Ng Chee Weng *v* Lim Jit Ming Bryan and another and another appeal
[2015] SGCA 13

Case Number : Civil Appeals Nos 77 and 79 of 2014

Decision Date : 12 March 2015

Tribunal/Court : Court of Appeal

Coram : Sundaresh Menon CJ; Andrew Phang Boon Leong JA; Steven Chong J

Counsel Name(s) : Richard Lester Millett QC, Narayanan Vijya Kumar and Niroze Idroos (Vijay & Co) for the appellant in Civil Appeal No 77 of 2014 and the respondent in Civil Appeal No 79 of 2014; Cavinder Bull SC, Woo Shu Yan, Lin Shumin, Vikram Raja Rajaram and Tan Yuan Kheng (Drew & Napier LLC) for the respondents in Civil Appeal No 77 of 2014 and the appellants in Civil Appeal No 79 of 2014.

Parties : Ng Chee Weng — Lim Jit Ming Bryan and another

Contract – Formation – Whether there was a binding settlement agreement

Contract – Repudiation – Whether plaintiff repudiated the settlement agreement

Trusts – True beneficial ownership

12 March 2015 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 Notwithstanding the apparent simplicity of the issues before this court, the application of the law to the facts is an intensely problematic one. This is due in no small measure to the fact that the respective cases advanced by both parties to the present appeals were rife with difficulties and improbabilities. As we shall see, the resolution of the appeals turns, in the final analysis, on whose account was *less im*probable.

2 By way of a very broad overview, the plaintiff brought a claim against the defendants for the recovery of dividends that were declared and paid out by a company on two alternative grounds. For all intents and purposes, the claim was brought principally against the first defendant (the second defendant being the wife of the first defendant who was not involved in the business of the company and was sued merely on the basis that, if she had received any part of the dividends concerned, she would be under a duty to account for the same to the plaintiff). The first ground of claim was premised on an alleged settlement agreement entered into between the plaintiff and the first defendant. The second was premised on the argument that the first defendant held the shares concerned on trust for the plaintiff and was therefore liable to account to the plaintiff for the dividends declared and paid during the period covering the financial years from 2003 until and including 2006 ("the material period"). Not surprisingly, the defendants argued that there had been no settlement agreement entered into between the plaintiff and the first defendant, and that, as the plaintiff had sold the shares to the first defendant *before* the material period mentioned, the plaintiff was not entitled to the dividends declared and paid during that period.

3 The trial judge ("the Judge") held in favour of the defendants on both grounds and therefore

dismissed the plaintiff's claim (see *Ng Chee Weng v Lim Jit Ming Bryan and another* [2014] SGHC 77 ("the Judgment")). The Judge held that, whilst the plaintiff and the first defendant had in fact entered into a binding settlement agreement, the plaintiff had nevertheless repudiated that agreement, which repudiation had been accepted by the first defendant. The Judge also held that the plaintiff had not discharged the burden of proving that the shares in question were sold to the first defendant in *2007*; thus the plaintiff was not entitled to the dividends declared and paid during the material period.

4 The plaintiff appealed against the whole of the Judgment in Civil Appeal No 77 of 2014 ("CA 77/2014"), whilst the defendants appealed against only that part of the Judgment which held that the plaintiff and the first defendant had entered into a settlement agreement in Civil Appeal No 79 of 2014 ("CA 79/2014"). For ease of reference in the context of this judgment, we will refer to the respective parties as above (*ie*, as "the plaintiff" and "the first defendant" (and, collectively, with respect to the first defendant and his wife, the second defendant, as "the defendants")).

5 We pause to note that, although the Judge dealt with the issue as to whether or not there was a settlement agreement between the parties first, it might have perhaps been preferable to consider the issue as to whether or not the first defendant held the relevant shares on trust for the plaintiff first. The order in which the Judge approached the issues is probably due to the fact that the plaintiff had placed the issue concerning the settlement agreement at the forefront of his claim against the defendants. But this is, in the final analysis, of little moment and we will proceed to consider both these issues in the order in which they were considered by the Judge in the court below.

6 So much by way of a very broad – and brief – overview. We turn now to the specific facts of the case. As alluded to above, a great many of them are controverted and the overall factual matrices relied upon by both the plaintiff and the first defendant (particularly with regard to the issue as to whether or not the first defendant held the relevant shares on trust for the plaintiff) are *both* less than satisfactory, to say the least. This will, in fact, be evident in the analysis that follows.

The facts

The undisputed facts

7 The plaintiff and the first defendant met in 1985 and became good friends. In 1995, the plaintiff agreed to help the first defendant set up a new company, SinCo Technologies Pte Ltd ("SinCo"). SinCo was incorporated in November 1995 and had two original shareholders: the first defendant and Terence Ng. Both their shares were held on trust for them by the plaintiff and Terence Ng's wife respectively.

8 It is undisputed that the first defendant took charge of SinCo and built it up into the dynamic and successful business it is today.

9 There were a number of changes in the shareholding of SinCo from 1995 to 2000. In or around 2000, the plaintiff held 175,000 shares: 62,500 were held on trust for the first defendant while 112,500 were the plaintiff's. There were two other shareholders who held 37,500 shares each on trust for their respective husbands, Terence Ng and Perry Ong.

10 On 15 March 2002, the plaintiff wrote to the company secretary of SinCo and sent a copy of this letter to all the other directors, *ie*, the first defendant, Terence Ng and Perry Ong. In the letter, the plaintiff stated that he wished to relinquish his entire shareholding of 112,500 shares in SinCo to the highest bidder at a minimum price of $1.2m (which works out to approximately $10.67 per share).

He also set out certain conditions which he wanted the buyer of his shares to fulfil. This included terms that the buyer had to ensure that all personal loans made by the plaintiff in relation to SinCo would be returned and that all guarantees given by him would be discharged.

11 On receipt of the plaintiff's letter, the company secretary wrote to the other registered shareholders asking them whether they wanted to purchase proportions of the plaintiff's shares to which they were entitled at $10 per share, or all the shares available at the same price if the other shareholders did not take up their respective proportions. Perry Ong's nominee was offered 56,250 shares. Perry Ong replied to say he was not interested in purchasing the shares. Terence Ng's nominee was offered the other 56,250 shares. She did not accept the offer.

12 Shortly thereafter, the plaintiff signed a share transfer form. The plaintiff said that this transfer form was blank when he signed it. The transfer form that was adduced in evidence showed that the plaintiff transferred 175,000 ordinary shares to the first defendant ("the Shares") in consideration of the sum of $875,000. The transfer form was dated 17 April 2002. On 17 April 2002, a company resolution was passed approving the transfer of the Shares from the plaintiff to the first defendant. This resolution was signed by the plaintiff, the first defendant and Terence Ng.

The conflicting positions

The Settlement issue

13 A significant amount of time lapsed between the events which took place in 2002 and in 2009 when the plaintiff first began to allege that the Shares were held on trust by the first defendant for him.

14 The plaintiff first approached the first defendant for his share of the dividends declared and paid between 2003 and 2006 on 18 March 2009. According to the plaintiff, the events leading up to this are as follows. First, he had learnt during a discussion with Terence Ng sometime in early March 2009 that dividend payments made by SinCo between 2003 and 2006 amounted to more than $5m, yet he (the plaintiff) had not received any payment in this regard. Terence Ng, for his part, was also surprised to learn during this discussion that the plaintiff had sold his shares to the first defendant in 2007 without making him an offer; hence Terence Ng wanted to confront the first defendant about the matter. On 16 March 2009, the plaintiff met the first defendant but did not raise the topic of the dividend payments. The plaintiff only told the first defendant that Terence Ng had found out about the sale of his shares in 2007. On 17 March 2009, the plaintiff had another discussion with Terence Ng who now clarified that dividends declared and paid between 2003 and 2006 amounted to a total of $11.66m (although the plaintiff's then solicitors later found that this sum was slightly over $24m prior to the commencement of these proceedings).

15 On 18 March 2009, the plaintiff met the first defendant at the latter's office with Terence Ng. They discussed the payment of dividends that the plaintiff said belonged to him and also why Terence Ng had not been given the chance to purchase the plaintiff's shares in SinCo. The first defendant did not respond to these claims. According to him, the plaintiff and Terence Ng both spoke fiercely and intimidatingly. He did not understand the basis for their demands or why the plaintiff had suddenly taken Terence Ng's side and, after a while, told both of them to leave his office which they did.

16 On 23 March 2009, the plaintiff visited a mutual friend of the two parties, Roy Ng, to enlist his assistance in respect of the dividends claim. Roy Ng called the first defendant who then arrived at Roy Ng's office. According to the plaintiff, Roy Ng told the first defendant about the plaintiff's claim for dividends and the first defendant did not say anything to contradict it. The first defendant's

version, however, is that he had responded by saying that he did not owe the plaintiff anything as he had purchased the plaintiff's shares in 2002.

17 The three men then went out for lunch where the plaintiff says he was told by the first defendant that part of the dividend payments had been used to pay a commission to one of SinCo's clients. The first defendant thus offered the plaintiff $3.5m to settle his claim for dividends which the plaintiff accepted straightaway. The first defendant's account is different. According to him, he did not mention the commission payment to justify the $3.5m offer. He arrived at this figure because he believed that he could afford this amount and was willing to pay it to bring an end to the vexatious claims being made by the plaintiff and Terence Ng. Further, the first defendant claims that the plaintiff initially rejected the offer of $3.5m and insisted on $5m, but later said that he would think about the offer.

18 About a week later, the plaintiff had second thoughts about the $3.5m offer after finding out from Terence Ng that no commission had in fact been paid out of the dividends, contrary to what the first defendant told him. The plaintiff thought he was entitled to more.

19 On 31 March 2009, the plaintiff told Roy Ng that he was turning down the first defendant's offer and Roy Ng, in turn, conveyed this to the first defendant. The three men had another meeting, during which the first defendant offered the plaintiff $4.5m. The plaintiff states that he agreed there and then to accept $4.5m in full settlement of his dividends claim ("the Settlement"). Roy Ng also gave evidence that the first defendant stated that he would make part payment of the $4.5m within two weeks, though he did not recall the first defendant saying how much the part payment was going to be.

2 0 *However*, the first defendant argues that there was no concluded settlement agreement for the plaintiff's dividends claim as his offer of $4.5m was never accepted by the plaintiff. But even if there was a concluded settlement agreement, it was nevertheless repudiated by the plaintiff and the first defendant had accepted the repudiation.

21 After the alleged acceptance of the Settlement on 31 March 2009, Roy Ng's evidence was that he received a call from the first defendant on 14 April 2009 and the first defendant stated that he was ready to make partial payment of the Settlement. The plaintiff also gave evidence confirming that he received a text message from Roy Ng which conveyed this to him. The first defendant disputes this. According to him, he had only called Roy Ng on 14 April 2009 to ask whether the $4.5m offer was acceptable to the plaintiff and to ask how payment should be made.

22 In any event, the plaintiff replied to Roy Ng on 15 April 2009 with the following text message ("the 15 April SMS"):

> Good morning roy, pls let Bryan know that I am rejecting his offer of 4.5m. I accepted because of friendship but as more infors (*sic*) given to me I feel he had done me a lot of things against me. Likely leave a lawyer to advice me unless he can come out proposal acceptable. Sori to trouble you. Thanks

This was followed by a call from the plaintiff to Roy Ng, stating that he wanted $6.5m payable within a month and that this was non-negotiable. Roy Ng called the first defendant to inform him of the plaintiff's position, to which the first defendant replied that he would not pay a single cent and did not want to deal with the plaintiff anymore. The first defendant was upset and told Roy Ng that the two earlier meetings (*ie*, on 18 and 23 May 2009) had been a waste of time and that the plaintiff was blackmailing him. Roy Ng then telephoned the plaintiff later that day telling him that the first

defendant had rejected the new $6.5m proposal.

23 The next day, on 16 April 2009, the plaintiff sent Terence Ng an email (copied to the first defendant) in which he described the settlement negotiations. The plaintiff wrote that a total of $11.66m in dividends had been paid out of SinCo between 2003 and 2006 but none was paid to him. He went on to state that, on 31 March 2009, he was offered $4.5m by the first defendant which he eventually "turned down". A few days later, on 21 April 2009, the plaintiff sent another email to Terence Ng and the first defendant in which he repeated that he had "turned down" the first defendant's offer of $4.5m and hoped that the latter would revert on his demand for $6.5m. According to the first defendant, these emails from the plaintiff confirmed his understanding that there was *no agreement* for him to pay the plaintiff $4.5m in settlement of the dividends claim.

24 Thereafter, on 24 April 2009, the plaintiff met with Roy Ng who then called the first defendant. The first defendant stated that he had done nothing wrong. On 13 May 2009, the first defendant sent an email asking why the plaintiff was alleging that he (the first defendant) held the Shares on trust for him as he did not. Also, he was not paying the plaintiff anything.

25 The plaintiff commenced the present action on 26 May 2009.

The Trust issue

26 The plaintiff's alternative claim is that the transfer of the Shares to the first defendant in 2002 was a paper transfer and that it was not until 2007 that the Shares were in fact sold to the first defendant. From April 2002 to June 2007, the Shares were held on trust by the first defendant for the plaintiff. In April 2007, it was agreed that the Shares would be sold for $5m. $500,000 was thus paid by the first defendant in cash sometime in April 2007 at the plaintiff's home; a further $500,000 was paid in cash in May 2007 at Thomson Plaza; and $4m was paid by way of a cashier's order on 22 June 2007. On this view, since the Shares were held on trust for the plaintiff, the first defendant was liable to account for the dividends declared and paid between 2003 and 2006 to the plaintiff.

27 The reason the plaintiff furnished for the alleged paper transfer in 2002 was that it was part of a plot among the first defendant, Terence Ng, and himself (the plaintiff) to motivate Perry Ong to sell his shares because of differences between the latter and the first defendant. The plaintiff's case was that the paper transfer was intended to create the false impression that he was severing all connections with SinCo and, once it appeared that the plaintiff was no longer around to support him, Perry Ong would be less confident of his position and thus be persuaded to sell out. Perry Ong eventually did resign as a director at SinCo's annual general meeting ("AGM") on 6 September 2002 and also sold his shares on 6 January 2003. The plaintiff argues that these developments were a result of the paper transfer of the Shares to the first defendant.

2 8 *However*, the *first defendant's* case is that there was no plot to oust Perry Ong from SinCo. The plaintiff genuinely wanted to sell his shares in SinCo which the first defendant purchased outright in 2002. The parties had agreed to a sale of the Shares for $4.875m on a deferred payment scheme. $875,000 would be paid in various instalments and the balance $4m would be paid later when the first defendant was capable of paying. The $4m was paid in June 2007 by way of a cashier's order. Because the Shares belonged entirely to the first defendant and not to the plaintiff since 2002, the plaintiff was not entitled to any dividends paid after that date.

29 It is undisputed that the $4m which both the plaintiff and the first defendant referred to above in their respective cases was paid by the first defendant to the plaintiff in June 2007 by a cashier's order. However, while the plaintiff argues that this payment was made pursuant to a sale of the

Shares in 2007, the first defendant argues that it was part of a deferred payment scheme for the purchase of the Shares which was entered into in 2002.

The decision in the court below

The Settlement issue

30 The Judge first considered whether there was a binding settlement agreement on 31 March 2009.

31 On this issue, the Judge found that the plaintiff's account of the main factual elements was consistent throughout and was also supported by the accounts of Terence Ng and Roy Ng, both of whom had no reason to help the plaintiff claim dividends (see the Judgment at [40] and [51]). In this connection, the Judge had considered a particular handwritten entry on Roy Ng's desk calendar stating, "Patrick, Bryan 2 pm meet 4.5m agreed by year end", and accepted Roy Ng's evidence that this notation was made on 31 March 2009 and that it referred to the parties' agreement that the Settlement was to be paid by the end of the year (see the Judgment at [52]). As for the plaintiff's frequent references to having "turned down" the $4.5m offer, the Judge found that this did not support the defendants' case that there was no concluded settlement – the 15 April SMS itself (see above at [22]) demonstrated that the plaintiff had used this expression incorrectly because he applied it to a situation where he was changing his mind about an offer that he had *already accepted* (see the Judgment at [55]).

32 On the other hand, the Judge found that the defendants' case had, *inter alia*, the following difficulties which we set out here in chronological order:

(a) The first defendant's behaviour during his first meeting with the plaintiff and Roy Ng on 23 March 2009 "undermined" his account of events because if he had, as he had claimed, made it clear from the very beginning that he did not owe the plaintiff anything due to the 2002 share sale, then why was there still so much to discuss that the three men went out for lunch together (see the Judgment at [53])?

(b) The contemporaneous evidence demonstrated that the first defendant was "lying" about not having mentioned the commissions excuse to the plaintiff when making the first $3.5m offer on 23 March 2009 (see the Judgment at [41]).

(c) Even though Roy Ng had not been able to produce a copy of the 14 April 2009 text message which he claimed to have sent to the plaintiff, it was, on the evidence, objectively likely to exist and said what Roy Ng and the plaintiff testified it said, *viz*, that the first defendant had expressed his readiness in making partial payment towards the concluded Settlement (see the Judgment at [50]).

(d) The first defendant's "strong reaction" to the plaintiff's rejection of the $4.5m offer on 15 April 2009 was "telling" as this was more probably due to the fact that he thought the matter had been resolved, only to find the plaintiff trying to wriggle out of the agreement to get more money (see the Judgment at [44]).

33 In light of the above, the Judge found that, on balance, the evidence supported the plaintiff's case that he had accepted the first defendant's offer of $4.5m on 31 March 2009 to conclude a binding settlement agreement. The Judge accepted that what was agreed was for part payment of $4.5m within two weeks and the rest by the end of the year (see the Judgment at [55]).

34 The Judge went on to find that the Settlement had been repudiated by the plaintiff *and* that the first defendant had accepted the repudiation.

35 In respect of her finding with regard to repudiation, the Judge relied on two pieces of evidence. First, on 15 April 2009, the plaintiff had conveyed to the first defendant (through Roy Ng) that he was no longer willing to settle at $4.5m and that he was now demanding the non-negotiable payment of $6.5m within one month. The Judge found it "hard to accept" the plaintiff's argument that his ultimatum was merely an attempt to *vary* the terms of the Settlement – it was "crystal clear" that this amounted to a *repudiation* of the same (see the Judgment at [61]). Secondly, in the 15 April SMS (see above at [22]), the plaintiff stated that he was likely to consult a lawyer unless the first defendant could come up with an acceptable proposal. The Judge found that the plaintiff must have intended, by mentioning the lawyer, to tell the first defendant that he was serious in his rejection of the Settlement and not merely to indicate that he would seek legal advice on his position if efforts to renegotiate were unsuccessful (see the Judgment at [62]). On this evidence, the plaintiff had demonstrated a settled intention not to abide by the Settlement and had thus repudiated it.

36 In support of her finding that the plaintiff's repudiation had been *accepted*, the Judge relied on the first defendant's telephone conversations with Roy Ng on 15 and 24 April 2009 and the first defendant's email on 13 May 2009 in which he essentially communicated that he was not going to pay the plaintiff anything (see the Judgment at [64]–[65]). Hence, the plaintiff could not enforce the settlement agreement and this claim was thus dismissed.

The Trust issue

37 In so far as the *alternative* claim in respect of the Shares was concerned, the Judge found that the plaintiff had not proven on a balance of probabilities that he had only sold the Shares to the first defendant in 2007. The plaintiff was therefore not entitled to the dividends declared and paid between 2003 and 2006.

The alleged plot to oust Perry Ong

38 The Judge began by considering whether the transfer of the Shares on 17 April 2002 (see above at [12]) was merely a *paper* transfer as the plaintiff had claimed. The Judge found that the plaintiff's claim that this transfer was executed pursuant to an elaborate plot to oust Perry Ong was "too much of a stretch" as it was unsupported by the available evidence (see the Judgment at [76]). She expressed her doubts over the alleged plot as follows (see the Judgment at [78]–[86]):

(a) First, if there really was a plot, the terms of the sale should have indicated that the plaintiff would also resign as *director* upon final disposition of the Shares to demonstrate to Perry Ong that he (the plaintiff) was indeed severing all ties with SinCo.

(b) Secondly, it did not make sense for the plaintiff's offer to require Perry Ong to repay the plaintiff in respect of his personal loans if he wanted to make Perry Ong leave. If Perry Ong refused to comply with this condition by failing to repay, the sale could not be completed.

(c) Thirdly, the plaintiff's offer also did not make sense as it in fact allowed Perry Ong to buy *more* shares in SinCo and it was, in this connection, also speculative of the plaintiff to suggest that Perry Ong could not afford the Shares since there was no reason why Perry Ong could not have taken out a loan.

(d) Fourthly, there was a more effective alternative in getting Perry Ong to leave as the

plaintiff could simply have transferred the shares which he held on trust for the first defendant to him (which would then constitute the first defendant as a member of SinCo) and thereafter freely transfer his (*ie*, the plaintiff's) own shares to the first defendant. Perry Ong would then learn of these changes in shareholding from the directors' resolutions which would have had to be passed.

(e) Fifthly, the plaintiff's alleged plot of ousting Perry Ong was also problematic for being poorly executed: (i) the plaintiff's offer letter did not follow company procedure in several respects and thus appeared to be a *unilateral* decision by the plaintiff to sell his shares; (ii) the company secretary of SinCo had sent a proposal only to all the *registered* shareholders, but since the first defendant was not one of them he could not disrupt the bids; and (iii) Terence Ng did not seem to be aware that there would be a bidding process if Perry Ong showed an interest in buying the plaintiff's shares.

(f) Sixthly, Terence Ng did not bother to take up any of the plaintiff's shares at all or show any interest in doing so when the offer was made to his nominee by the company secretary.

(g) Seventhly, the company secretary had offered the plaintiff's shares at $10 per share, while the plaintiff's initial offer was $10.67 per share. The plaintiff's evidence was that he did not instruct the company secretary to effect such change but the Judge preferred the company secretary's evidence which was to the contrary and this ultimately cast doubt on the veracity of the plot alleged by the plaintiff.

39 In light of the above, the Judge found that the plaintiff had not discharged the burden of proving the alleged plot.

The two versions: 2002 share sale vs 2007 share sale

40 In our view, however, the Judge's finding that the alleged plot to oust Perry Ong was not proven did not necessarily mean that the plaintiff's shares were sold in 2002. The Judge still had to consider which of the two versions advanced by the parties, *viz*, the 2002 share sale or 2007 share sale, was the genuine sale and, in this connection, she made the preliminary observation that there was a great deal of trust between the plaintiff and the first defendant before 2009 and that this was central to the arguments of both parties. Accordingly, the fact there was no agreement in writing for a share sale in either 2002 or 2007 was, in her view, a neutral factor.

41 The Judge first considered the *first defendant's* case to the effect that he had paid $4.875m for the Shares in 2002. The Judge was of the view that the first defendant's case had its unsatisfactory aspects, most notably with regard to the issue of pricing. This was because the total purchase price of $4.875m for 112,500 shares (*ie*, $43.33 per share) which the first defendant had allegedly paid was far in excess of what the plaintiff had asked for (*ie*, $10 per share). Further, the calculations that the first defendant said he had made to arrive at the figure of $4.875m were also "not obvious" (see the Judgment at [102]).

42 The Judge then put the issue of pricing to one side and made the following observations in respect of other aspects of the first defendant's case:

(a) There was sufficient trust between the parties which made it possible for the plaintiff to agree to the first defendant paying him $875,000 in instalments and $4m in a lump sum when he was able to do so. Further, even if it subsequently turned out that the first defendant would never be able to pay the plaintiff $4m, the plaintiff's return of $875,000 on his initial investment of $112,500 would still be very good (see the Judgment at [105] and [108]).

(b) The fact that the share transfer form stated a price of $875,000 did not assist the plaintiff as it was implicit in the first defendant's case that the plaintiff trusted the first defendant to pay him $4.875m and was not concerned with the actual price on the transfer form. The Judge also rejected the plaintiff's assertion that the transfer form was blank when he signed it and found that it would have stated $875,000 at that particular point in time (see the Judgment at [110]–[111]).

(c) The plaintiff had not proven that a sum of $583,000 that was paid monthly in cash by the first defendant to him between 2005 and April 2007 was unrelated to the $875,000 (see the Judgment at [125]). However, on the other hand, the Judge rejected the first defendant's submission that another $100,000 ought to be credited to him on the basis that he had set off that sum against the remainder of the $875,000 when the plaintiff purchased a Mercedes Benz motorcar from him in 2002 (see the Judgment at [126]).

43 The Judge then turned to consider the *plaintiff's* case that the Shares were sold in 2007 instead for $5m. She expressed, *inter alia*, the following difficulties with the plaintiff's case:

(a) As a matter of pricing, $5m was not a fair value for the plaintiff's 45% share of SinCo at a time when its net asset value was about $53m and its net profit was $28m. The plaintiff explained that he trusted the first defendant to offer him a fair value for his shares but the Judge found that this was "not rational" (see the Judgment at [139]).

(b) As a matter of payment, the Judge found that the plaintiff's claim that he received two $500,000 cash payments from the first defendant in April and May 2007 was unsupported by the first defendant's bank statements which showed that he (the first defendant) did not withdraw $1m in cash during these months (see the Judgment at [141]).

(c) The Judge also found that the plaintiff's conduct after 2002 was not compatible with that of a shareholder with a substantial stake in SinCo. Not once did he ask when payment out was going to be made on dividends which had been declared. Further, despite having heard from Terence Ng in early March 2009 that SinCo had paid dividends from 2003 to 2006, the plaintiff only met the first defendant on 16 March 2009, at which time he had also failed to mention his dividends claim. The plaintiff only did so at a subsequent meeting with the first defendant on 18 March 2009 when Terence Ng was also present but it was questionable why the plaintiff needed the latter to be present when he raised this topic (see the Judgment at [157]–[159]).

44 On this view of both the first defendant and the plaintiff's versions of when the share sale took place, the Judge was not satisfied that the plaintiff had proven, on a balance of probabilities, that he had only sold the Shares to the first defendant in 2007. There were, in her view, too many gaps in the plaintiff's evidence and some assertions which he made were too far-fetched. The Judge found that the first defendant's version had unsatisfactory aspects as well but it was sufficient to cast doubt on whether the plaintiff's case had a genuine basis.

45 The Judge thus dismissed both the plaintiff's claims.

The arguments on appeal

46 Both parties appealed from the Judge's decision. The plaintiff is appealing (in CA 77/2014) against the Judge's decision in relation to his entitlement to the dividends paid out on the Shares during the material period as well as the repudiation of the Settlement.

47 The plaintiff argues that establishing a trust for the Shares would mean that he was entitled to the dividends declared and paid during the material period. He argues that the two issues – *viz*¸ the Settlement issue and the Trust issue – are "closely related", yet the Judge appears to have treated them as "occupying wholly separate compartments" in the overall inquiry. According to the plaintiff, the Judge should have tested her finding that the Shares were not held on trust against her earlier conclusion that the first defendant did agree to settle the plaintiff's dividends claim for $4.5m. It is submitted that, had she done so, she would have found that it was possible, and indeed probable, that the first defendant was in fact agreeing to settle *an admitted claim* for dividends (rather than just buying his peace without admission) because the Shares were *not* sold in 2002 as he had claimed. The plaintiff also argues that the Judge had erred in finding that the Settlement had been repudiated. Further, allowing the first defendant to argue that there was a repudiation of the Settlement was inconsistent with his own case that there was no settlement agreement in the first place.

48 The plaintiff also argues that the Judge had erred in finding that it was possible that the plaintiff would agree to a deferred payment scheme in relation to the payment of $4.875m in 2002. The Judge, the plaintiff argues, had also erred in finding that there was no sham (or paper) sale designed to incite Perry Ong to leave because Perry Ong had sold his shares to the plaintiff on a pro-rata basis and the plaintiff had remained a director of SinCo until November 2005. It is inexplicable for him to have sold his entire shareholding in 2002.

49 The *first defendant* appealed (in CA 79/2014) against the Judge's finding that there had been a binding settlement agreement by way of the Settlement. The first defendant argues that the Judge had not considered evidence surrounding the meetings between the plaintiff, Roy Ng, and himself (the first defendant) on 23 and 31 March 2009. The Judge also did not account for how the plaintiff had advanced this claim or how he had effectively renounced his claim that there was a settlement agreement in his own submissions. The first defendant also argues that the Judge had erred in finding that the 15 April SMS, emails which the plaintiff wrote after 15 April 2009 "turning down" the settlement agreement, and notations on Roy Ng's calendar supported the conclusion that there was an agreement.

The issues

50 There are two issues before us. These are the same two issues that the Judge had decided upon. The first issue is whether there was a binding settlement agreement and, if so, then whether it had been repudiated, which repudiation had been accepted by the first defendant ("Issue 1"). The second issue is whether the Shares were held on trust for the plaintiff during the material period ("Issue 2").

Issue 1

Introduction

51 Before we turn to consider the facts in relation to this particular claim, we note that the plaintiff had raised the preliminary point that the first defendant was running two inconsistent cases. In the pleadings, the defendants had argued that there was *no settlement* at all. If so, the plaintiff argued, then it was factually inconsistent for the defendants to run the alternative case that, if there was a settlement agreement as found in the Settlement, he had *accepted* the plaintiff's repudiation of the same. These were inconsistent primary facts and both cannot be true.

52 The Judge had considered this submission below and rejected it. She was of the view that this

was not a case of inconsistent facts but, rather, one that related to alternative grounds (see the Judgment at [59]). We agree with the Judge in this regard. This was not a case where two versions of facts were being put forward which contradicted each other, but, rather, two *alternative* legal arguments derived from the same set of facts. One legal argument was that there was an offer and acceptance of the Settlement which the first defendant pleaded was not established. The second was that, if such agreement is found to have been concluded, the same facts would go to the alternative legal argument, which was that there was a repudiation of the same and that such repudiation had been accepted.

53 As we shall see later in an examination of the evidence, we did not agree that the self-same facts in this case were so mutually distinct that they could not be relied on for two different (and alternative) legal arguments.

Was there a settlement agreement entered into between the parties?

54 As stated above, the Judge found that the Settlement was entered into on 31 March 2009 in respect of a sum of $4.5m. This is the only finding that the defendants are contesting.

55 The defendants argue that the plaintiff's case demonstrated that the Settlement could not have been agreed to as maintained by the plaintiff. As mentioned above, the first defendant had initially offered $3.5m on the basis that some monies had been used to pay a commission to one of SinCo's clients. When the plaintiff found out that this was not true, he rejected the offer. The defendants thus argue that the plaintiff would have been suspicious about accepting the $4.5m immediately, knowing that the first defendant had previously lied to him. This made the plaintiff's acceptance of his offer which resulted in the Settlement implausible.

56 However, as the Judge had perceptively pointed out, the plaintiff consistently accepted and thereafter rejected concluded settlements by demanding more money in the process (see the Judgment at [44]). This is what happened when the plaintiff rejected the $3.5m settlement, and then again when he demanded $6.5m and was not content with the $4.5m settlement. This would also be consistent with the reason why the first defendant was upset when the plaintiff began to demand more money from him. Each time that he thought that a settlement had been arrived at, it was subsequently resiled from by the plaintiff. Looked at in this light, it does not appear inherently unbelievable that the plaintiff would accept an offer even if he felt "upset" (see the Judgment at [14]) at being previously lied to.

57 Secondly, the defendants argue that the plaintiff's own submissions were that there was no *consensus ad idem* in relation to the Settlement, even though the plaintiff had initially pleaded the Settlement. According to the defendants, the plaintiff was thus shifting positions in respect of the Settlement issue and this indicated that the entire claim based on the Settlement was a farce. This, however, does not paint an entirely accurate picture. The plaintiff was arguing that he had laboured under a misapprehension in relation to the value of the Shares, and that the first defendant knew of this and did not correct it. It is apt to point out that the plaintiff was not arguing for a rescission of the Settlement or that it was not enforceable. The relevant portion of the plaintiff's submissions stated thus:

> 143 … [The Plaintiff] is not seeking to invoke any jurisdiction to set aside or rescind that settlement agreement; if there was a binding settlement agreement in consequence of the acceptance of the offer, [the plaintiff] accepts that it is enforceable. …
>
> 144 Although [the plaintiff] is not seeking any relief from the consequence of mistake, it would

have been wrong for [the plaintiff] not to have drawn this matter to the attention of the Court, because it is a relevant legal consideration. The burden of proving that there was a settlement agreement lies on [the plaintiff]. If, for whatever reason, the Court is not satisfied on the balance of probabilities that that burden has been discharge, then the claim under the settlement would fail and the alternative claim then has to be determined.

[underlining in original]

58 Looked at in this light, we would reject the defendants' second argument.

59 The defendants also argue that there was no document recording the Settlement. However, this did not mean that it could not be inferred from the remaining evidence that there was an offer and an acceptance which resulted in the Settlement. The Judge made this inference based on Roy Ng's evidence, Roy Ng's calendar notations, and the 15 April SMS (see above at [22]).

60 Although the first defendant complained that Roy Ng was ganging up with the plaintiff against him and did not ask the first defendant about his version of the events, as the Judge had noted, Roy Ng did not have a vested interest in the agreement and was treated as an impartial mediator between the two parties even after Roy Ng had supposedly "sided" with the plaintiff (see the Judgment at [50]). It is notable that Roy Ng was a mutual friend of the parties and that they communicated with the other through him in the various discussions about arranging a settlement. This was not disputed by the first defendant. There are also no other facts that point to Roy Ng's bias against the first defendant.

61 It was common ground between the parties that the first defendant telephoned Roy Ng on 14 April 2009. It was disputed, however, as to what was said by the first defendant during this telephone call. While Roy Ng and the plaintiff say that the first defendant had expressed his readiness to make partial payment of the $4.5m, the first defendant said that he had only asked Roy Ng to ask the plaintiff whether $4.5m was an acceptable figure and how payment should be made. There was, on the first defendant's version, thus no agreement up to that point in time.

62 To determine which side should be believed, it is important to also have regard to Roy Ng's notations on the calendar (see above at [31]) which stated that there was an agreement for $4.5m to be paid by the end of 2009. The first defendant argues that there were inconsistencies as the notations did not refer to any part payments which the plaintiff and Roy Ng had both stated in evidence. However, this does not detract from the fact that there *was* a notation for $4.5m to be paid by the end of the year. It seemed unlikely that such a notation would have been made if there really was no agreement at that point in time between the plaintiff and the first defendant. The issue of partial payment could have very well arisen *after* the notation was made and was not captured by the calendar entry. Therefore, while the point of partial payment is neither here nor there, the fact that notations were made is evidence of the Settlement. This is also consistent with Roy Ng and the plaintiff's story that the first defendant had called Roy Ng on 14 April 2009 to convey that he was ready to make partial payment of the Settlement that had already been concluded.

63 We therefore find that the Judge was correct in relying on Roy Ng's evidence in finding that the Settlement existed.

64 Further, the 15 April SMS (see above at [22]) and the plaintiff's subsequent emails on 16 and 21 April 2009 (see above at [23]) were also significant in buttressing the Judge's finding that the Settlement had been concluded on 31 March 2009. While these emails do not expressly state that there had been an acceptance of the Settlement, and it was stated that the plaintiff was only

"turning down" the Settlement (see the Judgment at [55]), we agree with the Judge that the logical inference to be drawn is that these emails were consistent with the existence of the Settlement, and that the phrase "turning down" must be understood in the context of an acceptance and then a subsequent rejection, which is consistent with the plaintiff's previous conduct in respect of the $3.5m offer.

65 We turn now to the issue as to whether or not the Settlement was repudiated by the plaintiff and, if so, whether such repudiation was accepted by the first defendant, thus bringing the Settlement to a legal end.

Was the settlement agreement repudiated by the plaintiff?

66 As stated by this court in *San International Pte Ltd v Keppel Engineering Pte Ltd* [1998] 3 SLR(R) 447 at [20] (and recently followed, again by this court, in *Alliance Concrete Singapore Pte Ltd v Sato Kogyo (S) Pte Ltd* [2014] 3 SLR 857 at [59]), the law on repudiatory breach by renunciation is as follows:

> … A renunciation of contract occurs when one party by words or conduct evinces an intention not to perform or expressly declares that he is or will be unable to perform his obligations in some material respect. Short of an express refusal or declaration *the test is to ascertain whether the action or actions of the party in default are such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions*. The party in default may intend in fact to fulfil the contract but may be determined to do so only in a manner substantially inconsistent with his obligations, or may refuse to perform the contract unless the other party complies with certain conditions not required by its terms … [emphasis in original]

67 The Judge noted the evidence listed at [60] of the Judgment and – after considering, in particular, the significance of the plaintiff's ultimatum of $6.5m payable within a month and the plaintiff's reference to consulting his lawyers in his 15 April SMS – concluded that the plaintiff had evinced an intention not to be bound by the Settlement. However, the plaintiff argues that his conduct was only an attempt to vary the terms of the Settlement, and that his refusal of the $4.5m offer combined with a demand for a higher sum did not *per se* disclose an intention not to be bound.

68 However, we do not see how the evidence listed by the Judge at [60] of the Judgment can be controverted. As the Judge had rightly pointed out at [63] of the Judgment, it is settled law that continued negotiations may disclose an agreed rescission of an already concluded contract (see the decision of this court in *Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 at [53]). In our view, that is clearly what has happened on the facts of the present case. Looking at the plaintiff's conduct after he had agreed to the Settlement in its entirety, we can interpret it in no other way than to say that he treated it as no longer having any binding force. In this regard, it suffices for us to point out the following occasions where, in our view, the plaintiff had *clearly* articulated his *rejection* of the Settlement for $4.5m:

(a) In the 15 April SMS (see above at [22]) he said that he had "accepted" the offer of $4.5m out of friendship but was now "rejecting" it and was likely to seek legal advice on his claim unless the first defendant could come up with an acceptable proposal.

(b) In the plaintiff's email dated 16 April 2009 (see above at [23]) which was copied to the first defendant, he stated that he had "eventually turned down" the offer of $4.5m and "proposed a sum of $6.5m" which was rejected by the first defendant.

(c) In the plaintiff's email dated 21 April 2009 (see above at [23]) to the first defendant, he stated that "the highest sum [the first defendant] offered is $4.5 million which [the plaintiff] turned down".

69 In our view, these were instances which evinced the plaintiff's *clear* intention that he was unwilling to accept $4.5m as full and final settlement of his dividends claim and had wanted more in the quantum of payment by the first defendant. Any intention to be bound by the Settlement the parties had already concluded was plainly negated by the fact that he had conveyed his intention to seek legal advice should there be no successful settlement thereafter. As the Judge pertinently noted at [62] of the Judgment, the plaintiff clearly intended by this to signal to the first defendant that "the matter would move beyond a discussion between old friends" if the new figure of $6.5m could not be agreed upon. Eventually, this culminated in the filing of the present suit on 26 May 2009.

70 We thus hold that the Judge was correct in finding that there was a repudiation of the Settlement by the plaintiff.

Did the first defendant accept the repudiation of the settlement agreement by the plaintiff?

71 The plaintiff strongly contended in the hearing before us that, even assuming that there had been a repudiation of the Settlement by the plaintiff, the first defendant had not accepted the repudiation of the Settlement. In this regard, the Judge relied on the first defendant's email to the plaintiff dated 13 May 2009 as well as the telephone conversations that the first defendant had with Roy Ng on 15 and 24 April 2009 in which he had said that he was not going to pay anything to the plaintiff (see above at [36]).

72 On appeal, the plaintiff focused on the 13 May 2009 email to make good his argument that the first defendant was only arguing that there was no settlement, and not that he was accepting a repudiation of the same. The email, as it was argued (at [51]–[52]), could not stand for both legal arguments. However, as stated above, we did not think that the objective evidence was incapable of being relied upon to make alternative arguments.

73 The salient portions of the 13 May 2009 email are set out below:

> Additionally, as your friend, I was extremely surprised and disappointed that you approached me sometime in March 2009 to ask me for a sum of money in exchange for you not working together with Terence [Ng] against me… My conscience is clear: I did not, and do not, owe you any money whatsoever. …
>
> … In light of the intense pressure which Roy [Ng] and you were exerting, I felt compelled to offer something to you. I just wanted to get out of that extremely stressful situation. I had hoped that this would end the relentless pressure from you. When you asked for $6.5million, I knew that caving in to your pressure had been a mistake, not that it was any admission of liability on my part, but because I knew that you had and will continue to exploit my goodwill. Of course, I rejected your baseless demand.
>
> I reiterate: my conscience is clear. I do not owe you anything. I have paid you in full for the shares that were transferred to me in 2002, and I have never held them on trust for you.

74 Mr Richard Millett QC, counsel for the plaintiff, argued that a fair reading of the email indicated that there was no agreement in the first place, *per* the defendants' main defence, and not that it was an unequivocal acceptance of any repudiatory breach by the plaintiff.

75 We are of the view that this email must be read in the context of the legal finding that the Settlement had been *repudiated* by the plaintiff. The next step in the analysis concerns whether there was an *acceptance* of such repudiation on the part of the first defendant. If the 13 May 2009 email was to be analysed *only* on the basis that there was no settlement agreement, that would be an incorrect and incomplete analysis of all the evidence in the appropriate legal context. Having found that the Settlement did exist, it would be illogical to read the email to mean that it only referred to the first defendant's denial of a settlement given that this legal argument had already been rejected.

76 In our view, from the moment the first defendant knew that the plaintiff was resiling from the Settlement and was asking for more money, the first defendant had made it clear that he would not be paying any amount of money. The first defendant's reiterations of not "owing" the plaintiff any money were made known on three separate occasions – *viz*, in his telephone conversations with Roy Ng on 15 and 24 April 2009 and in his 13 May 2009 email to the plaintiff – and, in our view, they were indicative of an unequivocal acceptance of the repudiation.

Conclusion

77 We thus affirm the Judge's decision in respect of Issue 1. The Settlement was made on 31 March 2009 for the sum of $4.5m. This was subsequently repudiated by the plaintiff and this repudiation was unequivocally accepted by the first defendant.

Issue 2

Introduction

78 The issue here is a relatively straightforward one: did the first defendant hold the Shares on trust for the plaintiff and was he therefore liable to account to the plaintiff for the dividends declared and paid on the Shares during the material period? The resolution of this particular issue centres – in turn – on *when* the Shares were in fact sold by the plaintiff to the first defendant. If they were sold in *2002*, then there would be no trust simply because, with an outright sale, the legal and beneficial interests in the Shares would have passed from the plaintiff to the first defendant. The plaintiff would consequently have no right to (or interest in) the Shares and would, *ex hypothesi*, have no entitlement to any of the dividends declared and paid on the Shares during the material period (which was *post*-2002). If, on the other hand, the Shares were only sold in *2007*, then the transfer of the Shares in 2002 would merely confer a legal title to the same on the first defendant, who would then hold the beneficial interest on trust for the plaintiff. In such a situation, the plaintiff would be entitled to all the dividends declared and paid on the Shares during the material period.

79 The apparent simplicity of Issue 2 belies the enormous amount of difficulties as well as inconsistencies afflicting both parties' arguments as to when the sale of the Shares took place. In order to appreciate the true magnitude of these various difficulties and (more importantly) to try to clear the factual jungle as well as underbrush in order to ascertain whose view as to when the sale of the Shares took place is more persuasive (or, as alluded to at the outset of this judgment, less improbable), it is necessary to descend into the jungle itself, always bearing in mind the need to be lifted, so to speak, up from time to time in order to be able to survey the relevant factual terrain to avoid losing our bearings as we attempt to arrive at our ultimate destination – which is to decide Issue 2 itself. It should be added that the difficulty of our task is exacerbated by a patent dearth of documentary evidence. With these important preliminary observations in mind, let us proceed to consider the arguments by the respective parties, commencing with an analysis of the first defendant's submission to the effect that the sale of the Shares took place in 2002.

The alleged sale of the Shares in 2002

80 It will be recalled that the allegation that there was a sale of the Shares in 2002 was the crucial plank in the defendants' case. If they make good this argument, that would mean that the plaintiff would no longer be entitled to any dividends simply because he would have divested his entire interest in the Shares to the first defendant prior to the material period. The key question for us is whether or not this was, on the available evidence, the case. The difficulty we faced with this case theory consisted in the fact that there were many weaknesses and difficulties in the defendants' submissions which undermined them in significant ways.

81 In the first place, it is highly unusual that the alleged payment by the first defendant to the plaintiff for the Shares was made in two tranches *five years apart*. On the first defendant's case, he had paid the first instalment of the first tranche of $875,000 in 2002 and the second tranche of $4m only five years later in 2007. However, there was no documentation whatsoever evidencing this particular payment arrangement. The first defendant's explanation was that, as he and the plaintiff had a close relationship, he (the first defendant) was given the liberty to repay the remaining $4m at *any* time which was appropriate for him to do so. The Judge accepted that this account was plausible (see the Judgment at [108]) but, with respect, we find it to be rather unpersuasive – even if regard is had to the parties' close friendship at the time. Indeed, such an arrangement, if believed, gave the first defendant *carte blanche* to pay a very large amount of money at his own leisure – which could, theoretically, stretch over a period of many years (or even indefinitely). With respect, this was a submission which appeared to us to be less than probable. Correlatively, there is much substance, instead, in the plaintiff's submission to the effect that the first defendant had concocted this explanation in order to arrive at the alleged purchase price of $4.875m for the Shares which were (as is critical to the first defendant's case on this particular issue) allegedly sold in 2002 (and not, as the plaintiff argued, 2007).

82 Even more curious, in our view, was the fact that, on the defendants' own case, the Shares themselves were only valued at approximately $1.2m by the plaintiff (since the defendants' position is that the plaintiff's offer letter to the company secretary dated 15 March 2002 was not part of a plot to oust Perry Ong but evinced the plaintiff's genuine intention to sell the Shares). This begs the obvious question: why then did the first defendant offer to pay *more than four times* this amount (*ie*, $4.875m) for the Shares? The first defendant explained that there were several factors which contributed to the mark-up in price, such as an alleged goodwill payment of $500,000, $1m to compensate for the alleged deferred payment (of $4m) as well as an alleged 30% uplift for the purchase of a controlling stake in the company. However, these explanations did not, with respect, strike us as being realistic. It appeared to us less than probable that there could be such a wide disparity in the values just mentioned. And this is even if we take into account the friendship between the first defendant and the plaintiff – a factor which appeared to us could cut both ways and was therefore neutral, in the final analysis. In this regard, two points relating to the issue of pricing bear emphasis. First, it is clear that, by the first defendant's own admission, he did not have sufficient funds in 2002 to purchase the Shares at $4.875m. Second, according to him, the plaintiff was also willing to sell the Shares at the much lower sum of $1.2m. When these two points are considered together, it becomes clear that there was, as the Judge pertinently observed, nothing "forcing" (see the Judgment at [102]) the first defendant to buy the Shares at the very high price of $4.875m in 2002. Indeed, this was patently *against* his commercial interest. The first defendant explains, however, that he had *volunteered* to pay a premium on top of the plaintiff's asking price because, given his optimistic outlook for SinCo, he wanted to do the right thing by his friend (*ie*, the plaintiff) by paying the latter a fair value for the Shares. However, we consider this to be highly improbable: the first defendant's alleged offer was not only one which he *could not afford* at the time, it was also

quadruple the plaintiff's asking price, thus it did not appear to us to be explicable merely on the basis of the parties' then-existing friendship which, as we have just mentioned, is a neutral factor in this context. Further, we should also state that we had great difficulty with the very large sum of $1m which the first defendant rolled into the total purchase price apparently as compensation for the alleged deferred payment of $4m. As we have already noted in the preceding paragraph, there was no timeframe (not even a rough and ready one) that was in the contemplation of the parties in the first place. What if the first defendant had repaid the remaining $4m much earlier? Or, to take another extreme situation, what if he paid that sum much later? How did the payment of $1m as a lump sum take into account any of these eventualities? In the former scenario, it would lead to the plaintiff being over-compensated while, in the latter event, it would result in under-compensation. And even if we approach this from a "middle-view", how was this sum of $1m (which was, as we have already noted, by no means an insignificant sum) arrived at in the first place? In a related vein, we do note the first defendant's argument that he did not have the requisite funds to make the necessary payment in 2002 but that he envisaged (based on the then analysis that the company would, based on its performance, take off in a very significant way) that he would have the necessary funds if the payment for the Shares (as he in fact argued was the case) was deferred. However, this still does not answer many of the questions that have already been posed above.

83 Most importantly, perhaps, is the fact that, if the Shares were indeed sold to the first defendant in 2002, then why did the first defendant offer to settle (*via* the Settlement (and see the relevant analysis with regard to Issue 1 above)) the plaintiff's claim for dividends (which, *ex hypothesi*, he (the plaintiff) was not entitled to) for $4.5m? In our view, it is odd – possibly, even bizarre – for the first defendant to have offered such a large sum to settle what was, in substance and effect, a non-existent claim, given the fact that, in the first defendant's mind, the sale of the Shares had already taken place in 2002. And, to add to this observation, we find that it is also highly odd that the plaintiff would be so over-confident as to repudiate a concluded settlement for $4.5m in the hope of reaching a more favourable settlement at $6.5m *if* it was truly the case that he had sold the Shares in 2002 and thus had *zero* entitlement to speak of to begin with. In other words, the plaintiff's conduct during the 2009 negotiations was simply inconsistent with him having sold the Shares in 2002 (as the first defendant claimed). If, as the defendants claim, the plaintiff was not entitled to receive *any* dividends at all, one is compelled to ask: on what basis was the plaintiff repeatedly rejecting offers and *demanding larger* figures in settlement of a *non*-existent claim? And, as we have already pointed out, why was the first defendant *even entertaining* these demands if, on his case, he had wholly acquired the Shares in 2002? These aspects of the first defendant's case troubled us greatly and, as we shall see, in fact supported the plaintiff's case that the sale occurred in 2007 instead (see below at [98]).

84 In summary, the first defendant's submission that the sale of the Shares from the plaintiff to him took place in 2002 is riddled with many significant inconsistencies which, taken as a whole, undermine the submission itself. Indeed, as we have already alluded to above, there is little – if any – by way of positive evidence that would support the first defendant's submission. But what, then, of the plaintiff's submission which (not surprisingly) was diametrically opposed to that of the first defendant – that the sale of the Shares took place in *2007* instead. At this juncture, a brief (but necessary) interlude is required before we proceed to consider the plaintiff's arguments as to why the sale of the Shares took place in 2007 (instead of 2002).

A brief interlude – what are the choices before this court?

85 We need to pause and consider whether there is any other possible date on which the Shares might have been sold by the plaintiff to the first defendant. It seems to us that there is no middle-ground between the defendants' submission that the sale of the Shares took place in 2002 and the

plaintiff's submission that that sale in fact took place in 2007 instead (bearing in mind that both these submissions cannot co-exist when looked at from both logical as well as commonsensical points of view).

86 Counsel for the defendants, Mr Cavinder Bull SC, sought – at one point during oral submissions before this court – to argue otherwise. However, when pressed further, he admitted (correctly, in our view) that this court was faced only with either of these two possible dates with respect to the sale of the Shares by the plaintiff to the first defendant. This must surely be the case for at least two reasons.

87 First, that is the way the parties ran their respective cases both in the court below as well as before this court.

88 Secondly (and in a closely related vein), if there was indeed a third possible date during which the sale of the Shares by the plaintiff to the first defendant took place, there has been no concrete evidence led to even suggest what this date might be. Indeed, for this court to hold that there was a third possible date would to be to embark on a speculative exercise which has no basis whatsoever.

89 Given, therefore, that this court is faced with only two possible dates at which the Shares were sold by the plaintiff to the first defendant (*viz*, 2002 or 2007), let us now turn to consider the plaintiff's arguments in favour of the adoption of the latter (and later) date.

The alleged sale of the Shares in 2007

90 Just as the defendants' arguments to the effect that the sale of the Shares took place in 2002 were riddled with inconsistencies and difficulties, we find similar difficulties with the plaintiff's argument that this sale took place in 2007 instead. However, unlike the Judge, we find that they are – relatively speaking – *not as severe or problematic* as those which afflicted the defendants' case. Let us elaborate.

91 In the first place, it may be queried why the plaintiff transferred the Shares to the first defendant in 2002 if, as he claims, a sale of the Shares took place only in 2007. The plaintiff argues that the 2002 transfer was a paper transfer in that it passed only the legal title in the Shares to the first defendant because there was a plan to oust Perry Ong. We do note that, notwithstanding the possible difficulties with this particular argument, this is not a wholly untenable reason in light of the close relationship between the plaintiff and the first defendant – at least up to that particular point in time. However, we are not persuaded that the plaintiff has, on balance, made out his case on *this* particular point (which, as already noted above at [38]), the Judge found great difficulty with). This is not to say that we are making an affirmative finding that the alleged plot did not exist on a balance of probabilities. All we are saying is that the alleged plot is, in the terms of s 3(5) of the Evidence Act (Cap 97, 1997 Rev Ed), "*not proved*" on the evidence before us, and that is different from a finding that it has actually been "*disproved*". Simply put, there is, in our view, some "lingering doubt" as to the existence *and* non-existence of the alleged plot and, as a result, we are unable to say precisely how the matter stands (see the decision of this court in *Loo Chay Sit v Estate of Loo Chay Loo, deceased* [2010] 1 SLR 286 at [20]). This is therefore a *neutral* point at best, and the Judge rightly recognised as much when she stated that it did not automatically prove the defendants' case that the alleged sale in 2002 was the genuine one (see the Judgment at [93]).

92 Secondly, it may also be queried why the plaintiff sold his stake in SinCo, as he claims, for the price of $5m when his 45% of the total shareholding was (as a result of the impressive performance of the company itself) worth exceedingly more than that in 2007. The Judge stated that this was "not

rational" (see the Judgment at [139]) but, in our view, it could – to some extent at least – be explained by the fact that the plaintiff and the first defendant did hitherto have a close relationship and that, as the plaintiff was not active in the company, he was willing to factor that into the final sale price. We also note that this would not be the only amount which the plaintiff would receive as he would have also been entitled to the dividends declared and paid on the Shares during the material period.

93 Thirdly, we note that the Judge was also sceptical about the alleged 2007 share sale because the plaintiff's conduct since 2002 appeared to be inconsistent with him being entitled to the dividends declared and paid thereafter. This conduct consisted in the plaintiff failing to make any inquiries about whether dividends (which he knew to be declared) had been paid out and, further, in failing to confront the first defendant promptly once he discovered from Terence Ng that some $5m in dividends had *in fact* been paid out during the material period (see above at [43(c)]). With respect, we do not think that these matters can be held too strongly against the plaintiff.

94 First, we note that it is not uncommon for a company to declare dividends without paying them out immediately; hence the fact that the plaintiff did not ask about when the dividends declared would be paid out does not, in and of itself, strike us as being particularly unusual. More importantly, we consider it crucial to place the plaintiff's conduct in this regard in its proper context. As we have observed, the plaintiff was not active in the management of SinCo; his contribution appears to have been confined mainly to the raising of finance for the company while it was the first defendant who took charge in building it up. When the parties' respective roles in SinCo are viewed in this light – and when the closeness of their relationship is further taken into account – we find that it is not entirely unreasonable for the plaintiff to have acted, as he says, on the basis that "if [dividends] had been paid out, I would have expected [the first defendant] to have told me and accounted to me for my share". Further, it is also relevant to our consideration of this particular issue that the plaintiff had made personal loans to finance the starting up of SinCo in 1996 but only sought their repayment *some three years later* in 1999. We should pause to mention that this past behaviour of the plaintiff was also noted by the Judge, albeit for the separate purpose of inferring that the plaintiff might have possibly agreed to the deferred payment of $4m under the defendants' alleged 2002 share sale (see the Judgment at [107]). In our view, however, the relevance of the plaintiff's conduct here is that it demonstrates that there is no prior pattern of him chasing the first defendant for monies owed to him. His apparent lack of interest in receiving payment on the dividends declared is therefore merely consistent with his past behaviour and we would *not* read too much into it and state that it disclosed the mind of a man who knew full well that he was no longer entitled to such dividends since 2002. In summary, we find that once the plaintiff's passive role in the company, his friendship with the first defendant, and his past conduct in respect of other debts are considered in the round, it is understandable why he did not take a more proactive stance *vis-à-vis* the payment of dividends during the material period when a typical shareholder might ordinarily have been expected to.

95 We are also not unduly disturbed by the plaintiff's omission to immediately confront the first defendant about his (the plaintiff's) share of the dividends after learning from Terence Ng that such dividends had been paid out. The plaintiff had the opportunity to do so when he met the first defendant on 16 March 2009 but explained in cross-examination that he did not raise it then because he had yet to see the company's accounts to verify that dividends had in fact been paid out. Thus he said that he needed Terence Ng (who was his source of information) to be present when he broached the subject with the first defendant. The Judge found this explanation "questionable" because, in her view, the plaintiff could easily have asked the first defendant about the matter on 16 March 2009 and, if he was not convinced by a denial from the latter, he could then take the necessary steps to verify the matter for himself (see the Judgment at [159]). We do not disagree with the Judge's observation on this, but while she had identified *one* way in which the plaintiff could have approached

the issue, it was, with respect, not the *only* way (and certainly not the only *reasonable* way). Instead of confronting the first defendant on his own and then making the necessary verifications thereafter to satisfy himself, it was *also* open to the plaintiff to seek to clear the air with the first defendant at one sitting with all the relevant parties present. That was what he sought to do and we do not think that it was an entirely unreasonable approach. Accordingly, we would not put as much weight on the plaintiff's failure to raise the dividends issue with the first defendant on 16 March 2009 as the Judge had done.

96 We now turn our attention to consider that there are, more importantly, arguments which actually *support* the plaintiff's submission to the effect that the sale of the Shares took place in 2007 instead of 2002.

97 First, we note that the first defendant paid the $4m to the plaintiff in 2007 by way of a cashier's order. Whilst not conclusive, the timing of this payment does lend some credence to the plaintiff's case that the sale of the Shares took place in 2007 instead of 2002. Taking a rather straightforward view of matters, it seems to us more likely that the $4m was paid in 2007 because the sale of the Shares took place that same year as the plaintiff claimed. As we have noted earlier at [81], the first defendant's version that the sale took place in 2002 is highly unusual as it requires us to accept that the $4m was paid only after a period of five years had lapsed since the first instalment was made by way of the initial $875,000.

98 What is perhaps the most important point which we have, in fact, already canvassed in relation to the first defendant's submission that the sale of the Shares took place in 2002 ought, given its importance, to be reiterated and, indeed, emphasised. If the Shares were sold to the first defendant in 2002, then why did the first defendant offer to settle (*via* the Settlement) the plaintiff's claim for dividends (which, *ex hypothesi*, he (the plaintiff) was not entitled to) for $4.5m? As already mentioned, in our view, it is odd – possibly, even bizarre – for the first defendant to have offered such a large sum to settle what was, in substance and effect, a non-existent claim, given the fact that, in the first defendant's mind, the sale of the Shares had already taken place in 2002. And, as already alluded to above, if 2002 was not the appropriate date of the sale of the Shares, it must follow that the Shares were in fact sold, as the plaintiff claimed, in 2007 instead. We also repeat our earlier observation (at [83]) that it is highly odd that the plaintiff should repudiate the Settlement for $4.5m when, on the first defendant's case, he (the plaintiff) was not even entitled to any dividends in the first place by virtue of his agreement to an outright sale in 2002.

99 Finally, as we have already noted – and now reiterate – there was in fact a settlement agreement (*viz*, the Settlement) entered into between the plaintiff and the first defendant *vis-à-vis* the former's claim for the dividend payments. In this regard, it bears reiterating that the first defendant offered a sum of $4.5m pursuant to this agreement. We make the passing observation that this sum is slightly under half of what the plaintiff claimed was owed to him and which sum would be fully payable were he to succeed under Issue 2. The apparent significance of this is that it sheds, perhaps, some light on why the first defendant was willing to settle the plaintiff's dividends claim at $4.5m (but no higher) because, so far as he was concerned, this sum was as much as he was willing to part with to settle what he knew to be the plaintiff's legitimate claim for dividends. In other words, the sum of $4.5m was the first defendant's "break-even point" such that, if the plaintiff counter-proposed with a higher settlement figure, he would treat all bets as being off, so to speak, and take his chances in court instead (which, as it turns out, was eventually what happened as he rejected the plaintiff's ultimatum of $6.5m). The passing observation which we make here is, in our view, not at all inconsistent with our decisions on both Issue 1 as well as Issue 2.

Our decision

100 As we have already emphasised, there are difficulties with both parties' case theories as to when the Shares were sold. It can, however, be seen from our analysis above that there were far more (as well as significant) difficulties with the first defendant's submission to the effect that the Shares were sold in 2002. This is not, as we have also noted, to state that there were no difficulties with the plaintiff's submission to the effect that the Shares were, instead, sold in 2007. However, they are relatively less severe and there are also positive reasons which help to buttress the plaintiff's case. In the circumstances, we are of the view that the plaintiff has made out his case on a balance of probabilities in so far as Issue 2 is concerned.

Conclusion

101 To summarise, we affirm the Judge with regard to Issue 1. To recapitulate, we find that she was correct in holding that a settlement agreement was entered into between the parties (with a settlement sum of $4.5m) and, in this regard, dismiss the appeal in CA 79/2014. We also find that the Judge was correct in holding that, on the facts, the plaintiff had nevertheless repudiated this agreement and that his repudiation was accepted by the first defendant.

102 However, we would respectfully disagree with the Judge with regard to Issue 2. Based on the available evidence, we find that the plaintiff had established, on a balance of probabilities, that the Shares were sold in 2007, and not 2002. We therefore allow the appeal in CA 77/2014 on this ground.

103 In so far as the issue of costs is concerned, the plaintiff is entitled to 60 per cent of his costs in the court below as well as in respect of CA 77/2014. The plaintiff is also entitled to the costs in respect of CA 79/2014. There will be the usual consequential orders in respect of both appeals.

104 We also order that the defendants provide an account of the amount of all dividends declared and paid out of the company during the material period (*ie*, for the financial years from 2003 up to and including 2006) and pay the plaintiff his proportionate share thereof, plus interest. The parties shall have liberty to apply to this court if required.