IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 259

Suit No 997 of 2019 (Registrar's Appeal No 150 of 2020)

Between

Easybook.com Pte Ltd

… *Plaintiff*

And

OWW Investments III Limited

… *Defendant*

GROUNDS OF DECISION

[Civil Procedure] — [Striking out]
[Contract] — [Formation]
[Contract] — [Contractual terms] — [Implied terms]

TABLE OF CONTENTS

Easybook.com Pte Ltd
v
OWW Investments III Ltd

[2020] SGHC 259

High Court — Suit No 997 of 2019 (Registrar's Appeal No 150 of 2020)
See Kee Oon J
17, 28 August 2020

23 November 2020

See Kee Oon J:

Introduction

1 In this Registrar's Appeal, the plaintiff (the appellant in this appeal) sought to set aside the decision of the Assistant Registrar ("the AR") striking out and dismissing its claim against the defendant (the respondent in this appeal). The underlying claim relates to various agreements under which Redeemable Convertible Preference Shares ("RCPS") were issued by the plaintiff to the defendant. The plaintiff claimed that the defendant was not entitled to exercise its rights under the said agreements to redeem the RCPS. The central question in the appeal was whether it was plain and obvious that the plaintiff's claim was unsustainable in law or fact.

2 After hearing the parties' submissions, I dismissed the appeal and delivered some brief oral remarks in doing so. The plaintiff has since appealed against my decision. I now set out my grounds of decision in full.

Background facts

3 The plaintiff is in the business of, *inter alia*, ticketing agencies. The defendant is a venture capital fund. Both companies are incorporated in Singapore.[1]

4 The plaintiff and the defendant entered into three agreements: the Subscription and Shareholders Agreement dated 30 April 2014 (the "2014 SSHA"), the Convertible Loan Agreement dated 21 April 2015 (the "2015 CLA") and the Subscription and Shareholders Agreement dated 26 January 2016 (the "2016 SSHA"). The terms of the 2014 SSHA and the 2016 SSHA are substantially similar and where appropriate, they will be referred to collectively hereinafter as "the SSHAs". Pursuant to the 2014 SSHA, the plaintiff issued 29,623 RCPS to the defendant and pursuant to the 2016 SSHA, the plaintiff issued 48,531 RCPS to the defendant. Pursuant to the 2015 CLA, the defendant extended a convertible loan of US$500,000 to the plaintiff. The loaned amount outstanding was then converted to 15,166 RCPS issued by the plaintiff to the defendant.[2] In total, the plaintiff issued 93,320 RCPS to the defendant.

5 The RCPS constituted investments made by the defendant in the plaintiff. The defendant would be able to realise its investment upon the occurrence of a specified liquidity event and if not, after a stipulated cut-off date

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1 Statement of Claim at para 1; Defence (Amendment No. 1) at para 3

2 Statement of Claim at paras 3, 6, 7 and 9; Defence (Amendment No. 1) at para 5

in the SSHAs.[3] These specified liquidity events were listed in the Exit Events stated in Clause 1.1 of the SSHAs. Alternatively, the defendant could issue a redemption notice to compel the plaintiff to redeem its RCPS following a Default Event pursuant to Clause 2.4(g) of the 2014 SSHA and Clause 2.4(f) of the 2016 SSHA.[4] A Default Event is defined at Clause 1.1 of the SSHAs to include an Exit Event not being completed by the cut-off date of 31 March 2018 (for the 2014 SSHA) or 31 December 2018 (for the 2016 SSHA).[5]

6 The key terms in the SSHAs that are relevant to the present dispute are similar, save that the relevant cut-off date to procure an Exit Event in the 2014 SSHA is 31 March 2018 instead of 31 December 2018. Clause 6.7 of the 2015 CLA provides that the terms and conditions in the 2014 SSHA apply to the 15,166 RCPS issued under the CLA.[6] For reference, the relevant terms in the 2016 SSHA are set out as follows:[7]

> **1. DEFINITIONS AND INTERPRETATION**
>
> 1.1 In this Agreement, unless the context otherwise requires, the following expressions shall have the following meanings:
>
> …
>
> **"Default Event"** means any of (i) the Company and/or a Shareholder being in breach of any material term of any agreement entered into with the Investor (including but not limited to this Agreement, the 30 April 2014

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3 1st affidavit of Tan Bien Chuan dated 31 March 2020 ("TBCA1") at para 14, Bundle of Cause Papers ("BCP") Tab 2 at p 8

4 TBCA1 at paras 15–17, BCP Tab 2 at pp 8–10

5 TBCA1, BCP Tab 2 at p 53 (TBC-1) (2014 SSHA); TBCA1, BCP Tab 2 at p 112 (TBC-3) (2016 SSHA)

6 TBCA1, BCP Tab 2 at p 99 (TBC-2); Statement of Claim at para 8; Defence (Amendment No. 1) at para 7

7 TBCA1, BCP Tab 2 at pp 112, 113, 120, 121 and 132 (TBC-3)

Agreement, and the Convertible Loan Agreement) and such breach is not remedied to the Investor's satisfaction (acting reasonably) within thirty (30) days of notice thereof by the Investor, (ii) an Exit Event is not completed by 31 December 2018, or (iii) the Founder Absence;

…

"Exit Event" means with the Investor's written approval, any of (i) a Trade Sale, (ii) a sale by the Investor of its entire shareholding interests in the Company to a third party purchaser at a price acceptable to the Investor; (iii) an Asset Sale, (iv) an IPO Event, or (v) a RTO;

…

2.4 **Terms of the Series A RCPS** …

…

(f) Redemption

(i) Following a Default Event and subject to any applicable laws and regulations, a Series A RCPS Holder may, but is not obliged, to give notice in writing to the Company to redeem all or part of its Series A RCPS (a "**Redemption Notice**"). The Redemption Notice shall state clearly the number of Series A RCPS to be redeemed (the "**Redemption RCPS**").

(ii) If the Company is required to redeem any Series A RCPS pursuant to this **Clause 2.4**, the redemption amount to be paid by the Company to a Series A RCPS Holder for its Redemption RCPS (the "**Redemption Amount**") shall be calculated as follows:

A2 = B2 + C2

where:

'**A2'** means the Redemption Amount.

'**B2**' means the aggregate subscription price paid by the Series A RCPS Holder for the Redemption RCPS.

'**C2**' means the agreed return on B2, being ten per. cent. (10.0%) per annum compounded annually (based on a 360-day year) on B2

> commencing from the First Completion Date or the Second Completion Date (as the case may be) up to and including the Redemption Date.
>
> …
>
> 7.3 **Exit Event Undertakings**:
>
> (a) The Company and the Founder jointly and severally undertakes to use their best endeavour to procure or achieve the completion of an Exit Event by 31 December 2018.
>
> …

7 Sometime in or around June 2017, the plaintiff's Managing Director Lee William ("Mr Lee") found that the plaintiff did not have an easy working relationship with the defendant. Mr Lee proposed that the plaintiff could redeem the defendant's RCPS such that the defendant could exit from its investment earlier.[8] In the minutes of an Extraordinary General Meeting held by the plaintiff on 30 June 2017 ("EGM"), it was recorded that Mr Lee "raised the matter on 'redemption of the [RCPS]'" and that he would "[table] a proposal for [the defendant] to exit".[9]

8 Negotiations then took place between 2017 and 2018 in relation to this proposed redemption. The plaintiff's position was that the parties had reached an agreement in or around June 2017 for the plaintiff to redeem the defendant's RCPS pursuant to a sixth Exit Event, whereas the defendant submitted that there was no such agreement. The parties disputed the import of the records of negotiations between them, primarily in relation to the key issue of whether there had been such an agreement.

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8 2nd Affidavit of Lee William dated 12 May 2020 ("LWA") at para 19, BCP Tab 3 at p 7; Plaintiff's Written Submissions ("PWS") at paras 9–10

9 Certified Transcript (17 August 2020) at p 8 ln 9–23; TBCA1, BCP Tab 2 at p 308 (TBC-17)

9 On or around 30 December 2018, Mr Lee sent an email to Mr Louis Lou ("Mr Lou"), who was the defendant's nominee director in the plaintiff, and Mr Tan Bien Chuan ("Mr Tan") who was a director of the defendant,[10] stating that the plaintiff had managed to find a third party who was interested in investing in it, such that the plaintiff would have enough funds to redeem the defendant's RCPS. The plaintiff also proposed an exit plan to the defendant, and stated that otherwise, the defendant could proceed to issue a Redemption Notice "as per [the] SHA". The email stated as follows:[11]

> … It had been hard to raise fund [*sic*] in the past months because the amount of money to be paid out to OWW for redemption is not confirmed. Finally, we manage to get a third party to indicate their interest to invest so that we have enough money for redemption. We hereby offer OWW a smooth exit before 31 December 2018. The exit plan is as follows:
>
> > 1. OWW must sign and acknowledge the exit plan before the investor will start spending on lawyer fees to draft term sheet and conduct due diligence (a compulsory precondition from the new investor)
> >
> > 2. In the exit plan, Easybook must pay SGD 6 million to OWW by end of April 2019 (definitely sooner and the amount already higher than current capital + interest)
>
> We hope OWW can agree on this, and we can let you all sign ASAP. This is win-win for both OWW and Easybook.
>
> Otherwise OWW MAY GO AHEAD TO ISSUE A REDEMPTION NOTICE NOW as per SHA. Either way, we want a written commitment from OWW so we can assure the new investor.
>
> If OWW does not agree on the above 2 options, and we could not get investor due to this, we believe it is not good for OWW also. If this is the case, we are happy to have OWW continue as shareholder and we will not have to raise funds again. Please confirm that there will not be any breach of our agreement SHA. If you have a better suggestion let me know.
>
> …

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10 TBCA1 at paras 1 and 9, BCP Tab 2 at pp 1 and 5

11 TBCA1, BCP Tab 2 at p 192 (TBC-9)

10 It was undisputed that no Exit Event had been completed by 31 December 2018. The defendant therefore took the position that it was entitled to demand that the plaintiff redeem its 93,320 RCPS pursuant to Clauses 2.4(f) and 2.4(g) of the respective SSHAs.[12] However, the defendant did not issue a Redemption Notice at that point in time (*ie*, immediately after 31 December 2018). According to the defendant, it had, "[a]s a gesture of goodwill", intended to give the plaintiff some time to raise funds to redeem the RCPS. The parties continued discussions between January and April 2019 over the possible redemption of the defendant's RCPS.[13]

11 On 11 April 2019, Mr Lou wrote to Ms Mandy Yang ("Ms Yang"), who was the plaintiff's Finance Manager, to ask whether there was any update on the plaintiff's fundraising efforts. However, as the defendant did not receive any reply,[14] it issued a Redemption Notice to the plaintiff on or about 23 April 2019, notifying the plaintiff that it intended for all of its RCPS to be redeemed.[15] On 24 April 2019, Ms Yang replied, stating that the "fundraising [was] still ongoing".[16] On 2 May 2019, the plaintiff wrote to the defendant acknowledging the service of the Redemption Notice and stated that it was not yet able to make full payment of the redemption amount. The letter stated as follows:[17]

> …

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12 TBCA1 at para 24, BCP Tab 2 at p 13

13 TBCA1 at para 29, BCP Tab 2 at p 17; BCP Tab 2 at pp 194-200 (TBC-10)

14 TBCA1 at para 30, BCP Tab 2 at p 17

15 TBCA1 at para 25, BCP Tab 2 at p 14; BCP Tab 2 at p 187 (TBC-7)

16 TBCA1 at para 30, BCP Tab 2 at p 17; BCP Tab 2 at p 194 (TBC-10)

17 TBCA1, BCP Tab 2 at p 202 (TBC-11)

> 2. We note your service of the Redemption Notice. However, we are currently not ready to make a full payment of the redemption amount by 6 May 2019.
>
> 3. Nevertheless, we intend for the redemption of your RCPS to proceed as soon as possible, and are making preparations for it. We shall give you a favourable reply by 31 May 2019.

12 There was then continued correspondence between the plaintiff and the defendant's then-solicitors, CTLC Law Corporation, in May 2019. The plaintiff then engaged Drew & Napier LLC as its solicitors, and the parties continued to exchange correspondence through their solicitors from May to July 2019.[18] According to the defendant, in or around September 2019, the plaintiff learnt that the defendant would be taking steps to sell its RCPS to a third party purchaser.[19]

13 Shortly thereafter, the plaintiff commenced Suit 997 of 2019 ("S 997/2019") on 4 October 2019. In S 997/2019, the plaintiff sought a declaration that the defendant was not entitled to exercise its rights of redemption under Clause 2.4(f) of the 2016 SSHA and Clause 2.4(g) of the 2014 SSHA. In the plaintiff's Statement of Claim ("SOC"), it was pleaded that there was no Default Event entitling the defendant to redeem the 93,320 RCPS. No Default Event had arisen as the plaintiff had not breached any material term of the SSHAs or the CLA, and even if there had been a breach, such breach had been remedied by the plaintiff to the defendant's satisfaction.[20] The plaintiff further averred that there was an implied term in the 2016 SSHA that the defendant had an obligation to cooperate with the plaintiff to achieve an Exit Event, and that the

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18 TBCA1 at paras 33–34, BCP Tab 2 at pp 18–19; BCP Tab 2 at pp 207–215 (TBC-12)

19 TBCA1 at para 35, BCP Tab 2 at p 19

20 Statement of Claim at para 15

defendant had breached its implied duty to cooperate such that an Exit Event could not be procured by 31 December 2018.[21] The defendant was therefore "not entitled to rely on its breach of its implied duty to cooperate as a basis to exercise its rights of redemption under Clauses 2.4(f) and (g) of the [2016 SSHA]".[22]

The AR's decision in Summons 1514 of 2020

14 In Summons 1514 of 2020 ("SUM 1514/2020"), the defendant applied under O 18 r 19 of the Rules of Court (Cap 322, R5, 2014 Rev Ed) to strike out, *inter alia*, the plaintiff's pleadings and its claim in its entirety. The defendant relied on O 18 r 19(1)(*b*) and/or (*d*) and averred that the plaintiff's claim was scandalous, frivolous or vexatious (r 19(1)(*b*)), or that it was otherwise an abuse of the process of the court (r 19(1)(*d*)). The AR granted the defendant's application and struck out the plaintiff's claim. The AR made the following key findings:

> (a) The plaintiff's contention that the defendant was under a duty to cooperate with the plaintiff to achieve an Exit Event was factually and legally unsustainable. The alleged efforts on the plaintiff's part to redeem the defendant's RCPS appeared to be directed toward a redemption of the RCPS, and not toward the achievement of an Exit Event which, as defined in the SSHAs, did not include redemption. The plaintiff's claim is legally unsustainable as even if it succeeds in showing that the defendant failed to cooperate to achieve redemption, it

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21 Statement of Claim at paras 17–18

22 Statement of Claim at para 22

would not succeed in showing that the defendant was in breach of an alleged duty to cooperate to achieve an Exit Event.[23]

(b) The plaintiff's submission that the parties had come to an agreement sometime in or around June 2017 that an Exit Event would include the redemption of the RCPS was not factually sustainable. There was no mention of such an agreement in the pleadings. The correspondence between the parties showed that the discussion was centred on the possibility of redemption pursuant to Clause 2.4(f) (of the 2016 SSHA) rather than separately from it. There was also a distinct lack of clarity and certainty as to the nature and terms of this separate agreement, which the plaintiff claimed existed. Further, it was not clear why any alleged agreement had to be framed in terms of the amendment or expansion of an "Exit Event" as defined in the SSHAs, as opposed to a separate or collateral agreement between the parties.[24]

(c) Even if there had been sufficient evidence of an agreement between the parties that redemption constituted an Exit Event within the meaning of the SSHAs, the plaintiff's submission that the defendant had an implied duty to cooperate with the plaintiff to achieve an Exit Event would still be legally unsustainable. The court could not imply such a term as the parties did contemplate the issue of which parties would have to work towards procuring an Exit Event, as seen at Clause 7.3(a) of the SSHAs. There was therefore no gap in the SSHAs for the court to imply a term in fact, following the test set out in *Sembcorp Marine Ltd v PPL*

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23 Certified Transcript (SUM 1514/2020) at pp 5–7

24 Certified Transcript (SUM 1514/2020) at pp 7–10

Holdings Pte Ltd and another and another appeal [2013] 4 SLR 193 ("*Sembcorp Marine*").

(d) Further, the plaintiff's claim that the defendant acted in breach of its implied duty by acting unreasonably was factually unsustainable.

(e) However, on the assumption that there was such an implied duty and the defendant had breached such duty, it would have been *prima facie* open to the plaintiff to argue that the defendant should not be entitled to claim that it could exercise its right of redemption.

(f) Finally, the defendant made an alternative submission that it was entitled to exercise its right of redemption in any event because the plaintiff had breached material terms resulting in a Default Event. It was not clear that the plaintiff's position was unsustainable or that the defendant's position could be readily accepted, as further evidence as to what parties intended by the reference to "material term" would have been required.

The issues on appeal

15 The plaintiff's arguments on appeal revolved around two main issues. The first issue was whether there was an agreement in or around June 2017 between the plaintiff and the defendant that redemption of the RCPS would amount to a *sixth* "Exit Event", over and above the *five* Exit Events expressly defined in Clause 1.1 of the SSHAs ("the first issue").[25] The second issue was, if such an agreement was in place, whether the defendant was under an implied

[25] TBCA1, BCP Tab 2 at p 53 (TBC-1) – this contains the 2014 SSHA but the terms are substantially similar in the 2016 SSHA

duty to cooperate with the plaintiff to achieve redemption of the RCPS by 31 December 2018 ("the second issue"). The plaintiff argued that there was evidence that the parties had agreed that the redemption of the RCPS would be an additional Exit Event,[26] and that the AR had erred in his analysis that the duty to cooperate could not be implied into the SSHAs.[27] As the defendant had breached this implied duty, it was not entitled to demand that its RCPS be redeemed on the basis that an Exit Event had not been achieved, thereby triggering a Default Event under Clauses 2.4(f) and 2.4(g) of the respective SSHAs.

16 I was of the view that if the plaintiff were to fail on the first issue, it would necessarily follow that there was no basis for any of the corresponding arguments the plaintiff had raised on appeal. In addition to the second issue, these arguments included whether the defendant had allegedly breached the implied duty to cooperate, whether the defendant was estopped from maintaining that the only means of exit from its investment in the plaintiff was through the five defined Exit Events, and whether amendment of the plaintiff's pleadings could remedy any defects insofar as the pleadings did not contain any specific averment as to the existence of an agreement in or around June 2017 and any specific averment that the defendant was estopped by its conduct from denying that redemption of the RCPS would amount to an Exit Event.

17 The defendant's primary argument was that it was entitled to exercise its express right of redemption of its RCPS as no Exit Event had been completed by 31 December 2018. Separately, the defendant argued in the alternative that

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26 PWS at para 32

27 PWS at para 33

the plaintiff had breached material terms of the SSHAs and that it was therefore entitled to exercise its right of redemption. The AR had found that it was not plain and obvious that the plaintiff had breached material terms to trigger the defendant's right of redemption given that the phrase "material term" was not defined in the SSHAs and its meaning was disputed between the parties (see [14(f)] above). Notwithstanding this, if the plaintiff were to fail on the first issue, it was immaterial whether the defendant could rely on the argument of breach of material terms.

18 The key question on appeal was whether the plaintiff's claim was unsustainable in law or in fact such that it should be struck out. In this regard, I address in turn the following issues that arose on appeal:

(a) whether there was an agreement reached in 2017 that redemption of the RCPS would be a sixth Exit Event;

(b) whether the defendant was under an implied duty to cooperate with the plaintiff to achieve redemption of the RCPS by 31 December 2018;

(c) if there were such an implied duty, whether the defendant had breached its duty; and

(d) whether the plaintiff had breached material terms of the SSHAs such that the defendant was entitled to exercise its right of redemption of its RCPS.

Whether there was an agreement that redemption of the RCPS would be a sixth Exit Event

Parties' submissions

19 The plaintiff submitted that there was an oral agreement in or around June 2017 between the parties that the defendant's RCPS would be redeemed by the plaintiff pursuant to a sixth Exit Event ("the June 2017 agreement").[28] In support of this, the plaintiff pointed to correspondence between the parties which, according to the plaintiff, evidenced that such an agreement did exist. As a result of this agreement, the plaintiff proceeded to raise funds to redeem the defendant's RCPS.[29] To the extent that the June 2017 agreement was not pleaded, the plaintiff submitted that the pleadings could be amended to cure this defect, instead of being struck out.

20 Further or in the alternative, the plaintiff submitted that the defendant was estopped from denying that a redemption of the RCPS amounted to an Exit Event.[30] The plaintiff claimed that the defendant had made a "clear and unequivocal representation" that redemption of the RCPS would be a sixth Exit Event by agreeing to redemption since 2017, and by participating in negotiations from 2017 to 2018.[31]

21 Before the AR, the plaintiff took the position that the pleadings were clear and sufficient, notwithstanding that in the SOC, both the existence of the June 2017 agreement and estoppel by the defendant's conduct were not

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28 Certified Transcript (17 August 2020) at p 8 ln 31; p 116 ln 10–14

29 Certified Transcript (17 August 2020) at p 11 ln 5–7, 26–31

30 PWS at para 32

31 PWS at paras 40, 47

expressly pleaded. On appeal, the plaintiff focused on the June 2017 agreement as a bulwark of its argument that the parties had in effect agreed to vary the SSHAs to allow for a sixth Exit Event. As such, the defendant was not entitled to invoke its right of redemption pursuant to Clause 2.4(f) of the 2016 SSHA and Clause 2.4(g) of the 2014 SSHA, both of which are contingent on the occurrence of a "Default Event" as defined in Clause 1.1.

22 The argument of a sixth Exit Event was canvassed before the AR in the plaintiff's written submissions below. The plaintiff did not dispute that it was not pleaded but submitted that there was evidence in support of the argument that an agreement was reached in June 2017. The plaintiff continued to adopt this position on appeal given that the AR had found that the June 2017 agreement was a material fact which was not pleaded, and also that on the available evidence, the plaintiff's efforts to redeem the RCPS had nothing to do with the procurement of an Exit Event as defined in paragraph 11(b) of the SOC and Clause 1.1.

23 The defendant submitted that the plaintiff's claim that the parties had reached an agreement that redemption of the defendant's RCPS would constitute an Exit Event was unsustainable. There was no explicit agreement between the parties that redemption would be an Exit Event, and no resolution was passed to amend the definition of "Exit Event" in the SSHAs. Any such alleged agreement was also not pleaded. Further, there was no evidence that the parties had reached such an agreement based on the contemporaneous email correspondence. Even though the plaintiff claimed that a binding agreement had been reached, it was unable to articulate the terms of the agreement, or how the defendant would receive the proceeds of redemption. Finally, the parties had attempted unsuccessfully to negotiate a pre-redemption agreement. This reinforced the fact that no agreement had been concluded between them. Since

the plaintiff's claim was factually unsustainable, amendments made to the pleadings would not change the outcome of the application.[32]

My decision

24 The applicable legal principles relating to striking out are well-settled and undisputed. In relation to striking out under O 18 r 19(1)(*b*), the Court of Appeal held in *The "Bunga Melati 5"* [2012] 4 SLR 546 at [39] that a plainly or obviously unsustainable action would be one which was either legally or factually unsustainable. An action would be legally unsustainable if "it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks", or factually unsustainable if it is "possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance".

25 The plaintiff's claim that an agreement had been reached between the parties for the redemption of the RCPS pursuant to a sixth Exit Event was unsustainable. The evidence did not show that first, any agreement was reached between the parties for redemption of the defendant's RCPS, and second, that the parties had reached an agreement to the effect that redemption of the RCPS would constitute a sixth Exit Event under the SSHAs.

26 If there was indeed evidence to support the plaintiff's claims that an agreement did exist, the claim should not have been struck out. Defects in pleadings can be remedied where appropriate. In this regard, I note that the AR had raised his concerns in relation to the deficiencies in the plaintiff's SOC. In

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32 Defendant's Written Submissions ("DWS") at paras 41–48

explaining his reasons for his ruling, however, the AR did also state that the evidence the plaintiff sought to rely on did not support his case.[33]

27 Examining the parties' conduct post-June 2017 as reflected in the documentary evidence before me, it is apparent that Mr Lee made a proposal for redemption of the RCPS which the defendant did not reject offhand but had attempted to explore with the plaintiff. As the AR had observed, however, there was nothing from the relevant correspondence between the parties to show that the defendant had *agreed* to Mr Lee's proposal for the defendant's exit by way of redemption of the RCPS.

28 In my assessment, the best case that the plaintiff could put forth was that there was *some* in-principle understanding in or around mid-2017 that redemption *options* were to be explored. Parties thus entered into discussions on that basis. However, this fell short of an *agreement* to Mr Lee's proposal, let alone any agreement that redemption of the RCPS would be a sixth Exit Event. In any case, there was no evidence that the redemption option(s) being explored would necessarily be tied to the 31 December 2018 deadline alongside the five expressly defined Exit Events.

29 The plaintiff pointed to the EGM minutes (see [7] above), but this merely recorded that Mr Lee would table a *proposal* to enable the defendant to exit from its investment.[34] This could not possibly establish that there was an agreement between the parties. The defendant also pointed out that subsequent to this EGM, email correspondence between the parties in August 2017 showed

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33 Certified Transcript (SUM 1514/2020) at p 8

34 Certified Transcript (17 August 2020) at p 8 ln 9–26; TBCA1, BCP Tab 2 p 308 (TBC-17)

that till then, the plaintiff had not in fact tabled any such proposal to the defendant.[35] As such, the EGM minutes did not support the plaintiff's claim that an agreement had been reached in or around June 2017 between the parties.

30 The plaintiff submitted that there was a verbal agreement that the defendant's RCPS would be redeemed pursuant to a sixth Exit Event, which could be inferred from the parties' exchange of correspondence after June 2017. Such a position appears to differ from paragraph 20 of Mr Lee's affidavit where he relied on the defendant's lack of objection as the basis of the alleged agreement, stating that the defendant "did not object to [his] proposal and parties proceeded on the basis that the redemption of the [d]efendant's RCPS would be a way for the [d]efendant to exit from its investment in the [p]laintiff".[36] On appeal, the plaintiff's case was that the defendant's lack of objection to continuing negotiations was further evidence in support of its position that a verbal agreement had been concluded between the parties.

31 In respect of the parties' exchange of correspondence from which a verbal agreement could allegedly be inferred, the plaintiff pointed to emails sent from Mr Lee to Mr Lou and Mr Tan dated 14 June 2018 and 20 June 2018. In the email dated 14 June 2018, Mr Lee wrote that the defendant had been "verbally agreeing to redeem since last year", and in the 20 June 2018 email, that the defendant was "willing to redeem with capital + interest".[37] However, reading the emails in context, it was clear to me that no agreement had in fact

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35 Certified Transcript (17 August 2020) at p 77 ln 20 to p 78 ln 20; LWA, BCP Tab 4 at p 626–627 (LW-37)

36 LWA at para 20, BCP Tab 3 at p 7

37 Certified Transcript (17 August 2020) at p 9 ln 13 to p 11 ln 6; LWA, BCP Tab 3 at pp 152–153 (LW-11)

been reached between the parties for redemption to take place. The 20 June 2018 email states:

> …
>
> I had just finished a discussion with RCC about following back the last year method where we proceed to do all the fundraising activities first *before OWW commit to sign to redeem*. However RCC and me eventually disagreed this way and below are the reasons:
>
> …
>
> 2. *As per discussed over the phone, OWW is willing to redeem with capital + interest following the SHA*, hence by putting a commitment now is the same thing, and this will definitely ease our fund raising and then win-win for both parties. Because the SHA is open-ended, there are uncertainties such as OWW can choose to do nothing without redeem and so on …
>
> …
>
> Finally, *we hope that OWW can help by giving us a commitment to confirm to redeem before we start fund raising*, this is no difference for OWW to confirm later, i.e. eventually the amount for redemption is the same i.e. capital + interest accumulated till at the point of exit. But to us is a big difference, coz [*sic*] with the confirm intention and amount, this will definitely ease and speed up the fundraising …

[emphasis added]The 20 June 2018 email makes it clear that the defendant had not in fact made any commitment yet to redemption of the RCPS. Correspondingly, the plaintiff was requesting the defendant to provide such a commitment so that it would be easier to raise funds. The suggestion that paragraph 2 of the email was evidence of an agreement was misplaced. At best, on Mr Lee's own terms as contained in paragraph 2 of his email, this was merely an indication of the defendant's possible willingness for its RCPS to be redeemed "following the SHA". Otherwise, there would have been no need for Mr Lee to "hope" that the defendant would "help by giving [the plaintiff] a commitment to confirm to redeem before [the plaintiff] start[s] fund raising".

32 Assuming that the defendant's alleged verbal agreement was purportedly communicated through Mr Lou by his emails with the plaintiff, the more critical issue was that none of Mr Lou's emails contained any suggestion that such an agreement existed to the effect that redemption constituted a sixth Exit Event. Instead, the language in all of Mr Lou's emails was unambiguous. Mr Lou consistently reiterated the need for the plaintiff to have sufficient redemption funds. He spoke of redemption, issuance of redemption notices and avoidance of redemption shortfalls. None of these references was relevant to Exit Events, and more importantly, Mr Lou expressly linked them to Clauses 2.4(f) and 2.4(g) of the 2016 and 2014 SSHAs respectively, which deal with the defendant's right of redemption.

33 The plaintiff pointed to further email correspondence which allegedly showed that the defendant did not object to redemption as a sixth Exit Event. The plaintiff referred to an email sent from Mr Lee to Mr Lou and Mr Tan, updating them about the fundraising process and negotiating the price to be paid for redeeming the RCPS. It was argued that in Mr Lou's reply dated 5 September 2017, he did not object to the RCPS being redeemed on the basis of redemption as an Exit Event.[38] However, this email itself unequivocally showed that Mr Lou had contemplated any redemption of the defendant's RCPS to be governed by the conditions set out in Clauses 2.4(f) and 2.4(g) of the respective SSHAs pertaining to redemption, in particular the redemption price. The email states:

> *Pursuant to Clause 2.4(g)(ii) of the [2014 SSHA] and Clause 2.4(f)(ii) of the [2016 SSHA],* the Redemption Amount has to be the aggregate subscription price plus interest of 10.0% per annum compounded annually…

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[38] Certified Transcript (17 August 2020) at p 12 ln 4–19; LWA, BCP Tab 3 at p 65 (LW-2)

> …
>
> Pls also note that, pursuant to Clause 7.1(c) of [the 2016 SSHA], the Founder (*ie,* Mr Lee) unconditionally and irrevocably undertakes to pay any *outstanding Redemption Shortfall* not paid by the Company within ten (10) days of the Investor's written demand.
>
> [emphasis added]

34 In their email exchanges, Ms Yang and Mr Lee both mentioned the topic of redemption and issuance of a redemption notice. On 5 October 2017, Ms Yang herself had emailed Mr Lou asking the defendant to "please issue a *formal redemption notice* to us" [emphasis added].[39] Mr Lou replied to Ms Yang on the same day, stating:

> *Pursuant to Clause 2.4(f)(iii) of the [2016 SSHA]*, the Company has to pay the full Redemption Amount the next day once the Redemption Notice is issued.
>
> You should have bank offer letters and statements to show evidence that you have the necessary funds before the redemption is triggered.
>
> [emphasis added]

35 In response to this email, Mr Lee wrote to Mr Lou stating:[40]

> *I think you can go ahead and send the redemption notice,* then we have the confirmation and peace of mind that OWW will redeem for sure, so that we can commit to banks by paying all [the] finance cost which could amount to > SGD 100k and start to sell some properties. We do not want a case, after going through all the hassle aggregate all the money, and finally your side say not to redeem, then we will be in deep loss. *About the next day to pay out, we can negotiate on this to a reasonable timeline…*
>
> [emphasis added]

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39 LWA, BCP Tab 3 at p 72 (LW-3)

40 LWA, BCP Tab 3 at p 71 (LW-3)

36 In Mr Lee's affidavit, he sought to "clarify that this redemption notice [was] not the Redemption Notice under the Agreements", and that what the plaintiff wanted was a "written confirmation from the [d]efendant to show to potential lenders or investors that the [d]efendant had a firm intention to exit the [p]laintiff upon a certain price being met".[41] I was not persuaded by Mr Lee's attempt to explain away the mention of a redemption notice in Ms Yang's email dated 5 October 2017. The words are plain and obvious, and it was disingenuous to suggest that they were intended to mean something else. Further, in Mr Lee's reply to Mr Lou, he proposed negotiating the timeline set out in Clause 2.4(f)(iii). Mr Lee himself had asked the defendant to "go ahead and send the redemption notice". It is clear that parties were consistently on the same page in relation to referring to a redemption notice *under the SSHAs*.

37 I note that the plaintiff on appeal had proposed amendments to the SOC, and that in these amendments, it had pleaded that the "parties agreed that the 'Exit Event' would include a redemption of the [d]efendant's RCPS and this redemption would be in accordance with Clause 2.4(g) of the [2014 SSHA] (save for Clause 2.4(g)(i)) and Clause 2.4(f) of the [2016 SSHA] (save for Clause 2.4(f)(i))".[42] In my view, this was an afterthought to account for the parties' references to Clauses 2.4(f) and 2.4(g) in their contemporaneous correspondence and to link them to a sixth Exit Event that had been allegedly agreed upon. On the plaintiff's own case, the parties had agreed to redemption in accordance with Clauses 2.4(f) and 2.4(g) of the respective SSHAs, but Mr

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41 LWA at para 22, BCP Tab 3 at p 8; Certified Transcript (17 August 2020) at p 37 ln 6–10

42 PWS Annex A at p 11, para 17A(c)

Lee was attempting to negotiate to reduce the redemption price.[43] In making this argument, the plaintiff referred to Mr Lee's replies to Mr Lou's email which set out the redemption amounts calculated in accordance with the formulas in Clauses 2.4(f) and 2.4(g) (see [33] above). The emails state:[44]

> [Email sent from Mr Lee to Mr Lou dated 14 September 2017]
>
> Hi Louis,
>
> bad news 2 bank short term loan cannot be approved due to our net profit negative in 2016 and 2015, hence we got [*sic*] not enough money to even pay the USD 3.2m.
>
> however I will try to get from some private loan to make up the amount… *hence hopefully your side can agree on the amount around USD 3.2m…*
>
> for this buyout deal, *we suggest to have the SHA forfeited, since already exit. The forfeit of SHA is a prerequisite in this buyout deal.*
>
> …
>
> [Reply from Mr Lou to Mr Lee dated 14 September 2017]
>
> William
>
> As illustrated in our previous email [setting out the calculation based on clauses 2.4(f) and 2.4(g)], the Redemption Amount is USD 3,779,644 if the Redemption Date is 31 Oct 2017; and the Redemption Amount will be USD 3,841,180 if the Redemption Date is 31 Dec 2017.
>
> As you have insufficient fund to redeem our shares, you may want to come to our office for a face-to-face meeting.
>
> [Reply from Mr Lee to Mr Lou dated 14 September 2017]
>
> Hi Louis,
>
> *Hence i bargain to the amount that i can squeeze out.. difficult to find more cash…* besides, *SHA to be forgone if to buy back the shares. This is a point that we insist for this buy back deal.* As

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43 Certified Transcript (17 August 2020) at p 118 ln 9 to p 119 ln 12

44 LWA, BCP Tab 3 at p 64 (LW-2)

> you can see i got no money personally to pay back… hence the SHA is rather useless, I am prepared for the worst.
>
> …
>
> [emphasis added]

38 As can be seen from the correspondence, the defendant and/or Mr Lou had intended the redemption of the RCPS to follow the timelines and pricing conditions set out in Clauses 2.4(f) and 2.4(g) of the respective SSHAs, while the plaintiff had sought to negotiate some of these terms in its favour, in contemplation of the defendant's early exit. Both parties had referenced Clauses 2.4(f) and 2.4(g) and had negotiated for early redemption on terms separate from any Exit Event. Even if the plaintiff and/or Mr Lee had understood early redemption to be an Exit Event in accordance with Clauses 2.4(f) and 2.4(g) of the respective SSHAs, there was certainly no agreement from Mr Lou and/or the defendant that redemption would constitute an Exit Event. Mr Lou had repeatedly insisted on following the pricing terms as provided for in Clauses 2.4(f) and 2.4(g) of the respective SSHAs and made no mention of any Exit Event in his emails.

39 The plaintiff further argued that Mr Lee explicitly referred to the December deadline in an email to Mr Lou and Mr Tan on 6 June 2018. According to the plaintiff, the reference to the 31 December 2018 deadline showed that the parties viewed the redemption of the RCPS as an Exit Event.[45] The email states:[46]

> …
>
> [Right Click Capital, the plaintiff's fundraising advisor] will start to liaise with your side soon to determine and confirm on the

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45 Certified Transcript (17 August 2020) at p 16 ln 7–11

46 LWA, BCP Tab 3 at p 147 (LW-10)

> exit plan of OWW before they start to preach to investors outside. Hope OWW side can help on this ASAP since now already June, any delay will cause the new fund to come in late and might cause the redemption/buyout post December (i.e. beyond the deadline).
>
> The process will be:
>
> 1. OWW confirms to exit at certain price.
>
> 2. Issue new shares to new investors.
>
> 3. Money from new investors to buy out/ redeem OWW.
>
> 4. OWW shares will be dissolved and OWW SHA will be terminated.
>
> (all in 1 tranche)
>
> …

However, viewed in the context of the parties' negotiations, this reference to the December deadline simply meant that the plaintiff intended to redeem the defendant's RCPS before the 31 December 2018 Exit Event deadline, after which the defendant could issue a Redemption Notice on the basis that a Default Event had arisen under the SSHAs. The parties may have been negotiating for the defendant's early exit from its investment, and Mr Lee appears to have sought to strike a bargain on terms more favourable to the plaintiff than Clauses 2.4(f) and 2.4(g) would allow, and for the SSHAs to thereafter be dissolved. It would therefore be logical for the parties to have considered any early redemption to take place before 31 December 2018. As stated above at [38], even if Mr Lee viewed redemption as an Exit Event, it would merely have been his unilateral view.

40 The plaintiff also referred to an unsigned shareholders' resolution where there was a reference to redemption of the defendant's RCPS pursuant to Clause 7.3(a) of the SSHAs. However, this document again had to be viewed in context. Mr Lee stated in his affidavit that this draft shareholders' resolution along with other documents were prepared in the process of negotiating a pre-redemption

agreement with the defendant between July to August 2018. The pre-redemption agreement "[set] out the [p]laintiff's proposal to pay the sum of S$300,000 in exchange for the [d]efendant's cooperation with the fundraising process".[47] As further explained at [43] below, the fact that a pre-redemption agreement was drafted and eventually aborted showed that the parties did not have an agreement at that point in relation to how the defendant's RCPS were to be redeemed by the plaintiff, much less that redemption would constitute a sixth Exit Event. Since negotiations in relation to the pre-redemption agreement fell through, the shareholders' resolution was never signed by the parties. In any event, this resolution was only drafted pursuant to discussions in July to August 2018, which would not support the plaintiff's case that an oral agreement was reached in June 2017.

41 The plaintiff's position was that the documents and email correspondence between the parties had made it "very clear" that there was an agreement between the parties that the defendant's RCPS would be redeemed pursuant to a sixth Exit Event.[48] However, for the reasons I have given, these documents and emails did not assist the plaintiff in proving the existence of a verbal agreement in or around June 2017 whereby the defendant had agreed to redemption of the RCPS as a sixth Exit Event, or that any agreement was reached for redemption to take place.

42 As the AR opined, the lack of clarity and certainty in terms was also relevant in determining that no agreement was reached between the parties. I concurred. A crucial agreed term would be the redemption price, given that the

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47 LWA at paras 43–45, BCP Tab 3 at p 16; BCP Tab 4 at pp 321–326 (LW-13)

48 Certified Transcript (17 August 2020) at p 17 ln 12–21

plaintiff disputed the defendant's position that it should be pegged to what was set out in Clause 2.4(g)(ii) of the 2014 SSHA and Clause 2.4(f)(ii) of the 2016 SSHA.[49] In Mr Lee's affidavit, he stated that he explained to Mr Lou and Mr Tan that parties "should agree on a fixed price to buy out the [d]efendant's RCPS", but that the defendant maintained its "refusal to provide a written confirmation of its intention or agreement to being bought out upon a certain price being met".[50] As the documents show, the parties never reached any agreement on this. It is not difficult to see why, given that Mr Lee had proposed various "buyout" sums ranging from "around" US$3.2m[51] with an added "prerequisite" of forfeiture of the SSHAs, to S$6m in his eventual proposed "exit plan".[52] These sums were lower than other non-binding indicative offers that were only revealed by the plaintiff subsequently.[53] There was also no cogent reason why negotiations towards possible redemption options could not have been the subject of a separate or collateral agreement, but must have been encompassed under an additional Exit Event.

43 The fact that a pre-redemption agreement was negotiated in 2018 but ultimately not concluded was also a relevant consideration. This fortified my view that the defendant was attempting to explore with the plaintiff possible redemption options but there had been no agreement on the basic modalities. Meanwhile, the 31 December 2018 deadline for an Exit Event drew near. The

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49 LWA, BCP Tab 3 at p 57 (LW-2)

50 LWA paras 20(b) and 24, BCP Tab 3 at pp 7–9

51 Lee William's emails dated 4 September 2017 and 14 September 2017, in LWA, BCP Tab 3 at pp 64–65 (LW-2)

52 Lee William's email dated 30 December 2018, in TBCA1, BCP Tab 2 at p 192 (TBC-9)

53 TBCA1 at paras 40–41, BCP Tab 2 at pp 20–21; BCP Tab 2 at pp 219–227 (TBC-14)

plaintiff sought to argue that the "aim of the pre-redemption agreement" was to secure the defendant's compliance with its implied duty to cooperate, and that redemption itself had already been agreed upon.[54] However, this position was untenable. In the pre-redemption agreement, the plaintiff offered the defendant a $300,000 non-refundable deposit in exchange for the defendant's cooperation with the plaintiff for any matter relating to fundraising arrangements, including the signing and execution of relevant documents such as the relevant shareholders' and directors' resolutions.[55] As submitted by the defendant, it would not make sense for the parties to have to negotiate a pre-redemption agreement to secure the defendant's cooperation for redemption, if redemption had already been agreed upon between the parties.[56] That the pre-redemption agreement eventually was not signed further suggested that there was no agreement between the parties as to how the defendant's RCPS were to be redeemed. In any event, the draft of the pre-redemption agreement did not state that redemption would constitute an Exit Event.[57]

44 On the first issue alone, the plaintiff's SOC ought to be struck out and the claim dismissed in its entirety as it was plain and obvious that it was factually unsustainable. Amending the SOC would not serve a purpose since the evidence did not support the material facts that the plaintiff sought to plead.

45 I make a brief observation in relation to the plaintiff's arguments that the defendant was estopped by its conduct and continued participation in the

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54 Certified Transcript (17 August 2020) at p 18 ln 6–14

55 LWA, BCP Tab 4 at pp 308–313 (LW-13)

56 Certified Transcript (17 August 2020) at p 85 ln 7–16

57 DWS at para 47

plaintiff's business. The evidence plainly showed no express agreement *and* no verbal agreement in or around June 2017. In his affidavit, Mr Lee himself did not attest to the existence of any verbal agreement – he would know best whether there was one. It is clear that mere silence or even assumed acquiescence cannot amount to an unequivocal representation upon which the doctrine of estoppel depends (see, *eg*, *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [58]).

Whether the defendant had an implied duty to cooperate

Parties' submissions

46 The plaintiff submitted that the defendant was under an implied duty to cooperate in order to procure the completion of an Exit Event by 31 December 2018. Relying on *Mackay v Dick and another* (1881) 6 App Cas 251 ("*Mackay*"), *Tan Chin Hoon and others v Tan Choo Suan (in her personal capacity and as executrix of the estate of Tan Kiam Toen, deceased) and others and other matters* [2015] SGHC 306 ("*Tan Chin Hoon*") at [138] and *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd* [2006] 1 SLR(R) 634 ("*Evergreat*") at [49], the plaintiff argued that a duty to cooperate would be implied into a contract where the object of the contract could only be achieved with the cooperation of both parties to the contract. The plaintiff further relied on *Evergreat* at [51] for the proposition that a party who was in breach of his contractual obligations should not be allowed to take advantage of his own wrongdoing.[58] Here, the defendant's cooperation was necessary for an Exit Event to be procured, as it deals with the defendant's property rights as the holder of the RCPS, and its written approval would be expressly required for

[58] PWS at paras 50, 53

the completion of an Exit Event. It should therefore not be allowed to exercise its purported right of redemption when the Exit Event could not be procured due to its refusal to cooperate.[59]

47 The plaintiff further submitted that this duty to cooperate was a term implied in law and not in fact, such that the requirement of a "true gap" before a term could be implied as stated in *Sembcorp Marine* did not apply.[60] According to the plaintiff's interpretation of *Tan Chin Hoon*, *McCarrick v Liverpool Corporation* [1947] AC 219 and academic texts, the duty to cooperate is a term to be implied in law. The plaintiff argued that this duty would be incorporated "in all contracts where the performance of a thing agreed to be done cannot effectively occur without the cooperation of both parties".[61] Finally, the plaintiff argued that Clause 7.3 of the SSHAs, which states that the plaintiff and Mr Lee shall use their best endeavours to procure an Exit Event, did not preclude an implied duty on the part of the defendant to cooperate to achieve an Exit Event. As such, there was no inconsistency between its proposed implied term and the SSHAs.[62]

48 The defendant submitted that the duty to cooperate could not be implied in fact, as the requirements set out in *Sembcorp Marine* were not met for such implication of terms. There was no gap in the SSHAs, it was not necessary to imply such a term to give the contracts efficacy, and the implication of the term would not pass the "officious bystander" test.[63] As to whether such a term could

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59 PWS at paras 58–59

60 PWS at para 74

61 PWS at para 74

62 PWS at para 61

63 DWS at paras 51–61

be implied in law, the defendant disagreed with the plaintiff's interpretation of *Tan Chin Hoon* and argued that it should be a term implied in fact.[64] In relation to the plaintiff's defined category of contracts in which such a term should be implied, the defendant submitted that since the court would need to make a factual finding as to whether there was an obligation that could not be effectually done unless both parties cooperated, such a duty should be a term implied in fact.[65]

49 The defendant further submitted that it did not dispute the principle as espoused in *Mackay*, *Tan Chin Hoon* and *Evergreat*, but distinguished the cases on the facts. In the present case, unlike in the three cases, the parties did not agree to a condition that would be determinative of the parties' rights, since the defendant had the sole discretion to decide whether it wished to accept an Exit Event.[66] On the assumption that there was an agreement between partiesfor redemption to be achieved, the obligation was on the plaintiff to pay the defendant the agreed sum in order to redeem the RCPS. This condition did not require both parties to cooperate to achieve it.[67] The plaintiff's need to raise funds was an issue that the plaintiff itself had to solve, and should not give rise to a duty on the defendant's part to cooperate.[68] The defendant also argued that the cooperation sought by the plaintiff was for the defendant to commit to redemption of its RCPS. If the defendant was under such an implied duty to cooperate, it would have been compelled to agree upfront to redemption without

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64 Certified Transcript (17 August 2020) at p 94 ln 8–19

65 Certified Transcript (17 August 2020) at p 95 ln 20 to p 96 ln 11

66 Certified Transcript (17 August 2020) at p 96 ln 12 to p 97 ln 21; DWS at para 64

67 Certified Transcript (17 August 2020) at p 97 ln 23–31

68 Certified Transcript (17 August 2020) at p 98 ln 17–20

the knowledge of the terms of redemption, including the payment terms and who the investor would be.[69] This would be prejudicial to the defendant and inconsistent with the terms of the SSHAs.[70]

My decision

50 As I had ruled in favour of the defendant on the first issue, it was not strictly necessary to deal with the second issue and the remaining arguments canvassed by the plaintiff. Nevertheless, for completeness, I set out my reasons for agreeing with the AR that there was no implied duty to cooperate.

51 Clause 7.3(a) contains a "best endeavours" provision which places the burden on the plaintiff and the Founder (*ie*, Mr Lee) to exercise best endeavours to procure or achieve the completion of an Exit Event. There is no provision imposing any similar burden on the defendant. As held in *Sembcorp Marine* at [94]–[95], the court would only consider implying a term into a contract where the parties did not contemplate an issue and had failed to make provision for it, thus leaving a gap. It was clear on the face of the SSHAs that parties had contemplated the issue of who had the duty to procure the Exit Event. There was therefore no gap left by the parties and the AR justifiably found no basis on which the courts would imply a term in fact.

52 I agreed with the defendant that *Mackay*, *Tan Chin Hoon* and *Evergreat* could be distinguished. In *Mackay*, Lord Blackburn stated at 263 that where "it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it", there was an implied duty

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69 Certified Transcript (17 August 2020) at p 101 ln 12–17

70 Certified Transcript (17 August 2020) at p 102 ln 18–26

that parties would do all that is necessary for the doing of that thing. The facts of *Mackay* are such that parties had entered into a sale and purchase contract for a digging machine, subject to a condition precedent that the seller demonstrate to the buyer via a test that the machine was functioning adequately. The court held that there was an implied duty that the buyer was to cooperate in enabling a fair test to be done (at 264). In *Tan Chin Hoon*, the court similarly held at [143] that "[i]f two parties enter into a contract subject to a condition precedent which can be satisfied only if both parties cooperate, a term may readily be implied that both parties are under an obligation to cooperate in order to facilitate the fulfillment of that condition". On the facts, parties had reached an oral agreement to compromise their disputes, with the approval of the Attorney-General as a condition precedent (at [9]). The court implied into the agreement a duty to cooperate to procure the approval of the Attorney-General (at [145]). In *Evergreat*, parties jointly submitted a Consent Order which stated that its dispute would be submitted to an independent assessor for assessment. The court held that the plaintiff had an obligation to cooperate with the defendant to facilitate the assessment process (at [50]).

53 In these three cases, the parties had entered into agreements which either contained a condition precedent, or a term that the parties would presumptively agree to cooperate on for the contract to be effectual. However, that was patently not how the SSHAs were structured. On the face of the SSHAs, the parties did not even agree that an Exit Event or redemption of the defendant's RCPS had to take place. If an Exit Event did not take place, Clauses 2.4(f) and 2.4(g) of the respective SSHAs would then apply such that the RCPS could be redeemed. In that scenario, the clear terms of the SSHAs are that the defendant has the *sole* right and entitlement to unilaterally require the redemption of the RCPS and the plaintiff could not demand that the defendant seek redemption. Clause 2.4(f)

provides that the defendant "may, but is not obliged" to issue a redemption notice. There is therefore no basis on which to imply a duty on the defendant to cooperate to facilitate the redemption of its RCPS to achieve a sixth Exit Event.

54 The context of the SSHAs as well as the conduct of the parties also made it amply clear that there was no implied duty to cooperate. As mentioned above at [43], the parties were in negotiations for a pre-redemption agreement in or around July 2018, which the plaintiff claimed was to obtain the cooperation of the defendant for redemption to proceed. The plaintiff's offer of an advance payment of $300,000 "in exchange" for the defendant's full cooperation in the plaintiff's fundraising efforts[71] was not accepted by the defendant. This supported the defendant's position: not only was there no agreement in June 2017, there was also no implied duty to cooperate. If a duty to cooperate did exist in law, such an offer to "incentivise" the defendant towards cooperation, which was allegedly made pursuant to Mr Lee having obtained legal advice, would have been completely unnecessary. In any event, it cannot be that the defendant was under any legal duty to help the plaintiff raise funds to redeem its own shares, much less that the defendant should be bound to cooperate by acceding to Mr Lee's attempts to negotiate for a lower redemption amount.

55 Moreover, it was untenable for the plaintiff to suggest that the defendant should be compelled by law to cooperate when the plaintiff was the party initiating a possible early redemption of the RCPS. As Clause 1.1 of the SSHAs makes clear, the defendant must be prepared to give its *written approval* to any of the five defined Exit Events. One of the five events included a sale of the

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71 F&BP para 3.1.6, Bundle of Pleadings Tab 6. See also LW email dated 13 July 2018 in LWA, BCP Tab 4 at p 243

defendant's entire shareholding to a third party *at a price acceptable to the defendant*. It was not entirely clear to me why the plaintiff had highlighted the "sale by the [defendant]" option under Clause 1.1 in his affidavit,[72] and then sought to characterise redemption of the RCPS as a sixth Exit Event, but it is beyond dispute that there was no written approval from the defendant or any agreed price which was acceptable to the defendant.

56 The issue of whether a duty to cooperate is a term to be implied in fact or in law was not directly engaged in the present case. The distinction between terms implied in fact and in law has been elucidated by the Court of Appeal in *Ng Giap Hon v Westcomb Securities Pte Ltd and others* [2009] 3 SLR(R) 518. Implying a term in law involved broader policy considerations and once implied, such a term would also be implied in all future contracts of that particular type (at [38] and [46]). I did not think it was entirely accurate for the defendant to advance the proposition that a term would be one implied in fact if the court had to undertake a factual assessment to determine whether the contract was of a particular type. However, I did not find it necessary to examine this issue further as there was no scope for the implication of such a duty here. Implying a duty to cooperate on the defendant to procure an Exit Event would be inconsistent with the structure of the SSHAs. As explained at [52]–[54] above, the SSHAs would not have fallen into the category of contracts proposed by the plaintiff for which a duty to cooperate should be implied in law, since there had been no agreement between the parties to either procure an Exit Event or achieve redemption. Further, insofar as this purported "Exit Event" envisioned by the plaintiff was redemption, it would be inconsistent with the express terms of the SSHAs to imply a duty to cooperate on the defendant to

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72 LWA at para 13, BCP Tab 3 at p 5

facilitate redemption of its RCPS. The SSHAs expressly gave the defendant discretion to decide whether and when its RCPS would be redeemed.

Whether the defendant had breached an implied duty to cooperate

Parties' submissions

57 The plaintiff argued that the defendant had breached the implied duty to cooperate with the plaintiff to procure an Exit Event. As a result of this breach, an Exit Event could not be completed by 31 December 2018. Despite numerous emails sent to the defendant from 2017 to 2018, it had refused to provide the plaintiff with a written confirmation of its intention to exit from its investment, and the price it would be willing to accept for the redemption of its RCPS.[73] It also refused to sign the plaintiff's financial documents.[74] Referencing Mr Lee's email dated 30 December 2018 (see [9] above), the plaintiff submitted that the email showed that the defendant's non-cooperation led to difficulties in securing a deal with potential investors. Despite the defendant's refusal to cooperate for over a year, the plaintiff had finally managed to locate an investor, as communicated in the email of 30 December 2018. It was therefore "desperate to get a written commitment so that [it could] conclude this deal with this potential investor". The plaintiff asserted that even though it had told the defendant that it could "go ahead to issue a redemption notice", it had merely been "compelled" to do so, in order to "at the very least get some kind of written confirmation to facilitate the fundraising", as the defendant was not cooperating in the redemption process.[75]

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73 PWS at para 86

74 PWS at para 88

75 Certified Transcript (17 August 2020) at p 42 ln 3 to p 44 ln 22

58 The defendant submitted that even if it had an implied duty to cooperate, it did not breach any such duty. First, the cooperation sought by the plaintiff did not fall within the scope of any implied duty to cooperate. Whilst the plaintiff claimed that the defendant refused to provide a written confirmation, under the SSHAs, the plaintiff and Mr Lee could not demand that the defendant accept an Exit Event or dictate the terms of the redemption of the defendant's RCPS. They also could not demand that the defendant prejudice its own interests by giving a confirmation that the RCPS would be redeemed before the plaintiff had secured an investor or confirmed the redemption price. The SSHAs provided that it was within the defendant's discretion to decide whether to approve an Exit Event or to require the plaintiff to redeem its RCPS after the relevant cut-off dates.[76]

59 Further, the defendant averred that it had informed the plaintiff that it was prepared to confirm its intention to issue a redemption notice, but on the condition that the plaintiff furnished evidence that they had the requisite funds for redemption. The defendant referred to an email sent by Mr Lou to Mr Lee on 9 October 2017. The email states:[77]

> …
>
> Pursuant to Clause 2.4(f)(iii) of the [2016 SSHA], the Company has to pay the full Redemption Amount the next day after the Redemption Notice is issued. If the Company fails to make payment then the drag along clause can be triggered immediately. *As you do not have the available funds now* our legal advisors have advised that we should not issue redemption notice now in order not to trigger the drag along clause.
>
> However, *we can confirm our intention to issue redemption notice conditional upon*:

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76 DWS at para 72

77 LWA, BCP Tab 3 at p 70 (LW-3)

> *1. Sight of unconditional Bank offer letter(s) or bank statements showing William Lee has available funds amounting to redemption amount*;
>
> 2. Redemption interest continue to accrue until the date all RCPS are redeemed;
>
> 3. If there is no bank offer letter(s) amounting to S$3M by 30 Nov 2017 William Lee commences discussion with other potential investors to acquire OWW' s stake in the company;
>
> 4. This offer expires on 31 Dec 2017.
>
> …
>
> [emphasis added]

The defendant submitted that it had not acted unreasonably in requesting that the plaintiff provide proof that it had sufficient funds before providing any confirmation of its intention to be redeemed.

60 Second, the plaintiff was unable to show that but for the defendant's non-cooperation, the Exit Event would have been completed by 31 December 2018. There was no evidence that the plaintiff had not been able to attract investors or raise funds *as a result* of the defendant's alleged failure to provide a written confirmation. In fact, the defendant had managed to obtain two non-binding indicative offers from two potential investors.[78]

61 Finally, the defendant submitted that its entitlement to demand that the plaintiff redeem its RCPS following a Default Event "exist[ed] independently of any alleged breach". The defendant argued that it could only be disentitled from asserting a contractual right or claiming a contractual benefit if this right or benefit was accrued as a direct result of its prior breach of contract. However, its right under Clause 2.4 was not a "direct result" of any such alleged breach.

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[78] DWS at para 75–78

It retained the discretion under the SSHAs to approve or reject an Exit Event whether or not it had cooperated with the plaintiff, and its right to demand that the plaintiff redeem its RCPS under Clause 2.4 would arise as long as an Exit Event was not achieved by the cut-off date.[79]

My decision

62 Assuming *arguendo* that there was both an agreement between the parties in June 2017 and an implied duty to cooperate towards achieving an Exit Event, I would conclude as the AR did that the duty had not been breached by the defendant. There were no grounds to suggest that the defendant had sought to obstruct or impede the plaintiff's efforts to secure potential investors. A duty to cooperate extended only to doing what was reasonable in the circumstances (see, *eg*, *Tan Chin Hoon* at [149]). It was not unreasonable for the defendant to withhold providing written confirmation of intended redemption since there was no agreed redemption sum or evidence of adequate redemption funds forthcoming from the plaintiff. By the plaintiff's own account, the plaintiff had one and a half years from June 2017 to see to the necessary funding arrangements which would be prerequisites to a firm agreement being reached with the defendant. It was only on 30 December 2018 that the plaintiff informed the defendant that it had "finally" managed to secure an indication of interest from an investor and purported to offer the defendant a "smooth exit".[80]

63 By any measure, it would not be reasonable to expect the defendant to accept the plaintiff's proposed "smooth exit" with only one day to spare to 31 December 2018, the deadline for the five stipulated Exit Events. Perhaps it

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79 DWS at para 84

80 Lee William's email dated 30 December 2018 in TBCA1, BCP Tab 2 at p 192

was out of this realisation that Mr Lee himself expressly mentioned in his email of 30 December 2018 (in capital letters, no less) that the defendant could otherwise "GO AHEAD TO ISSUE A REDEMPTION NOTICE NOW as per SHA" (see [9] above).

64 In this connection, Mr Lee had acknowledged in the same email that his proposed "exit plan" and redemption were two separate and distinct options.[81] He went on to state that it was "entirely up too [*sic*] OWW decision to cooperate".[82] This further indicates that there was no agreement in June 2017 and no basis to pin the blame for the eventual outcome on the defendant's alleged failure to meet its duty to cooperate. The defendant was simply maintaining its entitlement to its rights under the SSHAs.

65 On the defendant's point that its contractual right under Clause 2.4 existed independently of any alleged breach, I agreed with the AR that if there had been an agreement to achieve an Exit Event and the defendant had breached an implied duty to cooperate to procure it, there would be a *prima facie* case that the defendant should not be entitled to exercise its right of redemption. Whether and to what extent the breach had caused the failure to achieve an Exit Event would be a matter for which evidence should be adduced and subject to proof at trial. In any event, this point is immaterial given my findings that there had been no agreement, no implied duty to cooperate and no breach of such a duty.

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81 Lee William's email dated 30 December 2018 in TBCA1, BCP Tab 2 at p 192

82 Lee William's email dated 2 January 2019 in TBCA1, BCP Tab 2 at p 191

Whether the plaintiff had breached material terms

Parties' submissions

66 The defendant submitted that it was additionally entitled to exercise its redemption right on the basis that the plaintiff had breached several material terms, such that a Default Event under Clause 1.1 had occurred.[83] The defendant argued that Clauses 10.1(dd), 10.1(e) and 7.4 of the 2016 SSHA were material terms.

67 Clause 10.1(dd) provided that specific approval was required for the appointment of and/or change to the authorised bank signatories of the plaintiff; while Clause 10.1(e) provided that specific approval was required for the payment of any director's fees or other remuneration to any of the directors of the plaintiff. The defendant submitted that Clause 10.1 effectively "grants [the defendant] special voting and veto rights" despite its status as a minority shareholder, such that it could safeguard its investment in the plaintiff.[84] As a shareholder's voting right was fundamental, these clauses had to be material terms. Clause 10.1(dd) had been breached as Mr Lou had been removed as an authorised bank signatory without the defendant's approval, and Clause 10.1(e) had been breached as the plaintiff and Mr Lee had increased the directors' salaries and allowances paid to Mr Lee and his wife Ms Loi (who was also a director of the plaintiff) without prior shareholder approval.

68 Clause 7.4 provided that the plaintiff and Mr Lee had an obligation to procure and supply to the defendant financial documents within stipulated time

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83 DWS at para 90

84 DWS at para 98(1)

periods. The defendant submitted that this clause was a material term as Clause 19.1 provided that "time shall be of the essence … as regards any dates and periods mentioned". This clause had been breached as the plaintiff frequently failed to meet the deadlines for information submission stipulated under Clause 7.4.

69 The plaintiff took the position that these clauses were not material terms. According to the plaintiff, a "material term" is to be interpreted as a "condition" within the meaning of the condition/warranty approach set out in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal* [2007] 4 SLR(R) 413. According to the plaintiff, Clauses 10.1(e), 10.1(dd) and 7.4(a) to (d) were not intended to be material terms. It argued that the defendant, a venture capital fund, would not have intended to participate in the day-to-day management of the plaintiff and its sole interest was to earn returns on its investments. Accordingly, "material" terms would be those that would undermine the value of the defendant's shareholding if breached.[85] It also offered various defences to the defendant's claim, including waiver or estoppel, and that the defendant had failed to issue a notice of breach in respect of certain alleged breaches.

My decision

70 The phrase "material term" in Clause 1.1 of the SSHAs was not defined in the SSHAs. I agreed with the AR that additional evidence would need to be adduced as to what the parties had intended to be construed as material terms. In interpreting a contract, the court is to "determine and give effect to the intention of the parties, objectively ascertained" (*HSBC Trustee (Singapore) Ltd v Lucky Realty Co Pte Ltd* [2015] 3 SLR 885 at [30], referencing *Zurich*

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[85] PWS at paras 108, 111 and 112

Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd [2008] 3 SLR(R) 1029). While the defendant had made various assertions as to whether the relevant clauses were fundamental or important terms in the SSHAs, the court would have to ascertain which terms should be deemed "material" such that a breach would amount to a Default Event, entitling the defendant to exit from its investment.

71 I did not think that the defendant's position was so incontrovertibly made out that it would be dispositive of the main issue, *ie*, whether it had a right to demand that the plaintiff redeem its RCPS. As such, the plaintiff's claim would not have been struck out on this basis without more. However, as noted at [17] above, whether the defendant could rely on the plaintiff's alleged breaches of material terms is immaterial since I had found that the plaintiff failed on the first issue, which formed the core of its arguments on appeal.

Conclusion

72 For the reasons I have set out above, the appeal was dismissed.

73 As for costs of the appeal, the defendant submitted that a sum of $10,000 would be appropriate, with an additional $1,090 for disbursements. The plaintiff submitted that a sum of $5,000 inclusive of disbursements would be appropriate, on the basis that there were no additional affidavits filed and the submissions and authorities were substantially similar to those canvassed at the hearing below.[86]

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86 Certified Transcript (28 August) at p 11 ln 3–10

74 I noted that almost an entire day had been taken for submissions. Considering the submissions on costs by both parties as well as the costs guidelines set out in Appendix G of the Supreme Court Practice Directions, I ordered costs of the appeal to the defendant, to be fixed at $9,000 inclusive of disbursements.[87]

See Kee Oon
Judge

Lim Qiu Yi, Regina and Woo Shu Yan (Drew & Napier LLC) for the plaintiff;
Lee Bik Wei and Ngiam Hian San, Laura (Allen & Gledhill LLP) for the defendant.

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87 Certified Transcript (28 August) at p 12 ln 3–8