually not executed. [note: 8]

12 On 30 September 2009, Wong sent an email instructing a solicitor to draft guarantee agreements for both Richard and Yeoh. [note: 9] In the email, he stated that their shareholdings in NCPL would be 33% each and that HRT would own the shares on Richard's behalf.

13 On 23 October 2009, Wong sent Yeoh an email, copying Richard, stating as follows: [note: 10]

> [Yeoh] can you top up balance:
>
> 33% = $165,000.00 less 14,676.32 (your loan) = 150,323.68
>
> paid 50K on 16th Oct. Balance = $100,323.68.
>
> Can you top up another 50k by early next week?

14 Wong followed up with another email to Yeoh on 18 November 2009, again copying Richard, asking for the balance (which had by then been reduced to $50,323.68) to be paid: [note: 11]

> We do not have enough funds.
>
> [Yeoh] can you top up balance of S$50,323.68 to complete your full amount for share of capital for Sands Japanese Restaurant project.
>
> Calculation as follows:
>
> 33% share = S$165,000.00
>
> Less loan on 11.08.09 14,676.32
>
> Less loan on 13.10.09 50,000.00
>
> Less loan on 29.10.09 50,000.00

Balance to top up **50,323.68**

15 On 18 December 2009, Richard sent another email to SAC repeating his instructions for the shares to be allocated in a ratio of 33:33:34. [note: 12] As with Richard's earlier email, both Yeoh and Wong were copied and neither ventured any comment. Once again, draft share transfer forms were prepared in accordance with these instructions and sent to Wong, but these were eventually also not executed. [note: 13]

16 The fact that the parties were to be equal, or nearly equal, shareholders was communicated to third parties. On 16 December 2009, one of the Japanese investors, Junichiro Yamada, emailed Richard, Yeoh and Wong advising them that the auditor acting for other Japanese investors would be likely to ask who Wong was. This was because Wong seemed to be in control of both NCPL and Mataban. [note: 14] Yamada wrote that he had already explained to the auditor that he had three equal Singaporean partners, and that Wong's companies were not selected to be their investment vehicles for any particular reason.

17 Separately, Yeo Siok Keak ("Yeo"), a Singaporean investor who was approached regarding the Chinese restaurant, deposed in his affidavit of evidence-in-chief that Wong had told him that he, Wong, was an equal partner with Richard and Yeoh in the MBS venture. [note: 15] Yeo testified that it was important to him that Richard, Yeoh and Wong were equal partners, since his planned investment envisaged him eventually becoming the majority shareholder in NCPL. [note: 16] Yeo therefore needed to be assured that the parties had the capacity to transfer the shares to him.

18 Secondly, Wong accepted in cross-examination that there was an agreement in September 2009 for the parties to have an equal stake in NCPL. [note: 17] However, he was at pains to note that this was premised on their investment being confined to the earning of "dry money". He further noted that a separate company should have been incorporated for Jin Shan Lou. [note: 18] Wong's caveat is an issue to which I will return. However, it is clear from his evidence that there was indeed an agreement for the parties to have equal stakes in NCPL as at September 2009.

19 I note that Wong attempted to vary his testimony as cross-examination continued. This took place when he was referred to his pleadings, which flatly denied the existence of any agreement in September 2009. [note: 19] When this inconsistency was brought to his attention, Wong testified that there was in fact no agreement at the time. [note: 20] Instead, there was only an "understanding" that was not intended to be legally binding. He explained that an agreement would only be legally binding if documented by a lawyer and signed by the parties. [note: 21] I am unable to accept Wong's attempt to vary his evidence. I find that his evidence was unreliable and that he was an evasive and untruthful witness. This was amply borne out in the course of his cross-examination. There is no evidence that the parties were acting on the assumption that they would not be bound by the September agreement until some condition was fulfilled or their agreement was formally documented. It bears repeating that there was no formally documented agreement between the parties on NCPL's share allocation at all. Further, there was nothing contingent or tentative in the language of the correspondence traversed above. In particular, it was not suggested anywhere that Yeoh's contribution of $165,000 was provisional and could subsequently be increased or decreased in accordance with the agreement eventually reached by the parties. The plaintiffs noted that this "understanding" had not been mentioned by Wong prior his testimony. I am of the view that this "understanding" was an afterthought introduced by Wong in an attempt to retract what he had by

then realised was a damaging concession made under cross-examination.

Events of 6 January 2010 and after

Variation of the parties' agreement

20 The fact that the evidence supports the existence of the September agreement does not mean that the plaintiffs have therefore proven their case. This is because the parties could subsequently have varied the September agreement. As noted above, Wong testified that the agreement that the parties be equal shareholders was premised on NCPL being involved only in earning "dry money". There would be no reason for the parties to have unequal stakes in the company since their involvement in running the restaurants would be minimal and their exposure to risk identical. However, Wong asserts that this premise was departed from sometime in November or December 2009 due to developments concerning the Chinese restaurant.

21 A formal letter of offer concerning the lease of the premises for the Chinese restaurant was issued by MBS to NCPL on 19 November 2009. [note: 22] Under the terms of this letter of offer, NCPL was obliged:

(a) Upon confirming the terms of the letter of offer, to pay MBS:

(i) $84,710, being the first month's base rent, service charge, and promotion fund;

(ii) $254,130, being a security deposit equal to 3 months' base rent, service charge and promotion fund; and

(iii) $16,270, being the stamp fees payable; and

(b) Upon taking possession of the premises, to pay MBS $3,000,000 for the "landlord's works".

22 These sums were well above the total of $500,000 that the parties had contributed to NCPL's share capital. Wong claims that he informed Richard and Yeoh about the funds required under the letter of offer and told them that $1,500,000 in initial capital was required to undertake the second lease. [note: 23] Such funds had to be raised as a precaution in case an external investor could not be found. [note: 24] The full sum in excess of $3,000,000 did not need to be raised immediately because Wong had negotiated for the landlord's works to be paid in two equal tranches, one to be paid before the opening of the restaurant and the second three years later. [note: 25] According to Wong, Richard and Yeoh both informed him that they were unable to procure their share of the extra funds required. [note: 26] They therefore agreed in or around December 2009 that Wong would be responsible for securing the whole sum; consequently, he would be entitled to 51% of NCPL's shares, and Yeoh and HRT 24.5% each ("the December agreement"). [note: 27] It should be noted that none of these communications were documented. The plaintiffs deny that there was such an agreement.

23 In my view, the evidence does not support the existence of the December agreement. First, notwithstanding the lack of any documentary evidence, Wong's testimony regarding the circumstances of this agreement was inconsistent and unreliable. In his affidavit of evidence-in-chief, Wong deposed that the agreement was reached through various telephone calls and meetings and that it was likely to have been concluded sometime after 18 December 2009. [note: 28] It will be recalled that 18 December 2009 was the last occasion on which the distribution of shares in accordance with the September agreement was mentioned in correspondence between Richard, Yeoh

and Wong (see [15] above). However, Wong's testimony in court was different: [note: 29]

A ... by January, I was talking to banks and I managed to get some understanding from the bank that they will fund me provided I mortgage my house.

So at that point of time, by January 4th, I decided that I better have this company incorporated, with myself taking the majority share so that I have control over the finance and all the important aspects of the business and my guarantee to MBS. I do not want to get myself exposed, because if having one-third each means I don't have control.

...

Q Mr Wong, you decided to give yourself majority because, from your perspective, you suffered the most financial exposure; correct?

A Not just that. There are other aspects of it.

Q The truth is that Mr Yeoh and HRT's Mr Kuah was kept in the dark when you decided to give yourself 51 per cent of NCPL; correct?

A How can I keep them in the dark when they signed the share transfer and all the necessary documentation?

...

Q When the share transfer documents were put before them, they saw it, they realised that you have majority –

A I'm sure they do.

Q -- and they were quite happy for you to have majority?

A I do not know --

Q They were agreeable for you to have majority?

A There's no objection, no protest from them.

...

Q So there was no prior discussion, but when they saw the share transfer forms, they understood where you were coming from?

A Of course.

...

Court: ... I just want to clear up what I thought I heard.

So, before the share transfer form was sent to them to sign, you never discussed this shareholding. Did you discuss it?

A No, not with them personally.

24 It is clear from this excerpt that Wong's decision to vary the shareholdings was a unilateral one and had not previously been discussed with Richard and Yeoh. If Wong's testimony is accurate, the plaintiffs' agreement was secured when the share transfer forms were executed. Wong was led back to his affidavit of evidence-in-chief and questioned on this inconsistency. His response was first to equivocate, next to claim he could not remember, and finally to assert that it was his affidavit evidence that was true and his testimony inaccurate. [note: 30] In the process, this telling exchange took place: [note: 31]

> Q ... Mr Wong, earlier on, under cross-examination, you told this court that before the share transfer forms were sent to Mr Yeoh and HRT to sign, you never discussed with them personally on a change in shareholding for you to get 51 per cent. That is completely inconsistent with your [affidavit of evidence-in-chief].
>
> Can you please tell the court where you are speaking the truth?
>
> A What I meant was, not personally was because I didn't really meet up with them after December 18 because I know what Richard was trying to do, to allocate 34/33/33, and I know that if I were to agree with him on that, I would have no control, and the JV -- the Japanese money is not in yet at that point of time. There is a big risk for me. And on top of that, I already signed a letter of offer for the [lease for the Chinese restaurant], so there is a lot of pressure and a lot of risk.

25 Wong's answer suggests that the other parties were not willing to deviate from the September agreement, notwithstanding Wong's greater exposure to risk. However, Wong's evidence varied still further. The very next day of trial, he testified that he had decided "over the Christmas period" that he should take majority control of NCPL because of his increased risk. [note: 32] Accordingly, on 4 January 2010, he had SAC prepare share transfer forms in accordance with the December agreement. Wong then had Yeoh visit his office where he explained the contents of the share transfer forms to Yeoh. [note: 33] When asked by counsel if he was now saying that the agreement was reached between 4 January and 6 January 2010, his response was to disagree on the basis that Richard and Yeoh were already aware that he was seeking financing from banks. [note: 34] It is clear that at this point Wong was again taking the position that there had been no concluded agreement for him to have a majority shareholding and was therefore again departing from his affidavit evidence. He was now asserting that the plaintiffs would have known of the new arrangements when they signed the share transfer forms since they knew that Wong was securing financing for the second lease. I am unable to find, on the basis of Wong's prevaricating evidence, that there was even a December agreement. Wong's final position is also at odds with the existence of such an agreement. I should also add that, in contrast to Wong, Yeoh and Richard were more straightforward and candid witnesses and I accept their evidence.

26 Secondly, the manner in which Wong procured the preparation of the share transfer forms undermines the existence of the December agreement. As noted at [11] and [15] above, Richard had twice via email asked SAC to allocate the shares in accordance with the September agreement. Each time, SAC responded by preparing share transfer forms and forwarding them to Wong. It is therefore clear that email was the usual means by which instructions were communicated to SAC.

27 In contrast, when Wong gave instructions on the allocation of shares, he personally visited

SAC's offices without informing the other parties. [note: 35] This behaviour can fairly be characterised as surreptitious and suggests that Wong did not want to alert Richard or Yeoh to the fact that he was pursuing a majority stake. There is no reason why Wong would not have sent his instructions via email as Richard had if the December agreement truly did exist. Wong did not testify that he had other reasons that had compelled him to visit SAC personally and that his instructions had been issued during his visits as a matter of convenience.

28 In fact, this was not the first time that Wong had communicated with SAC without the plaintiffs' knowledge and at variance with their shared expectations. Wong called SAC twice following Richard's first email regarding the allocation of shares to tell them not to proceed with Richard's instructions. [note: 36] The inference can be drawn that Wong was from the earliest stages seeking to work around the September agreement. There is no other reason why he would choose to countermand Richard's instructions in such a manner.

29 Thirdly, it is undisputed that until April or May 2010, the parties continued to court potential investors for the purpose of earning "dry money" from the second lease. While this is not inconsistent with Wong being responsible for securing the necessary financing for the Chinese restaurant as a precautionary measure, it appears premature for the parties to have agreed in December 2009 or January 2010 that Wong should have a majority stake; if other investors were secured, then Wong would not have to shoulder more risk than the others. Wong has not suggested that they intended to revert to the shareholding structure laid down in the September agreement should the involvement of an external investor eventually be secured. In a similar vein, one would have expected arrangements to have been made for Yeoh's contributions to be varied once the December agreement was struck. Finally, the option of Wong being responsible for running the Chinese restaurant was not even under contemplation at the time. Given these circumstances, the existence of the December agreement appears very implausible.

Documents consistent with the December agreement

30 Notwithstanding the discussion above, what is one to make of the fact that Yeoh and Phuah appear to have witnessed share transfer forms that transferred only 24.5% of NCPL's shares to them? This *prima facie* indicates that they knew how many shares they were allocated and their lack of protest suggests that the transfers were in accordance with their expectations. The share transfer forms can therefore be said to corroborate the December agreement.

31 However, HRT has filed a notice of non-admission in respect of the share transfer form allegedly witnessed by Phuah. [note: 37] This was on the basis that: (1) Wong had pleaded that Phuah had signed it at the offices of the corporate secretary when she had never been there before; and (2) Phuah could not remember whether the share transfer form was filled up or blank at the time she signed it, if she had signed the version exhibited by Wong at all. Under s 66 of the Evidence Act (Cap 97, 1997 Rev Ed) ("the Evidence Act"), documents must be proved by primary evidence unless one of the exceptions under s 67 is applicable. Pursuant to s 64, primary evidence means the document itself must be produced for the inspection of the court. Further, s 69 requires that if a document is alleged to be signed by any person, the signature must be proved to be his handwriting. Since HRT has challenged the authenticity of the share transfer form, Wong had to produce the original and prove that the signature thereon was in fact Phuah's. However, he has not done so. Accordingly, HRT cannot be taken to be aware that it had only been allocated 122,500 shares on 6 January 2010.

32 Wong's failure to produce the original share transfer form is not a mere technicality. In *Jet Holding Ltd and others v Cooper Cameron (Singapore) Pte Ltd and another and other appeals* [2006]

3 SLR(R) 769, the Court of Appeal noted the general principle that the party who wishes to introduce documents into evidence must comply with the salient principles of the Evidence Act (at [48]). To do otherwise would be to ignore the clear provisions of the Evidence Act as well as to signal to parties that there is a different approach in civil matters in so far as the introduction of documents is concerned. Further, the party who wishes to object to the admission of certain documents into evidence should make such objections before the documents are admitted as it cannot do so after that has happened (at [51]). The Court of Appeal also cautioned that frivolous or vexatious objections could be sanctioned by way of an order for costs (at [50] and [56]). In the present case, HRT filed its notice of non-admission six months ahead of trial and it cannot be said that this notice was frivolous or vexatious. Wong had ample opportunity to procure the original share transfer form but failed to do so without explanation.

33 Unlike HRT, Yeoh does not dispute the authenticity of the share transfer form he allegedly witnessed. Instead, he asserts that its contents were not brought to his attention when he signed it. Therefore, his signature cannot be taken as evidence of his awareness of the number of shares that were transferred to him. It must be emphasised that Yeoh is not pleading the defence of *non est factum*. It is well-established that such a plea will not be entertained if the party relying upon it was oblivious to the contents of the document signed due to his negligence and carelessness: see *Oversea-Chinese Banking Corp Ltd v Frankel Motor Pte Ltd and others* [2009] 3 SLR(R) 623 at [26]. Wong relies on the share transfer form as evidence of a prior agreement rather than as a written agreement *per se*. Its weight as corroborative evidence will therefore be undermined or even negated if Yeoh can prove that he was not aware of what he was signing.

34 Yeoh claims that he was in the habit of signing company documents without reading them. Such documents would often be passed to him by Wong's assistant as a stack with flags attached where his signature was required. [note: 38] He would then sign them and hand them back to the assistant without reading them. Yeoh surmises that Wong had probably arranged for the share transfer form to be included in one such stack of company documents and he had signed it without being aware of its contents. I note that this evidence is entirely self-serving and must therefore be treated with caution. On weighing the evidence, I find that this is buttressed by Yeoh and Richard's account of a meeting on 12 March 2011. They both deposed that they had asked Wong why he had changed NCPL's share structure without telling them. [note: 39] Wong is said to have responded by smiling wryly and saying "next time, read before you sign". Wong denied making this statement during cross-examination [note: 40]. I note however that this was not challenged in the cross-examination of Yeo and Richard. Given Wong's lack of reliability as a witness, I accept that this exchange did take place. To my mind, it indicates that Wong was aware that Yeoh was in the habit of signing documents without reading them and that he had deliberately taken advantage of this. Thus, the fact that Yeoh signed the share transfer forms does not amount to evidence that he was aware of the share allocations.

35 I also note that Wong's account of the circumstances of the signing of the share transfer form by Yeoh was highly inconsistent. In his Defence filed on 4 November 2011, Wong pleaded that Yeoh had signed the share transfer form at SAC's offices. [note: 41] However, in his second amended Defence filed on 27 August 2012, Wong simply pleaded that Yeoh had signed the share transfer form without specifying where this was done. In his affidavit of evidence-in-chief filed on 28 August 2012, Wong asserted that Yeoh had signed the share transfer form in his, Wong's, office. [note: 42] Wong added that he had even explained the contents of the share transfer form to Yeoh. This account was maintained at trial (see [25] above); if this actually happened, it is unlikely that Wong would have forgotten it only to remember it more than nine months later. Further, Pamela Neo ("Pamela"), who is SAC's managing director and Wong's sister-in-law, did not give evidence to the effect that Yeoh had

visited her offices to sign the share transfer form. This suggests that on balance, both of Wong's accounts are untrue. It bears mention that Pamela also testified that to the best of her knowledge Phuah had never visited SAC's office. [note: 43]

36 Moreover, the subsequent actions of Richard and Yeoh are consistent with their case that they only found out about Wong's majority stake in NCPL sometime between August and October 2010. According to Richard, this happened when Pamela told him that Wong had boasted that he was the majority shareholder at a dinner attended by his family members at Jin Shan Lou. Surprised by this information, Richard and Yeoh went to SAC's offices to verify how NCPL's shares had been allocated. I am of the view that the evidence corroborates the plaintiffs' case that they did not know about the actual allocation of NCPL's shares before this point.

37 On 24 October 2010, Yeoh forwarded to Richard the email that Wong had sent on 23 October 2009. [note: 44] As noted at [13] above, Wong was then asking that more of Yeoh's 33% contribution of the share capital be provided. This suggests that Yeoh had gone through the parties' correspondence for a record of the parties' agreed share allocation to confirm that they had been acting on the basis that they would be equal, or very nearly equal, shareholders.

38 On 26 October 2010, SAC sent Richard the handwritten minutes taken during Wong's visit to its offices on 4 January 2010. [note: 45] This stated as follows:

> Next Capital PL – Sands (Contract)
>
> -Mr Wong's shares % change to 51%
>
> Mataban Development PL
>
> -redo sale of shares in Next Capital PL

39 The next day, SAC forwarded to Richard email correspondence wherein Wong had confirmed the instructions given on 4 January 2010. In my view, these emails indicate that Richard had been making inquiries into the share allocation of NCPL. Richard would not have had to do so if the December agreement existed. SAC was in turn attempting to justify the share allocation by demonstrating that it had acted in accordance with Wong's instructions. Richard forwarded both of these emails to Yeoh, including the following text: [note: 46]

> Bro...this also for your eye only...kekeke...email ...[Wong] only write to [SAC] without CC all parties....kekeke

40 This indicates that Yeoh was also none the wiser about the state of NCPL's share allocation. Richard's comments also show that he now realised that Wong had been acting behind their backs. In my view, this flurry of emails demonstrates decisively that the plaintiffs were not previously aware that Wong had been accorded a majority stake in NCPL. It follows that their witnessing of the share transfer forms without protest does not corroborate the existence of the December agreement.

41 Separately, Wong points out that SAC had sent Richard the Accounting and Corporate Regulatory Authority company profiles of NCJV and NCPL on 31 March 2010 at Richard's request. [note: 47] The company profile for NCPL stated that the plaintiffs each held 122,500 shares while Wong held 255,000. Had Richard seen this information, it would be clear to him that Wong held a majority stake in NCPL. However, I do not think this is determinative. The shareholder information is only one part of

the company profiles. It could well be that Richard was interested in finding out who the current directors of the companies were. If that was the case, he may not have considered the shareholder information at all. In any event, this must be considered in light of the fact that the evidence indicates that the plaintiffs only realised what the allocation of the shares was between August and October 2010 (see [36] above).

Payment for the shares

42 As noted at [3] above, NCPL's share capital was provided by Mataban and the latter remained the sole shareholder of the former until 6 January 2010. The parties' acquisition of NCPL's shares was therefore effectively a purchase from Mataban. Wong pleaded that the Yeoh had only paid $67,300 for his shares and that HRT had not made any payments at all. Mataban commenced a separate action, Suit 94 of 2012, for the outstanding consideration allegedly owed to it by Yeoh and HRT. Pursuant to a consent order dated 15 June 2012, Mataban, NCPL, Richard, Yeoh and Wong have each agreed to be bound by the findings of fact made by this court in these proceedings in respect of the plaintiffs' entitlement to shares in NCPL and their liability to pay for such shares. Consequently, Suit 94 was discontinued on 4 April 2013.

Payments by Yeoh

43 The evidence suggests that Yeoh has paid in excess of $165,000 for his shares in NCPL. As noted at [14] above, Wong personally stated in an email that Yeoh had made payments to Mataban totalling $114,676.32 as at 18 November 2009. These comprised the following:

(a) 11 August 2009: payment of $14,676.32 to Next Capital Japan Inc, a subsidiary of NCPL;

(b) 11 October 2009: payment of $50,000 by cheque to NCPL;

(c) 29 October 2009: payment of $50,000 by cheque to NCPL.

44 The 11 August 2009 payment was documented in emails with Yamada, [note: 48] while the two subsequent payments were indirectly corroborated by entries in NCPL's general ledger, [note: 49] which recorded that $140,000 (the sum of the two $50,000 payments in October 2009 and two further payments to NCPL on 15 January and 11 February 2010 made by way of a cheque for $20,000 on each occasion; these last two payments are not disputed by Wong) [note: 50] had been attorned to Mataban. On 31 March 2010, Wong applied a payment of $27,300 that was due to Yeoh towards NCPL. This is also not disputed by Wong. Accordingly, I find that Yeoh has established that he had made payments totalling $181,976.32.

45 When brought through the records of these payments, Wong agreed that Yeoh had paid in full for his shares in NCPL. [note: 51] However, he attempted to withdraw this concession in closing submissions by drawing a distinction between "share capital" and "investment capital". It is argued that this distinction was present in Wong's affidavit of evidence-in-chief, where reference was made to the need to raise "working capital" in order to equip the Chinese restaurant. [note: 52] But this remark was entirely separate from the issue of share capital, and the plaintiffs do not assert that the share capital of NCPL alone was adequate to run either or both restaurants. Reference was also made to the email dated 18 November 2009. The excerpt at [14] above is reproduced for convenience:

> We do not have enough funds.

[Yeoh] can you top up balance of S$50,323.68 to complete your full amount for *share of capital* for *Sands Japanese Restaurant project*.

Calculation as follows:

33% share = S$165,000.00

Less loan on 11.08.09 14,676.32

Less loan on 13.10.09 50,000.00

Less loan on 29.10.09 50,000.00

Balance to top up 50,323.68

[emphasis added]

46 Wong argues that the phrase "share of capital", plainly read, was a reference to "investment capital". Further, the reference to the "Sands Japanese Restaurant project" suggests that Yeoh was being asked to contribute a 33% share of investment capital totalling $500,000 to Hide Yamamoto. This is contrary to Wong's own case that the "dry money" business model was successfully deployed for the Japanese restaurant and that the need for financing in respect of the Chinese restaurant only arose after MBS made the offer of the second lease on 19 November 2009 (see [22] above). There was also no suggestion in the evidence that the parties had agreed to contribute a further $500,000 in investment capital towards the Japanese restaurant, bringing their total outlay to $1,000,000. Further, if Yeoh had to pay an additional $165,000 as a 33% share of this investment capital, one would expect similar payments to have been made by HRT and Wong. There is no evidence that this had been done. Wong also argues that the fact that Yeoh's payments were made to NCPL in the form of loans rather than to Mataban directly suggests that these payments were not for the purchase of shares. However, NCPL's general ledger clearly shows the sum of $140,000 advanced by Yeoh as attorned to Mataban, indicating that NCPL was not the final payee.

47 In my view, this distinction between share and investment capital was an afterthought and is without merit. It is inconsistent with Wong's pleaded case that Yeoh had only paid $67,300 in consideration for his shares. Accordingly, I find that Yeoh has paid in full for his shares in NCPL under the September agreement.

Payments by HRT

48 As noted at [2] above, Richard was neither a director nor a shareholder of HRT even though he was its representative at all material times. Similarly, Wong held 45% of Mataban's shares on trust for Phuah, not Richard. This is because Richard was and continues to be an undischarged bankrupt. Thus, Richard characterises the investments in which he was involved as being his family's investments. As an aside, it is noted that Richard is being investigated by the Official Assignee for managing a business without prior approval. However, this is not relevant to the resolution of the present dispute.

49 Mataban was incorporated in 2004 as a vehicle for a joint property investment by Richard's family and Wong. [note: 53] This netted Mataban a profit of about $7 million to $8 million. [note: 54] Subsequent investments jointly entered into by Richard's family and Wong were funded out of the profits held by Mataban. According to HRT's case, Richard's family and Wong decided as a matter of convenience that NCPL's share capital would be channelled from Mataban as had been done in

previous joint investments. This was because Mataban had the requisite funds and sufficient profits to be distributed as dividends. [note: 55] HRT would then hold NCPL's shares as the nominee of Richard's family.

50 Given that HRT was never asked to pay for its shares in NCPL prior to the commencement of these proceedings, and that Wong has not furnished any proof that he has made any such payment, I am satisfied that HRT's account is accurate. Were HRT expected to reimburse Mataban, one would have expected Wong to have been seeking funds from HRT in addition to Yeoh. Further, on Wong's own case, he would also have had to make payments to Mataban for his shares. There is no evidence that this was done. One would expect that such evidence, if it did exist, would be eagerly raised to the attention of the court. In my view, the fact that only Yeoh was expected to make any payments is highly revealing. Accordingly, I find that no payments are due from HRT to Mataban for HRT's NCPL shares under the September agreement.

Remedies

51 As things stand, NCPL's shares are held in the following proportion (see above at [6]):

(a) Richard: 122,500 shares (24.5%);

(b) Yeoh: 122,500 shares (24.5%);

(c) Wong: 150,000 shares (30%);

(d) Wong's wife Christina: 105,000 shares (21%).

52 The plaintiffs do not seek for NCPL's shares to be held strictly in accordance with the September agreement as they have no objections to Wong's shares being divided between him and Christina. Hence, they do not take issue with Christina's possession of NCPL's shares as such. Rather, the plaintiffs claim the following: [note: 56]

(1) An order that Wong does all that is necessary to rectify the share register of NCPL to reflect [Yeoh's/HRT's] entitlement to 33% [each] of the shareholding in NCPL as from 6 January 2010;

(2) Further, or alternatively, an order that Wong effects the necessary share transfer of his shareholding in NCPL to [Yeoh and HRT], such that [each of Yeoh's and HRT's] shareholding in NCPL is 33% of the shareholding in NCPL;

53 In other words, the plaintiffs seek specific performance of the September agreement. The Court of Appeal's observations in *Lee Chee Wei v Tan Hor Peow Victor and others and another appeal* [2007] 3 SLR(R) 537 are instructive:

> 53 While the dominant principle is that equity will only grant specific performance "if under all the circumstances, it is just and equitable to do so" (*Stickney v Keeble* [1915] AC 386), factors affecting the court's discretion include considerations such as (a) whether damages would be an adequate remedy; and (b) whether the person against whom the relief of specific performance is being sought would suffer substantial hardship (*Chua Kwok Fun Kevin v Etons Management Consultants Pte Ltd* [1999] 1 SLR(R) 1088 ("Chua Kwok Fun")).
>
> 54 At the outset, it should be clarified that the trial judge's concern that "the vendor's interest

in a contract of sale was strictly monetary", should not *per se* preclude the grant of an order of specific performance. While a contract to transfer shares in a *publicly* listed company will generally not be specifically enforced, a contract to transfer shares in an unlisted company on the other hand can be specifically enforced at the suit of either purchaser or vendor (see Jones & Goodhart at pp 161–162). In *Pamaron Holdings Sdn Bhd v Ganda Holdings Bhd* [1988] 3 MLJ 346 , it was unequivocally held (at [16]), that "a seller of shares not freely saleable in the open market is entitled to specific performance". Similarly, in *Duncuft v Albrecht* (1841) 12 Sim 189, the court decreed specific performance for the sale of shares which were limited in number and not always available in the open market.

55 While the subject matter of the contract may readily lend itself to an order of specific performance, the more pertinent issue in every case is whether specific performance constitutes the just and appropriate remedy in the circumstances.

[emphasis in original]

54 It is clear that specific performance will *prima facie* be available where the subject matter of a contract is shares that are not freely saleable in the open market. On the facts of the present case, I am satisfied that specific performance would be a just and equitable remedy. The parties had contracted to have very nearly equal stakes in NCPL, such that no one party would be the dominant shareholder. There is a world of difference between being a shareholder powerless to oppose a majority shareholder and a shareholder who could realistically influence decisions in conjunction with other shareholders. I therefore find that damages would not be an adequate remedy. I note that Wong has put in tremendous effort in running NCPL and, in particular, Jin Shan Lou. He had also exposed himself to a greater degree of risk than the plaintiffs in obtaining financing for the company. It was clear from his testimony that he thought that he deserved his majority stake. However, in view of the September agreement, to which Wong is a party, it cannot be said that specific performance would cause Wong to suffer substantial hardship. The fact is that Wong unilaterally attempted to impose a *fait accompli* on the plaintiffs instead of negotiating a mutually satisfactory agreement or, alternatively, incorporating a separate company to enter into the second lease as he noted he should have done (see [18] above). He should not have the benefit of his subterfuge.

55 The plaintiffs seek as an additional remedy a declaration that Wong holds the shares to which they are entitled on trust for them and an order that he account for all dividends, profits and other benefits that he derived from these shares. [note: 57] Yeoh argues that a constructive trust should be imposed on Wong as an errant fiduciary. HRT contents itself with asserting that "if Wong is held in breach of the shareholders agreement ... then it is trite that Wong would be the trustee of HRT's 42,500 shares in NCPL". Given that the plaintiffs amended their pleadings together to include these prayers in identical terms, it can be surmised that HRT aligns itself with Yeoh's submissions.

56 These remedies are premised on Wong owing the plaintiffs fiduciary duties. The plaintiffs rely on the Court of Appeal's identification of the common features of a fiduciary relationship in *Susilawati v American Express Bank* [2009] 2 SLR(R) 737 at [41], which cited Frame v Smith [1987] 2 SCR 99 at [60]:

Relationships in which fiduciary obligations have been imposed seem to possess three general characteristics:

(1) The fiduciary has scope for the exercise of some discretion or power.

(2) The fiduciary can unilaterally exercise that power or discretion so as to affect the

beneficiary's legal or practical interests.

(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

57 It is clear that the relationship between Wong and the plaintiffs does not possess these characteristics. As sole legal owner and director of Mataban, Wong was contractually obliged to transfer the appropriate number of shares to each of the plaintiffs. It is unclear what discretion he can be said to possess in that capacity. It is no use for the plaintiffs to argue that Wong had complete control over the affairs of NCPL and was the only person with the power to instruct the corporate secretary in the allocation of NCPL's shares. It is invariably the case that every party to a contract will have a choice of whether or not to perform the contract, and it is absurd to suggest that they should all owe fiduciary obligations to their counterparties. Nor can the plaintiffs be said to be peculiarly vulnerable, notwithstanding Yeoh's attempts to play up his lack of education and his passivity in his joint investments with the others. The evidence shows that both Yeoh and Richard are shrewd and experienced businessmen who could deal with Wong on equal terms. I therefore decline to grant the plaintiffs these remedies.

Conclusion

58 In conclusion, it is ordered that Wong do all that is necessary to rectify the share register of NCPL to reflect Yeoh's and HRT's entitlement to 33% of the shareholding in NCPL each. Further, Wong is to effect the necessary transfers of shares to Yeoh and HRT such that Yeoh and HRT each hold a 33% share of NCPL, or 165,000 shares. Such transfers may be from either Wong's or Christina's shareholdings. The parties are granted liberty to apply.

59 Costs in Suit 724 and Suit 762 are to follow the event, to be taxed if not agreed.

[note: 1] 3AB1046 and DBD145.

[note: 2] 3AB1044.

[note: 3] Yeoh's AEIC at para 51; Richard's AEIC at para 35.

[note: 4] Yeoh's AEIC at para 52; Richard's AEIC at para 36.

[note: 5] 2AB549.

[note: 6] *Ibid*.

[note: 7] 2AB552.

[note: 8] 2AB554–554D.

[note: 9] 2AB560.

[note: 10] 2AB695.

[note: 11] 2AB720.

[note: 12] 3AB1003.

[note: 13] 3AB1011–1011-18.

[note: 14] 3AB960–961.

[note: 15] Yeo's AEIC at para 19.

[note: 16] NE 18 Sep 2012 p 101:9–p102:17.

[note: 17] NE 26 Feb 2013 p114:3–8, 115:7–24, 116:7–14, 118:12–19.

[note: 18] NE 26 Feb 2013 p118:21–23.

[note: 19] NE 27 Feb 2013 p5:3–19.

[note: 20] NE 27 Feb 2013 p5:20–7:11.

[note: 21] NE 27 Feb 2013 p9:12-11:4.

[note: 22] 2AB723–740.

[note: 23] Wong's AEIC at para 4.2.12; Defence (Amendment No 2) for Suit 724 at 2.2.1; Defence (Amendment No 2) for Suit 762 at 2.2.1.

[note: 24] Wong's AEIC at para 4.2.15.

[note: 25] Wong's AEIC at para 4.2.13.

[note: 26] Wong's AEIC at para 4.2.18; Defence (Amendment No 2) for Suit 724 at 2.2.2; Defence (Amendment No 2) for Suit 762 at 2.2.2.

[note: 27] Wong's AEIC at para 4.2.20; Defence (Amendment No 2) for Suit 724 at 2.2.3 and 2.2.4; Defence (Amendment No 2) for Suit 762 at 2.2.1 and 2.2.4.

[note: 28] Wong's AEIC at para 4.2.21.

[note: 29] NE 27 Feb 2013 p48:15–51:12.

[note: 30] NE 27 Feb 2013 p51:20–57:12.

[note: 31] NE 27 Feb 2013 p53:11–54:2.

[note: 32] NE 28 Feb 2013 p81:3–7.

[note: 33] NE 28 Feb 2013 p82:2–17.

[note: 34] NE 28 Feb 2013 p84:7–18.

[note: 35] Wong's AEIC at para 4.3.1.

[note: 36] Wong's AEIC at paras 4.2.8–4.2.9.

[note: 37] Plaintiff's Setting Down Bundle for Suit 762 p 40.

[note: 38] Yeoh's AEIC at para 104.

[note: 39] Yeoh's AEIC at para 129; Richard's AEIC at para 107.

[note: 40] NE 27 Feb 2013 p15:16–19.

[note: 41] Defence for Suit 724 at 2.2.5.

[note: 42] Wong's AEIC at para 4.3.5(c).

[note: 43] NE 4 Mar 2013 p13:16–23.

[note: 44] 6AB1910.

[note: 45] 6AB1918–1922.

[note: 46] 6AB1923–1926; 6AB1943–1945.

[note: 47] 4AB1245–1251.

[note: 48] Yeoh's AEIC, exhibit YWL-13.

[note: 49] Plaintiff's Exhibit File for Suit 724, Tab 3.

[note: 50] Defence (Amendment No 2) for Suit 724 at 2.3.3.

[note: 51] NE 28 Feb 2013 p5:25–6:1, 7:6–20, 12:11–15:11.

[note: 52] Defendant's Closing Submissions at 4.6.2; Wong's AEIC at para 4.2.15.

[note: 53] Richard's AEIC at para 10.

[note: 54] Richard's AEIC at para 12.

[note: 55] Reply (Amendment No 1) at para 17.

[note: 56] Statement of Claim (Amendment No 2) in Suit 724 of 2011 at p 13 and Statement of Claim (Amendment No 2) in Suit 762 of 2011 at pp12 and 13.

[note: 57] Statement of Claim (Amendment No 2) in Suit 724 of 2011 at p 13 and Statement of Claim (Amendment No 2) in Suit 762 of 2011 at p 13.