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

[2022] SGHC 192

District Court Appeal No 49 of 2021
Summonses Nos 1219 and 2338 of 2022

Between

Chan Tam Hoi (alias Paul Chan)
… *Applicant / Appellant*

And

Wang Jian
… *Respondent*

In the matter of District Court Suit No 533 of 2020

Between

Wang Jian
… *Plaintiff*

And

(1) NSC Capital Pte Ltd
(2) Chan Tam Hoi (alias Paul Chan)
… *Defendants*

JUDGMENT

[Contract — Formation — Oral agreement]
[Contract — Formation — Certainty of terms]
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v
Wang Jian and other matters

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General Division of the High Court — District Court Appeal No 49 of 2021, Summonses Nos 1219 and 2338 of 2022
Goh Yihan JC
26 July 2022

15 August 2022 Judgment reserved.

Goh Yihan JC:

1 This is an appeal against the decision of the learned District Judge (the "DJ") in *Wang Jian v NSC Capital Pte Ltd & Anor* [2021] SGDC 282 (the "GD") to award the respondent $467,165 based on an oral agreement entered into at or around November 2018 for the respondent to sell 360,000 shares (the "Shares") to the appellant at that sum (the "Alleged Oral Agreement"). The key issue in the present case is whether the Alleged Oral Agreement was validly formed between the parties. The appellant had also made two applications to adduce further evidence, which I dismissed at the hearing before me on 26 July 2022.

2 Having taken time to consider the matter more fully after the hearing, I allow the appeal. In my judgment, the respondent has not proven, on a balance of probabilities, her pleaded case that the Alleged Oral Agreement was formed.

More specifically, I am not convinced that the parties even reached an agreement in November 2018. Further, even if the parties had reached an agreement at that time, I am not convinced that a material term of the said agreement, namely, the sale price of the Shares, was agreed with sufficient certainty to satisfy the substantive requirement of a contract.

3 I now set out the reasons for my decision in full.

Background facts

4 I begin with a summary of the findings of fact by the DJ, which form the background to the matter. On or around 13 December 2012, the respondent, Ms Wang Jian, purchased 360,000 shares in NSC Executive Centre Pte Ltd ("NSC Executive Centre"), which was 30% of the issued shares of the company. The company had an issued share capital and paid-up capital of $1,200,000.[1] The respondent had purchased the shares from Lu Jinyang ("Lu"), an existing shareholder, and they concluded a share transfer form dated 13 December 2012 (the "2012 Share Transfer Form").[2] While the consideration for the Shares was stated in the 2012 Share Transfer Form to be $216,315, the respondent claimed that it was in fact $400,000. The DJ preferred the respondent's account on the amount paid for the Shares. I agree with the DJ's finding in this regard. Nonetheless, the present appeal does not turn on whether the agreed consideration was $216,315 or $400,000. The broader point is that the respondent had purchased the Shares for a substantial sum – far more than the nominal $1 she was later alleged to have transferred the Shares to the appellant for.

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1 Agreed Bundle of Documents dated 15 April 2021 ("**AB**") at p 22.

2 AB at p 14.

5 Following this purchase, the respondent was appointed a director of NSC Executive Centre on 13 December 2012. She remained a shareholder and a director of NSC Capital Pte Ltd ("NSC Capital") when NSC Executive Centre was renamed NSC Capital on 11 May 2018.

6 The first material event in the present dispute occurred in November 2018. At or around that time, the respondent ceased to be a shareholder of NSC Capital when she transferred the Shares in NSC Capital to the appellant, Chan Tam Hoi @ Paul Chan, on 21 November 2018. Similar to how the respondent acquired the Shares in 2012, the parties signed a share transfer form. The consideration for the transfer was reflected as a mere $1 on the share transfer form dated 21 November 2018 (the "2018 Share Transfer Form").[3] The respondent also resigned and ceased to be a director of NSC Capital with effect from the same date.[4]

7 The appellant then became the sole director of NSC Capital on 21 November 2018 when the other directors also resigned as directors. At present, the appellant is the majority shareholder of NSC Capital with 55% shareholding. There are two other shareholders.

8 The second material event in the present dispute occurred on 30 January 2019. At about 5pm on 30 January 2019, the respondent's father, Mr Wang Bin ("Mr Wang"), appeared at NSC Capital's premises. The respondent was already there. It is undisputed that the appellant executed a letter dated 30 January 2019 which had been printed on NSC Capital's letterhead and bore its company stamp. This letter, which was addressed to the respondent, contained the

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3 AB at p 17.

4 AB at pp 20–21.

following statement: "We will buy back the 30% of your investment in NSC Capital for the amount of SGD $467,165.00". This letter was executed by the respondent on behalf of NSC Capital.

9 This, however, was not the end of the matter. On the very next day, 31 January 2019, the respondent and Mr Wang turned up at NSC Capital's premises again. They procured the appellant's signature on a revised version of the letter dated 30 January 2019 that the respondent had prepared. This revised letter, which was also dated 30 January 2019, was addressed to the respondent and contained the following statements: "We will buy back the 30% of your investment in NSC Capital for the amount of SGD $467,165.00" and "The funds will be returned to your account (DBS Bank account: [redacted]) between today and the expiry date of your Visa in Singapore".[5] As the DJ noted, this second letter is substantively identical to the first letter except that it contained the account details to which the $467,165 was to be transferred to and a timeframe for payment to be made. This second letter was similarly executed by the appellant on behalf of NSC Capital. For convenience, I will refer to both letters collectively as the "30 January 2019 Letter". Nothing in the present appeal turns on whether I am referring specifically to the original version signed on 30 January 2019, or the later revised version signed on 31 January 2019.

10 Notwithstanding the execution of the 30 January 2019 Letter and the transfer of the Shares to the appellant, neither the appellant nor NSC Capital paid the sum of $467,165 to the respondent. As such, on 6 May 2019, Mr Wang went to NSC Capital's premises and demanded payment for the sum of $467,165 from the appellant. The respondent's mother, Mdm Qi Ling, was also present. The appellant was non-committal about paying the sum. This irritated

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5 AB at p 4.

Mr Wang, who became increasingly agitated as the meeting progressed. The appellant then called for security assistance. Mr Wang had secretly made an audio recording of the meeting, a transcript of which was tendered in the trial below.

11 Subsequently, the respondent's solicitors issued a letter of demand dated 26 August 2019 on behalf of the respondent against the appellant and NSC Capital.[6] The respondent's solicitors demanded payment of the sum of $467,165 from the appellant and NSC Capital by 3 September 2019, failing which the respondent would begin legal proceedings. The appellant and NSC Capital's then-solicitors responded to the letter of demand on 27 September 2019, denying liability.[7] The respondent thereafter issued a writ against the appellant (as the second defendant) and NSC Capital (as the first defendant) on 5 November 2019.

The proceedings below

The parties' respective cases

The respondent's case

12 The respondent's case in the trial below – which she largely maintained in the present appeal – is that the appellant had breached the Alleged Oral Agreement. By this agreement, the appellant had agreed to purchase the Shares from the respondent for $467,165.

13 By the respondent's own case, the basis for her entering into the Alleged Oral Agreement in November 2018 is that she wanted to exit her

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6 AB at pp 8–11.

7 AB at pp 12–13.

investment in NSC Capital. She had paid $400,000 for the Shares as an investment in 2012. In 2018, the respondent started to have doubts about the viability and profitability of NSC Capital's business. She thus sought a return of her investment. She asked Mr Wang to represent her in the negotiations with the appellant as she had to travel for some personal matters. Mr Wang met with the appellant in or around the middle of November 2018. Subsequently, Mr Wang informed the respondent that the appellant had agreed at that meeting to purchase the Shares from the respondent for $467,165. The figure represented the appellant's valuation of the Shares. The respondent was prepared to accept the offer. The appellant then proposed for the respondent to transfer the Shares to him at a nominal sum of $1 first and he would pay her the purchase price later. Accordingly, the respondent executed the 2018 Share Transfer Form, letter of resignation as director, and directors' resolution sent to her by the appellant's operations manager.

14 At the trial below, the respondent advanced a separate claim against NSC Capital for breach of a written agreement between her and NSC Capital as evidenced by the 30 January 2019 Letter.[8] As will be recalled, the letter obliged NSC Capital to buy back the Shares from the respondent at $467,165, which shall be paid to the respondent's specified bank account between 30 January 2019 and the expiry of the respondent's visa in Singapore. The respondent's case is that she had required the letter to be executed as the appellant failed to effect payment of $467,165 for more than two months after the conclusion of the Alleged Oral Agreement. The appellant had also been unresponsive to the respondent's requests for a meeting.

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[8] Statement of Claim dated 5 November 2019 ("SOC") at paras 11–17: Record of Appeal dated 17 January 2022 ("ROA") Vol 2 at pp 9–10.

15 Left with no choice, the respondent and Mr Wang turned up uninvited at NSC Capital's premises on 30 January 2019. When the appellant was finally confronted in person about his failure to pay over the sum, he made up many excuses. The respondent then demanded a written confirmation from the appellant as to when she would receive the $467,165. This was when the appellant, as sole director of NSC Capital, issued a letter, which confirmed that NSC Capital would buy back the Shares from the respondent at $467,165. While the respondent would have preferred a written agreement stating that the appellant would personally pay the sum, she felt she had no choice but to accept the letter in the abovementioned form.

16 The respondent and Mr Wang returned on 31 January 2019 and procured the appellant's execution of a similar letter. The difference, as I recounted above at [9], is that this later letter contained details about the receiving bank account, as well as a deadline for payment. The 30 January 2019 Letter thus formed the basis of the respondent's alternative claim against NSC Capital, which is not a party to the present appeal.

The appellant's case

17 The appellant's case at trial – which he largely maintains for the present appeal – was simply that there was no agreement between him and the respondent for the latter to sell the Shares to him for $467,165. Instead, the agreement purportedly reached between the parties in November 2018 was for the respondent to transfer the Shares to the appellant for the nominal sum of $1 as indicated on the 2018 Share Transfer Form. According to the appellant, this was because the respondent wanted to withdraw from further involvement in NSC Capital's business as she could not satisfy the requirements and expectations that the appellant had for her to contribute to the company's

business. The respondent would therefore be relieved of the obligations and expectations she had as a director and shareholder of NSC Capital.

18 As for the respondent's claim against NSC Capital based on 30 January 2019 Letter, the appellant and NSC Capital both contended at trial that the letter (both in its original and revised versions) was executed by the appellant under duress and should therefore be void.

The DJ's decision

19 At the end of the trial, the DJ allowed the respondent's claim against the appellant. He was satisfied, on a balance of probabilities, that the respondent (through Mr Wang) and the appellant had concluded the Alleged Oral Agreement in or around November 2018, in which the appellant agreed to purchase the Shares at $467,165 (see the GD at [24]).

20 As he found for the respondent against the appellant, the DJ dismissed the respondent's claim against NSC Capital (see the GD at [25]). The learned judge held that the documentary evidence suggested that the appellant was always intended to be the transferee and/or buyer of the Shares instead of NSC Capital (see the GD at [25]). The DJ also considered that the respondent's claim against NSC Capital amounted to a share buyback by the company, which is prohibited under s 76(1A)(*a*)(i) of the Companies Act (Cap 50, 2006 Rev Ed) (see the GD at [25]). I shall have occasion to set out the DJ's more detailed reasoning in respect of the Alleged Oral Agreement later in this judgment.

The relevant issues before me

21 Given the myriad of issues that the parties raised before me, it is helpful to first set out what issues I consider to be of relevance.

22 First, I provide brief reasons for my dismissal of the appellant's applications to adduce further evidence at the hearing before me.

23 Second, I deal with the substantive appeal. Given that the respondent has not filed a cross-appeal against the DJ's decision to dismiss her claim against NSC Capital, I need not consider this aspect of her case (see, for example, the decision of the Appellate Division of the High Court in *Sim Kwai Meng v Pang Moh Yin Patricia and another* [2022] SGHC(A) 1 at [49]). Instead, the only issue I should consider is whether the respondent has proven, on a balance of probabilities, that there was an oral agreement between her and the appellant for the latter to purchase the Shares for $467,165 in or around November 2018 (*ie*, the Alleged Oral Agreement).

24 In dealing with this broad issue, I will address the following sub-issues:

(a) First, I consider the requirements for an oral contract to be valid and enforceable.

(b) Second, I explain why, in my judgment, the respondent has failed to satisfy these requirements in the present case.

25 With the above issues in mind, I turn now to the appellant's applications to adduce further evidence in the present appeal.

The appellant's applications to adduce further evidence

26 The appellant sought to adduce further evidence in HC/SUM 1219/2022 and HC/SUM 2338/2022. In relation to HC/SUM 1219/2022, leave for evidence to adduce the following evidence was sought:[9]

[9] Affidavit of Chan Tam Hoi @ Paul Chan dated 24 June 2022 at para 4.

(a) all the pleadings filed in HC/S 147/2021 ("Suit 147") and all the affidavits filed in HC/SUM 4884/2021 in Suit 147; and

(b) all the trial transcripts, pleadings, affidavits of evidence-in-chief and closing submissions filed in DC/DC 1387/2019 ("DC 1387").

27 In relation to HC/SUM 2338/2022, leave for evidence to adduce the following evidence was sought: [10]

(a) the judgment dated 27 May 2022 in respect of DC 1387 ([2022] SGDC 95);

(b) an email from Ms Balvinda Kaur d/o Jaswant Singh ("Ms Balvinda") at "[Ms Belvinda's email address]" to Mr Ho Chiman ("Chiman") at "[Chiman's email address]" dated 13 September 2018 at about 5:56pm (with attachment) (the "13 September 2018 Email"); and

(c) an email from Chiman at "[Chiman's email address]" to the Respondent at "[Ms Wang Jian's email address]" and "[XX@yahoo.com]" dated 30 January 2019 at about 5:46pm (with attachment) (the "30 January 2019 Email").

At the hearing before me, the appellant also sought leave to amend HC/SUM 2338/2022 to adduce further evidence by affidavit of the screenshots of WhatsApp messages between the respondent and Chiman, who is NSC Capital's accountant. I disallowed this application to amend as it was

[10] Affidavit of Chan Tam Hoi @ Paul Chan dated 24 June 2022 at para 5.

brought at the eleventh-hour with no reasonable possibility for the respondent to reply meaningfully.

The applicable law: further evidence admitted only on special grounds

28 The applicable law is not in dispute. Order 19 r 1(*a*) of the new Rules of Court 2021 provides that this Order applies to "an appeal against any judgment of a Magistrate's Court or District Court". Under O 19 r 7(7) of the new Rules of Court 2021 (previously under O 55D r 11(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) (the "Rules of Court 2014")), it is provided that the "appellate Court has power to receive further evidence, either by oral examination in court, by affidavit, by deposition taken before an examiner, or in any other manner as the appellate Court may allow, but no such further evidence (other than evidence relating to matters occurring after the date of the decision appealed against) may be given except on *special grounds*" [emphasis added]. Given that the language used in O 19 r 7(7) of the new Rules of Court 2021 is substantially similar to the previous O 55D r 11(1) of the Rules of Court 2014 (and its predecessors), the jurisprudence in respect of the latter is still relevant to the former.

29 While the term "special grounds" is not defined in the relevant subsidiary legislation, it appears that the courts have consistently interpreted it to refer to the threefold requirements in the seminal English decision of *Ladd v Marshall* [1954] 1 WLR 1489 ("*Ladd v Marshall*") (see, for example, the decisions of the Court of Appeal in *Toh Eng Lan v Foong Fook Yue and another appeal* [1998] 3 SLR(R) 833 at [34]; *ARW v Comptroller of Income Tax* [2019] 1 SLR 499 at [99]; *Anan Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2019] 2 SLR 341 at [21]). In this regard, the three requirements in *Ladd v Marshall* are:

(a) first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial or hearing;

(b) second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; and

(c) third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

These three requirements have often been referred to respectively as the criteria of non-availability, relevance, and credibility.

My decision: the appellant's applications were dismissed

30 With the applicable principles in mind, I dismissed both applications at the hearing before me. The further evidence sought to be adduced can be grouped into two broad categories: (a) documents or judgments from other proceedings that are said to shed light on the facts in the present case; and (b) emails that are said to affect the present case but which the appellant did not know were in existence in the trial below.

31 I begin with the first category of evidence, which includes the judgment dated 27 May 2022 for HC/SUM 2338/2022 and the other materials in HC/SUM 1219/2022. Essentially, these are documents relating to other court proceedings. The appellant says that these would aid in showing that the respondent's claim in the present action is completely unmeritorious as it is

merely part of a larger conspiracy to harm the appellant by bringing "contrived claims" in a piecemeal fashion.[11]

32 In my judgment, this is completely irrelevant. Essentially, the appellant is trying to argue that because Mr Wang's other claim in HC/S 147/2021 is contrived, and that Ms Tang Swea Phing (NSC Capital's finance manager) ("Ms Tang") had reasons to lie in her evidence in the proceedings below (as she had a counterclaim against the appellant in DC 1387), that necessarily means that there is no merit to the present claim as this is merely part of their grand scheme to cause harm to the appellant by raising frivolous claims. However, I cannot see how those other proceedings can have any bearing on the substance of the present case. I therefore have little hesitation in concluding that the second requirement of relevance is not satisfied under *Ladd v Marshall*.

33 I turn to the second category of evidence, which are the emails in HC/SUM 2338/2022. Starting with the 13 September 2018 Email, this was sent from Ms Balvinda to Chiman. Ms Balvinda was in the employment of NSC Capital at the material time, and it was explained at the hearing before me on 26 July 2022 that Chiman was working for NSC Capital under a consultancy agreement acting as its accountant. Given that the appellant controls the company, and thus has oversight over these two individuals who were working under him, he could have easily obtained and adduced the emails in the trial below. He had failed to do so. Regarding the 30 January 2019 Email, this was sent by Chiman as an accountant of NSC Capital. Similarly, the appellant could have easily obtained and adduced this email at the trial below since Chiman was essentially his employee acting under a consultancy agreement. These materials were all available before the date of the hearing below.

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[11] Appellant's Case at para 72.

34 Indeed, it is clear to me that the failure to adduce both emails is likely based on an oversight, and the appellant has acknowledged that he was "not aware that Chiman had the 13 Sep 2018 Email", [12] and was "not aware that Chiman had the 30 Jan 2019 Email".[13] Accordingly, the non-availability requirement in *Ladd v Marshall* is not met. The court must guard against attempts by a disappointed party to rely on evidence which he could have put before the court below but did not (see the decision of the Court of Appeal in *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others* [2018] 2 SLR 159 at [55]).

35 For all these reasons, I dismissed the appellant's applications to adduce further evidence in HC/SUM 1219/2022 and HC/SUM 2338/2022.

The appellant's substantive appeal

36 I turn now to the substantive appeal. While the parties largely maintained their respective cases at trial for the appeal before me, I invited them to address me on the following specific issues (without limiting their submissions on any other relevant issue) that I felt were determinative of this appeal:

(a) Whether the DJ erred in finding that there was an oral agreement concluded in or around November 2018 for the appellant to purchase the Shares from the respondent for $467,165 (*ie*, the Alleged Oral Agreement)?

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12 Affidavit of Chan Tam Hoi @ Paul Chan dated 24 June 2022 at para 9(b)(i).

13 Affidavit of Chan Tam Hoi @ Paul Chan dated 24 June 2022 at para 9(c)(i).

(i) How does the relevant evidence, especially those considered by the DJ, affect the finding of the Alleged Oral Agreement?

(ii) Is the appellant precluded from arguing the point of certainty of terms because it was not pleaded?

(iii) Even if a material term of the Alleged Oral Agreement was uncertain, does the evidence show that the parties have nonetheless reached agreement on such a term later, and if so, is the respondent allowed to make the point on appeal?

(b) Whether, if the Alleged Oral Agreement was concluded in November 2018, it was nonetheless superseded by a written agreement between the respondent and NSC Capital dated 30 January 2019?

I am grateful to both Mr Benedict Eoon ("Mr Eoon"), counsel for the appellant, and Mr Darren Tan ("Mr Tan"), counsel for the respondent, for their helpful submissions on these issues.

Preliminary observations on burden of proof and pleadings

37 Before considering these issues, I begin with two preliminary observations.

The burden of proof remains on the respondent to prove the Alleged Oral Agreement

38 First, it is important to bear in mind that the burden of proof always remains on the *plaintiff* (the respondent in this appeal) to prove its positive case. This is especially important in cases involving oral agreements, where there will be gaps in the evidence precisely because there is no direct evidence that points

to a written agreement. In the cut and thrust of conflicting evidence, it is important not to confer an unintended advantage to the plaintiff where the defendant's defence is unsustainable. In my respectful view, this had happened in the present case.

39 In the trial below, the DJ began his analysis by refuting the defendant's defence that the respondent had only agreed to transfer the Shares for $1 (see the GD at [36]). By doing so, the DJ elided the preliminary question of whether the respondent had even discharged her *legal* burden of proof on a *prima facie* basis before the *evidential* burden of proof shifts to the defendant (where consideration of the countervailing evidence would begin). Indeed, the DJ's methodology was also evident from his oral grounds of decision.[14] He had considered that the parties' claims could be distilled into just three scenarios: (a) the appellant's case that the respondent had agreed to transfer the Shares for $1; (b) the respondent's case that NSC Capital had breached an agreement to purchase the Shares for $467,165; and (c) the respondent's case that the appellant had breached an agreement to purchase the Shares for $467,165. He then proceeded to analyse each scenario in turn, with the implicit assumption that one of the three scenarios must be correct. With respect to the DJ, there is always a remaining scenario, which is simply that the respondent, as the plaintiff, has failed to discharge her burden of proof and therefore not proven her case that there was a valid agreement.

40 It is trite that the concept of burden of proof is split into two distinct senses. First, the concept may be used in the context of referring to the *legal* burden of proof, which is "properly speaking, a burden of proof, for it describes the obligation to persuade the trier of fact that, in view of the evidence, the fact

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14 ROA Vol 1 at p 323.

in dispute exists" (see *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 ("*Britestone*") at [58]). A plaintiff in a civil claim bears the legal burden of proving the existence of any relevant fact necessary to make out its claim on a balance of probabilities. The legal burden of proof will remain fixed on the party who bears it throughout the course of the trial.

41 The second sense in which the concept of burden of proof is commonly used is in the *evidential* sense, and it is a "burden of proof only loosely speaking" for it falls short of an obligation to prove that a particular fact exists (see *Britestone* at [58]). Unlike the legal burden of proof, the evidential burden can and will shift from one party to the other based on the state of the evidence. Essentially, the evidential burden of proof is the "tactical onus to contradict, weaken or explain away the evidence that has been led" (see *Britestone* at [59]).

42 The practical operation of the above principles in the context of a trial were helpfully summarised in *Britestone* at [60] as follows:

> 60 To contextualise the above principles, at the start of the plaintiff's case, the legal burden of proving the existence of any relevant fact that the plaintiff must prove and the evidential burden of adducing some (not inherently incredible) evidence of the existence of such fact coincide. Upon adduction of that evidence, the evidential burden shifts to the defendant, as the case may be, to adduce some evidence in rebuttal. If no evidence in rebuttal is adduced, the court may conclude from the evidence of the plaintiff that the legal burden is also discharged and making a finding on the fact against the defendant. If, on the other hand, evidence in rebuttal is adduced, the evidential burden shifts back to the plaintiff. If, ultimately, the evidential burden comes to rest on the defendant, the legal burden of proof of that relevant fact would have been discharged by the plaintiff. The legal burden of proof – a permanent and enduring burden – does not shift. A party who has the legal burden of proof on any issue must discharge it throughout. …

The placement of the legal burden of proof generally depends upon how parties have pleaded their case (see the High Court decision of *Lee Kim Song v Chan*

Chee Kien and another [2021] SGHC 6 at [49(c)]). The plaintiff will always have a legal burden to prove his claim. The defendant will likewise have a legal burden of proving a pleaded defence unless the defence is a bare denial of the claim.

43 In the present case, the legal burden of proof is placed on the respondent to prove that an oral agreement was reached between parties for the sale of Shares for $467,165 that was concluded in November 2018 (*ie*, the Alleged Oral Agreement). If the respondent can prove a *prima facie* case, then the evidential burden of proof will shift to the appellant to put up evidence to show why the respondent's case is unlikely by attempting to "contradict, weaken or explain away the evidence that has been led" (see *Britestone* at [59]).

44 The DJ, in finding that it was "highly improbable and wholly inconsistent with the evidence" that the respondent would agree to transfer the shares for $1 (see the GD at [46]), had erred in striking down the appellant's defence *before* considering the respondent's case that an oral agreement exists. This would have cleared away the contrary evidence from the appellant for the court to consider, and the court is only left with the standalone evidence of the respondent. Conceptually, this might have conferred an unintended tactical advantage to the respondent (even though the practical implications may not necessarily be as such in every case). With respect, the DJ had failed to appreciate that the respondent had the burden of *first* adducing evidence to show that there was such an oral agreement before the appellant would have the burden of adducing rebuttal and explanatory evidence as to why the respondent's case should fail.

45 The respondent likewise misunderstands the concept of the burden of proof. For example, in her submissions for this appeal, the respondent refers to

the appellant's supposed "fatal concession" during cross-examination that there was no agreement between the appellant and the respondent for the Shares to be sold at $1.[15] Because of this "fatal concession" and the appellant's failure to plead any alternative sale price for the Shares, the DJ "had no other evidence before him with regard to the determination of the Agreed Consideration, apart from the figure of S$467,165.00".[16] The implicit argument is that the DJ must therefore conclude that $467,165 is the correct figure. With respect, the respondent cannot make out her case *indirectly* merely by eliminating the other possible scenarios. The enduring legal burden remains with the respondent throughout, and it is for the respondent to prove the elements of the Alleged Oral Agreement (see the High Court decision of *Tan Swee Wan and another v Johnny Lian Tian Yong* [2018] SGHC 169 ("*Tan Swee Wan*") at [222]). If the respondent is unable to establish even a *prima facie* case, then the evidential burden will not shift to the appellant to rebut her case.

The respondent must prove her pleaded case and not any other case

46 The second preliminary (and connected) point I make concerns the importance of pleadings especially in cases involving oral agreements. Central to the determination of who bears the burden of proof in civil trials is the state of the parties' pleadings. This is because it is in the pleadings that one finds the material facts that each party asserts to establish its claim or defence and, as is trite law, he who asserts must prove. This is a rule which is consistent with the general principle underlying ss 103 and 105 of the Evidence Act 1893 (2020 Rev Ed) (the "EA") (see the decision of the Court of Appeal in *Cooperatieve*

15 Respondent's Case at para 21.

16 Respondent's Case at para 37.

Centrale Raiffeisen-Boerenleenbank BA (Trading as Rabobank International), Singapore Branch v Motorola Electronics Pte Ltd [2011] 2 SLR 63 at [31]).

47 In my view, pleadings are even more important in cases involving oral agreements. In the absence of a written document that proves the parties' agreement, it is important for the plaintiff to plead the material particulars of an alleged oral agreement so that the defendant knows the case it must meet. In saying this, I accept that a court is not required to adopt an overly formalistic and inflexibly rule-bound approach, and departure from the general rule is allowed where no prejudice is caused to the other party at trial or where it would clearly be unjust for the court not to do so (see the decision of the Court of Appeal in *V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422 at [39]–[40]). While I understand that it may not be possible to plead particulars of an oral agreement with the level of precision as in the case of a written agreement, it is still incumbent on the plaintiff to plead its case to a sufficient degree of certainty. For example, while it may not be possible to plead the *exact date* on which an oral agreement was reached, it is still necessary to plead the *precise range of dates* on which the contract was allegedly concluded.

48 In the present case, the respondent's pleaded case is that the appellant had breached an oral agreement that he had concluded with Mr Wang (who was acting on behalf of the respondent) in or around November 2018. It is important that the respondent has *consistently* maintained this version of events in her pleadings. Thus, the respondent in her Statement of Claim dated 5 November 2019 pleaded that:[17]

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17 SOC at para 7: ROA Vol 2 at pp 8–9.

> At a meeting between the 2nd Defendant [NSC Capital], the Plaintiff [the respondent], and the Plaintiff's father, Mr Wang Bin ("Mr Wang"), at the 1st Defendant's premises in or around November 2018, the 2nd Defendant agreed ("the Agreement") to buy out the Plaintiff's investment in the 1st Defendant by purchasing the Shares for the sum of S$467,165.00 (the "Consideration"). This was the 2nd Defendant's own valuation of the Shares at that time.

49 Moreover, even the evidence tendered by her and in support of her case all hinged on this version of events. Thus, in the respondent's own affidavit of evidence-in-chief, her evidence is that:[18]

> In this regard, Mr Wang subsequently informed me that he had a meeting (the "Nov Meeting") with the 2nd Defendant at the office premises of the 1st Defendant in or around the middle of November 2018, and that the 2nd Defendant agreed to purchase the Shares from me at the sum of S$467.165.00 (the "Agreement").
>
> [emphasis in original omitted]

Similarly, Mr Wang, who had met with the appellant in person in November 2018, also gave evidence in his affidavit of evidence-in-chief as follows:[19]

> In this regard, I had a meeting (the "Nov Meeting") with the 2nd Defendant at the office premises of the 1st Defendant in or around the middle of November 2018, and the 2nd Defendant agreed to purchase the Shares from the Plaintiff at the sum of S$467,165.00 (the "Agreement").
>
> [emphasis in original omitted]

50 This has therefore always been the case that the respondent knows he needs to meet. Nonetheless, when it became apparent during the hearing before me that I had doubts about certain aspects of the respondent's pleaded case,

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18 Respondent's affidavit of evidence-in-chief dated 18 January 2021 at para 25: ROA Vol 1 at p 395.

19 Mr Wang Bin's affidavit of evidence-in-chief dated 20 January 2021 at para 11: ROA Vol 1 at pp 425–426.

Mr Tan made an oral application to amend the respondent's pleadings. Specifically, for reasons I will explain in detail below, I had doubts that the respondent could prove that there was an agreement between the parties in November 2018 for the Shares to be sold at $467,165. In response, Mr Tan applied during the hearing to amend the pleadings to reflect that the oral agreement for the sale of the Shares for $467,165 had materialised only in January 2019.

51 I dismiss this application. To my mind, there is a material difference between the pleaded case that Alleged Oral Agreement was concluded in November 2018, against a case that it was only concluded in January 2019. There must be a single point in time when the necessary consensus *ad idem* is reached. Even leaving aside this trite principle that there must be a definite point of formation for every contract (see the High Court decisions of *Day, Ashley Francis v Yeo Chin Huat Anthony and others* [2020] 5 SLR 514 ("*Day, Ashley Francis*") at [53]; *Independent State of Papua New Guinea v PNG Sustainable Development Program Ltd* [2019] SGHC 68 at [149]), Mr Tan's belated application is a bridge too far to cross. While I will allow for some latitude in relation to the date of consensus *ad idem* for oral agreements, such as pleading a range of dates within a specified period, that latitude cannot extend to changing the narrative completely by saying that the oral agreement materialised several months later from the original pleaded date. This will prejudice the appellant as he has always run his defence based on an oral agreement in November 2018, not an agreement at a completely different point in time.

52 This is therefore quite unlike the case in *Day, Ashley Francis*, where Aedit Abdullah J had allowed plaintiff to amend the date of formation of the oral agreement concerned in his pleadings, as the new date fell *within* the

original period of one year that was pleaded (at [58]). Abdullah J reasoned that the evolution of the plaintiff's case such that the date of formation was a specific time within the original period did not materially prejudice the defendants since they would have had to prove that no agreement was formed throughout the entirety of this time in the first place (at [61]). In the present case, while the time period between November 2018 and January 2019 is much shorter than the one year in *Day, Ashley Francis*, the material difference here is that a case premised on an oral agreement concluded in January 2019 would be significantly different from one concluded in November 2018. This is because January 2019 was never within a specified period in which the oral agreement was alleged to have been concluded. To put it differently, had the respondent pleaded November 2018 and January 2019 as alternative dates for the formation of the oral contract, this would have given fair notice to the appellant and no issue would arise. That was not the case here.

53 Accordingly, with these two preliminary observations in mind, the pertinent question is whether the respondent has discharged her burden of proving her pleaded case that there was the Alleged Oral Agreement between her and the appellant for the appellant to purchase the Shares at $467,165 that was concluded in November 2018. In considering this question, it bears repeating that it is important to consider the respondent's own case *first* before considering the appellant's defence, so as not to confer an unintended advantage to the respondent.

Whether there was even offer and acceptance in November 2018

54 I consider first whether there was even an offer and an acceptance between the parties in November 2018, to give rise to the Alleged Oral Agreement.

The DJ's reasoning

55 Having rejected the appellant's defence, the DJ held that the evidence supported an agreement between the parties. First, the WhatsApp message from the respondent to Ms Tang on 28 November 2018 supported the respondent's claim that the appellant had agreed to purchase the Shares for $467,165. Specifically, the appellant mentioned to Ms Tang that "Wang Bin want to sell his share 1 dollar to $1.50 from NSC and take the money back ... [at $460,000]" (see the GD at [41]). The DJ accorded significant weight to this message as the appellant had voluntarily sent it to Ms Tang shortly after the 2018 Share Transfer Form was executed by the parties. As such, the content and timing of this WhatsApp message made it reasonable to infer that Mr Wang and the appellant had discussed and eventually agreed on the sale of the Shares at $467,165, which approximated the $460,000 referenced in the appellant's WhatsApp message.

56 Second, the 30 January 2019 Letter executed by the appellant on behalf of NSC Capital had stated the purchase price of the Shares to be $467,165. The DJ found that the appellant's willingness to execute the letter suggested that the figure of $467,165 had already been discussed and agreed in advance (see the GD at [52]–[53]). Importantly, the letters were complete with figures already inserted by the respondent. Thus, taken together with the 2018 Share Transfer Form which on its face transferred legal ownership of the Shares from the respondent to the appellant, this collectively suggested that an agreement for the sale and purchase of the Shares was reached way before 30 January 2019. For completeness, the DJ also held that the letter was not procured by duress. This therefore did not affect the weight which the DJ placed on the letter.

57 Third, the DJ drew an adverse inference against the appellant for his failure to call NSC Capital's accountant, Chiman (see the GD at [56]). The respondent had said the figure of $467,165 was given to her by Chiman. In contrast, the appellant said that Chiman had confessed to him that Mr Wang had "pressurised" him to prepare the letter. By this account, Mr Wang had come up with the figure himself and "pressurised" Chiman to insert it into the letter. Given the appellant's account of events, the DJ regarded that it would have been important for him to call Chiman as a witness to explain how the figure was arrived at. However, the appellant chose not to call Chiman. The DJ held that this warranted the drawing of an adverse inference against the appellant under s 116, illustration (*g*) of the EA that Chiman's evidence would not have been favourable to the appellant.

The parties' arguments on appeal

58 On appeal, Mr Eoon submitted that there was no oral agreement between the parties concluded in or around November 2018 for the respondent to purchase the Shares at $467,165. He gave several reasons for this submission.

59 First, the evidence showed that there was no such oral agreement. In the first place, the respondent had admitted under cross-examination that she was unsure about what was discussed between Mr Wang and the appellant, and only recalled something about $1.50. Also, Mr Wang provided no evidence that there was such an oral agreement for the purchase of the Shares at $467,165. If at all, Mr Wang's evidence at trial pointed to there only being a discussion and proposal from him for the Shares to be sold at $1.50 per share. More importantly, Mr Wang's own evidence was that there was no binding oral agreement even as of 30 January 2019. This is all corroborated by the

contemporaneous 2018 Share Transfer Form and the WhatsApp message from the appellant to Ms Tang dated 28 November 2018.

60 Second, there was no reason for the appellant to enter into the Alleged Oral Agreement. Mr Eoon argued that this was because the appellant did not receive the benefit of $400,000 paid by the respondent to NSC Executive Centre. Also, the appellant had no reason to value the Shares at $467,165 given that NSC Capital was not profitable and had debts. Indeed, the appellant had suffered financially from NSC Capital not being profitable and being in debt.

61 In contrast, Mr Tan argued that the determination of whether there was an oral agreement for the sale of the Shares is necessarily a fact-finding exercise by the DJ. In this case, the DJ had a choice between $467,165 and $1 as being the consideration in the said oral agreement. Given that the DJ had made a finding of fact that the consideration was $467,165, I should be slow in overturning this finding on appeal unless the DJ's finding was plainly wrong.

62 In any event, Mr Tan argued that, contrary to the appellant's contentions, there is overwhelming contemporaneous documentary evidence to prove the Alleged Oral Agreement. He suggested that the appellant was cherry-picking parts of the DJ's reasoning and evidence adduced at trial, without addressing the totality of the evidence.

My decision: there was no offer and acceptance in November 2018

(1) The law

63 The principles for ascertaining the formation of an oral agreement, which would necessarily include the consideration of whether there was offer and acceptance, are not different from those applicable to the finding of a written

contract (see *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2nd Ed, 2022) ("*The Law of Contract in Singapore*") at p 184). However, oral agreements present a different challenge from written contracts in how one goes about proving those substantive requirements. This is because unlike a written contract, where the substantive requirements (such as formation, consideration and certainty) can be found on the face of the written document, an oral agreement, by its very nature, is not recorded on such a written document. Accordingly, it is important to differentiate between two separate questions: first, the substantive requirements needed for an oral agreement, and second, *how* to go about proving those substantive requirements. The numerous cases dealing with oral agreements have tended to focus on the second question.

(A) THE SUBSTANTIVE REQUIREMENTS OF AN ORAL AGREEMENT

64 The first question in ascertaining the existence of an oral agreement is to consider whether its substantive requirements are satisfied. In this regard, the substantive requirements of an oral agreement are no different from those in relation to a written contract. This is because the manner through which a contract is "recorded" – whether orally or written – is simply proof of the parties' agreement. In other words, the "contract" between the parties, in so far as that word is used to refer to their legally binding agreement, is not *the* written document itself. Rather, the written document is a *record* of the parties' agreement. With such a written record, it is easier to discern whether the parties' agreement has satisfied the substantive requirements of a contract. In contrast, without such a written record for oral agreements, it is more difficult to so discern. But this does not change the principle that the substantive requirements of an oral agreement are no different from those of a written contract.

65 Accordingly, George Wei J in the High Court decision of *Tan Swee Wan* reiterated that whether an oral agreement amounts to a binding contract depends on whether the following well-established legal requirements are satisfied (at [222]): (a) offer and acceptance; (b) intention to create legal relations; (c) certainty of terms; and (d) consideration. These are no different from the requirements for a written contract. Similarly, Choo Han Teck J in the High Court decision of *Lim Seng Choon David v Global Maritime Holdings Ltd and another and another suit* [2019] 3 SLR 218 summarised the applicable principles as follows. First, to establish an oral agreement, there must be clear evidence that all parties to the alleged agreement intended to create legal obligations by their exchange of words and conduct (at [6]). Second, the terms orally agreed to should be consistent with the contemporaneous documents (at [7]). Third, an oral agreement must contain terms that are clear enough to be enforced (at [10]).

(B) PROVING THE SUBSTANTIVE REQUIREMENTS OF AN ORAL AGREEMENT

66 The second question in ascertaining the existence of an oral agreement is *how* to prove the substantive requirements of such an agreement. The starting point, as Ang Cheng Hock JC held in *Tan Li Yin Michel v Avril Rengasamy* [2018] SGHC 274, is that the court must consider the relevant documentary evidence and contemporaneous conduct of the parties at the material time in an *objective manner* (at [29]).

67 The cases reveal a sliding scale of evidence that the courts use in deciding whether the substantive requirements of an oral agreement are satisfied. At the top of the scale is the relevant documentary evidence. Thus, the Court of Appeal in *OCBC Capital Investment Asia Ltd v Wong Hua Choon* [2012] 4 SLR 1206 (at [41]) emphasised the importance of looking to the

relevant documentary evidence *first* as they would be more reliable than a witness' oral testimony given well after the fact, and which may be coloured by the onset of subsequent events and the dispute between the parties. This is also evident from the first three guiding principles from the oft-cited framework in the High Court decision of *ARS v ART* [2015] SGHC 78 ("*ARS v ART*"), where Quentin Loh J held as follows (at [53]):

(a) in ascertaining the existence of an oral agreement, the court will consider the relevant documentary evidence (such as written correspondence) and contemporaneous conduct of the parties at the material time;

(b) where possible, the court should look first at the relevant documentary evidence; and

(c) the availability of relevant documentary evidence reduces the need to rely solely on the credibility of witnesses in order to ascertain if an oral agreement exists.

68 Following from documentary evidence, the courts turn secondarily to oral testimony. Thus, as the Court of Appeal held in *Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 (at [60]), where there is little or no documentary evidence, the court will "nevertheless attempt its level best by examining closely (and in particular) the precise factual matrix". This is also clear from *ARS v ART* (at [53]), where Loh J had said that "if there is little or no documentary evidence, the court will nevertheless examine the precise factual matrix to ascertain if there is an oral agreement concluded between the parties". In examining the reliability of oral testimony, the following guiding principles set out in *ARS v ART* should be kept in mind (at [53(d)]–[53(f)]):

(a) oral testimony may be less reliable as it is based on the witness's recollection and it may be affected by subsequent events (such as the dispute between the parties);

(b) credible oral testimony may clarify the existing documentary evidence; and

(c) where the witness is not legally trained, the court should not place undue emphasis on the choice of words.

69 In the end, the collective thrust of these principles is that the courts will prefer documentary evidence over oral testimony in the finding of an oral agreement, where the former is available.

(C) SUMMARY OF THE APPLICABLE PRINCIPLES IN RELATION TO ASCERTAINING THE EXISTENCE OF AN ORAL AGREEMENT

70 In summary, it would be helpful to bear in mind the two separate questions at play when ascertaining the existence of an oral agreement. First, whether the substantive requirements of an oral agreement are satisfied. It will be helpful for parties to identify the specific requirement that is being questioned. Second, how one goes about proving the specific substantive requirement in question. In this regard, documentary evidence will be preferred over oral testimony, and the specific guidelines in *ARS v ART* in relation to each type of evidence will be helpful.

(D) ASCERTAINING THE TERMS OF AN ORAL AGREEMENT

71 Although this does not arise in the present case, it is also helpful to bear in mind that the ascertainment of the *existence* of an oral agreement is conceptually different from the ascertainment of the *terms* of an oral agreement. In this regard, Chan Seng Onn J in *Naughty G Pte Ltd v Fortune Marketing Pte*

Ltd [2018] 5 SLR 1208 (at [57]) held that the general guidelines set out in *ARS v ART* in ascertaining the existence of an oral agreement are equally applicable to ascertaining the terms of such an agreement. Both involve a holistic view of the evidence to determine what (if anything) was agreed between the parties.

(2) Application to the present case

72 With the above principles in mind, I now consider whether a substantive requirement of the Alleged Oral Agreement, namely that there be an offer and an acceptance, was satisfied. I start with the relevant documentary evidence and written communications, before considering the testimonies of the witnesses and their clarifying effect.

(A) THE RELEVANT DOCUMENTARY EVIDENCE

(I) 2018 SHARE TRANSFER FORM

73 The 2018 Share Transfer Form, on the face of it, states that the respondent would pay $1 as consideration for the sale. This Form was executed on 21 November 2018,[20] shortly after when the Alleged Oral Agreement materialised.

74 The DJ had chosen to disregard the price stated on the 2018 Share Transfer Form by noting that the "consideration stated in a share transfer form is not conclusive as to the true consideration paid or to be paid for the shares" (see the GD at [32]) and he cited *Walter Woon on Company Law* (Tan Cheng Han SC gen ed) (Sweet & Maxwell, Revised 3rd Ed, 2009) ("*Walter Woon*") at para 11.126. However, a closer reading of that extract reveals that it does not stand for that proposition as suggested. Instead, the point made in *Walter Woon*

[20] Appellant's Case at para 12.

(which in turn cited *Lin Ah Moy v Lee Cheng Hor* [1970] 2 MLJ 99 ("*Lin Ah Moy*")) is that despite the admission in the share transfer document that consideration has been received, it is still open to the seller to prove that it has not actually been paid by the buyer (see *Kho Tian Boo v Tengku Ibrahim Petra bin Tengku Indra Petra* [2013] 10 MLJ 584 at [28], citing *Lin Ah Moy*). The authority therefore says something slightly different from what the DJ has suggested, although it could be possible that the DJ was trying to extrapolate the legal principle further.

75 Thus, on the face of it, in the absence of rebuttal evidence from the respondent, the consideration for the Shares is as stated on the 2018 Share Transfer Form, which is $1. However, to accept that the 2018 Share Transfer Form reflected this would potentially lead us to an absurd result. It would require me to accept that the respondent chose to relinquish the Shares which she had ostensibly acquired for $400,000 (as mentioned above at [4]) for the nominal consideration of only $1. Notwithstanding this, when we bear in mind the burden that the respondent must discharge, the 2018 Share Transfer Form does not assist in ascertaining the existence of the Alleged Oral Agreement. This is because the respondent is referring to the 2018 Share Transfer Form to disprove the appellant's case that the agreement was for the Shares to be sold at $1. However, it remains the respondent's *burden* to prove that there was an oral agreement concluded between the parties in November 2018 at the price of $467,165. She cannot discharge that burden by refuting the appellant's defence that the parties had entered into an agreement to purchase the Shares for $1, as evidenced by the 2018 Share Transfer Form. Even if I were to accept that the respondent did not transfer the Shares for $1, that does not, in and of itself, mean that the parties had agreed for the Shares to be sold at $467,165 in November 2018.

(II) WHATSAPP COMMUNICATIONS ON 28 NOVEMBER 2018

76 The contemporaneous WhatsApp communications a few days after the 2018 Share Transfer Form was executed were more relevant in ascertaining the formation of the Alleged Oral Agreement. These were made on 28 November 2018. The messages from the appellant to Ms Tang were as follows:[21]

> "I want to transfer menon share to wang jin
> Wang bin *want* to sell his share *1 dollar to 1.50*
> From nsc
> And take the money back
> *320 mean 460k*
> Nsc has liabilities
> Menon is good
> I transfer share to apply p.r
> Real investment"
> [emphasis added]

Both Mr Eoon and Mr Tan clarified during the hearing that "320" in the message probably was meant to be "360", which reflected the 360,000 shares held by the respondent.

77 The DJ held that this message supported the respondent's claim that the appellant had agreed to purchase the Shares at $467,165 because the appellant had said in the message that "Wang Bin want to sell his share 1 dollar to $1.50 from NSC and take the money back ... [at $460,000]".

78 With respect, on the face of it, the message does not show such an agreement. A plain reading of the message suggests that Mr Wang had not

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[21] ROA Vol 2 at p 67.

agreed on the *exact* price at which to sell the Shares. There was in fact a variance between the prices of $1.00 and $1.50 per share, which would have translated into a price range of $360,000 and $540,000 for all the Shares. The appellant's reference to "$460,000" is therefore inconclusive and likely reflects what he had considered to be the median price. In my respectful view, because the DJ had wrongly rejected the appellant's defence before considering the respondent's case, the respondent's alternative scenario that the Shares had been sold for $467,165 became more compelling, to the extent that one might read the evidence as supporting that scenario even if it does not in fact do so.

79 In my judgment, the fact that this was a message sent *after* the 2018 Share Transfer Form was executed, and yet, was still being couched in the language of Mr Wang "want[ing] to sell his share 1 dollar to 1.50", must instead mean that *no* agreement had been reached as of 28 November 2018. What is apparent from the message is that parties were still negotiating the price. This also indicates that neither party, contrary to the respondent's pleaded case, thought that the Alleged Oral Agreement had already been concluded *before* the 2018 Share Transfer Form was executed.

(III) 30 JANUARY 2019 LETTER

80 The other significant piece of documentary evidence is the 30 January 2019 Letter, executed about two months after the incidents in November. It was confirmed in the Letter that NSC Capital "would buy back 30% of [the] investment in NSC Capital for the amount of $467,165.00" from the respondent. In the Letter, there is a very clear reference to the price in the region of what was mentioned in the 28 November 2018 WhatsApp message mentioned above (*ie*, the "460k").

81 However, my difficulty with the 30 January 2019 Letter is that the appellant is not a party to the agreement contained within. The DJ managed to overcome this difficulty by concluding the evidence suggests that the buyer of the Shares was always intended to be the appellant and not NSC Capital (see the GD at [25]), as observed from the 2018 Share Transfer Form where the appellant was stated to be the transferee. In my view, this is reading too much into the document, which on its face, if at all, is an agreement between the respondent and NSC Capital. In my respectful view, the DJ fell into error by becoming influenced by his *prior* rejection of the appellant's defence such that the only scenario left, that is, the respondent had purchased the Shares at substantial consideration, became so compelling that the DJ was willing, in effect, to ignore the express wording of the 30 January 2019 Letter that it was entered into between the respondent and NSC Capital.

82 I therefore do not think it is correct to use the 30 January 2019 Letter to find an agreement for the respondent to sell the Shares to the appellant for $467,165. In any event, even if I accept that the parties' agreement somehow crystallised on 30 January 2019 itself, this goes against the case which the respondent has maintained throughout the proceedings, which is that the Alleged Oral Agreement had been concluded in November 2018.

(B) THE RELEVANT ORAL TESTIMONIES

83 The relevant oral testimonies further support my conclusion that the parties never agreed to a price for the Shares before 30 January 2019, if at all. If we consider the oral testimony of Mr Wang to "clarify the existing documentary evidence" (see *ARS v ART* at [53]), what becomes clear is that Mr Wang was unable to settle on a price *prior* to 30 January 2019. The relevant

portions of the transcripts are reproduced from the first day of cross-examination on 21 April 2021:[22]

> Q: So, the 30th January 2019 letter which was prepared by your daughter, okay? After she had prepared the letter in draft form, she must have checked the contents with you first to make sure that whatever is in the letter was in line with what you had agreed with Mr. Chan in November 2018.
>
> A: *In 2018, we didn't discuss about the figures in concrete.* I only told Paul---I only *told him that I wanted to sell him $1.50 per share and asked him to consider about it.*
>
> Q: So---
>
> A: This is what it's about. I didn't know about the figures.
>
> Q: So, you are saying now that in the November 2018 with Mr. Chan, you have just told Mr. Chan that you were *willing to sell your shares in NSCC for $1.50*, is that correct?
>
> A: *Yes***.** But to sell to Paul.
>
> Q: So, there was no agreement on the price that Mr. Paul Chan had to pay to buy back the shares. Am I right? Not at the November 2018 meeting. Is that your position?
>
> A: *He only went to consider about my proposal of 1.5.*
>
> Q: So, your proposal of $1.5 per share *was just your--- your offer. Am I right?* There was no actual agreement on the sale price. I think just to make clear on the 2nd part of my question, it also needs to be translated. It wasn't a--- *there was no actual agreement* and there was no agreement on the sale price.
>
> A; *No***.**
>
> Q: Thank you very much. So, the first time---
>
> Court: No, as in, it was just an offer, there was no actual agreement?
>
> Witness: *It was a proposal and there was no actual agreement.*
>
> Q: So, the *first time* that the issue of the sale price of the shares to Paul Chan was at the *30th January 2019 meeting*?
>
> A: *Yes, correct.*
>
> [emphasis added]

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22 ROA Vol 1 at pp 109–110.

84 What becomes clear from this exchange is that Mr Wang had made crucial concessions that there was no agreement on the price prior to the first meeting where the 30 January 2019 Letter was signed, despite the respondent's case being that the Alleged Oral Agreement had been reached by November 2018. At that stage of the negotiations, on Mr Wang's account, there was merely an *offer* made to buy the shares at $1.50 per share, and it was for the appellant to take his time to communicate his acceptance to that proposal. There was nothing set in stone.

85 In fact, this is made even clearer by the fact that Mr Wang's offer at $1.50 per share was within the higher range of what he was happy with, but he knew that the appellant might not purchase the shares at that price:[23]

> Q: Now, Mr. Wang, you said just now that *your offer price* was *$1.50 per share*, right?
>
> A: *Correct*.
>
> Q: And there are 360,000 shares at stake, right? Your daughter had---3---360,000 shares, Are you aware of that? Are you aware that the number of shares involved in this transaction was 360,000 shares?
>
> A: Around there, 30%.
>
> Q: Yes. Now, at $1.50 per share, for 360,000 shares to be transferred from your daughter to Mr. Chan, you should be getting $540,000, right?
>
> A: If it is *540,000, I would be happier. May---maybe he didn't give me up to 1.5*.
>
> Q: Now, I put it to you Mr. Wang, that after your daughter showed you the draft letter to be signed by Paul and you saw the *figure 467,165, you become very angry because it was much lower than what you had expected* based on the share vet---share price of $1.50 per share.
>
> A: *Agree*. When my daughter told me about this, *my daughter told me just forget about it, anyway we did not lose any money*.

[23] ROA Vol 1 at pp 110–111.

> [emphasis added]

86 From the above excerpt, Mr Wang agreed that he was pushing for $1.50 per share but knew that the appellant was unlikely to agree to this. What this whole exchange demonstrated was that there were a lot of back-and-forth discussions on the price, and it cannot be the case that an oral agreement was definitively reached in November 2018.

87 Further, Mr Wang also candidly accepted that everything fell to be finalised on 30 January 2019, even if he had previously suggested a *range* of prices between $1.00 and $1.50 in November 2018. The parties were still free to decide whether the price per share would be "1.2, 1.3, or 1.4". Indeed, if the price was not right for Mr Wang (who was negotiating on behalf of the respondent), he would not have entered into the agreement. For example, if the total price were set at $400,000 for all of the 360,000 shares, implying a valuation of $1.11 per share, he would have rejected that suggestion outright:[24]

> Court: So, there was *no precise price, there was only a range*, alright?
>
> A: It was within this framework as long as it's *between $1 and 1.5*, I could accept. …
>
> Q: Now, Mr. Wang, if you remember correctly, yesterday when I cross-examine you, I asked you *whether you accept just $400,000* from Mr. Chan and you said no, right? Do you recall that?
>
> A: *I won't accept, correct.*
>
> …
>
> Q But just now you said, as long as your price is between $1 and 1.50, you'll accept it?
>
> A It is not like this. $1 to $1.50 is what we agreed verbally. *Eventually, we may discuss whether it is to be multiplied by 1.2, 1.3, or 1.4. If it is lower that what I desire I will not accept.*

[24] ROA Vol 1 at pp 137–138.

> Q Okay, let---
>
> A As for this 467,000, I could still try to accept. If on the *30th of January*, the *amount was 400,000 I wouldn't have agreed.*
>
> [emphasis added]

88 While I do not decide this as the respondent did not cross-appeal on it, it may well be that an agreement was reached in the 30 January 2019 Letter, but with NSC Capital as the counterparty to the contract, and not the appellant. In fact, the respondent had complained that she would have preferred a written agreement which stated that the appellant himself would personally pay the purchase price (see the GD at [20]), suggesting that she knew that the arrangement between her and NSC Capital might give rise to issues later on. For present purposes, however, it is clear from Mr Wang's testimony that the parties simply never reached any agreement in relation to the Shares in or around November 2018.

89 In assessing Mr Wang's testimony, I took into consideration the DJ's concern that he was not legally trained and unfamiliar with English. I also recognise, as Loh J had alluded to in *ARS v ART* (at [53(f)]), that where the witness is not legally trained, the court should not place undue emphasis on the choice of words. However, even accounting for these factors, I disagree with the DJ that when Mr Wang said that the parties only agreed on the $467,165 figure on 30 January 2019, that did not necessarily mean that there was no verbal agreement on $467,165 before that. Firstly, it is not clear to me *when* the supposed verbal agreement before 30 January 2019 took place. This cuts against the respondent's clearly pleaded case that the Alleged Oral Agreement was concluded in November 2018. Second, and more substantively, even if I accept that Mr Wang understood agreement to mean a written agreement (and hence, by this account, he only took the agreement to have materialised when it was reduced to writing in the 30 January 2019 Letter), this does not explain why

Mr Wang would repeatedly refer to the $1.50 as a "proposal" for the appellant to consider. The truth of the matter is that there was simply no agreement on the price for the Shares before 30 January 2019, if any agreement was even reached in the end.

(3) Conclusion

90 For all these reasons, I conclude that the appellant and the respondent were still negotiating about the price for the Shares as late as 30 January 2019. This is aptly borne out by the relevant documentary evidence and the witness testimonies. It bears repeating that however unsatisfactory the appellant's defence may appear on its face, it is important for a court to consider the prior question of whether the respondent had even shown a *prima facie* case in accordance with her pleadings, towards the discharge of her burden of proof. In my judgment, she has not, because there was no consensus *ad idem* on the price of the Shares in November 2018. In fact, it is unclear to me whether there was eventual agreement between them, but I do not need to decide this point.

Even if there was an agreement in November 2018, whether that agreement was unenforceable for uncertainty of a material term

91 I deal with the next issue, which is, even if I assume that there was some kind of agreement in November 2018 between the parties for the respondent to sell the Shares to the appellant, whether this agreement was unenforceable for uncertainty of a material term.

The DJ's reasoning

92 The DJ dealt briefly with the appellant's argument during closing submissions that the price of the Shares was indeterminate (see the GD at [75]–[78]). This argument had arisen from Mr Wang's testimony at trial that he had

discussed the sale of the Shares with the appellant at a price range of between $1.00 and $1.50 per share (see the GD at [75]). According to Mr Wang's testimony at trial, the sum of $467,165 was only finalised at the 30 January 2019 meeting. By this argument, the appellant submitted that there was therefore no certainty of terms required for there to be a valid contract in period in or around November 2018, which was the respondent's pleaded case.

93 The DJ held that this argument centring on certainty had been "foreclosed" because the appellant never pleaded it (see the GD at [76]). Instead, the appellant's sole defence was that there was a valid binding contract for the sale of the Shares, but only at $1 as stated in the 2018 Share Transfer Form.

94 However, the DJ held that even if he were wrong on this point, he would find that although the parties had discussed a price range, they did eventually reach an oral agreement on the sale price of the Shares to be $467,165 (see the GD at [77]). The DJ, however, did not identify precisely *when* this agreement took place. When questioned during the hearing before me, Mr Tan likewise could not pinpoint the exact (or even rough) point of agreement. Regardless, the DJ found that this agreed price was then further confirmed in writing by the 30 January 2019 Letter. Again, the DJ ascribed little weight to Mr Wang's testimony that the figure of $467,165 was only agreed on 30 January 2019 as he was not legally trained and unfamiliar with English (see the GD at [78]). The fact that Mr Wang said they only agreed on the $467,165.00 figure on 30 January 2019 did not necessarily mean that there was no verbal agreement on $467,165 before that.

The parties' arguments on appeal

95 Mr Eoon argued that the Alleged Oral Agreement, even if formed, was indeed uncertain because the price for the Shares was never agreed with sufficient certainty. He therefore urged me to find that there was no oral agreement for this reason as well, quite apart from his other argument that Mr Wang was only making an offer to sell the Shares.

96 While Mr Tan in his written submissions had agreed with the DJ that the appellant was "foreclosed" from arguing that the oral agreement was unenforceable for uncertainty as this was not pleaded as a defence, he candidly conceded the point before me. Mr Tan submitted instead that I could indeed consider the appellant's argument that the Alleged Oral Agreement was unenforceable as a material term concerning the price for the Shares was uncertain. I am grateful for Mr Tan's candour, which saved the parties from arguing over what I had regarded as an obvious point. However, on this point, Mr Tan argued that the courts endeavour to give effect to agreements and not render them nugatory, citing the High Court decision of *Gardner Smith (SE Asia) Pte Ltd v Jee Woo Trading Pte Ltd* [1998] 1 SLR(R) 950 ("*Gardner Smith*") at [10]. Thus, even if the price for the Shares was based on a determinate range of prices, the Alleged Oral Agreement would not be invalidated.

My decision: even if there was an oral agreement in November 2018, it would have been unenforceable for being uncertain

(1) The permissibility of considering the requirement of certainty of terms even though it was not pleaded

97 As a starting point, I disagree with the DJ that the court is "foreclosed" from considering the uncertainty point because the appellant had not pleaded it in his defence. This is because whether a material term is certain in a contract is

an essential element of its existence. It is therefore incumbent on the plaintiff (the respondent in this case) to prove to the satisfaction of the court that all the material terms in the contract are certain. Put another way, the certainty of terms is not a "defence" in the same way that duress might be, in which case, the defendant (the appellant in this case) would have to plead that in its defence.

98 Moreover, regardless of the parties' pleadings, the issue of certainty of a material term ultimately turns on the court's interpretation of the contractual terms. As such, as Warren Khoo J had noted in *Gardner Smith* (at [15]), the court is entitled to find that no contract had been concluded even though neither party had pleaded that there was a failure to agree an essential term:

> 15 Payment terms are essential terms of a sale contract. In the circumstances, it seems to me that the parties had failed to agree on this important element of their contract. Reluctant as I am to come to such a conclusion, it seems to me that in fact no contract had been reached at all by reason of the failure to agree an essential term. Neither party has pleaded this, as each asserts claims of breaches against the other. However, since it is the court that has to interpret the contract, if it finds it impossible to give any sensible meaning to an essential term, the court is entitled, or bound, to find that no contract had been concluded even though neither party has pleaded the point.

99 I therefore take the view that I can and, in fact, should, consider the certainty point that the appellant had brought up during closing submissions in the trial below and on appeal.

(2) The law

100 It is axiomatic and commonsensical that before there can be a concluded contract in law, its terms must be certain. In this regard, a term that is "uncertain" exists but is otherwise incomprehensible. A contract may be unenforceable for uncertainty even though there has otherwise been both offer and acceptance between the parties (see *The Law of Contract in Singapore* at

p 162). Thus, Maugham LJ has said in the oft-cited English Court of Appeal decision of *Foley v Classique Coaches Ltd* [1934] 2 KB 1 (at 13):

> [U]nless all the material terms of the contract are agreed there is no binding agreement. An agreement to agree in future is not a contract; nor is there a contract if a material term is neither settled nor implied by law and the document contains no machinery for ascertaining it.

101 The basis for the requirement of certainty is a practical one. When contracts are before the courts, that generally means that there is a dispute, the resolution of which depends on construing the very terms of the contract itself. Thus, the courts insist on certainty because of the very practical need to construe the contract to provide the solution to the dispute at hand. Having said that, the law is generally anxious to uphold the contract concerned whenever possible (see the House of Lords decision in *Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503 at 512), and it usually takes a rather uncertain or incomplete contract before the courts will find it unenforceable.

(3) Application to the present case

102 In the present case, even if I assume the parties had reached some kind of agreement in November 2018, the hurdle in relation to the Alleged Oral Agreement is that the price of the Shares is an essential term which generally cannot be left open to be decided upon later on. Giving a range of figures would not be sufficient. For example, in the High Court decision of *Likpin International Ltd v Swiber Holdings Ltd and another* [2015] 5 SLR 962 ("*Likpin International*"), it was held that an alleged oral charterparty, which provided that the rate of hire was "approximately US$130,000" per day, was unenforceable as the use of an *approximate* rate was simply too uncertain and inconsistent with the existence of a concluded contract (at [44]–[45]). It would

have led to "endless, insoluble, disputes as to what the agreed rate of hire is" (at [44]).

103 In a similar fashion, Mr Wang seems to be asserting that while the Alleged Oral Agreement (or some other agreement after November 2018 but before 30 January 2019) had come into existence, the price of the Shares remained open for discussion and could range between $1.00 to $1.50. If true, this would have led to a significant difference in the valuation of the shares between $360,000 to $540,000. I extract the relevant portions of Mr Wang's testimony below:[25]

> A: In November---in November 2018, regarding the *price, we have already agreed. It was from 1 to 1.5*. Later then I asked my daughter to sign the transfer of shares to allow him to use $1 to buy back the shares. If we had not made this agreement, I would not ask my daughter to sign. She would not sign.
>
> Court: Sorry. What---what---what agreement?
>
> Witness: It was not an agreement but an oral agreement that he would purchase 30% of the shares.
>
> Court: *At what price?*
>
> Witness: At that time, *it was $1 to $1.50*.
>
> Court: And to be clearer, is it per share?
>
> Witness: Yes, for 1 share.
>
> [emphasis added]

104 It is clear from this exchange that, even if I assume that there was some kind of agreement between the parties for the respondent to sell the Shares to the appellant in November 2018, Mr Wang had thought the agreed price was between "$1 to $1.50". This represents a variance in total price of between $360,000 to $540,000 for the 360,000 shares which renders the Alleged Oral

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[25] Record of Appeal Vol 1 at p 132–133.

Agreement too uncertain as to be enforceable. Further, if we refer to the other extract from Mr Wang's testimony cited at [87] above, it becomes clear that despite having "agreed" on the range of prices between "$1 to $1.50" per share, rather surprisingly, Mr Wang was not even willing to accept all of the prices stated within that range. This demonstrates how this term is too uncertain to be enforceable and would have led to "endless, insoluble, disputes" about the price later on (see *Likpin International* at [44]).

105 The respondent therefore fails to prove a *prima facie* case according to its pleaded case that there was a valid oral agreement for the sale of the Shares at the precise figure of $467,165 in or around November 2018.

Whether, if the oral agreement was concluded in November 2018, it was nonetheless superseded by a written agreement between the respondent and NSC Capital dated 30 January 2019?

106 Since I have concluded that there was no oral agreement concluded between the parties in November 2018, I do not need to decide if it was nonetheless superseded by a written agreement between the parties dated 30 January 2019. I also do not need to consider if any agreement said to be concluded on 30 January 2019 should be set aside for duress.

Conclusion

107 Towards the end of the hearing, Mr Tan made a final submission for me to consider the "justice of the case". His submission was that since the Shares have already been transferred to the appellant, my overturning of the DJ's decision would mean that the appellant would end up with the Shares for $1.

108 I understand and empathise with Mr Tan's submission. However, I can only rule on what I can see (the pleadings and evidence), and even what I do not

see (by way of an inference), but I certainly cannot rule on what I know I should not see (an alternative case that was not pleaded and the approach of ascribing too much importance on the feasibility of the appellant's defence before considering if the respondent had even made out a *prima facie* case). The justice of *every* case requires the court to do just that.

109 For all the reasons above, I allow the appeal. Once again, I am grateful to both Mr Eoon and Mr Tan for their helpful submissions. The parties are invited to address me on costs within 5 days of this judgment.

Goh Yihan
Judicial Commissioner

Eoon Zizhen Benedict and Adlin Haque (Oon & Bazul LLP) for the appellant;
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