Chia Kok Kee v HX Investment Pte Ltd (So Lai Har (alias Chia Choon), third party in issue) (Tan Wah, third party in counterclaim) [2007] SGHC 164

Case Number : Suit 558/2005

Decision Date : 28 September 2007

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Chua Teck Leong, Thean Chow Leong, Low Wai Cheong (Chris Chong & CT Ho Partnership) for the plaintiff and the Third Party in Issue; Wong Seow Pin (SP Wong & Co) for the defendant and Third Party in Counterclaim

Parties : Chia Kok Kee — HX Investment Pte Ltd (So Lai Har (alias Chia Choon), third party in issue) (Tan Wah, third party in counterclaim)

Contract – Contractual terms – Dispute over dividend payouts and expenses claimed by plaintiff – What were the precise terms of the oral agreement via conduct of parties – Whether company intended to be incorporated as commercial vehicle to hold investment on trust for investors

28 September 2007 Judgment reserved.

Lai Siu Chiu J

Introduction

1 In early 1995, the plaintiff Chia Kok Kee was looking for potential co-investors in a 50-year joint-venture in a hydro-electric power plant in Dujiangyan, Sichuan Province, in the People's Republic of China ("PRC"). Eventually, one Madam Tan Wah ("TW"), who is the Third Party in the Counterclaim, agreed to invest in the joint-venture ("the joint-venture"). Four Chinese counterparts were also involved in the joint-venture and they were:

(i) China Sichuan Dujiangyan Electric Power Joint Stock Company Limited (subsequently reconstituted as Chengdu Power Bureau Dujiangyan Electric Power Company) ("CSEP");

(ii) China Sichuan Machinery and Equipment Import & Export Corp ("SCMEC");

(iii) China Sichuan Machinery Equipment Weida Branch Company ("Weida"); and

(iv) Shenzhen Bao Ye Trading Corporation ("Bao Ye").

The formal joint-venture contract was signed by the above mentioned Chinese parties and the plaintiff on 15 May 1995 and a Chinese company, Sichuan New Dujiang Electrical Power Co. Ltd ("SND") was incorporated as the investment vehicle to acquire and hold the joint-venture. The plaintiff signed the contract using the name "HX Investment Pte Ltd" which name was assumed by the defendant when it was subsequently incorporated.

2 The defendant, HX Investment Pte Ltd ("HX") was incorporated on 14 June 1995 for the purpose of investing in the joint-venture. The directors and shareholders of HX were TW and the plaintiff's mother So Lai Har ("SLH") who is the Third Party in issue. HX only had an initial paid-up capital of $2.00 and TW and SLH held one ordinary share each. The paid-up capital was eventually increased to $100,000 with TW and SLH holding 60,000 shares and 40,000 shares respectively. It was

decided that HX would invest a total amount of RMB 6,225,369 ("the Investment") which was equivalent to 25% of the share capital in SND. According to the joint-venture contract, HX was guaranteed a 20% annual return on the Investment by CSEP for the first four years (which amounted to RMB 312, 768.44) after the joint-venture establishing SND came into effect on 31 July 1995 and 18% annual return on the Investment for the remaining term of the joint venture up to 31 July 2045, which amounted to RMB 281,491.60 ("the profit guarantee clause"). The returns on the Investment were to be paid out as dividend ("the dividends").

The facts

3 The plaintiff and TW had agreed to invest in the joint-venture pursuant to an oral agreement entered into sometime in early May 1995 ("the oral agreement"). It is common ground that the parties had entered into the oral agreement but the terms thereof were hotly disputed. For ease of reference later, the parties' differing versions of the terms of the oral agreement are now set out. The plaintiff deposed (in his affidavit of evidence in chief ["AEIC"]): [note: 1] _

i. TW, SLH and myself would jointly invest RMB 6,255,369 into Sino-foreign joint-venture company, eventually named Sichuan New Dujiang Electrical Power Co Ltd ("SND"), to be formed to purchase the Qian Jia Wan Power Station (the "Investment") in the following manner:

a. I would invest approximately RMB 1,876,610.70 (which was equivalent to approximately 30% of the Investment);

b. SLH would invest the sum of S$100,000 (which was equivalent to approximately 10% of the Investment;

c. TW would invest the balance 60% of the Investment amounting to approximately RMB 3,753,221.40.

ii. For my efforts in securing the joint-venture, and for arranging the formal joint venture contract to be signed by a company to be incorporated to hold the parties' interests (eventually the Defendant) instead of King's Huaxin, TW agreed to reward me by allocating 10% from her 60% share in the Investment to me as a bonus (the "10% bonus"). In fact, it was TW who raised the issue about rewarding me for my efforts in securing the Investment and I indicated the figure of 10% and she readily agreed to this during the discussion.

iii. A facilitation fee ("facilitation fee") equivalent to 10% of the gross dividends was also agreed to be paid to Zheng and Oh for their efforts in facilitating the investment.

iv. The facilitation fee would be deducted from the gross dividends before the balance proceeds were distributed equally between TW on the one part and SLH and myself on the other part.

4 On the other hand, TW's version (according to her "AEIC") was[note: 2]:

[The] essential terms were: 1st, the proportion of share is 60:40 between me and him; and 2nd, a new Singapore company will be set up to invest in China. In addition, I agreed to lend the plaintiff a sum of S$100,000 to help him make up his capital investment for his 40% share.

5 It was accepted that a new company, i.e. HX was to be set up for the Investment. Although the plaintiff wanted to use his existing company, King's Huaxin Pte Ltd, TW insisted that a

new company be set up to invest in China. However, there was no discussion about the business structure of this new company. TW disputed the plaintiff's case that there was a common understanding between the parties that:

> the Defendant… incorporated to hold the Investment would merely be a commercial vehicle or a nominee for the parties, each of TW, SLH and myself were free to deal with our part of the Investment without having to limit ourselves to dealing with the same through the Defendant;… each of TW, SLH and myself referred to the Investment as our personal investment and have never considered the existence of the Defendant as a separate party holding the Investment in our own right.[note: 3]

TW also disputed the plaintiff's claim that the 10% bonus and the 10% facilitation fee formed part of the oral agreement. She asserted that only the parties' percentage shareholding in the Investment had been discussed. She countered that it was the plaintiff who suggested that he wanted a 40% share in the Investment. The plaintiff then asked TW for a loan of $100,000 ("the loan") so that he could make his 40% financial contribution to the Investment. The plaintiff did not deny that the loan was given to him and both sides agreed that the plaintiff has since repaid the loan.

6 In late June 1995, funds were remitted to SCMEC from the account of HX with the Bank of China (Katong Branch) ("the BOC Singapore account"). The breakdown of the funds remitted was as follows:

(i) S$640,000 came from TW which amount approximated 60% of the Investment;

(ii) S$100,000 came from the plaintiff (lent by TW); and

(iii) S$100,000 came from SLH, which amount approximated 10% of the Investment.

The $840,000 remittance was roughly equivalent to RMB 4,896,000.03. Additional funds were remitted by the plaintiff from his Malaysian and Hong Kong bank accounts to SCMEC directly. His total financial contribution (including TW's loan) amounted to 30% of the Investment. The total remittance to SCMEC was RMB 6,255,368.88 which was slightly above the sum of RMB 6,225,061.00 required for the Investment. The funds remitted were later recorded as part of the registered capital of SND in the name of HX.

7 Based on these capital contributions, the plaintiff contended that there were three investors in the Investment: TW, SLH and himself. Thus, HX was holding the Investment for the parties in the proportions of 60:10:30, 60% being the entitlement of TW, 10% being that of SLH and the remaining 30% being the plaintiff's share. According to the plaintiff's version of the oral agreement, TW would give him 10% as a bonus from her own 60% stake, thus altering the aforesaid ratios to 50:10:40 respectively. TW however contended that the only investors were the plaintiff and herself. Since the plaintiff nominated SLH to be his director and shareholder in HX, the shareholding of the company was to be in the ratio of 60:40 in favour of TW and the plaintiff respectively with SLH holding the plaintiff's share. TW was adamant in her insistence that there was no discussion of any 10% bonus being allegedly payable to the plaintiff by herself or 10% facilitation fee being payable to one Zheng Rong Guang ("Zheng") who had introduced the plaintiff to the investment potential of the hydro-electric power plant or to one Oh Lian Keng ("Oh") who (according to the plaintiff) had provided legal and consultancy services for the joint venture and helped to draft the joint-venture agreement.

The dividends

8 Between 12 October 1995 and 20 November 2003, a total of 33 quarterly dividend payouts were paid out by SND to HX. The dividend payouts were described in great detail in the plaintiff's affidavit-of-evidence-in-chief ("AEIC") at [64] to [232]. However, TW questioned the accuracy of his account and her computation (RMB9,789,652.24) of the dividends received by HX differed from the plaintiff's figure (RMB 9,784,957).

9 According to the plaintiff, the first dividend payout was received around 12 October 1995. It was listed in SND's dividend payout records as the payout for the 3rd quarter of 1995.[note: 4]SND's records revealed that there was a second dividend payout for the 4th quarter of 1995. However, according to the plaintiff, this second dividend payout was accounted for under the 1st quarter of 1996 in his record, which was subsequently given to TW. This led TW to accuse the plaintiff of retaining for himself the entire first dividend payout. A comparison of the plaintiff's account of the dividend payouts (in his AEIC) with SND's dividend payout records showed that all 33 dividend payouts were received by the plaintiff. The plaintiff testified that the mismatch between his and the records of SND was merely with regards to terminology. This was further explained in his AEIC where he said that TW had suggested that the parties take turns to receive the dividend payouts instead of dividing each dividend payout equally between them. In accordance with this understanding, the plaintiff kept the second dividend payout for himself (and SLH) after paying the 10% facilitation fee to Zheng. However, both in his AEIC and in cross-examination (see *infra* [35]) Zheng (DW1) insisted he had never collected any such fees from the plaintiff.[note: 5]

10 It appeared that in the initial years, the plaintiff collected the dividend payouts in cash from SCMEC. Eventually, several bank accounts were opened by the plaintiff in PRC to receive the dividend payouts. There is some controversy between the parties as to the opening and maintenance of these bank accounts. According to the plaintiff's version, three bank accounts were opened:

(i) Account no. 5080193610001 with China Merchant Bank, Chengdu Branch ("CM Bank Account") in the name of the defendant;

(ii) Account no. 0102019500033 with Bank of China, Shenzhen Branch ("BOC Account 1") in the plaintiff's name;

(iii) Account no. 01-02-1-1-0305454 with Bank of China, Shenzhen Branch ("BOC Account 2") in the plaintiff's name.

The plaintiff explained that the CM Bank Account was opened when the defendant set up its Dujiangyan Representative Office. A perusal of the CM Bank Account's statements showed that it received several dividend payouts in late 1997 and in January 1998 but activity in this account slowly dwindled and on 20 December 2000, the account was automatically closed for lack of activity. The plaintiff however claimed that the CM Bank Account was closed upon his request.

11 In a letter dated 19 January 1998 written on behalf of HX, the plaintiff requested CSEP to remit the dividend payouts to BOC Account 1.[note: 6] Thenceforth, the dividend payouts were credited to BOC Account 1. Although BOC Account 1 was opened in the plaintiff's name, he maintained that the account was treated as a trust account to receive the dividend payouts on behalf of TW on the one part and SLH and himself on the other part. When TW queried why the plaintiff did not continue to use the CM Bank Account, his only response was that in any case, BOC Account 1 was meant for HX.

12 There were major discrepancies between the statements of BOC Account 1 and the

plaintiff's testimony on its inflows and outflows. There were a number of entries in the BOC Account 1 statements that the plaintiff failed to explain. There were withdrawals therefrom which the plaintiff explained were used for petty cash and for reimbursement of expenses. He stated that all these withdrawals were done with TW's consent (which she denied). TW had also complained that the plaintiff did not take the time to explain the dividend payout situation to her whenever she asked. During the period of the Investment, TW stated that the only information the plaintiff provided her was on 5 pieces of paper with no supporting documents. The 5 pieces of paper ("the 5 papers") showed[note: 7]:

(i) The capital contributions of the parties, given in 1995 (the "1995 paper");

(ii) Dividend payouts between 1995 to 1998 (the "1998 paper");

(iii) Dividend payouts between 1995 and 2001;

(iv) Dividend received by TW between 1995 and 2001; and

(v) A summary of expenses incurred between 1995 and 2001 (items

(Items (iii) to (v) are collectively referred as the "2001 papers").

The 2001 papers were provided pursuant to a request by TW after the plaintiff broached the issue of reimbursement of all other expenses he had incurred. The plaintiff gave TW a summary of expenses incurred from 1995 to 2001 which amounted to approximately RMB 2,135,017, together with a summary of dividend payments made to TW from November 1995 to October 2000. TW asserted that many of his expense claims were exaggerated and unrelated to the Investment. One example she cited was a claim for a Rolex watch which the plaintiff had bought and allegedly given to Zheng as a gift. However, in the plaintiff's Answers to Interrogatories filed on 22 December 2006, he revealed that the Rolex watch had not been given to Zheng and was in fact still in his possession.

The dispute

13 TW pointed out that there were many inconsistencies between the 1998 and 2001 papers. By 2002, the business relationship between the plaintiff and TW had deteriorated. In 21 December 2003, accompanied by her daughter Koh Teng Cheng ("KTC"), TW met the plaintiff and SLH at a MacDonald's outlet ("the confrontation meeting"). The parties argued primarily about the accounting of the dividend payouts and the expenses claimed by the plaintiff. TW wanted the plaintiff to account for all the dividend payouts received to date, but she did not receive a satisfactory answer from him. This problem culminated in a letter dated 4 January 2004 to SND sent by TW in the name of HX, requesting SND to withhold all dividends payouts until further notice.

14 A second mediation attempt to resolve the parties' differences was held at accountant Paul Tan's office on 11 March 2004 ("the mediation meeting"). At this mediation meeting, the plaintiff explained his and the capital contributions of TW and SLH in the Investment and asked that his financial contributions be recognized, that his expense claims of about RMB 1,400,000 be acknowledged and reimbursed by the defendant and lastly, that he be given a 50% share of the dividend payouts based on the 10% bonus he was entitled to. No settlement was reached at the mediation; hence, these proceedings.

The pleadings

The main claim

15 The primary issue turns on what the precise terms of the oral agreement were. There are two sub-issues which follow from this determination. First, whether HX was intended to be incorporated as a commercial vehicle to hold the Investment on trust for the benefit and interests of its investors (which was the pleaded case of the plaintiff) and secondly, what was the percentage shareholding the plaintiff, TW and SLH had in HX. If HX indeed was found to be a mere commercial vehicle through which its shareholders acted (as the plaintiff repeatedly contended in the witness stand) then the plaintiff sought *inter alia,* a declaration that HX was holding 40% of the Investment on trust for him, together with 40% of all profits, dividends and benefits accruing from the Investment. He asked that his 40% interest in HX Investment be transferred back to him and that HX direct SND to release all outstanding dividend payments withheld since January 2004.

The defence and counterclaim

16 TW filed a defence and counterclaim on behalf of HX disputing the plaintiff's allegations (at [15]). The defence of HX *inter alia* denied that the plaintiff had a 40% shareholding in the company and hence in the joint-venture. As HX was the party stated in the joint-venture contract, the defence averred that HX was the real investor in the joint-venture and that the plaintiff had acted for and on behalf of HX in collecting the dividend payments from SND. Total dividends of RMB 9,789,652.24 were collected for the period 1995 to 2003 and HX alleged that the plaintiff had distributed the dividend payments without proper authority. The plaintiff had instructed the corporate secretary and auditor that no dividends had been paid by SND and as such, HX's accounts did not properly reflect the dividends collected by and paid to the plaintiff on behalf of HX by SND. Thus, HX pleaded, the plaintiff had breached his fiduciary duty to HX, had acted dishonestly and defrauded the latter. It was further alleged that the plaintiff had refused to account for and pay the dividends to HX despite requests from TW.

17 HX counterclaimed against the plaintiff for restitution of the dividend payments he had collected from SND. The company alleged that the plaintiff had acted as a fiduciary of HX in circumstances which gave rise to a relationship of trust and confidence between them. By failing to account for and pay to HX the dividends collected, the company had suffered loss. The plaintiff was therefore liable to account for all the dividends received and/or retained by him.

The third party action to the main claim

18 HX joined SLH to the action in Third Party proceedings. In its Third Party statement of claim, HX sought from SLH an indemnity and/or contribution against the plaintiff's claim in the event that he succeeded wholly or partially. HX averred that SLH (as a director of HX) had breached her fiduciary duty to HX in not arranging for the proper distribution of the dividend payments to the shareholders, or in consenting to the plaintiff's meddling with and distribution of the dividend payments unlawfully. HX also alleged that SLH had breached her duties as a director as she did not act in the company's interest and had disregarded its interest by siding with and aiding the plaintiff in his wrongdoing against HX.

19 HX alleged that SLH had unjustly enriched herself in taking dividend payments belonging to HX and claimed restitution of the dividends paid by SND amounting to RMB 9,789,652.24. HX averred that SLH was a constructive trustee in her receipt of the dividends distributed unlawfully by the plaintiff or arising from the plaintiff's wrongdoing. HX alleged that SLH had knowingly received the dividend payments in breach of trust and/or dishonestly assisted the plaintiff in his breach of trust against HX.

Defence to the Third Party claim

20 In her defence to the Third Party claim, SLH denied that HX was entitled to a contribution or indemnity from her in the event that the plaintiff succeeded in his claim. SLH reiterated that HX was a trustee holding the Investment for the benefit and interests of herself, the plaintiff and TW and argued that the dividend payments received by the plaintiff were distributed amongst the three parties in accordance with the terms of the oral agreement. She also pointed out that TW had herself received the sum of RMB 3,016,876 as the latter's share of the dividend payments.

21 In addition, SLH averred that HX was estopped from making a claim to the dividend payments. First, HX was estopped by conduct as the distribution of the dividend payments to the plaintiff, TW and SLH was with the knowledge and express or implied consent of the company's directors. By reason of such conduct, HX permitted and induced SLH to believe that the company had agreed, consented or acquiesced to the distribution of the dividend payments to the three persons, such distribution being pursuant to the oral agreement. Secondly, SLH averred that there was a common understanding between the parties which gave rise to an estoppel by convention, that HX was incorporated as a commercial vehicle to hold the Investment for the benefit and interests of the plaintiff, TW and SLH and all dividend payments derived from the Investment belonged to the three persons. Further, the dividend payouts would not be recognized by HX but were to be accrued in the PRC and distributed (after deduction of the facilitation fees and the plaintiff's expenses) between TW on one part, and the plaintiff and SLH on the other part.

Third party Action to the Counterclaim

22 The plaintiff then filed a Third Party claim against TW in respect of the counterclaim of HX. In that statement of claim, the plaintiff averred that if the counterclaim by HX succeeded, then, by receiving the sum of RMB 3,016,876 personally, TW herself was in breach of her fiduciary duty owed to HX and was a constructive trustee for the said sum. TW's breach of her fiduciary duty was due to her knowledge of, consent to and participation in the arrangement to distribute the dividend payments to the three persons. As a director of HX, TW had facilitated the arrangement by certifying in HX's audited accounts and annual returns that the company did not generate any revenue or profits. Further, HX did not declare any dividends since its incorporation. In the event that the plaintiff was held liable to account to HX for the dividend payments distributed, the plaintiff pleaded that the sum paid to TW as her share was paid under a mistake of fact – that the plaintiff was obliged to do so pursuant to the terms of the oral agreement. Consequently, the plaintiff should be entitled to a contribution and/or restitution of the said sum as to allow TW to retain what she had received would be to unjustly enrich her.

Defence and counterclaim to the Third Party Action to the counterclaim

23 TW's defence to the Third Party claim of the plaintiff was that she was unaware until this action, of the implications of s 403(2)(b) of the Companies Act (Cap 50) (revised 1994 ed) ("the Act") – that it prohibited the distribution of dividends to a company's members. Save for the fact that she had received the sum of RMB3,003,015.94 (not RMB3,016,876) from the plaintiff, TW denied the allegations raised in the plaintiff's Third Party statement of claim.

24 TW counterclaimed against the plaintiff for restitution of her rightful share (60%) of the dividend payouts (pursuant to the terms of the oral agreement) should the plaintiff succeed in his main claim against HX.

25 It should be noted that in the event the plaintiff prevails wholly or partially in his main

claim, it would be unnecessary to deal with the defences raised by HX and the plaintiff based on breach of fiduciary duties to the company. In that event, the further claims that need to be considered would be the Third Party action of HX against SLH (*supra* [18] to [21]), as well as TW's counterclaim against the plaintiff as the Third Party in the counterclaim. (*supra* [24]).

The evidence

The plaintiff's case

26 Apart from the plaintiff (PW1), the only other witness for his case was SLH (PW2). The plaintiff testified that he had signed the joint-venture contract on behalf of the TW, SLH and himself even though the contract was in the name of HX.

27 The plaintiff stated in his AEIC that the joint-venture contract was entered into pursuant to an oral agreement which arose from a series of discussions with TW in early May 1995. The series of discussions led to a plan to protect their respective interests in the intended investment. In his AEIC, the plaintiff stated that the series of discussions took place between 6 and 15 May 1995. However, in the course of cross-examination by SP Wong ["Mr Wong"] counsel for the defendant and TW, it appeared that the plaintiff was out of Singapore from 8 May 1995 onwards. His passport entries showed that he had entered Hong Kong on 8 May 1995. There were also air ticket receipts that showed the plaintiff had flown from Shenyang to Chengdu on 13 May 1995 and later from Chengdu to Beijing on 21 Mary 1995. The joint-venture was signed on 18 May 1995 in Dujiangyan which was/is a 2 hour car ride from Chengdu. The plaintiff's testimony that he could have flown to Hong Kong on 8 May 1995 and returned to Singapore the following day did not appear to be credible.

28 On the subject of the oral agreement, the plaintiff contended that although it was not expressly discussed that HX would be a trustee, it was a common understanding among the parties that it would be so. The plaintiff testified that in accordance with the discussion with TW, whenever he received the dividends, he would deduct 10% therefrom as the facilitation fees payable to Zheng and Oh and then distribute the remainder equally between TW, himself and SLH. However, it emerged that the plaintiff had previously (in an affidavit dated 29 September 2006) stated that he did not make any payment of facilitation fee to Zheng or to Oh, due to the lack of documentary evidence (as he had no receipts for such payments and had difficulty proving that he had in fact made such payments). The plaintiff then claimed that Oh had initially been willing to come forward to testify on his behalf but had changed her mind due to threats made by TX.

29 In court, the plaintiff was also unable to produce any evidence to substantiate his claim that the 10% facilitation fees and 10% bonus was part of the terms of the oral agreement. Based on the 1998 paper he had prepared for TW, the plaintiff had paid TW S$23,398.00 which was approximately equivalent to 60% of the dividends. Based on the calculations carried out in court, the division of the dividends was clearly demarcated as being 60-40, with 60% being distributed to TW. There was no indication of any 10% payment as the purported facilitation fees payable. Indeed, the plaintiff encountered considerable difficulties in explaining the figures in the 1998 paper and failed to provide any credible explanation to substantiate his claim that 10% facilitation fees had been paid to Zheng and/or Oh. His excuse was that he was a "lousy record keeper"[note: 8]. When he was referred to the 1998 paper, the plaintiff claimed that for one entry dated 31 August 1997 (showing RMB 210,000 having been paid out as part of the dividends) the actual sum paid was RMB 250,000 but he had wrongly recorded the figure as RMB 210,000.

30 The plaintiff alleged that TW had promised to reimburse him for expenses incurred in relation to the Investment in a further oral agreement entered into in 2001. However, his testimony in

this regard was highly questionable. He initially claimed a sum of RMB 2,135,017 as his travelling and telephone expenses in the 2001 paper. However, the plaintiff later reduced the sum to RMB 1.4m at the mediator's meeting on 11 March 2004. He attempted to explain that the initial claim of RMB 2,135,017 included loans to Peng Wei, Zheng and Fang Yudi (who were witnesses for HX). The plaintiff justified his claim by saying that "that was just a sum added up. [He] had the habit of doing that"[note: 9].

31 Mr Wong drew the court's attention to evidence that showed that the plaintiff had acted for HX – the plaintiff stated that he had managed HX's corporate affairs during the period from 1995 to 2003 and letters were written to the Chinese joint-venture counterparts on the letterhead of HX. Despite the evidence, the plaintiff insisted that he was acting for the three individuals and not HX. I should point out that the receipt issued by SCMEC for the sums (RMB$6,225,368.88) received from Singapore for the Investment was in favour of HX. The plaintiff argued that although the sums were remitted through HX, the contributions came from the three individuals and HX was merely a vehicle through which the transfer of funds took place.

32 There was disagreement between the plaintiff and Mr Wong on the share certificates that had been issued by SND to the plaintiff and TW. The plaintiff maintained that only one share certificate had been issued by SND and that was to him. He stated that one share certificate was issued to each investing party and so HX, as a party to the Investment, received one share certificate. However, Mr Wong produced a similar share certificate that was issued to TW; the plaintiff's response was to dispute the document's authenticity.

33 The evidence of SLH did not lend much support to the plaintiff's testimony. She testified that she had been present at a discussion between the plaintiff and TW at a coffee shop along Alexandra Road. She stated that the plaintiff and TW had talked about the proportion of shares in the Investment which was to be 60% for TW and 40% for the plaintiff and herself. SLH maintained that she was an investor in the Investment since she had contributed S$100,000 to the same but could not explain why she was not issued a share certificate if indeed that was the case. Wong pointed out that if SLH was a party to the Investment, then there would/should have been three not two share certificates issued (*supra* [31]) by SND.

34 The court also referred SLH to her AEIC where she stated at [22] that "[she] was named as director of HX at the relevant time for the incorporation of HX because the plaintiff was travelling most of the time and could not be around to sign the relevant documents in the beginning". SLH repeated this statement in court without prompting.[note: 10] However, she disagreed with Mr Wong's suggestion that she became a director and shareholder of HX on behalf of the plaintiff and had acted according to his direction and instruction. I noted that based purely on the accounting records of HX, the shareholding was reflected as 60% for TW and the balance 40% for SLH while the plaintiff was never a registered shareholder.

The defendant's case

35 HX was represented by TW (DW9). She testified that there were only two terms to the oral agreement – a new company *viz*. HX would be set up for the China investment and she would hold 60% while the plaintiff would hold the balance 40% of the shares. There was no agreement that she would pay any facilitation fee or 10% bonus share to the plaintiff. TW maintained that SLH was not a party to the oral agreement.

36 HX called several Chinese witnesses to testify on its behalf one of whom was Zheng, the Chairman of the Board of Directors of SND. He was also a director of SCMEC before he stepped down

in July 1997. Zheng testified that he had never received any facilitation fees from the plaintiff. He was however uncertain on the number of original share certificates issued to HX.

37 Another witness was Peng Wei (DW2), who was the executive director of SND and also Chairman of Weida (one of the investors in SND see [1]). Peng Wei testified that the plaintiff had told him the plaintiff had personally invested 40% of the investment of HX in SND. Since the investment of HX in SND amounted to a 25% share in SND, the plaintiff would thus have a 6.25% direct investment in SND. However, Peng Wei was unable to say whether a record was kept of the number of share certificates issued. He merely said that if Zheng said that there were records, he would accept what Zheng said since the latter was SND's chairman. Subsequently, Peng Wei corrected himself and said that two share certificates had been given to the plaintiff. Peng Wei revealed that the plaintiff had approached him for a certificate to state that the plaintiff had made a personal investment in SND. Peng Wei further testified that

> there are actually two relationships, but the law only recognize the legal entity, that is the company. But the other – the other, er, relationship would be that we know – privately we know that HX has two shareholders.[note: 11]

38 Tang Jianbin ("Tang") also came to court. Tang (DW3) was the Vice-Chairman and General Manager of SND until November 1998. He said that TW had invested through the plaintiff.[note: 12]

39 Paul Tan ("Paul"), the accountant who managed the accounts of HX, was a more helpful witness. Paul (DW5) testified that in the initial years, the plaintiff had been the main contact person with regard to matters concerning HX. Paul was aware that the plaintiff was not a director of the company. SLH and TW would be called upon to sign the company's documents including the annual report and the directors' resolutions. He testified that HX was a dormant company throughout the years *viz*. there was no income and no expenditure, notwithstanding that HX had an asset. After his staff had explained the contents of requisite statutory documents to the directors, they would just sign the same. Signed copies of the records would be kept in the secretarial and audit files while one copy would be sent off to the Inland Revenue Authority ("IRAS") and the Accounting and Corporate Regulatory Authority ("ACRA") and other copies given to HX. After 2000, most of the instructions concerning HX were given by TW. Paul also testified that the writing-down of the asset was done in 2000 on the instructions of TW.

40 Paul was aware that KTC had been appointed as the company director and that this was contrary to the articles of association of HX as it was done without a proper resolution being passed by TW and SLH (who refused to sign documents or even to visit Paul's office when contacted). Paul explained that this was taking a practical approach as he was aware of the dispute and impasse between the two shareholders/directors. Late filing fees would have been imposed if the accounts were not filed with IRAS and ACRA. Since two directors were needed to sign the financial statements and TW was the majority shareholder, Paul took the practical albeit not the right approach, to appoint another director. His evidence was corroborated by TW during her cross-examination.[note: 13]

41 All the statutory accounts were filed promptly after KTC's appointment but no mention was made of the previous dividends that had been collected by the shareholders. Further, at the mediation meeting [14], none of the parties present (the plaintiff, SLH, TW or KTC) said anything about repaying to HX the dividends that had been collected. They merely insisted on their respective entitlement: the plaintiff claimed 50% of the shareholding but TW disagreed because as far as she was concerned, it was a 60-40% split from the start with 60% being in her favour.

42 It was only in March 2004 that Paul became aware that HX was profitable, received

dividends and was not a dormant company. However, Paul left it to the directors as to how they wanted the company's accounts to be audited to reflect the true state of its finances. After all, it was the directors who were ultimately responsible for the accounts.

43 KTC (DW6) was also called to the stand. She testified that her mother complained the plaintiff never explained which quarter dividends were being paid to TW. KTC agreed that the last two sets of accounts filed by HX were inaccurate as they failed to take into account the dividends received. KTC confirmed she was present at the confrontation meeting on 21 December 2003 and had made a recording of what transpired. The nub of the discussion boiled down to the plaintiff's failure to properly account to TW for the dividends he had received. It should be noted that at the confrontation meeting, TW requested the plaintiff to account for the dividends in respect of *her 60% share* and not with regard to HX.

44 The final and most important witness for the defence was TW (DW9) who was in court in dual capacities – one in her capacity as the corporate representative of HX and the other in her personal capacity as the Third Party to the counterclaim (TW was once the sole proprietor of Tan Wah Contractor and was previously a director and shareholder of a private limited company known as Arena Construction).

45 In the course of TW's cross-examination on the terms of the oral agreement, she testified that it was agreed during the discussion that the percentage of shareholding would be 60%:40% in her and the plaintiff's favour with SLH holding the plaintiff's share. TW admitted that the plaintiff had raised the subject that the Chinese parties may require a facilitation fee to be paid and she had agreed that if it was really necessary, she would not object to such payments. However she added, the plaintiff did not specifically mention any individual wanting a certain amount of that fee.

46 On the subject of the dividends, TW was of the view that although she received dividends in her personal capacity, the payments were in actuality meant for HX. TW testified that "since the investment was made in HX's name so rightfully the dividends should be kept by HX but the situation surrounding HX Investment [was] slightly different. In the past, [she] was in the construction business and it [did] not involve cross-boundary's transactions and for this investment in SND, [she] really had no inkling about how to bring the dividends out of China".[note: 14] She further testified that it was also the plaintiff who suggested setting up a dormant company. TW further stated that when she signed the accounts at Paul's office, she knew what she was signing. She understood that since the plaintiff had made the arrangements for HX to be a dormant company, its accounts would not show any income. It was still a dormant company at the time of trial but she indicated she would change its status once the hearing was over.

47 TW revealed that the registered address of HX at No 90 Pasir Ris Terrace, was actually her residential address. Initially, the registered address was that of her friend's company but it was later changed to TW's residential address in 1999.

The findings

48 As indicated earlier [15], the starting point is to determine what the terms of the oral agreement were. Whether any oral agreement actually existed and if so, what were its terms was a question of fact to be determined by an assessment of the evidence: see *ECRC Land Pte Ltd v Wuu Khek Chiang, George* [1998] SGHC 157. It made the court's task easier that the parties did not dispute the existence of the oral agreement. The main bone of contention was the terms. In determining what the terms of a contact are, the Court of Appeal in *Aircharter World Pte Ltd v Kontena Nasional Bhd* [1999] 3 SLR 1, provided a comprehensive summary of the law on this issue at

[40]:

> Unlike the situation where the formation of a contract is in issue, once it has been established that a contract has been formed, the actual intentions of the parties as to the meaning or effect of the contract becomes irrelevant. In such a situation, the court adopts an objective approach to the construction of the contract. Of course, the object sought to be achieved in construing any contract is "to ascertain what the mutual intentions of the parties were as to the legal obligations each assumed by the contractual words in which they sought to express them": *Pioneer Shipping Ltd v BTP Tioxide Ltd*; *The Nema* [1982] AC 724 at p 736 per Lord Diplock; but the court is concerned to ascertain, not what were the mutual intentions of the actual parties to the contract, but what would have been the intentions of the hypothetical reasonable parties, placed in the same position as the actual parties, and contracting in the words used by the actual parties. Thus in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 3 All ER 570 at p 574; [1976] 1 WLR 989 at p 996, Lord Wilberforce said:
>
> > When one speaks of the intention of the parties to the contract one speaks objectively — the parties cannot themselves give direct evidence of what their intention was — and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties.
>
> It is therefore more accurate to say that the object of a court of construction is to ascertain the presumed intention of the parties, on the assumption that both parties are reasonable. In *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at p 352, Mason J said:
>
> > … when the issue is which of two or more possible meanings is to be given to a contractual provision we look not to the actual intentions, aspirations or expectations of the parties before or at the time of the contract, except in so far as they are expressed in the contract, but to the objective framework of facts within which the contract came into existence, and to the parties' presumed intention in this setting. We do not take into account the actual intentions of the parties and for the very good reason that an investigation of those matters would not only be time consuming but would also be unrewarding as it would tend to give too much weight to these factors at the expense of the actual language of the contract.

49 In determining the terms of the contract, the statement by Lord Wilberforce in *Prenn v Simmonds* [1971] 3 All ER 237 is instructive. He said (at 239):

> The time has long since passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations.

The admissible background or "matrix of facts" may include evidence of the "genesis" and objectively of the "aim" of the transaction. The commercial or business object of a provision, objectively ascertained, may be highly relevant. But the court must be careful in that the purpose of the contract can only be inferred from the language used by the parties, judged against the objective contextual background. These propositions were directed towards arriving at the proper construction of a written agreement. Nonetheless, it provides some guidance when construing terms of an oral agreement. As was further reiterated in Cheshire, Fifoot and Furmston's *Law of Contract* (Second Singapore and Malaysian Edition, 1998, at p 235), if the contract is wholly by word of mouth, its contents are a matter of evidence normally submitted to a judge sitting as a jury. It must be found as a fact exactly what it was that the parties said.

50 Looking at the "matrix of facts" in our case, this was an agreement made on the basis of the parties realizing substantial returns from their investment almost immediately after the joint-venture was entered into. Based on an objective interpretation of the "aim" of the transaction, instant returns (particularly at 20% per annum for the first four years) on the Investment made it very attractive and it was unlikely in such a situation, that a reasonable investor would have waited for dividends to be distributed from profits pursuant to s 403 of the Act, the relevant subsections of which state:

> (1) No dividend shall be payable to the shareholders of any company except out of profits.
>
> (2) Every director or manager of a company who wilfully pays or permits to be paid to be paid any dividend in contravention of this section
>
> > (a) shall, without prejudice to any liability be guilty of an offence and shall be liable on conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding 12 months; and
> >
> > (b) shall also be liable to the creditors of the company for the amount of the debts due by the company to them respectively to the extent by which the dividends so paid have exceeded the profits and such amount may be recovered by the creditors or the liquidator suing on behalf of the creditors.

51 This was a joint-venture which was intended to last for 50 years. As I said, the parties would not have entered into a joint-venture for such a lengthy period without any guarantee that they would receive some immediate returns. Assuming for a moment that the parties had intended HX to be the investing vehicle and in the event that little or no profits were made by the company during this lengthy period, then the parties' capital contributions would have been tied up in the joint-venture for 50 years for nothing. It would not be wrong to assess the parties involved in the Investment as "small-time" businessmen without substantial spare cash for the business venture. For example, SLH's capital contribution of $100,000 was her hard-earned money accumulated over a period of more than 30 years (according to her) while the plaintiff had to borrow $100,000 from TW to pay for his share of the Investment. Of the three individuals, TW was the most affluent. While the plaintiff repeatedly contended that HX was set up merely as a vehicle to enable him and TW to enter into the joint-venture in the PRC, TW denied this was the common understanding between the parties.

52 Based on the authorities cited [48], the task of ascertaining the true intention of the parties must be approached objectively. It is well-settled law that the court may not look at the subsequent conduct of parties to interpret a written agreement except when variation or estoppel is in issue (*James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583; *MAE Engineering Ltd v Fire-Stop Marketing Services Pte Ltd* [2005] 1 SLR 379 at [41]); *Estate of Seow Khoon Seng v Pacific Century Regional Developments Ltd* [1997] 1 SLR 509).

53 Although the agreement here was oral, nothing in case-law prevents the court from looking at the manner the parties acted for the purpose of ascertaining what terms were agreed but not written down, when the contract is partly oral. In *Wilson v Maynard Shipbuilding Consultants Pte Ltd* [1978] QB 665, the UK Court of Appeal held that where one cannot ascertain from the terms of a written contract itself what was agreed about a relevant term, one may look at what happened and what the parties had done under the contract during the whole contemplated period of the contract for the limited purpose of ascertaining what that term was (see Kim Lewison QC, *The Interpretation of Contracts*, 2004, 3rd Ed at [3.12]). Although this principle was intended to apply to contracts that

were partly written and partly oral, the principle appears equally applicable in situations where the contract was purely oral.

54 I am satisfied from the evidence adduced that HX was indeed intended to be a vehicle through which the parties would channel their investment. The pleaded case (of the plaintiff) that HX was a trust vehicle appeared to be an afterthought. The intention of the parties must be ascertained at the point of entering into the oral agreement. In this regard, I also looked at the correspondence exchanged between the parties' solicitors. After the dispute arose, in a letter dated 16 November 2004 to the plaintiff's counsel, Mr Wong wrote:

> We act for Mdm Tan Wah…
>
> Although your client's claim for personal expenses is not justified, our client would be prepared to accept the sum of RMB 1.4 million as his personal expenses for HX Investment Pte Ltd. This is conditional upon an amicable solution to this matter. This is also conditional upon your client's proper account of the dividends received for and on behalf of our client and your client's payment to our client of such dividends accordingly…
>
> … Our client proposes a solution below:
>
> > 1. Your client account for our client's rightful share of dividends and pay to our client the shortfall due to her. Our client has drawn up a list of dividends based on the Dujiang's records of dividends paid to the Singapore investor(s). This list shows the shortfall owed to our client by your clients. Your clients may propose a plan to pay the shortfall subject to our client's acceptance…
>
> Thereafter, if your clients do not accept this proposal, our client would be entitled to take whatever steps she deems fit to secure *her share of the dividends* from Dujiang Co and to pursue *her rights to claim such dividends* whether past or future.
>
> [emphasis added]

55 The subsequent conduct of the parties is also helpful in shedding light on the intention of the parties with regards to the status of HX. This conclusion is supported by the explanation proffered by TW on s 403(2)(b) of the Act [50], where she said:

> Well, in the past I didn't know about this chapter 403 of the company law. It was only when Mr Chia applied this 403 to strike out the case that I got to know about it. So by 2004, I was very clear of Mr Chia Kok Kee's dishonest ways and wrongdoings, so I realized that I must do something for myself or everything would go to him. So the agreement we made in the past about the proportion of shares we would each hold is actually no longer valid looking at how things unfold. Because -- because the dividends from this investment couldn't be included in HX's accounts, so I would have to -- *I would have to claim for the dividends in a personal capacity but I think in future I would do everything in the interest of HX and claim on behalf of HX*.[note: 15]
>
> [emphasis added]

56 Throughout the period of the Investment, HX's audited accounts showed that the company did not generate any revenue and did not declare any dividends to its shareholders since its incorporation. This was supported by the testimony of Paul. All dividends were collected personally by

the plaintiff and distributed to the parties. This was the state of affairs that went on for several years without any objections by TW. TW had also signed off on the audited accounts annually and she was fully aware of the implications of such audited accounts. Furthermore, as was pointed out by Paul, TW had given him instructions to continue maintaining HX as a dormant company.

57 The number of share certificates issued to the parties (one each to the plaintiff and TW and none to SLH) in fact confirms my finding that HX was only a vehicle used for the parties' investment. Although the plaintiff testified that SND issued only one share certificate, Mr Wong proved him wrong. This fact was detrimental to the company's case that it was the designated investor as it showed that SND recognized the individuals behind HX. My caveat to this observation is that I am unable to say whether the laws of the PRC take a different view from our law where a corporation is considered a separate legal entity from the individuals behind it.

Terms of the oral agreement

58 I turn now to the other disputed terms of the contract. Having considered all the evidence, the testimony of the plaintiff when weighed against all the documentary evidence presented, gave rise to serious doubts on the veracity of his version of the terms of the oral agreement. The plaintiff's testimony was often inconsistent and sometimes incoherent as well. The evidence adduced contradicted his assertion that he had a series of discussions with TW between 6 May 1995 and 15 May 1995 (see *supra* at [27]). He was unable to offer a rational explanation when confronted with his passport showing entries into Hong Kong and part of the PRC from 8 May 1995 onwards. It did not appear possible that he could have entered into a complicated oral agreement with TW after one or at most two, meetings between 6 May 1995 and 8 May 1995.

59 Further, the plaintiff's claim for the 10% facilitation fee to Zheng and Oh was clearly unfounded. There was no reason to doubt Zheng's testimony that he had not received any such fees. In addition, the plaintiff failed to procure Oh as a witness to corroborate his testimony. No explanation was offered by the plaintiff as to why he did not and/or could not call Oh to testify. His accusation that TW threatened Oh and prevented the latter from testifying was unsubstantiated and I believe untrue. Finally, the plaintiff's own affidavit dated 29 September 2006 deposed that he did not pay any facilitation fees to Zheng and Oh.

60 The plaintiff's other claim for a 10% bonus fee from TW was not proven. A cursory perusal of the 5 papers given to TW in [29] showed that the dividends were being divided in accordance with a 60-40% split between TW and the plaintiff, based on their percentage of shareholdings in HX. One example was a transaction dated 31 August 1997 in his 1998 paper wherein the sum of RMB 210,000 was divided in the proportion of 60% to 40% between TW and the plaintiff. The plaintiff's attempt to argue that the actual sum was RMB 250,000 but he had wrongly recorded the figure as RMB 210,000 in the 1998 paper was at best unconvincing and at worst untrue. His excuse that he was a "lousy record keeper" was unacceptable.

61 The plaintiff was proven to have lied to TW on at least three occasions; first, when he told her at end 2003 that the Investment was a complete loss, prompting TW (accompanied by KTC) to visit Dujiangyan to see for herself, where she discovered (contrary to the plaintiff's claim) that SND had paid dividends to the plaintiff up to the third quarter of 2003 and the Investment was a very profitable venture indeed. Another occasion was the plaintiff's (unsuccessful) attempt in July 2006 to collect dividend payments from SND (accompanied by SLH), even after TW had terminated his authority to do so on behalf of HX. The third incident which revealed the plaintiff's true character related to the discovery application taken out by TW for the plaintiff's bank statements which he resisted on the basis the documents were irrelevant to his claim. However an order for discovery of

his bank statements (including the CM Bank account) was made against the plaintiff. He then gave TW the run-around by claiming that he did not have the representative office and finance seals of HX which would have enabled her to obtain the bank statements from CM Bank. The plaintiff gave TW his personal seal which did not match the seal record of CMB. He then claimed Fang Yudi ("Fang") had the seals. Fang (DW8) (who was with SCMEC at the material time) denied the plaintiff's allegation and testified that when he (Fang) closed the CMB Bank account, Fang had handed over to the plaintiff the balance monies (RMB52,500) in the account together with all documents as well as the company's seals. Fang was able to support his testimony by producing a receipt (exhibit D8) signed by the plaintiff.

62 The testimony of TW was consistent with the documentary evidence produced in court. Her version of the terms of the oral agreement appeared to be more credible. Consequently, I find that the terms of the oral agreement were that TW would have 60% shareholding in HX and secondly, that a new company would be set up to invest in the joint-venture.

63 As for the plaintiff's contention that SLH was also entitled to a 10% share of the dividends based on her $100,000 capital contribution, this was misconceived. Regardless of whether SLH had 10% share, TW's share was confined to 60%. The accounts of HX showed that TW held 60% of the shares in her name. Thus, as the other registered shareholder SLH must hold the balance 40%. Therefore, SLH and/or the plaintiff would ultimately be entitled to 40% of the dividends, regardless of who held the shareholding and in what proportion. This was clear from her evidence when SLH admitted to Mr Wong[note: 16] that her 40% shareholding in HX included her son's share and (in re-examination)[note: 17] that his share was 30%. It was immaterial whether SLH beneficially owned 10% of the 40% shares; that was a matter between the plaintiff and her. There is therefore no question of HX being estopped by convention from claiming an indemnity and/or contribution from SLH as was pleaded in SLH's defence had the plaintiff succeeded in his claim.

64 For estoppel by convention to apply, I need only refer to the case cited by both the plaintiff and TW in their closing submissions *viz. MAE Engineering Ltd v Fire-Stop Marketing Services Pte Ltd* (supra [52]) where I had set out at [45] the requisite criteria laid down in *Singapore Island Country Club v Hilborne* [1997] 1 SLR 248 which was:

(a) that there must be a course of dealings between the two parties in a contractual relationship;

(b) that the course of dealing must be such that both parties must have proceeded on the basis of an agreed interpretation of the contract; and

(c) that it must be unjust to allow one party to go back on the agreed interpretation.

Criterion (b) was conspicuously absent in our case.

65 I should add that I was not impressed with the testimony of SLH. Indeed, the court was prompted to chide her at one stage[note: 18]when she was in the witness stand as SLH habitually failed to answer Mr Wong's questions during cross-examination by her repeated response that she knew nothing and/or she could not remember what happened; yet she had the propensity to volunteer information neither asked for nor relevant. Contrary to her denials in court, SLH's evidence was essentially to support the claim and position of her son and was mostly hearsay and hence inadmissible. SLH was undoubtedly the plaintiff's *alter ego* as Mr Wong suggested to her – the plaintiff wrote letters on her behalf to Paul on the letterhead of HX and he complained to ACRA against Paul on her behalf over the appointment of KTC as a director, alleging it was not done in accordance with

the articles of HX.

Conclusion

66 Based on the evidence adduced at the trial, the plaintiff fails in his claim that he had 50% share in HX. He and/or SLH are only entitled to 40% of the dividends generated from the joint-venture as TW had asserted. The plaintiff is not entitled to the alleged 10% facilitation fee as it was not proven to have been paid by him at all nor to the 10% bonus fee allegedly promised by TW as that was never agreed.

67 I note that the 33 dividends already paid by SND amounted to either RMB 9,784,957 (according to the plaintiff) or RMB 9,789,652.24 (according to TW). I accept TW's testimony and her figure of RMB 9,789,652.24 as the dividends actually received by HX. Accordingly, TW would be entitled to 60% thereof amounting to RMB 5,873,791.34 whilst the plaintiff should receive the difference of RMB 3,915,860.90.

68 Although the plaintiff claimed (in his amended statement of claim) that he paid her RMB 3,517,462, TW only admitted (in her defence to the Third Party counterclaim and in her Admission of Facts) to having received RMB 3,003,015.94 from him. Again, I have no reason to doubt TW, bearing in mind the plaintiff's own evidence that he was "a lousy record keeper'. Consequently, TW is entitled to claim from the plaintiff and I accordingly award her judgment on her Third Party Counterclaim, in the sum of RMB 2,870,775.40 (RMB 5,873,791.34 less RMB 3,003,015.94).

69 According to Schedule 1 of the plaintiff's (amended) statement of claim, he had paid dividends amounting to RMB 4,597,673 to himself/SLH. Based on his 40% share in the Investment, the plaintiff should only have received RMB 3,915,860.90. Contrary to the 60/40 division, the plaintiff had paid TW 30% and kept for himself 70% of the dividends received from SND. He had therefore overpaid himself RMB 681,812.10 (RMB 4,597,673–RMB 3,915,860.90) and must account to TW for the overpayment.

70 As the plaintiff was only entitled to 40% share in the Investment, he fails in his main claim and in his two other claims for reimbursement of facilitation fees and 10% bonus shares. I therefore dismiss the plaintiff's action with costs to HX. The plaintiff's mother SLH not HX was his trustee, holding his 40% or 30% share (if SLH is an investor in her own right) in HX as his nominee. It is for SLH to transfer the plaintiff's 30% or 40% share to him.

71 I turn next to the remaining claims. First, the Third Party claim of HX against SLH. The action is academic in view of my finding that HX is not liable to the plaintiff so as to warrant an indemnity or contribution by SLH. Consequently, no order is made on the Third Party claim of HX but costs in those proceedings are awarded to SLH based on 1½ days excluding reasonable disbursements. This unusual order for costs is being made because it was not unreasonable on the part of the company to have joined SLH as a Third Party to look for either an indemnity or contribution should it have been found liable to the plaintiff. SLH was in the witness stand for the afternoon of Friday 2 March and about the whole day on Monday 5 March. As indicated earlier [65] her testimony was largely hearsay based on what she was told by the plaintiff and she was an unreliable witness.

72 The plaintiff's Third Party action against TW in respect of the counterclaim of HX is dismissed with costs. I have no doubts that the plaintiff was prompted to file this claim to protect SLH should HX succeed in its Third Party action against SLH.

73 The dividends withheld by SND after the third quarter of 2003 and all future dividends payable by SND shall be distributed on the basis of 60%:40% in favour of TW and the plaintiff. The dividends are to be paid to TW prior to distribution, in the light of the plaintiff's admitted poor record-keeping and past failure to properly account to TW for the payments received.

74 In the event that the plaintiff fails to pay the costs awarded against him, TW is at liberty to deduct her costs as well as the costs of HX, from the plaintiff's share of dividend payments and to set-off her costs against the costs awarded to SLH in [71].

10 December 2007

75 After I released my judgment on 28 September 2007 ("the judgment"), the plaintiff filed a notice of appeal in Civil Appeal No. 127 of 2007. Prior to the plaintiff's appeal, Mr Wong, counsel for HX and TW, wrote to inform the court that he had made an Offer to Settle ("the OTS") on his clients' behalf to the plaintiff on 26 July 2006, pursuant to O 22A of the Rules of Court (2004 Rev Ed) ("the Rules"). Mr Wong pointed out that the judgment was more favourable than the OTS. Therefore he submitted, under O 22A rr 9(1) and 13 of the Rules, his clients were entitled to standard costs up to 25 July 2006 and to indemnity costs after 26 July 2006. Counsel for the plaintiff not unexpectedly disagreed.

76 In order to determine whose argument is right, it is necessary to look at both the OTS and O 22A rr 9(1) and 13 of the Rules. The OTS made by HX (referred to as the defendant) and TW (referred to as the 2nd Third Party in the OTS) reads as follows:

> Past Dividends – RMB9,789,652.24 for Y1995 Q3-Y2003 Q3
>
> 1. The Plaintiff accounts for and pays the Dividends that have been declared and paid by Sichuan New Dujiang Electric Power Co Ltd ("SND"). The Dividends are for the relevant period from Y1995 Q3 to Y2003 Q3 ie. 33 quarters of Dividends.
>
> 2. The Plaintiff pays the Dividends of RMB9,789,652.24 to the Defendant save for the sum that 2nd Third Party has received previously. In this respect, the sum received by 2nd Third Party is RMB3 million+ (final sum to depend on the exchange rate used). The 2nd Third Party will account to the Defendant the sum that she had received from the Plaintiff. In addition, the Defendant will procure the shareholders' resolution for the sums paid by the Plaintiff to the shareholders who are entitled to the distribution of the Dividends according to their proportionate shares. The shareholders' proportionate shares are 60% for Madam Tan Wah and 40% for Madam So Lai Har.
>
> Money in the Plaintiff's BOC SZ account
>
> 3 The Plaintiff pays to Defendant the sum of RMB500,586.62 including any accrued interest on such sum from the Plaintiff's personal savings account No. 476XXXX-XXXX-XXXX94-5 (Bank of China Shenzhen). This was the balance sum shown in the extract of the Plaintiff's personal savings account – as at 03/11/2003. After the Plaintiff's payment of such sum to the Defendant, the Defendant shall procure the shareholders' resolution for the payment of such money to the shareholder – Madam Tan Wah.
>
> Reasonable Expenses – Incurred with Proof and related to the Defendant's

Investment in SND

4 The Defendant reimburses or pays for the reasonable expenses of both the Plaintiff and Madam Tan Wah incurred for and related to the purpose of the Defendant's investment in SND. Any party's claim is subject to proper documentary proof or to be agreed (if any). If the reasonable expenses are not resolved thereafter, the Defendant shall be at liberty to restore the lawsuit for the Court's determination on such issue.

Legal Costs

5. The Plaintiff pays for reasonable costs and disbursements in this lawsuit or costs based on Order 22A of the Rules of Court.

Settlement of the Defendant's Summary Judgment Application

6. Upon the Plaintiff's acceptance of the above terms, the Defendant withdraws its application for summary judgment with the Plaintiff's payment of costs.

Future Dividends – Collection and Other Issues

7. The Defendant will be responsible for the collection and distribution of the Dividends from SND in future.

8. All issues arising out of and connected with the Defendant's collection of future Dividends from SND will be resolved through the mechanism of the Defendant's company procedure and meetings. The Defendant's costs and expenses for doing so are to be decided by the company procedure and meetings.

Settlement of the Plaintiff's claim for 40% share

9. The Plaintiff's claim for 40% share is to be recognized as or substituted for Madam So Lai Har's 40% share in the Defendant. Alternatively, Madam So Lai Har will continue to hold 40% share for and on behalf of the Plaintiff.

Future Dealings

10. All parties shall act in good faith and in the best interests of the Defendant in their dealings with each other and with any other person in relation to the Defendant's investment in SND.

11. The Defendant is and shall remain as the sole legal and equitable investor of SND or the PRC investment in the hydro-electric power plant at Qian Jiawan of Dujiangyan, Sichuan, People's Republic of China.

77 Order 22A rr 9(1) and 13 state:

9 — (1) Where an offer to settle made by a plaintiff —

(a) is not withdrawn and has not expired before the disposal of the claim in respect of which the offer to settle is made; and

(b) is not accepted by the defendant, and the plaintiff obtains a judgment not less favourable

than the terms of the offer to settle,

the plaintiff is entitled to costs on the standard basis to the date an offer to settle was served and costs on the indemnity basis from that date, unless the Court orders otherwise.

….

13 — Rules 1 to 12 shall apply, with necessary modifications, to counterclaims and third party claims.

The submissions

78 Mr Wong argued that the terms of the OTS were more favourable than the judgment for a number of reasons. First, the plaintiff (as well as SLH) did not succeed in his action. Therefore the OTS was more favourable than the judgment which awarded judgment to the defendant and TW (on her Third Party Counterclaim).

79 Paragraph 2 of the OTS asked the plaintiff to pay dividends amounting to RM9,789,652.24 to HX less the amount TW had previously received. The dividends would then be apportioned 60:40 in favour of TW and SLH respectively. The judgment (at [67]) accepted the dividend figure in the OTS and further held that the plaintiff must account to TW for her 60% share amounting to RM5,873,791.34. Further, TW was awarded judgment for the shortfall in payment of RM2,870,775.40 (*supra* at [68]).

80 In para 3 of the OTS, TW had requested the plaintiff for payment of the sum of RM500,586.62 from the plaintiff's personal savings account with Bank of China in Shenzhen. Mr Wong complained that despite his admission in court that the moneys in this account were held on trust for TW, the plaintiff unreasonably refused to pay the said sum (which had since increased) to TW.

81 Paragraph 4 of the OTS offered on behalf of HX reimbursement of the reasonable expenses of the plaintiff and TW relating to the investment of HX in SND. I had not allowed any expense claim in the judgment as I found the plaintiff's assertion that TW had orally agreed to allow him to claim expenses unsubstantiated (at [30]) together with his claim for facilitation fees (*supra* at [59])

82 Contrary to para 7 of the OTS (which stated that HX would be responsible for future collections of dividends), I had directed that TW would be responsible for collecting future dividends from SND in view of the plaintiff's past unreliability in that respect ([73] of the judgment).

83 Paragraph 9 of the OTS stated that the plaintiff's 40% investment in HX would be recognised and substituted for that of SLH. Alternatively, that SLH would continue to hold her 40% share in HX on behalf of the plaintiff. This accorded with [70] of the judgment.

84 Paragraph 11 of the OTS provided that HX would remain the sole legal and equitable owner of the investment in SND. I had made a finding at [54] of the judgment that HX was the vehicle that the parties used for their investment. While the parties' investment was indeed channelled through HX, the Chinese parties took cognisance of the individuals behind HX, *viz* the plaintiff and TW. That was why share certificates were issued by SND to them individually and not to HX.

85 My view that HX was the parties' vehicle for their investment in SND was the only finding I made in favour of the plaintiff's many contentions. However, that does not detract from the fact that HX was the investing party. Yet, throughout the years since its incorporation on 14 June 1995, the

company had its accounts filed on the basis that it was dormant when it was actually a very active company with recurring annual profits from its investment in SND.

86 It was however not for this court to resolve the problems the parties may have to face with the Accounting and Corporate Regulatory Authority ("ACRA") over the incorrect accounts filed in previous years by HX on the instructions of the plaintiff. That was a matter between the parties and ACRA. What was undisputed was that TW neither knew of nor was she aware of the implications of s 403 of the Act (set out at [50] of the judgment) until this dispute arose.

87 Taking a pragmatic view of the matter, if the dividends had indeed been paid to HX in the past instead of to the plaintiff and TW, what would or should have happened was for the company to treat the dividends as profits received from SND and declare dividends in turn. HX should then have distributed the dividends to TW and SLH/the plaintiff based on their 60:40 apportionment. By paying themselves the dividends direct, what TW and the plaintiff did was to shortcut the process.

88 I found paras 8 and 10 of the OTS unusual.

89 The purpose of an offer to settle at law according to the appellate court in *The Endurance 1* [1999]1 SLR 661 (at [39]) is to encourage the termination of litigation by agreement of the parties, more speedily and less expensively than by judgment of the Court at the end of the trial. The appellate court added (at [44]) that it is axiomatic to the proper application of O 22A that the offer to settle should be a serious and a genuine offer and not just to entail the payment of costs on an indemnity basis. This case was cited in the submissions tendered on behalf of HX and TW as well as the Canadian case from which the principles were culled.

90 On the issue of an offer to settle, I had (at [124]) in *Colliers International (Singapore) Pte Ltd v Senkee Logistics Pte Ltd* [2007] 2 SLR 230 ("*Colliers* case") also referred to the above tests. The same tests were approved and followed in subsequent cases (see *Singapore Airlines Ltd v Fujitsu Microelectronics (Malaysia) Sdn Bhd (No 2)* [2001] 1 SLR 532 and *Man B&W Diesel S E Asia Pte Ltd v PT Bumi International Tankers* [2004] 3 SLR 267).

91 All three appellate courts in the above cases had followed the Canadian case I referred to in [89], which was *Data General (Canada) v Molnar System Group* (1991) 85 DLR (4^{th}) 392.

92 In *Colliers* case, I had (at [114]) cited from the judgment of Chao Hick Tin JA in *Singapore Airlines Ltd v Fujitsu Microelectronics (Malaysia) Sdn Bhd (No 2)* (*supra* [90]). He had held that an offer having the effect contemplated in O 22A had to contain in it an element which would induce or facilitate settlement.

93 Applying the principles here, HX and TW must show that the OTS gave the plaintiff an incentive to settle. I find that there was no incentive that would have prompted the plaintiff to accept the OTS. I should add too that the OTS did not comply with the format set out in Form 33 of the Rules. There were too many conditions attached therewith. I repeat my observation in *Colliers* case (following *SBS Transit Ltd v Koh Swee Ann* [2004] 3 SLR 365) that compliance with Form 33 is obligatory.

94 In opposing the application for indemnity costs, counsel for the plaintiff had rightly pointed out in his submissions (at para 3) that the OTS was premised on HX being the true legal and beneficial owner of the dividend payouts whereas the judgment upheld the plaintiff's contention that HX was only a vehicle used by the parties for their investment in SND. Counsel for the plaintiff added that this was also the pleaded case of HX where (in its re-re-amended Defence and Counterclaim) the

company averred that it was not a trustee of the investment in SND for the benefit of the plaintiff, TW and SLH (at para 25) and that the plaintiff acted for HX in collecting the dividends from SND (at para 36).

95 Consequently, I am of the view that HX (the defendant) and TW (the Third Party in the Counterclaim) are not entitled to indemnity costs after 26 July 2006. My original order of costs to them on a standard basis remains.

[note: 1] at para 13

[note: 2] at para 12

[note: 3] The plaintiff's AEIC at [33]

[note: 4] TW's AEIC at p 83 to 87

[note: 5] DW1's AEIC at p 9

[note: 6] TW's AEIC at p 115

[note:7] TW's AEIC at p 89-93

[note: 8] N/E p 222 at 32

[note: 9] N/E p 236 at 19

[note: 10]N/E p 431

[note: 11]See N/E p 571 at 10

[note: 12]See N/E p 587 at 8

[note: 13]N/E p 845 at 9

[note: 14] See N/E at p 823-4

[note: 15] See N/E p 829 at 11-23

[note: 16]N/E p 440

[note: 17]N/E p 482

[note: 18]N/E p 423