Tan Eck Hong *v* Maxz Universal Development Group Pte Limited
[2012] SGHC 240

Case Number : Suit No 898 of 2008

Decision Date : 30 November 2012

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : Alvin Tan Kheng Ann (Wong Thomas & Leong) for the plaintiff; Davinder Singh SC, Bernette C Meyer, Jackson Eng and Vanathi S (Drew & Napier LLC) for the defendant.

Parties : Tan Eck Hong — Maxz Universal Development Group Pte Limited

Contract – Consideration – Detriment or loss suffered

Contract – Remedies – Specific performance

Companies – Directors – Duties

30 November 2012 Judgment reserved.

Tan Lee Meng J:

Introduction

1 The plaintiff, Mr Tan Eck Hong ("TEH"), and the defendant, Max Universal Development Group Private Limited ("MDG"), are shareholders of Treasure Resort Pte Ltd ("TR") and their dispute concerns TR shares allegedly held by MDG on TEH's behalf.

2 TEH filed two suits against MDG. In the present suit, he sought specific performance of a shareholders' agreement dated 11 May 2007 ("the Second Shareholders' Agreement") that he concluded with MDG. Under this agreement, which was signed on MDG's behalf by its then managing director and chief executive officer, Mr Seeto Keong ("Seeto"), TEH was entitled to 13% of the shares in TR. On the day this agreement was concluded, Seeto executed a share transfer form for 581,000 TR shares in TEH's favour. However, the 581,000 shares were not transferred to TEH as MDG's position on TEH's entitlement to TR's shares changed after Seeto sold his interest in MDG to Roscent Group Ltd ("Roscent"), a company controlled by Mr Rodney Tan Boon Kian ("Rodney"). The new shareholder of MDG refused to recognise the Second Shareholders' Agreement as well as a number of earlier agreements concluded by MDG and TEH.

3 TEH's second suit, namely Suit No 581 of 2007, concerns oppression of the minority under s 216 of the Companies Act (Cap 50, 2006 Rev Ed). This second suit has not been heard.

Background

4 The dispute between TEH and MDG may be traced to the problems faced by another company, Sijori Resort (Sentosa) Pte Ltd ("Sijori"), which leased a property ("the lease") in Sentosa from Sentosa Development Corporation ("SDC") and operated a hotel ("the hotel") on the said property.

5 By 2004, Sijori was in dire straits as it owed $12m to the Bank of China ("BOC"). Furthermore, in November 2005, SDC instituted legal proceedings against Sijori to recover more than $1m. There was a real risk that the lease would be forfeited by SDC. Sijori's managing director, Mr Lim Chong Poon, wanted an investor to take over the lease. In March 2005, he had discussions with Seeto, who wanted to incorporate a new company, TR, with MDG as the majority shareholder, to take over the lease and the hotel with SDC's consent.

6 On 28 June 2005, TR was incorporated and Seeto became its chairman and one of its two directors. The other director was Mr Chiang Sing Jeong ("Chiang"), who operated a tourist attraction, Butterfly Park, near Sijori's hotel in Sentosa.

7 Before Sijori could transfer the lease and the hotel to TR, its massive debts to SDC, the BOC and other creditors had to be settled. Seeto had grandiose plans but neither MDG nor TR had sufficient funds to take over the lease and the hotel. As such, Seeto had to look for investors who were prepared to inject money into TR.

TEH is persuaded by Seeto to invest in TR

8 TEH, who was then 28 years old, was persuaded by Seeto to invest in TR. On 19 September 2005, TEH and TR signed a non-binding memorandum of understanding ("MOU"), which recorded TEH's intention to purchase from Seeto "the shares of TR in the proportion of 8% (eight percentile) at a price of $720,000 based on an estimated valuation of the lease of the property ... [at] $9,000,000". It also provided for TR to pay TEH a yield of 8.5% per annum based on the sum of $720,000 and for the latter to have one seat on TR's Board of Directors.

9 At the material time, only 820,000 TR shares had been issued. On 27 October 2005, MDG transferred to TEH 8% of these shares, which amounted to 65,600 shares. However, there was more to this than meets the eye. Clause 6.1 of the MOU provided that TEH's investment of $720,000 would be used for the "sole purpose of paying the purchase price of the leasehold interest in the Sijori resort and for renovation, refurbishment and other operational expenses incurred in respect of the said resort" and on 29 September 2005, Seeto and TR's CEO, Mr Gary Koh, wrote to assure TEH that his investment of $720,000 in TR "shall be duly used in accordance [with] the [MOU] dated 19 September 2005". Despite this, Seeto utilised TEH's $720,000 to have TR issue 720,000 new shares to MDG. This meant that for the same $720,000 that TEH paid to TR, he received 65,600 shares from Seeto while MDG obtained 720,000 TR shares. TEH alleged that this was a deception perpetrated on him by Seeto and MDG.

TEH lends MDG $160,000

10 In early December 2005, MDG was so short of funds that Seeto had to ask TEH to lend $160,000 to MDG for just three weeks. TEH said that Seeto offered him 2% of TR's shares in return for the said loan, which was to be repaid by 24 December 2005. Seeto handed over to TEH a handwritten note dated 7 December 2005 ("the Letter Agreement"), which stated as follows:

> We hereby acknowledge the receipt of SGD160,000 from Mr EH Tan on a loan basis which is to be returned by 24 Dec 2005.
>
> As a gesture of goodwill, MDG will provide an additional 2 per cent (2%) to his existing shareholding of 8 per cent (8%) in Treasure Resort Pte Ltd. The share transfer shall be exercised after ... 7 December 2005.

The FirstShareholders' Agreement on 8 August 2006

11 On 8 August 2006, Seeto, TEH and Chiang entered into a shareholders' agreement ("the First Shareholders' Agreement"). Although the MOU had recorded that TEH intended to purchase 8% of TR's shares and Seeto had agreed that MDG would hand over 2% of TR's shares in the Letter Agreement, the First Shareholders' Agreement stated rather curiously that TEH had only 1% of the shares of TR.

12 Significantly, the First Shareholders' Agreement gave TEH a right to veto decisions on a number of matters. Clause 5.3 of this agreement provided that the unanimous consent of all the shareholders was required for, among other things, an amendment to the Memorandum of Association or the Articles of Association, any change in the shareholders of the Company or the appointment or removal of directors and on any matter referred by the directors to be approved by the shareholders. Clause 6 of the First Shareholders' Agreement also gave TEH a veto on decisions of the Board of Directors on a number of management matters, including the payment of compensation for loss of office.

The Call Option Agreement on 31 October 2006

13 Although MDG promised to repay the loan of $160,000 by 24 December 2005, it did not do so and the loan remained unpaid more than 10 months later. TEH claimed that when he threatened to sue MDG to recover the loan, Seeto offered to transfer another 6% of TR's shares to him in return for more time to repay the loan. This agreement was embodied in a "Call Option Agreement" dated 31 October 2006, which was signed by Seeto on MDG's behalf. Under this agreement, TEH paid one cent for an option to purchase 6% of the shares in TR from MDG for another one cent.

The Supplemental Agreement to the First Shareholders' Agreement

14 On 5 December 2006, Seeto, Chiang and TEH entered into a Supplemental Agreement to the First Shareholders' Agreement ("the Supplemental Agreement"). While the First Shareholders' Agreement acknowledged that TEH had 1% of TR's shares, the Supplemental Agreement acknowledged that TEH was entitled to 16% of TR's shares on the basis of the MOU (8%), the Letter Agreement (2%) and the Call Option Agreement (6%). In the rest of this judgment, unless otherwise stated, the term "First Shareholders' Agreement" will include the Supplemental Agreement. There was some debate as to whether the First Shareholders' Agreement gave TEH 16% or 17% of TR's shares. During the trial, TEH agreed that the figure should be 17% but the difference is of no significance as TEH's case in these proceedings was that he had agreed in the Second Shareholders' Agreement to reduce his shares to 13% from whatever percentage he was entitled to under the First Shareholders' Agreement.

TR acquires the lease

15 On 14 November 2006, just before the Supplemental Agreement was executed, TR finally acquired the lease and the hotel with the consent of Sijori and SDC. TR also entered into an agreement with SDC to lease a property adjoining the Sijori resort. It undertook to renovate the hotel and extend it with a new wing on the adjoining land ("the project").

TR's financial woes and the entry of Rodney Tan

16 After acquiring the lease and the hotel, TR did not have funds to renovate the existing hotel or commence construction work on the project. By May 2007, both TR and the project were on the

verge of collapse. In view of this, Seeto needed investors to inject funds into TR.

17 Seeto invited Rodney to invest in TR. Rodney made it clear that he would do so only if he had majority control of MDG and TR. Seeto offered to sell more than 50% of MDG's shares to Rodney so as to give the latter majority control of both MDG and TR.

18 Rodney instructed his solicitors, Stamford Law Corporation ("Stamford Law"), to check whether MDG was indeed the legal owner of all the TR shares registered in its name. Stamford Law advised Rodney that the following two documents appeared to affect MDG's legal ownership of TR shares:

(i) the First Shareholders' Agreement dated 8 August 2006 signed by TEH, Chiang and MDG; and

(ii) a Declaration of Trust dated 10 August 2006 ("the Declaration of Trust") executed by MDG in favour of Chiang. TEH was neither a party to nor a beneficiary of this Declaration of Trust.

19 Rodney instructed Stamford Law to arrange for the termination of both the First Shareholders' Agreement and the Declaration of Trust. Seeto also made arrangements to terminate the MOU, the Letter Agreement and the Call Option Agreement. With respect to the termination of the agreements that concerned him, TEH was represented by Ms Pebble Sia of Esquire Law Corporation, who liaised with MDG's solicitor, Mr Allister Lim.

Termination of the First Shareholders' Agreement and execution of the Second Shareholders' Agreement

20 On 11 May 2007, MDG's solicitor, Mr Allister Lim, had a meeting with Seeto, Chiang and TEH in a private room in a karaoke lounge. He brought along with him the Second Shareholders' Agreement as well as a number of deeds to terminate the First Shareholders' Agreement, the other Historical Documents and the MOU. He explained the contents of these documents to Seeto, Chiang and TEH, after which the documents were signed. *Notably, Rodney was present in the room when Mr Allister Lim explained the contents of these documents and when the said documents were signed by Seeto, Chiang and TEH.* Rodney claimed that he did not pay attention to what Mr Allister Lim, Seeto, TEH and Chiang had said before they signed the documents.

21 TEH explained that the Second Shareholders' Agreement was intended to regulate the position between him and MDG following the termination of the First Shareholders' Agreement. Under the Second Shareholders' Agreement, TEH renounced his veto rights under clauses 5.3 and 6 of the First Shareholders' Agreement and agreed to reduce his shareholding in TR to 13%, subject to a non-dilution clause requiring MDG to maintain his 13% shareholding in TR up to the point when TR's issued capital reached $6.2m.

22 When the Second Shareholders' Agreement was signed by Seeto and TEH, TR had issued 4,820,001 shares with a par value of $1 each. If TEH was entitled to 13% of TR shares, he should have had 626,600 shares registered in his name. Notably, the deed of termination and release in relation to the MOU signed by TEH provided in its recital that MDG, the majority shareholder of TR, "has agreed to transfer 626,000 of its shares in TR to TEH". As mentioned, if the 65,600 TR shares already registered in TEH's name are taken into account, this meant that MDG had to transfer 561,000 shares to TEH. *Significantly, a share transfer form for 561,000 TR shares was executed by Seeto at the same time the Second Shareholders' Agreement was signed on 11 May 2007. MDG's corporate seal was affixed onto the share transfer form, which was witnessed by Mr Allister Lim.* Despite this, MDG's new majority shareholder, Roscent, refused to honour Seeto's promise and

contended that TEH was not entitled to the 561,000 TR shares.

23 After the Second Shareholders' Agreement was executed, TR's issued share capital was increased and it presently exceeds $13m. Under the non-dilution clause in the Second Shareholders' Agreement, TEH's 13% of TR's shares, capped at $6.2m of issued capital, amounted to 806,000 TR shares. As he had been allotted 65,600 TR shares in late 2005, TEH contended that MDG had to transfer 740,400 TR shares to him so that he would have a total of 806,000 TR shares.

Whether the Second Shareholders' Agreement is enforceable

24 TEH's claim against MDG rests primarily on the Second Shareholders' Agreement. His counsel, Mr Alvin Tan, stated that TEH will rely on the Letter Agreement, the Call Option Agreement and the First Shareholders' Agreement ("the Historical Documents") to prove his claim against MDG only if the Second Shareholders' Agreement is found to be unenforceable for any of the reasons advanced by MDG.

25 In contrast, MDG asserted that the earlier agreements, namely the MOU and the Historical Documents should be considered first. MDG's strategy was to prove that the First Shareholders' Agreement was unenforceable on the ground that it rested on allegedly unenforceable agreements, namely the non-binding MOU, which was entered between TEH and TR, the Letter Agreement and the Call Option Agreement.

26 A large part of TEH's cross-examination focussed on the alleged unenforceability of the MOU and the Historical Documents. However, as TEH advanced his case on the basis that the Second Shareholders' Agreement is valid, attention will be focussed on whether or not this agreement is valid.

27 TEH's case was that he agreed to give up his rights to the 16% or 17% of TR shares promised to him under the First Shareholders' Agreement and the other Historical Documents only because he had agreed with Seeto that their rights would from henceforth be governed by the terms of the Second Shareholders' Agreement. Notably, Recitals C and D of the Second Shareholders' Agreement provided as follows:

> (C) The shareholders of [TR] intend to terminate the [First Shareholders' Agreement] with effect from 11 May 2007.
>
> (D) Contemporaneously with the termination of the [First Shareholders' Agreement], the parties wish to enter into this Agreement to regulate their respective rights and obligations to each other in relation to their respective shareholding in the Company on the terms and subject to the conditions set out in this Agreement.

28 MDG contended that TEH could not rely on the Second Shareholders' Agreement for the following reasons:

> (i) Seeto had no authority to conclude this agreement;
>
> (ii) Seeto breached his fiduciary duties to MDG by entering into the said agreement and TEH was aware of this; and
>
> (iii) TEH did not furnish any consideration for the said agreement.

Whether Seeto had authority to conclude the Second Shareholders' Agreement

29 MDG asserted that Seeto had no authority to conclude the Second Shareholders' Agreement because there was no board resolution authorising him to do so.

30 By virtue of the rule in *Royal British Bank v Turquand* (1856) 6 El & Bl 327 ("the rule in *Turquand's case*"), an outsider, such as TEH, may, without more, assume that indoor management rules have been observed by the party properly representing a company. In that case, a company asserted that it was not obliged to repay a loan to a bank on the ground that its board of directors did not have the power to borrow without the prior authorisation of the general meeting. It was held that while the bank was required to inspect the company's constitution, it could assume that the general meeting had taken place.

31 The rule in *Turquand's case* has been applied by our courts on innumerable occasions (see, for instance, the decision of the Court of Appeal in *Abdul Jalil bin Ahmad bin Talib and others v A Formation Construction Pte Ltd* [2007] 3 SLR(R) 592). TEH was thus entitled to assume that Seeto had complied with MDG's internal rules before the latter signed the Second Shareholders' Agreement on MDG's behalf.

32 Even if, as MDG alleged, Seeto had no actual authority to enter into the Second Shareholders' Agreement on behalf of MDG, he had apparent authority to do so. He was MDG's managing director and chief executive officer at all material times. Moreover, MDG was legally advised on the Second Shareholders' Agreement and its solicitor, Mr Allister Lim, had liaised with TEH's solicitor, Ms Pebble Sia, on TEH's requirements for the termination of the Historical Documents and the MOU. It was Mr Allister Lim who brought all the relevant documents, including the Second Shareholders' Agreement, to the meeting on 11 May 2007 for Seeto and TEH to sign. Following the signing of the said documents, Ms Pebble Sia wrote to Mr Allister Lim on 17 May 2007 as follows:

> Thanks for your signed documents. Could I also trouble you to confirm:
>
> 1 My client's appointment as director of Treasure Resort Pte Ltd with effect from 11 May 2007...
>
> 2 *That the shares in question have been transferred to my client with effect from 11 May 2007* and consequently provide me with (i) the original share certificate evidencing my client's holdings of the new shares together with the cancelled share certificate of MDG ...
>
> [emphasis added]

33 In these circumstances, TEH had every reason to believe that all was in order. I thus find that it was not proven that Seeto had no authority to sign the Second Shareholders' Agreement. Furthermore, at the very least, he had apparent authority to sign the Second Shareholders' Agreement on MDG's behalf.

Whether Seeto breached his fiduciary duties by signing the Second Shareholders' Agreement

34 A director owes fiduciary duties to his company and must act in the company's best interests. In *Intraco Ltd v Multi-Pak Singapore Pte Ltd* [1994] 3 SLR(R) 1064, the Court of Appeal held **(**at [29]) that whether a director has breached his fiduciary duties to his company depends on whether "an honest and intelligent man in the position of the directors, taking an objective view, could reasonably have concluded that the transactions were in the interests of the [company]".

35 It is for MDG to prove its assertion that the Second Shareholders' Agreement was concluded by

Seeto in breach of his fiduciary duties to it and that TEH was aware of Seeto's breach or was put on inquiry. In regard to constructive knowledge of a director's breach of fiduciary duties, in *Cheong Kim Hock v Lin Securities (Pte) (in liquidation)* [1992] 1 SLR(R) 497, the Court of Appeal explained (at [28]) that where a person who knows of circumstances sufficient to put him on inquiry as to whether a breach of trust or fiduciary duty has occurred shuts his eyes to the obvious or fails to make such inquiries as an honest and reasonable man would make, the law fixes him with a constructive notice of such breach, and he is accountable to the beneficiary for benefits obtained by him as a result of the breach.

36 There was no evidence that MDG had written to or taken any action against Seeto regarding his alleged breach of fiduciary duties. Undoubtedly, Seeto should have been called to testify on why he concluded the Second Shareholders' Agreement and his earlier agreements with TEH. Although Seeto was listed as MDG's witness, MDG decided not to call him to testify and invited the court to hold that he had breached his fiduciary duties on the basis that the terms of the Second Shareholders' Agreement and the Historical Documents were not in its commercial interest.

37 Considering the complexity of Seeto's machinations on behalf of MDG and TR, it was regrettable that MDG chose not to call him as a witness, and especially so since he had testified on MDG's behalf in other cases in the High Court on his agreements with other parties before Rodney came onto the scene. Not surprisingly, TEH rightly contended that an adverse inference should be drawn against MDG for not calling Seeto to testify in the present proceedings and that it may be assumed that Seeto's evidence, had it been given, would not have advanced MDG's case on the alleged breach of fiduciary duties. On the other hand, MDG assumed incorrectly that it had established a *prima facie* case that Seeto had breached his fiduciary duties to it and invited the court to draw an adverse inference against TEH for not calling Seeto as a witness to disprove the alleged *prima facie* case. This cannot be countenanced.

38 MDG claimed that Seeto did not act in its interest by acknowledging in the Second Shareholders' Agreement that TEH was entitled to 13% of TR's shares because he knew that Rodney would only invest in MDG and TR if MDG had full ownership of all the TR shares registered in its name and if all MDG's past agreements with TEH and Chiang affecting its rights were terminated. MDG's position was put as follows (at para 354 of its closing submissions):

> [S]eeto clearly acted in breach of his fiduciary duties to MDG by going against the conditions for investment of [Rodney] when it was in MDG's commercial interests to secure [the latter's] involvement in MDG. That it was a breach of fiduciary duty is indisputable. *Seeto's conduct exposed MDG to the risk that if [Rodney] found out what had happened, he could have refused to invest resulting in a total collapse of TR and consequently the value of MDG's assets.*
>
> [emphasis added]

39 The simple answer to MDG's assertion is that the desire to have Rodney come on board did not entitle the company to ignore the rights of other parties to whom it had already made commitments. Indeed, Seeto would *not* have acted in MDG's interests if he had disregarded these earlier commitments to other parties, including TEH, as this might have exposed the company to suits against it by the other parties.

40 It cannot be overlooked that both MDG and TEH had the benefit of legal advice in relation to the drafting and signing of the Second Shareholders' Agreement. By contending that Seeto breached his fiduciary duties to MDG when he signed the Second Shareholders' Agreement, Rodney was in fact suggesting that TEH, who had invested $720,000 in TR and had lent MDG $160,000, was prepared to

terminate the First Shareholders' Agreement, which gave him veto rights as well as 16% or 17% of TR's shares, without any fresh agreement on his shareholding in TR. If this was true, TEH would be left with only the 65,600 TR shares allotted to him in late 2005, or 1.56% of TR's shares. This is a totally unrealistic scenario.

41 It is far more likely than not that TEH had negotiated with Seeto before agreeing to give up his rights under the First Shareholders' Agreement. That was why his solicitor, Ms Pebble Sia, represented him in the matter and liaised with MDG's solicitor, Mr Allister Lim. TEH referred to an oral agreement ("the Oral Agreement") with Seeto, under which his shareholding in TR would be reduced to 13%, subject to a non-dilution clause requiring MDG to ensure that he remained a 13% shareholder of TR up to a cap of $6.2m of issued capital. MDG claimed that the Oral Agreement was not proven and that the "entire agreement" clause in the Second Shareholders' Agreement precluded any attempt to rely on oral terms. However, TEH did not rely on the Oral Agreement to vary or contradict the terms of the Second Shareholders' Agreement, on which he relied. His point was that the Oral Agreement was evidenced by the Second Shareholders' Agreement and that it placed all the documents signed on 11 May 2007 in the proper context. In view of this, attention ought to be focused on the Second Shareholders' Agreement rather than on whether or not there had been an Oral Agreement.

42 I believe TEH's assertion that Rodney was fully aware of the new arrangements following the termination of the First Shareholders' Agreement. If Seeto had intended to "do a deal" with TEH behind Rodney's back by signing the Second Shareholders' Agreement, it is inexplicable that this agreement and all the other deeds terminating the Historical Documents and the MOU *were signed in Rodney's presence* on 11 May 2007*.* Admittedly, Rodney claimed that he did not pay attention to what had been discussed about the deeds and the Second Shareholders' Agreement but if Seeto had wanted to do something surreptitious, he would not have done it when Rodney *could* have heard what was being discussed about, *inter alia*, the Second Shareholders' Agreement.

43 The evidence was that after the Second Shareholders' Agreement was signed, Rodney conducted MDG's affairs on the basis that TEH had 13% of TR's shares. Some three weeks after the said agreement was signed, Rodney, TEH, Chiang and Seeto met on 30 May 2007 to discuss a further adjustment of their shareholdings in TR. The agreement between the parties on that day was that TEH was to transfer 1% of TR's shares to Chiang. If, as MDG alleged, the Second Shareholders' Agreement is invalid and TEH's shareholding of TR shares had been reduced to 65,600 shares or a mere 1.56% after the First Shareholders' Agreement was terminated on 11 May 2007, it was most unlikely that TEH would have agreed to give up another 1% of TR's shares to Chiang three weeks later as this would have reduced his shareholding of TR shares by two-thirds to a meagre 0.56%.

44 In contrast, if, as TEH contended, the Second Shareholders' Agreement recognising his 13% of TR's shares is valid, he would be left with 12% of TR's shares after agreeing to give up 1% to Chiang. Interestingly, within two weeks after the 30 May 2007 agreement on reallocation of shares in TR, Rodney referred to TEH's 12% shareholding in an email on 11 June 2007, to, *inter alia*, TEH's solicitor, Ms Pebble Sia, Seeto and TR's Gary Koh. Part of this email, which was sent to Ms Pebble Sia after she had been instructed to draft a letter to SDC on TR's intended shareholding structure, stated as follows:

> *As per last meeting*, the plan shareholders structure of TR will change a lot a slight adjustment among existing shareholders. Please inform no new shareholders expected: *the structure will be MDG 86%, [TEH] 12%, Chiang 2%....*
>
> [emphasis added]

45 Although it was quite obvious that Rodney had acted as if TEH's shareholding in TR was indeed 12%, he claimed that the reference to TEH's 12% in his email on 11 June 2007 concerned *plans to increase* TEH's shareholding in TR to 12% in the future. There was no evidence that plans to increase TEH's shareholding in TR had been discussed at the "last meeting" referred to in the said email. Furthermore, Rodney would not have instructed Ms Pebble Sia to inform SDC that TEH's shareholding will be 12% if this was based solely on TEH's intention to purchase TR's shares from MDG at some time in the future. Apart from the fact that Rodney's explanation was not credible, he subsequently sent the following rather telling text message to TEH on 2 August 2007:

> Eck Hong, Not this time. You should not appear now. Tomorrow is more on [SDC] like to find out who actually take the lead of [MDG] and all progress of renovation. At mean time, *I do not want them to question your stake in [TR] to see we have so many changes cause they are sensitive of us always never ask their consent*. We like them to forgive those previous breaches and make sure all future *include our transfer to you the shares* we will ask for consent from them proper procedure.
>
> Dont worry as soon as we finished this meeting and the first loan is started *I will start the procedure to* ask for [consent to] appoint you as director *and transfer share to you from Egm of Mdg and treasure resort*. Thanks.
>
> [emphasis added]

46 When Rodney was cross-examined on why he told TEH that he would *start the procedure to transfer shares* "after this meeting and the first loan is starting", he testified as follows:

> Okay, when you talk about the transfer of shares, [TEH] starting chasing me for the shares because he claimed that there was an agreement with MDG for the transfer of shares. I wanted to see proof but he could not produce any. As this was a very sensitive issue, I told him, 'give me some time, let me finish off with the major things first'.
>
> *Actually what I meant at that time was that if he could show me proof, I will transfer the shares but we must do it through the proper procedure.*
>
> [emphasis added]

47 If, as alleged by Rodney, TEH was only entitled to 65,600 TR shares after the First Shareholders' Agreement was terminated on 11 May 2007, he would not have had to "start the procedure" to transfer TR shares to the latter because the 65,600 TR shares had already been registered in TEH's name. In any case, Rodney's testimony that he wanted TEH to prove his claim to TR shares contradicted his explanation of his email of 11 June 2007, which was that his reference to TEH's 12% of TR's shares in that email concerned the latter's intention to *purchase* the said 12% *in the future*. TEH was either intending to purchase 12% of TR's shares from MDG, as alleged by Rodney in his testimony on his email of 11 June 2007, or claiming that MDG held TR shares on his behalf, as alleged by Rodney in his testimony on his text message on 2 August 2007 to TEH.

48 In my view, Rodney's offer on 2 August 2007 to start the procedure to transfer shares to TEH showed that he knew about the Second Shareholders' Agreement and acknowledged TEH's rights under it.

49 For reasons that are unclear, the share restructuring agreement on 30 May 2007 was not implemented. TEH assumed that he was still entitled to 13% of TR's shares. On 11 September 2007,

he emailed Rodney about his entitlement as follows:

> Under the agreement that MDG signed with me on 11 May, MDG needs to transfer TR shares to me to maintain my 13% up to $6,200,000 paid-up capital. Based on my current shareholding of 62,500, MDG needs to transfer another 743,000 TR shares to me.....
>
> Also, I understand that my directorship appointment needs SDC approval. Can you let me know when you expect to get their approval.

50 Rodney's reply to TEH's claim for 13% of TR's shares on 12 September 2007 consisted of only two words, namely, "As discussed". A hint on what had been discussed appeared in TEH's email to Rodney on the same day, which was as follows:

> You mean as discussed as in I can look at the unaudited accounts but not get a copy? Can you let Sebastian know then?
>
> Also assuming that the capitalisation of the loans is valid, can I proceed with buying the shares at the $1.00 capitalisation price and set off the loan of $160,000 owing by MDG to me?
>
> For the directorship appointment, I understand that we are waiting for SDC's approval for our Maybank loan, then we will seek approval for the appointment, Can I confirm that SDC will most likely approve the Maybank loan within these two weeks.

51 It was rather telling that TEH did not refer to his claim for 13% of TR's shares in his reply to Rodney's email on 12 September 2007. If Rodney had rejected his claim to the said 13% during their discussions, TEH would surely have reiterated his claim in his said reply. I thus find that Rodney did not challenge TEH's claim to 13% of TR's shares during his discussions with the latter before he sent his email containing the two words "As discussed" on 12 September 2007.

52 Admittedly, TEH was battered during cross-examination and he occasionally could not justify all that he said. However, I accept that the Second Shareholders' Agreement was intended by MDG and TEH to regulate their rights following the termination of the First Shareholders' Agreement and that Rodney was fully aware of the terms of the Second Shareholders' Agreement. I thus hold that MDG did not prove that Seeto breached his fiduciary duties to the company by signing the Second Shareholders' Agreement.

Whether TEH furnished consideration for the Second Shareholders' Agreement

53 Consideration for a fresh promise can take the form of a renunciation of or a compromise on legal rights or commercial expectations that may not be legally binding.

54 TEH asserted that an inquiry into the enforceability of the Historical Documents is unnecessary because even if they are unenforceable, they gave rise to commercial expectations on his part that the promises made therein by MDG will be kept. TEH rightly contended that a renunciation of some of his commercial expectations under the Historical Documents may be regarded as the consideration offered by him for the Second Shareholders' Agreement that he sought to enforce in the present proceedings. In *Ong Chay Tong & Sons (Pte) Ltd v Ong Hoo Eng* [2009] 1 SLR(R) 305, the Court of Appeal approved [at [30]) of the following passage from *Chitty on Contracts* (Sweet & Maxwell, 29th Ed, 2004) at para 3-008A:

> A person who makes a commercial promise expects to have to perform it (and is in fact under

considerable pressure to do so). Correspondingly, one who receives such a promise expects it to be kept. *These expectations, which can exist even where the promise is not legally enforceable, are based on commercial morality, and can properly be called a detriment and a benefit; hence they satisfy the requirement of consideration in the case of mutual promises.*

[emphasis added]

55 It cannot be seriously doubted that TEH had a commercial expectation that the TR shares promised to him by MDG under the Historical Documents will be transferred to him. After all, on 11 May 2007, Seeto executed a share transfer form in TEH's favour for 561,000 TR shares. I thus find that at the very least, TEH is entitled to say that he furnished consideration for the Second Shareholders' Agreement by renouncing some of his commercial expectations under the First Shareholders' Agreement.

56 TEH also submitted that apart from renouncing some of his commercial expectations, he furnished consideration for the Second Shareholders' Agreement by giving up important *legal* rights accorded to him under the First Shareholders' Agreement. He referred to his renunciation of his veto rights and the reduction of his entitlement to TR's shares from 17% or 16% to 13%.

57 TEH testified that it appeared from his discussions with Rodney before the Second Shareholders' Agreement was signed that the latter had wanted a free hand to run TR. He added that while Rodney did not want him to have veto rights over important decisions regarding TR's affairs, the latter was not adverse to a new arrangement on his shareholding. I accept that TEH furnished consideration for the Second Shareholders' Agreement by renouncing his veto rights under the First Shareholders' Agreement.

58 TEH also contended that apart from veto rights, he had other legal rights under the Historical Documents to renounce. This was certainly true in the case of the Letter Agreement, under which Seeto agreed to give him 2% of TR's shares in return for an interest-free loan of $160,000 for 17 days in December 2005. MDG asserted that the Letter Agreement was unenforceable as it was made without any intention to create legal relations and Seeto had stated that the 2% of TR's shares were given to TEH as "a gesture of goodwill". TEH insisted that whatever Seeto may have written, he had agreed to lend MDG $160,000 in exchange for 2% of TR's shares. He testified that if Seeto had not offered him the 2%, he would not have lent MDG the $160,000.

59 What MDG was suggesting to the court was that TEH had agreed to lend MDG $160,000 for nothing in return. This is a most unrealistic reading of the situation. While parting with 2% of TR shares for a loan of $160,000 for 17 days may appear to be rather generous, the court is, without more, not concerned with the adequacy of TEH's consideration. Even so, it must be borne in mind that TR's shares were then not worth as much as they are today. Furthermore, the financial position of TR was rather bleak in December 2005 as it required several million dollars to acquire the lease and its major shareholder, MDG, was so short of funds that it needed a loan of $160,000 from TEH. In any case, this was not the only time Seeto had given away TR shares in exchange for a very short term loan. In *Maxz Universal Development Group Pte Ltd v Shen Yixuan and Another Suit* [2009] SGHC 164, Seeto offered a Mr Shen Yixuan 6% of TR's shares, totalling 289,200 shares, for $1 in return for giving MDG an interest-free bridging loan of $500,000 for *only 12 days*, from 8 November 2006 to 20 November 2006. Lee Seiu Kin J, who held that this agreement was binding, pointed out that Seeto was so desperately short of money at the material time that he would trade a kingdom for a horse. While that decision does not prove any of the issues in the present case, it showed that Seeto had parted with 6% of TR's shares in exchange for a loan for only 12 days.

60 As for MDG's assertion that Seeto had no intention to create legal relations when he promised TEH 2% of TR's shares for the loan, in *Edwards v Skyways Ltd* [1964] 1 WLR 349 (at 355), where an "*ex gratia*" payment promised to redundant pilots of an airline company was held to be enforceable, Megaw J aptly pointed out that where business relations are concerned, "the onus is on the party who asserts that no legal effect was intended, and the onus is a heavy one". In the present case, MDG certainly did not prove its assertion.

61 I thus find that TEH had legal rights under the Letter Agreement and by giving up those rights, which were recognised under the First Shareholders' Agreement, he furnished consideration for the Second Shareholders' Agreement.

62 TEH also pointed out that under the Second Shareholders' Agreement, he gave up his legal right to 8% of TR's shares, which was recognised in the First Shareholders' Agreement as having emanated from the MOU. It may be recalled that the non-binding MOU between TEH and TR recorded that he was to pay $720,000 for 8% of TR's shares and he received 65,600 shares in exchange for his money. However, although the MOU stated that TEH's $720,000 was to be used for solely for purchasing the lease, renovating the hotel and other operational expenses, Seeto utilised TEH's $720,000 to have 720,000 TR shares issued to MDG. MDG contended that as TEH had already received 65,600 shares for his $720,000, he could not rely on past consideration to support his claim for 8% of TR's shares under the First Shareholders' Agreement. TEH retorted that the question of past consideration did not arise because the 8% promised to him under the First Shareholders' Agreement was intended to address the wrongful utilisation by MDG of his investment of $720,000 to issue 720,000 TR shares to itself. MDG chose not to call Seeto to contradict TEH and there was no credible evidence to counter TEH's version of events. I thus reject the argument that TEH had no legal rights to renounce in relation to the said 8% of TR shares.

63 As for MDG's contention that the allegation of Seeto's deception was not pleaded, the gist of the wrong done by Seeto when he used TEH's $720,000 to acquire 720,000 shares for MDG was pleaded in paras 13 to 14 of the Reply and Defence to Counterclaim as follows:

> 13 The Plaintiff and Defendants had recognised that the transfer of 65,600 shares to the Plaintiff, as evidenced by the transfer form dated 27 October 2005 did not reflect the intention of the parties nor the obligations of the Defendants to transfer to the Plaintiff 8% of the share capital of Treasure Resort.
>
> 14 In the premises, the Plaintiff avers that the 1st Shareholders' Agreement was supported by valid consideration *insofar as the 8% of the share capital of Treasure Resort promised to the Plaintiff thereunder derived from the S$720,000.00 payment from the Plaintiff which had been utilized by the Defendants to procure the allotment of shares of Treasure Resort to themselves.*
>
> [emphasis added]

64 I thus reject MDG's assertion that TEH had no legal right under the First Shareholders' Agreement to the 8% of TR's shares recognised in the said agreement as having emanated from the MOU.

65 In relation to the termination of the Call Option Agreement, which gave 6% of TR shares which TEH was entitled to purchase for one cent, TEH explained that Seeto had promised him the said 6% in return for more time to repay the loan of $160,000. MDG queried why the deal was not recorded in a simple agreement instead of a Call Option Agreement, which did not refer to any additional time given to MDG to repay the loan. TEH explained that he obtained a template on a Call Option Agreement and

got Seeto to sign it after it became evident to him that MDG was not in a position to repay the loan at the material time. Admittedly, when cross-examined, TEH could not say how much additional time was given to MDG to repay the loan. However, it is noteworthy that it was not established that Seeto, who held the majority of the shares in MDG at the material time, had acted in breach of his fiduciary duties to his company when he signed the Call Option Agreement. MDG could easily have called Seeto to explain why he signed the Call Option Agreement but it chose not to do so. In these circumstances, and in the light of Seeto's machinations in his desperate attempt to raise funds for TR to take over the lease and the hotel, it cannot be said that on a balance of probabilities, TEH had no legal rights at all to renounce in relation to 8% of TR shares recognised in the First Shareholders' Agreement as emanating from the Call Option Agreement.

66 Finally, MDG's assertion that TEH did not believe that he had legal rights to renounce was not proven. TEH testified that his solicitor had advised him that his agreements with Seeto were "loose" and "not tight" but this did not mean that he believed that he had no valid claims against MDG In regard to the Letter Agreement, TEH did not claim the 2% of TR's shares offered under this agreement when he initiated an action for the return of the $160,000 loaned to MDG but he explained that as the said 2% had been acknowledged as due to him in the Supplemental Agreement, he saw no urgency in suing for the shares whereas the $160,000 owed to him could have been invested or used to purchase an asset that might appreciate in value over time and that was why he sued to recover the loan.

67 For the reasons stated, MDG failed to prove that TEH had furnished no consideration for the Second Shareholders' Agreement.

Conclusion on the validity of the Second Shareholders' Agreement

68 In the final analysis, it should not be overlooked that TEH claimed to be entitled under the said agreement to only 806,000 TR shares. The number of TR shares claimed by him is thus not much more than the 720,000 shares that Seeto obtained for MDG by misusing the $720,000 paid by TEH in 2005, which, according to the MOU, was intended to be used solely for the purchase price of the lease, hotel renovation and operational expenses of the resort. Furthermore, TEH had lent MDG $160,000 at a crucial time for MDG and this loan has not been repaid.

69 I found TEH to be a quite a truthful witness. Although he was battered during cross-examination, the essence of his evidence was believable, and especially so in the absence of any testimony from Seeto. The evidence clearly showed that Rodney knew about the Second Shareholders' Agreement, which was willingly entered into by Seeto to replace the First Shareholders' Agreement. I thus hold that the Second Shareholders' Agreement is valid and that MDG is bound by it.

TEH's statutory declaration

70 MDG also asserted that even if TEH had rights under the Second Shareholders' Agreement, he waived his right to the 13% of TR's shares claimed by him when he swore in a statutory declaration dated 19 February 2008 ("the statutory declaration") that he was the legal and beneficial owner of only 65,600 TR shares. TEH did not mention his entitlement to TR's shares under the Second Shareholders' Agreement in the statutory declaration.

71 TEH said, and I believe him, that Rodney had informed him that SDC required the statutory declaration and that Rodney had asked him to state therein that he only owned 65,000 TR shares. TEH added that Rodney explained to him that SDC wanted to be kept informed of changes in the shareholding of TR and it was then not the right time to inform SDC about the changes in the

shareholding of TR. Rodney promised that at an appropriate time in the future, MDG would transfer the TR shares claimed by TEH. Rodney thus knew that TEH did not intend to waive his right to the 13% of TR's shares promised to him under the Second Shareholders' Agreement by furnishing the statutory declaration to SDC at his request.

72 Undoubtedly, TEH should have stated the true position on his entitlement to TR shares in the statutory declaration but it is crucial to note that he is not relying on the statutory declaration to mount his claim against MDG for TR's shares. As such, the question of the effect of illegality on his claim against MDG does not arise. What is clear is that in the circumstances of this case, MDG cannot, in view of Rodney's actions, be allowed to take advantage of the statutory declaration to avoid its obligations to TEH under the Second Shareholders' Agreement.

Whether specific performance should be ordered

73 The next question is whether TEH is entitled to specific performance of the Second Shareholders' Agreement. The court has a discretion on whether or not to grant the remedy of specific performance although the discretion must be exercised in accordance with fixed rules and principles.

74 It ought to be noted that Article 6.3 of the Second Shareholders' Agreement provides as follows:

> **Consent to Specific Performance**
>
> The parties hereby agree that it might be impossible to measure in money the damages which would accrue to a party by reason of failure to perform certain obligations hereunder. Any such party shall, therefore, be entitled to seek injunctive relief, including specific performance, to enforce such obligation and *if any action should be brought in equity to enforce any of the provisions of this Agreement, none of the parties hereto shall raise the defence that there is an adequate remedy at law.*
>
> [emphasis added]

75 Leaving aside the above-mentioned contractual provision for the moment, TEH's case merits an order of specific performance. In *Lee Chee Wei v Tan Hor Peow Victor and others and another appeal* [2007] 3 SLR(R) 537 ("*Lee Chee Wei*"), the Court of Appeal pointed out (at [55]) that "the more pertinent issue in every case is whether specific performance constitutes the just and appropriate remedy in the circumstances". In *Tito v Waddell* [1977] Ch 106, 126, Megarry VC opined (at 322) that specific performance is ordered where this would do "more perfect and complete justice than an award of damages".

76 In the context of a claim for shares in a private company such as TR, the Court of Appeal stated in *Lee Chee Wei* (at [54]) as follows:

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

open market.

[emphasis in original]

77 TEH explained that specific performance of the Second Shareholders' Agreement was necessary as the transfer by MDG of 740,400 TR shares to him would affect the percentage of his equity in TR if he succeeds in his claim in another suit for the cancellation of some of the TR shares issued to MDG after Roscent took over Seeto's stake in MDG.

78 As for factors which might possibly persuade the court not to grant an order of specific performance, it cannot be said that there was delay on TEH's part in instituting the present proceedings. Admittedly, the Second Shareholders' Agreement was concluded in May 2007 and the present action was commenced in November 2008. However, Rodney had promised TEH that he would look into his claim for 13% of TR's shares as well as a place on the Board of Directors of TR and TEH sued as soon as it became quite clear that MDG was not going to honour its promises. TEH has performed his side of the bargain by observing the terms of the Second Shareholders' Agreement and MDG would not suffer any hardship if it was ordered to fulfil the terms of a bargain willingly entered into by Seeto on its behalf. As mentioned, MDG had legal advice when the Second Shareholders' Agreement was executed on 11 May 2007.

79 After taking all circumstances into account, I have no doubt that subject to what is stated below on the appointment of TEH as a director of TR, an order for specific performance of the Second Shareholders' Agreement would be just and appropriate. Accordingly, I grant this order. As such, MDG is required to transfer 740,400 TR shares to TEH.

Appointment of TEH as a director of TR

80 In his closing submissions, TEH sought specific performance of clause 2.1 of the Second Shareholders' Agreement, which relates to his right to appoint a director to sit on the Board of TR and to MDG's obligation to procure that TEH or his nominee be appointed as a director of TR. However, TEH's counsel had made it clear during the trial that he was no longer pursuing this relief *in this action*. The relevant part of the proceedings is as follows:

> Although the Shareholders' Agreement does contain a provision entitling him to be appointed to the Board of Treasure Resort Pte Ltd, given the concurrent claim in Suit 581 of 2007, where we are asking for a buyout, *that remedy is not being asked of your Honour in this action*.
>
> [emphasis added]

81 MDG conducted its case on the basis of TEH's earlier decision not to proceed in the present proceedings with his claim for a seat on the Board of TR. As such, the appointment of TEH as a director of TR need not be further considered at this juncture.

The Counterclaim

82 In its counterclaim, MDG sought a declaration that it is not bound by the Letter Agreement and the Call Option Agreement. In view of my findings in the earlier part of this judgment, MDG's counterclaim is dismissed.

Costs

83 TEH is entitled to costs.