Ding Pei Zhen *v* Yap Son On
[2015] SGHC 246

Case Number : Suit No 558 of 2013

Decision Date : 23 September 2015

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Hee Theng Fong, Ong Po Qin and Lin Chunlong (Harry Elias Partnership LLP) for the plaintiff; Devinder Kumar Rai (Acies Law Corporation) for the defendant.

Parties : DING PEI ZHEN — YAP SON ON

Choses in Action – assignment

Contract – contractual terms – admissibility of evidence

Contract – contractual terms – rules of construction

Contract – remedies – damages

Equity – estoppel

[LawNet Editorial Note: In the appeal to this decision in Civil Appeal No 194 of 2015, the appeal on the main claim was allowed in full while the appeal on the counterclaim was allowed in part by the Court of Appeal on 19 December 2016. See [2016] SGCA 68.]

23 September 2015 Judgment reserved.

Judith Prakash J:

Introduction

1 In June 2012, the plaintiff and the defendant made an agreement on how certain shareholdings in a listed company should be divided between them. The agreement, which was handwritten in Chinese on a page from the prospectus prepared for the listing of the company, is now the centre of the parties' dispute. The plaintiff says that under the agreement she is entitled to more shares than she has so far received. The defendant denies this and says he has fully discharged his obligations. The main issue therefore is what the parties actually agreed on.

2 The plaintiff is Ding Pei Zhen, a Chinese businesswoman residing in Jinjiang in the Fujian Province of the People's Republic of China. Although she has only a basic education, the plaintiff is an enterprising woman who has been successful in business: she owns and runs a shoe factory. She is also referred to as "Hei Mei" in the correspondence between her and the defendant.

3 Xie Yinlai ("Mr Xie") is a business associate of the plaintiff who also resides in Jinjiang. While he is not a party to the agreement that is central to the dispute, he played an integral role in the whole transaction and is also key to the defendant's counterclaim. He is also referred to by the plaintiff as "Chief Xie".

4 The defendant is Yap Son On, a Malaysian businessman currently residing in Singapore. The defendant has experience in preparing companies for public listing and has parlayed this experience into a successful business. He acts as a listing consultant to China-based companies having the potential and desire to be listed on stock exchanges outside China. He also invests in such companies. Generally, the defendant acts through his company, One Capital Group Investment Limited ("One Capital"), of which he is the sole director and shareholder. He is also referred to by the plaintiff as "Chief Ye".

Background facts

The listing of Goldrooster AG

5 The defendant first became acquainted with the plaintiff and Mr Xie sometime in 2009. The trio subsequently agreed to work together in procuring the listing of Chinese companies on foreign bourses. The plaintiff's role was to introduce likely companies to the defendant who would then offer his services as their listing consultant. The plaintiff and the defendant also agreed that they would invest in such companies and share the expenses of the listing in return for share capital in the listed company.

6 Sometime in early 2010, the plaintiff referred one Li Wenwen ("Mr Li"), who was then the owner of Jinjiang Goldrooster Sports Goods Co Ltd ("Goldrooster Jinjiang"), to the defendant. Goldrooster Jinjiang was in the business of designing, manufacturing and distributing sports fashion apparel, footwear and accessories in the People's Republic of China. In July 2010, Mr Li engaged the defendant, through One Capital, to act as a consultant in the foreign listing of Goldrooster Jinjiang. The two men executed an agreement dated 29 July 2010 ("Listing Agreement") which provides that for its services One Capital would be paid 5% of invested funds as commission and 12% of "[Goldrooster Jinjiang's] shares of the after-listing total capital" as remuneration ("the Listing Fee"). It was also agreed between the defendant and Mr Li that the defendant would be responsible for all expenses incurred in the listing exercise ("the Listing Expenses").

7 Goldrooster Jinjiang was re-structured for the purpose of the listing. A Hong Kong company ("Goldrooster HK") was incorporated as the tax vehicle and it became the 100% shareholder of Goldrooster Jinjiang. The shares of Goldrooster HK itself were held by four companies which had been incorporated in the British Virgin Islands. These were:

(a) Zhuo Wei Investments Limited ("Zhuo Wei");

(b) Season Market Limited ("Season");

(c) Xanti Investments Limited ("Xanti"); and

(d) Fortune United Investment Limited ("Fortune").

Mr Li was the ultimate owner of Zhuo Wei whilst the defendant was the ultimate owner of the other three companies (collectively "the Yap Companies") although two of them were held on his behalf by nominees. According to the plaintiff, originally it had been agreed that the shares in the listed company that were to be allotted to her would be put into a BVI company owned by her. Subsequently, she was advised by the defendant that if she, as a Chinese citizen, appeared to be the beneficial owner of these shares there would be problems in the listing. The defendant and his nominees did not face such problems and the plaintiff therefore agreed that all shares intended for her should be placed in the Yap Companies together with those intended for the defendant.

8 The listing of Goldrooster Jinjiang was intended to be effected on the Frankfurt Stock Exchange through a listing vehicle incorporated in Germany ("Goldrooster AG"). For this purpose, the shares held by the four companies in Goldrooster HK were transferred to Goldrooster AG. In exchange, these companies were issued shares in Goldrooster AG. Meanwhile, the plaintiff and the defendant separately agreed that the Listing Expenses would be shared between them on a 60-40 basis; in return, the plaintiff would be entitled to 60% of the shares acquired by the defendant in Goldrooster AG under the Listing Agreement ("the 60-40 Split"). They also agreed to invest jointly, on a 50-50 basis, in Goldrooster AG.

9 On completion of all preparatory work for the listing, Goldrooster AG had an issued share capital of €20m divided into 20 million par value ordinary bearer shares. The shares were divided between the four shareholders as follows:

(a) Zhuo Wei: 14.5 million shares (72.5%);

(b) Season: 3,005,000 shares (15.025%);

(c) Xanti: 1,247,500 shares (6.2375%); and

(d) Fortune: 1,247,500 shares (6.2375%).

Together, the Yap Companies held 5.5 million shares or 27.5% of the issued capital of Goldrooster AG at that stage.

10 Goldrooster AG was successfully listed on the Frankfurt Stock Exchange on 18 May 2012. Post-listing, the company's total share capital increased to 20,720,206 shares due to the 720,206 shares that were purchased by investors pursuant to the initial public offering. An initial public offering of 5 million shares had been made and, if it had been fully subscribed, Goldrooster AG would have had an issued share capital of 25 million shares. This would have resulted in the Yap Companies owning 22% of the Goldrooster AG shares. I draw attention to this here because this figure of 22% plays an important part in the dispute between the parties. The other figure to remember is "19%" because what it stands for is another area of dispute.

The Allotment Agreement

11 On 15 June 2012, the plaintiff, Mr Xie and the defendant held a meeting in Jinjiang ("the June Meeting") to determine how many Goldrooster AG shares each of the plaintiff and the defendant were entitled to, post-listing. It is a matter of contention as to what was discussed and agreed at the June Meeting. Nevertheless, the parties do not dispute that they arrived at an arrangement that was put into writing on page 157 of the listing prospectus of Goldrooster AG ("the Prospectus"). The printed content of this page is itself of great significance. The page reads:

> **SHAREHOLDER STRUCTURE**
>
> The following table provides an overview of the shareholding structure and the participation of the shareholders in the share capital of [Goldrooster AG] prior to the Offering and upon completion of the Offering assuming the placement of all of the Offer Shares.

Name	Shareholdings before the Offering (percentage and number of shares)	Shareholdings following completion of Offering (without exercise of Greenshoe Option)	Following completion of Offering (with full exercise of Greenshoe Option)
Zhuo Wei Investments Limited *(Note)*	72.50% 14,500,000	58.00% 14,500,000	58.00% 14,500,000
Season Market Limited	15.025% 3,005,000	12.02% 3,005,000	10.37% 2,592,500
Xanti Investments Limited	6.2375% 1,247,500	4.99% 1,247,500	4.315% 1,078,750
Fortune United Investment Limited	6.2375% 1,247,500	4.99% 1,247,500	4.315% 1,078,750
Free Float	0% 0	20.00% 5,000,000	23.00% 5,750,000
Total	**100.00%** **20,000,000**	**100.00%** **25,000,000**	**100.00%** **25,000,000**

Note: Zhuo Wei Investments Limited is a company incorporated under the laws of the British Virgin Islands, with the sole shareholder being Ms Shu Hsia Li.

The Company is not aware of any member of the Company's management board and supervisory board who, directly or indirectly, has an interest in the Company's capital or voting rights which is notifiable under German law.

[italics in original]

12 It would be noted that the table set out three shareholding situations: the first was the distribution of shares pre-listing when the issued capital was €20m comprising 20 million shares; the second was the distribution of shares post-listing on the assumption that all the offer shares would be taken up and the share capital would be increased to 25 million; and the third was the distribution of shares post-listing on the basis that all the offer shares would be taken up and the Yap Companies would each have to give up 3% of their respective shareholdings (totalling 750,000 shares) to the public pursuant to the Greenshoe Option which would come into play if the offering had been oversubscribed. In this case, the issued share capital would still be at 25 million shares but the number of shares held by the Yap Companies would be reduced in total to 4,750,000 shares representing 19% of the capital.

13 The Greenshoe Option referred to in the above table was not exercised due to the lack of demand for the placement shares. As a consequence, there was no change in the number of shares held by the Yap Companies post-listing.

14 Two versions of the written agreement were adduced, both of which were written in Chinese by Mr Xie below the contents in print on page 157 of the Prospectus. The first of these ("the Allotment

Agreement") states:

> [Yap Son On]: For Ding Peizhen's investment in Jinjiang Goldrooster Co, her shareholdings after listing in Germany is confirmed as follows:
>
> Total 19%
>
> Ding Peizhen confirmed holding 10.35% in Goldrooster Co, to be gradually held on behalf by [Yap Son On].
>
> [Yap Son On] confirmed holding 6.65% in Goldrooster Co.
>
> Xinye, Zhong Yedian holding 2% in Goldrooster Co.
>
> / Total 19%
>
> Signatures of Investors: Ding Peizhen [illegible] [Yap Son On]

15 The other version was produced by the defendant who only had the copy and not the original. Mr Xie did not dispute its authenticity, confirming that he had authored it and that a copy was given to the defendant while the original was thrown away. It appears to be a copy of the Allotment Agreement without the signatures of the investors but, pertinently, includes an additional page ("the Draft Calculations") which the plaintiff considers shed some light as to how the parties arrived at the figures in the Allotment Agreement:

> Chief Ye:
>
> [Yap Son On]: 5.66% 6.66 6.65
>
> Ding Peizhen: 11.34% 10.34% 10.35
>
> Xin Ye, Zhong Ye: 2%
>
> / 19%

The defendant's subsequent dealings in the Goldrooster AG shares

16 On or around 27 June 2012, the defendant transferred his ownership of Xanti to the plaintiff, thereby giving her an interest in the 1,247,500 Goldrooster AG shares owned by Xanti.

17 Sometime in March 2013, the defendant instructed his brother-in-law (who was the apparent owner of Fortune) to sell the 1,247,500 Goldrooster AG shares held by Fortune. The shares were sold at a net price of €1.05 per share, and HK$6,389,910.21 of the proceeds from the sale of the shares were remitted to Mr Xie's bank account. This amount represented the proceeds of 897,041 Goldrooster AG shares (less an amount previously paid to Mr Xie). The plaintiff is prepared to give the defendant credit for this amount in the event that she succeeds in her claim. It is the defendant's position that under the Allotment Agreement the plaintiff was only entitled to 2,144,541 Goldrooster AG shares and therefore the transfer of Xanti and the payment detailed here satisfied that entitlement.

The parties' respective cases

The plaintiff's case

18 In her statement of claim, the plaintiff pleads that the Allotment Agreement provided that out of 5.5 million shares in Goldrooster AG, the plaintiff was entitled to 2,996,053 shares and that the defendant had to transfer or procure the transfer of all the said shares to the plaintiff. In breach of contract, the defendant had failed to transfer, or procure the transfer of, 1,748,553 Goldrooster AG shares to the plaintiff. The plaintiff claims either specific performance of the Allotment Agreement or damages for breach of contract and interest.

19 The plaintiff says that her entitlement to 2,996,053 of the Goldrooster AG shares held by the Yap Companies arose out of three separate transactions. First, she says that by virtue of the 60-40 Split she is entitled to a 40% of the 12% shareholding in Goldrooster AG that was given to One Capital as the Listing Fee. However, as she and the defendant had agreed to give 2% of the Listing Fee to the auditor and the accountant of Goldrooster AG, Messrs Xin Ye and Zhong Ye ("the Finance Team"), the Listing Fee available for division between the parties became 10% of the total share capital of Goldrooster AG and, accordingly, her entitlement was to 6% of the same.

20 Second, the plaintiff says that her sister and Mr Li had entered into a written agreement dated 28 October 2007 ("the 2007 Agreement") when Mr Li had already initiated the process of getting Goldrooster Jinjiang listed on a stock exchange. Under the 2007 Agreement, Mr Li and the plaintiff's sister agreed that the latter would get a 5% shareholding in Goldrooster Jinjiang after its successful listing. Subsequently, in around December 2010, it was orally agreed between the parties concerned that this 5% shareholding in Goldrooster Jinjiang would be translated into a 5% shareholding in Goldrooster AG, and be held by the plaintiff on her sister's behalf ("the Plaintiff's 5% Holding").

21 Third, she says that on 1 January 2011 Mr Li entered into a written agreement with her ("the 2011 Agreement") that she would be entitled to a 5% shareholding in Goldrooster AG after its successful listing in exchange for a sum of RMB 5,000,000. It was subsequently agreed between the plaintiff and the defendant that the 5% shareholding would be outside the 60-40 Split and that it would be divided evenly between them instead ("the Joint 5% Holding") because they contributed equally to the RMB 5,000,000 investment. Thus, the plaintiff would be entitled to a 2.5% shareholding in Goldrooster AG under the 2011 Agreement.

22 As a result of the above agreements, the plaintiff, the defendant and the Finance Team were altogether entitled to a 22% shareholding in Goldrooster AG ("the 22% Shareholding"), comprising the 12% Listing Fee, the Plaintiff's 5% Holding and the Joint 5% Holding. The plaintiff's share of this was 13.5% (6% + 5% + 2.5%) and the defendant's 6.5% (4% + 2.5%). At the defendant's suggestion, the plaintiff agreed that the shares representing the 22% Shareholding should be held by the Yap Companies. The plaintiff was unaware of the actual number of shares she was entitled to at this point. It is appropriate to reiterate at this juncture that, prior to listing, the Yap Companies in fact held 5.5 million shares, equivalent to 22% of the *anticipated* post-listing share capital of Goldrooster AG without the exercise of the Greenshoe option. This is as set out in the Prospectus (see [11] above).

23 As stated, the listing of Goldrooster AG on the Frankfurt Stock Exchange took place on 18 May 2012. Thereafter, the plaintiff became anxious about receiving her shares and made several attempts to contact the defendant to discuss her entitlement. Eventually, the parties held the June Meeting. The defendant then informed the plaintiff and Mr Xie that 3% of the 22% Shareholding was gone as the Greenshoe Option was not exercised. That is, the total shareholding held by the Yap Companies in Goldrooster AG only amounted to 19% as set out in the last column of the table at [11] above. He did not tell them the actual number of shares that comprised the post-listing capital of Goldrooster AG.

24 Neither the plaintiff nor Mr Xie understood exactly what the defendant meant about 3% of the shares being gone. Mr Xie told the defendant that as far as he was concerned, the total number of shares forming the 22% Shareholding should remain unchanged. The defendant and Mr Xie then worked out an alternative arrangement under which the shares forming the 22% Shareholding would be divided into 19 *portions* instead, but maintaining the ratio of shares each party would get relative to the others under the original arrangement. That is, out of 19 portions:

(a) the plaintiff would get 13.5/22 x 19 ≈ 11.65 portions;

(b) the defendant would get 6.5/22 x 19 ≈ 5.6 portions; and

(c) the Finance Team would get 2/22 x 19 ≈ 1.726 portions.

25 I note at this juncture that the figures at [24] above do not add up exactly to 19 and appear to be very slightly wrongly rounded up or down, as the case may be. In any case, pursuant to further negotiations between the defendant and Mr Xie, the portions were modified such that:

(a) from her entitlement of 11.65 portions, the plaintiff allotted 0.274 portions to the Finance Team and 1.05 portions to the defendant;

(b) the plaintiff accordingly held approximately 10.326 (11.65 –0.274 – 1.05) portions which were subsequently rounded up to 10.35 portions;

(c) the defendant accordingly held 6.65 (5.6 + 1.05) portions; and

(d) the Finance Team accordingly held 2 (1.726 + 0.274) portions.

26 Therefore, the plaintiff says, her total entitlement was 2,996,053 (*ie*, 10.35/19 x 5,500,000) Goldrooster AG shares. Taking into account the shares that were held by Xanti, she says that she is still owed 1,748,553 Goldrooster AG shares by the defendant. Since these shares were sold by the defendant, the plaintiff claims damages of €1,566,585.78. This figure was arrived at by subtracting the amount remitted to Mr Xie from the net sale proceeds.

The defendant's case

27 In the defence, the defendant avers that the plaintiff's entitlement was only to 2,144,541 Goldrooster AG shares and that this was partially satisfied by the transfer of Xanti to her. Further, the defendant avers that that the plaintiff had relinquished all of her remaining rights to Goldrooster AG shares in favour of Mr Xie by her SMS dated 20 August 2012. In the alternative, the defendant avers that the plaintiff is now estopped from making her claim to the shares by virtue of that SMS.

28 The defendant mounts a counterclaim as well. He counterclaims the sum of €449,031.96 as well as the plaintiff's share of further expenses relating to the restructuring and listing of Goldrooster AG. These are:

(a) RM60,000 and S$180,000 for fees paid to Teoh Toh Soon ("Mr Teoh"), an accountant who assisted in the listing;

(b) RMB 1,530,000 for accounting and legal fees incurred in China, comprising RMB 900,000 for fees paid to one Huang Yingcai and another RMB 630,000 for fees paid to the Grandall Legal Group (Guangzhou); and

(c) €4,500 paid to Kirchhoff Consult AG.

29 The defendant denies all knowledge of the agreements giving rise to the Plaintiff's 5% Holding and the Joint 5% Holding. In any case, the defendant says that the 5.5 million shares in Goldrooster AG held by the Yap Companies did not belong to him but were held on behalf of Mr Li (at least in part). Therefore, his entitlement (through his ownership of One Capital) was merely to 12% of the post-listing total share capital of Goldrooster AG, which entitlement was subsequently revised to 19% by Mr Li after the successful listing.

30 It was therefore agreed between the plaintiff, Mr Xie and the defendant at the June Meeting that of this 19% shareholding in Goldrooster AG, 2% would be paid to the Finance Team with the remaining 17% to be divided as per the 60-40 Split. That is, the plaintiff would get 10.2% of the post-listing total share capital of Goldrooster AG and the defendant would get the remaining 6.8%. Upon further negotiation, this became 10.35% for the plaintiff amounting to 2,144,541 shares out of the total capital of 20,720,000 shares. After the transfer of Xanti to the plaintiff, the number of Goldrooster AG shares due to the plaintiff was reduced to 897,041 shares.

31 After receiving an SMS message from the plaintiff on 20 August 2012 in which the plaintiff instructed the defendant to transfer all her rights and interest in the Goldrooster AG shares to Mr Xie, the defendant started dealing exclusively with Mr Xie. Sometime in March 2013, he informed Mr Xie that he had found a buyer for the 897,041 Goldrooster AG shares, and Mr Xie agreed to the sale of the shares at the price of €1.05 per share. This amounted to €941,893.05 (897,041 x €1.05) which was equivalent to HK$9,513,119.81 at that time. However, only HK$6,389,310.21 was transferred to Mr Xie as the defendant had previously paid the equivalent of HK$3,123,209.60 to Mr Xie.

32 Coming to his counterclaim, the defendant says that he had expended €1,197,344.93 in the restructuring and listing of Goldrooster AG. He acknowledges that a total of RMB 13,070,000 had been transferred to either him or Yu Yahong ("Ms Yu"), an associate of his, by the plaintiff between 5 January 2011 and 4 August 2011. However, he says that they had returned RMB 10,915,000 to the plaintiff. Therefore, the plaintiff's net contribution to the Listing Expenses was only RMB 2,155,000 (RMB 13,070,000 – RMB 10,915,000) which was equivalent to €269,375 at the relevant time. In the result, the plaintiff owes him €449,031.96 [(0.6 x €1,197,344.93) – €269,375] as her 60% share of the Listing Expenses.

33 The plaintiff does not accept the above figures. She says that the defendant's own records show that he had received RMB 17.6m from her and that she had at most received RMB 8.8m in return. The net contribution of RMB 8.8m is sufficient to meet her share of the Listing Expenses. There is no basis, therefore, for the counterclaim which the defendant is mounting against her.

Summary of the issues

34 In relation to the plaintiff's claim, the main issues are:

(a) What is the correct approach to the interpretation of the Allotment Agreement and is extrinsic evidence available for this purpose?

(b) What did the Allotment Agreement mean?

(c) Has the defendant fully satisfied the plaintiff's entitlement under the Allotment Agreement and, if not, has the plaintiff lost her right to claim the remaining shares?

35 In respect of the defendant's counterclaim, the issues are:

(a) What were the defendant's expenses for the listing of Goldrooster AG?

(b) How much did the plaintiff contribute to these expenses?

Issues in relation to the plaintiff's claim

Approach to the interpretation of the Allotment Agreement

36 The defendant says that the Allotment Agreement has to be objectively construed in order to give effect to the parties' intentions as objectively expressed therein. He cites *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*"). Therefore, the starting point is the plain language of the Allotment Agreement. He says this language "confirmed" that of the 19% of the post-listed shares of Goldrooster AG "following the investment in Goldrooster AG, after its listing in Germany", the plaintiff would be entitled to "10.35%", the defendant would be entitled to "6.65%" and the Finance Team would be entitled to "2%".

37 The plaintiff does not dispute the applicability of the principles set out in *Zurich Insurance*. Her position is that the defendant started on the wrong footing by contending that the language of the Allotment Agreement is clear and unambiguous. The plaintiff says the language is not clear because the description of the shares to be divided in the Allotment Agreement is simply "19%" without specifying the total number of shares on which the 19% is based. The issue is whether it means 19% of 20.72 million shares (the total number of issued shares post-listing) or 5.5 million shares (*ie*, the total number of shares held by the Yap Companies) divided into 19 portions.

38 The paragraph from *Zurich Insurance* that the defendant relies on is [130] which reads:

> … the court will *first* take into account the plain language of the contract together with relevant extrinsic material which is evidence of its context. *Then, if, in the light of this context*, ***the plain language of the contract becomes ambiguous (ie, it takes on another plausible meaning) or absurd, the court will be entitled to put on the contractual term in question an interpretation which is different from that demanded by its plain language*** . This is in fact merely making explicit the role of extrinsic evidence, which was previously obfuscated under the traditional approach.
>
> [emphasis in original in italics; emphasis added in bold italics]

39 The paragraphs of the *Zurich Insurance* judgment that precede [130] are also relevant because they deal with the situations in which extrinsic evidence should be admitted. These are [125], [127] and [129] which provide:

> 125 Turning to the first issue, we endorse Lord Hoffmann's view that extrinsic material is admissible if:
>
> (a) it is relevant – *ie*, it would affect the way in which the language of the document would have been understood by a reasonable man (see *BCCI v Ali* … at [39] …); and
>
> (b) it was reasonably available to all the contracting parties (see *Investors Compensation Scheme* … at 912 …)

…

127 Thus, the extrinsic material sought to be admitted must always go towards proof of what the parties, from an objective viewpoint, ultimately agreed upon. …

…

129 We have already emphasised the importance of contractual certainty … . In our view, the benefits of adopting, via proviso (*f*) to s 94, the contextual approach to contractual interpretation (*viz*, flexibility and accord with commercial common sense) will be maximised and its costs (*viz*, increased uncertainty and added litigation costs) minimised if, ***as a threshold requirement for the court's adoption of a different interpretation from that suggested by the plain language of the contract, the context of the contract should be clear and obvious*** . …

[emphasis in original in italics; emphasis added in bold italics]

40 The defendant says that the clear and obvious context in which the Allotment Agreement was entered into was that (1) Goldrooster AG had been listed; (2) the plaintiff and the defendant had meant to determine each party's entitlement; (3) the defendant told the plaintiff that he had received 19% of the total post-listed shares for Goldrooster AG; and (4) the plaintiff and the defendant discussed and agreed how this total number of shares should be distributed. There is no ambiguity and the parties cannot give direct evidence of their subjective intentions and this court must totally disregard any subjective intentions of the parties in construing the Allotment Agreement.

41 The defendant would have me approach the interpretation exercise as if what I am examining is a formal contract drafted in formal circumstances. What I have, rather grandly perhaps, termed "Allotment Agreement" is no such thing. As mentioned earlier, it was scribbled in Chinese on a page from another document immediately after a discussion between laypersons, only one of whom was fully familiar with the public listing of companies and the English language. No lawyers were present and no legal advice was taken. Neither Mr Xie who did the writing nor the plaintiff who signed it understood English. All persons present at the time were more concerned with numbers rather than words. What was written was more akin to an aide memoire than a formal contract. Further, what I am interpreting is the English translation of that writing. In these circumstances, the approach to interpretation has to be differently nuanced.

42 Fortunately, the Court of Appeal gave guidance as to the correct approach in this situation in the recent case of *Xia Zhengyan v Geng Changqing* [2015] 3 SLR 732 ("*Xia Zhengyan*"). In that case, the document to be interpreted was a sale and purchase contract written in Chinese. It had not been prepared by lawyers but by the parties themselves. One of the main issues turned wholly on the interpretation of cl 1 of the contract. The Court of Appeal noted (at [45]) that the judge at first instance had employed standard legal techniques based on a close scrutiny of the actual language used in cl 1, as well as the consideration of which interpretation cohered better with the other clauses in the agreement. The Court emphasised that in a case like this, however, it was imperative to pay heed to the context in which the agreement had been made. This context, the Court made clear, was not only the factual context but also the drafting context. The Court observed at [46]:

There are two key aspects in this context. First, the Agreement was in *Chinese*, although the Judge was (understandably) looking at the English *translation* – as we also did. Secondly (and in a closely related vein), the Agreement was in fact *drafted by the parties themselves (with no legal advice as such)*. What is of crucial significance in this regard is that, as a result of what we

have just noted, the terms of the Agreement in general and cl 1 thereof in particular ***cannot*** be read *as if they had been* ***drafted by lawyers*** *who were*, ex hypothesi, *aware of the legal significance of the relevant language of the terms of the Agreement itself*. Indeed (and this brings us back to the first point noted at the outset of this paragraph), given that the Agreement was drafted in Chinese, even the *English translation* of the relevant terms of the Agreement cannot be analysed and interpreted in the manner that laypersons whose *first language was English* would be accustomed to. [emphasis in original]

43 Justice Andrew Phang who delivered the judgment of the Court of Appeal emphasised in [50] that in a case like this, a common sense approach must be taken to interpretation. He repeated that a foreign language contract cannot be treated in the same way as one that has been drafted by persons whose first language is English. As his Honour observed:

> … With respect, the infelicitous (or, as the Judge put it, clumsy) drafting can be explained by the fact (as already noted above) that the Agreement in general and cl 1 in particular were drafted in Chinese by parties whose first language was not English *and* who were laypersons acting without the benefit of legal advice. In our view, this context requires that we eschew a strict construction of the structure and language of cl 1, and adopt instead a more common-sense approach that considers the reasonable and probable expectations that parties would have had.

44 The common sense approach requires me to consider the reasonable and probable expectations of the parties at the time the Allotment Agreement was made. This means an investigation of the deeper background to the Allotment Agreement and not simply a consideration of the immediate context in which it was made as put forward by the defendant as per [40] above. This will be done as part of the analysis under the second issue.

45 Before I go on to do this, however, there are some points regarding the interpretation of the Allotment Agreement that can be quickly disposed of. First, the defendant submits that the plain language of the Allotment Agreement, discloses no ambiguity. I agree with the defendant to the extent that the language of the agreement makes it plain that the subject of the Allotment Agreement is the shareholding to which the plaintiff was entitled after the listing of Goldrooster AG and to that extent the agreement deals with the number of actual post-listing shares.

46 However, I agree with the plaintiff that the Allotment Agreement also contains an ambiguity because the reference to "19%" is *in vacuo* – it does not specify the total number of shares on which it is based or, indeed, that it is based on the actual (and not anticipated) post-listing share capital of Goldrooster AG. Therefore, as the plaintiff submits, it is necessary for the court to consider the circumstances leading to the acquisition of shares in the Yap Companies in order to appreciate the context in which the Allotment Agreement was formed and what the 19% was actually meant to convey.

47 Second, the plaintiff in cross-examination stated that the "%" symbol is commonly understood in Jinjiang to refer to portions. This proposition can be summarily dismissed. First, her subjective understanding of what the "%" symbol refers to has little bearing on how the Allotment Agreement is to be interpreted given that the defendant does not come from Jinjiang. More importantly, her evidence was partially rebutted by Mr Xie, who stated that the symbol represents percentage under normal circumstances. As the defendant points out, there is nothing to indicate that he would have been aware that the Agreement was entered into under "special circumstances".

48 Third, the defendant seeks to exclude much of the evidence given by the plaintiff to establish the circumstances in which the Allotment Agreement was reached. First, he submits that the

evidence given by the plaintiff and Mr Xie should not be admitted as they seek to *vary* the term "10.35%" to read "10.35 portions". He refers to *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 ("*Sembcorp*") and *Zurich Insurance* at [132(b)], but it seems to me that what he actually seeks to rely on is [132(f)] of *Zurich Insurance*, which states (internal references omitted):

> A court should always be careful to ensure that extrinsic evidence is used to explain and illuminate the written words, and not to contradict or vary them. Where the court concludes that the parties have used the wrong words, rectification may be a more appropriate remedy.

49 I am not inclined to accept this submission. For one thing, it takes an over-legalistic approach to the interpretation of this Chinese language contract. Further, the plaintiff is not seeking to vary 10.35% to 10.35 portions in the literal sense, as the defendant claims. Instead, she says that her 10.35% must be calculated on the basis that 19% represents 5.5 million shares and therefore if 5.5 million shares are divided into 19 portions, her 10.35% would be the number of shares obtained by multiplying one of those portions by 10.35. If anything, varying the terms of the Allotment Agreement to "10.35 portions in [Goldrooster AG]" would make it more ambiguous. Therefore, this is not a valid ground for the exclusion of evidence.

50 Fourth, the defendant says that the evidence should not be admitted as the plaintiff had not pleaded the factual matrix on which she seeks to rely with sufficient specificity. He refers to *Sembcorp* at [73], where the Court of Appeal laid down the pleading requirements. In my view, this criticism of the plaintiff's pleading is misplaced. The plaintiff has pleaded particulars of the 2007 Agreement, the Listing Agreement and the 2011 Agreement relating to the Joint 5% Holding. She has also pleaded that the shares to which she and the defendant were collectively entitled were held in the Yap Companies and that they had entered into the Allotment Agreement which entitled her to 2,996,053 out of the 5.5 million Goldrooster AG shares held by the Yap Companies.

51 I consider the pleadings to be sufficiently particularised. While the statement of claim does not explicitly state that "%" is to mean "portions", it is apparent that the plaintiff's case is that the 5.5 million Goldrooster AG shares will be apportioned between the parties and that their entitlement would not be derived as a portion or percentage of the post-listing shares of Goldrooster AG. This also sufficiently addresses the defendant's more general objection that the plaintiff had diverged from her pleadings in respect of the parties' collective entitlement to the 5.5 million Goldrooster AG shares.

52 Fifth, the defendant submits, on the authority of *Sandar Aung v Parkway Hospitals Singapore Pte Ltd (trading as Mount Elizabeth Hospital)* [2007] 2 SLR(R) 891 ("*Sandar Aung*") at [30], that parties cannot themselves give direct evidence of what their intention was. On that basis, he seeks to exclude significant portions of the plaintiff's and Mr Xie's evidence. Saliently, this includes their evidence as to what was said and discussed between the parties at the June Meeting. The facts which the evidence is intended to prove include, that at the June Meeting:

(a) The defendant did not inform the plaintiff and Mr Xie of the number of shares to which the plaintiff was entitled.

(b) The defendant had informed the plaintiff and Mr Xie that the Yap Companies only had a 19% shareholding in Goldrooster AG.

(c) Mr Xie had told the defendant that the total number of shares that the parties would be entitled to should remain unchanged.

(d) The plaintiff had told the defendant that the Goldrooster AG shares held by the Yap

Companies should be divided into 19 portions.

(e) Mr Xie had worked out what the parties' respective entitlements would be given the change in circumstances.

(f) Both the plaintiff and the defendant had agreed with the revised share entitlements as calculated by Mr Xie.

53 I agree with the plaintiff that most of these go to show the circumstances in which the Allotment Agreement was made rather than to merely demonstrate the plaintiff's subjective intent. In any case, it should be noted that subjective declarations of intent are not necessarily precluded from the court's consideration in the interpretation of ambiguous terms. *Zurich Insurance* states at [132(e)] (internal references omitted):

> In some cases, the extrinsic evidence in question leads to possible alternative interpretations of the written words (*ie*, the court determines that latent ambiguity exists). A court may give effect to these alternative interpretations, always bearing in mind s 94 of the Evidence Act. In arriving at the ultimate interpretation of the words to be construed, the court may take into account subjective declarations of intent. Furthermore, the normal canons of interpretation apply in conjunction with the relevant provisions of the Evidence Act, *ie*, ss 95–100.

54 What then is the nature of the ambiguity in the present case? As set out in the immediately preceding paragraphs, the parties contest what "[t]otal 19%" represents in the Allotment Agreement. The defendant says that it is 19% of the actual total post-listing share capital of Goldrooster AG; the plaintiff says that it is all the Goldrooster shares held by the Yap Companies post-listing. Either version is possible and which is more plausible depends on the facts as they appeared to the parties at the time the Allotment Agreement was concluded. If the facts asserted by the plaintiff are established, they could lead to a plausible construction that the Allotment Agreement is in fact based on the anticipated post-listing shares of Goldrooster AG. In my view, this is clearly an instance of latent ambiguity for which subjective declarations of intent may be taken into account. In any case, based on *Xia Zhengyan*, the facts would have to be established in order to ascertain the parties' reasonable expectations.

How should the Allotment Agreement be interpreted?

55 The defendant's and the plaintiff's respective accounts of their business arrangement in respect of Goldrooster AG differ completely. Given the paucity of documentary evidence, the resolution of this matter lies largely in the credibility of the witnesses and whose evidence is to be preferred.

56 As the plaintiff acknowledges, how the 5.5 million Goldrooster AG shares came to be held by the Yap Companies is a central pillar of her case. The only plausible manner in which the plaintiff's case can be interpreted is that she had agreed with the defendant for their investment returns in the form of Goldrooster AG shares to be held by those companies and that their joint investment returns were anticipated to be 22% of the issued capital of Goldrooster AG at the end of the listing exercise. This gives an explanation as to why the "[t]otal 19%" should be interpreted as being 22% of the anticipated total Goldrooster AG shareholding held by the Yap Companies represented in 19 portions.

57 On the other hand, if it is found that the Yap Companies did not hold the 5.5 million shares as returns on investment to be shared between the plaintiff and defendant, the plaintiff's version would make less sense. The origin of the 5.5 million Goldrooster AG shares therefore forms an integral part of the context in which the Allotment Agreement is to be interpreted.

The 22% Shareholding

58 As discussed earlier, on the plaintiff's version, the 22% Shareholding is made up of three separate components: the 12% Listing Fee, the Joint 5% Holding and the Plaintiff's 5% Holding. The plaintiff says that it was because of the 22% Shareholding that the Yap Companies were allocated 5.5 million shares in the initial capitalisation of Goldrooster AG. Although this number then represented 27% of the company's capital, it was anticipated that on completion of the listing exercise the company would have a capital of 25 million shares and thus the Yap Companies' holdings would comprise 22% of the same.

59 The defendant attacks this version. He says that the plaintiff's account of the origin of the 5.5 million Goldrooster AG shares is not to be believed. First, he disputes the authenticity of the 2007 Agreement. He highlights that it had only been produced in the plaintiff's fifth List of Documents on 8 April 2015, less than a week before the commencement of the trial. This was notwithstanding the fact that it had allegedly been in the plaintiff's possession since July 2010. The plaintiff's explanation was that she had felt it was unnecessary for the 2007 Agreement to be produced given that the 22% shareholding was, in her opinion, already set out in the Prospectus. She had only handed it to her solicitors in February or March this year when they had asked for more details. In this regard, the defendant submitted that it was incredible that her solicitors had been in possession of the 2007 Agreement early this year, since they had only given discovery of it months later and had not pleaded particulars of a written agreement in relation to the Plaintiff's 5% Holding when they amended the Statement of Claim on 2 April 2015.

60 Second, the defendant argues that even if the court were to find that the 2007 Agreement was authentic, it merely establishes an entitlement to shares in Goldrooster Jinjiang and not Goldrooster AG. He also highlights that the 2011 Agreement and the Listing Agreement refer to shareholdings in the *post-listing* share capital of Goldrooster AG, and not the *anticipated* share capital. Clause 7 of the 2011 Agreement states that "[the plaintiff] shall hold a total of 5% of the shares of [Goldrooster AG] *after the successful initial public offering*" [emphasis added], while clause 2(B) of the Listing Agreement states that "[Goldrooster Jinjiang] shall pay twelve per cent (12%) of the company shares of the *after-listing total capital* to [One Capital] as remuneration" [emphasis added].

61 Third, he says that the 2007 Agreement, at best, evidences the plaintiff's *sister's* entitlement to 5% of the total share capital of Goldrooster AG post-listing. There is no evidence, save for the plaintiff's bare assertion, that her sister's interest had been assigned to her and that Mr Li had consented to it.

62 The arguments above were made by the defendant in his reply submissions, to which the plaintiff had no opportunity to respond. On my part, while I agree that the circumstances under which the 2007 Agreement were produced were highly suspicious, I do not think that throwing out that document has, as its inevitable corollary, the discarding all the plaintiff's evidence relating to the Plaintiff's 5% Holding. I note that while the amendments to the statement of claim made on 2 April 2015 did not specify that the 2007 Agreement was in writing, details of the agreement were set out in that pleading. Therefore, the plaintiff's solicitors had instructions on the content of what had been agreed. The written agreement may have been fabricated after the event but this does not mean that no oral agreement in those terms ever existed. In my view, the doubt cast on the plaintiff's credibility by the suspicious circumstances surrounding the 2007 Agreement is mitigated by the matters discussed below.

63 The plaintiff disputes that the shares awarded under the Listing Agreement are based on Goldrooster AG's total share capital post-listing. She points to cl 2 of the Listing Agreement which

provides that the shares are to be transferred "when the company receives listing clearance letter or 'consent in principle' from the exchange". Since it would not have been possible to determine what the actual post-listing share capital of Goldrooster AG would be at that early stage, she submits that remuneration under the Listing Agreement was based on the *estimated* post-listing share capital of Goldrooster AG. Accordingly, it is likely that the 22% Shareholding was also based on Goldrooster AG's estimated post-listing share capital. There is some force to this argument, notwithstanding the plain wording of cl 2(B).

64 As for the defendant's arguments in respect of the nature of the rights that arise under the 2007 Agreement and the lack of documentary evidence of the purported assignment to the plaintiff, these are factors that I have taken into account in assessing the believability of the plaintiff's case. Ultimately, the issue that is to be resolved is how the terms of the Allotment Agreement are to be interpreted – these factors may make it less likely that the plaintiff's version is to be believed, but they are not necessarily conclusive of this matter. All relevant factors, including the cogency of the defendant's evidence, are to be considered in totality.

65 In this regard, the defendant's evidence as to how his ownership of the 5.5 million Goldrooster AG shares came about was unconvincing and contradictory. As stated at [29] above, his initial version of events, as set out in his supplementary affidavit of evidence-in-chief ("SAEIC"), was that all the 5.5 million shares were held on behalf of Mr Li alone. He provided a different version during his cross-examination on 22 April 2015, stating that the shares were held for the collective benefit of the plaintiff, Mr Li and himself. He sought to explain away the inconsistency by stating that his SAEIC was erroneous but contradicted himself again the very next day, stating that the shares were to be shared between the plaintiff, Mr Li, some high-ranking officers, Ms Yu and himself.

66 His evidence in respect of the nature of the agreement between him and Mr Li was also highly inconsistent. The defendant stated that Mr Li's original intention was for the Yap companies to hold 12% of the post-listing shares of Goldrooster AG *on the basis that its total share capital would be 25 million shares* (consistent with the plaintiff's interpretation of the Listing Agreement) with the remaining 10% going back to Mr Li to be distributed amongst Mr Li, his investors, the plaintiff and some high-ranking officers. However, he later appeared to accept that the Yap Companies would hold 22% of the post-listing shares of Goldrooster AG (*ie*, the extra 10% would be held by his companies and not returned to Mr Li), and that it was that additional 10% that was reduced to 7% to give him his purported entitlement to 19% of Goldrooster AG's post-listing shares:

> Court: And Mr Li's intention, when he put the pre-offering shares in the name of your three companies, was to make sure that after listing, on the basis that there was a 25 million capital, your three companies would have 22 per cent, correct?
>
> A. That's correct.
>
> …
>
> Court: Why did he put an extra 10 per cent in your companies?
>
> A. That would be the total amount. It was rewards for his shareholders and staff post listing.
>
> Court: Sorry? Post listing, an extra 10 percent would be a reward for whom?
>
> A. From what I understand, it would be himself and his investors, including Madam Ding, and also some of the high ranking officers.
>
> Court: Madam Ding? What about Ms Yu?

A. Yes, included inside.

Court: So the extra 10 per cent would not be for you?

A. No.

Court: So your entitlement was 12 per cent?

A. Yes.

Court: Which you were going to share with Madam Ding 60/40?

A. That's correct.

Court: Then the extra 10 per cent, did he tell you what percentage had to go to whom?

A. He did not tell me at that time.

Court: All right. So when the company was listed, you didn't get 25 million shares issued, right?

A. No.

Court: Only 20.7 million shares.

A. That's correct.

Court: On that basis, should your three companies only have had 22 per cent of 20.7 million shares?

A. That's correct.

…

Court: All right. Just now, my calculations were based on the fact that he had agreed to give you 22 per cent and therefore he should only get back 4.5 per cent. But now you say, instead of giving you 22 per cent, he was going to give you 19 per cent. How did he adjust the 22 per cent to 19 per cent?

A. 12 plus 7 per cent.

Court: Originally it was 12 plus 10, correct? Before IPO.

A. Yes.

Court: Now he is giving you 12 plus 7. Did he explain to you why it could only be 12 plus 7 now?

A. Yes, he told me that that would be his investments, Madam Ding and Yu Yahong's investments.

Court: No. Originally, his investment, Madam Ding's investment and whoever else's was 10 per cent. How did it come down to 7?

A. Li Wenwen would not acknowledge the 5 per cent.

Court: No, what 5 per cent?

A. Madam Ding's sister's 5 per cent.

Court: He acknowledged Madam Ding and Ms Yu's investment of 5 per cent?

A. Yes.

Court: But he did not acknowledge the sister's 5 per cent.

A. Yes.

67 I first note that the defendant stated that he was told by Mr Li that the additional 7% comprised Mr Li's, the plaintiff's and Ms Yu's investment. This is clearly at odds with his pleaded case in which Mr Li had no stake in the 19%. This is also inconsistent with his evidence given during cross-examination, which is that the 7% would be divided in the following manner: 2.5% to the plaintiff; 2.5% to Ms Yu and 2% to the Finance Team. Further, although the defendant had originally denied any knowledge of the agreement referred to by the term "Joint 5% Holding", he subsequently admitted that the plaintiff and he had agreed to make a joint investment for a return of 5% of the post-listed capital of Goldrooster AG which would be shared equally between the plaintiff and Ms Yu (on the defendant's behalf).

68 Second, the purported arrangement between the defendant and Mr Li, as I understand the defendant's evidence, was simply that the Yap Companies held the 5.5 million shares on behalf of Mr Li. The defendant would receive 12% of the post-listing shares of Goldrooster AG under the Listing Agreement. If that was indeed the arrangement, then I agree with the plaintiff that there was no reason for Mr Li to have entrusted the defendant with his shares at all. He found a nominee to own Zhuo Wei for him and he could have used this company or another for the 5.5 million shares.

69 Third, not only had the defendant not returned the remainder of the 5.5 million shares to Mr Li by the time of the hearing (some three years after the listing), but he considered himself to be entitled to not return the shares to Mr Li if he lost the present suit:

Q. Can you explain to her Honour why you have not paid the monies to Li Wenwen?

A. After I had sold the shares, Madam Ding and Mr Xie came to my house to look for me, pointing out the errors. Mr Li Wenwen, through his CFO, also mentioned about his shares. I told him that we were involved in a lawsuit and I could not give him the money. If I lost the case Li Wenwen would not get anything. If I won, I will return him the money.

Court: If you lose the case, why shouldn't Li Wenwen get something if it belongs to him?

A. This was part of free float, which is a grey area.

70 This explanation is baffling. Even if I were to accept that more shares were floated and that the number of shares the defendant would be entitled to would increase as a result, I fail to see how Mr Li's entitlement to the remaining shares held by the Yap Companies would be dependent on the present suit. Further, as the plaintiff pointed out, given that the value of the remaining 1.56 million Goldrooster AG shares was approximately €2m, it is highly unlikely that the defendant would have been able to withhold transferring the remaining shares to Mr Li for about three years had the arrangement truly been what the defendant said it was.

71 In addition to the above inconsistencies, the timing of the defendant's disclosure suggests that his story in respect of the 5.5 million shares may have been formulated as a mere afterthought. Notwithstanding the multiple amendments made to the statement of claim, the plaintiff's case has never deviated from the initial premise that the 5.5 million Goldrooster AG shares held by the Yap Companies were to be divided between the plaintiff and the defendant as returns from investment.

Yet, in his affidavit of evidence-in-chief ("AEIC") the defendant did not assert his claim over some of the 5.5 million shares or, indeed, explain the significance of those shares. It was only in the SAEIC, which was filed four days before the commencement of the trial, that the defendant gave his account of how the 5.5 million shares came to be held by the Yap Companies. Similarly, the defendant did not state in his AEIC that Mr Li had revised his remuneration under the Listing Agreement from 12% to 19% of the post-listing shares of Goldrooster AG, only mentioning it in his SAEIC. The defendant did not produce any documentary evidence in support of his claim either.

72 Finally, both parties submit that an adverse inference should be drawn against the other for failing to call material witnesses. The defendant says that the plaintiff should have called her sister as a witness, given that the burden was on her to prove her entitlement under the Plaintiff's 5% Holding. This is because of the number of unresolved issues, such as how 5% interest in Goldrooster Jinjiang came to be 5% of the *anticipated* share capital of Goldrooster AG post-listing and the lack of documentary evidence in respect of the purported assignment to the plaintiff. The plaintiff, in turn, points to the fact that Mr Li plays an integral role in the defendant's case, particularly in respect of the ownership of the 5.5 million Goldrooster AG shares held by the Yap Companies.

73 The defendant's failure to call Mr Li as a witness or even attempt to do so must be held against him. Given that the documentary evidence shows that the defendant had an entitlement to only 12% of the post-listing capital of Goldrooster AG, Mr Li's explanation for the alleged gift of an extra 7% would have been extremely helpful to the defendant. Also, Mr Li would have been able to throw light on the plaintiff's sister's entitlement to shares if any. Considering that it was the defendant's position that he was holding a substantial number of shares on trust for Mr Li, he should have had every expectation of Mr Li giving evidence that was favourable to him. Looked at in this light, the lack of an attempt by the defendant to even ask Mr Li to testify is inexplicable.

74 On the other hand, the failure of the plaintiff to call her sister is less damaging to her case. The plaintiff's sister's evidence may have assisted the plaintiff's case but unless she produced documentary support as well, such evidence would have attracted the criticism that it was a bare assertion and the plaintiff's case would be no further forward. Further, the actual allocation of 5.5 million Goldrooster AG shares to the Yap Companies is much more consistent with the plaintiff's version of events than with the defendant's. I explain this below.

75 The initial share capital of Goldrooster AG was 20 million shares. On listing, the intention was to offer a further 5 million shares to the public and thus if the offering had been fully subscribed, the post-listing capital would have been 25 million shares. There was also the Greenshoe Option for a further 750,000 shares to be issued to the public if the offering was over-subscribed. However, in that event, the post-listing capital would remain at 25 million, the extra 750,000 shares being taken from the Yap Companies' respective holdings. It is also important to note that there were restrictions on the post-listing sale of shares by the original shareholders, *ie*, Zhuo Wei and the Yap Companies. They could not sell their shares for a defined period after listing and that is the reason why the defendant settled part of the plaintiff's entitlement by transferring Xanti to her rather than transferring Goldrooster AG shares to her directly. For this reason also, the initial allocation of shares to the Yap Companies would have to exceed their actual entitlement so as to ensure that post-listing they would have the correct number of shares without the necessity of any further transfer.

76 On the plaintiff's case, the above explains why 5.5 million shares were allotted to the Yap Companies initially even though the Yap Companies had no entitlement on any ground to 27% of the capital of Goldrooster AG. If an extra 5 million shares were issued on listing, then post-listing the Yap Companies would have 22%.

77 The defendant's case that Mr Li gave the Yap Companies 19% does not explain the allocation of 5.5 million shares. If, prior to listing, Mr Li had decided to put 19% in the name of the Yap Companies, they would have been allotted only 4.75 million shares, being 19% of 25 million shares. On the other hand, if Mr Li had decided that 22% should be put in the name of the Yap Companies so as to share the extra 10% amongst himself, the plaintiff and Ms Yu (as the defendant claimed in court), he would likely have had a written agreement with the defendant to this effect. Mr Li had executed both the Listing Agreement and the 2011 Agreement and this shows that he was careful to have written evidence of the shareholdings due to the parties rather than leaving it to oral communications. The 2011 Agreement in itself is inconsistent with the defendant's case.

78 In these calculations, there is the complication of the Greenshoe Option. If Greenshoe shares had to be allotted to the public because of an over-subscription of the public offering, the Prospectus indicated that these shares would come from the Yap Companies. The Yap Companies therefore stood to lose up to 3% of their shares. So that might explain why Mr Li allocated the Yap Companies more than the 12% Listing Fee and the Joint 5% Holding (total 17%) even if he did not recognise the Plaintiff's 5% Holding as the defendant asserted. However, this explanation is not very satisfactory because it only accounts for 20% and does not take care of the 2% difference between the 17% due to the Yap Companies and the 19% the defendant said they actually received. Further, it is not an explanation that the defendant put forward. He did not give any explanation as to why the Greenshoe Option was to be fulfilled from the Yap Companies' shares and how that possibility was accounted for in the allocation of shares to the Yap Companies. Perhaps the defendant who was experienced in the listing of Chinese companies abroad did not expect the Greenshoe Option to be utilised at all.

The revised entitlements under the Allotment Agreement

79 It was not argued by either party that the Draft Calculations ought not to be admitted, despite the fact that they could be characterised as evidence of pre-contractual negotiations which should not be admitted for the sole purpose of aiding the interpretation of the contract. This may be because the parties were not seeking to rely on the Draft Calculations as evidence of the parties' subjective intent, but to corroborate their accounts as to how the Allotment Agreement was arrived at.

80 As set out at [24]–[25] above, the plaintiff's case is that the respective entitlements as originally calculated were 11.65 portions to the plaintiff, 5.6 portions to the defendant and 1.726 portions to the Finance Team, and that these were subsequently adjusted to the figures written in the Allotment Agreement. In court, Mr Xie explained how the figures in the first column of the Draft Calculations (*ie*, 11.34, 5.66 and 2) came to be the figures that were finally agreed upon; however, as counsel for the defendant suggested during his cross-examination, this tells us nothing as to whether the figures relate to portions or percentages. It would have strengthened the plaintiff's case if the figures in the Draft Calculations corresponded directly with the calculations set out at [24] above and there was a mention of the re-adjustment of 22% into 19%. That is not the case here however. The court is still left in the dark as to how the figures 11.34, 5.66 and 2 were derived to begin with. Even if the figures as calculated at [25] above were corrected and adjusted in the same manner (*eg*, to ensure that the Finance Team was given two portions), I am still unable to arrive at the figures in the Allotment Agreement. I therefore reject the plaintiff's submission that the Draft Calculations support her version of events.

81 In the same tenor, the Draft Calculations do not assist the defendant's case as set out above. The figures that would have been arrived at under a 60-40 Split of 17% of the Goldrooster AG shares between the plaintiff and the defendant (with 2% going to the Finance Team) do not appear in the Draft Calculations.

The parties' knowledge of the actual number of post-listing shares in Goldrooster AG

82 The defendant submits that the Allotment Agreement could not have been referring to the 5.5 million Goldrooster AG shares given that the plaintiff and Mr Xie, on their own evidence, had no knowledge of the number of shares held by the Yap Companies until 21 March 2013, more than nine months after the Allotment Agreement was entered into. I do not think that this submission should be given much weight. It was not necessary that the Allotment Agreement specify the exact number of shares; the plaintiff's case is that the parties had simply agreed that the shares held by the Yap Companies would be divided into 19 portions, whatever the number was. That the parties did not know the exact number of shares held by the Yap Companies does not render the Allotment Agreement invalid.

83 The plaintiff, on the other hand, draws the court's attention to the defendant's purported indifference to the actual number of post-listing shares in Goldrooster AG. The defendant's case is that Mr Li had agreed to give him 19% of the total number of Goldrooster AG shares post-listing. Therefore, the defendant's apparent lack of interest in finding out what that exact number was is at odds with his case. In this regard, the defendant could not provide a satisfactory explanation when cross-examined on this matter:

Q. And as a consultant to the listing, you were indifferent to the outcome, you were not interested in the outcome from 18 May to 15 June. Is that what you are telling the court?

A. Yes.

…

Court: So your responsibility was to have the company listed and you were not concerned about how many shares it managed to sell to the public. You are saying that?

A. Yes.

Q. But you had an investment in the company.

A. I did not invest.

Q. Your remuneration would be based on the number of shares in the company.

A. Yes, but that would not be considered an investment.

Q. Surely that would make you interested in the outcome of the offering?

A. It has got no help to me.

Court: 12 per cent of 25 million is much more than 12 per cent of 20 million. Agree?

A. Yes.

Q. Yet you are not interested in the outcome of the offering. Is that what you are telling the court, Mr Yap?

A. Yes. Firstly, I based this on the agreement that I would get 12 per cent from post IPO shares, regardless of how many shares they sold. It would be 12 per cent post IPO.

Court: Yes, but 12 per cent of post IPO 20 million shares is different from 12 per cent of post IPO 25 million shares.

A. Whether they managed to sell 20 million or 25 million, we will just base it on the share capital of 20 million.

Court: Does it say so in your agreement?

A. Yes.

Court: Where?

A. The consultancy agreement.

…

Q. So it is clause 2(B) [of the Listing Agreement], right, Mr Yap?

A. Yes.

…

Court: What does it say?

A. Party A shall pay party B 20 per cent of the total share capital -- sorry, 12 per cent of the total share capital after listing as remuneration for party B.

Court: Total share capital after listing?

A. Yes, total share capital after listing.

Q. So that is why you should be interested, because 12 per cent of 25 million shares and 12 per cent of 20 million shares are different.

A. No, that's not right.

Court: Let's move on.

84 As the exchange above shows, the defendant's only explanation for his indifference to the actual number of post-listing shares was that he would get 12% of 20 million Goldrooster AG shares regardless of what the actual number of Goldrooster AG shares post-listing was. This does not assist the defendant since it was not what was provided by the Listing Agreement. In fact, if the Listing Agreement provided for remuneration in the form of a fixed number of shares, that term would detract from one of the defendant's strongest arguments – that the 5.5 million Goldrooster AG shares held by the Yap Companies could not have been the parties' return on investment since the 2011 Agreement and the Listing Agreement refer to the post-listing share capital of Goldrooster AG and not the shares allocated to them pre-listing.

85 The alternative explanation, as discussed below, is simply that the defendant was already aware of the actual number of Goldrooster AG shares post-listing at the time of the June Meeting. Not only was this denied by the defendant, but it would raise questions as to why the Allotment Agreement merely set out the parties' entitlements in percentages when the exact number of shares they were entitled to could easily have been calculated.

The plaintiff's alleged scheme

86 The defendant submits that the plaintiff's case is a scheme by Mr Xie and the plaintiff to obtain more Goldrooster AG shares than was originally agreed. First, he points to the fact that the plaintiff had asked for 60% of the 5.5 million Goldrooster AG shares held by the Yap Companies, which exceeds

what the plaintiff currently claims she is entitled to. As the plaintiff points out, this is factually inaccurate – what was actually sought was 3.16 million shares, which is lower than 60% of the 5.5 million shares. Nevertheless, it cannot be disputed that it is still higher than the 2.99 million shares which the plaintiff now claims she is entitled to under the Agreement.

87 The plaintiff emphasised that Mr Xie had explained that the figure of 3.16 million was an error in calculation and that the draft agreement sent to the defendant in March 2013 ("Equity Confirmation Letter") that the plaintiff wanted the defendant to sign should have reflected the plaintiff's purported entitlement of 3.125 million shares. The plaintiff misses the point, however – the revised figure would still have been higher than what she now claims she is entitled to, and does not go very far in rebutting the defendant's argument. However, I am not inclined to accept that the Equity Confirmation Letter alone is sufficient to establish what is effectively a conspiracy to defraud the defendant. This is particularly so since it would have been far easier for her to disavow any relation with Mr Xie and not give the defendant any credit for the HK$6,389,910.21 than to concoct such an elaborate scheme. There is also no other evidence to suggest any collusion between the two to commit the alleged fraud.

88 Second, the defendant points to various correspondence sent to him by the plaintiff in which she described One Capital as a "con company", called the defendant a cheat, accused him of falsifying accounts and committing fraudulent acts, and threatened to publish these allegations in Singapore newspapers. In this regard, the plaintiff's stand was consistent – she had tried all avenues to procure the return of the remaining shares, and had sent the SMS and e-mail correspondence to pressurise the defendant into giving her the shares. Much as I deprecate her harassing and bullying conduct, I am inclined to believe the plaintiff. In any case, it is not entirely clear to me what the court is expected to make of this evidence. Even if the plaintiff had harassed the defendant, there is again nothing that indicates that the plaintiff was working in concert with Mr Xie to defraud the defendant. To the extent that the defendant seeks to impugn the plaintiff's credibility by way of the above, I do not think that this sort of bad behaviour translates into making the plaintiff a liar in regard to the meaning of the Allotment Agreement and the circumstance in which it was arrived at.

The post-Allotment Agreement correspondence

89 The plaintiff refers to an e-mail sent to her by the defendant on 9 July 2012 ("the 9 July 2012 e-mail") in which the defendant stated:

> [Goldrooster] shares or stocks held by me on your behalf amounts to 10.35% x 250,000 = 2,587,500 shares in total. Previously, 4.315% shares held by [Xanti] (1,078,750 shares) plus transferred 1.185% shares (296,250 shares), have all been transferred to the above company which now holds 5.5% shares in total (1,375,000 shares).

90 The plaintiff points to the fact that the calculations were premised on the *anticipated* total share capital of Goldrooster AG post-listing (25,000,000) and not its actual share capital, which is consistent with her version of events. That is only partially correct – the calculations are premised on the anticipated total share capital of Goldrooster AG *had the Greenshoe Option been fully exercised*. The defendant, in turn, refers to an SMS sent by him to the plaintiff on 16 July 2012 ("the 16 July 2012 SMS"), a draft agreement for the sole shareholder of Fortune to hold 897,041 Goldrooster AG shares on trust for the plaintiff that was sent to her in July 2012 ("the Fortune Agreement"), and an SMS sent by the defendant to Mr Xie on around 19 March 2013 ("the 19 March 2013 SMS"). All of these, he says, are calculated on the basis of the actual total share capital of Goldrooster AG post-listing.

91 The defendant's only explanation for the 9 July 2012 e-mail and his subsequent change in position in the 16 July 2012 SMS was that he had realised the calculations in the 9 July 2012 e-mail were wrong after checking with Goldrooster HK's chief financial officer, Mr Ashley Soh ("Mr Soh"). He then revised the calculations and sent the 16 July 2012 SMS with the adjusted figures. I am not inclined to believe that the contents of the 9 July 2012 e-mail were mere miscalculations for two reasons. First, as the plaintiff points out, there was no mention in the 16 July 2012 SMS that the figures had been revised or any explanation as to why the defendant had done so, as one would expect had the 16 July 2012 SMS truly been intended to correct the error in the 9 July 2012 e-mail. More importantly, the evidence suggests that the defendant had been aware of the actual number of post-listing shares of Goldrooster AG before he sent the 9 July 2012 e-mail. When cross-examined as to when he became aware, the defendant appeared to be less than sure:

Court:	Look, don't tell me a long story. You say on 9 July you didn't know. Correct?
A.	Yes.
Court:	And on 16 July obviously you knew. Right?
A.	Yes.
Court:	So when did you find out?
A.	Two to three days after 15 June.
Court:	What? Please think.
A.	Yes.
Court:	If you knew two to three days after 15 June, why did you make a mistake on 9 July?
A.	I may need to think about the dates.
Court:	I've asked you to think about the date. Now think. (Pause).
A.	I'm sorry, I can't recall.
Court:	But do you think it would have been two or three days after 15 June, or is it more likely to have been between 9 July and 16 July?
A.	I really can't recall.

92 In contrast, the evidence of the defendant's own witness was unequivocal. Mr Soh testified that he had informed the defendant of the total number of Goldrooster AG shares post-listing within days of its listing. He said that it was likely to have been between 18 and 20 May 2012, and was certainly before the end of May 2012. I see no reason why this evidence should be doubted.

93 The defendant submits that the plaintiff's failure to correct the defendant after receiving the 16 July 2012 SMS, the Fortune Agreement and the 19 March 2013 SMS shows that there was no error in the defendant's calculations. That is not entirely accurate. The plaintiff's evidence is that she had spoken to the defendant on 17 July 2012. While she had not expressly told the defendant that his calculations were wrong as she was worried he would "run away", she had indicated to him that she was owed more than six portions, calculated on the basis that the 1.2475 million Goldrooster AG shares owned by Xanti represented 4.315 portions. Further, she also claimed to have attempted to contact the defendant by phone in respect of the Fortune Agreement, though she was unable to provide any satisfactory reason as to why she did not attempt to contact him via other means. Mr

Xie also testified that he had called the defendant to tell him that the figures in the 19 March 2013 SMS were wrong. Nevertheless, given that the plaintiff's and Mr Xie's evidence are not supported by any documentary evidence, I do not give their explanations much weight.

94 The bigger issue, in my view, is the admissibility of this evidence, which neither party addressed. The post-Allotment Agreement conduct of the parties should be distinguished from the other categories of evidence discussed above, in that they do not relate to how the 5.5 million Goldrooster AG shares came to be held by the Yap Companies but relate directly to the interpretation of the Allotment Agreement. It is therefore necessary to consider whether it meets the *Zurich Insurance* requirements.

95 The requirement of reasonable availability to all contracting parties, as set out in *Zurich Insurance* at [125], appears to be that the extrinsic evidence sought to be adduced be available to the parties *at the time of the contract*. Similarly, the requirement that the context of a contract be clear and obvious seems to refer to the context *in which the contract was made*: see *Zurich Insurance* at [128], citing *Sandar Aung* at [25]. It this is correct, it necessarily follows that post-agreement conduct is always inadmissible if solely for the purpose of aiding in the interpretation of an agreement. However, given that the Court of Appeal did not close the door on evidence of such nature, it is arguable that these requirements were not intended to be limited temporally. In any case, given the conflicting positions reflected in the post-Allotment Agreement correspondence, I am of the view that they do not pass the threshold requirement of providing a clear and obvious context. However, there is nothing to prevent the court from considering the evidence with regard to the credibility of the parties.

Conclusion on the interpretation of the Allotment Agreement

96 Taking everything into account, I prefer the plaintiff's version of events. That is, that she had acquired her share of the 22% Shareholding through the Listing Agreement, the Plaintiff's 5% Holding (despite my doubts regarding the 2007 Agreement) and the Joint 5% Holding, and that the defendant and she had agreed the returns on their investment would be held by the Yap Companies. I accept that the plaintiff and Mr Xie had not known exactly how many Goldrooster AG shares were held by the Yap Companies until 21 March 2013 and this, in my view, accounts for why the terms of the Allotment Agreement were not expressed in a more straightforward manner. I therefore also find that because the agreed arrangement was for 22% of the capital of Goldrooster AG to be shared between them, when the plaintiff and Mr Xie were told by the defendant that the shareholding to be divided was only 19%, Mr Xie carried out the various computations set out in [24] and [25] above.

97 It should be noted that the plaintiff's version is far from perfect. In particular, it is unclear how the 2007 and 2011 Agreements, the entitlements under which appear to be based on the actual number of Goldrooster Shares post-listing, could have given rise to an entitlement to a fixed number of shares. Yet the defendant's version raises even more questions which are also unanswered. There is no explanation as to why Mr Li would have entrusted the defendant with the shares that were placed with the Yap Companies and allowed the defendant to hold on to the shares up until now, or why the defendant would be entitled not to return the remaining shares to Mr Li if he lost this suit. During cross-examination, the defendant contradicted himself on multiple occasions and could not provide any documentary evidence proving that Mr Li had revised his remuneration from 12% to 19% of the total share capital of Goldrooster AG post-listing, a claim that was only made in his SAEIC. Further, the defendant's version that the figures in the Allotment Agreement were arrived at on the basis of the 60-40 Split, made even less sense after he admitted that the Joint 5% Holding was intended to be shared equally between him and the plaintiff. That admission meant that the 60-40 Split would not apply to the Joint 5% Holding and therefore the calculation of the distribution of the

19% that the defendant gave was clearly wrong. In these circumstances, the evidence of the plaintiff of how the figures 10.35% and 6.65% were arrived at is clearly preferable.

98 The evidence suggests that what had actually transpired was that the defendant had wrongly believed that the Greenshoe Option had been fully exercised and informed the plaintiff accordingly. This explains why the defendant had pointed to the last column of the table set out at [11] above as well as the calculations of the 9 July 2012 e-mail, and how the parties had come to agree on a total of 19%. Having later realised his mistake, he then sought to interpret the Allotment Agreement in a different manner such that "[t]otal 19%" refers to 19% of the actual number of Goldrooster AG shares post-listing. An alternative interpretation of the Allotment Agreement would therefore be to give effect to the last column of the table, such that the plaintiff is entitled to 10.35% of the anticipated post-listing shares of Goldrooster AG *had the Greenshoe Option been fully exercised*. There are at least three obstacles to this alternative interpretation. First, on the basis that the parties had entered into an agreement for all of their investment returns to be held by the Yap Companies, this alternative interpretation would be inconsistent with such arrangement. Second, it is dependent on the contents of the 9 July 2012 e-mail which (as discussed above at [95]) I think to be inadmissible. The third objection is that the defendant never argued that the Allotment Agreement was infected by a mistake on his part as to the exercise of the Greenshoe Option. Nor did he ask for rectification of the Allotment Agreement.

99 Having found that the parties had agreed for the returns on their investment in the listing of Goldrooster AG to be held in the form of Goldrooster AG shares by the Yap Companies, and in the absence of any evidence or term in the Allotment Agreement indicating an intention to deviate from that earlier agreement, I am satisfied that the "[t]otal 19%" in the Agreement should be interpreted in this context as referring to all the Goldrooster AG shares held by the Yap Companies, *ie*, 5.5 million shares. The Allotment Agreement then recorded the parties' agreement at the June Meeting for that 19% to be split into three lots with 10.35% out of 19% going to the plaintiff, 6.65% going to the defendant and 2% going to the Finance Team. The plaintiff's share entitlement, being 10.35% out of that 19%, was, therefore, to 2,996,053 Goldrooster AG shares.

100 The plaintiff received 1,247,500 Goldrooster AG shares held by Xanti and authorised Mr Xie to deal with the remaining shares. Thereafter, the Yap Companies sold all the remaining Goldrooster AG shares with Mr Xie's consent. Therefore, the plaintiff's remedy must lie in damages rather than in the transfer of the remaining shares.

Calculation of damages

101 Two issues arise in this context. First, while the statement of claim seeks damages on the basis of each share being valued at €1.10, the plaintiff now seeks damages on the basis of each share being valued at €1.26. This was because of the defendant's admission during cross-examination that these shares were sold at €1.26 per share. The defendant, on the other hand, submits that damages should be calculated on the basis of €1.05 per share because that was the net amount he received. Both parties appear to accept that the appropriate time at which the shares should be valued is the date of sale. I accept the defendant's submission. The plaintiff has not adduced any evidence that she could have sold the shares without incurring intermediary fees. She also does not dispute that the defendant had only received net proceeds of €1.05 per share. I am therefore of the view that damages should be assessed at €1.05 per share.

102 Second, the defendant says that the HK$6,389,910.21 was full and final payment for the 897,041 Goldrooster AG shares referred to in the 19 March 2013 SMS, and that his evidence in relation to the use of the remaining HK$3,123,209.60 to offset moneys previously given to Mr Xie is

determinative since it was not challenged during cross-examination. In this regard, it is apparent from Mr Xie's AEIC and the statement of claim that the plaintiff has never accepted the use of this sum as an offset for other purported debts. Further, not only does there appear to have been no consent obtained from Mr Xie, the content of the March 2013 SMS suggested that the remaining HK$3,123,209.60 would be *temporarily* kept with the defendant and "returned upon confirmation". I find that the HK$6,389,910.21 did not constitute full and final payment for the 897,041 Goldrooster AG shares. Damages should therefore be assessed at (1,748,553 x €1.05) = €1,835,980.65 with HK$6,389,910.21 to be deducted from this amount.

Has the plaintiff relinquished her rights over the outstanding Goldrooster AG shares?

103 The defendant submits that the plaintiff relinquished her rights and interest in the outstanding Goldrooster AG shares by way of an equitable assignment to Mr Xie of the same. He relies on her text message to himself on 20 August 2012 ("the 20 August SMS"), which states:

> … Sorry, but could I trouble you to do me a favour regarding our Goldrooster shares held by you? Please take my portion of the 3 points [unintelligible] we left with Li Wen, and give them all to Xie Yinlai. … I'll have to trouble you to change my name to that of [Xie's]; *all the shares that I, Ding Peizhen, hold in Goldrooster, shall go to Xie Yinlai. Xie Yinlai shall own all the rights pertaining to 100% of the shares that Ding Peizhen holds in Goldrooster*. Chief Ye, help me with this. *Transfer all shares held by [Ding Peizhen] in Goldrooster to Xie Yinlai*; *declarant: "Ding Peizhen", 20 August 2012*. Chief Ye, I owe Chief Xie a deep debt of gratitude. Help to ensure a timely and smooth transfer when 18 November comes. I have also asked my lawyer to draft a (document) regarding Goldrooster (shares) you are holding for me … [emphasis added]

104 The defendant argues that the three requirements for an effective equitable assignment, as set out in *Phelps v Spon-Smith & Co* [2001] BPIR 326 ("*Phelps*"), are made out under the 20 August SMS. These requirements are:

(a) an intention to assign;

(b) clear identification of the chose being assigned; and

(c) some act by the assignor showing that he is passing the chose in action to the alleged assignee.

105 The plaintiff does not appear to dispute that the second and third of the above requirements have been met. Instead, she contends that there was no intention to assign, notwithstanding what was stated in the 20 August SMS. It must be stressed, as held in *Phelps* at [39], that the key intention in such cases is that of the *assignor*. In this regard, I accept the plaintiff's evidence that there was no real intention to assign on her part. Both the plaintiff and Mr Xie testified that the 20 August SMS was part of an arrangement between them to obtain the balance of the Goldrooster AG shares due to the plaintiff. They had agreed that Mr Xie would transfer the shares back to the plaintiff upon receipt of the same from the defendant.

106 This is consistent with the evidence given in their affidavits and is not contradicted by any other evidence. As the plaintiff highlights, their evidence is corroborated by the manner in which the plaintiff and Mr Xie behaved after the purported equitable assignment. When Mr Xie was approached by the defendant in respect of the sale of the shares in March 2013, he consulted with the plaintiff as to whether the proposed sale was at a price acceptable to her. More importantly, the proceeds from the sale of those shares, which were transferred by the defendant to Mr Xie's account, were

ultimately transferred to the plaintiff. Mr Xie would not have done so had there been a genuine intention by the plaintiff to assign her rights and interest in the shares to Mr Xie.

Is the plaintiff estopped from asserting a claim to the outstanding Goldrooster AG shares?

107 In the alternative, the defendant says that the plaintiff is estopped from asserting a claim to the outstanding Goldrooster AG shares.

108 The three elements of a representation, reliance and detriment must be established in order for an estoppel by representation to be made out: see *United Overseas Bank Ltd v Bank of China* [2006] 1 SLR(R) 57 at [18]. The defendant says that the italicised portions of the 20 August SMS as reproduced at [103] above were "clear and unequivocal" representations that the plaintiff wished to transfer her rights and interest in the outstanding Goldrooster AG shares to Mr Xie, that he had relied on those representations, and that the sale of those shares in March 2013 and the transfer of the proceeds to Mr Xie constitutes detriment to him.

109 The plaintiff submits that none of these elements are made out. With regard to the representations made in the 20 August SMS, she argues that they were equivocal given the events that subsequently occurred. She points, in particular, to a subsequent e-mail ("the 26 August e-mail") and the Equity Confirmation Letter. The 26 August e-mail, as re-interpreted during court proceedings, asks that the defendant return her shares *to her*, while the Equity Confirmation Letter also makes it clear that it is the *plaintiff* to whom the outstanding shares should be returned. The defendant does not dispute that he had received both these documents.

110 Notwithstanding the change in position from that as conveyed in the 20 August SMS to that in the 26 August SMS and the Equity Confirmation Letter, I do not think that subsequent representations can colour the interpretation of an earlier representation. That is, the representations made in the 20 August SMS were not equivocal simply because the plaintiff made subsequent representations to the contrary. The 20 August SMS read on its own contains no ambiguity. However, given his receipt of the subsequent communications (one as early as six days after the 20 August SMS) it would not have been reasonable for the defendant to have relied on the 20 August SMS as showing a complete relinquishment of the plaintiff's interest.

111 In any case, the facts appear to show that the defendant did not rely on the 20 August SMS. According to the defendant, he had stopped dealing with the plaintiff in respect of the Goldrooster AG shares as a consequence of the 20 August SMS and dealt only with Mr Xie thereafter. Subsequently, the defendant told Mr Xie to execute a declaration attesting to the transfer of the shares from the plaintiff to Mr Xie. This was executed by Mr Xie on 21 November 2012, and the alleged act constituting detriment to the defendant (*ie*, the sale of Goldrooster AG shares and transfer of the proceeds to Mr Xie) occurred only after this date. In my view, it is more likely that the defendant had relied on Mr Xie's declaration rather than the 20 August SMS.

112 Further, I agree with the plaintiff that even if the defendant had relied on the 20 August SMS to sell the outstanding Goldrooster AG shares and transfer the proceeds to Mr Xie, no detriment has been suffered by him as a result. The defendant does not assert that the sold shares belonged to him, and that the plaintiff acknowledges that she received the sale proceeds that were transferred to Mr Xie. When he was questioned about the detriment, the defendant himself struggled to identify any real detriment suffered by him. He gave all sorts of irrelevant answers and finally said that the adverse consequence of the 20 August SMS to him was that it created doubt in him. He could not identify any more concrete detriment.

Issues in relation to the defendant's counterclaim

Issues in relation to the defendant's counterclaim

The Listing Expenses

113 In her submissions, the plaintiff does not dispute that the defendant had incurred the Listing Expenses despite suggesting otherwise in her AEIC. Counsel for the plaintiff also declined to cross-examine Mr Huang Yingcai, whose AEIC attesting to the fees incurred was admitted without qualifications. On the other hand, the defendant does not seem to have adduced any evidence in respect of the fees paid as detailed in [28(c)] above. Nevertheless, given that the plaintiff has not suggested that these fees should not be part of the Listing Expenses, I have proceeded on the basis that the Listing Expenses amount to RMB 12,462,858.62, as per the conversion rate used in the table of alleged Listing Expenses annexed to the plaintiff's AEIC. This computation excludes the fees paid to Mr Teoh ("Teoh's Fees") which the defendant now seeks to claim and which I discuss below. The plaintiff's 60% share of the Listing Expenses amounts to RMB 7,477,715.17.

114 The plaintiff's primary contention is in respect of how much she had contributed towards the Listing Expenses. She says that over the years she had paid to the defendant a total sum of not less than RMB 17.6m, of which only RMB 8.8m was returned to her. The net amount of RMB 8.8m is sufficient to satisfy her share of the Listing Expenses. However her record keeping was inadequate to say the least and she was not able to document all her alleged remittances from her own records.

115 Both parties rely heavily on document D1. This was a document prepared by the defendant sometime in June 2011 that sets out a table of expenses in relation not only to Goldrooster AG but also for other investments entered into by the plaintiff and the defendant. A copy of D1 was given to the plaintiff but her copy differs – the table in the plaintiff's version does not have the defendant's annotations on the right-most column of the table setting out the plaintiff's investments and expenses. However, both versions show that RMB 4.94m had been incurred as Listing Expenses for Goldrooster AG as at June 2011, and that RMB 4m had been paid by the plaintiff to the defendant by that date.

116 In respect of the RMB 17.6m which the plaintiff claims to have transferred to the defendant, she relies on D1 as well the defendant's own admissions. The annotations in D1 show that the defendant had received an additional RMB 13m from the plaintiff for their other investments and had also paid RMB 4m for listing expenses in Goldrooster AG as at June 2011. Additionally, she points to the RMB 600,000 transferred by her to the defendant on 4 September 2011.

117 The defendant argues that since the plaintiff's share of the Listing Expenses would only have amounted to RMB 2.964m (0.6 x RMB 4.94m), D1 at best shows that the plaintiff paid only that amount in relation to the Listing Expenses. I do not agree. There is nothing that suggests that the plaintiff was only paying the expenses as and when they were incurred; it is possible that she had paid these amounts as advance contributions to the expenses.

118 Further, the defendant also seems to suggest that the court should find that the plaintiff had transferred no more than RMB 12.47m, that being the amount that she could recall transferring to the defendant. This is because the money could have been for any of the parties' other investments, given that the money was not earmarked for any specific purpose. At first blush, this seems to be a departure from the defendant's pleadings – para 10A of the Defence and Counterclaim (Amendment No 3) states that "the Defendant avers that the Plaintiff's net contribution *towards the Goldrooster Jinjiang investment and expenses* is only RMB 2,155,000 (RMB 13,070,000 less RMB 10,915,000)" [emphasis added], which suggests that the defendant accepts that the entire RMB 13.07m was for the Listing Expenses. But, as counsel for the plaintiff pointed out during the hearing, his position is more equivocal when read together with the defendant's AEIC. At para 41, the defendant states that

the plaintiff had transferred the RMB 13.07m "for the purpose of investment and expenses in relation to Jinjiang Goldrooster *as well as other companies*" [emphasis added]. This is also set out in the Defence and Counterclaim (Amendment No 3) at para 10(b).

119 As for the plaintiff's claim that she had paid RMB 17.6m for the listing of Goldrooster AG, D1 goes not very far in support of her claim. The objective documentary evidence adduced by the defendant in the form of bank statements shows a total of only RMB 13.07m received from the plaintiff. More importantly, the annotations that set out the transfer of RMB 17.6m from the plaintiff to the defendant specify that most of these payments were made in relation to other investments. The plaintiff's submissions concede that RMB 17m of the RMB 17.6m was in relation to investments not relating to Goldrooster AG, a finding that is partially supported by the plaintiff's own evidence and an SMS dated 28 July 2012 that was sent by the plaintiff to the defendant. It is therefore unclear as to how this sum should be taken into consideration for the assessment of the plaintiff's contribution to the Listing Expenses, which relate only to Goldrooster AG.

120 The plaintiff has stated on affidavit that at least RMB 12.47m out of the RMB 13.07m was solely for the listing of Goldrooster AG. The disparity between these amounts lies in a transfer of RMB 600,000 from the plaintiff to the defendant on 4 September 2011. She appears to have proceeded on the basis that the defendant had conceded that all of the RMB 13.07m was for the Listing Expenses but as discussed above, the defendant's evidence was otherwise. Even on the basis of the RMB 13.07m, there are some inconsistencies in the plaintiff's stand. First, during the cross-examination of the plaintiff, it was not clear how much of the money transferred was in the nature of investments, and how much was for her contribution to the Listing Expenses:

Mr Rai:	It is not your case, right, Madam Ding, that this entire amount of RMB 12.470 million was for the listing expenses, correct?
A.	I have remitted a lot of money to him through many channels, and also through bank notes. I definitely have invested this amount of money. If not he would not have returned it to me.
Q.	I know. My question is: it is not your case that this amount, RMB 12.470 million, is all for the listing expenses, correct?
A.	Also for the Goldrooster investment.
Q.	Yes. But you -- under the 60/40 agreement with Mr Yap, you were responsible to pay 60 per cent of the listing expenses, correct?
A.	Yes.
Q.	And is it your case that you have paid Mr Yap 60 per cent of the listing expenses?
A.	I've paid everything.
Q.	How are you able to say this when you are not saying that this -- you see, you have only transferred RMB 12.470 million to Mr Yap, according to your case. And your evidence is that you are responsible for 60 per cent of the listing expenses?
A.	Yes.
Q.	And your evidence also is that this whole amount of RMB 12.47 million, is not for listing expenses, correct?

Mr Hee: I don't think the witness has given any evidence to that effect, that it is not all for Goldrooster. In fact --

Court: She said it was for the Goldrooster investment. Which was a bit ambiguous.

So what was this money to be used for? The money in paragraph 20?

A. For Goldrooster, and for all these investment expenses and other expenses.

Court: For Goldrooster for what purpose?

A. The expenses, because I have to bear 60 per cent of it. As well as for the investment.

121 Even if I were to accept that all of the RMB 13.07m was "solely for the purposes of the Goldrooster Investment" as the plaintiff claims, her evidence indicates that there was a distinction between investments and Listing Expenses. This was indeed her stand when she gave evidence about the Joint 5% Holding – that it was an investment made jointly with the defendant/his associate Ms Yu. The plaintiff's uncertainty as to how much she had transferred to the defendant for the Listing Expenses was also evident from the many shifts in her position, as pointed out by the defendant.

122 Second, D1 states that only RMB 4m had been paid by the plaintiff for Goldrooster AG's listing expenses as at June 2011. The plaintiff has not disputed the veracity of the contents of D1 save for the defendant's annotations. It would therefore appear that the plaintiff had at most contributed RMB 4m to the Listing Expenses at the time D1 was created.

123 With regard to the RMB 10.915m that was transferred to the plaintiff by the defendant, the plaintiff argues that the evidence shows that not all of this sum relates to the listing of Goldrooster AG. She emphasises that it is the defendant's own evidence that he had made repayments amounting to the RMB 10.915m "following written requests" by the plaintiff. She does not dispute that the written requests were sent by her. However, she argues that the transfer of RMB 2.115m to her on 10 January 2011 could not have been related to these written requests given that the requests only commenced on 25 July 2012, more than 18 months *after* that transfer. In cross-examination, the defendant had no real explanation save for his bare insistence that the payment related to the listing of Goldrooster AG.

124 What was even more startling was his admission that the remaining sum of RMB 8.8m had no relation to Goldrooster AG at all. That being the case, I fail to see how the RMB 10.915m can have any bearing on the assessment of the plaintiff's contribution to the Listing Expenses.

Teoh's Fees

125 The defendant claims that the plaintiff must pay her share of the sums of RM100,000 and S$300,000 in respect of fees paid to Mr Teoh. Mr Teoh's evidence was that he was engaged by the defendant sometime in 2010 to assist in various matters relating to the listing of Goldrooster AG. The scope of his engagement included "introducing bankers, coordinating with various parties and preparing the Information Memorandum for bankers/investors". There was no document evidencing the terms of his engagement. The only documentary evidence adduced in support of his affidavit were two cheques evidencing payment of the above sums and the copy of the Information Memorandum.

126 The plaintiff submits that Mr Teoh's account is wholly incredible and that the above sums should be disregarded for the purpose of the defendant's counterclaim. I agree. The defendant could

not recall during cross-examination exactly when he and Mr Teoh came to be acquainted but testified that he had known the latter for a number of years. The defendant, knowing Mr Teoh's accounting background, then engaged Mr Teoh to assist him in the listing of Goldrooster AG. What is significant is that this was the first time both parties were working together and yet the fees were agreed at what most people would consider to be a significant sum. When questioned as to how his experience and credentials would have led the defendant to approach him, Mr Teoh could only point to his accounting background and contacts in Germany. Mr Soh testified that Mr Teoh's role was that of a consultant who built the foundation for the project but, as the plaintiff points out, Mr Teoh's contribution predates Mr Soh's employment on the listing of Goldrooster AG.

127 More pertinently, as the plaintiff submits, there was no invoice or receipt that showed that the cheques relied on were issued in relation to the listing of Goldrooster AG. The cheques are therefore of little probative value in relation to the existence and terms of Mr Teoh's engagement. Nor did Mr Soh give any evidence on the same. All that the court has to rely on, essentially, is Mr Teoh's evidence. In this regard, Mr Teoh's AEIC was of little assistance. Consisting of a total of five paragraphs, it contains no further details of how he came to be engaged by the defendant and the nature of his assistance on the listing of Goldrooster AG beyond what I quoted above. The only documentary evidence that was adduced was the Information Memorandum itself – marketing material comprising a mere 25 slides setting out a very brief background on Goldrooster Jinjiang. Taking into account all of these factors, I do not think that the defendant has proven, on a balance of probabilities, that Teoh's Fees as quantified should be taken into consideration for determining the counterclaim.

Conclusion on the counterclaim

128 Having found that Teoh's Fees should be disregarded, the plaintiff is liable under the 60-40 Split for RMB 7,477,715.17. I am also of the view that the defendant has not shown that the RMB 10.915m that he transferred to the plaintiff relate to the Listing Expenses. The next difficulty lies in determining how much the plaintiff contributed to the Listing Expenses.

129 As discussed earlier, the evidence does not show that all of the RMB 13.07m transferred by the plaintiff to the defendant relates to the Listing Expenses. In particular, D1 shows that as at June 2011, at most RMB 4m had been transferred for that purpose. The plaintiff made four further transfers to the defendant between 10 June 2011 and 4 September 2011. These totalled RMB 2.6m. Since D1 is the defendant's document, I am willing to assume that D1 shows the position between the parties as at 1 June 2011. Given that the defendant has not been able to establish that all subsequent transfers made by the plaintiff were for other projects, I find that they were the plaintiff's contributions to the Listing Expenses as asserted by her. Thus, the plaintiff's contributions for the Listing Expenses totalled RMB 6.6m.

130 The plaintiff has submitted that it would have been "patently illogical" for the defendant to have transferred the ownership of Xanti to her in June 2012 had there been amounts due and owing as part of the Listing Expenses and, on that ground, invited the court to infer that the plaintiff had already made full payment in relation to the Listing Expenses. Although the defendant stated during cross-examination that the issue of expenses ceased to exist after the listing of Goldrooster AG, as he points out in his submissions, the expenses listed in Mr Soh's AEIC were all incurred after 4 September 2011. The transfers that are reflected by the bank records, on the other hand, were all made on or prior to that date. In the absence of any documentary evidence showing monetary transfers from the plaintiff to the defendant after 4 September 2011, I find that she had only contributed RMB 6.6m to the Listing Expenses. Therefore, she is still liable for RMB 877,715.17 (RMB 7,477,715.17 – RMB 6,600,000).

Conclusion

131 For the reasons given above, there will be judgment for the plaintiff on the claim for damages in the sum of €1,835,980.65 less a deduction of HK$6,389,910.21. There will also be judgment for the defendant on the counterclaim in the sum of RMB 877,715.17.

132 I will hear the parties on costs.