OCBC Capital Investment Asia Ltd *v* Wong Hua Choon
[2012] SGCA 54

Case Number	: Civil Appeal No 16 of 2012
Decision Date	: 28 September 2012
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Lee Eng Beng SC and Jonathan Lee Zhongwei (Rajah & Tann LLP) for the appellant; Chew Kei-Jin, Chen Yixin Edith and Teo Jun Wei Andre (Tan Rajah & Cheah) for the respondent.
Parties	: OCBC Capital Investment Asia Ltd — Wong Hua Choon

Contract

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2012] 2 SLR 903.]

28 September 2012 Judgment reserved

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

Introduction and facts

1 This is an appeal against the decision of the trial judge ("the Judge") in *OCBC Capital Investment Asia Ltd v Wong Hua Choon* [2012] 2 SLR 311 ("the Judgment").

The dramatis personae

2 The Appellant, OCBC Capital Investment Asia Limited, is an investment holding company incorporated in Hong Kong which is wholly owned by Oversea-Chinese Banking Corporation Limited ("OCBC"). Messrs Vincent Ng Fook Cheong ("Vincent") and Goh Chong Jin ("Mr Goh") were officers of the Appellant at the material time. Mr Chua Choon Kiang ("Mr Chua") was the Vice-President of the Mezzanine Capital Unit of OCBC at the material time. Vincent, Mr Goh and Mr Chua shall collectively be referred to as "the Appellant's representatives" in this judgment.

3 The Respondent, Mr Wong Hua Choon, is the Appellant's customer. He is the President and Chief Executive Officer of Frontken Corporation Berhad ("Frontken"), a company incorporated in Malaysia and listed on the Main Board of Bursa Malaysia Securities Berhad ("Bursa Malaysia"). He is also a shareholder of Frontken, with a shareholding of about 20%. Mr Nicholas Ng Wai Pin ("Nicholas") was an independent director of Frontken and a personal friend of the Respondent at the material time. He was also legally trained and had practised law before. In fact, the Respondent relied on Nicholas who acted upon the Respondent's instructions as well as on his behalf in the Respondent's dealings with the Appellant's representatives at the material time. Nicholas was first introduced to both Mr Goh and Vincent at a meeting held on 26 February 2009 between the Respondent, Nicholas, Mr Goh and Vincent.

The original agreement – the Risk Participation Agreement

4 On 20 July 2007, the Appellant and the Respondent entered into a contract ("the Risk

Participation Agreement"). Under the terms of the Risk Participation Agreement, if the Appellant subscribed for shares in Frontken ("the Frontken shares") and subsequently sold them within a stipulated period ("the Risk Participation Period"), the Respondent had to pay the Appellant the difference between the sale price and the "floor price" (which was stipulated as 85% of the cost price of each Frontken share) of the Frontken shares less any capital distributions received. After the parties entered into the Risk Participation Agreement, the Appellant proceeded to subscribe to a total of 27,630,400 Frontken shares. Pursuant to the terms of the Risk Participation Agreement, the Risk Participation Period was scheduled to expire on 10 August 2009.

The impact of the global financial crisis in late 2008 and the search for a mutually beneficial solution

5 In late 2008, the global financial crisis struck and the market price of the Frontken shares fell drastically below the floor price. In February 2009, the Appellant decided to divest itself of its investment in Frontken. This intention was communicated to the Respondent at a meeting on 10 February 2009 held between the Respondent, Mr Goh and Vincent.

6 As mentioned above at [3], the Respondent owned about 20% of the shares in Frontken then and was the largest single shareholder in Frontken. If the Appellant were to sell its Frontken shares, the Respondent would be exposed to a large personal liability under the Risk Participation Agreement and the share price of Frontken would be depressed, hence reducing the value of the Respondent's shareholding in Frontken. In so far as the Appellant was concerned, in the best case scenario, the Appellant would suffer a 15% loss on its investment in Frontken, assuming buyers for its Frontken shares could be found and the Respondent was able to meet his liabilities under the Risk Participation Agreement. There was hence an additional risk to the Appellant if it could not find buyers for its Frontken shares and if the Respondent did not have the financial liquidity to meet his liabilities to the Appellant under the Risk Participation Agreement.

7 In the circumstances, the Appellant and the Respondent entered into negotiations in order to find a mutually beneficial solution, which would simultaneously furnish the Appellant with an acceptable exit option and safeguard the Respondent's interest in the Frontken shares.

The 23 June 2009 meeting

8 These negotiations culminated in a meeting on 23 June 2009 ("the 23 June 2009 meeting") in which the parties settled on the terms contained in a term sheet ("the Term Sheet") which was earlier drawn up on 16 June 2009.

9 The key provisions of the Term Sheet [note: 1] were as follows:

(a) Risk Participation Period: "In force immediately following Restricted Period (1 July 2010) for as long as [the Appellant] continues to hold its Frontken shares".

(b) Restricted Period: "1 July 2009 to 30 June 2010. Risk Participation does not apply during this period; Compensation Sum will also not apply to the balance Sale Shares if [the Appellant] sells any shares below [RM 0.47] during this period".

(c) Sale of Shares to [the Respondent] ("Sale Shares"):

(i) The Appellant shall sell 3,703,704 [Frontken shares] to the Respondent in five tranches at Market Price, *ie*, the closing price quoted by Bursa Malaysia for the trading day

immediately preceding the date of the sale of shares.

(ii) The Respondent "shall compensate difference between Market Price and [RM 0.54]" ("the Compensation Sum").

(iii) The Appellant "may sell balance [Frontken shares] at anytime [*sic*] but if any shares are sold below [RM 0.47] during Restricted Period, [the Appellant] must forgo balance Compensation Sum for subsequent tranches of the Sale Shares".

(d) Security: The Respondent has to pledge [his] Frontken shares to the Appellant upon signing of this agreement. The Respondent "shall undertake to maintain the [Loan-to-Value ratio ("LTV")] to be not more than 1. Should the LTV be more than 1, [the Respondent] is required to top up by pledging additional Security so that the [LTV] immediately after topping up is not more than 0.9".

(e) Shareholder Profit Sharing: The Respondent would be entitled to profit-sharing, should the Appellant make any profit from any eventual disposal of its Frontken shares, according to the following formula: "(Total Net Proceeds from sale of all Investor shares – RM 15M) x 25%".

(f) Right of first refusal: The Respondent shall have a right of first refusal to purchase the Appellant's remaining Frontken shares, whereby "the [s]elling price shall be at least 87.5% the previous day's closing price".

(g) Fees: Waived by the Appellant.

(h) Documentation: "A Supplemental Agreement to be executed to effect necessary changes."

10 The Term Sheet essentially provided for the sale of 3,703,704 Frontken shares owned by the Appellant to the Respondent in five tranches. It also provided for the remaining 23,926,696 shares to be subject to, *inter alia*, a *new* Risk Participation Period commencing from 1 July 2010 and continuing as long as the Appellant holds any Frontken shares. The Respondent had a right of first refusal to the remaining Frontken shares that the Appellant chose to sell. If the Appellant made a profit from selling the remaining Frontken shares, it was obligated to share its profits with the Respondent in accordance with a specified formula (see above at [9(e)]). The Respondent also had to pledge a certain amount of his shares in Frontken as security.

11 Most importantly, for the purposes of the present appeal, the parties agreed to execute a "Supplemental Agreement" (hereafter referred to as "the Supplemental Agreement") to "effect necessary changes". Because of its importance, the term providing for this ("the crucial term") is reproduced once again, as follows: [note: 2]

> ***Documentation*** : A ***Supplemental Agreement*** *to be executed* ***to effect necessary changes.*** [emphasis added in italics and bold italics]

The events following the 23 June 2009 meeting

12 After the 23 June 2009 meeting, an OCBC investment committee ("OIC") internal meeting was held in the early evening of that same day. The OIC approved the terms of the Term Sheet on 23 June 2009 itself. [note: 3]

13 On the night of 23 June 2009, Mr Goh forwarded to the Respondent and Nicholas a list of the

panel of lawyers that the Appellant would be agreeable to appoint to prepare the formal documentation. [note: 4] The Respondent had agreed to bear the legal fees in connection with the preparation of the formal legal documentation. On 24 June 2009, Mr Goh sent a follow-up email to the Respondent and Nicholas, requesting their feedback on the list of the panel of lawyers. On the same day, Mr Chua also sent an email to the Respondent and Nicholas, stating "its [*sic*] was great that [they] were able to quickly agree on the outstanding matters" and that he "[l]ook[ed] forward to signing of this [S]upplemental [Agreement] with the same urgency". [note: 5]

14 From 24 June 2009 to 6 July 2009, Nicholas (who, as already noted above at [3], represented the Respondent) exchanged correspondence with Mr Goh and Mr Chua in which he attempted to minimise the legal fees for preparing the formal documentation. On 8 July 2009, the Respondent agreed to the appointment of Shook Lin & Bok (Malaysia) to prepare the Supplemental Agreement, with OCBC's internal legal department drafting the Sale and Purchase Agreement as well as the Memorandum of Deposit. From then till the time when the documentation was sent to the Respondent, there was no communication or any meeting between the parties.

15 The formal documentation (which included the Supplemental Agreement) was eventually completed by the Appellant and sent to the Respondent for execution on 6 August 2009, just four days before the expiry of the Risk Participation Period on 10 August 2009 (see above at [4]). Despite persistent attempts by Mr Chua and Mr Goh to contact the Respondent, they were unable to reach him. The Respondent only responded by email on 11 August 2009, the day *after* the *expiry* of the Risk Participation Period. In that email, the Respondent requested for time to consult his lawyers on the documents sent to him, which included the Supplemental Agreement. In his reply dated 12 August 2009, Mr Chua requested that the Respondent sign a Letter of Extension for the extension of the Risk Participation Period (which expired on 10 August 2009) under the Risk Participation Agreement ("the Letter of Extension"). The Respondent replied on the same day, again requesting for some time to consult his lawyers, to which request Mr Chua agreed. From 10 to 28 August 2009, the Appellant's representatives repeatedly sought updates from the Respondent and requested that the Respondent sign the Letter of Extension, but to no avail.

16 Eventually, a meeting on 28 August 2009 was arranged and held between the Respondent, Nicholas and Mr Chua. At that meeting, Mr Chua presented the formal documentation to the Respondent and asked him to sign them, but the Respondent declined to sign the documentation, stating that he was not legally obliged to do so. Subsequently, at the same meeting, a "restructuring" proposal was floated under which the Appellant was to extend a loan to Frontken to purchase the Appellant's Frontken shares. The discussions for the proposal that took place in the following days ended in a stalemate.

The proceedings in the court below

The parties' arguments

17 The Appellant subsequently sued the Respondent in the High Court by initiating Suit No 63 of 2010 ("the suit"), alleging that a legally binding (oral) contract in the terms of the Term Sheet had arisen as a result of the 23 June 2009 meeting and that the Respondent had been in repudiatory breach of the contract by refusing to execute the formal documentation and performing his obligations under the contract. The Appellant alleged that it had suffered loss as a result of the Respondent's repudiatory breach.

18 Alternatively, the Appellant pleaded estoppel by convention as a second string to its legal bow, alleging that the Respondent was estopped from either denying that a legally binding contract was

formed on 23 June 2009 or denying that the Risk Participation Period had been extended till the execution of the formal documentation, because of a common assumption or understanding held by both parties that a legally binding contract had been validly formed on 23 June 2009, or that the Risk Participation Period had been extended till the execution of the formal documentation and that the Respondent had knowingly acquiesced in the same.

19 On the other hand, the Respondent argued that no contract had been formed at the 23 June 2009 meeting, no breach of any contract had occurred, no assumption or understanding as pleaded by the Appellant had existed, and the Appellant had not suffered any loss that it could claim against the Respondent.

The Judge's decision

20 The Judge dismissed the Appellant's claim.

21 In arriving at his decision, the Judge first reviewed the relevant case law (see the Judgment at [21]–[45]) after setting out the undisputed facts. He noted this court's decision in *Norwest Holdings Pte Ltd (in liquidation) v Newport Mining Ltd and another appeal* [2011] 4 SLR 617 ("*Norwest*") and stated that if the crucial term in the Term Sheet was tantamount to a "subject to contract" clause, then "very strong and exceptional context" must be demonstrated by the Appellant before the *prima facie* inference that the parties' intention was not to be bound prior to the execution of the Supplemental Agreement would be displaced (see the Judgment at [23]). He noted that "[t]he critical inquiry in resolving the applicable scenario is to determine from the objective evidence whether the parties intended to be *immediately bound* to perform on the agreed terms or to defer legal relations until formal execution of the written contract" [emphasis in original], and that "[i]mmediacy of performance is the key consideration" (see the Judgment at [34]).

22 After construing the crucial term (see above at [11]), the Judge held that it had the same effect as a "subject to contract" clause (see the Judgment at [35]).

23 The Judge then proceeded to examine the conduct of the parties prior to, at, as well as subsequent to the 23 June 2009 meeting to ascertain whether their conduct was consistent with the existence of a binding oral contract entered into during that particular meeting (see the Judgment at [45]).

24 The Judge first examined the Appellant's submissions made to displace the *prima facie* inference (see the Judgment at [46]). After examining the Appellant's case, the Judge concluded that the Appellant had failed to adduce sufficient evidence to displace the *prima facie* inference (see the Judgment at [56]).

25 The Judge then proceeded to examine the Respondent's submissions made demonstrate that the parties' objective intention was for the agreement between them to be legally binding only after the execution of the formal agreement (see the Judgment at [56]). The Judge reviewed the evidence and accepted and agreed with the four main points made by the Respondent, which were as follows (see the Judgment at [56]–[87]):

(a) The fact that the approval of the OIC had to be obtained after the 23 June 2009 meeting and before the Appellant could proceed with the preparation of, *inter alia*, the Supplemental Agreement;

(b) The manner of the operation of the Supplemental Agreement both under its terms and in

practice;

(c) The course of dealing between the parties; and

(d) The Appellant's absence of belief in the existence of a binding oral contract after the 23 June 2009 meeting and prior to the commencement of the suit.

26 In so far as the fourth point was concerned, the Judge considered and accepted three material facts raised by the Respondent to demonstrate the Appellant's own absence of belief in the existence of a binding contract concluded at the 23 June 2009 meeting (see the Judgment at [74]–[87]):

(a) The Appellant's attempts to salvage the Risk Participation Agreement after the expiry of the Risk Participation Period, including:

(i) requesting that the Respondent sign the Letter of Extension in order to extend the Risk Participation Period; and

(ii) negotiating with the Respondent to restructure the deal.

(b) Evidence of the Appellant's representatives under cross-examination indicating their absence of belief in the existence of a binding oral contract reached at the 23 June 2009 meeting.

(c) The urgency with which the Appellant treated the execution of the Supplemental Agreement in view of the impending expiry of the Risk Participation Period.

27 The Judge was of the view that the conduct of the parties was entirely consistent with their own understanding that legal relations between them had been deferred until the execution of the Supplemental Agreement. As a result, the Judge found that no binding oral contract had been concluded at the 23 June 2009 meeting (see the Judgment at [87]).

28 In so far as the Appellant's alternative claim based on the doctrine of estoppel by convention was concerned, the Judge was of the view that, on the evidence, there had been no "unambiguous and unequivocal" assumption by the Appellant *vis-à-vis* the conclusion of a binding oral agreement (see the Judgment at [94]), with the result that the Appellant's argument failed *in limine* and there was no need to consider whether estoppel by convention could be used to found a cause of action (see the Judgment at [96]).

The issues on appeal

The Appellant's arguments

29 The Appellant raises two issues on appeal. First, the Appellant argues that a binding contract was formed at the 23 June 2009 meeting ("the contractual issue"). Secondly, the Appellant argues, in the alternative, that it is entitled to relief under the doctrine of promissory estoppel ("the promissory estoppel issue").

30 For reasons which we will elaborate on below, the present appeal may be decided on the basis of the Appellant's arguments with regard to the contractual issue. We therefore do not propose to consider the promissory estoppel issue in this judgment and will focus only on the contractual issue.

31 In so far as the contractual issue is concerned, the Appellant essentially argues that the Judge

was wrong in his assessment of the evidence. In the Appellant's view, the evidence demonstrates that the parties intended to be bound by the terms of the agreement reached at the 23 June 2009 meeting. The Appellant first points out that there was evidence of a concluded agreement between the parties, emphasising the parties' eagerness to *conclude* an agreement at the 23 June 2009 meeting. The Appellant then argues that an objective assessment of the parties' conduct after the 23 June 2009 meeting demonstrates that the parties acted consistently with the existence of a binding agreement arrived at the 23 June 2009 meeting, referring to the fact that the Appellant did not sell its Frontken shares as well as to certain contemporaneous correspondence between the Appellant's representatives, the Respondent and Nicholas.

32 The Appellant argues that the Judge was wrong to accept the four points raised by the Respondent (see above at [25]) as none of these points demonstrates that no binding contract arose at the 23 June 2009 meeting. Reviewing each of the four points in detail, the Appellant argues that each of these points was inconsistent with the evidence, properly assessed.

33 Not surprisingly, the Appellant also disagrees with the Judge's construction of the crucial term in the Term Sheet.

The Respondent's arguments

34 In response, the Respondent supports the Judge's analysis of the evidence and conclusion that a legally binding contract was not formed at the 23 June 2009 meeting, and that the parties intended a legally binding contract to be concluded only upon the execution of the formal documentation.

35 The Respondent also argues that, objectively construed, the evidence demonstrates that the parties intended the terms of the Term Sheet to take effect only upon execution of the Supplemental Agreement. The Respondent submits that the Judge was fully entitled to make the findings he did in this respect, and that the Appellant's arguments to the contrary (see above at [31]) are untenable. The Respondent argues that the Judge's approach is consistent with that in *Norwest*, and that the Judge correctly interpreted the crucial term in the Term Sheet as a "subject to contract" clause.

36 We shall now examine these arguments and the evidence adduced before the Judge.

The contractual issue

37 The decision of this court in relation to this particular issue turns on the answer to one straightforward question: Do the *objective* facts demonstrate that the parties had entered into a binding oral contract at the 23 June 2009 meeting, *or* do they support, instead, the opposite conclusion, in which case a binding agreement would only come into being when the Supplemental Agreement referred to in the crucial term was signed?

The applicable legal principles

38 The applicable legal principles are relatively straightforward and were canvassed by this court most recently in *Norwest*. They were also set out in some detail by the Judge in the court below (see the Judgment at [21]–[45]). We agree with the Judge's exposition of the applicable legal principles although, as we will explain below, we respectfully disagree with the conclusion he reached based on his assessment of the evidence.

39 A useful summary of the applicable legal principles may also be found in a recent book, as follows (see Andrew Phang Boon Leong & Goh Yihan, "Offer and Acceptance" in ch 3 of *The Law of*

Contract in Singapore (Academy Publishing, 2012) at paras 03-171 and 03-173):

> … the particular facts as well as the language utilised are crucial. If, in other words, the actual facts and/or language merit it, the court will hold that a valid and binding contract has been concluded. As the Court of Appeal put it in [*Norwest*], " ***whether there is a binding contract between the parties should be determined by considering all the circumstances, not just the inclusion of the stock phrase 'subject to contract'*** (on the basis that the *substance* of the situation must always prevail)" …
>
> ...
>
> However, in some cases, ***even if some terms remain to be negotiated, it is possible for parties to have agreed to a contract despite the presence of a "subject to contract" clause.*** As the Court of Appeal said in *The Rainbow Spring*:
>
> > It is established law that negotiating parties may conclude a contract that binds each of them even though there are some terms that are yet to be agreed. The important question is whether the parties by their words and conduct have made it clear, objectively, that they intend to be bound despite the unsettled terms.
>
> [emphasis in italics in original, emphasis added in bold italics and bold underlined italics, footnotes omitted]

Our decision

40 As mentioned at [38] above, we respectfully differ from the decision of the Judge as, in our view, the objective (and relevant) facts point *towards* the existence of a binding oral contract entered into between the parties at the 23 June 2009 meeting. We will deal with them *seriatim*. However, before proceeding to do so, we note that, in fairness to the Respondent, we will also consider and discuss the salient facts which may militate *against* the existence of this contract, after discussing the salient facts which confirm the existence of the contract.

41 Much emphasis was placed (especially by the Respondent) on the *oral testimony* given by various witnesses in the court below. Unfortunately, very little of the testimony relied upon by the Respondent was in fact helpful, being neutral at best and either irrelevant or ambiguous at worst. It bears mention that the first port of call for any court in determining the existence of an alleged contract and/or its terms would be the relevant *documentary* evidence. Where (as in the present case) the issue is whether or not a binding contract *exists* between the parties, a contemporaneous written record of the evidence is obviously more reliable than a witness's oral testimony given well after the fact, recollecting what has transpired. Such evidence may be coloured by the onset of subsequent events and the very factual dispute between the parties. In this regard, *subjective* statements of witnesses *alone* are, in the nature of things, often unhelpful. Further, where the witnesses themselves are not legally trained, counsel ought not – as the Respondent's counsel sought to do in oral submissions before this court – to forensically parse the words they use as if they were words in a statute. This is not to state that oral testimony should, *ipso facto*, be discounted. On the contrary, *credible* oral testimony can be helpful to the court, especially where (as we shall see below in relation to supporting the Appellant's case) such testimony is given for the purpose of *clarifying the existing documentary evidence*. There is, however, no magic formula in determining the appropriate weight that should be given to witness testimony. Much would depend on the precise factual matrix before the court. However, it bears reiterating that the court would always look first to the most reliable and objective evidence as to whether or not a binding contract was entered into between the

parties and such evidence would tend to be *documentary* in nature.

42 The Judge found the crucial term to be in the nature of an ordinary "subject to contract" clause. Given its critical importance in the context of the present appeal, the crucial term is reproduced once again, as follows:

> ***Documentation*** : A ***Supplemental Agreement*** *to be executed* ***to effect necessary changes*** . [emphasis added in italics and bold italics]

We respectfully disagree with the Judge in this regard. The critical requirement in the crucial term is not that a Supplemental Agreement shall be executed, but "to effect the necessary changes". This form of words implies that there is already an existing *underlying* agreement on the Appellant's Frontken shares, and that the Supplemental Agreement is merely to *give effect to the changes*. The questions which we therefore need to consider are what these changes were, and whether the failure of the parties to execute a Supplemental Agreement to give effect to these changes somehow also had the effect of invalidating the underlying agreement. Let us now examine the evidence.

43 As already mentioned at [7] above, both parties were urgently seeking a mutually beneficial solution to their respective problems in relation to the disposal of the Frontken shares of which market value had dropped sharply in 2008.

44 Pertinently, *prior to* the 23 June 2009 meeting, Mr Chua had written (*via* an email dated 16 June 2009) to Nicholas, as follows: [note: 6]

> I would like to send out the terms latest by tomorrow and would appreciate feedback by Friday, prior to the meeting *so that we can* ***sign off*** *and* [*sic*] ***an in-principle agreement*** by Monday when we meet. [The parties in fact met on Tuesday, 23 June 2009, *viz*, the 23 June 2009 meeting.]
>
> I apologise for ***the urgency*** in trying *to* ***complete*** *this* ***quickly*** , but I feel that we have been in discussions for quite some time already *and time for us to exit within the window is getting smaller if we are not able to come to* ***some agreement*** *by Monday*. [Again, the parties in fact met on Tuesday, 23 June 2009, *viz*, the 23 June 2009 meeting.]
>
> [emphasis added in italics and bold italics]

45 The Judge was of the view that the reference to an "in-principle agreement" in the email above detracted from a finding that the parties intended to enter into a binding oral agreement at the 23 June 2009 meeting (see the Judgment at [51]). With respect, such a view places too much of a legal gloss on what was essentially an email written by a layperson (see, in this regard, our caveat above at [41]). Instead, emphasis should have been placed on the words "some agreement". The purpose of the 23 June 2009 meeting was plainly to reach an agreement on the outstanding issues which had been the subject of "discussions for quite some time". It is also plain from this email that, because of the urgency of the matter, the Appellant was keen for a quick and (more importantly) *final* resolution. Such finality could only have been achieved by a *binding* agreement between the parties. This conclusion is buttressed by the words "sign off" as well as "complete" utilised by Mr Chua in the email reproduced in the preceding paragraph.

46 More importantly, Mr Chua subsequently wrote to both the Respondent and Nicholas (*via* an email dated 17 June 2009), as follows: [note: 7]

> As per my email yesterday, I have attached a summary of terms and conditions that I hope that we would be able to ***finalise on Tuesday*** [*ie*, 23 June 2009] *and start the* ***documentation*** *immediately after that*. [emphasis added in italics and bold italics]

It was clear that, in so far as *the Appellant* was concerned, the Supplemental Agreement referred to in *the crucial term* in the Term Sheet (which, in fact, emanated *from the Appellant itself*) was merely "*documentation*" that would *formally embody* the binding agreement that the parties would "*finalise*" *at the 23 June 2009 meeting itself*. What, then, about the *Respondent's* perspective?

47 More importantly, it was clear, from *the Respondent himself*, that he was *wholly in agreement with the terms set out in the Term Sheet*, which were discussed at the 23 June 2009 meeting itself. This was one occasion when the oral testimony was both clear as well as helpful. In particular, the following answers by the Respondent during cross-examination are particularly apposite: [note: 8]

Court: I'm right, *Mr Wong, you---you---you are basically saying that as far as you are concerned, you have no issue with the---the---the terms set out in the term sheet, correct?*

Witness: ***Your Honour, yes. In fact, I have no issue with the term sheet, with that term sheet or earlier term sheet.*** To me, I want to see a paper come to me so I can give---go to my lawyer,

Court: Yes.

Q And, Mr Wong, you had---not only had you no issue with term sheet, that was the impression that you gave to [the Appellant], right?

A ***No, I---I have no issue because give me a term sheet because I don't have to make a decision on the---***

Q *Mr---Mr Wong, you had no issue with the term sheet. That's clear, right?*

A ***I have no issue to have the term sheet go and make a draft agreement, Mr Tong.***

Q *That's not what the Judge's question was earlier.*

Court: *Did you have any issue with---*

Witness: Oh, yes, sorry.

Court: *---any of the terms set out in the term sheet that you wouldn't agree?*

Witness: ***Mm, no*** .

Court: Yes.

Witness: Thank you.

Court: ***Because if you didn't agree, you would have voiced it somewhere along the line at least by the 23rd of June, correct?***

Witness: ***Yes, your Honour.***

Court: ***Yes. Right, we'll proceed on that basis.***

Witness: ***Thank you, your Honour, we'll proceed.***

Court: ***And just---just to close up on that point. In the correspondence with the bank, with*** [***the Appellant], did you at any stage intimate to the---to [the Appellant], "Please have this draft agreement ready so that I could check with my own lawyers"? Did you ever say that?***

Witness: ***I did not but I have that experience when---I did not.***

Court: No, no, I just---

Witness: ***I did not.***

Court: ***Yes. Yes, you did not. Okay.***

Tong: Yes.

Q Now---

Witness: Your Honour, excuse me.

Court: Yes.

Witness: Erm, I just want to emphasise because even we deal with the bank, we do go through that lawyer to lawyer, ***er, paperwork, er, process.***

[emphasis added in italics and bold italics]

We should add that the references to "paperwork" and "process" do not aid the Respondent inasmuch as they could and, in our view, do refer to the execution of a formal document embodying the terms of an oral agreement *previously concluded* at the 23 June 2009 meeting.

48 It is noteworthy that the Respondent only set out his legal position in an email sent to Mr Chua dated 11 August 2009 (well after the 23 June 2009 meeting and several reminders from the Appellant) stating, as follows: [note: 9]

> If you recall during our meeting in your office there will *still some unresolved issues* on the proposed variation to the [Risk Participation Agreement]. These were supposed to be dealt with in the supplemental agreement which I noticed have just been sent to me. [emphasis added]

We shall have occasion to return to this email (see below at [52]). For present purposes, however, it will suffice to observe that these alleged "unresolved issues" appear to be, in our view, *a mere afterthought*. Save for the assertion in the Respondent's email dated 11 August 2009, there was *no evidence on record* to demonstrate that the parties had any "unresolved issues" *during (and even following) the 23 June 2009 meeting itself*.

49 Indeed, the fact that the parties had arrived at a binding oral contract at the 23 June 2009 meeting also appeared to be confirmed by Nicholas himself during cross-examination, as follows: [note: 10]

Q Yes. And so therefore it must have been p*retty straightforwa*rd for a law*yer to come and* (indistinct) it up ***and put it to a formal supplemental agreement because the parties had already come to an agreement. Right?***

A ***It should be.***

Q ***So there---you didn't expect any additional negotiation to be done. Right?***

A *No, no, I---that's not true. I do expect when---when the supplemental agreement is out, [the Respondent's] lawyer should be able to negotiate on the agreement because I---I---I---during my days when I was practising, there was no way I would receive a draft and not negotiate on it*.

Q Okay.

Court: *But you will not negotiate on matters which already were agreed in the agreed terms, right, in the indicative terms; would you?*

Witness: *No but if I was involved from day 1, yah, but if my client changed his mind along the way---*

Court: Right.

Witness: ---of course I would have conveyed that message before the draft came out, you know, but in this particular instance my state of mind, when I came out from that meeting with OCBC was that he would then go get somebody to---to look at it carefully, I wasn't doing that for him.

Court: *Well, it seems that you---you---you certainly were looking at it in a sufficient detail but---but never mind, Mr Ng, if the supplemental agreement, the key provisions reflect the agreed indicative term sheets, would you or [the Respondent] take issue with it?*

Witness: *I mean I wouldn't.*

Court: Yes, okay.

[emphasis added in italics and bold italics]

50 In fairness to Nicholas, he did attempt – as is evident from his subsequent response set out immediately above – to distance himself from his initial response. In our view, however, this subsequent response was far from convincing, especially taking into account the fact that Nicholas was not only legally trained but had also (in his own words) been in practice before (see above at [3]). Be that as it may, there is, in any event, further *documentary* evidence *after* the 23 June 2009 meeting which also points towards the fact that a binding oral contract had been concluded at that meeting.

51 In an email dated 24 June 2009 (one day *after* the 23 June 2009 meeting), Mr Chua wrote to, *inter alia*, the Respondent and Nicholas in the following terms: [note: 11]

> Thank you for the meeting yesterday, its [*sic*] was great that we were *able* ***to quickly agree on the outstanding matters*** . Look forward to ***signing*** of this [S]upplemental [Agreement] with the *same urgency*. [emphasis added in italics and bold italics]

52 It is clear, in our view, from the above email that the parties had in fact arrived at a binding oral contract during the 23 June 2009 meeting – which also took into account all "outstanding matters", thus *contradicting* the Respondent's (very much later) claim in his email dated 11 August 2009 (see above at [48]) to the effect that there were "still some unresolved issues" and rendering, as we have observed above at [48], it a mere afterthought.

53 Crucially, Mr Chua's email dated 24 June 2009 (see above at [51]) was *replied to by the Respondent himself* on the same day, wherein the Respondent stated, *inter alia*, as follows: [note: 12]

> Glad to meet you up and thnks [*sic*] for your time and enthusiasm. *My end will follow up precisely as discussed.* [emphasis added]

This was, in our view, a clear indication that the Respondent was *also* of the view that he had indeed entered into a binding oral contract with the Appellant during the 23 June 2009 meeting and that, pursuant to that contract, he would now "follow up precisely as discussed" – in particular, to execute the Supplemental Agreement which was merely to document the oral contract *already entered into* by the parties. There was nothing left to discuss after that meeting. In this regard, we note that although the Respondent sought to proffer an alternative explanation for the phrase "precisely as discussed" during cross-examination, it was not, in our view, persuasive in the least. The relevant testimony is as follows: [note: 13]

Q So look at this. This is 24th of June, sent at 4.47pm. You say here:

[Reads] "Hi CK,

Glad to meet you up and thks for your time and enthusiasm.

My end will follow up precisely as discussed."

"Precisely as discussed"---

A Yes.

Q *--- means you will continue---you know what the terms are in the agreement and you will continue to sign up---*

A *No*.

Q *---to the supplemental agreement?*

A *No.*

Q Right?

A No.

Q *Then explain what this means.*

A *"Precisely", use these terms, whether right or wrong worded, we would---how finally would be go and make a draft.*

Q *These are the terms that had been talked about at the discussion. [The Appellant] told you they wanted to finalise it. You were invited to the meeting to finalise it.* ***You didn't give any comments, you didn't make any objection, and then you proceeded, in your own words, to leave the meeting and talk about getting lawyers to draft it. So in that context, the word "follow up precisely as discussed" means---***

A *Waiting.*

Q ---"We will"---you will then proceed to sign up to the supplemental---

A No.

Q ---which---which would correspond with the term sheet. Correct?

A No.

Q And by this time, you knew that you were safe in the knowledge that [the Appellant] will not sell the shares?

A I don't know.

[emphasis added in italics and bold italics]

54 There was *also* an email response that same day (*ie*, 24 June 2009) *from Nicholas* to, *inter alia*, Mr Chua, Mr Goh and Vincent, as follows: [note: 14]

> Maybe to expedite matters could you please obtain a fee estimate from Zaid Ibrahim for them to *prepare the supplemental agreement bearing in mind the very concise and good summary of the* ***agreed*** *terms that CK* [*ie*, Mr Chua] *had prepared*. [emphasis added in italics and bold italics]

We should add that, although the Judge was correct in pointing to the fact that this particular email was sent in relation to the negotiation of the lawyers' fees for drafting the Supplemental Agreement (see the Judgment at [51]), it was, in our view, nevertheless *simultaneously* evidence of *a concluded and binding oral contract that the parties had already entered into at the 23 June 2009 meeting*. Once again, even from the *Respondent's perspective*, the irresistible inference is that there had indeed been a binding oral contract entered into between the parties at the 23 June 2009 meeting.

55 However, as noted at [48] above, in the email to Mr Chua and Mr Goh dated *11 August 2009*, the Respondent subsequently sought to assert that "there were *still some unresolved issues* on the proposed variation to the [Risk Participation Agreement]" [emphasis added]. *However*, as we have also noted at [52] above, this appears – having regard to the objective evidence and context – to have been a *legal ploy* on the part of the Respondent. Indeed, this particular email was sent *a day after the expiry of the Risk Participation Period*, with the Respondent claiming that he had "been away since last week to take advantage of the long weekend in Singapore". The Respondent then concluded this email by stating that he would "forward to [his] lawyers the various documents [the Appellant] sent [him] for their review and comments" and that he would "come back to [the Appellant] as soon as [he heard] back from them". The *reality* of the situation, however, was that *the Respondent himself had admitted, during cross-examination, that he knew that the draft Supplemental Agreement sent by the Appellant had arrived on 6 August 2009 itself, although he also claimed that he had "no time to handle" it*. The relevant part of this testimony is as follows: [note: 15]

Q Yes. And you knew. *You knew that the document* [*viz*, the draft Supplemental Agreement] *arrived on the 6*th [August 2009]*, right?*

A *I knew that I've no time to handle.*

Q And *you did not say to [the Appellant] that you'll be away or you did not send it off to*

Nicholas to look at at all, right?

A *I did not. I just feel that it's no point, so I did not.*

Q And in that period---it is not that there's no point. *If you were genuine and* bona fide *in your own evidence that this supplemental [agreement] that the lawyers prepared should accurately reflect the term sheet, then I suggest to you that you would have every interest to check that that indeed is the case*.

A *It is too---that was not my part*, ah.

[emphasis added]

56 Indeed, even after the Appellant's representatives continued to correspond with the Respondent after the latter had sent the email dated 11 August 2009 (see above at [48]), the Respondent merely strung the Appellant along. This is evident, for example, from the email exchange between the parties dated 21 August 2009. Indeed, as late as *21 August 2009*, the Respondent wrote to, *inter alia*, Mr Chua, Mr Goh and Vincent as follows (*via* an email of the same date): [note: 16]

Apologize...I have been engaged in day long meeting ....

I was having difficulty getting hold of the lawyer, but I did get his comment over the phone. The lawyer [*sic*] reply was that it is inadvisable to sign the letter that you requested.

Consequently, I will now seek a second opinion from another legal firm.

Shall try to revert soonest possible next week.

Thanks for your patience.

57 Significantly, the Appellant's response to the Respondent's email dated 21 August 2009 (see above at [56]) was consistent with its view (consistently held throughout) that a binding oral contract had been entered into between the parties at the 23 June 2009 meeting. This response (from Mr Chua to, *inter alia*, the Respondent) was sent the same day (*ie*, 21 August 2009), the material part of which reads as follows: [note: 17]

Honestly, I am very disappointed that you would not sign the letter, not to mention the agreement after all the time we have spent *to come to* ***an agreement cumulating*** [*sic*] ***in the term sheet*** *that we all* ***agreed to*** *in Singapore* ***on 23rd June 2009*** . Based on that meeting and concurrence from you, we proceeded to appoint the lawyers to draft the agreement and as requested by you and Nicholas we tried to reduce the total cost by using our own internal legal. [emphasis added in italics and bold italics]

58 The Respondent was in fact not entitled to change his mind following what is – by his own admission – his complete assent to the terms in the Term Sheet at the 23 June 2009 meeting. In the circumstances, it is clear that the parties had entered into a binding oral contract at the 23 June 2009 meeting. Indeed, this conclusion is clearly supported by the objective evidence as well as the context which we have already set out above.

59 We agree with counsel for the Appellant, Mr Lee Eng Beng SC ("Mr Lee"), that, as this was a situation that related to the *modification* of an *existing* contract between the parties *and* given the

relevant context in which the parties (already armed with a full understanding of the terms in the original contract (*ie*, the Risk Participation Agreement) and fully apprised of the various difficulties which a further agreement was intended to resolve to the mutual benefit of both parties) found themselves, it would not at all be surprising if the parties had entered into a binding *oral* contract at the 23 June 2009 meeting – leaving any inconsequential wrinkles to be ironed out in the (written) Supplemental Agreement. The Supplemental Agreement would therefore constitute both a mere formality and a document that confirmed a *binding oral* contract *already* entered into. Such a situation ought, in our view, to be distinguished from those in, for example, the English Court of Appeal decision of *Cheverny Consulting Ltd v Whitehead Mann Ltd* [2007] 1 All ER (Comm) 124 ("*Cheverny Consulting*") and the New Zealand Court of Appeal decision of *Concorde Enterprises Ltd v Anthony Motors (Hutt) Ltd* [1981] 2 NZLR 385 (both decisions of which were, in fact, followed by the Judge in the court below but which concerned commercial transactions of some complexity between parties who were not only dealing with each other for the first time but who were also represented by their own lawyers).

60 We now address another salient fact relied on by the Respondent to suggest that no binding contract had been entered into between the parties at the 23 June 2009 meeting. This was the fact that the Appellant was still required to obtain approval from the OIC. Counsel for the Respondent, Mr Chew Kei-Jin ("Mr Chew") argued that this was why no binding oral contract could have been contemplated by the parties at the 23 June 2009 meeting and that, instead, the parties had contemplated a binding agreement by way of the Supplemental Agreement (presumably after approval had been obtained by the Appellant from the OIC). Indeed, this point found favour with the Judge (see the Judgment at [57]–[62]).

61 In our view, this was, in the final analysis, the Respondent's strongest point. *However*, we find Mr Lee's argument (to the effect that approval by the OIC was only an *internal* matter which was *solely* within the scope of responsibility of the Appellant) to be more persuasive. The Respondent's argument is that the requirement of the OIC approval indicated that the Appellant's representatives at the meeting did not have the authority to enter into a binding oral agreement. In our view, the answer to this argument is that (a) the evidence shows that the Appellant's representatives went to the 23 June 2009 meeting to finalise the terms of the agreement which the parties had already discussed earlier; (b) the OIC approval was not known to the Respondent, and therefore, assuming that the Appellant's representatives had entered into a binding agreement with the Respondent, the Respondent would surely be entitled to hold the Appellant to the agreement; and (c) if the Appellant had subsequently sold the Respondent's shares in the market, the Respondent would surely argue that he would not be liable to perform any of his obligations under the oral contract (*eg*, his obligation to purchase the five tranches of shares from the Appellant), since the Appellant had itself breached the oral agreement not to sell the shares within the restricted period which was a term contained in the Term Sheet (see above at [9]).

62 Another argument the Respondent advanced is that according to the Term Sheet, the Respondent was supposed to have purchased Frontken shares from the Appellant in five separate tranches, the first of which was to take place on 31 July 2009 (which was some five weeks after the 23 June 2009 meeting). However, in the Sale and Purchase Agreement prepared by the Appellant's legal department (which was sent to the Respondent on 6 August 2009 together with the Supplemental Agreement), the date for the sale of the first tranche of Frontken shares was changed from 31 July 2009 to 15 August 2009 (which happened to be five days after the expiry of the Risk Participation Period). Not surprisingly, Mr Chew argued that this demonstrated that no binding oral agreement had been entered into between the parties at the 23 June 2009 meeting. This particular argument was endorsed in the following observations made by the Judge in the court below (see the Judgment at [65]–[67]):

65 Further, another key provision of the Term Sheet was that [the Appellant] would sell to [the Respondent] 3,703,704 Frontken shares in five tranches. The first tranche was stipulated to be sold on 31 July 2009, some five weeks after the 23 June 2009 meeting. However, there was no attempt by [the Appellant] to sell the first tranche to [the Respondent] when the date arrived. There was no correspondence whatsoever from [the Appellant] in relation to the sale of the first tranche as would be expected if [the Appellant] had regarded the oral contract to be immediately binding following the 23 June 2009 meeting. Instead, in the Sale and Purchase Agreement prepared by [the Appellant's] legal department which was sent to [the Respondent] on 6 August 2009 together with the Supplemental Agreement, the date for the sale of the first tranche was *unilaterally* changed by [the Appellant] from 31 July 2009 to 15 August 2009, which was five days after the expiry of the Risk Participation Period.

66 If there was indeed an oral binding contract concluded on 23 June 2009, [the Appellant] would have taken steps to sell the first tranche on 31 July 2009. As the Term Sheet stipulated an *effective* sale price of RM 0.54 per share (as [the Respondent] is required to compensate for the difference between Market Price and RM 0.54), which was [the Appellant's] average cost per share and was significantly higher than the market price as well as the floor price per share at that time, [the Appellant] would have reduced its risk exposure significantly by proceeding with the sale. Further, it is trite that the terms of a concluded contract can only be varied by mutual agreement (*Chitty*, para 22-032); however, the consent of [the Respondent] to the change in the date for the sale of the first tranche was never procured. While at common law a contract may validly confer on one contracting party the power to unilaterally vary the contract (*Chitty*, para 22-039), there was no such provision in the agreement here. It is irrelevant that the amendment caused no prejudice to [the Respondent] or that it was in fact "beneficial" in deferring the purchase date. Instead, [the Appellant's] failure to sell the first tranche and its subsequent amendment of the date of sale for the first tranche evidenced two things: (a) the terms agreed on 23 June 2009 were not regarded as immediately binding as they could still be amended, and (b) [the Appellant] viewed the agreement as binding only after its final execution, and having failed to have the contract executed before 31 July 2009, it stipulated a new transaction date of 15 August 2009 for the first tranche. The other difficulty with the unilateral amendment in respect of the sale of the first tranche is that it necessarily implies that [the Respondent] would be in breach of contract if he fails to purchase the first tranche on 15 August 2009. How could [the Respondent] be in breach of a term which he never agreed to?

67 When questioned on [the Appellant's] omission to sell the first tranche on 31 July 2009, Mr Goh offered the following explanation:

> Q: Can you explain to us why there was no such sale of the shares to [the Respondent] on 31st of July 2009?
>
> A: We wanted to---first on our mind is to get the documentation signed. So---er, er, and then we thought he would execute it after the signing of the documentation and---and we don't see any detriment ah to him lah by not buying, er, slightly earlier---I mean or slightly later.

The first part of Mr Goh's explanation is unhelpful to [the Appellant's] case – the priority placed on the execution of the contract over an immediate opportunity to reduce [the Appellant's] risk exposure goes to show that [the Appellant] had treated the agreement as having legal effect only upon formal execution. The second part of Mr Goh's explanation is unconvincing – it is difficult to believe that [the Appellant] was willing to postpone the sale because there was no detriment to [the Respondent]. This is *non sequitur* to [the Appellant's] omission to sell the first

tranche shares.

[emphasis in original]

63 We are unable to accept the Judge's finding that the amendment of the date for the sale of the first tranche of the Frontken shares showed that the Appellant acted on the basis that no binding agreement was reached at the 23 June 2009 meeting. The change in date was explicable on the basis that it constituted a waiver by the Appellant of the time frame for the sale of the first tranche of Frontken shares to the advantage of the Respondent (he did not have to pay the purchase consideration earlier). The amendment was nothing more than a proposal by the Appellant to revise the date for the sale of the first tranche of the Frontken shares to take place in order to accommodate the delay in the signing of the Supplemental Agreement. If the Respondent signed the Supplemental Agreement with this modification it simply meant that he agreed to it. If he did not, the Appellant's right to sell the first tranche of the Frontken shares would not have been impaired or forfeited but merely delayed. Time was not of the essence with respect to the sale of the first tranche of the Frontken shares.

64 Finally, we note the following observations in *Cheverny Consulting* (at [45]), which were in fact cited by the Judge (see the Judgment at [26]):

> Obviously each case depends on its own facts but in my view *where, as here, solicitors are involved* ***on both sides*** *, formal written agreements are to be produced and arrangements made for their execution the normal inference will be that the parties are not bound unless and until both of them sign the agreement …* [emphasis added in italics and bold italics]

In our view, as the Judge acknowledged, each case depends on its own facts, and therefore, no inference should be drawn only because both sides are represented by lawyers. In the present case however, the Judge's approach was contradicted by the fact that the parties were represented by *one common set of solicitors, viz*, Shook Lin & Bok (Malaysia) (see above at [14]) for the purpose of drawing up the Supplemental Agreement. This is by no means a conclusive factor, not least because, as already emphasised above, the entire process of inquiry depends very much on the precise factual matrix before the court. It is nevertheless yet another factor which, in our view, buttresses our finding that the parties had entered into a binding oral contract at the 23 June 2009 meeting.

The promissory estoppel issue

65 In the light of our findings with regard to the contractual issue, it is unnecessary to decide on the parties' (in particular, the Appellant's) arguments in relation to the doctrine of promissory estoppel. Indeed, a number of potentially thorny legal issues were raised in relation to the operation of this doctrine in the Singapore context – all of which will need to be addressed by this court when they arise directly for decision in a future case. Indeed, a threshold issue had also been raised by the Respondent to the effect that, having only pleaded and relied upon the doctrine of estoppel by *convention* in the court below, the Appellants could not now radically change tack and rely on the doctrine of *promissory* estoppel instead. Again, in the light of our decision on the contractual issue, there is no need for us to deal with this threshold issue as well.

Conclusion

For the reasons set out above, we allow the appeal. The Appellant is entitled to costs here and below. The usual consequential orders will apply.

[note: 1] Appellant's Core Bundle, vol 2 ("2ACB"), pp 33–34.

[note: 2] *Ibid*, p 34.

[note: 3] *Respondent's Supplemental Core Bundle* ("RSCB"), p 19.

[note: 4] 2ACB, p 40.

[note: 5] *Ibid*, p 41.

[note: 6] *Ibid*, p 31.

[note: 7] *Ibid*, p 28.

[note: 8] *Ibid*, pp 36–37.

[note: 9] *Ibid*, p 76.

[note: 10] *Ibid*, p 38.

[note: 11] *Ibid*, p 40.

[note: 12] *Ibid*, p 41.

[note: 13] RSCB, p 61.

[note: 14] 2ACB, p 42.

[note: 15] *Ibid*, p 75.

[note: 16] *Ibid*, p 79.

[note: 17] *Ibid*, p 83.

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