IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC 67

Suit No 175 of 2019

Between

Simran Bedi

… *Plaintiff*

And

Mark A Montgomery

… *Defendant*

JUDGMENT

[Contract — Breach — Repudiatory breach]
[Contract — Contractual terms — Implied terms]
[Contract — Remedies — Damages]
[Restitution — Failure of consideration — Total failure of consideration]
[Restitution — Change of position]

TABLE OF CONTENTS

Simran Bedi
v
Montgomery, Mark A

[2022] SGHC 67

General Division of the High Court — Suit No 175 of 2019
S Mohan J
23–25 June, 1 July, 13 August 2021, 2 November 2021

31 March 2022 Judgment reserved.

S Mohan J:

Introduction

1 This case revolves around a relatively straightforward contract for the sale of shares in Xeitgeist Entertainment Group Pte Ltd ("Xeitgeist") by the defendant, Mark A Montgomery, to the plaintiff, Simran Bedi ("the Contract"). While the plaintiff furnished the purchase price of US$270,000, it is not disputed that the defendant never transferred the shares to her. The crux of the dispute concerns whether the plaintiff was required, under the terms of the Contract, to execute a document known as a Deed of Ratification and Accession (the "DRA") as a pre-condition to receiving her shares. Executing the DRA would have the effect of binding the plaintiff to a supplemental shareholders' agreement, which had been signed by Xeitgeist's pre-existing shareholders on 28 November 2013 ("1SSA"), prior to the conclusion of the Contract.

Background Facts

2 The plaintiff has been the director of Beetroot Investments Pte Ltd ("Beetroot") since 19 March 2008.[1] The defendant is the President and Secretary, as well as a director and shareholder, of Xeitgeist. Xeitgeist is a company registered in Singapore whose principal business is the production of motion pictures and other visual media. At the time, Xeitgeist had another director, Mr Jomon Thomas ("Joe"), who is also a shareholder of the company.[2]

3 The plaintiff was first introduced to the defendant through the defendant's wife in October 2016.[3] The plaintiff gave evidence that she subsequently became close friends with the defendant and his wife.[4] In addition, the plaintiff claimed that, at the defendant's request and on account of their friendship, she introduced the defendant to several of her contacts for his business purposes.[5]

4 Sometime between November 2016 and January 2017, the defendant approached the plaintiff with an opportunity to invest in "Hotel Mumbai", a movie that Xeitgeist was making at the time about the horrendous terrorist attacks that occurred in Mumbai in 2008.[6] The cast of "Hotel Mumbai"

---

1 Agreed Bundle ("AB") at p 107.

2 Mark A Montgomery's 1st Affidavit of Evidence-in-Chief dated 30 January 2020 ("MM-1") at para 3 (Defendant's Bundle of Affidavits of Evidence-in-Chief ("DBAEIC") at p 5).

3 Simran Bedi's 1st Affidavit of Evidence-in-Chief dated 27 February 2020 ("SB-1") at para 13 (Plaintiff's Bundle of Affidavits of Evidence-in-Chief ("PBAEIC") at p 8); MM-1 at para 4 (DBAEIC at p 5).

4 SB-1 at para 13 (PBAEIC at p 8).

5 SB-1 at para 16 (PBAEIC at p 9).

6 SB-1 at paras 18–19 (PBAEIC at p 9–10); AB at p 292.

included, among others, well-known names such as Dev Patel of "Slumdog Millionaire" fame.[7]

5 On 21 January 2017, the defendant e-mailed the plaintiff to suggest that instead of investing directly in "Hotel Mumbai", the plaintiff could purchase shares in Xeitgeist.[8] It is not disputed that the parties subsequently entered into the Contract, under which the plaintiff agreed to purchase 82,192 shares in Xeitgeist from the defendant at a price of US$270,000. Neither is it now disputed that the terms of the Contract are contained in a series of e-mails exchanged between the parties from 30 January 2017 to 14 February 2017.[9] The parties continued corresponding via e-mail regarding the Contract until 17 June 2017.

6 As these e-mails exchanged between the parties form a material part of the background to the present dispute, I summarise the contents of these e-mails below. A full chronology of the parties' correspondence can be found at **Annex A** to this judgment.

7 Following the defendant's e-mail on 21 January 2017 (see [5] above), the defendant e-mailed the plaintiff on 30 January 2017 to furnish her with more details of the share offer.[10] In particular, the defendant offered to sell the plaintiff US$300,000 worth of Xeitgeist shares that he held in his name, at a 10% discount. The purchase price was therefore US$270,000, or US$3.285 per

---

7 AB at p 293.

8 AB at p 40–41.

9 Plaintiff's Closing Submissions dated 11 October 2021 ("PCS") at para 23; Defendant's Closing Submissions dated 11 October 2021 ("DCS") at p 3, para 6; Defendant's Reply Closing Submissions dated 1 November 2021 ("DRS") at paras 15–16.

10 AB at p 318–319.

share.[11] The defendant told the plaintiff that the shares had to come from himself or Joe, as the shares held by Xeitgeist itself could not be discounted.[12]

8 On 1 February 2017, the defendant e-mailed the plaintiff and Mr Jeremy Kong ("Jeremy"), who was an account manager from TKNP Professional Services ("TKNP"), Xeitgeist's corporate secretarial services provider.[13] The defendant informed Jeremy that the plaintiff would be acquiring his shares in Xeitgeist, and instructed Jeremy to send the plaintiff the "transfer papers", including "all the associated shareholders agreements for her review and signing".[14]

9 On 8 February 2017, another employee of TKNP, Ms Grace Goh ("Grace"), followed up on the defendant's instructions by e-mailing the plaintiff several documents.[15] The first of these was a share transfer deed, which the plaintiff was instructed to execute and return to TKNP (the "Share Transfer Deed"). Grace's e-mail also stated that the remaining documents had been enclosed for the plaintiff's "reference", namely:

(a) a shareholders' agreement dated 10 June 2013;

(b) a copy of the 1SSA; and

(c) an undated supplemental shareholders' agreement, which would be dated upon being signed by all existing shareholders;

---

11 AB at p 318.

12 AB at p 318.

13 AB at p 322; Affidavit of Evidence-in-Chief of Kong Ming-Tat, Jeremy dated 30 January 2020 ("JK-1") at para 3 (DBAEIC at p 219).

14 AB at p 322.

15 AB at p 462.

(collectively, the "Shareholders' Agreements").

10 Under the terms of the 1SSA attached to Grace's e-mail (see [9(b)] above), any person bound by the 1SSA was required to sign a DRA as a *pre-condition* to acquiring any shares in Xeitgeist:[16]

> Article 10 – Shareholders' Subscription Agreement
>
> …
>
> 'Article 10 – Deed of Ratification and Accession to the Shareholder's Agreement
>
> 1. Pre-condition to acquisition of Shares
>
> Notwithstanding any other provision of this Deed, *no acquisition of* [*sic*] *transfer of any Shares in the Company shall be effected or be valid and binding unless the person or entity acquiring the Shares, if not already bound by the provisions of this Deed, executes a Deed of Ratification and Accession.*
>
> …
>
> [emphasis in original omitted; emphasis added]

11 In addition, the 1SSA attached to Grace's e-mail contained a blank draft DRA, *ie,* a DRA that left blank the respective portions for the name, personal details and number of shares held by the incoming shareholder.[17]

12 On 14 February 2017, the plaintiff e-mailed Grace, Jeremy and the defendant querying, "Do we alos need to do a contract for Xietgiest shares or just a share transfer" [*sic*].[18] On the same day, Grace replied to the plaintiff's e-mail, informing her that she would need to provide TKNP with the original signed Share Transfer Deed and a scanned copy thereof, to "complete the share

---

16 AB at p 465.

17 AB at p 476.

18 AB at p 332.

transfer process".[19] Likewise, the defendant replied to the plaintiff's e-mail later that day, stating that she would need to "basically … sign the paperwork" and transfer funds to a designated account.[20] Grace then sent another e-mail to the plaintiff that day, again enclosing the Shareholders' Agreements as well as a copy of Xeitgeist's latest business profile, for the plaintiff's "reference".[21]

13 The parties signed the Share Transfer Deed on 12 April 2017,[22] following which Grace e-mailed the plaintiff on 20 April 2017 to congratulate her on becoming a Xeitgeist shareholder and inform her that steps were being taken to arrange for payment to the tax authorities of the stamp duty "in relation to this share transfer" by GIRO.[23] In the same e-mail, Grace also confirmed that once the GIRO payment was approved, TKNP would proceed "to file the share transfer in ACRA *and send you the latest Business Profile of Xeitgeist* ***and your share certificate***" [emphasis added in italics and bold italics].

14 Subsequently, on 24 April 2017, Grace sent the following e-mail to the plaintiff, with the defendant copied:[24]

> Dear Simran,
>
> I understand that upon successful transfer of shares from Mark to yourself, you wish to transfer your shareholdings to your corporate entity.
>
> I have listed down the following steps for us to proceed.
>
> Stage 1) Transfer from Mark to your personal name:
>
> Next steps to complete the transfer:

---

19 AB at p 331.

20 AB at p 331.

21 AB at p 330.

22 AB at p 962.

23 AB at p 439.

24 AB at p 444.

> 1) Kindly sign ***attached deed of ratification*** and scan to us.
>
> 2) Scan to us a copy of proof of payment (USD270,000) to Mark
>
> 3) We will proceed with e-filing of share transfer.
>
> Stage 2) Transfer from your personal name to your corporate entity:
>
> For KYC purposes and preparation of paperwork, please let us have the following information:
>
> 1) Do you wish to transfer all of your shareholdings (82,192 ordinary SGD shares) or otherwise (_____)?
>
> 2) Corporate and beneficial owners' identification documents (as per attached KYC Roadmap) – if not furnished to us yet.
>
> …
>
> [emphasis in original omitted; emphasis added in bold italics]

15 It is not disputed that this was *the first time* that the plaintiff was told to sign a DRA.[25] As compared to the blank draft DRA attached to the 1SSA sent by Grace to the plaintiff on 8 February 2017 (see above at [11]), this later version of the DRA contained the plaintiff's name, personal information and details of the share transfer from the defendant.[26] On the same day, the plaintiff replied to Grace's e-mail requesting Grace to send her "the share holders [*sic*] agreement to sign".[27]

16 On 8 May 2017, the plaintiff transferred to the defendant the sum of S$377,190, being the approximate Singapore Dollar equivalent of the agreed purchase price of US$270,000.[28] From 22 May to 16 June 2017, TKNP sent the plaintiff several e-mails reminding her that they had not received the signed

---

25 Notes of Evidence ("NEs"), 25 June 2021, p 59 lines 9–12.

26 AB at p 965.

27 AB at p 442.

28 SB-1 at para 33 (PBAEIC at p 16); Statement of Defence dated 25 June 2021 (Amendment No 4) ("Defence") at para 9; 2nd Supplementary Affidavit of Evidence-in-Chief of Mark A Montgomery dated 30 June 2021 ("MM-3") at para 3.

DRA.[29] On 17 June 2017, the plaintiff replied to TKNP's e-mails (with the defendant copied) stating that she could "sign [the DRA] next week as I have carpel [*sic*] tunnel syndrome on my right hand" and that she would "sign and send [the DRA] by Friday".[30]

17 It is common ground that the plaintiff ultimately *did not* sign the DRA, and that the Xeitgeist shares were not transferred to her. Nonetheless, on 24 November 2017, the plaintiff was listed as a shareholder of Xeitgeist in the Shareholders' Circulation List, which was distributed by TKNP to all of Xeitgeist's shareholders.[31]

18 Following the e-mail of 17 June 2017 from the plaintiff referred to at [16] above, matters remained as they were until almost two years later in January 2019. On 8 January 2019, the plaintiff's solicitors wrote to the defendant to, *inter alia*, put him on notice that he was in repudiatory breach of the Contract by failing to transfer the Xeitgeist shares to the plaintiff. The letter also proceeded to accept the defendant's repudiation of the Contract and demanded that the defendant pay back the sum of US$270,000 to the plaintiff.[32]

The parties' cases

19 Mr Gerard Quek ("Mr Quek"), lead counsel for the plaintiff, argues that the plaintiff is entitled to the return of the US$270,000 that she had paid to the defendant on three broad grounds. First, Mr Quek submits that the plaintiff should be awarded the sum as damages for repudiatory breach of the Contract.

---

29 AB at p 453, 455 and 458.

30 AB at p 460.

31 SB-1 at para 34 (PBAEIC at p 16); PBAEIC at p 296.

32 AB at pp 238–239.

The Contract was concluded by 14 February 2017, and the terms of the Contract are contained in the e-mails exchanged between the parties from 30 January 2017 to 14 February 2017.[33] Based on these e-mails, Mr Quek contends that the signing of the DRA was not a term of the Contract.[34] Accordingly, by failing to transfer to the plaintiff the Xeitgeist shares that she had paid for, the defendant had committed a repudiatory breach of the Contract.[35]

20 In the alternative, Mr Quek submits that the plaintiff is entitled to the US$270,000 as restitution, on the basis of total failure of consideration and/or unjust enrichment.[36] He argues that consideration has completely failed as the plaintiff never received the Xeitgeist shares that she paid for.

21 The third and other alternative ground on which the plaintiff rests its case is that of misrepresentation. Mr Quek submits that the plaintiff is entitled to rescind the Contract and be awarded damages, on the basis of several misrepresentations that the defendant made to her between November 2016 and January 2017.[37] The plaintiff claims that these representations were made orally, through a deck of slides that the defendant had shown and/or sent to the plaintiff in November 2016 ("the 2016 slide deck"), or through the defendant's e-mails to the plaintiff.[38] The plaintiff alleges that the defendant made the following misrepresentations:[39]

---

33 PCS at paras 23 and 27.

34 PCS at para 38.

35 PCS at paras 70–71.

36 Statement of Claim dated 23 June 2021 (Amendment No 2) ("SOC") at para 15; PCS at para 72.

37 PCS at para 165.

38 PCS at paras 95–133.

39 SOC at para 19; PCS at para 134.

(a) Xeitgeist's growth was long-term and "assured";

(b) Xeitgeist could obtain the revenue projections stated in the 2016 slide deck;

(c) Xeitgeist was worth US$13.5m on or around 21 January 2017;

(d) Xeitgeist's shares were worth US$3.65 per share in January 2017;

(e) The plaintiff was obtaining a "fantastic deal" to purchase Xeitgeist shares from the defendant at a discounted rate, compared to the valuation of the company at the material time;

(f) The defendant would be able to obtain investor(s) within 24 months from January 2017, to buy out Xeitgeist at a valuation of US$25m;

(g) Xeitgeist was always profitable and had a strong financial record; and

(h) The defendant offered the plaintiff the opportunity to invest in Xeitgeist because he felt that she could contribute to Xeitgeist's growth by introducing her contacts to the defendant.

22 Mr Quek submits that the facts of the case support a claim (a) for fraudulent misrepresentation, (b) under s 2 of the Misrepresentation Act (Cap 390, 1994 Rev Ed) (the "Misrepresentation Act"), or (c) for negligent misrepresentation.[40]

[40] PCS at paras 141, 147 and 148.

23 Mr Quek argues that the true reason why the defendant had insisted that the plaintiff sign the DRA was because he intended to engineer a buyout of Xeitgeist by Pandanomia Pte Ltd ("Pandanomia"), another company that the defendant was a director and shareholder of.[41] If the plaintiff signed the DRA, she would have been bound by a "drag-along provision" in the 1SSA, which allows Xeitgeist's majority shareholders to force minority shareholders to sell their shares.[42] Mr Quek submitted that the defendant therefore insisted that the plaintiff sign the DRA, so that he could rely on the "drag-along provision", should the plaintiff refuse to sell her shares in the event of a buyout.[43]

24 I turn now to the defendant's case. Contrary to the plaintiff's position that the Contract was concluded by 14 February 2017, the defendant takes the position that the Contract was concluded (or "accepted") on 12 April 2017, when the Share Transfer Deed was signed.[44]

25 As I noted above at [5], the defendant does not dispute that the terms of the Contract are set out in the e-mail correspondence between the parties from 30 January to 14 February 2017. Nonetheless, the defendant argues that the Share Transfer Deed signed on 12 April 2017 somehow incorporates an obligation on the part of the plaintiff to sign the DRA. The defendant's counsel at the time of the trial before me, Ms Jacintha d/o Gopal ("Ms Gopal"), contends that *per* the wording of the Share Transfer Deed, the plaintiff agreed to hold the Xeitgeist shares subject to the "several conditions" on which the defendant had

---

41 PCS at paras 3 and 39.

42 2nd Affidavit of Evidence-in-Chief of Simran Bedi dated 10 June 2021 ("SB-2") at paras 16–17 (PBAEIC at p 519).

43 PCS at paras 54–55.

44 DRS at para 16–17.

previously held the shares.[45] It was accepted by the plaintiff that the defendant held his Xeitgeist shares subject to the 1SSA, under which the signing of the DRA was stipulated as a pre-condition for acquiring any Xeitgeist shares (see [10] above).[46] Ms Gopal argues that the phrase "several conditions" in the Share Transfer Deed therefore incorporated the obligations set out in the 1SSA into the Contract, such that the plaintiff was required to sign the DRA as a term of the Contract.[47]

26 In any case, Ms Gopal contends that the signing of the DRA was also incorporated as a term when the defendant e-mailed the plaintiff on 1 February 2017, informing her that the "associated shareholders agreements" would be sent to her for "***review and signing***" [emphasis added in bold italics] (see [8] above).[48] As noted at [9] above, Grace followed up on the defendant's e-mail by sending the plaintiff the Shareholders' Agreements, which included a copy of the 1SSA. Ms Gopal argues that the reference to "review and signing" therefore envisioned that the plaintiff was to be bound by the 1SSA, including the obligation therein to sign the DRA.

27 In the alternative, Ms Gopal submits that a term should be implied into the Contract, that the plaintiff would cooperate with the defendant to execute the necessary documents, including the signing of the DRA, to perfect the transfer of shares.[49]

---

45 DCS at p 6, paras 16–17.

46 DCS at p 6, para 17.

47 Defence at paras 4–6; DCS at p 6, para 17.

48 DCS at p 9, paras 27–28.

49 DCS at p 12, paras 36–37.

28 With regard to the plaintiff's claim in restitution, the defendant's case is that consideration has not *totally* failed.[50] In this regard, the defendant argues that the plaintiff received benefits from being associated with Xeitgeist, such as being credited as an executive producer of "Hotel Mumbai" on the IMDB movie website and a sponsored trip to the Cannes Film Festival.[51] In any event, the defendant raises a defence of change of position, as he claims that he spent part of the money he had received from the plaintiff (amounting to S$207,565.71).[52] In addition, the defendant argues that the plaintiff is estopped from claiming that consideration has totally failed.[53]

29 As for the plaintiff's claim in misrepresentation, the defendant argues that the statements he made are not actionable misrepresentations, and in any case, that the plaintiff was not induced by his statements into entering the Contract.[54]

Issues to be determined

30 Based on the background set out above, I consider that the following issues arise for my determination:

(i) When was the Contract concluded ("Issue 1")?

(ii) What were the terms of the Contract ("Issue 2")?

(iii) Whether the defendant repudiated the Contract ("Issue 3")?

---

50 DCS at p 23, para 76.

51 DCS at pp 23–24, para 79.

52 DCS at p 26, para 90.

53 DCS at p 32, para 108.

54 DCS at p 33, para 110.

(iv) If Issue 3 is answered in the affirmative, whether the plaintiff is entitled to damages from the defendant, and for what amount ("Issue 4")?

(v) Whether the plaintiff is entitled to restitution by reason of total failure of consideration and/or unjust enrichment ("Issue 5")?

(vi) Whether the plaintiff has a claim against the defendant for fraudulent misrepresentation, under the Misrepresentation Act or negligent misrepresentation ("Issue 6")?

Issue 1: When was the Contract concluded?

31 As I have summarised at [24], the plaintiff argues that the Contract was concluded by 14 February 2017, while the defendant submits that this occurred somewhat later on 12 April 2017 when the Share Transfer Deed was signed. In my view, the dispute over *when* the Contract was concluded is, ultimately, somewhat of a red herring. As I noted above at [1], the crux of the present dispute really concerns *what* the terms of the Contract are, or more specifically, whether the signing of the DRA was a term of the Contract. Given that it is undisputed that the terms of the Contract are contained in e-mails exchanged between the parties between 30 January and 14 February 2017 (see [5] above), the terms of the Contract may be ascertained with reference to these e-mails alone, without having to decide the issue of precisely when or on which date the Contract was concluded. That being said, as the defendant has made the somewhat contradictory submission that the Share Transfer Deed signed on 12 April 2017 *also* incorporated the obligations under the 1SSA as terms of the Contract (see [25] above), I consider it prudent to nonetheless address the issue of when the Contract was formed. Moreover, in deciding *what* the terms of the Contract are, it would in any case be useful to identify the point in time at which

the Contract was concluded, since the parties would, by that time, have agreed on all material terms of the Contract. As such, I first address the anterior issue of when the Contract was concluded, before moving on to Issue 2 proper.

32 In my judgment, I am unable to see any basis for the defendant's contention that the Contract was only concluded on 12 April 2017. First, it is unclear to me what the defendant means by the statement that the Contract was only "accepted, and consequently concluded" on 12 April 2017; this was not part of the defendant's pleaded case and was raised for the *first* time in the defendant's closing submissions.[55] If the purport of the defendant's argument is that the parties had only been in negotiations prior to 12 April 2017, such that the plaintiff only *accepted* the defendant's offer to purchase Xeitgeist shares on 12 April 2017, I find that this contention is plainly contradicted by the evidence. Based on the e-mail correspondence between the parties, it is clear that the plaintiff's acceptance of the defendant's offer occurred much earlier. As early as 1 February 2017, the defendant had instructed Jeremy that "Simran will be acquiring USD300,000 of my Xeitgeist stock" at a 10% discount, and then *congratulated* the plaintiff on joining the Xeitgeist team.[56] Likewise, in his e-mail sent on 14 February 2017, the defendant informed the plaintiff that "the transfer papers that you have been sent approve the transfer of shares *at the price we have agreed*" [emphasis added].[57] Clearly, by 14 February 2017, the parties were well past the point of negotiating the Contract. Offer and acceptance had been completed. I therefore find that by 14 February 2017 at the latest, the Contract had been concluded and its essential terms were agreed, namely that the defendant would sell and transfer to the plaintiff 82,192

---

55 DCS at paras 5(1) and 55–58; DRS at para 17.

56 AB at p 50.

57 AB at p 331.

Xeitgeist shares held in his name, in return for the sum of US$270,000 to be paid by the plaintiff to the defendant.

33 To the extent that the parties continued liaising after 14 February 2017 on the signing of the Share Transfer Deed, these communications related only to the paperwork or formalities necessary to execute the Contract. For instance, the day before the parties signed the Share Transfer Deed, the defendant e-mailed Jeremy to inform him that he would be meeting the plaintiff the next day, and that the plaintiff's "paper work and transfer will be initiated this week".[58] Clearly, the parties were not contemplating the *formation* of the Contract by that point. They were simply carrying out the steps needed to formalise the Contract or completing the steps necessary in performance of it.

34 For the foregoing reasons, I therefore agree with the plaintiff's pleaded case that the Contract was concluded between 30 January and 14 February 2017.[59] The plaintiff's and defendant's signing of the Share Transfer Deed on 12 April 2017 was simply an executory step of the Contract, and did not signify, as the defendant contends, the conclusion of the Contract on that date. With this in mind, I now turn to consider Issue 2.

Issue 2: What were the terms of the Contract?

35 In cases such as the present one, where at least on the parties' cases, there is no single document containing all the terms of the Contract, the court is entitled to consider all relevant documents as well as testimony in order to ascertain the terms of the Contract: *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927 at [7]. Given that it is not disputed

---

58 AB at p 435.

59 SOC at paras 3–4.

that the terms of the Contract are contained in the e-mail correspondence between the parties from 30 January to 14 February 2017 (see [5] above), I direct my attention to this series of e-mail exchanges.

36 Based on the e-mails exchanged from 30 January to 14 February 2017, it is clear to me that the signing of the DRA was *not* a term of the Contract. First, there was absolutely *no mention* in any of the e-mail exchanges during this period that the plaintiff would be required to sign the DRA, as a pre-condition to the transfer of the Xeitgeist shares from the defendant to the plaintiff. On the contrary, the plaintiff received *multiple* assurances that she would not need to do anything other than sign the Share Transfer Deed and make payment of the purchase price, in order to receive the Xeitgeist shares. As noted above at [12], when the plaintiff sent an e-mail on 14 February 2017 querying if she needed to conclude a separate contract for the transfer of the Xeitgeist shares, Grace assured the plaintiff that she only needed to provide TKNP with the original signed Share Transfer Deed and a scanned copy thereof, in order to complete the share transfer process. Grace's e-mail stated as follows:[60]

> ***Kindly furnish us the scanned and original signed copy of the attached share transfer deed*** before we proceed to update ACRA on the share transfer.
>
> After we lodge with ACRA, we will provide you a copy of the latest Business Profile ***as well as a share certificate reflecting your shareholdings in XEG.***
>
> ***The above will complete the share transfer process.***
>
> [emphasis in original omitted; emphasis added in bold italics]

[60] AB at p 331–332.

37 Later that same day, the defendant also replied to the plaintiff's e-mail, stating as follows:[61]

> Thanks Grace, in the meantime can you send Simran a current Xeitgeist BizFile for her records please.
>
> Simran the transfer papers that you have been sent approve the transfer of shares at the price we have agreed.
>
> You will also receive the company shareholders agreement and supplemental agreements that all shareholders have signed upon, most recently Richard Sharkey.
>
> The process is basically ***you sign the paperwork*** and send a scanned copy to Jeremy and Grace.
>
> You transfer the funds in to designated account.
>
> Once that has occurred they issue the stock in your name and update the ACRA file and send the share certificates to you.
>
> Jeremy did I miss anything?
>
> [emphasis added in bold italics]

38 There was no further reply from Jeremy. As is clear from the above e-mails, there was no suggestion that the plaintiff was required to sign the DRA as well. Given that the defendant had been copied on Grace's e-mail, he could reasonably have corrected Grace in his later e-mail, had Grace inadvertently omitted to mention the signing of the DRA. However, the defendant did not do this. Instead, the defendant reiterated that the plaintiff only needed to "basically … sign the paperwork" and make payment of US$270,000. The Share Transfer Deed was the *only* paperwork that the plaintiff was given to sign as at 14 February 2017, *ie*, the latest date by which, as I have found, the Contract had been concluded (see [9] and [34] above). As such, it is plain to me that at the

---

[61] AB at p 331.

time the Contract was concluded, the parties did not contemplate that the plaintiff was required to sign the DRA as a term of the Contract.

39 In fact, for slightly over two months *after* the Contract was concluded, there continued to be no mention of any need for the plaintiff to sign the DRA. On 16 February 2017, Jeremy e-mailed the plaintiff asking for an update on when "we will receive the share transfer deed" and stating that the Share Transfer Deed was "the *last document* before we can execute the transaction" [emphasis added].[62] On 5 April 2017, Jeremy sent another e-mail to follow up with the plaintiff on Grace's e-mail of 14 February 2017, in which Grace had re-sent the Shareholders' Agreements to the plaintiff (see [12] above).[63] Jeremy's e-mail attached the Shareholders' Agreements again (which included the 1SSA and the draft DRA therein), and stated that "documents" to "execute" the share transfer had been appended. Nonetheless, during cross-examination, Jeremy confirmed that his e-mail did not contain any instruction or requirement for the plaintiff to sign the DRA.[64]

40 Even on 20 April 2017, when Grace e-mailed the plaintiff to, *inter alia*, congratulate her on becoming a Xeitgeist shareholder and update her on the share transfer process, there was still *no* reference to the requirement of signing the DRA.[65] In his evidence-in-chief, Jeremy sought to explain his e-mail of 16 February 2017 and the reference therein to the Share Transfer Deed being the "last document" to be executed as an oversight on his part.[66] I found this

---

62 JK-1 at p 36 (DBAEIC at p 253).

63 AB at p 430.

64 NEs, 13 August 2021, p 60 line 25 to p 61 line 4.

65 AB at p 439.

66 JK-1 at para 14 (DBAEIC at p 223).

explanation difficult to believe. There was no attempt to correct this oversight, if there indeed had been one, by anyone in TKNP. Grace was copied on Jeremy's e-mail of 16 February 2017 and said nothing to correct Jeremy. There was also nothing said by way of a correction in the e-mails sent by Jeremy and Grace to the plaintiff on 5 April and 20 April respectively. Ultimately, as noted above at [15], the *first time* that the plaintiff was informed of the need to sign the DRA was only on 24 April 2017 when Grace e-mailed the plaintiff. This was accepted by both the defendant and Jeremy in cross-examination.[67]

41 Moreover, the DRA attached to Grace's e-mail on 24 April 2017 was *different* to the one that had been sent to the plaintiff on 8 and 14 February 2017. As I noted above at [15], the draft DRA that was first sent to the plaintiff on 8 February 2017 was blank, whereas the DRA sent on 24 April 2017 contained the plaintiff's personal details and details of the share transfer from the defendant. In addition, there were slight differences in the wording of the two DRAs:[68]

> Draft DRA sent on 8 February 2017
>
> **2 WHEREAS:**
>
> (A) The Company and the existing Shareholders of the Company ('Existing Shareholders'), being parties to a written Shareholders' Agreement, dated 10 June 2013, have agreed, thereunder, to regulate the affairs of the Company …
>
> DRA sent on 24 April 2017
>
> **WHEREAS:**
>
> (A) The Company and the existing Shareholders of the Company ('Existing Shareholders'), being parties to a written Shareholders' Agreement dated 10 June 2013, *as revised by two Supplemental Shareholders' Agreements dated 28*

67 NEs, 25 June 2021, p 58 line 30 to p 59 line 12; 13 August 2021, p 63 lines 2–3.

68 AB at p 476 (blank DRA sent on 8 February 2017); p 965 (DRA sent on 24 April 2017).

> *November 2013 and _____ 2016 respectively,* have agreed, thereunder, to regulate the affairs of the Company …
>
> [emphasis added]

42 The defendant himself conceded that there were differences between these two versions of the DRA, and that the plaintiff saw this newer version of the DRA for the first time on 24 April 2017.[69] In my view, this suggests that even if the plaintiff received a draft DRA in February 2017, the parties did not actually contemplate or even consider that the plaintiff should sign the DRA any time before April 2017. Had the parties agreed that the signing of the DRA would be a term of the Contract, it did not make sense for TKNP to send the plaintiff a draft DRA with no relevant information filled in, assure the plaintiff she only needed to sign the Share Transfer Deed to complete the share transfer, and then send the plaintiff a re-drafted DRA in April 2017 with the plaintiff's personal information and details of the share transfer filled in.

43 I also note that the version of the DRA that the plaintiff received on 24 April 2017 referred to her as a *current* subscriber of Xeitgeist shares, rather than a prospective shareholder:[70]

> Name: SIMRAN BEDI
>
> …
>
> (Hereinafter called the 'Subscriber');
>
> …
>
> (*B) The Subscriber* ***is*** *the subscriber of 82,192 SGD ordinary shares ('Shares') in the issued share capital of the Company, by virtue of a share transfer entered into in respect thereof, on 12 April 2017 …*
>
> [emphasis in original omitted; emphasis added in italics and bold italics]

---

69 NEs, 25 June 2021, p 58 lines 20–27.

70 AB at p 965.

44 As such, it appears to me that the parties conducted themselves as if the plaintiff had discharged her obligations under the Contract by 12 April 2017 when the Share Transfer Deed was signed by the plaintiff and defendant, such that she was already *in effect* a Xeitgeist shareholder, with the only remaining obligation on the plaintiff's part being payment of the purchase price to the defendant. In this regard, the signing of the DRA was therefore not a *pre-condition* to the plaintiff receiving her shares under the terms of the Contract. Rather, it was, in my view, a further formality raised belatedly by the defendant only on 24 April 2017 *via* TKNP, well *after* the conclusion of the Contract in February 2017. This may well have been due to an oversight on the part of the defendant or may have simply been something that the defendant raised only as an afterthought. Alternatively, the defendant may have, post-Contract, contemplated the plaintiff signing the DRA as part of a process to *further* transfer the shares *from* the plaintiff *to* her company, Beetroot, which indeed was the impression that the plaintiff had from TKNP's e-mails (as detailed below at [112]). In any case, *why* the defendant raised the issue of signing the DRA belatedly is ultimately an issue that is unnecessary for me to decide for the purposes of ascertaining the terms of the Contract. For present purposes, what matters is that on the evidence before me, the signing of the DRA was not contemplated by the parties at the time the Contract was concluded, and therefore cannot reasonably be a term of the Contract.

45 I am also not persuaded by the defendant's argument that the obligation to sign the DRA was somehow incorporated as a term of the Contract, when the parties signed the Share Transfer Deed on 12 April 2017 (see [25] above). Given the defendant's concession that the terms of the Contract are contained in the e-mails exchanged from 30 January to 14 February 2017, and my conclusion that the Contract was concluded by 14 February 2017 (at [34] above), I do not see how the Share Transfer Deed signed *later* on 12 April 2017 could somehow

incorporate terms into the Contract which had been concluded at an earlier point in time. In this regard, I note that neither party pleaded nor contended that the terms of the Contract were varied at any time after 14 February 2017. As a document, the Share Transfer Deed was therefore, at best, merely evidence of the Contract and its terms which had already been agreed upon by 14 February 2017. Likewise, the execution of the Share Transfer Deed was, at most, a step contemplated in the performance of the Contract. In the circumstances, even if the Share Transfer Deed states that the plaintiff would purchase the Xeitgeist shares subject to the same "several conditions" on which the defendant held his shares, I disagree that this incorporates the signing of the DRA as a term of the Contract.

46 In any case, I am not convinced that the wording of the Share Transfer Deed alone is sufficient to incorporate the terms of the 1SSA and the obligation therein to sign a DRA. The defendant may be right to contend that a party is, generally, bound by the terms of a contract it signs even if it does not read or understand those terms. However, where it is argued that terms in another document have been incorporated into a contract by reference, the defendant's contention above only holds true when the relevant terms have been incorporated into the contract by an *express* incorporating clause*: Bintai Kindenko Pte Ltd v Samsung C&T Corp and another* [2019] 2 SLR 295 ("*Bintai Kindenko*") at [60]–[61]. On the contrary, in the absence of an express incorporating clause, onerous and unusual conditions cannot be incorporated unless the attention of the party sought to be bound has been specifically drawn to them: *Bintai Kindenko* at [60]–[61]; see also *Wartsila Singapore Pte Ltd v Lau Yew Choong and another suit* [2017] 5 SLR 268 at [122]. On the facts before me, I am not persuaded that the reference to "several conditions" in the Share Transfer Deed is the equivalent of an express incorporating clause. Rather, I find that the obligations attendant upon the incorporation of the terms

of the 1SSA, such as the signing of a DRA, can be characterised as "onerous and unusual", since signing the DRA would have the effect of binding the plaintiff to the "drag-along provision" (see [23] above). Accordingly, I find that such obligations, in the absence of an express incorporating clause in the Contract, cannot be incorporated unless the plaintiff was specifically alerted to them at the time the Contract was concluded. I have already found that the plaintiff was not alerted to them at any time up to 14 February 2017, which is the latest time by when the Contract was concluded (see [39] above). Therefore, the wording of the Share Transfer Deed alone would not in any event suffice to incorporate the terms of the 1SSA into the Contract.

47 The defendant also relies on *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2014] 1 SLR 130 ("*International Research*") in support of its contention that the Share Transfer Deed incorporates the obligations of the 1SSA. The defendant's reliance on *International Research* does little to advance its case. As the defendant itself observes, *International Research* stands for the proposition that "[t]he task before the court in determining whether or not there has been incorporation by reference is one of construction, namely, ***to ascertain the parties' intentions when they entered into the contract by reference to the words that they used***" [emphasis in original omitted; emphasis added in bold italics]: at [33].

48 It was for this reason that I found it irrelevant that the plaintiff conceded in cross-examination that she wanted some of the benefits of the Shareholders' Agreements, or that she supposedly accepted that the defendant was bound by the Shareholders' Agreements.[71] These facts pertain to the plaintiff's subjective knowledge or intentions; what matters is the intentions of the parties,

---

71 DCS at p 8 and 10, paras 26 and 30.

objectively ascertained, *at the time* the Contract was concluded (*ie*, by 14 February 2017). Looking at the e-mails between the parties during that time, there was simply no discussion at all of the plaintiff being bound by the Shareholders' Agreements, let alone the signing of the DRA (as I have already noted above at [36]). The defendant also concedes that there is no express reference in the Share Transfer Deed to the Shareholders' Agreements or the DRA.[72] In the premises, I cannot see how one can reasonably conclude that the parties had an objectively ascertainable intention to incorporate either the 1SSA or the obligations contained within the 1SSA into the Contract, through the *later* signing of the Share Transfer Deed.

49 I turn now to consider the defendant's argument that the 1SSA, and the obligation therein to sign the DRA, were incorporated into the Contract through his e-mail on 1 February 2017, when he instructed Jeremy to provide the plaintiff with the "associated shareholders agreements" for her "review and signing" (see above at [26]).

50 Applying the reasoning in *Bintai Kindenko* as detailed above at [46], I am likewise unconvinced that the reference in the defendant's e-mail to "associated shareholders agreements" for the plaintiff's "review and signing" can be construed as, or having the same effect as, an express incorporation clause. In addition, on the evidence before me, it is clear that the defendant did not intend by his e-mail of 1 February 2017 to incorporate the 1SSA into the Contract. When Grace followed up on the defendant's instructions to provide the plaintiff with the "associated shareholders agreements", her e-mail of 8 February 2017 expressly stated that the enclosed Shareholders' Agreements

---

[72] DCS at p 6, para 20.

were for the plaintiff's "reference" only.[73] Despite being copied on Grace's e-mail, the defendant did not reply Grace's e-mail to say anything to the contrary. I also note that the Shareholders' Agreements did not even contain fields for the plaintiff's signature, as they were copies of prior agreements concluded between other shareholders.[74] In the circumstances, I find it unbelievable and implausible that the defendant actually intended for the plaintiff to review *and* sign the Shareholders' Agreements that were sent to her on 8 February 2017.

51 In this regard, I note the defendant contends in his closing submissions that it was not a requirement that the Shareholders' Agreements themselves had to be executed by the plaintiff, but that the defendant nonetheless intended for the Shareholders' Agreements to be "important documents which the Plaintiff would be bound by".[75] I reject this argument for two reasons. Firstly, it ignores the defendant's own evidence at trial that he expected the plaintiff to sign *all* the documents referred to in Grace's e-mail of 14 February 2017, *including* the Shareholders' Agreements.[76] No explanation has been offered by the defendant to explain the contradiction between his testimony and his submissions. Secondly, this submission lacks plausibility. If the defendant had indeed wanted to incorporate the Shareholders' Agreements into the Contract, it makes little sense that the defendant would inform the plaintiff (through TKNP) that the Shareholders' Agreements were for her "reference" only, and thereafter execute a Share Transfer Deed that made no express mention of these Shareholders' Agreements.

---

73 AB at p 52.

74 AB at pp 479, 511, 542–546.

75 DCS at p 9, para 28.

76 NEs, 25 June 2021, p 49 lines 13–26.

52 In any case, even if the defendant's e-mail of 1 February 2017 is evidence that he wanted the plaintiff to be bound by the Shareholders' Agreements *at some point*, I do not think it proves that the parties intended for the plaintiff to be bound by the obligations under the Shareholders' Agreements as a *pre-condition* to receiving the Xeitgeist shares from the defendant under the Contract. Nothing to this effect was communicated in the defendant's e-mail of 1 February 2017. In my view, the Shareholders' Agreements were, at best, *separate* contracts that the defendant proposed the parties should enter into. They should not be conflated with the terms of the Contract, under which it was not an express term or a pre-condition that the plaintiff would be bound by the obligations in the Shareholders' Agreements.

53 For the foregoing reasons, I reject the defendant's contention that the 1SSA, and the obligation therein to sign the DRA, were incorporated into or formed any part of the terms of the Contract.

54 For completeness, I address the defendant's argument that a term should be implied into the Contract, that the plaintiff would cooperate with the defendant to execute the necessary documents, including the signing of the DRA, to perfect the transfer of shares.[77] It is not disputed that in determining whether to imply a term into a contract, the court will apply the three-step test in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp Marine*"), namely that:

(a) First, the court will ascertain if there is a gap in the contract and if so, how the gap arises. Implication will only be considered if the court

[77] DCS at p 12, paras 36–37.

finds that the gap arose because the parties did not contemplate the gap in the contract (at [95] and [101(a)]).

(b) Second, the court will consider if it is necessary in the business or commercial sense to imply a term to give the contract efficacy. The threshold for implying a term is therefore necessarily a high one (at [100] and [101(b)]).

(c) Third, the court considers the specific term to be implied. This must be a term which the parties, having regard to the need for business efficacy, would have responded "Oh, of course!" had the proposed term been put to them at the time of the contract (at [101(c)]).

55 With regard to the first step of the *Sembcorp Marine* test, I am prepared to accept that there is a gap in the Contract, in the sense that the Contract is silent on whether the plaintiff is obliged to sign the DRA, and the parties did not contemplate this issue up to the time Contract was concluded (see [36] above).

56 This brings me to the second stage of the *Sembcorp Marine* test. In my judgment, I cannot see how it is *necessary* in the business or commercial sense, for the sake of efficacy, to imply a term that would require the plaintiff to sign the DRA. Firstly, the evidence suggests that at least one other shareholder of Xeitgeist acquired shares in Xeitgeist without signing a similar DRA (namely, one Patric Markus Jeuch who acquired shares in Xeitgeist in December 2016 without executing any DRA).[78] Secondly, when the plaintiff raised the possibility of transferring her Xeitgeist shares to Beetroot, there was also curiously no mention in Grace's e-mail of 24 April 2017 (on which the

[78] PBAEIC at p 562; NEs, 13 August 2021, p 48 lines 12–25.

defendant was copied) of *Beetroot* having to sign a DRA as an incoming shareholder.[79] The defendant has not explained why this is the case, nor proven why it is necessary in the interest of efficacy for an incoming shareholder to sign a DRA. I do not accept the defendant's contention that an implied term is necessary to ensure compliance with the "administrative requirements" of the transfer of the Xeitgeist shares.[80] Absent any proof that such administrative requirements are themselves *necessary* in the interest of efficacy, the defendant's insistence on the signing of the DRA is, in my view, a self-created impediment to contractual performance. That cannot be the basis on which a term is implied into the Contract.

57 For the reasons set out above, I decline to imply a term into the Contract as the defendant urges me to and therefore find that the plaintiff was not required to sign the DRA under the terms of the Contract.

Issue 3: Whether the defendant repudiated the Contract

58 Following from my conclusion above at [57], it is evident that the defendant has breached the Contract. The defendant does not dispute that he had a contractual obligation to transfer the Xeitgeist shares to the plaintiff; by failing to do so despite the plaintiff furnishing the purchase price on 8 May 2017, the defendant was in breach of the Contract.

59 The question that remains is whether the defendant's breach is sufficient to amount to a *repudiation* of the Contract. As the defendant submits, an innocent party will have the right to terminate the contract when the other party "by his words or conduct, simply *renounces* its contract inasmuch as it clearly

---

79 AB at p 964.

80 DCS at p 13, para 45.

conveys to the other party to the contract that it *will not perform its contractual obligations at all*" [emphasis original]: *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal* [2007] 4 SLR(R) 413 ("*RDC Concrete*") at [93]. It is a "question of fact" in each case whether the party in question has acted in such a way that it might reasonably be taken to have renounced the contract: *GIB Automation Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd* [2007] 2 SLR(R) 918 ("*GIB Automation*") at [77].

60 On the facts before me, I find that the defendant's conduct did amount to a repudiation of the Contract. The plaintiff had paid the defendant for the Xeitgeist shares by May 2017, and yet the defendant failed to transfer the shares to her, despite the plaintiff being included as a shareholder in Xeitgeist's Shareholders' Circulation List in November 2017.[81] Moreover, as detailed at [81] below, almost immediately after receiving the purchase price from the plaintiff, the defendant proceeded to utilise the same. The state of affairs remained for almost two years with no steps being taken to transfer the shares to the plaintiff, and continued to be the case when the plaintiff elected to terminate the Contract in January 2019 by a letter from her solicitors.[82] In my judgment, the totality of the evidence demonstrates a clear unwillingness on the defendant's part to fully perform his side of the bargain.

61 In this regard, I disagree with the defendant that he "gave every sign" that he considered himself to still be bound by the Contract.[83] Even if TKNP had informed the plaintiff on 16 June 2017 that they were awaiting the signed DRA before they would forward her the share certificates, there appears to have been

---

81 SB-1 at para 34 (PBAEIC at p 16).

82 AB at p 238.

83 DCS at p 20, para 67.

no follow-up since then. On the evidence before me, the last correspondence between the parties pertaining to the Contract was on 17 June 2017, following which the next communication was the plaintiff's solicitors' letter of termination in January 2019.[84] No explanation has been provided for why the defendant decided to sit on his hands for close to two years. Nor was any evidence presented by the defendant that he sent follow-up e-mails to the plaintiff during that time, spoke to her or made any attempt to complete the share transfer process. In the circumstances, I do not think it can be said that the defendant acted in a way that shows that he considered himself still bound by the Contract; on the contrary, the defendant gave every indication that he was not willing to follow through with contractual performance.

62 That the defendant had *instructed* Jeremy to include the plaintiff in the Shareholders' Circulation List circulated in November 2017, is, in my view, equivocal.[85] It does not say much about the defendant's willingness to perform his end of the bargain when considered against his complete inaction for nearly two years. Nor do I consider it relevant that the plaintiff represented to TKNP on 17 June 2017 that she would "sign and send" the DRA shortly.[86] Given my conclusion that the plaintiff is not required to sign the DRA under the terms of the Contract, the signing of the DRA is a wholly separate issue and does not, in my judgment, change the fact that the defendant failed to perform his obligations under the Contract. Moreover, as I noted above at [44], it is possible that the parties contemplated the signing of the DRA as part of the process to further transfer the Xeitgeist shares from the plaintiff to Beetroot. As I detail below at [112], this was indeed the plaintiff's understanding of why she was

---

84 AB at p 238.

85 DCS at p 20, para 69; JK-1 at para 21 (DBAEIC at p 226).

86 AB at p 460; DCS at p 20, para 68.

asked to sign a DRA. Any discussions between 24 April and 17 June 2017 on the plaintiff signing the DRA therefore do not, in my view, detract from the analysis of whether the defendant, by his actions and conduct, evinced an intention to still be bound by the Contract or otherwise. This is especially so when viewed against the backdrop of the defendant doing nothing after 17 June 2017.

63 Finally, I disagree with the defendant that the facts of the present case are analogous to those in *GIB Automation*. On the facts of *GIB Automation*, the plaintiff had formed the preliminary view that it was entitled to withhold performance under the sub-contract. However, as the sub-contract referenced certain terms from the main contract, the plaintiff requested the defendant to provide it with a copy of the main contract, so that it could "review" the defendant's demand that the plaintiff effect contractual performance (at [71]). Without providing the plaintiff with a copy of the main contract, the defendant instead alleged that the plaintiff had renounced the sub-contract and elected to terminate the contract. Judicial Commissioner Sundaresh Menon (as he then was) held that the plaintiff's conduct did not evince its intention to renounce the sub-contract as it was simply "attempting to understand the defendant's position" (at [74]). Accordingly, the court held that the defendant had unlawfully terminated the sub-contract.

64 The present case is not, as was the case in *GIB Automation*, a situation where one party was simply trying to clarify the extent of its contractual obligations. As I noted at [61] above, the defendant in the present case did not, from the available evidence, even contact the plaintiff for close to two years after June 2017 regarding performance of the Contract. Short of an express statement from the defendant that he refused to transfer the Xeitgeist shares to the plaintiff, there can hardly be any clearer indication that the defendant was,

by his conduct and complete silence, unwilling to perform his side of the bargain – in my judgment, that was sufficient to constitute conduct amounting to a repudiatory breach of the Contract. *GIB Automation* therefore does not assist the defendant.

65 For the reasons detailed above, I find and hold that the defendant's conduct had the effect of renouncing the Contract, such that the plaintiff was entitled to accept the defendant's repudiation of the Contract and terminate it. The plaintiff duly exercised that right of termination through her solicitors' letter of 8 January 2019, which expressly accepted the defendant's repudiatory breach.[87]

Issue 4: Whether the plaintiff is entitled to damages from the defendant, and for what amount

66 Having answered Issue 3 in the affirmative, I turn now to the issue of the appropriate award of damages, for the defendant's breach of contract. The plaintiff claims a sum of US$270,000, representing the amount that she transferred to the defendant for the Xeitgeist shares; as stated at [16] above, the precise amount transferred by the plaintiff to the defendant was S$377,190. For convenience and unless the context otherwise requires me to, I will refer to the sum paid in US Dollars (*ie*, US$270,000). The defendant rightly observes that the plaintiff's claim is one for reliance losses, and that there is a line of authority for the proposition that a party will not be allowed to claim reliance losses to escape a bad bargain.[88] As noted by Justice Vinodh Coomaraswamy in *Loh Chiang Tien and another v Saman Dharmatilleke* [2020] SGHC 45 ("*Loh Chiang Tien*") at [25]–[26]:

---

87 AB at p 238.

88 DCS at pp 56–57, paras 212–214.

> 25 The alternative measure of damages in contract is the promisee's reliance loss. A claim for reliance loss allows a promisee to recover from the promisor the costs and expenses which the promisee incurred in reliance on the promisor's performing his obligations under the contract, where such costs and expenses are then wasted by the promisor's breach. *A promisee cannot, however, elect reliance loss as the measure of its damages if it has made a bad bargain* (*C & P Haulage v Middleton* [1983] 1 WLR 1461). ***The burden is on the promisor to prove that the bargain was a bad one*** (*Commonwealth Bank of Australia v Amann Aviation Pty Ltd* (1991) 17 CLR 64).
>
> 26 As the learned authors of *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) ('*The Law of Contract in Singapore*') explain at para 21.052, this limitation on the recovery of reliance loss is to prevent overcompensating promisees. A promisee who has made a bad bargain would not have recovered its reliance expenditure in full even if the promisor had performed its obligations under the contract. When the contract is breached, to compensate that promisee by an award of its reliance loss would put the promisee in a position better than it would have been in had the contract been performed.
>
> [emphasis added in italics and bold italics]

67 What stands out to me from the above passages is that the burden is on the promisor, being the *defendant* in this case, to prove that the bargain the plaintiff entered into was in fact a bad one. The notion that the burden of proof rests with the defendant promisor was also affirmed by Justice Lee Seiu Kin in the recent case of *Koh Chew Chee v Liu Shu Ming and another* [2022] SGHC 25 at [117]–[118]:

> 117 Lastly, there will invariably be cases where the plaintiff will not be able to prove the profitability of the contract … Should this then mean that the plaintiff ought to be left without a means to recover payments made to the defendant, as well as reasonably incurred expenses?
>
> 118 In respect of the former, there is of course, the law of unjust enrichment. However, even within the field of contract, the law's answer to this question is a rebuttable 'no', and it has reached this position by relieving the plaintiff of the burden of proving that, had the contract be [*sic*] performed, sufficient revenue would have been earned *at least* to cover his reasonable capital outlay and expenses. The burden is then shifted to the

> defendant to prove that the contract would not only have been unprofitable, but that the plaintiff would not *even* have been able to recover what he put down in expectation of performance. ***Put simply, though the plaintiff may have entered a bad bargain, this is a matter for the defendant to prove***. If the defendant is unable to discharge this burden, the plaintiff would be entitled to damages assessed on the reliance measure.
>
> [emphasis added in bold italics]

68 From the foregoing, it is therefore clear that the plaintiff is entitled to damages assessed based on reliance losses, *unless* the defendant can prove that the plaintiff entered into a bad bargain. On the evidence before me, the defendant has not discharged this burden of proof. Given that the plaintiff had furnished the purchase price for the Xeitgeist shares on 8 May 2017, she would have been entitled to the shares from that point onward. The defendant has not led any evidence on the valuation of the Xeitgeist shares as of 8 May 2017, or any time after that. Without such evidence, it is impossible to ascertain if this is a case where a claim for reliance losses would place the plaintiff in a better position than if the Contract had been performed.

69 I am not convinced that it is sufficient for the defendant to simply allege that the plaintiff's case is that the Xeitgeist shares are "worthless",[89] to satisfy its burden of proving that the plaintiff entered into a bad bargain. In my view, the plaintiff's submissions on the value of the Xeitgeist shares relate primarily to its argument that the defendant misrepresented the value of the shares to the plaintiff sometime from *November 2016 to January 2017*; they were not submissions on the actual value of the Xeitgeist shares as of May 2017 or later.[90] While the plaintiff may have raised concerns about the solvency of Xeitgeist from 2015 to 2017 by adducing the financial statements of Xeitgeist for that

---

89 DCS at p 57, para 214.

90 PCS at paras 130–131.

period, I am not satisfied that this is sufficient evidence that the Xeitgeist shares were *worthless*.[91] It goes without saying that the valuation of shares may be determined by a multitude of factors including a company's projected growth. In the absence of direct evidence on the valuation of Xeitgeist shares in May 2017, I hesitate to treat Xeitgeist's financial statement for the financial year ending on 31 December 2017 as a sufficient basis on which to conclude that the Xeitgeist shares were worthless. In this case, if I had to fix a point in time when the defendant's breach occurred, I would be prepared to proceed on the assumption that the shares ought reasonably to have been transferred to the plaintiff by the end of June 2017, following payment by the plaintiff of the purchase price on 8 May 2017. No evidence was led by the defendant that as of 30 June 2017, the Xeitgeist shares were worthless. Even taking the plaintiff's pleaded case that a reasonable period within which the shares ought to have been registered with ACRA was no more than three months after the purchase price had been paid (*ie*, by 8 August 2017),[92] no evidence was led by the defendant that the shares of Xeitgeist were worthless as of that date.

70 In addition, while the plaintiff highlights in its closing submissions that there was a tentative structure floated sometime around May 2018 that Xeitgeist would be bought out by an entity to be set up, known as Xeitgeist UAE, at a price of approximately US$0.69 per share[93], I note that this price appears to be a back-of-the-envelope calculation. There has also been little evidence led on the circumstances surrounding the proposed buyout of Xeitgeist by Xeitgeist UAE, or how Xeitgeist came to be valued at US$2m in May 2018. I therefore find that this approximation of the value of Xeitgeist's shares in May 2018

---

91 PBAEIC at p 356 and 384; see also NEs, 1 July 2021, p 44 lines 1–7.

92 SOC at para 6.

93 PCS at Annex A.

cannot be authoritative or bear probative value. I also take into account the fact that the defendant himself has never asserted that the Xeitgeist shares *are* presently worthless or were worthless at any material time, including in June 2017. On the contrary, the defendant maintained that at the time, Xeitgeist had a good number of movies in the pipeline including "Hotel Mumbai", had a sizeable intellectual property library as part of its asset base, and had healthy revenue projections.[94] In the circumstances, I find that the defendant has not proven that the plaintiff entered into a bad bargain, such that she is not entitled to claim reliance losses.

71 Finally, I disagree with the defendant that a parallel can be drawn between the facts of the present case and *Loh Chiang Tien*.[95] The latter case concerned an agreement that the defendant would transfer shares (the "INS shares") to the plaintiff as repayment for a loan by 24 April 2011 (at [4]). In breach of the agreement, the defendant failed to transfer the INS shares to the plaintiff by that date. Nonetheless, Coomaraswamy J observed that even if the INS shares had been duly transferred to the plaintiff, the share transfer would have been nullified in August 2011 by an order of court obtained by two of INS' shareholders (at [23]). Moreover, even though no evidence was adduced on the value of the INS shares as of 24 April 2011, the learned Judge found it was "manifest" that the INS shares had become worthless, as INS went into insolvent liquidation in February 2013 (at [24]). In any case, if it had been necessary to make a finding on the value of the INS shares as of 24 April 2011, Coomaraswamy J noted that he would have found the INS shares to be worthless on that date, because of the financial difficulties that INS was facing and the internal shareholder conflict which afflicted the company (at [24]). In the

---

94 DCS at p 45, para 167; NEs, 1 July 2021, p 47 line 23 to p 48 line 6; p 72 lines 23–26.

95 DCS at p 57, para 214.

circumstances, the learned Judge found that the plaintiff had made a bad bargain and would be barred from claiming reliance losses (at [27]).

72 Based on the evidence placed before me, the facts of *Loh Chiang Tien* are clearly not on all fours with the present case. In the case before me, had the defendant transferred his shares to the plaintiff, there is no suggestion that this share transfer would be nullified or in any way invalidated, as was the case in *Loh Chiang Tien*. Moreover, at least on the evidence adduced by the parties, there is no allegation that Xeitgeist has since entered insolvent liquidation. In addition, as I noted above at [69]–[70], I am not prepared to conclude that it is "manifest" that the Xeitgeist shares were worthless as of June 2017 (or 8 August 2017), based on the evidence that was led at trial. In any case, I note that the analysis and findings in *Loh Chiang Tien* on this issue were *obiter* and unnecessary for the decision, as the plaintiff's claim in that case for damages arising from breach of contract was found to be time-barred (at [28]).

73 For the foregoing reasons, I therefore agree with the plaintiff that she is entitled to claim for her reliance losses, which in this case, translate to the sum paid by her to the defendant as the purchase price for the shares. As I noted above at [66], the plaintiff claims a sum of US$270,000. However, in my view, a more accurate and proper quantification of the plaintiff's damages would be the sum actually paid by the plaintiff and received by the defendant, *ie,* S$377,190 (being the approximate Singapore Dollar equivalent of US$270,000).[96] I therefore award the plaintiff damages in the sum of S$377,190.

---

[96] MM-3 at para 3.

Issue 5: Whether the plaintiff is entitled to restitution by reason of total failure of consideration and/or unjust enrichment

Failure of consideration

74 As an alternative ground for my decision, I turn to consider the plaintiff's claim in restitution.

75 It is well-established that for a claim grounded on failure of consideration to succeed, the failure of consideration must be *total*: *Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd and another* [2018] 1 SLR 239 ("*Benzline Auto v Supercars*") at [53]. What amounts to "consideration", or the basis of the transfer, must be objectively determined based on what is communicated between the parties; not every expectation which a party has in making a transfer forms part of the basis for that transfer: *Benzline Auto v Supercars* at [51].

76 Bearing this in mind, I am satisfied that there has been a total failure of consideration on the present facts. Looking at the e-mails between the parties with an objective lens, I find that the parties regarded the share transfer as a straightforward transaction: the plaintiff would pay the defendant US$270,000 for 82,192 Xeitgeist shares, nothing more and nothing less. In all the e-mails between the parties leading up to the payment to the defendant on 8 May 2017, there was simply no other basis mentioned for the transfer of the US$270,000. The parties also regarded the share transfer as a transaction *separate* from any of their other business dealings. For instance, in his e-mail to the plaintiff on 30 January 2017, the defendant outlined the share transfer as a proposal distinct

from the plaintiff's potential direct investment into Hotel Mumbai, or her tenure on Xeitgeist's advisory panel as an Indian cultural advisor.[97]

77 In the circumstances, I reject the defendant's contention that any benefits that the plaintiff received from being associated with Xeitgeist (*eg,* being credited as an executive producer of "Hotel Mumbai" on the IMDB movie website, or attending the Cannes Film Festival) can be considered as part of the basis for the transfer of US$270,000. Put simply, the agreement between the parties was that the plaintiff would pay US$270,000 for shares in Xeitgeist, and *not* that she would pay US$270,000 to be generally associated with Xeitgeist. As such, any additional benefits that the plaintiff received from her general association with Xeitgeist cannot be said to be benefits that the plaintiff "bargained for under the contract" (*Ooi Ching Ling v Just Gems Inc* [2003] 1 SLR(R) 14 at [44]).

78 In any case, I note that some of these additional benefits were not even conferred upon the plaintiff in her capacity *qua* shareholder. During cross-examination, the defendant himself appeared to acknowledge (at least initially) that the plaintiff had attended the Cannes Film Festival ("the Festival") due to her role as a member of Xeitgeist's advisory panel, rather than in her capacity as a shareholder of Xeitgeist.[98] Although the defendant subsequently suggested during further cross-examination that the plaintiff's attendance at the Festival was due to a *combination* of her roles as a member of Xeitgeist's advisory panel, a direct investor in "Hotel Mumbai" and a shareholder of Xeitgeist,[99] I find this explanation implausible. It was not disputed that as a member of the advisory

---

97 AB at p 318–319.

98 NEs, 25 June 2021, p 103, lines 18–25.

99 NEs, 25 June 2021, p 105, lines 16–22; PCS at para 78.

panel, the plaintiff was required to travel overseas for the purposes of *inter alia*, attending the Festival, in return for being paid a retainer.[100] The retainer agreement made no mention that the plaintiff was undertaking those obligations whilst also wearing her shareholder hat.[101] It was, to my mind, clear that any benefits that might have been enjoyed by the plaintiff by reason of her attendance at the Festival was in her capacity *qua* advisory board member. In the round, I thus see no merit in the defendant's argument that consideration had only partially failed, simply because the plaintiff received some non-tangible benefits by virtue of her association with Xeitgeist.

79 In sum, I find that the *only* basis for the plaintiff's transfer of US$270,000 (or more precisely, S$377,190) to the defendant was the expected transfer of the Xeitgeist shares from the defendant to her. As the defendant failed to effect the transfer of his Xeitgeist shares to the plaintiff, there was, in my judgment, a total failure of consideration.

80 For clarity, while the plaintiff urged me to adopt the reasoning in *Giedo Van Der Garde v Force India Formula One Team* [2010] EWHC 2373 (QB)[102], I do not find it necessary to do so, given my findings at [76]–[79]. I now turn to address the defences that the defendant raised in respect of the plaintiff's claim in restitution.

Change of position

81 The defendant argues that even if the plaintiff has a claim for restitution by reason of total failure of consideration and/or unjust enrichment, he should

---

100 NEs, 25 June 2021, p 104, lines 19–23.

101 AB at p 97.

102 PCS at para 74.

be able to avail himself of the defence of change of position.[103] The defendant confirms that he received S$377,190 from the plaintiff on 8 May 2017 (being the approximate equivalent of US$270,000) in his personal DBS bank account number 033-9-091811 (the "DBS Account"). The defendant claims that he then incurred various expenditures amounting to a total of S$207,565.71, as follows:[104]

S/N	Date	Amount	Description
1	8 May 2017	S$18,000	Payment of 2 months' rent for the property at 7 Grange Road, Singapore 239694 (the "Grange Road property") which was used as the defendant's residence and home office
2	9 May 2017	S$52,281.05	Payment to Joe for expenses relating to Xeitgeist's trip to Cannes Film Festival
3	10 May 2017	S$5,500	Payment to Mr Johnny Yeow for transport services that Xeitgeist engaged in Malaysia, and for the transportation of VIP guests visiting Singapore
4	10 May 2017	S$20,000	Transfer to the defendant's Standard Chartered bank account number 0119197502 (the "SCB Account") for Xeitgeist's expenses related to a trip to Sydney, Australia in October 2017
5	12 May 2017	S$50,000	Unsecured loan to Xeitgeist
6	13 May 2017	S$15,000	Payment to the defendant's SCB Account as part payment of his own salary
7	14 May 2017	S$7,608.51	Payment to a real estate agency for Xeitgeist's accommodation during the Cannes Film Festival
8	16 May 2017	S$3,050	Purchase of laptop for Xeitgeist

103 DCS at p 26, para 90.

104 MM-3 at paras 3–15.

9	18 May 2017	S$30,000	Unsecured loan to Xeitgeist
10	18 May 2017	S$3,126.15	Payment for accommodation for Xeitgeist staff at the Cannes Film Festival
11	25 May 2017	S$3,000	Payment for expenses incurred on credit cards linked to the defendant's SCB Account
	TOTAL	S$0	

82 There are three elements to the defence of change of position, namely that (a) the payee has changed his position; (b) the change was *bona fide*; and (c) it would be inequitable to require the person enriched to make restitution or to make restitution in full: *Management Corporation Strata Title Plan No 473 v De Beers Jewellery Pte Ltd* [2002] 1 SLR(R) 418 ("*De Beers*") at [35]; see also *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] 2 SLR 543 ("*Cavenagh*") at [58].

83 With regard to the first element that the payee has changed his position, the payee must demonstrate that there is a causative link between the payment received and the change of position; in other words, the payee must prove that he would not have changed his position "but for" the payment received: *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another appeal* [2011] 3 SLR 540 at [140]; *Cavenagh* at [67].

84 The second element, that the payee must have acted *bona fide*, arises from the proposition that the defence will not be open to someone who has changed his position in bad faith or who is a "wrongdoer": *Seagate Technology Pte Ltd and another v Goh Han Kim* [1994] 3 SLR(R) 836 ("*Seagate*") at [31].

85 As for the third element that it would be inequitable to require the payee to make restitution, the inequity itself must arise from the payee's change of

position, and in this all the circumstances relating to the change of position should be taken into consideration: *Seagate* at [31]. In addition, it would *not* be inequitable to require a payee to make restitution, if the expenditure might in any event have been incurred by him in the ordinary course of things: *De Beers* at [36].

86 I turn to the facts before me. As a preliminary point, I note that the defence of change of position applies *pro tanto* and the payee will only be allowed to keep that part of the money which he has disposed of: *De Beers* at [52]. This means that even if the defendant in the present case succeeds in establishing the defence of change of position, he would only have a *partial* defence to the plaintiff's claim in restitution, since he received S$377,190 from the plaintiff but incurred, on his own best case, expenditure amounting to a *lesser* sum of S$207,565.71.

87 In any case, I am doubtful that the defendant has adduced sufficient evidence to even prove the first element of his defence, *ie,* that he changed his position. In this regard, the defendant relies on his DBS Account statement for the month of May 2017, as well as several miscellaneous receipts and documents that the defendant claims prove the expenditures he incurred as a result of the payment from the plaintiff.[105] Yet I note that these were documents adduced at the eleventh hour, just prior to the penultimate day of trial. Moreover, after the plaintiff filed a notice of non-admission to the authenticity of these documents, the defendant conceded that he was "unable to take any further steps to prove the authenticity of those documents", save for two

105 MM-3, Tabs 1–6.

documents (namely, the defendant's DBS Account statement and the tenancy agreement for the Grange Road property).[106]

88 Even then, the defendant purported to "prove" the authenticity of the DBS Account statement by downloading a copy of his bank statement for the month of May 2017 from the DBS website, while testifying via video-link in open court proceedings. As the Court of Appeal in *CIMB Bank Bhd v World Fuel Services (Singapore) Pte Ltd and another appeal* [2021] 1 SLR 1217 ("*CIMB v World Fuel*") noted at [54]:

> A party who has the burden of proving the authenticity of a document first has to produce primary or secondary evidence thereof, *ie*, the alleged original or a copy, within the provisions of the EA. ***Thereafter***, *it* ***also*** *has to prove that the document is what it purports to be …*
>
> [emphasis added in italics and bold italics]

89 As such, even if I find that the soft copy of the DBS Account statement (as downloaded by the defendant during trial) is the corresponding original of the bank statement that the defendant exhibited in his AEIC, the defendant still has to adduce evidence that the DBS Account statement is *what it purports to be.* This could have been done by, for example, adducing evidence from a DBS representative that the DBS Account statement indeed reflects the deposits and withdrawals in and out of the DBS Account for the month of May 2017. However, no such evidence was adduced by the defendant. Moreover, I disagree with the defendant that he has established the authenticity of the DBS Account statement, simply by operation of Explanation 3 to s 64 of the Evidence Act (Cap 97, 1997 Rev Ed) (the "EA").[107] This provision states:

Primary evidence

---

106 NEs, 13 August 2021, p 4 lines 1–4.

107 DCS at p 28, paras 82–83.

> **64**. Primary evidence means the document itself produced for the inspection of the court.
>
> …
>
> *Explanation* 3.—Notwithstanding *Explanation* 2, if a copy of a document in the form of an electronic record is shown to reflect that document accurately, then the copy is primary evidence.
>
> *Illustrations*
>
> (*a*) An electronic record, which has been manifestly or consistently acted on, relied upon, or used as the information recorded or stored on the computer system (the document), is primary evidence of that document.
>
> …

90 As can be seen from the wording of the provision, s 64 of the EA merely defines what qualifies as primary evidence, which in turn may be used to prove the contents of documents under s 63 of the EA. This is relevant to the *first* step of the procedure for proving authenticity set out in *CIMB v World Fuel* (see above at [88]), but it does not relieve the defendant from its burden of going on to prove that the document is what it purports to be. Neither was this a case where the defendant sought to rely on the presumption under s 116A(2) of the EA, which provides as follows:

> **Presumptions in relation to electronic records**
>
> **116A**.—(1) …
>
> (2) Unless evidence to the contrary is adduced, the court shall presume that any electronic record generated, recorded or stored is authentic ***if it is established that the electronic record was generated, recorded or stored in the usual and ordinary course of business by a person who was not a party to the proceedings*** on the occasion in question and who did not generate, record or store it under the control of the party seeking to introduce the electronic record.
>
> *Illustration*
>
> *A* seeks to adduce evidence against *B* in the form of an electronic record. The fact that the electronic record was generated, recorded or stored in the usual and ordinary course

> of business by *C*, a neutral third party, is a relevant fact for the court to presume that the electronic record is authentic.
>
> [emphasis added in bold italics]

91 As is clear from the italicised wording, the presumption of authenticity under s 116A(2) of the EA may be raised if a party proves that the electronic record is "generated, recorded or stored in the usual and ordinary course of business by a person who was not a party to the proceedings". The defendant may well have been able to rely on s 116A(2) of the EA to prove the (presumed) authenticity of the electronic DBS Account statement, had he obtained evidence to prove that the said statement was a record "generated, recorded or stored in the usual and ordinary course of business" by DBS. However, the defendant did not do so, and did not in any case advance any arguments on s 116A(2) of the EA.

92 Likewise, with regard to the tenancy agreement for the Grange Road property, following from the Court of Appeal's observations in *CIMB v World Fuel* (see above at [88]), the first step to proving authenticity would have been for the defendant to produce the original tenancy agreement before the court. This was not done. I note that in his closing submissions, the defendant argues that pursuant to s 67(1)(*c*) of the EA, he should be entitled to rely on a copy of the tenancy agreement as secondary evidence as he "was in Australia at the time of the trial and was consequently not able to produce the original of the Tenancy Agreement".[108] I stress that this alleged fact was never put into evidence and no explanation has been provided regarding the whereabouts of the original tenancy agreement.

---

108 DCS at p 29–30, para 98.

93 Even if the defendant could justifiably rely on a copy of the tenancy agreement as secondary evidence under the exception set out in s 67(1)(*c*) of the EA, the second step to proving authenticity would be to adduce evidence to prove that the tenancy agreement is what it purports to be (see above at [88]). In this regard, the defendant suggested it could do so by relying on a certificate of stamp duty, which it disclosed in its 6th Supplemental List of Documents.[109] Yet, this certificate of stamp duty was ultimately not adduced in evidence. Accordingly, I cannot see what the defendant relies on to prove the authenticity of the tenancy agreement.

94 In the circumstances, I find that the defendant has not discharged its burden of proving the authenticity of the documents it seeks to rely on to establish the defence of change of position. Given that authenticity is a "necessary condition" of admissibility, those documents are therefore not admissible in evidence: *Super Group Ltd v Mysore Nagaraja Kartik* [2018] SGHC 192 at [53].

95 In addition to my reasons above, I am also of the view that there is insufficient evidence of a *causative link* between the defendant's expenditure and the transfer from the plaintiff, or similarly, that the defendant would not have incurred the expenditure in the ordinary course, such that it would be inequitable to require him to make restitution. The defendant contends that he would not have incurred the expenditure of S$207,565.71 but for the receipt of money from the plaintiff, as he only had S$396.97 in his DBS Account immediately prior to receiving the money from the plaintiff.[110] In my judgment, this observation alone says little about what the defendant's expenditure would

---

109 NEs, 13 August 2021, p 4 lines 12–26; DCS at p 30, para 99.

110 DCS at p 26, para 92.

otherwise have been, had the plaintiff not transferred to him the sum of S$377,190 on 8 May 2017. The defendant's evidence at trial was that he drew an annual salary of S$240,000 from Xeitgeist in 2016 and 2017.[111] Moreover, as is clear from the defendant's own evidence, he has at least two bank accounts, namely the DBS Account and the SCB Account. Accordingly, the mere fact that the defendant had S$396.97 in his DBS Account on 7 May 2017 does not necessarily show the *entirety* of his means, nor does it indicate that he would not have incurred the expenditure of S$207,565.71 *but for* the payment received from the plaintiff.

96 In addition, and turning to examine the specific expenses that the defendant incurred, I note that the defendant conceded that he would have had to pay rent on the Grange Road property (S/N 1 in the table at [81] above) *regardless* of whether he received payment from the plaintiff.[112] This was therefore not an extraordinary expense that the defendant incurred as a result of the payment from the plaintiff. Likewise, it is unclear what expenses the defendant had used the credit cards linked to his SCB account for (S/N 11 in the table at [81] above), and accordingly, it cannot be said on a balance of probabilities that these were extraordinary expenses. As for the remaining items of expenditure incurred by the defendant, these related to unsecured loans extended to Xeitgeist and purported expenses of Xeitgeist. Crucially however, there was no evidence led either through affidavit or at trial, that these expenses would not have been incurred by the defendant in the ordinary course. The mere fact that the defendant was not "legally obliged" to make such payments does

---

111 NEs, 1 July 2021, p 35 line 28 to p 36 line 3; p 41 lines 10–18; see also PBAEIC at p 397.

112 NEs, 1 July 2021, p 109 line 30 to p 110 line 1.

not prove that he would not have incurred such expenses in the ordinary course.[113]

97 In any case, it is also arguable that the defendant should not be allowed to rely on the change of position defence in relation to the *loans* that he extended to Xeitgeist. As the learned editors of Goff & Jones, *The Law of Unjust Enrichment* (Sweet & Maxwell, 9th Ed, 2016) ("Goff & Jones") note at [27–03]:

> To develop the [change of position] defence in a principled way the courts must understand its rationale. The defence generally applies where the benefit transferred from the claimant to the defendant has been ***irretrievably lost*** so that the courts must choose which of the parties should bear this loss…
>
> [emphasis added in bold italics]

98 A loan can hardly be characterised as an "irretrievable loss", since the lender would ordinarily expect the return of the loan. In any case, the defendant did not adduce any evidence that the money loaned to Xeitgeist *was* an irretrievable loss. As such, even if the defendant had proven that he would not have extended loans to Xeitgeist but for the payment from the plaintiff, I would be reluctant to find that the change of position defence should be available to the defendant in respect of these loans.

99 Finally, I express my doubts that the change of position defence should be available to a defendant who spends a sum of money, in full knowledge that he received the said sum conditional upon his performance of a contractual obligation. The learned editors of Goff & Jones note at [27–58]:

> (d) *Failure of Basis*

---

113 DCS at p 27, para 95.

> When money is paid to a recipient on an agreed basis, he knows that he may have to repay a like sum if the basis fails to materialise, *suggesting that he cannot spend the money in the honest belief that the transferor had an unqualified intention to benefit him.* So, for example, if a claimant pays a defendant money to build a house, and the defendant spends it on a holiday that he would not otherwise have bought, the law will almost certainly not permit him to rely on this fact in the event that the house is not built and the claimant sues to recover his money.
>
> [emphasis added]

100 In support of this proposition, the editors of Goff & Jones highlight the case of *Murray Stanley Goss and another v Laurence George Chilcott* [1996] 3 WLR 180 ("*Goss v Chilcott*"). The defendants, Mr and Mrs Goss, had borrowed money from a company. This sum of money was then paid to a third party ("Mr Haddon"), as a personal loan from the defendants. Mr Haddon did not return this money, and consequently the defendants failed to repay the loan. The company then sued the defendants. Lord Goff, delivering judgment on behalf of the Privy Council, held that the defendants had received the money on the basis that they covenanted to repay the loan, and that having failed to do so, the company therefore had a claim in restitution for total failure of consideration (at 187–188). In this regard, Lord Goff rejected the argument that the defendants were entitled to the change of position defence, simply because they had paid away the money to Mr Haddon. Lord Goff observed (at 189):

> From the beginning, the defendants were under an obligation to repay the advance once it had been paid to them or to their order; and this obligation was of course unaffected by the fact that they had allowed the money to be paid over to Mr. Haddon. The effect of the alteration of the mortgage instrument was that their contractual obligation to repay the money was discharged; but they had nevertheless been enriched by the receipt of the money, and prima facie were liable in restitution to restore it. They had however allowed the money to be paid over to Mr. Haddon in circumstances in which, as they well knew, the money would nevertheless have to be repaid to the company. They had, therefore, in allowing the money to be paid to Mr. Haddon, deliberately taken the risk that he would be

> unable to repay the money, in which event they themselves would have to repay it without recourse to him. Since any action by them against Mr. Haddon would now be fruitless they are seeking, by invoking the defence of change of position, to shift that loss onto the company. This, in their Lordships' opinion, they cannot do. The fact that they cannot now obtain reimbursement from Mr. Haddon does not, in the circumstances of the present case, *render it inequitable for them to be required to make restitution to the company in respect of the enrichment which they have received at the company's expense*.
>
> [emphasis added]

101 *Goss v Chilcott* was followed by the English Court of Appeal in *Haugesund Kommune and another v Depfa ACS Bank (Wikborg Rein & Co, Part 20 defendant)* [2012] 2 WLR 199 ("*Haugesund Kommune*"). This case concerned a series of swap contracts entered into *ultra vires* by Norwegian local authorities, under which the respondent bank ("Depfa") loaned the local authorities several sums of money, which were then re-invested in financial instruments. These investments were unprofitable and resulted in substantial losses. Depfa brought a claim in restitution to recover the sums advanced to the local authorities. Lord Justice Aikens, delivering the majority judgment, held that the local authorities could not rely on the defence of change of position, as the local authorities had received the money from Depfa on the understanding that they had to repay it (at [124]–[125]). As such, even though the local authorities *had* acted *bona fide* when they made the investments, they were the ones who had taken the risk that their investments would fail, rather than Depfa which simply extended a loan on the expectation that it would be repaid. Lord Justice Aikens observed that the "justice of the case" therefore lay with allowing Depfa's claim in restitution (at [126]).

102 I note that *Haugesund Kommune* was applied by Judicial Commissioner Aedit Abdullah (as he then was) in *Supercars Lorinser Pte Ltd and another v Benzline Auto Pte Ltd* [2016] SGHC 281 ("*Supercars*"). The case concerned

payment of a sum of money by the plaintiff ("Supercars") to the defendant ("Benzline"), ahead of entry into an exclusive dealership agreement. Abdullah JC found that the payment had been made conditional on the parties entering into the exclusive dealership agreement, and accordingly that when the parties failed to form such an agreement, the basis for the payment failed (at [37]). The learned Judicial Commissioner rejected that Benzline was entitled to a change of position defence, observing (at [79]):

> 79 However, where the basis has been found to have failed, change of position is not made out as a defendant in such a position would know that flowing from such failure, repayment would follow. It is therefore not inequitable to require repayment: *Haugesund Kommune and another v Depfa ACS Bank (Wikborg Rein & Co, Part 20 defendant)* [2010] EWCA Civ 579 at [123], [125]. An exception noted in *Goff & Jones* is made in respect of situations where the basis requires some advance expenditure, such as a contract requiring work, before it is frustrated, but that is a different situation from what we have here.

103 However, when the case went on appeal in *Benzline Auto v Supercars* (as noted at [75] above), the Court of Appeal took the differing view that the payment had not been made conditional on the parties entering into the exclusive dealership agreement (at [66]–[67]). Rather, the Court of Appeal found that the basis for the payment was that Benzline would *offer* Supercars the exclusive dealership agreement on terms that corresponded in material ways to a prior draft agreement. Given that Benzline had been prepared to execute the exclusive dealership agreement, there had been no failure of consideration (at [68]–[69]). The Court of Appeal therefore disallowed Supercars' claim in restitution, and consequently did not need to comment on the change of position defence.

104 Since the High Court's decision in *Supercars*, it appears that there has been no further development on this aspect of the law: namely, whether the

change of position defence is available to a defendant who spends away a benefit, despite knowing that he received the benefit conditional upon his performance of a contractual obligation. From my review of the cases and commentary above, it is not entirely clear which of the three elements of the change of position defence (summarised above at [82]) this question of law relates to. In the extract at [99] above, the editors of Goff & Jones suggest that this is a matter that touches on the question of whether the defendant has acted with an "honest belief", which in turn suggests that it is the defendant's *bona fides* that is relevant (*ie*, the second element). On the other hand, the courts in *Haugesund Kommune* as well as *Supercars* appear to have based their analysis in the context of the third element, *ie*, whether it was inequitable in the circumstances to allow restitution. These finer points were, however, not fully canvassed before me and as such, I hesitate to analyse them in any detail or to arrive at any definitive conclusion. In any case, there is no need for me to do so for present purposes.

105 Nonetheless, and without expressing any preference between the reasoning of the editors of Goff & Jones and that of the courts in *Haugesund Kommune* and *Supercars*, I would express my preliminary agreement with the general proposition that a defendant should not be allowed to rely on the change of position defence in circumstances when he pays away money that he knows he received subject to an obligation on his part to perform. In the present case, the defendant spent over half of the money he had received from the plaintiff, knowing that he had received the money subject to his obligation to transfer the Xeitgeist shares to the plaintiff, and that he had not done so as of May 2017 (when the defendant spent the money). Moreover, even after he had expended the money received from the plaintiff, the defendant persisted in his failure to transfer the Xeitgeist shares to the plaintiff. This failure persisted even as of 30 June 2017, when the defendant ought reasonably to have transferred the

shares to the plaintiff, and even as of 8 August 2017, by which time the shares ought, according to the plaintiff, reasonably to have been registered with ACRA (see [69] above). In such circumstances, I fail to see how it would be equitable to allow the defendant to escape making restitution (or inequitable to require him to do so), simply because he spent the money he received with particular expedition.

106 As I stated above at [104], this is a point that is best left to be fully considered on another occasion when the court has had the benefit of full argument. For present purposes, I find that the defendant has not adduced sufficient evidence that he changed his position, that there was a causative link between his expenditure and the payment from the plaintiff, or that he would not have incurred the expenditure in the ordinary course of things. For these reasons, I find that the defendant has failed to establish his defence of change of position.

Estoppel

107 Alternatively, the defendant argues that the plaintiff is estopped from asserting a total failure of consideration and bringing a claim in restitution, or denying that she had a contractual obligation to sign the DRA, as she made "an explicit representation acknowledging the [execution of the] DRA as a condition precedent to the share transfer" in her e-mail on 17 June 2017.[114] Grace had e-mailed the plaintiff on 16 June 2017 to remind the plaintiff to sign the DRA.[115] In her response e-mail on 17 June 2017 (on which the defendant was copied), the plaintiff stated:[116]

---

114 DCS at pp 31–32, para 104 and 108.

115 AB at p 1412.

116 AB at p 1411.

> Dear grace
>
> Thank you for your email
>
> I can sign it next week as I have carpel [*sic*] tunnel syndrome on my right hand and unable to sign documents
>
> Will sign and send by Friday to you
>
> Regards
>
> Simran

108 The defendant claims that he relied on the plaintiff's representation that she would sign the DRA to his detriment, as he incurred expenditure of S$207,565.71 and lost the opportunity to sell his shares at the non-discounted rate of US$3.645 per share.[117]

109 As a preliminary observation, I find the defendant's argument that he incurred expenditure of S$207,565.71 *in reliance on* the plaintiff's representation on 17 June 2017 somewhat puzzling. On the defendant's own case, he incurred expenditure of S$207,565.71 in *May* 2017 (see [81] above), *before* the plaintiff sent her response e-mail on 17 June 2017. It is not the defendant's case that the plaintiff made any representation to a similar effect at any time before 17 June 2017. I therefore cannot see how the defendant could have spent the said sum in May 2017, in reliance on an e-mail the plaintiff sent only later in June 2017.

110 In any case, in order to establish the defence of estoppel by representation, the defendant must show that (a) there has been a representation of fact; (b) which was relied on by the defendant; and (c) the defendant suffered detriment as a result of the reliance (*United Overseas Bank Ltd v Bank of China* [2006] 1 SLR(R) 57 at [18]). In this regard, the representation of fact relied on

---

117 DCS at p 32, paras 106–107.

to establish the defence cannot be "promissory in nature" (*Chng Bee Kheng and another (executrixes and trustees of the estate of Fock Poh Kum, deceased) v Chng Eng Chye* [2013] 2 SLR 715 at [94]); it must be a representation that deals with existing fact rather than future intention (*Day, Ashley Francis v Yeo Chin Huat Anthony and others* [2020] 5 SLR 514 ("*Ashley Francis Day*") at [201]).

111 In the present case, I find that the plaintiff's representations that she could "sign [the DRA] next week" and that she would "sign and send by Friday" are clearly statements of future intention. They did not deal with a state of affairs that was existing as of 17 June 2017. Accordingly, I find that the defendant has not surmounted the first step to establishing estoppel by representation, which is to show that there has been a representation of fact.

112 Moreover, in order for the defence of estoppel by representation to be made out, the representation of fact relied upon must be "clear and unambiguous": *Ashley Francis Day* at [196]. In my judgment, the plaintiff's e-mail of 17 June 2017 did *not* contain a clear and unambiguous representation that she would execute the DRA *as a condition precedent* to receiving the Xeitgeist shares from the defendant. First, nowhere is it stated in the plaintiff's e-mail of 17 June 2017 that she would execute the DRA in order to receive the Xeitgeist shares. Second, reading the plaintiff's e-mail of 17 June 2017 in the context of the prior correspondence between the parties, I find that it is ambiguous why the plaintiff stated that she would execute the DRA. I find it plausible that in her e-mail of 17 June 2017, the plaintiff meant that she would execute the DRA in order to transfer the Xeitgeist shares from her name *to Beetroot*, and *not* to transfer the shares from the defendant *to her own name*. Grace had raised the signing of the DRA for the first time on 24 April 2017, in response to the plaintiff's interest in transferring the Xeitgeist shares (once she

had received them) from her name to Beetroot (see [14]–[15] above).[118] In cross-examination, the plaintiff acknowledged that Grace, in her e-mail of 24 April 2017, had instructed the plaintiff to sign the DRA in order to complete the share transfer from the defendant to *her own name*, but admitted that she had misread Grace's e-mail.[119] The plaintiff instead understood Grace's e-mail to mean that she only needed to sign the DRA as a formality if she wanted to transfer her Xeitgeist shares onward to Beetroot,[120] and continued harbouring this impression when Jeremy had e-mailed her on 22 May 2017 to remind her to sign the DRA.[121] As such, when she sent the e-mail at [107] above to Grace on 17 June 2017, the plaintiff explained that she thought that the Xeitgeist shares had already been transferred to her name.[122]

113 I find the plaintiff's explanation to be believable, particularly when considered in the context of the e-mails and discussions leading up to Grace's e-mail of 24 April 2017, when the issue of signing the DRA was raised with the plaintiff for the first time (as I have summarised and analysed at [7]–[13] and [32]–[53] above). Thus, when read in context, the plaintiff's e-mail of 17 June 2017 does not, in my view, constitute a clear and unambiguous representation "acknowledging the [execution of the] DRA as a condition precedent to the share transfer" from the defendant to the plaintiff under the Contract, as contended by the defendant (see [107] above). For completeness, I also consider it immaterial, for similar reasons, that the plaintiff replied to Grace's e-mail of 24 April 2017 on the same day, asking for the "share holders [*sic*] agreement to

---

118 AB at p 444.

119 NEs, 23 June 2021, p 119 line 27 to p 120 line 2.

120 NEs, 23 June 2021, p 119 lines 23–26; p 123 lines 5–6; p 126 line 24 to p 127 line 17.

121 NEs, 23 June 2021, p 124 lines 7–9.

122 NEs, 23 June 2021, p 128 line 16; p 129 lines 1–23.

sign" (see [15] above). In my judgment, the defendant has therefore not made out the defence of estoppel by representation.

Remedies

114 As the defendant has not established any defences to the plaintiff's alternative claim for restitution grounded upon total failure of consideration and/or unjust enrichment, the defendant is, in my judgment, obliged to make restitution of the sum of S$377,190 he received from the plaintiff.

Issue 6: The plaintiff's claim for misrepresentation

115 Given that I have allowed the plaintiff's claim in contract and alternatively for restitution, I do not find it necessary to deal with the plaintiff's further alternative claim grounded on misrepresentation. Nor is it necessary for me to address or make any specific findings on the plaintiff's allegation that the defendant intended, from the inception, to engineer a forced buyout of Xeitgeist (see [23] above).

Conclusion

116 For the foregoing reasons, the plaintiff is entitled to damages from the defendant for breach of contract in the sum of S$377,190 or alternatively, to restitution in the same amount by reason of a total failure of consideration and/or unjust enrichment.

117 Accordingly, I grant the plaintiff judgment against the defendant in the sum of S$377,190, together with interest thereon at the rate of 5.33% per annum from the date of the writ to the date of this judgment.

118 I shall hear the parties separately on the question of costs of the action.

S Mohan
Judge of the High Court

Quek Wen Jiang Gerard and Ling Ying Ming Daniel (PDLegal LLC) for the plaintiff;
Naidu Priyalatha and Jacintha d/o Gopal (Advocatus Law LLP) for the defendant.

Annex 1: Chronology of e-mail correspondence

Date	Details
21 January 2017 5.26pm	Defendant e-mails the plaintiff to propose acquiring shares in Xeitgeist instead of investing directly in "Hotel Mumbai", as well as to offer her tenure on Xeitgeist's advisory board for 12 months.[123]
30 January 2017 12.06am	Defendant e-mails the plaintiff with further details regarding his proposal that she invests in Xeitgeist or invests directly in "Hotel Mumbai". With regard to the proposed share acquisition, the defendant suggests that the plaintiff purchase US$300,000 worth of Xeitgeist shares at a 10% discount from him (*ie,* at a purchase price of US$270,000). In addition, the defendant again offers the plaintiff 12-months tenure on Xeitgeist's advisory panel as an Indian cultural advisor.[124]
30 January 2017 9.29am	Defendant e-mails the plaintiff attaching a copy of the commission agreement that Xeitgeist uses.[125]
30 January 2017 11.29am	Defendant e-mails the plaintiff to clarify the commissions she would receive from potential future fund raising, as well as to provide more details on his proposal that the plaintiff invests in "Hotel Mumbai".

123 AB at pp 40–43.

124 AB at pp 318–319.

125 AB at p 45.

	The defendant states that Xeitgeist "will be entering a significant growth phase in 2018".[126]
30 January 2017 10.22pm	Joe e-mails the defendant and plaintiff stating he agrees with the defendant's e-mails on the discounted Xeitgeist shares and process.[127]
1 February 2017 4.19pm	Defendant e-mails the plaintiff and Jeremy. Defendant informs Jeremy that the plaintiff will be acquiring US$300,000 of his shares in Xeitgeist. Defendant instructs Jeremy to apply a 10% discount to the shares priced at US$3.65, and to send the plaintiff the "transfer papers", including "all the associated shareholders agreements for her review and signing which has been signed by all the Xeitgeist shareholders". Defendant informs the plaintiff that Jeremy will be sending her the "paperwork and details for the share transfer" and congratulates her on joining the Xeitgeist team. [128]
1 February 2017 5.49pm	Jeremy e-mails the plaintiff congratulating her on her "acquisition" and says he will provide the transfer documents the next day.[129]
8 February 2017 6.03pm	Grace e-mails the plaintiff (with the defendant copied), attaching the Share Transfer Deed. Grace instructs the

126 AB at pp 316–317.

127 AB at p 45.

128 AB at pp 322–323.

129 AB at p 321.

	plaintiff to scan and mail the executed copy of the Share Transfer Deed to TKNP. In addition, Grace's e-mail encloses (a) a shareholders' agreement dated 10 June 2013; (b) a copy of the 1SSA; (c) an undated supplemental shareholder's agreement for the plaintiff's reference.[130]
9 February 2017 4.26pm	Grace e-mails both the plaintiff and defendant instructing them to sign on the attached Share Transfer Deed, and scan and mail the original signed copy to TKNP.[131]
14 February 2017 10.17am	Plaintiff e-mails the defendant and TKNP, asking "Do we alos need to do a contract for Xietgiest shares or just a share transfer" [*sic*]. Plaintiff also states that she is "sending all [her] papers" to her lawyer, who can advise the parties if needed.[132]
14 February 2017 12.23pm	Grace replies the plaintiff's e-mail stating: "Kindly furnish us the **scanned and original signed copy** of the attached share transfer deed before we proceed to update ACRA on the share transfer. After we lodge with ACRA, we will provide you a copy of the latest Business Profile as well as a share certificate reflecting your shareholdings in XEG.

130 AB at p 462.

131 AB at p 327.

132 AB at p 332.

	The above will complete the share transfer process."[133]
14 February 2017 3.33pm	Defendant replies to the plaintiff's e-mail stating: "… Simran the transfer papers that you have been sent approve the transfer of shares at the price we have agreed. You will also receive the company shareholders agreement and supplemental agreements that all shareholders have signed upon, most recently Richard Sharkey. The process is basically you sign the paperwork and send a scanned copy to Jeremy and grace. You transfer the funds in to designated account. Once that has occurred they issue the stock in your name and update the ACRA file and send the share certificates to you. Jeremy did I miss anything?"[134]
14 February 2017 4.04pm	Grace e-mails the plaintiff, re-attaching the documents from her e-mail on 8 February 2017, and attaching the latest business profile of Xeitgeist.[135]

133 AB at p 331.

134 AB at p 331.

135 AB at p 330.

16 February 2017 10.25pm	Jeremy e-mails the plaintiff asking for an update on when TKNP would receive the Share Transfer Deed, as it "is the last document before [TKNP] can execute the [share transfer] transaction".[136]
27 March 2017 1.21pm	Defendant e-mails plaintiff and her brother, Aman Bedi ("Aman"), detailing Simran's expected future involvement in Xeitgeist. Defendant states that "[i]t is core to where we are going that Simran is a shareholder in Xeitgeist. This can be done as either a direct investment into Xeitgeist or purchasing shares from Joe and myself at the discounted price we have discussed. The accountants have this paperwork ready to execute."[137]
5 April 2017 2.13pm	Jeremy forwards Grace's e-mail of 14 February 2017 at 4.04pm to the plaintiff, stating "please find appended below our last correspondence to you on the share transfer, and documents to execute the same".[138]
20 April 2017 3.45pm	Grace e-mails the plaintiff congratulating her on becoming a Xeitgest shareholder. Grace informs the plaintiff that TKNP is arranging for payment of stamp duties on the share transfer, and will forward the plaintiff her share certificates after the transfer is registered with ACRA.[139]
24 April 2017	Grace e-mails the plaintiff stating:

136 AB at p 64.

137 PBAEIC pp 126–127.

138 AB at p 430.

139 AB at p 439.

4.24pm	"Dear Simran, I understand that upon successful transfer of shares from Mark to yourself, you wish to transfer your shareholdings to your corporate entity. I have listed down the following steps for us to proceed. <u>Stage 1) Transfer from Mark to your personal name:</u> Next steps to complete the transfer: 1) Kindly sign attached deed of ratification and scan to us. 2) Scan to us a copy of proof of payment (USD270,000) to Mark 3) We will proceed with e-filing of share transfer. <u>Stage 2) Transfer from your personal name to your corporate entity</u>: For KYC purposes and preparation of paperwork, please let us have the following information: 1) Do you wish to transfer all of your shareholdings (82,192 ordinary SGD shares) or otherwise (_____)? 2) Corporate and beneficial owners' identification documents (as per attached KYC Roadmap) – if not furnished to us yet."[140]

[140] AB at p 444.

24 April 2017 9.57pm	Plaintiff e-mails Grace stating "Please can you also send me the share holders [*sic*] agreement to sign".[141]
28 April 2017 8.00am	Grace e-mails the plaintiff and the defendant, stating that upon receipt of the signed DRA and proof payment from the plaintiff, TKNP would proceed with the share transfer.[142]
28 April 2017 8.17am	Plaintiff replies to Grace's e-mail stating that she will complete the funds transfer by 5 May 2017.[143]
22 May 2017	Jeremy e-mails the plaintiff reminding her that TKNP has yet to receive the signed DRA.[144]
3 June 2017 6.21am	Plaintiff replies to Jeremy's e-mail, stating "I have already done the payment for xietgiest [*sic*] shares. What documents we need to sign and you need to transfer shares on my name".[145]
3 June 2017 7.27am	Grace e-mails plaintiff requesting her to sign the DRA to "finalise the paperwork for [her] share transfer".[146]
16 June 2017 10.57pm	Grace e-mails plaintiff stating that TKNP is "pending receipt" of the signed DRA, before TKNP forwards the share certificates to her. Grace states that she hopes to hear from the plaintiff soon so "we can wrap up the paperwork for this share transfer".[147]

141 AB at p 442.

142 AB at p 447.

143 AB at p 447.

144 AB at p 453.

145 AB at p 453.

146 AB at p 455.

147 AB at p 458.

17 June 2017 9.37am	Plaintiff replies to Grace's e-mail, stating: "Dear grace Thank you for your email I can sign it next week as I have carpel [*sic*] tunnel syndrome on my right hand and unable to sign documents Will sign and send by Friday to you".[148]

[148] AB at p 460.