

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

[2023] SGHC 81

Suit No 108 of 2021

Between

Tan Tien Sek

... Plaintiff

And

Tan Tien Sai

... Defendant

JUDGMENT

[Contract — Contractual terms — Oral agreement]

[Contract — Contractual terms — Parol evidence rule]

[Contract — Intention to create legal relations — Sham]

[Contract — Consideration — Failure of consideration]

[Contract — Formalities — Evidenced in writing — Part performance]

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Tan Tien Sek

v

Tan Tien Sai

[2023] SGHC 81

General Division of the High Court — Suit No 108 of 2021

Teh Hwee Hwee JC

19–21, 25–28 October, 27 December 2022

31 March 2023

Judgment reserved.

Teh Hwee Hwee JC:

1 The present case involves a dispute between two brothers and a property at One Tree Hill (the “Property”) that was gifted to them more than four decades ago by their late father, in the proportion of 10% to the plaintiff and 90% to the defendant. The plaintiff transferred his 10% share (the “One-Tenth Share”) to the defendant in 2000 by executing three documents: (a) a sale and purchase agreement dated 10 May 2000 (the “SPA”); (b) a statutory declaration dated 11 May 2000 (the “Statutory Declaration”); and (c) a transfer document dated 6 July 2000 (the “Transfer Document”) (collectively, the “Written Documents”). The plaintiff now claims that the reason he executed the Written Documents in 2000 was because prior to the execution of those documents, the defendant had given the plaintiff an oral undertaking that if the plaintiff transfers the One-Tenth Share, the defendant will pay the plaintiff the monetary value of

the One-Tenth Share once the Property is sold (the “Oral Undertaking”).¹ The Property was sold some 17 years later, in or around 2017. The plaintiff now sues for 10% of the sale proceeds based on the alleged Oral Undertaking.

Facts

The parties

2 The plaintiff is the eldest and the defendant is the youngest of three brothers. During these proceedings, the plaintiff called on three of his other siblings to give evidence – his two sisters, Ms Tan Sook Har and Ms Tan Seok Phin, and his half-sister, Ms Tan Bee Lee. The parties’ father, the late Mr Tan Teck Lye (“TTL”), who passed away on 18 September 2020, had a second wife, the late Mdm Ting Seok Hien (“Mdm Ting”). Mdm Ting was the biological mother of Ms Tan Bee Lee but not the parties.²

The allocation of properties

3 Sometime around 1976, TTL divided his three properties by way of ballot among his three sons, namely, the plaintiff, the defendant and Mr Tan Hian Chye. The properties were located at:

- (a) One Tree Hill (*ie*, the Property);
- (b) Guillemard Road (the “Guillemard Property”); and
- (c) Jalan Sedap (the “Jalan Sedap Property”).

¹ Statement of Claim (Amendment No. 2) dated 8 October 2021 (“SOC (Amendment No. 2)”) at para 7(c) (Set Down Bundle (“SDB”) at p 62).

² Tan Tien Sek’s AEIC at paras 5–6 (Bundle of Affidavits-of-Evidence-in-Chief (“BAEIC”) at p 5); Tan Tien Sai’s AEIC at paras 1.2.1–1.2.3 (BAEIC at pp 84–85); Tan Sook Har’s AEIC at paras 1–2 (BAEIC at p 30); Tan Seok Phin’s AEIC at paras 1–2 (BAEIC at p 34); Tan Bee Lee’s AEIC at paras 1–2 (BAEIC at p 38).

It is undisputed that pursuant to the ballot, the plaintiff was allocated the Guillemard Property, Mr Tan Hian Chye was allocated the Jalan Sedap Property and the defendant was allocated the Property.³

4 It is also undisputed that on 18 January 1977, TTL gifted the Property to the parties in the proportion of 10% to the plaintiff (*ie*, the One-Tenth Share) and 90% to the defendant.⁴ The transfer was registered on 6 April 1977.⁵ The parties give different explanations for the plaintiff’s One-Tenth Share in the Property. According to the plaintiff, TTL decided of his own volition to give the plaintiff the One-Tenth Share because TTL was a “very traditional man” who felt that the Guillemard Property was not a fair allocation for his eldest son, since it was of lower value than the Property.⁶ According to the defendant, the plaintiff demanded an exchange with the defendant immediately after the ballot. The defendant was, at the time, agreeable to the exchange, but Mdm Ting objected, stating that he was too young to make that decision and that the sons should abide by the ballot results. TTL supported Mdm Ting, and the exchange was not made, but the defendant subsequently found out that TTL had transferred nine-tenth share of the Property to the defendant and the One-Tenth Share to the plaintiff.⁷

³ Tan Tien Sek’s AEIC at paras 8–9 (BAEIC at pp 5–6); Tan Tien Sai’s AEIC at paras 2.1.2–2.1.3 (BAEIC at pp 87–88).

⁴ Tan Tien Sek’s AEIC at para 11 (BAEIC at p 6); Tan Tien Sai’s AEIC at para 1.3.3 and pp 35–37 (BAEIC at pp 85 and 118–120).

⁵ Tan Tien Sek’s AEIC at para 11 (BAEIC at p 6); Tan Tien Sai’s AEIC at para 1.3.3 (BAEIC at p 85).

⁶ Tan Tien Sek’s AEIC at para 10 (BAEIC at p 6).

⁷ Tan Tien Sai’s AEIC at paras 2.1.4 and 2.1.5 (BAEIC at pp 88–89).

The transfer of the One-Tenth Share

5 As earlier mentioned at [1], in 2000, the plaintiff executed the Written Documents to effect the transfer of his One-Tenth Share to the defendant. It is recorded in the SPA dated 10 May 2000 that the plaintiff’s One-Tenth Share was transferred to the defendant in exchange for S\$320,000.⁸ The plaintiff also signed the Statutory Declaration dated 11 May 2000, which records the disposal of the One-Tenth Share by the plaintiff and the corresponding acquisition of it by the defendant for a sale price of S\$320,000, along with the plaintiff’s “solemn declaration conscientiously believing the same to be true”.⁹ Finally, the plaintiff also signed the Transfer Document dated 6 July 2000, which records the plaintiff’s acknowledgment of receipt of S\$320,000 for the transfer of the One-Tenth Share.¹⁰ The defendant became the sole legal owner of the Property on 28 July 2000.¹¹

6 The plaintiff pleads that when the parties signed the Written Documents, they “did not intend to create the legal relations that the Written Documents gave the impression of creating” and the Written Documents are a sham.¹² Further, the plaintiff states that he never received the stipulated consideration of S\$320,000.¹³ In fact, the plaintiff pleads that he was never paid anything for the transfer.¹⁴ Instead, he transferred his One-Tenth Share pursuant to the Written

⁸ Tan Tien Sai’s AEIC at pp 31–33 (BAEIC at pp 114–116).

⁹ Tan Tien Sai’s AEIC at pp 55–56 (BAEIC at pp 138–139).

¹⁰ Tan Tien Sai’s AEIC at pp 61–63 (BAEIC at pp 144–146).

¹¹ Tan Tien Sai’s AEIC at para 3.2.6 and pp 61–64 (BAEIC at pp 93 and 144–147).

¹² SOC (Amendment No. 2) at para 8 (SDB at p 63).

¹³ Tan Tien Sek’s AEIC at para 26 (BAEIC at p 9).

¹⁴ SOC (Amendment No. 2) at para 8(f) (SDB at p 64).

Documents in reliance on the alleged Oral Undertaking.¹⁵ According to the plaintiff, sometime in late 1999 or early 2000, the defendant called the plaintiff, said that he was in deep financial trouble and requested that the plaintiff transfer the One-Tenth Share, to enable the defendant to refinance his bank loan and/or obtain a bigger bank loan. The plaintiff sought TTL's blessing, following which TTL spoke to the brothers. The defendant gave the alleged Oral Undertaking to TTL and the plaintiff. It was only upon the defendant's said undertaking that the plaintiff agreed to transfer his One-Tenth Share.¹⁶ Additionally, despite the Written Documents recording various dates on which they were signed, the plaintiff claims that he visited M/s Lim & Lim only once on 10 May 2000 to sign all the Written Documents.¹⁷

7 The plaintiff also highlights that the defendant had previously mortgaged the Property on several occasions, in support of his case that the defendant sought the transfer because he was in financial difficulty:

- (a) On 20 October 1988, the defendant mortgaged his share in the Property (the "1988 Mortgage").¹⁸
- (b) On 7 July 2000, after the transfer, the defendant mortgaged the Property.¹⁹
- (c) On 5 April 2002, the defendant further mortgaged the Property.²⁰

¹⁵ Plaintiff's Closing Submissions dated 5 December 2022 ("PCS") at para 9.

¹⁶ SOC (Amendment No. 2) at para 7 (SDB at pp 62–63).

¹⁷ SOC (Amendment No. 2) at para 8(e) (SDB at p 64).

¹⁸ Defence (Amendment No. 3) dated 11 February 2022 ("Defence (Amendment No. 3)") at para 8 (SDB at p 93); Reply to Defence (Amendment No. 3) dated 25 February 2022 ("Reply to Defence (Amendment No. 3)") at para 9 (SDB at p 115).

¹⁹ SOC (Amendment No. 2) at para 10(a) (SDB at p 65).

²⁰ SOC (Amendment No. 2) at para 10(a) (SDB at p 65).

8 The defendant disputes the plaintiff’s version of events. The defendant pleads that sometime in or around early 2000, TTL requested that the plaintiff transfer his One-Tenth Share to the defendant. The defendant’s position is that the plaintiff was paid by TTL, but the defendant is not aware of when and how this payment was made.²¹ The defendant further pleads that sometime in or around May 2000 to July 2000, TTL orally informed him that TTL had paid the plaintiff, on behalf of the defendant, for the transfer of the plaintiff’s One-Tenth Share, and that the sale of the plaintiff’s One-Tenth Share to the defendant had been completed.²² On the stand, the defendant gave evidence that from as early as 1995, TTL told the defendant that he had paid the plaintiff for the One-Tenth Share.²³ According to Mdm Ke Xuerong (“Mdm Ke”), the wife of the parties’ half-brother, the late Mr Tan Tien Guan, who was called by the defendant to give evidence, TTL mentioned to her in or around 1997 or 1998 that TTL had paid the plaintiff the market price of his One-Tenth Share.²⁴

Sale of the Property

9 The defendant eventually sold the Property. According to the defendant, he sold the Property on or around 15 December 2017.²⁵ While the plaintiff pleads that the sale of the Property was on or around 19 April 2018,²⁶ on the

²¹ Defence (Amendment No. 3) at paras 9 and 10(b) (SDB at pp 93–94); Tan Tien Sai’s AEIC at para 3.3.3 (BAEIC at pp 94–95).

²² Defence (Amendment No. 3) at para 11 (SDB at p 95).

²³ 27 Oct NE at p 10, line 10 to p 12, line 6.

²⁴ Ke Xuerong’s AEIC at para 2.1.7 (BAEIC at p 63).

²⁵ Defence (Amendment No. 3) at para 26 (SDB at p 98).

²⁶ SOC (Amendment No. 2) at para 10(b) (SDB at p 65); Reply to Defence (Amendment No. 3) at para 16 (SDB at p 116).

stand, he appeared to accept that the sale took place in late 2017.²⁷ The plaintiff claims that the defendant sold the Property for approximately S\$9 to 9.3m.²⁸

Events prior to TTL’s passing

Ms Tan Bee Lee’s conversation with TTL

10 According to the plaintiff and Ms Tan Bee Lee, the latter visited TTL on 17 April 2019.²⁹ During the visit, TTL and Ms Tan Bee Lee discussed the sale of the Property. According to Ms Tan Bee Lee, TTL said that the defendant had sold the Property for S\$9.3m, “complained” that the defendant did not pay the plaintiff for the latter’s share in the property and said that the defendant “must pay” the plaintiff S\$930,000, being the plaintiff’s 10% share in the property.³⁰ Ms Tan Bee Lee recorded the conversation, which was in Hokkien. She produced the recording as part of her evidence (the “Audio Recording”).³¹ The plaintiff and defendant each produced a translated transcript of the Audio Recording (the “plaintiff’s Transcript” produced by the “plaintiff’s transcriber” and the “defendant’s Transcript” produced by the “defendant’s transcriber” respectively).³²

²⁷ 26 Oct NE at p 7, lines 10–12.

²⁸ SOC (Amendment No. 2) at para 10(b) (SDB at p 65).

²⁹ Statement of Claim (Amendment No. 2) at para 17 (SDB at p 67); Tan Bee Lee’s AEIC at para 5 (BAEIC at p 39).

³⁰ Tan Bee Lee’s AEIC at para 6 (BAEIC at p 39).

³¹ Tan Bee Lee’s AEIC at para 7 and p 5 (BAEIC at pp 39 and 42).

³² BAEIC at p 59 (plaintiff’s Transcript) and pp 81–82 (defendant’s Transcript).

The meetings between the plaintiff and the defendant

11 To support his position that he is owed payment of the monetary value of his One-Tenth Share in the Property, the plaintiff cites three separate instances when he had met with the defendant, in the years immediately prior to TTL’s passing:

(a) The plaintiff describes a previous occasion on which he had helped the defendant out, to illustrate the point that he would help out when called upon to do so.³³ According to the plaintiff, on or around 10 April 2017, the defendant called the plaintiff to request S\$2,000 urgently. The brothers met at Parkway Parade, where the plaintiff gave the defendant S\$2,800.³⁴

(b) The plaintiff also refers to two separate occasions on which he had demanded the monetary value of his One-Tenth Share from the defendant:

(i) On or around July 2019, the plaintiff, the defendant and Mr Tan Hian Chye accompanied TTL to a lawyer’s office for matters relating to TTL’s will. The four had lunch at Chinatown Point. During lunch, the plaintiff asked the defendant to return the monetary value of his One-Tenth Share (the “Chinatown Point Meeting”).³⁵ The defendant admits that the parties and Mr Tan Hian Chye accompanied TTL, as the plaintiff pleads, but denies that the plaintiff had made the said demand.³⁶

³³ 25 Oct NE at p 123, line 6 to p 125, line 5.

³⁴ Tan Tien Sek’s AEIC at para 16 (BAEIC at p 7).

³⁵ SOC (Amendment No. 2) at para 10(c)(i) (SDB at p 65).

³⁶ Defence (Amendment No. 3) at paras 28–28B (SDB at p 98).

(ii) On 12 January 2021, the defendant met the plaintiff at People’s Park Centre to discuss TTL’s probate. During the discussion, the plaintiff raised the issue of the monetary value of his One-Tenth Share. The defendant said the plaintiff had no such entitlement. The defendant then left and informed the plaintiff that he would meet the latter the following day at People’s Park Centre, but subsequently did not show up.³⁷ The defendant disputes this. According to the defendant, on 12 January 2021, he met the plaintiff at People’s Park Centre to hand over mail that he had retrieved from the mailbox of one of the units at People’s Park Centre that TTL owned. The plaintiff said to the defendant, in Hokkien, “[w]e are checking on [TTL’s] CPF ... I am going to sue you”. The defendant reminded the plaintiff that the One-Tenth Share had already been sold to the defendant and that TTL had paid S\$320,000. According to the defendant, he asked the plaintiff to confirm that he had received payment from TTL but the plaintiff neither responded to nor denied what the defendant had said.³⁸

12 On 29 January 2021, the plaintiff commenced the present action against the defendant, claiming, in the main, the payment of the monetary value of his One-Tenth Share in the Property.³⁹

³⁷ SOC (Amendment No. 2) at para 10(c)(ii) (SDB at p 65).

³⁸ Defence (Amendment No. 3) at para 29 (SDB at pp 98–99).

³⁹ SOC (Amendment No. 2) at prayer b (SDB at p 68).

The parties' cases

13 The plaintiff's case is premised on the alleged Oral Undertaking, pursuant to which the defendant allegedly promised to pay the monetary value of the One-Tenth share upon the sale of the Property. The plaintiff contends that the Written Documents do not reflect the true arrangement between the parties as there was no intention to create the legal relations that the Written Documents gave the impression of creating. The plaintiff also did not receive S\$320,000 or any other amount from the defendant or from TTL for the transfer of the One-Tenth Share.⁴⁰ I note that the plaintiff does not challenge the validity of the transfer of his One-Tenth Share. Neither does he ask for the transaction to be set aside. Indeed, the plaintiff's claim appears to depend on the validity of the transfer of his One-Tenth Share in 2000, which forms the basis for the alleged Oral Undertaking that he now seeks to enforce. All the plaintiff seeks before this court is to be paid pursuant to the alleged Oral Undertaking, despite the documentary evidence showing that he was already paid for the transfer. The plaintiff's assertions regarding the absence of an intention to create legal relations, and of the lack of payment or consideration for his transfer of his One-Tenth Share in 2000, must therefore be considered in this context.

14 The defendant's defence is that the consideration for the plaintiff's transfer of his One-Tenth Share to the defendant was already pre-paid by TTL on the defendant's behalf,⁴¹ based on what the defendant was told by TTL, and there was no Oral Undertaking as alleged by the plaintiff. The defendant also argues that all evidence of the alleged Oral Undertaking, insofar as it contradicts the SPA, is inadmissible by virtue of the parol evidence rule, as embodied in

⁴⁰ PCS at paras 6–14; SOC (Amendment No. 2) at para 8 (SDB at pp 63–64).

⁴¹ Tan Tien Sai's AEIC at para 3.3.2 (BAEIC at p 94).

ss 93 and 94 of the Evidence Act 1893 (2020 Rev Ed) (the “EA”).⁴² Finally, the defendant contends that the alleged Oral Undertaking is unenforceable pursuant to s 6(d) of the Civil Law Act 1909 (2020 Rev Ed) (the “CLA”).⁴³

Issues to be determined

15 The issues to be determined are as follows:

- (a) whether the alleged Oral Undertaking, if proven, is enforceable, having regard to s 6(d) of the CLA and the doctrine of part performance;
- (b) whether there was an Oral Undertaking as alleged by the plaintiff; and
- (c) whether the Written Documents are a sham.

Whether the alleged Oral Undertaking, if proven, is enforceable

16 I begin by considering the threshold issue, which is whether the alleged Oral Undertaking, if proven, is enforceable. In my judgment, even if the Oral Undertaking as alleged by the plaintiff indeed exists, it will nonetheless offend s 6(d) of the CLA and be unenforceable. The plaintiff has also failed to show that he is able to avail himself of the doctrine of part performance, which is an exception to the requirements under s 6(d) of the CLA.

17 Section 6(d) of the CLA provides that:

No action shall be brought against any person upon any contract for the sale or other disposition of immovable property, or any interest in such property, unless the promise or

⁴² Defendant’s Closing Submissions dated 5 December 2022 (“DCS”) at para 4.1.1.

⁴³ DCS at para 1.2.1(d).

agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person lawfully authorised by him.

18 The alleged Oral Undertaking involves a disposition of the plaintiff's interest in the Property, since it concerns the plaintiff's transfer of his One-Tenth Share to the defendant, allegedly in exchange for the monetary value of that share upon the sale of the Property. There must, therefore, be at least some memorandum or note signed by the defendant, evidencing the alleged Oral Undertaking, in order for the alleged Oral Undertaking to be enforceable. The plaintiff has produced no such memorandum or note. In fact, the plaintiff accepts that the alleged Oral Undertaking is unenforceable under s 6(d) of the CLA for being a contract for the sale or disposition of an interest in immovable property that is not evidenced in writing.⁴⁴

19 The plaintiff argues, however, that he is entitled to rely on the doctrine of part performance as an exception to s 6(d) of the CLA.⁴⁵ He pleads that he “performed his part of the [Oral Undertaking] by signing the [Written Documents] without receiving \$320,000”.⁴⁶ In the plaintiff's written submissions, it is not clear what the plaintiff asserts as the part performance. It can only be presumed that the plaintiff seeks to argue that his signing of the Written Documents and transfer of the One-Tenth Share constitute the part performance.

20 There are two different standards which may be applied to determine whether a promisee's acts constitute sufficient part performance, and, as noted

⁴⁴ PCS at para 143.

⁴⁵ PCS at para 144.

⁴⁶ Reply to Defence (Amendment No. 3) at para 11(a) (SDB at p 116).

by the courts in *Hu Lee Impex Pte Ltd v Lim Aik Seng (trading as Tong Seng Vegetable Trading)* [2013] 4 SLR 176 (“*Hu Lee Impex*”) at [25] and *Pang Moh Yin Patricia and another v Sim Kwai Meng* [2021] SGHC 11 (“*Patricia Pang*”) at [96], the Court of Appeal has not made a definitive pronouncement as to which of the two standards should apply in Singapore. Under the two standards, as examined by the court in *Hu Lee Impex* at [21]–[24], the plaintiff must show either:

- (a) that the acts relied upon as part performance “unequivocally” point towards the existence of a contract fitting the description of the oral contract alleged to exist (*ie*, the standard in *Elizabeth Maddison v John Alderson* (1883) 8 App Cas 467 (“*Maddison*”)); or
- (b) that on an analysis of all the circumstances (but leaving aside evidence of the purported oral contract), it is “more probably than not” that the acts relied upon as part performance were done in reliance on the oral contract alleged to exist (*ie*, the standard in *Steadman v Steadman* [1976] AC 536 (“*Steadman*”)).

21 The High Court in *Hu Lee Impex*, after an analysis of legal developments in England and in Singapore, concluded at [33] that the approach in *Maddison* is to be preferred to that in *Steadman*. In a more recent decision in *Patricia Pang*, the General Division of the High Court set out the historical background leading to the recognition of the doctrine of part performance as an exception to the requirements under s 6(d) of the CLA in Singapore and considered the application of the doctrine of part performance by both Singapore courts and foreign courts. The court similarly concluded that the *Maddison* standard should be applied (*Patricia Pang* at [114]–[115]). In this regard, I note that the appeal from the decision in *Patricia Pang* was allowed in part by the Appellate

Division of the High Court in *Sim Kwai Meng v Pang Moh Yin Patricia and another* [2022] SGHC(A) 1. The Appellate Division, however, did not comment on the learned Judge’s conclusions on the doctrine of part performance, but disposed of the appeal based on an unrelated point. The courts in *Hu Lee Impex* and *Patricia Pang* made the following observations:

(a) There is a need to strike a balance between ensuring that the legislative purpose of s 6(d) of the CLA is not defeated and that the doctrine of part performance achieves its objective of thwarting unconscionable conduct in exploiting the statute. The *Maddison* standard better strikes this balance between the two competing considerations (*Patricia Pang* at [103], citing *Hu Lee Impex* at [32]).

(b) The doctrine of part performance, under Lord Selborne’s rationalisation in *Maddison* (at 475–476), only seeks to enforce the equities generated by a party who has partially performed the alleged oral contract, and does not seek to undermine the formality requirements imposed by statute by enforcing the oral contract itself. The requirement of “unequivocal referability” in *Maddison* specifies the appropriate threshold that a party’s equities must cross in order to justify the enforcement of the same despite the non-compliance of the contract with the requisite statutory formalities. This reason for preferring the *Maddison* standard is aligned with the persuasive reasoning of the seven-judge *coram* of the Australian High Court in *Pipikos v Trayans* [2019] 1 LRC 236 (“*Pipikos*”) at [47]–[49], [51]–[52], [54] and [65], which unanimously held that the *Maddison* standard was preferred (*Patricia Pang* at [104]–[107]).

(c) The doctrine of part performance ought not to be regarded as a free-wheeling creation of equity which can be moulded to deliver “palm-tree justice” in an unprincipled manner. The requirement of “unequivocal referability” in *Maddison* provides a principled limitation on the scope of the doctrine (*Patricia Pang* at [107], citing *Pipikos* at [72]).

(d) *Steadman* is not entirely persuasive as an authority for overturning the *Maddison* standard because the reasoning of the members of the *coram* in *Steadman* was disparate, and none of their Lordships in *Steadman* suggested that the decision involved a departure from the approach of Lord Selborne in *Maddison* (*Patricia Pang* at [111], citing *Pipikos* at [67]–[70]).

(e) The doctrine of part performance was legislatively abolished under English law due to the perceived uncertainty in the law created by the more relaxed standard in *Steadman*. Under the *Steadman* standard, it was difficult to discover, with acceptable certainty, prior to proceedings, whether a contract will be found to be enforceable (*Patricia Pang* at [100]–[103], citing *Hu Lee Impex* at [29]–[33]).

22 The paragraph above at [21] is but a brief summary of the observations and detailed analyses undertaken by the learned Judges in *Hu Lee Impex* and *Patricia Pang*. I am in agreement with the reasons given in those cases for preferring the *Maddison* standard, and I gratefully adopt the same. For completeness, it should be mentioned that the court in *Liberty Sky Investments Ltd v Goh Seng Heng and another* [2019] SGHC 40 (“*Liberty Sky*”), which was referred to in *Patricia Pang* at [97], also applied the *Maddison* standard (*Liberty Sky* at [65]).

23 The plaintiff relies on *Hu Lee Impex* “[i]n addressing the requirements for the doctrine of part performance to apply in Singapore”.⁴⁷ The plaintiff appears to suggest in his submissions that the court in *Hu Lee Impex* held that the *Steadman* standard applied, by reproducing quotes from [24] and [31] of *Hu Lee Impex*.⁴⁸ This submission is incorrect, as the court’s final view that the *Maddison* standard is to be preferred over the *Steadman* standard is stated later at [33] of *Hu Lee Impex*. At [24] and [31] of *Hu Lee Impex*, the court was only presenting the various views that had been expressed concerning the doctrine of part performance, and the court did not endorse those views. Indeed, at the later part of [31], in a portion of that paragraph that was not reproduced in the plaintiff’s closing submissions, the court in *Hu Lee Impex* departed from the view expressed in *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at paragraph 08.164, which was in the portion of [31] that was reproduced in the plaintiff’s closing submissions. Specifically, the court noted that the learned contributors did not take cognisance of the fact that *Steadman* no longer represents the position in English law and that *Steadman* was the impetus for the abolition of the doctrine of part performance under English law.

24 As was held in *Hu Lee Impex* at [34(b)], “the doctrine of part performance requires evidence of *acts* which manifestly speak for themselves [and] [c]ontested evidence of what allegedly transpired at a meeting is manifestly inadequate to cross the hurdle of unequivocalty” [emphasis in original]. In this regard, the court is required to disregard the alleged oral

⁴⁷ PCS at para 138.

⁴⁸ PCS at paras 139–140. While the PCS at para 140 refers to [26] of *Hu Lee Impex*, the quotation reproduced in that paragraph of the closing submissions is found at [24] of *Hu Lee Impex*.

agreement (*Hu Lee Impex* at [34(c)]). Applying the *Maddison* standard to the facts of this case, I find that there is nothing in the plaintiff's signing of the Written Documents and transfer of the One-Tenth Share that unequivocally, and in their own nature, point towards the existence of the alleged Oral Undertaking. On the contrary, the Written Documents themselves, on their face, provide an explanation for the plaintiff's transfer of his One-Tenth Share of the Property to the defendant: the Written Documents state that the transfer of the One-Tenth Share was done in exchange for consideration of S\$320,000.

25 The plaintiff also relies on *Joseph Mathew and another v Singh Chiranjeev and another* [2010] 1 SLR 338 (“*Singh Chiranjeev (CA)*”) and *Singh Chiranjeev and another v Joseph Mathew and others* [2009] 2 SLR(R) 73 (“*Singh Chiranjeev (HC)*”) in support of his invocation of the doctrine of part performance.⁴⁹ In both *Singh Chiranjeev (CA)* and *Singh Chiranjeev (HC)*, it was held that the requirements in s 6(d) of the CLA were satisfied on the facts (*Singh Chiranjeev (CA)* at [41]–[46] and *Singh Chiranjeev (HC)* at [38]). The High Court had also found, assuming *arguendo* that s 6(d) of the CLA was not complied with, that there was part performance of a contract for the sale of a condominium unit by the defendants to the plaintiffs for the sale price of S\$506,000. As noted by the court at [39]–[40], the part performance was the payment of 1% of the sale price and acceptance of the same, evidenced by a cheque for S\$5,060 (on the back of which the full address of the condominium unit was spelt out) issued by the first plaintiff and receipt of that sum by the first defendant. There, the draft option stated that it was to be granted in consideration of the sum of \$5,060 paid by the purchaser as the option money. In the circumstances of *Singh Chiranjeev (CA)* and *Singh Chiranjeev (HC)*, the

⁴⁹ PCS at paras 135–137.

acts of payment and receipt of the S\$5,060 were found to be acts “referable to the [oral] contract to sell the [p]roperty and there was thus part performance” (*Singh Chiranjeev (HC)* at [39]–[40], as reproduced and endorsed in *Singh Chiranjeev (CA)* at [63]–[64]). It can further be seen that the evidence before the courts in *Singh Chiranjeev (CA)* and *Singh Chiranjeev (HC)* was also unequivocal that the acts were done in reliance on the oral contract for the sale of the condominium unit. For the reasons stated above at [24], the present facts are very different from those in *Singh Chiranjeev (CA)* and *Singh Chiranjeev (HC)*, and the fact that the plaintiff signed the Written Documents and transferred his One-Tenth Share to the defendant does not tend to unequivocally show that the plaintiff had done so because he relied on the alleged Oral Undertaking.

26 For completeness, I note that even if the *Steadman* standard was applied, the plaintiff would have failed to show that it is met. As may be seen below, in the context of analysing the evidence *vis-à-vis* whether there was an Oral Undertaking and whether the Written Documents are a sham, the allegations of the plaintiff concerning the circumstances surrounding the signing of the Written Documents are vigorously contested, and the plaintiff’s evidence is manifestly inadequate to show that the Written Documents were executed in reliance on any oral agreement. Thus, on an analysis of all the circumstances (but leaving aside evidence of the Oral Undertaking), it is not more probable than not that the Written Documents were executed in reliance on any oral agreement.

27 The plaintiff therefore cannot rely on the doctrine of part performance to overcome the unenforceability of the alleged Oral Undertaking under s 6(d) of the CLA. The claim of the plaintiff must fail since the alleged Oral Undertaking, even if proven, will be unenforceable.

28 In any event, I find, on the evidence, that the plaintiff has not proven on a balance of probabilities that the defendant gave him the Oral Undertaking as alleged. It is to this that I now turn.

Whether there was an Oral Undertaking as alleged by the plaintiff

29 According to the plaintiff, there was (a) a phone call between himself and the defendant, during which the defendant sought his help and asked for the transfer of his One-Tenth Share; (b) a conversation with TTL to seek TTL's blessing for the transfer; (c) communications between himself, the defendant, and TTL, pursuant to which the alleged Oral Undertaking was given.⁵⁰ In support of this narrative, the plaintiff attempts to show that the defendant was facing financial difficulties in or around 2000 and that there were two instances when the plaintiff had demanded payment from the defendant (see [11] above). However, I note that most of these contentions are bare assertions by the plaintiff that the defendant does not admit to and in respect of which the plaintiff is unable to adduce any evidence.

30 To prove the alleged Oral Undertaking, the plaintiff relies on the following pieces of evidence:⁵¹

- (a) the Audio Recording; and
- (b) the evidence of Ms Tan Sook Har, Ms Tan Seok Phin and Ms Tan Bee Lee.

⁵⁰ Tan Tien Sek's AEIC at paras 18–19 (BAEIC at pp 7–8).

⁵¹ PCS at paras 41 and 68.

The Audio Recording

31 The Audio Recording is one minute and 55 seconds long and records a conversation between Ms Tan Bee Lee and TTL. The pair can be heard conversing in Hokkien.

The Transcriptions

32 In the recording, the following terms are used:⁵²

- (a) “Xiao Tiao” is the plaintiff’s nickname, and “the younger one” refers to the nickname “Xiao Tiao”. It does not refer to the defendant although the defendant is in fact the younger sibling.
- (b) “O Yi” or “Orh Yee” refers to the defendant.
- (c) “Ah Sim” refers to the defendant’s wife.

33 The plaintiff’s Transcript records the conversation as follows:⁵³

0:00 Woman: I am saying Ah Sim leh, because she, I told her to come, she is not free to come, she’s embarrassed, she’s embarrassed.

0:09 Man: Who?

0:10 Woman: Ah Sim.

0:11 Man: What did she say?

0:12 Woman: Ah. And to say, I say she is embarrassed lah hor? Oh, maybe it’s because of this issue lor. Is it?

0:21 Man: Don’t bother about her.

0:23 Woman: Oh ... Then did you tell O Yi already lah, until then he return him, or if don’t return him leh, he will deduct la, is it?

⁵² Tan Tien Sai’s AEIC at para 4.3.8 (BAEIC at p 102); 27 Oct NE at p 78, lines 1–15.

⁵³ BAEIC at p 59.

0:29 Man: *Then I, if is from I here return him ... (inaudible) ... See if he wants to deduct or not. If he doesn't return him, then deduct from his [share, company, account, etc] ... (inaudible) ...*

0:40 Woman: Oh ...

0:41 Man: *O Yi say want to return him.*

0:42 Woman: *O Yi say want to return him la? Oh ... 10% want to return him la?*

Man: *Ah Sim (inaudible).*

0:49 Woman: *Oh, like that har? Good la. Mmm mmm mmm. In that case, it means 10% la hor? Mmmm.*

0:57 Man: *Yeah, 10%. It's 9.3 million, so deduct 930 thousand.*

...

1:18 Man: *If let's say I have previously (inaudible), I ... (inaudible) ... Let see if Xiao Tiao wants. If he wants, by then, O Yi said want to return him. If no return, this here say share, they three of them share. Deduct. This is also good la.*

[emphasis added]

34 The defendant's Transcript reads as follows:⁵⁴

0:00 Lady: *I was saying that Ah Sim, I told her that she should come but she said that she is not free.*

0:06 Man: *Ah.*

Lady: *Oh, she feels embarrassed.*

0:08 Lady: *She is embarrassed.*

0:09 Man: *Who?*

0:10 Lady: *Ah Sim.*

0:11 Man: *What did she say?*

0:12 Lady: *She said that she is not free to come.*

0:13 Man: *(inaudible)*

⁵⁴ BAEIC at pp 81–82.

0:14 Lady: So, I said, she is embarrassed, perhaps it was due to this matter. Is that so?

0:22 Man: You don't have to care about her.

0:25 Lady: Oh, so you had spoken to Orh Yee that he has to pay him when the time comes. else he can deduct it, is that so?

0:29 Man: *But I have paid him from my side ...*

0:31 *See if he still wants to deduct or not. If he did not pay him and he still wants to deduct, then deduct from Orh Yee's share.*

0:41 *But Orh Yee said that he wants to pay him.*

0:42 Lady: Orh Yee said that he wants to pay him.

0:44 10%, to pay him.

0:47 Man: Ah Sim said (inaudible).

0:48 Lady: Oh, I see. Alright.

0:52 So, it is 10% in this case?

0:57 Man: 10%.

9.3 million is 930,000.

...

1:18 Man: *I have already paid him the previous time ... (inaudible). See if the younger one wants to or not. If he wants, by then, if Orh Yee wants to pay him. If he does not pay him, there is still a share among the three of them for deduction. This will also work.*

[emphasis added]

35 There are four main points that may be noted from the Audio Recording. First, TTL said that he had already paid the plaintiff. Second, it was for the plaintiff to decide if he wishes to receive a payment that was the subject of the conversation. Third, the defendant had purportedly said that he “want[ed]” to pay the plaintiff. Fourth, a deduction could be made from the defendant’s share in TTL’s estate should the plaintiff opt for the payment, but the defendant does

not make the payment to the plaintiff. TTL thought that it would be “good”, or it would “also work”, if a deduction is made from TTL’s estate. I elaborate.

TTL said that he had paid the plaintiff for the transfer

36 In the Audio Recording, when Ms Tan Bee Lee brought up the subject of a payment to be made by the defendant to the plaintiff, TTL mentioned that he had previously made payment to the plaintiff. At the 29 second mark, the plaintiff’s Transcript reads, “[t]hen I, if is from I here return him”,⁵⁵ and the defendant’s Transcript reads, “[b]ut I have paid him from my side”.⁵⁶

37 During cross-examination, after listening to replays, including replays at half speed, of the relevant portion of the recording, the plaintiff’s transcriber accepted that the possible translations of that portion of the recording are “I wanted to return him” and “but I already return [*sic*] him”, and that the literal translation would be “but I have already return [*sic*] him”.⁵⁷ I note that the literal translation provided by the plaintiff’s transcriber during cross-examination is consistent with the transcription of the defendant’s transcriber.

38 At or around the one minute 18 second mark, the plaintiff’s Transcript reads, “[i]f let’s say I have previously (inaudible), I ... (inaudible)”,⁵⁸ and the defendant’s Transcript reads, “I have already paid him the previous time ... (inaudible)”.⁵⁹ During cross-examination, the plaintiff’s transcriber confirmed that with the benefit of hearing the recording at half-speed, he could update his

⁵⁵ BAEIC at p 59.

⁵⁶ BAEIC at p 81.

⁵⁷ 21 Oct NE at p 24, line 20 to p 28, line 11 and p 30, lines 3–20.

⁵⁸ BAEIC at p 59.

⁵⁹ BAEIC at p 82.

translation to include what was previously marked inaudible as, “[i]f let’s say I have previously returned him”.⁶⁰ The plaintiff’s transcriber also agreed that this phrase could possibly be translated as “or should I say I have paid him in the past”.⁶¹

39 Counsel for the parties cross-examined the transcribers on the word “if”, which was included only in the plaintiff’s Transcript but not in the defendant’s Transcript, at or around the 29 second mark, right before the statement by TTL that he had returned the moneys to the plaintiff. During cross-examination, the plaintiff’s transcriber explained the reason for including “if” in the plaintiff’s Transcript. Due to the slurring in TTL’s speech in the recording, the words used by TTL were not entirely clear. The plaintiff’s transcriber thus had reference to the context and inferred that TTL was making a conditional statement.⁶²

40 When cross-examining the defendant’s transcriber, counsel for the plaintiff pointed out that the plaintiff’s transcriber included the word “if” in his transcription at the 29 second mark and asked the defendant’s transcriber if he too heard the word “if”. The defendant’s transcriber answered in the negative.⁶³ Counsel for the plaintiff then highlighted to the defendant’s transcriber that in the recording, TTL subsequently spoke of a payment to be made from the defendant to the plaintiff at the one minute 18 second mark, such that it would be “a little hasty” for the defendant’s transcriber to have come to the conclusion that TTL said, at the 29 second mark, that payment had already been made. In

⁶⁰ 21 Oct NE at p 44, lines 4–16.

⁶¹ 21 Oct NE at p 17, line 5 to p 18, line 16.

⁶² 21 Oct NE at p 22, line 12 to p 24, line 10.

⁶³ 28 Oct NE at p 16, lines 15–22.

response, the defendant’s transcriber said that he translated according to what he heard, as he understood it sentence by sentence. He was unable to guess or interpret the sentences in relation to each other.⁶⁴

41 I prefer the defendant’s transcriber’s evidence of what was said at the 29 second mark. It is not for the transcriber to seek to make sense of the conversation based on his own idea of what the context might be, as the plaintiff’s transcriber did by inserting the word “if”, which arguably has the effect of altering the meaning of the sentence in favour of his client. The plaintiff’s transcriber has also shown a propensity to regard as “inaudible” the portions of the conversation that are not in his client’s favour, until he was confronted during cross-examination. In any event, the plaintiff’s transcriber ultimately agreed that a literal translation of the 29 second mark of the recording was “but I have already return [*sic*] him”.⁶⁵

42 The plaintiff’s case is that he was never paid anything for the transfer of the One-Tenth Share.⁶⁶ However, TTL’s words at both the 29 second mark and the one minute and 18 second mark indicate that he had already paid the plaintiff. He also prefaced his statement with the word “but” at the 29 second mark, which appear to give emphasis to the fact that the plaintiff had in fact already been paid.

⁶⁴ 28 Oct NE at p 21, line 5 to p 22, line 11.

⁶⁵ 21 Oct NE at p 29, line 20 to p 30, line 20.

⁶⁶ PCS at paras 49 and 121.

TTL said that the plaintiff could decide if he wishes to receive payment and a deduction could be made from TTL's estate

43 Next, the plaintiff's Transcript at or around the 29 second mark, reads, "... [s]ee if he wants to deduct or not. If he doesn't return him, then deduct from his [*share, company, account, etc*] ... (inaudible)",⁶⁷ and the defendant's Transcript at or around the 31 second mark reads, "[s]ee if he still wants to deduct or not. If he did not pay him and he still wants to deduct, then deduct from Orh Yee's [the defendant's] share".⁶⁸ In relation to his inclusion of the word "still" in the defendant's Transcript, the defendant's transcriber explained that TTL used the Hokkien phrase "*ai ko kau*", in which "*ko*" meant "still" and the phrase as a whole means "if he still wants to deduct".⁶⁹ As an illustration, the defendant's transcriber explained that if one wished to say "if he wants to", one would say "*yi ai kau*", whereas if one wanted to say "if he still wants to", the phrase would be "*yi ai ko kau*".⁷⁰

44 At or around the one minute 18 second mark, what was said here follows from the discussion of the S\$930,000, being 10% of the sale proceeds of the Property, which both transcripts are consistent in interpreting: "[l]et see if Xiao Tiao [the plaintiff] wants. If he wants, by then, O Yi [the defendant] said want to return him. If no return, this here say share, they three of them share. Deduct. This is also good la" and "[s]ee if the younger one [the plaintiff]⁷¹ wants to or not. If he wants, by then, if Orh Yee [the defendant] wants to pay him. If he

⁶⁷ BAEIC at p 59.

⁶⁸ BAEIC at p 81.

⁶⁹ 28 Oct NE at p 31, line 1 to p 32, line 10.

⁷⁰ 28 Oct NE at p 31, line 22 to p 32, line 10.

⁷¹ The plaintiff's nickname, "Xiao Tiao", was mentioned here. "The younger one" refers to the nickname, "Xiao Tiao".

does not pay him, there is still a share among the three of them for deduction. This will also work”. In both sets of transcripts, TTL was recorded at or around the 41 second mark as saying that the defendant wanted to return moneys to the plaintiff or to pay the plaintiff.

45 The plaintiff points out that since right before the one minute 18 second mark, there was a discussion of the S\$930,000, being 10% of the sale proceeds of the Property, and thereafter, a deduction was mentioned, this suggests that the defendant has an outstanding obligation to pay 10% of the sale proceeds of the Property.⁷² The defendant argues that since the Audio Recording shows that TTL had already paid the plaintiff, any further payment from the defendant mentioned would be an “additional, voluntary payment that would be made on top of [TTL’s] prior payment”.⁷³

46 Indeed, as the defendant argues,⁷⁴ TTL only stated that the defendant “want[ed]” to pay the plaintiff, not that the defendant had given an undertaking to pay. There is also nothing in the Audio Recording that suggests that the defendant should have paid the plaintiff after the sale of the Property or ought to pay the plaintiff as he had not done so. In my judgment, the plaintiff’s claim that the defendant is under an obligation of payment is not consistent with the language that TTL used. TTL used language that suggests that the plaintiff could decide if he “wants” to,⁷⁵ or if he “wants to or not”⁷⁶ (at the one minute 18 second mark of the plaintiff’s and defendant’s Transcription), receive payment. This

⁷² PCS at paras 77 to 79.

⁷³ DCS at para 4.3.3(b).

⁷⁴ DCS at para 4.3.2.

⁷⁵ BAEIC at p 59, at the one minute 18 second mark of the plaintiff’s Transcription.

⁷⁶ BAEIC at p 82, at the one minute 18 second mark of the defendant’s Transcription.

verbiage suggests that the payment is contingent upon the plaintiff's inclinations. If moneys are indeed owing to the plaintiff, TTL would not have spoken of the payment in those terms. Unlike what was recorded at the one minute 18 second mark, there is an ambiguity at the 29 second to the 31 second mark as to who "he" refers to in the phrases "... [s]ee if he wants to deduct or not. ..."⁷⁷ (at the 29 second mark of the plaintiff's Transcription) and "[s]ee if he still wants to deduct or not"⁷⁸ (at the 31 second mark of the defendant's Transcription). If "he" at the 29 second to the 31 second mark is taken to refer to the plaintiff, then TTL had spoken in a manner that suggests that the plaintiff might not pursue the option in the event that the defendant fails to make the payment that the defendant purportedly said he wanted to make, particularly when TTL alluded to how the plaintiff might "still" want to make the said deduction if that were to happen. Even if "he" at the 29 second to the 31 second mark is understood to refer to the defendant, that interpretation would still not assist the plaintiff's case as that reading gives the defendant the choice to deduct or not. If, indeed, the defendant is obligated to pay the plaintiff, the deduction would logically not be optional. I therefore find the Audio Recording to be inconsistent with the plaintiff's case that there was a binding oral agreement *obligating* the defendant to pay the plaintiff. Had the defendant been bound by an obligation to pay the plaintiff, the payment referred to in the conversation would not be dependent on the plaintiff's inclination to receive payment or the defendant's inclination to make payment. This is because it would follow as a natural consequence to a binding oral agreement for the plaintiff to receive payment and for the defendant to have to pay the plaintiff.

⁷⁷ BAEIC at p 59, at the 29 second mark of the plaintiff's Transcription.

⁷⁸ BAEIC at p 81, at the 31 second mark of the defendant's Transcription.

47 Further, I take the view that there is nothing in either set of transcriptions that suggests that the payment that the defendant purportedly “want[ed]” to make to the plaintiff (which payment I shall henceforth refer to as the “optional payment”) is for moneys that are owing by the defendant to the plaintiff under a binding oral agreement. Indeed, the tone and tenor of the conversation is consistent with what the defendant has argued. In my judgment, the mention of the optional payment could allude to a potential payment of S\$930,000 to the plaintiff, after the sale of the Property, but this would be a further payment in addition to what TTL had already paid the plaintiff.

TTL said that the defendant “want[ed]” to pay the plaintiff

48 Even if TTL’s words go towards showing that the defendant might have indicated that he wanted to pay the plaintiff, this does not in and of itself prove the existence of the alleged Oral Undertaking. The contents of the transcriptions do not provide sufficient information to explain the defendant’s purported indication that he “wants” to pay the plaintiff. It cannot be extrapolated to mean that there was a binding oral agreement between the plaintiff and the defendant based on the evidence before the court. The defendant may “want” to pay for any number of reasons, and the existence of the Oral Undertaking is *only one of the possible extrapolations* that may be made from the statements in the transcript. Simply put, there is insufficient evidence for the court to come to the conclusion that the defendant must have “want[ed]” to pay the plaintiff because there was a binding oral agreement to pay the plaintiff 10% of the sale proceeds of the Property.

Further observations

49 I further observe that in the Audio Recording, there was no complaint by TTL about the defendant, contrary to what Ms Tan Bee Lee asserts. At no

point in time during the course of the conversation was TTL critical of the defendant for not paying the plaintiff the monetary value of the latter's One-Tenth Share in the Property after the sale of the Property. This contradicts the evidence of Ms Tan Sook Har that TTL "regularly ... complain[ed] that [the defendant] had not yet paid [the plaintiff] for his 10% share in the Property".⁷⁹ Further, insofar as the conversation in the Audio Recording went, it is not consistent with the impression given in the evidence of Ms Tan Sook Har and Ms Tan Seok Phin, which is that TTL was dissatisfied with the defendant for not paying what he owed to the plaintiff and that TTL had regularly complained about that.⁸⁰ In my view, the possible deduction in favour of the plaintiff in the event that the defendant does not make the optional payment appears to be an expression of the patriarch's wishes for his estate to make that optional payment if it is not made by the defendant or if it is not paid from the defendant's share of TTL's estate.

50 It is apt at this juncture to reiterate that the plaintiff's case is that he has never been paid by anyone for the transfer of his One-Tenth Share; it is not his case that he has been paid, but there is an agreement for the optional payment to be made. The mention of the optional payment does not, therefore, serve to advance the plaintiff's case.

51 Additionally, as the defendant argues,⁸¹ the Audio Recording appears to be made under suspicious circumstances, which calls into question the reliability of the recording as evidence supporting the existence of the alleged

⁷⁹ Tan Sook Har's AEIC at para 8 (BAEIC at p 31).

⁸⁰ Tan Sook Har's AEIC at para 8 (BAEIC at p 31); Tan Seok Phin's AEIC at paras 6–7 (BAEIC at p 35).

⁸¹ DCS at para 4.2.1.

Oral Undertaking. First, I observe that, as accepted by Ms Tan Bee Lee, her voice was louder than that of TTL and this was because Ms Tan Bee Lee's phone was placed closer to her than to TTL.⁸² Second, it is evident from the transcripts that Ms Tan Bee Lee initiated the discussion about the Property. At the very start of the recording, the pair were speaking about the defendant's wife, and the first mention of the Property was by Ms Tan Bee Lee. She appears to be leading TTL to say that the defendant had an obligation to pay the plaintiff when she said, "... so you had spoken to [the defendant] that he has to pay him when the time comes ...".⁸³ She was also the one to bring up the 10% payment. In my assessment, it is evident that Ms Tan Bee Lee was guiding the conversation towards the topic of the payment for the plaintiff's One-Tenth Share. She tried, but was not successful, in leading the conversation towards the conclusion that the defendant is obligated under an undertaking to pay the plaintiff. Indeed, TTL's response to her was "but" he had already paid the plaintiff (see [37] above). Although Ms Tan Bee Lee explained that this Audio Recording was made because she had just purchased a new mobile phone and was fiddling with the phone to show TTL how to use it to record,⁸⁴ I find this explanation to be unconvincing and I do not believe her explanation.

52 Further, I consider that on the available evidence, TTL's conduct at the time of the Audio Recording and thereafter is inconsistent with the plaintiff's case that TTL took the view that the defendant had an outstanding obligation to pay the plaintiff for the One-Tenth Share. First, as observed above at [49], TTL did not make any negative remarks about the defendant in the Audio Recording,

⁸² 20 Oct NE at p 23, lines 3–23.

⁸³ BAEIC at p 81, at the 25 second mark of the defendant's Transcription.

⁸⁴ 20 Oct NE at p 22, lines 2–14.

as Ms Tan Bee Lee accepted.⁸⁵ Second, I note that the brothers and TTL made a trip to TTL's lawyer's office on the day of the Chinatown Point Meeting on 4 July 2019 to settle his will. There is no evidence that TTL made any arrangement to see to it that any alleged outstanding payment from the defendant would be made to the plaintiff. If what the sisters and the plaintiff said on the stand were true – and in particular, the plaintiff testified that TTL was the one who encouraged him many times to ask for payment from the defendant⁸⁶ – it is puzzling why TTL had not brought the matter up on that occasion.

53 On 4 July 2019, after the trip to the lawyer's office, the plaintiff made a video recording of himself walking with TTL.⁸⁷ It is reasonable to infer that at this point, which was after 17 April 2019 when the Audio Recording was made, the plaintiff would have been alive to the option of making a recording of TTL saying something about the payment that the plaintiff now claims is due from the defendant. The plaintiff, despite having made a recording of himself walking with TTL that day, does not have any recording of TTL saying that the defendant should pay the plaintiff under the alleged Oral Undertaking. The plaintiff also did not make any attempts to gather any other evidence that could have been obtained when TTL was alive, nor did he raise the issue of the payment that he said was due to him at the lawyer's office when the father and sons attended for the purpose of settling the will of TTL,⁸⁸ which would have

⁸⁵ 20 Oct NE at p 41, lines 6–9.

⁸⁶ 25 Oct NE at p 35, line 24 to p 37, line 3.

⁸⁷ Tan Tien Sek's AEIC at para 35(a) (BAEIC at p 11).

⁸⁸ Tan Tien Sek's AEIC at para 35(a) (BAIEC at p 11); Tan Tien Sai's AEIC at paras 3.4.3–3.4.4 (BAEIC at p 96–97).

been an opportune occasion for matters relating to the distribution of TTL’s assets to be raised and discussed.

54 In the circumstances, I find that the Audio Recording does not support, and in fact contradicts, the plaintiff’s case.

The sisters’ evidence

55 I set out the relevant portions of the evidence of the parties’ sisters, relied upon by the plaintiff.⁸⁹ Ms Tan Sook Har testified that:⁹⁰

As instructed by my father ... [the defendant’s] property was worth more. [The plaintiff’s] property was not worth as much. So my father instructed [the defendant], when you sell the property you must give 10 per cent to [the plaintiff].

56 In the same vein, Ms Tan Seok Phin testified that:⁹¹

My father said if the property is sold, [the defendant] would have to pay [the plaintiff] 10 per cent.

57 Ms Tan Bee Lee similarly testified that:⁹²

My father said, after [the defendant] sell [sic] the property, he must give [the plaintiff] 10 per cent.

58 In my judgment, the sisters’ testimonies are (a) not supported by what was said by TTL in the Audio Recording; and (b) must be viewed in context. First, as already explained at [42], TTL mentioned twice in the Audio Recording that he had paid the plaintiff. Second, at no point did TTL say in the Audio Recording that the defendant “must” or “would have to” give or pay 10 per cent

⁸⁹ PCS at paras 42, 45–46.

⁹⁰ 19 Oct NE at p 56, lines 20–24.

⁹¹ 19 Oct NE at p 91, lines 8–9.

⁹² 20 Oct NE at p 32, lines 7–8.

of the sale proceeds to the plaintiff. Third, it appears that none of the sisters were made aware or have proper information of the transfer of the One-Tenth Share. Ms Tan Sook Har stated expressly during cross-examination that she did not know of any transfer of property by the plaintiff to the defendant.⁹³ She disavowed paragraph five of her Affidavit of Evidence-in-Chief (“AEIC”), in which she had stated that her father had told her about the plaintiff’s transfer of his One-Tenth Share.⁹⁴ Ms Tan Seok Phin admitted that she did not know of the parties’ arrangement in the year 2000 in relation to the Property.⁹⁵ Ms Tan Bee Lee similarly did not have the benefit of the knowledge of the transfer of the One-Tenth Share from the plaintiff to the defendant in 2000.⁹⁶

59 After considering the evidence given by the sisters in their AEICs as supplemented by their testimony under cross-examination, it would appear that their belief that the plaintiff was entitled to the monetary value of the One-Tenth Share upon the sale of the Property was premised on an incomplete knowledge or understanding of the dealings between the plaintiff and the defendant. It is clear that the sisters knew that TTL had given 10% of the Property to the plaintiff, but they were unfamiliar with, or even unaware of, the sale and transfer of the One-Tenth Share *via* the Written Documents to the defendant in 2000. The reliability of their evidence as proof of the alleged Oral Undertaking that

⁹³ 19 Oct NE at p 55, line 17 to p 59, line 4.

⁹⁴ 19 Oct NE at p 58, lines 12–22.

⁹⁵ 19 Oct NE at p 89, lines 2–21.

⁹⁶ 20 Oct NE at p 15, line 10 to p 19, line 12.

was supposedly given in exchange for the transfer of the plaintiff's One-Tenth Share is therefore called into question.

Mdm Ke's evidence

60 Mdm Ke, as earlier mentioned at [8], is TTL's daughter-in-law. She and her late husband lived in close proximity to TTL, initially staying together with TTL at the latter's home in People's Park Centre and thereafter in units in the same block as or near TTL's home. Her late husband worked as a traditional Chinese medical practitioner together with TTL at TTL's clinic, while Mdm Ke helped as an assistant at the clinic and assisted TTL as his caretaker. Mdm Ke was in regular contact with TTL for around 13 years.⁹⁷

61 According to Mdm Ke, TTL spoke to her often about matters concerning the extended family. Mdm Ke's evidence is that around 1997 or 1998, TTL told her that he had paid the plaintiff the market price of his One-Tenth Share in the Property. She explained that TTL said that he wanted to avoid any dispute arising between his sons in the future on the allocation of TTL's properties. She stated that she had never heard TTL complain about the plaintiff not having been paid for the One-Tenth Share.⁹⁸

62 I pause to note the plaintiff's argument that Mdm Ke's evidence is not credible on account of (a) inconsistency in her testimony regarding whether she had met members of the Tan family prior to her marriage; (b) her inability to recall the address of the Property; and (c) her lack of knowledge as to when TTL had paid the plaintiff.⁹⁹ I cannot agree with the plaintiff. The first point is

⁹⁷ Ke Xuerong's AEIC at paras 2.1.1–2.1.3 (BAEIC at p 62).

⁹⁸ Ke Xuerong's AEIC at paras 2.1.5–2.1.7 (BAEIC at p 63).

⁹⁹ PCS at paras 53–64.

irrelevant to the case at hand while the third point involves details that are understandably not within Mdm Ke's knowledge. As for the second point, although she could not provide the exact address, Mdm Ke was able to describe the location of the Property.¹⁰⁰ In any event, none of these matters detract from her lucid and firm testimony that TTL told her that he had paid the plaintiff, nor her credibility as someone who interacted regularly and worked closely with TTL.

63 In light of all the available evidence, I have come to the view that the plaintiff was in fact already paid by TTL for his One-Tenth Share in the Property, even before the execution of the Written Documents in 2000. Therefore, the plaintiff did not transfer his One-Tenth Share in reliance on any alleged Oral Undertaking from the defendant, as the consideration for the transfer had in fact been earlier furnished by TTL. Although in the Audio Recording there is a reference to the optional payment that the defendant had purportedly agreed to make, it does not assist the plaintiff's case. The plaintiff's case is that he was never paid by anyone for the transfer, not that he has been paid and is owed a further payment, as mentioned above at [50]. It is also unclear, on the available evidence, whether the defendant had in fact agreed to make the optional payment and if there was such an agreement, what the terms, such as the consideration, for that payment may be. As there is no claim for the optional payment, I say no more about it. I conclude that the plaintiff has not proven on a balance of probabilities that the defendant gave him the Oral Undertaking as alleged.

¹⁰⁰ 26 Oct NE at p 88, lines 15–24.

Whether the Written Documents are a sham

64 The plaintiff’s position is that the Written Documents are a sham. A sham is “a provision or agreement which the parties do not really intend to be effective, but have merely entered into for the purpose of leading the court or a third party to believe that it is to be effective”; in other words, the crux of a sham lies in a common intention to mislead, such intention pertaining to the subjective intentions of the parties involved (*Chng Bee Kheng and another (executrixes and trustees of the estate of Fock Poh Kum, deceased) v Chng Eng Chye* [2013] 2 SLR 715 (“*Chng Bee Kheng*”) at [50] and [52]). There is a “very strong presumption” that the parties intend to be bound by the terms of an agreement that they enter into (*Chng Bee Kheng* at [51]). As the party alleging the sham, the plaintiff bears the legal burden of proving that the Written Documents are a sham (*Toh Eng Tiah v Jiang Angelina and another appeal* [2021] 1 SLR 1176 (“*Toh Eng Tiah*”) at [80]).

65 To ascertain whether the documents represent the true relationship between the parties, the court looks to (a) whether the documents were intended to create legal relationships; and (b) whether the parties did actually act according to the apparent purpose and tenor of the documents (*Koon Seng Construction Pte Ltd v Chenab Contractor Pte Ltd and another* [2008] 1 SLR(R) 375 at [64], citing *TKM (Singapore) Pte Ltd v Export Credit Insurance Corp of Singapore Ltd* [1992] 2 SLR(R) 858 at [48]).

66 The plaintiff did not plead any specific facts nor lead any evidence to show that the plaintiff and the defendant did not really intend the Written Documents to be effective, but have merely executed the said documents for the purpose of leading the court or a third party to believe that the documents were to be effective. The plaintiff also did not identify anyone whom he and/or the

defendant sought to mislead when the Written Documents were executed. In fact, the plaintiff did not even admit to having formed an intention with the defendant to mislead or deceive anyone when he signed the Written Documents. Instead, the plaintiff merely alleges that because the defendant requested the transfer of the plaintiff's One-Tenth Share to enable the defendant to refinance the defendant's bank loan and/or obtain a bigger bank loan in 2000, the plaintiff accordingly transferred the One-Tenth Share in reliance on the alleged Oral Undertaking, without receipt of any consideration.

67 To support his allegation of a sham, the plaintiff relies on the following arguments:¹⁰¹

- (a) there is a presumption that an intention to create legal relations is generally absent in social and domestic arrangements because these agreements are usually made on the basis of natural love and affection;
- (b) the parties did not comply with certain key clauses in the SPA and, importantly, the plaintiff did not receive payment of any consideration unlike what is recorded in the Written Documents; and
- (c) the plaintiff did not rely on the terms of the SPA but instead relied on the alleged Oral Undertaking, such that the SPA was simply to effect the transfer and did not reflect the actual terms agreed upon.

68 First, I reject the plaintiff's argument that there was no intention to create legal relations when the Written Documents were executed. In my view, the

¹⁰¹ PCS at paras 23–28 and 120–122.

presumption that an intention to create legal relations is generally absent in social and domestic arrangements is inappropriate on the present facts. According to the defendant, the parties had not been on speaking terms since around 1982, after a business partnership between them failed.¹⁰² The plaintiff confirmed that the parties had worked together in an electronics business in the 1980s and the plaintiff had called off the business as he felt that if things were to continue, “it would come to a point that there would be a lot of unhappiness” such that it was “best that we stop it”.¹⁰³ The plaintiff’s own description of his relationship with the defendant shows that the parties were not on talking terms since the 1990s:¹⁰⁴

Q: Okay, well, my instructions are that Mr Tan Tien Sai moved into his One Tree Hill property from 1991 to 1993. And I think we have established that you didn’t know when he moved in at all –

A: Ah –

Q: ... So it sounds like the two of you are not on talking terms even since the 1990s. Is that correct?

A: It is not really on good talking term at all. ...

Q: ... So from the 1990s onwards, it was not really on good talking terms at all, correct?

A: *Not at all until ... the encounter that he call [sic] me for help to sign over the 10 per cent ownership, in year 2000 when I go and sign. And it was again another quiet period, until 2014 when the whole family did an ancestor visit in China ...*

[emphasis added]

¹⁰² Defence (Amendment No. 3) at para 12 (SDB at p 95).

¹⁰³ 21 Oct NE at p 120, lines 7–15.

¹⁰⁴ 21 Oct NE at p 131, line 19 to p 132, line 9.

69 As stated by the Court of Appeal in *Ong Wui Teck (personal representative of the estate of Chew Chen Chin, deceased) v Ong Wui Swoon and another and another appeal* [2019] SGCA 61 at [46], the presumption may be inappropriate “where parties are estranged notwithstanding their family ties, because they can no longer be assumed to trust the other to fulfil his or her promise on the basis of their natural love and affection”. The present case appears to be precisely such a scenario. The plaintiff himself gave evidence that, at the signing of the Written Documents on 10 May 2000, the parties did not speak at all,¹⁰⁵ further indicating the estranged relationship at the point of executing the Written Documents. Also, the context in which the Written Documents were executed suggests that the parties intended to create legal relations. The plaintiff signed the documents, which included the Statutory Declaration (see [5] above), at a lawyer’s office. He testified at trial that he understood, at the time, that he was executing proper and valid legal documents.¹⁰⁶

70 I pause here to note that in the plaintiff’s AEIC, he stated that he spoke with the defendant at the lawyer’s office and the defendant said the S\$320,000 stipulated in the SPA was merely a number for completing the transfer and not meant to reflect the alleged Oral Undertaking.¹⁰⁷ At trial, the plaintiff stated that on that day, he just “signed and walk[ed] off” and “didn’t have words [*sic*] with [the defendant]”.¹⁰⁸ The plaintiff’s evidence is therefore inconsistent between that in his AEIC and at trial. This inconsistency relates to an important aspect

¹⁰⁵ 25 Oct NE at p 13 lines 16–25.

¹⁰⁶ 21 Oct NE at p 104, lines 11–17; p 133, line 16 to p 134, line 1; p 141, line 6 to p 142, line 12; p 148, line 15 to p 149, line 2; p 151, line 19 to p 153, line 19.

¹⁰⁷ Tan Tien Sek’s AEIC at para 22 (BAEIC at p 8).

¹⁰⁸ 21 Oct NE at p 104, lines 23–25 and p 105, lines 20–23.

of his case as to whether the alleged Oral Undertaking was given by the defendant, and casts some doubt on the credibility of the plaintiff's evidence.

71 I also note that given the state of the parties' relationship, it is difficult to conceive that the pair had any common intention to collude and deceive or mislead a third party. Indeed, the plaintiff has not shown any such plan between the two. In view of the state of the relationship between the plaintiff and the defendant, I also find it hard to believe that the plaintiff would agree to transfer his One-Tenth Share based solely on an agreement that was never documented. Further, the transfer and the alleged Oral Undertaking appears not even to have been mentioned by the plaintiff to anyone other than TTL. Even the sisters who were called by the plaintiff to give evidence were never informed by the plaintiff. To conclude this point, I find that it is inappropriate to apply the presumption that the parties did not intend to create legal relations. I also find that the plaintiff has not shown that there was no intention to create legal relations when the parties executed the Written Documents.

72 Second, I address the plaintiff's arguments that the key terms of the SPA were not followed and instead, the alleged Oral Undertaking is the real agreement between the parties. The plaintiff points to clauses 2, 4 and 10 of the SPA, which state that the defendant is to pay S\$32,000 as a deposit to the plaintiff and that upon completion of the sale, the defendant is to pay the balance of the purchase price of S\$320,000 to the plaintiff.¹⁰⁹ He argues that these clauses are "inconsistent with the [d]efendant's position that TTL had pre-paid for the [S\$320,000] before 8 July 2000 and prior to the execution of the [Written Documents]". Further, it is the plaintiff's position that he did not receive the

¹⁰⁹ Agreed Core Bundle of Documents ("ACB") at pp 31–32.

S\$320,000.¹¹⁰ In essence, the plaintiff raises the alleged non-compliance with all these clauses to bolster his claim that he has not been paid for the transfer of his One-Tenth Share because there was an oral undertaking by the defendant to pay him the monetary value of the One-Tenth Share once the Property is sold. I reiterate that the plaintiff did not challenge the validity of the transfer of his One-Tenth Share pursuant to the Written Documents. This is inconsistent with his argument that the Written Documents are a sham, since a sham provision or agreement is one which the parties do not really intend to be effective, per *Chng Bee Kheng* as set out above at [64].

73 In my judgment, there is nothing in the evidence to show that in executing the Written Documents, the parties had a common intention to mislead. Even if it were shown that the defendant did not comply strictly with the terms in the SPA, that in and of itself may not be sufficient to prove the sham alleged. Non-payment alone might well just indicate a breach of a payment obligation and not necessarily indicate a sham (*Akfel Commodities Turkey Holding Anonim Sirketi v Townsend, Adam* [2019] 2 SLR 412 at [55]). While it is true that the defendant has no documentary evidence showing that payment was made to the plaintiff,¹¹¹ nor does the defendant know when or how TTL paid the plaintiff,¹¹² the burden does not lie on the defendant to prove the payment. Rather, it is the plaintiff's burden to prove the sham as he alleges. In any event, I have already found at [63] that TTL had paid the plaintiff for the transfer. As for what the plaintiff alleges to be the true agreement intended in place of the Written Documents, I have already found at [63] that there was no Oral Undertaking as alleged by the plaintiff. Therefore, having regard to

¹¹⁰ PCS at paras 24–27.

¹¹¹ 27 Oct NE at p 8, lines 6–18.

¹¹² Defence (Amendment No. 3) at para 10(b) (SDB at p 94).

whether the parties did act according to the apparent purpose and tenor of the documents, being one of the considerations for ascertaining whether the documents represent the true relationship between the parties, I find that the plaintiff has failed to show the Written Documents to be a sham. The intention of the parties was to effect the transfer of the One-Tenth Share from the plaintiff to the defendant, and the parties had conducted themselves in line with the transaction embodied in the Written Documents

74 Finally, the plaintiff claims that the defendant sought the transfer because he was in deep financial trouble and wanted to refinance his bank loans and/or obtain a bigger bank loan.¹¹³ To show this, the plaintiff points to the three instances where the defendant mortgaged the Property (see above at [7]).

75 The defendant accepts that the Property was mortgaged in 1988 for a loan of S\$450,000 (*ie*, the 1988 Mortgage). However, he argues that the fact that he mortgaged the Property did not show that he was in financial difficulty. Rather, he argues that his business in Cinestar Film and Video Pte Ltd (“Cinestar”), was “operating very well”.¹¹⁴ According to the defendant, he was able to pay off the loan under the 1988 Mortgage in 1996 and the bank was willing to provide an additional line of credit under the mortgage.¹¹⁵ The defendant produced a letter dated 22 July 1996 from M/s Lim & Lim (the “1996 Lim & Lim Letter”) in support of his contention. I reproduce the pertinent parts of the letter:¹¹⁶

As spoken ... we shall be grateful if you could furnish us with your particulars ... as well as your brother’s particulars to

¹¹³ Tan Tien Sek’s AEIC at para 18 (BAEIC at p 7).

¹¹⁴ DCS at para 3.4.4.

¹¹⁵ DCS at para 3.4.2(a).

¹¹⁶ ACB at p 108.

enable us to prepare the Sale and Purchase Agreement between yourself and your brother for the purchase of your brother's 1/10 share in the above property [stated in the letter to be the Property] to you. Please confirm that the sale price is \$320,000 as earlier advised by you.

In the meantime, we enclose herewith a copy of our letter of even date to Tat Lee Bank Limited ... relating to the redemption of the existing mortgage for your information.

We have received the fresh Letter of Offer dated 4/1/96 from Tat Lee Bank Ltd and instructions from the Bank's legal department ...

76 There is insufficient evidence for the court to assess the state of the defendant's financial position in 2000. But what may be observed from the 1996 Lim & Lim Letter is that steps were taken to effect the transfer of the One-Tenth Share from as early as 1996, which was much earlier than 2000, the year in which the plaintiff claims he received a call from the defendant asking for the transfer due to alleged financial difficulties. In the same vein, the defendant has adduced drafts of the SPA dated 1996 and 1998, which he states were prepared in accordance with TTL's instructions, but which were not executed due to the plaintiff's lack of cooperation.¹¹⁷

77 Mdm Ke's evidence also supports the defendant's version of events. She testified that TTL was concerned that the plaintiff's One-Tenth Share may subsequently result in disputes with the defendant and TTL therefore arranged for the sale of the One-Tenth Share to facilitate a clean break.¹¹⁸ This is consistent with what the plaintiff accepted during cross-examination, which is that TTL held the ballot to ensure that there would not be quarrels about which

¹¹⁷ Tan Tien Sai's AEIC at paras 3.1.3–3.1.4 and pp 48–53 (BAEIC at pp 91 and 131–136).

¹¹⁸ 26 Oct NE at p 89, lines 3–8 and p 89, line 20 to p 90, line 4.

son should get which property.¹¹⁹ Mdm Ke also gave evidence that TTL told her as early as in 1997 that he had paid the plaintiff for the transfer.¹²⁰ These pieces of evidence, especially with regard to the timing of the various events, do not support the plaintiff's narrative that the transfer was prompted by the financial difficulties that the defendant was facing in 2000.

78 In light of all the available evidence, I find that the plaintiff has failed to show that the parties had a common intention to execute the Written Documents so as to give a false appearance of creating, between the parties, legal rights and obligations different from those actually intended.

79 I note that the defendant takes the position that the plaintiff is precluded from relying on any evidence as to the alleged Oral Undertaking, insofar as it is used to contradict the SPA terms, pursuant to the parol evidence rule as embodied in ss 93 and 94 of the EA.¹²¹ However, it was held by the Court of Appeal in *Toh Eng Tiah* at [70]–[71] and [77] that where the allegation is that the agreement was a sham, that goes to the very existence of the contract. The issue of whether there is a sham is therefore prior to and will necessarily not engage ss 93 and 94 of the EA, which pertain to a situation where there is a contract and where the proof of the terms of the contract is in issue. I have therefore considered all the evidence before the court before coming to the conclusion that the plaintiff has failed to prove that the Written Documents are a sham. Having found that there was no Oral Undertaking which the plaintiff alleges forms the basis of the sham, the issue as to whether ss 93 and 94 of the

¹¹⁹ 21 Oct NE at p 88, lines 7–16.

¹²⁰ Ke Xuerong's AEIC at para 2.1.7 (BAEIC at p 63).

¹²¹ DCS at para 4.1.1.

EA are engaged is now moot because there is nothing to contradict or vary the Written Documents.

Conclusion

80 In view of the foregoing, the plaintiff has failed to prove that the Written Documents are a sham and failed to prove the alleged Oral Undertaking, which in any event would have been unenforceable pursuant to s 6(d) of the CLA. The plaintiff therefore has no basis for claiming that he is entitled to the monetary value of the One-Tenth Share in the Property. Accordingly, I dismiss the claim. I will hear the parties on the issue of costs separately.

Teh Hwee Hwee
Judicial Commissioner

Patrick Fernandez and Mohamed Arshad bin Mohamed Tahir
(Fernandez LLC) for the plaintiff;
Joseph Tay Weiwen, Lai Wei Kang Louis, Tan Kah Wai and Tan
Wei Sze (Shook Lin & Bok LLP) for the defendant.
