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

[2022] SGHC(A) 37

Civil Appeal No 20 of 2022

Between

Ma Binxiang

… *Appellant*

And

Hainan Hui Bang Construction Investment Group Ltd

… *Respondent*

In the matter of Suit No 242 of 2019

Between

Hainan Hui Bang Construction Investment Group Ltd

… *Plaintiff*

And

Ma Binxiang

… *Defendant*

JUDGMENT

[Contract — Formation]
[Evidence — Proof of Evidence — Standard of proof]

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Ma Binxiang
v
Hainan Hui Bang Construction Investment Group Ltd

[2022] SGHC(A) 37

Appellate Division of the High Court — Civil Appeal No 20 of 2022
Woo Bih Li JAD, Quentin Loh JAD and Hoo Sheau Peng J
17 August 2022

27 October 2022 Judgment reserved.

Woo Bih Li JAD (delivering the judgment of the court):

1 This appeal arises from the decision of the Judge of the General Division of the High Court (the "Judge") in *Hainan Hui Bang Construction Investment Group Ltd v Ma Binxiang* [2022] SGHC 13 (the "*Judgment*") and it concerns a dispute between Hainan Hui Bang Construction Investment Group Ltd ("HHBC"), a company incorporated in the People's Republic of China ("PRC") and Ma Binxiang ("Mr Ma"), a PRC national. From October 2010 to March 2018, Mr Ma was an employee of Weiye Holdings Limited ("Weiye"), a company incorporated in Singapore which is principally based in the PRC. Since then, Mr Ma has been running his own investment company.

Background facts

The transfer of the Sum to Mr Ma in 2015

2 The dispute revolves around S$1,784,350 (the "Sum") that HHBC caused certain intermediaries (the "Intermediaries") to transfer to Mr Ma. HHBC claims that sometime between early to mid-2015, one Mr Li Keyi ("Mr Li") (on behalf of HHBC) and Mr Ma entered into an oral "Investment Agreement", under which Mr Ma was to invest in stocks in Singapore and/or Hong Kong on behalf of HHBC. For context, Mr Ma and Mr Li had met in or around 2012 when both of them were working at Weiye. They became friends and remained so after Mr Li left Weiye to join HHBC as a director in 2013 or 2014.

3 It was and remains uncontroversial that the Sum was transferred in ten tranches by the Intermediaries over 36 days from 30 March 2015 to 4 May 2015 to Mr Ma's UOB account in Singapore (the "UOB Account"). The four Intermediaries were Mr Li, Mr Liu Hongen, Max Fill International Limited ("Max Fill") and Well Fai International Limited ("Well Fai"). HHBC claimed to have entered into loan agreements with the Intermediaries, at an interest rate of 12% *per* annum, to procure the transfer of the Sum to Mr Ma. In addition, HHBC alleged that Mr Ma had used two other accounts to manage the investments: one with China Construction Bank (Asia) Hong Kong (the "CCB Account"), and, another with KGI Securities (Singapore) Pte Ltd (the "KGI Account"). Where necessary, we will refer to the UOB Account and these two other accounts, collectively, as the "Accounts".

4 On the other hand, Mr Ma alleged that the Sum was transferred to him pursuant to a different oral agreement formed earlier in December 2014 between

Mr Ma and one Mr Zhang Wei ("Mr Zhang"). At the material time, Mr Zhang was the chairman of Weiye's board of directors and HHBC's "Supervisor" (a position in PRC law that entails exercising supervisory functions over a company's directors and senior management).

5 Mr Ma gave evidence that he was thinking of leaving Weiye at the end of 2014 to set up his own investment firm to manage investments of about RMB100m. He informed Mr Zhang of this. According to Mr Ma, Mr Zhang asked him to stay on at Weiye and provide him with investment consultancy and management services. In exchange for the commissions and returns he would have had to give up by staying in Weiye, Mr Zhang would pay Mr Ma a single lump sum of RMB9m (*ie*, 3% *per* annum on RMB100m over three years). Mr Ma agreed. The Judge referred to this alleged oral agreement as "Zhang Wei's Arrangement" (see the *Judgment* at [17]). Hence, under Mr Ma's case, the Sum was transferred on the instruction of Mr Zhang (not HHBC) to Mr Ma's UOB Account in Singapore. The Sum, denominated in Singapore dollars, was supposedly the equivalent of RMB9m.

Execution of the Declaration in 2018

6 According to HHBC, between January and March 2018, Mr Li heard that Mr Ma was being investigated by Weiye. Mr Li discussed this with HHBC's president and legal representative, Mr Wang Xianzhou ("Mr Wang"). HHBC decided to terminate the Investment Agreement and retrieve the Sum and any investment returns (the "Investment Returns") from Mr Ma. However, when Mr Li spoke to Mr Ma about returning these moneys, Mr Ma cited difficulties in the stock market. Accordingly, Mr Li was tasked to obtain a written document from Mr Ma to attest to the existence of the Investment

Agreement and Mr Ma's obligation to return the Sum and Investment Returns. Mr Ma signed a document in Shenzhen on 15 March 2018, which the Judge referred to as the "Declaration" (*Judgment* at [11]). In the Declaration, Mr Ma declared that all "cash deposits and stocks" in the Accounts were owned by HHBC. The Declaration states as follows:

> I, [Mr Ma,] hereby declare that all the cash deposits and stocks in [the CCB Account], [the KGI Account], and [UOB Account] are owned by [HHBC]. ***I have no ownership rights and disposal rights to all the assets in the abovementioned accounts. Instead, [HHBC] has all ownership rights and disposal rights to all the assets*** in the abovementioned accounts. The undersigned shall voluntarily cooperate with [HHBC] in completing other operations such as the realization of the accounts, transfer etc.
>
> [emphasis added in bold italics]

7 Mr Ma's version of events was that the Declaration had been signed pursuant to another oral agreement formed between him and HHBC in or around March 2018. Mr Ma referred to this alleged oral agreement as the "Asset Exchange Agreement", and, on his account, its genesis was as follows. Mr Li conveyed to him that Mr Zhang had requested Mr Ma to lend the funds in the Accounts to Weiye for either Mr Zhang's own or Weiye's use outside of the PRC. In exchange, an equivalent sum in RMB would be transferred to Mr Ma's personal bank account in the PRC. Mr Ma would also be reimbursed for the entirety of his income tax incurred in the PRC as a result of the assets exchanged. As the Judge noted, this "in essence leads to a remittance of [Mr Ma's] monies in Singapore currency in Singapore back to China in RMB in exchange for a remittance of [HHBC's] monies in RMB out of China to Singapore in Singapore currency" (*Judgment* at [20]). Mr Ma alleged that he signed the Declaration to show his commitment to the Asset Exchange Agreement.

8 Mr Ma denied that he drafted the Declaration (as alleged by Mr Li). He claimed instead that he signed a document presented to him by Mr Li. Mr Li's evidence was that, at the same meeting in Shenzhen on 15 March 2018, Mr Ma informed him of "the relevant banking information such as the passwords" of the Accounts for the purposes of ceding control (see [40] below) over the Accounts to him. In August 2018, Mr Xu Jingbo ("Mr Xu"), Mr Zhang's secretary at the material time, transferred HK$2,785,000 from Mr Ma's CCB Account to Mr Li. Mr Ma claimed that this transfer was made pursuant to the Asset Exchange Agreement. However, the Judge viewed this transfer as Mr Ma "return[ing] some of the assets owed to [HHBC]" under the Declaration (*Judgment* at [117]).

9 In or around September 2018, HHBC caused RMB680,000 to be transferred to Mr Ma's designated recipient company as reimbursement for part of his personal income tax. Mr Ma had commissioned the preparation of a tax report, which indicated that he was liable to pay personal income tax of RMB1,189,071.74 on the Sum and Investment Returns residing in the Accounts. According to Mr Ma, this reimbursement was pursuant to the Asset Exchange Agreement (*Judgment* at [20]–[21] and [124]). HHBC accepts that Mr Li did agree, on its behalf, to reimburse Mr Ma for personal income tax incurred in respect of the Sum and Investment Returns residing in the Accounts (*Judgment* at [12]). However, HHBC did not agree that this reimbursement was made pursuant to the Asset Exchange Agreement. Rather, it was made in exchange for the Sum and the Investment Returns.

10 As it turned out, Mr Ma refused to return the Sum and Investment Returns to HHBC. To recover these moneys, HHBC commenced Suit 242 of

2019 ("Suit 242") on 4 March 2019. Mr Ma counterclaimed for breach of the Asset Exchange Agreement and for damages to be assessed. The trial was bifurcated, and the judgment being appealed concerned only issues of liability.

The decision below

11 The Judge found in favour of HHBC. He found that the objective evidence, at the time of the Investment Agreement and thereafter, supported the existence of the Investment Agreement (*Judgment* at [85]). He accepted that the agreement contained these terms (*Judgment* at [69], [115] and [116]):

(a) HHBC would transfer the Sum to Mr Ma, and this would be held by the latter for and on behalf of HHBC.

(b) Mr Ma would invest the Sum in listed stocks in Singapore and/or Hong Kong for HHBC.

(c) On HHBC's demand, at any time, Mr Ma was to fully account for and return the Sum together with any profits, dividends and benefits derived therefrom (*ie*, the Investment Returns).

(d) It was a common understanding that HHBC would remunerate Mr Ma according to the investment profits. The quantum of Mr Ma's remuneration was to be determined *after* the investment profits had been accounted for. If a loss were made, Mr Ma would not be remunerated. We refer to this as the "Alleged Remuneration Understanding".

We elaborate on the Judge's evidential bases for recognising the Investment Agreement below.

12 The Judge found that to give effect to the Investment Agreement, HHBC took loans from the Intermediaries at an interest rate of 12% *per* annum and had the moneys disbursed to Mr Ma (*Judgment* at [71]).

13 The Judge held that the Investment Agreement was governed by PRC law and that it constituted a contractual entrustment thereunder. He ordered as follows (*Judgment* at [121]–[126]):

(a) Mr Ma is to return the Sum to HHBC.

(b) An inquiry is to be held to assess the quantum of Investment Returns derived by Mr Ma from the underlying Sum, and Mr Ma is to return the assessed returns to HHBC at the conclusion of the inquiry.

(c) Mr Ma is to return the RMB680,000 paid to him in purported reimbursement of part of his personal income tax arising from the assets in the Accounts.

(d) However, as Mr Ma had already returned HK$2,785,000 to HHBC (see [8] above), this is to be set off against his obligation to return the Sum, assessed Investment Returns and RMB680,000.

(e) Against the moneys owing to HHBC, Mr Ma is also entitled to set off both his reasonable remuneration and his actual expenses (inclusive of (a) any tax he has in fact paid or will have to pay to the PRC tax authorities as a result of his performance of his duties under the Investment Agreement and (b) any interest accrued on these expenses, in accordance with Art 398 of the Contract Law of the PRC). Both his remuneration and his expenses are to be assessed.

14 As for Mr Ma's counterclaim, this was rejected. The Judge found the Asset Exchange Agreement to be "inherently unlikely" because HHBC had access to funds outside of the PRC and need not have paid a "significant premium" (*ie*, Mr Ma's income tax amounting to RMB1,189,071.74) simply to, in effect, remit RMB out of the PRC (*Judgment* at [87]). He also found that the alleged agreement was not supported by objective evidence. The main piece of documentary evidence pointing to the Asset Exchange Agreement was the Declaration. But that, to his mind, evidenced the *Investment* Agreement.

The parties' cases on appeal

15 Mr Ma argues that HHBC has not discharged its burden of proving the existence, terms and date of the alleged oral Investment Agreement. His main reasons are:

(a) The Judge erred in law by assessing whether HHBC's account of events was more probable than his own, and not whether HHBC's account of events is proved on the balance of probabilities.

(b) There are "critical gaps" in HHBC's evidence relating to the existence, terms and date of the alleged Investment Agreement.

16 HHBC submits that the Judge did not err in finding that the Investment Agreement exists. HHBC's arguments on this issue are largely in support of the Judge's reasoning and we detail them below as necessary.

17 Pertinently, HHBC submits that even if *no agreement* is found by this court (*ie*, both parties' cases are rejected), Mr Ma remains liable under both PRC and Singapore law. Under PRC Law, Mr Ma must still return the Sum and

Investment Returns under a trust and/or the Notice by the Supreme People's Court of Issuing the Minutes of the National Courts' Civil and Commercial Trial Work Conference in 2019 (the "SPC 2019 Notice"). If Singapore law governs instead, HHBC argues that: (a) the Sum and Investment Returns are held on trust (either express or resulting) for HHBC; (b) there is a presumption of repayment that obliges Mr Ma to minimally repay the Sum; and/or (c) "the principles of restitution" require Mr Ma to return the Sum.

Issues to be determined

18 In light of the foregoing, the issues for this court's determination are:

(a) Whether the threshold for appellate intervention is met in relation to:

(i) the Judge's finding that the Investment Agreement was formed between HHBC and Mr Ma; and

(ii) the Judge's finding that Zhang Wei's Arrangement and the Asset Exchange Agreement did not exist.

(b) If this court overturns the Judge's finding in [18(a)(i)], and upholds the Judge's finding in [18(a)(ii)], is Mr Ma still liable to return the Sum and Investment Returns to HHBC?

19 Before turning to these issues, it is useful to recall the principles governing appellate interference with a trial judge's factual findings. The findings of a trial judge should be taken as *prima facie* correct and should not be disturbed in the absence of sound reasons. An appellate court will be slow to overturn the trial judge's findings of fact unless it can be shown that those

findings are plainly wrong or are against the weight of the evidence before the court. If the trial judge's findings of fact are based on his assessment of the witnesses' veracity and credibility, the appellate court should exercise even more restraint in overturning such findings: *Poh Chiak Ow v United Overseas Bank Ltd* [2021] SGHC(A) 6 at [33]. If inferences by the trial judge are based on the internal inconsistency of the witnesses' evidence or external inconsistency with the extrinsic objective evidence, the appellate court has access to the same material as the trial judge and is in as good a position as the trial judge to assess the witnesses' credibility. In this situation, the advantage of the trial judge in having heard the witness is "not as critical": *Ng Chee Chuan v Ng Ai Tee (administratrix of the estate of Yap Yoon Moi, deceased)* [2009] 2 SLR(R) 918 at [14].

Whether the Judge erred in dismissing Mr Ma's case on Zhang Wei's Arrangement and the Asset Exchange Agreement

20 While Mr Ma's written submissions in the appeal challenged the Judge's rejection of Zhang Wei's Arrangement and the Asset Exchange Agreement, he did not place emphasis on this in his oral submissions. We begin by dealing briefly with this portion of Mr Ma's case.

Zhang Wei's Arrangement

21 Mr Ma submits that even if Zhang Wei's Arrangement is disbelieved, the evidence in support of this arrangement diminishes the likelihood of HHBC's alleged Investment Agreement. In the trial below, Mr Ma relied on several documents to prove Zhang Wei's Arrangement (*Judgment* at [49]). For the reasons given below, our view is that Mr Ma failed to show that the Judge erred in his analysis of these pieces of evidence.

22 First, Mr Ma relied on a document handed to him on 31 December 2014 by Mr Liu Yang (the "Liu Yang Document"). Mr Liu Yang was Mr Zhang's secretary at the time. The document contains details of several bank accounts under the control of Mr Zhang, including the relevant usernames and passwords. However, while the Judge found the document to be probably authentic, it merely indicated that Mr Ma was tasked by Mr Zhang to make trades. The Judge found that cross-referencing the accounts identified in the Liu Yang Document with bank statements disclosed by Mr Ma, the account balances in those statements only added up to about HK$30m of shares and funds (*Judgment* at [51]). But the Judge noted that what the Liu Yang Document did *not* indicate was that Mr Zhang had "paid [Mr Ma] RMB$9 million to do this work; nor does it suggest a quantum of work to manage investment funds much greater than HK$30 million which would justify RMB$9 million of remuneration".

23 We agree with the Judge's analysis of the Liu Yang Document. The document indicates that Mr Ma was likely doing *some* work in relation to the accounts identified in the Liu Yang Document. But this, without more, is not probative of whether Mr Ma was enlisted to provide "investment consultancy and management services" in respect of these accounts, much less whether he was to be remunerated at a rate of 3% of RMB100m *per* annum.

24 Second, Mr Ma relied on a Letter of Undertaking (the "LOU") dated 20 March 2015, which allegedly originated from HHBC. Only a photograph thereof was produced. The LOU states as follows:

> To: Ma Binxiang
>
> Hainan Huibang Construction Investment Co Ltd (hereinafter referred to as 'the Company') hereby makes the following undertaking to Ma Binxiang ... : *Henceforth, any money transfer made by the company or any third party entrusted by the*

> *Company to any of Ma Binxiang's foreign bank accounts established outside Mainland China (including Hong Kong, Macau and Taiwan) shall all be for the purposes of remuneration.* In the case of any inconsistent transfer summary, the transfers shall be subject to this Letter of Undertaking.
>
> All legal and economic disputes arising from this Letter of Undertaking shall have nothing to do with Ma Binxiang, and shall be borne by the Company.
>
> [emphasis added]

25 However, the HHBC company stamp found on the LOU was an old one used by HHBC before 2015. The Judge found that this document was "most likely fabricated" (*Judgment* at [56]). He accepted that the old company stamp was destroyed on 18 November 2013 by the Haikou Municipal Public Security Bureau (*Judgment* at [54] and [56]).

26 We see no reason to disturb the Judge's reasoning regarding the LOU. Mr Ma does not even challenge the Judge's finding that HHBC's old company stamp used on the LOU was destroyed before the alleged creation of the LOU.

27 On appeal, Mr Ma argues, among other things, that if he had truly wanted to forge a document evidencing Zhang Wei's Arrangement, he would have named Mr Zhang in the LOU, not HHBC. However, we regard this as a neutral factor. It is Mr Ma's own case here and below that HHBC was controlled by Mr Zhang in 2015 and that HHBC was merely carrying out Mr Zhang's instructions. He submitted below that "Zhang Wei controls [HHBC's] corporate actions, and has been heavily involved in [HHBC's] affairs". Mr Ma clearly associated Mr Zhang with HHBC. Thus, that the LOU names HHBC instead of Mr Zhang is neither here nor there.

28 Mr Ma also suggests on appeal that he had no access to HHBC's company stamp and was not in a position to forge the LOU. However, the point is that HHBC denies issuing the LOU and argues that the LOU was "fabricated / forged by Ma and/or his associate(s) / agent(s)". The Judge agreed and found that it was "most likely fabricated", in part, because the old company stamp had been destroyed in 2013 (*Judgment* at [54] and [56]). This required Mr Ma to explain how and why the old company stamp came to be found in the photograph of the LOU *and* that HHBC did indeed issue the LOU. Merely asserting that he was personally unable to access the old company stamp accomplished neither of these things. The Judge's refusal to place reliance on the LOU is not plainly wrong.

29 Third, Mr Ma relied on text messages between Mr Zhang and himself from August 2015 to January 2016. These messages emanated mainly from Mr Ma. The Judge likened Mr Ma's messages to a "stock ticker containing only raw numbers and information" (*Judgment* at [58]). The Judge found no recommendations or advice on share transactions except on one instance dated 25 September 2015 when Mr Ma recommended using RMB200,000 in Mr Li's futures account for commodity trading to make profits for "the company" (*Judgment* at [60]):

> Chairman, there is one more thing. I would like to ask you for advice. There remains more than 200,000 yuan in Li Keyi's futures account. I think it would be a pity to leave it idle there. Now I would like to apply for using that money in respect of commodity trading during day and night time, so as to make a money turnover as far as possible. *If there incurs losses, I will make it up for the account and all the profits will attribute to the company.*
>
> I want to make more contributions to the company, and I want to push myself, so that I might grow faster. But I don't have too

> much money here and I'm afraid that I'm not able to make it up.
>
> What do you think, Chairman?
>
> [emphasis added]

However, the Judge regarded this message as being contradictory to Zhang Wei's Arrangement. This was because there was "nothing in Zhang Wei's Arrangement, as alleged, that [Mr Ma] was also to personally cover any losses incurred when his suggestions were followed. This being the case, he could simply have worded his proposal as a suggestion without any offer to make up for the losses" (*Judgment* at [61]).

30 On appeal, Mr Ma argues that the Judge "appears to have mischaracterised" the work he did for Mr Zhang. He argues that his text messages to Mr Zhang also reported on "bank and securities accounts outside of the PRC", including accounts that matched those listed in the Liu Yang Document. However, even if this is true, it fails to address the nub of the Judge's concern. Namely, Mr Ma appeared to be merely collating and conveying market information to Mr Zhang, rather than providing higher order investment consultancy and management services. We can find no basis to displace the Judge's characterisation of Mr Ma's text messages.

31 Fourth, Mr Ma relied on emails from him to Mr Xu in 2017 and 2018. Mr Xu was Mr Zhang's secretary who took over from Mr Liu Yang. The Judge found that nothing in these emails supported Mr Ma's allegation about Zhang Wei's Arrangement. He noted as follows: "[a]s with the Liu Yang Document and the Text Messages, the Emails indicate that [Mr Ma] was perhaps performing some work for Zhang (which appears here to be more auditing/accounting work rather than that of an investment adviser). Nothing in

the Emails supports [Mr Ma's] pleaded case that he was remunerated RMB9 million in advance for such work" (*Judgment* at [64]).

32 On appeal, Mr Ma argues that the Judge failed to consider that these emails specifically set out the status of accounts in the names of various individuals linked to Mr Zhang, with some accounts matching those in the Liu Yang Document. However, it appears that the emails merely summarise stock holdings in various securities accounts and/or cash balances in cash accounts. Mr Ma has not pointed to anything in these emails showing that the Judge was wrong to interpret them as disclosing "auditing/accounting work" (*Judgment* at [64]), rather than consultancy or investment work.

33 Apart from the documentary evidence (or lack thereof), the Judge also noted that if the Sum was supposed to be the equivalent of the RMB9m remuneration that Mr Ma was to receive under Zhang Wei's Arrangement, the exchange rate would be about S$1 is to RMB5.0438. However, the Judge pointed to historical records of the exchange rate for December 2014 showing an exchange rate of S$1 is to RMB4.7. If so, the RMB9 million should have entitled Mr Ma to S$1,914,893, instead of the Sum of $1,784,350. It was unlikely that Mr Ma would forego the difference of S$130,543 (*Judgment* at [67]). Mr Ma does not challenge these observations on appeal. This is another point weighing against the existence of Zhang Wei's Arrangement.

34 Given the weakness of the evidence Mr Ma relies on, we uphold the Judge's conclusion that Zhang Wei's Arrangement has not been proved. However, as will become clearer at [45]–[49] below, it does not follow that HHBC's case that the alleged Investment Agreement exists should have succeeded.

Asset Exchange Agreement

35 We now consider the alleged Asset Exchange Agreement, the breach of which forms the basis of Mr Ma's counterclaim.

36 As a preliminary point, the Judge found that on Mr Ma's account, there was "no apparent connection" between his personal income tax and the Asset Exchange Agreement (*Judgment* at [87]). This may be incorrect as the *Judgment* at [20] recognises that Mr Ma's allegation is that he would incur personal income tax in the PRC "as a result of the assets exchanged" under the agreement.

37 In any event, we agree with the Judge that the Asset Exchange Agreement (as explained in the *Judgment* at [20]) does not make commercial sense.

38 Mr Ma's case is that under the Asset Exchange Agreement, Mr Zhang or Weiye was free to take over all of his assets in the Accounts. In exchange, Mr Ma was to receive the equivalent amount of cash in RMB into his personal bank account in the PRC *and* be reimbursed for the personal income tax he incurred in the PRC in respect of the assets in the Accounts. Mr Ma claimed that he was "happy to enter into that proposed transaction as it would otherwise also be quite cumbersome for [him] to move the funds [he] ha[d] in Singapore back to the PRC if and when [he] wanted to do so" (*Judgment* at [20]).

39 However, the Judge and HHBC point out that it makes little sense for HHBC to incur a significant premium (*viz*, RMB1,189,071.74 of Mr Ma's personal income tax arising in respect of the Accounts) simply to, in effect,

remit money out of the PRC (*Judgment* at [87]). We agree. Further, in so far as Mr Zhang, acting on behalf of HHBC, was the alleged mastermind behind the Asset Exchange Agreement, Mr Ma does not challenge the Judge's observation that it is "unlikely that [Mr Ma] was the only person to whom Zhang could turn to who had access to funds outside of the PRC. If Zhang's reach and influence were as extensive as [Mr Ma] alleges, he must have been able to find someone else who would not demand such a significant premium" (*Judgment* at [88]). In respect of Mr Zhang's "reach and influence", Mr Ma's affidavit of evidence-in-chief ("AEIC") recognises that HHBC was "one of many companies owned and/or controlled by Zhang Wei". Further, in his written closing submissions below, Mr Ma cited Mr Li's evidence to portray Mr Zhang as being "very high up" and having "influence over many people". In these circumstances, we agree that the Asset Exchange Agreement makes no commercial sense for HHBC.

40 Moreover, it appears that the Asset Exchange Agreement is contradicted by the Declaration. While Mr Ma explained that the Declaration was made to support his confirmation of the Asset Exchange Agreement, the Declaration does not record any obligation on HHBC's part to pay Mr Ma for the assets in the Accounts which he had ceded control of to Mr Zhang or Weiye (see [8] above). The alleged Asset Exchange Agreement imposed such an obligation on HHBC. Yet, the Declaration only discloses an obligation or acknowledgement on *Mr Ma's* part and none from HHBC.

41 On the other hand, it is true that there is no written acknowledgement by HHBC to pay Mr Ma's personal income tax. Nevertheless, HHBC accepts that it agreed to do so. Hence, the absence of a corresponding document to acknowledge HHBC's obligation to pay Mr Ma in RMB in return for his assets

in the Accounts is not necessarily fatal to Mr Ma's case. However, it remains a factor weighing against his counterclaim.

42 Ultimately, the burden is on Mr Ma to establish the Asset Exchange Agreement in order to explain why he signed the Declaration. Considering the commercial implausibility of the Asset Exchange Agreement and the contradiction between the Declaration and alleged Asset Exchange Agreement, the Judge did not err in rejecting the existence of the Asset Exchange Agreement.

43 We uphold the Judge's dismissal of Mr Ma's counterclaim for breach of the Asset Exchange Agreement. As for HHBC's claim for breach of the Investment Agreement, it remains to be seen if the Judge's finding on the existence of the Investment Agreement should be upheld. It is to this issue that we now turn.

Whether the Judge's finding that the Investment Agreement was formed should be overturned

44 To re-capitulate, the Judge found that HHBC had proved the formation of the Investment Agreement and hence ordered the return of the Sum and the Investment Returns (the latter to be assessed) (see [13] above).

45 Before analysing the evidence, it is important to note that the Judge's approach to applying the civil standard of proof is unclear. We are unable to determine if he had assumed that he had to find that either of the allegations regarding the Investment Agreement or Zhang Wei's Arrangement was established (*ie*, the binary approach), or if he proceeded on the basis that he could also find that neither had been proved. The *Judgment*, at [2], [39], [41]

and [85], suggests that the Judge adopted the binary approach. For instance, he stated that he had to decide "which version of events has been proven" (*Judgment* at [2]), and framed the issue in these terms: "was the S$1,784,350 transferred into the defendant's UOB Account as remuneration for the defendant (pursuant to Zhang Wei's Arrangement), ***or*** was it transferred as the principal sum for investment on behalf of the plaintiff (pursuant to the Investment Agreement)?" [emphasis in original omitted; emphasis added in bold italics] (*Judgment* at [39]).

46 The binary approach is inconsistent with the requirement for the claimant to prove his case on the balance of probabilities. The relevant principles were stated by this court in *Tan Chin Hock v Teo Cher Koon and another and another appeal* [2022] SGHC(A) 15 ("*Tan Chin Hock*") at [31] as follows (see also *Suying Design Pte Ltd v Ng Kian Huan Edmund and other appeals* [2020] 2 SLR 221 at [94]):

> A plaintiff in a civil suit must prove his case on the balance of probabilities. A plaintiff proves his case 'on the balance of probabilities' when he shows that his case is more probably true than not true: *Clarke Beryl Claire (personal representative of the estate of Eugene Francis Clarke, deceased) and others v SilkAir (Singapore) Pte Ltd* [2002] 1 SLR(R) 1136 at [58]. ***He does not meet this burden by showing his case is a "better explanation" for certain events than the defendant's***. This means that a trier of fact is not bound to prefer one of the parties' assertions. A third alternative is available where the state of the evidence is unsatisfactory: the judge may simply find that the plaintiff has failed to discharge his burden: *Wee Yue Chew v Su Sh-Hsyu* [2008] 3 SLR(R) 212 at [8] citing *Popi M* [1985] 1 WLR 948.
>
> [emphasis added in bold italics]

As Mr Ma's counsel pointed out, if the Judge was overly influenced by a comparison of the two competing versions of events, his findings pertaining to these events would warrant greater scrutiny: see *Tan Chin Hock* at [69].

47 On the other hand, [28] and [68] of the *Judgment* suggest that the Judge did not adopt the binary approach. For instance, [68] states that HHBC has to prove the Investment Agreement "on the balance of probabilities in order to found its claim." However, as Mr Ma's counsel argued, mere reference to the civil standard of proof does not resolve the doubts we expressed above, as this assumes that the civil standard of proof, as properly understood, was applied.

48 Interestingly, HHBC's case in this appeal refers to [39] of the *Judgment*, and states that the issue was "aptly identified" by the Judge thereat. However, we earlier said that [39] suggests that the Judge adopted the binary approach. This approach would have been wrong.

49 In these circumstances, the Judge's findings invite even closer scrutiny than would ordinarily be the case.

50 We now summarise the Judge's analysis of the documentary evidence adduced by HHBC in support of the Investment Agreement. The Judge identified three categories of documentary evidence (*Judgment* at [73]).

51 First, HHBC relied on contemporaneous documents attesting that HHBC had procured the transfers of moneys making up the Sum to Mr Ma's UOB Account. There were two sub-sets of documents.

52 One was a set of letters of authorisation dated from March to May 2015 from HHBC to each of the Intermediaries to transfer a sum of money to the UOB Account. It turned out that these documents were not originals and were documents re-executed after the originals were lost. Hence, the Judge found that they were not acceptable as contemporaneous evidence of the transfers (*Judgment* at [74] and [75]). HHBC does not contest this finding.

53 The other sub-set comprised transfer notices from each of the Intermediaries to HHBC confirming that it/he had transferred the requested sums to Mr Ma's UOB Account. These notices are dated March to May 2015. Originals were not produced but the Judge rejected Mr Ma's suggestion that they were fabricated. The Judge found that the notices "do provide some contemporaneous support for [HHBC's] version of events" (*Judgment* at [76]).

54 Second, HHBC relied on statutory declarations from Mr Liu Hongen, one of the Intermediaries, and Mr Chan Siu Mat ("Mr Chan"), an employee of Max Fill and Well Fai. Each statutory declaration confirms that the respective Intermediary transferred moneys to Mr Ma's UOB Account and that the Intermediary has claims only against HHBC and not Mr Ma. In addition, Mr Chan's statutory declaration contains directors' resolutions from Max Fill and Well Fai ratifying the transfers to Mr Ma and confirming that they were made pursuant to loans to HHBC. The resolutions are signed by Mr Zhang (*Judgment* at [77]). However, *none* of these documents are contemporaneous with the Investment Agreement. They were executed in July 2021.

55 Further, neither Mr Liu Hongen nor Mr Chan was called as a witness in Suit 242. Nevertheless, the Judge was of the view that the declarations were

admissible under s 32(1)(*j*)(iv) of the Evidence Act (Cap 97, 1997 Rev Ed) which allows statements by persons, who are competent but not compellable to give evidence and refuse to do so, to be admitted. While the Judge did not accord the statutory declarations full weight, he was of the view that they supported HHBC's version of events to some degree (*Judgment* at [78]–[80]). We do not agree as we elaborate later.

56 Third, the Judge noted that HHBC relied heavily on the Declaration. He accepted that the Declaration only recorded that the assets in the Accounts belonged to HHBC but did not mention the Investment Agreement. However, he did not find it incongruous for parties who "apparently thought it prudent to enter into multimillion-dollar agreements on nothing but their word" to execute a declaration making no reference to the underlying transaction. He said that it was "not unlikely that parties simply did not think to include it" (*Judgment* at [82]). He did not believe Mr Ma's account about the Declaration being signed to give effect to the Asset Exchange Agreement (see [14] above). He concluded that HHBC's explanation for the Declaration was far more likely, *ie*, that Mr Ma was responsible for HHBC's money (*Judgment* at [84]).

57 Apart from the documentary evidence, the Judge noted that Mr Li alleged that HHBC borrowed the Sum at an interest rate of 12% *per* annum. He accepted Mr Li and Mr Wang's testimony that 12% interest *per* annum for unsecured loans was fairly usual in the PRC. On the other hand, Mr Li did not confirm with Mr Ma that the latter would be able to obtain a better rate of return than 12% *per* annum through investments made on behalf of HHBC. It was for this reason that the Judge said that he had to examine the allegation about the Investment Agreement more carefully. He said that he did so by turning to the

objective evidence in the form of the three categories of documents mentioned above (*Judgment* at [71] and [72]).

58 After considering Mr Ma's arguments against the Investment Agreement, the Judge found that the objective evidence both around the time of the Investment Agreement and thereafter supported HHBC's version of events and not Mr Ma's (*Judgment* at [85]).

59 We now set out our views on the Judge's decision.

60 First, we agree that the fact that Mr Li did not confirm with Mr Ma his expected rate of return on the investments to be made was a factor militating against the existence of the Investment Agreement. This agreement would only have been profitable for HHBC if Mr Ma could promise a return on investment exceeding 12% *per* annum. Given that the alleged Investment Agreement was HHBC's first foray into overseas stock investment *and* Mr Ma's first professional experience as a fund manager, it beggars belief that Mr Li threw (all) caution to the wind *and* that no one in HHBC prompted him to make this enquiry with Mr Ma.

61 In addition, it seems to us that while the Judge placed limited weight on the statutory declarations (*Judgment* at [80]), he did not place enough weight, if at all, on the absence of *any* contemporary document between the Intermediaries and HHBC recording the fact of the loans and the terms thereof, including the rate of interest which HHBC was to pay the Intermediaries for the loans constituting the Sum.

62 This point is distinct from Mr Li's omission to even discuss the expected rate of return on the investments with Mr Ma. For all the "objective" evidence that HHBC relied upon, the statutory declarations and directors' resolutions were not even contemporaneous documents signed around the time when the transfers were made (*ie*, March to May 2015). Instead, they were signed in July 2021. Although the transfer notices were signed in the first half of 2015, significantly, they *do not* mention that loans were extended by the Intermediaries. Only the later statutory declarations and directors' resolutions mention loans. Furthermore, they did not mention the rate of interest of the loans or any other term of the loans for that matter.

63 In the absence of documentary evidence on the interest rate of the loans, Mr Li and Mr Wang gave oral evidence that 12% interest was a fairly usual rate of interest in the PRC. Mr Li said that it is "only considered a mid, or even lower of the mid-range interest in China" and Mr Wang said that it is "not a very high interest in China" (*Judgment* at [71]). However, the point is not what a fair rate should be but what the Intermediaries and HHBC had agreed to.

64 There was no suggestion that the loans were made interest-free because of the closeness of the relationship between each of the Intermediaries and HHBC. The lack of evidence on the interest rate, as well as on any other term of the loans, casts doubt on Mr Li's explanation that the moneys transferred by the Intermediaries to Mr Ma's UOB Account constituted loans by them to HHBC. This in turn affects the credibility of the existence of the Investment Agreement, the viability of which depended on HHBC obtaining liquidity from the Intermediaries. Perhaps the loan moneys belonged to Mr Zhang all along. This is because Max Well and Wei Fai were wholly-owned by Mr Zhang at the

material time. Also, Mr Li was an employee of HHBC while Mr Liu Hongen was an employee of Shenzhen Hui Bang Holdings Ltd, a *subsidiary* of HHBC. As noted above at [27], Mr Ma submits that HHBC was controlled by Mr Zhang in 2015 and that HHBC was merely carrying out Mr Zhang's instructions. We do not need to make a finding that the money belonged to Mr Zhang. It is sufficient that we have serious reservations that the Sum was transferred to Mr Ma on instructions from HHBC. This raises the question of whether HHBC is the proper claimant to recover the Sum in the first place.

65 Second, Mr Ma argued that he would not have agreed to manage investments for HHBC without any assurance of remuneration. The Judge was of the view that the oral terms of the Investment Agreement, as alleged by HHBC, did provide for Mr Ma to be renumerated after the investment profits had been accounted for. The quantum of Mr Ma's remuneration was to be based on the returns he generated. The Judge noted that Mr Li and Mr Ma were friends and it was not inherently unlikely that Mr Ma accepted that he would be renumerated based on the performance of the investment (*Judgment* at [69]).

66 In our view, the Judge erred. It is one thing for Mr Ma to agree to accept a remuneration based on the performance of the investment. It is another for the details of the remuneration to be left unspecified. Even the Judge accepted that "three to four years (from 2015 to 2018) is a long time for [Mr Ma] to be doing work for [HHBC] without immediate or ongoing remuneration" (*Judgment* at [69]). The absence of such details weighed against the existence of the Investment Agreement.

67 Further, Mr Li's changing evidence on Mr Ma's remuneration impugned his credibility. Mr Li equivocated over whether parties had any implicit understanding as to the rate of Mr Ma's remuneration:

(a) Mr Li's (starting) position in his AEIC was that the quantum of Mr Ma's remuneration was "not specified [in 2015] and would be correspondingly determined after HHBC's profits pursuant to the [Investment] Agreement had been accounted for." He testified in this connection that he only told Mr Ma that "if this was successful, then we could see how we could work from there." This suggests that Mr Li/HHBC and Mr Ma had *no agreement whatsoever* as to the latter's rate of remuneration.

(b) However, when the Judge asked Mr Li to explain what would happen if the parties disagreed over the percentage of the profits that Mr Ma would receive as remuneration, Mr Li attempted to suggest that he and Mr Ma had an implicit understanding that (at least) an industry rate would apply. Specifically, the Judge asked: "[i]s there a rule in China that when somebody invests for somebody, he will get a certain fixed percentage, there's an understanding throughout the whole of China such that the rule is understood?" Mr Li replied: "according to the industry practice, it is around ***20 per cent***" [emphasis added in bold italics]. Mr Li had not stated this in his AEIC.

(c) When the Judge queried if 20% was really the industry practice, Mr Li qualified his answer and said it "depends on the situation." He said that if the investment is a "principal-protected investment" (he did not elaborate on what this term meant), the percentage of profits paid

will be *at least 30 per cent*. He claimed to have gotten these figures from "what [he] had worked on previously".

(d) When pressed by Mr Ma's counsel, Mr Li again changed his evidence. He said that the common understanding could be *15 per cent, 20 per cent, or even 40 per cent*.

(e) He later admitted that Mr Ma had *no idea how much* he was going to be remunerated (*ie* he reverted to his original position in his AEIC).

68 Mr Li is HHBC's only factual witness who has first-hand knowledge of the alleged formation of the Investment Agreement in 2015. Mr Wang only joined HHBC in 2016. If Mr Li's credibility suffers, HHBC's overall case is undermined.

69 Mr Li's credibility is connected with another argument raised by Mr Ma. Namely, that HHBC amended its Statement of Claim very late, on or about 7 September 2021, after the trial had concluded in July 2021, to plead the Alleged Remuneration Understanding. While Mr Ma is incorrect in the sense that the Alleged Remuneration Understanding was mentioned earlier by HHBC in its Further and Better Particulars dated 16 September 2019 ("HHBC's FNBP"), this was still a late mention and is another factor suggesting that Mr Li was making up the terms of the Investment Agreement as he went along. For context, HHBC's initial Statement of Claim is dated 4 March 2019.

70 Third, Mr Ma also argued that Mr Li had changed his evidence as to when the oral Investment Agreement was entered into. While some lapse of recollection is not unexpected, Mr Li's evidence on when the alleged

Investment Agreement had been formed changed from time to time. This is significant because the Court of Appeal stated in *Independent State of Papua New Guinea v PNG Sustainable Development Program* [2020] 2 SLR 200 at [15] that a claimant's "inability to specify when the Agreement was allegedly entered into, in our judgment, undermines its very existence." Mr Li's evidence on this issue evolved on the stand as follows:

(a) First, he said he could not tell when the exact time of formation was. He accepted that his evidence in his AEIC – that the Investment Agreement had been formed around early to mid-2015 – could refer to any time between January to July 2015.

(b) Then, he changed his mind and said "it will be either in ***April or May*** but if you want me to pinpoint the exact date, I will say I don't know" [emphasis added in bold italics].

(c) Under re-examination, Mr Li again changed his position and testified that the Investment Agreement was entered into in or around *March 2015*, after being referred by his counsel to HHBC's FNBP.

These inconsistencies again suggest that Mr Li is not credible.

71 Fourth, Mr Ma argued that there was no contemporaneous evidence between Mr Ma and Mr Li relating to the Investment Agreement. Neither was there internal evidence within HHBC about that agreement. We agree and find that this reduces the force of HHBC's account of events.

72 For instance, HHBC pleaded that the in-person meeting between Mr Li and Mr Ma, at which the Investment Agreement was allegedly formed, took

place in Shenzhen. However, there is no contemporaneous evidence showing when (or if) this meeting took place. As Mr Ma submits, "one would expect messages or emails tying down the date, time and location of the meeting. Yet, there is nothing at all". There is also no written exchange between Mr Ma and Mr Li about the alleged Investment Agreement soon after it was entered into. While these exchanges could have been deleted or destroyed due to the passage of time, we note that other pieces of evidence from the past were made available by HHBC (*eg*, the transfer notices).

73 There is also no documentary evidence subsequent to the date of the Investment Agreement recording the investments made by Mr Ma on behalf of HHBC. In our view, this is a strong point against the existence of the Investment Agreement. We do not accept that HHBC did not monitor Mr Ma or that Mr Ma provided no updates on the investments or that it was all done orally only.

74 HHBC's response is that Mr Li and Mr Ma were close friends and were living in the same dormitory in Shenzhen in 2015. The suggestion was that any monitoring was done by Mr Li orally and without a paper trail. However, Mr Ma disputed that the two stayed together. In oral submissions, Mr Ma's counsel directed us to text messages between Mr Ma and Mr Zhang in September 2015, which reveal that Mr Ma had left Shenzhen for Xinjiang sometime that month to accompany his wife because she was giving birth around 10 September 2015. He appears to have stayed in Xinjiang until around 25 September 2015. In any event, the *total* absence of any written updates or communication between Mr Ma and Mr Li and/or HHBC regarding the progress or status of the investments gives us pause.

75 Furthermore, as Mr Ma submits, there is a complete absence of internal company records from HHBC showing that it decided to enter into the Investment Agreement with Mr Ma or recording the investment(s) in its accounting records. There is no documentary evidence showing that Mr Li was given the authority by HHBC's management to negotiate the Investment Agreement with Mr Ma. While there was some suggestion that HHBC did not want to keep the investments made under the alleged Investment Agreement in its books, there was no explanation as to why this should be so.

76 Mr Wang could not help HHBC to shed light on the formation of the alleged Investment Agreement because he joined HHBC in 2016, which was after the Investment Agreement had allegedly been entered into in 2015 (see [2] above).

77 In so far as Mr Wang said that he had left Mr Li in charge of the Investment Agreement and Mr Wang (or HHBC's management) would receive "sporadic and generally uneventful" updates from Mr Li, this was short on details. Mr Wang did not elaborate on whether these updates contained information as to the shares (if any) Mr Ma had bought on behalf of HHBC and how the shares were performing.

78 This is connected to the point earlier made at [73] above that no documentary evidence was produced by HHBC of Mr Ma informing Mr Li about the investments he had made on behalf of HHBC using the Sum. One would expect some such evidence over the years. On the contrary, the evidence produced (see [29]–[32] above) contained no advice or report from Mr Ma about purchases made or to be made of Weiye or other shares and only showed Mr Ma summarising market information on Weiye stocks and shareholdings in entities

such as Weiye, "Weiye Holdings Hainan Real Estate Co., Ltd" and "Henan Zhongrun Electronics Co."

79 Fifth, as alluded to at [62] above, we are of the view that the transfer notices have limited probative value because they do not allude to the Investment Agreement. These notices merely "prove" the peripheral point that the Intermediaries transferred moneys to Mr Ma amounting to the Sum. However, they do not go further to (a) establish that the moneys were disbursed to Mr Ma under *loans* taken out by HHBC; and (b) that the purpose of these transfers was to give effect to the Investment Agreement (see, *eg*, *Tan Chin Hock* at [88], [89] and [93]).

80 Finally, we address the Declaration which HHBC placed much reliance on. We agree that the Declaration signed by Mr Ma shows that the money in the Accounts belongs to HHBC. However, that does not mean that the Declaration supports the existence of the Investment Agreement. A deficiency in the Declaration is its failure to refer to the Investment Agreement. Pertinently, Mr Li's AEIC states that HHBC wanted the Declaration for two reasons, one of which was to record the *existence* of the alleged Investment Agreement. Thus, the Judge's inference that parties "simply did not think to include" a reference to the Investment Agreement in the Declaration is, with respect, not consistent with the evidence from HHBC's primary factual witness.

81 In any event, the Declaration was only one piece of evidence that seemed to support the existence of the Investment Agreement. Other evidence which we alluded to pointed the other way.

82 HHBC had to prove the existence of the agreement that was the primary basis of its claim. In our view, the Judge erred in concluding that HHBC had discharged its burden of proof. He failed to give weight, or, at least, adequate weight to the factors militating against the existence of the Investment Agreement. Perhaps this was partly because he thought it was a binary approach as we have mentioned.

83 It appears to us that neither side has told the court the truth behind the transfer of the Sum to Mr Ma's UOB Account. We need not conclude what the true purpose was. It is sufficient for us to conclude that neither side has proved the oral agreement that it/he relies upon. The next question is the outcome in the light of such a conclusion.

Whether Mr Ma remains liable even if neither side proves the oral agreement that it/he relies upon

84 Mr Ma's Appellant's Case and skeletal submissions do not elaborate on his counterclaim in the event that the existence of the Investment Agreement, Zhang Wei's Arrangement and Asset Exchange Agreement is rejected. We do not revisit the counterclaim below. What follows is our analysis of HHBC's claims in light of the fact that the alleged Investment Agreement has not been proved.

Trust claims

85 In its Statement of Claim (Amendment No 3) ("SOC"), HHBC pleads that Mr Ma "holds the sums of S$1,784,350, S$1,113,161.05 and RMB680,000, and any and all sum(s), profit(s), dividend(s), asset(s), benefit(s) and/or title(s) derived therefrom, on trust". However, the "trust" is pleaded to be *based on*

HHBC's allegations that Mr Ma breached the Investment Agreement and the Declaration. Furthermore, the SOC does not specify clearly what sort of trust it is relying on, *eg*, is it only an express trust?

86 PRC law and Singapore law recognise an express trust. However, HHBC's own PRC law expert, Professor Chen Lei ("Prof Chen"), accepts that PRC law does not recognise a resulting trust, whereas Singapore law does.

87 HHBC submits that PRC law is applicable to the question of a trust. However, Prof Chen maintained in his reports that the Declaration does not create a valid express trust under PRC law. And, as mentioned, PRC law does not recognise a resulting trust. Hence, HHBC's submission for a trust fails.

88 Even if Singapore law were to apply to the question of whether an express trust is formed, the central issue is whether certainty of intention exists. Certainty of intention requires clear evidence of an intention on the part of the alleged settlor to create a trust and to subject the trust property to trust obligations, as opposed to creating any other form of binding legal relationship (for example, a contractual relationship): *The State-Owned Company Yugoimport SDPR (also known as Jugoimport-SDPR) v Westacre Investments Inc and other appeals* [2016] 5 SLR 372 at [55]. It must be certain that the settlor intended to create a trust rather than to impose a mere moral obligation or to make a gift or to do some other act which was not a trust: *Baker, Michael A (executor of the estate of Chantal Burnison, deceased) v BCS Business Consulting Services Pte Ltd and others* [2020] 4 SLR 85 at [217].

89 We are of the view that certainty of intention is not established. The Declaration merely acknowledges that the assets in the Accounts belong to

HHBC. There is no indication that Mr Ma intended to subject the assets in the Accounts to trust obligations. On the contrary, the statement in the Declaration that Mr Ma shall "*voluntarily cooperate* with [HHBC] in completing other operations such as the realization of the accounts, transfer etc" [emphasis added] suggests that he only envisioned himself as having a *moral obligation*, rather than some equitable or fiduciary obligation, to assist HHBC in realising its interest in the assets. Taking the Declaration at face value, in that it states that Mr Ma lacks ownership over the assets in the Accounts, we also question whether it was legally possible for Mr Ma to have declared a trust over assets he did not own.

90 As for a resulting trust under Singapore law, HHBC's case was factually rooted in the putative *Investment Agreement*. For one, in the SOC, the existence of a trust is expressly pleaded to be based on "the matters pleaded ... above", which includes the breach of the Investment Agreement. In its submissions here and below, HHBC submits that a resulting trust arises because the Sum was transferred to Mr Ma "in furtherance of the [Investment] Agreement and [Mr Ma] was required to, amongst other things, return the Principal Sum (along with any Investment Returns) to HHBC on demand at any time". In other words, HHBC relies on the existence of the Investment Agreement to prove that it *did not intend the Sum to benefit* Mr Ma, thereby giving rise to a resulting trust, but we have concluded that HHBC has failed to prove the existence of that agreement.

Restitution

91 HHBC argues that if Singapore law governs the dispute, the "principles of restitution" should apply to oblige Mr Ma to return the Principal Sum *if* no

agreement is found to exist. But, HHBC does not identify the cause of action that entitles it to the remedy of restitution. That cause of action, in our view, is unjust enrichment. HHBC has *not* pleaded unjust enrichment under Singapore law and cannot now rest its claim on it.

Residual PRC law claims

92 On appeal, HHBC argues that an oral contractual entrustment is established under PRC law if two elements are established. First, there must be a written acknowledgement that the money does not belong to the agent and, second, a transfer of funds from the principal to the agent. The Judge found both elements to be satisfied but that is because he also found that HHBC had established the Investment Agreement (*Judgment* at [105] and [114]).

93 Separately, HHBC also relies on Art 33 of the SPC 2019 Notice to claim the Sum and Investment Returns. Article 33 states:

> 33. [Return of Property and Discount Compensation] Where a contract is ***not formed, invalid or rescinded***, the factors of appreciation or depreciation of the property shall be taken into full consideration in determining the return of the property. After the non-formation, invalidation or revocation of a bilateral contract, the parties shall return the property obtained as a result of the contract to each other. Where property, such as equity and houses, to be returned appreciates or depreciates in value relative to the price agreed upon in the contract, the people's court shall reasonably distribute or allocate such property among the parties concerned by taking into comprehensive consideration of market factors, the relevance between the operation or addition of the transferee and the appreciation or depreciation of the property, so as to prevent one party from gaining benefits because the contract is not formed, invalid or rescinded. In the event that the subject matter has been lost, resold or other situations that the subject matter cannot be returned, if the party concerned requests the return of the original object, the people's court shall not uphold such request, provided that the people's court shall uphold

> such request if it requests discount compensation. For the conversion of the subject matter into cash, the compensation standard shall be determined on the basis of the price agreed by the parties at the time of transaction and by taking into account the gains of the parties at the time of loss or resale of the subject matter. The insurance money or other compensations obtained by the parties concerned when the subject matter is lost, and the considerations obtained from resale, shall all be the interests obtained by the parties concerned due to the subject matter. The benefits received that are higher or lower than the purchase price shall also be distributed or allocated reasonably between the parties.
>
> [emphasis added in bold italics]

94 However, there are two obstacles in the way of HHBC's claim based on the SPC 2019 Notice. First, Art 33 of the SPC 2019 Notice (which is foreign law) is not pleaded as a substantive cause of action although HHBC argues that its effect is pleaded.

95 Second, neither party's PRC law expert opined on whether Art 33 of the SPC 2019 Notice requires Mr Ma to return the Sum to HHBC if HHBC fails to prove the existence of the Investment Agreement. HHBC's counsel accepts this.

96 Article 33 states that where a contract is "not formed, invalid or rescinded", property exchanged by the parties shall be returned. However, it is unclear whether the words "not formed, invalid or rescinded" encompass a situation like the present, where *neither* party has proved the existence of the oral agreement it/he has alleged. It is possible that these words are confined to cases where the evidence reveals that parties in fact entered into a contract but the contract failed to be binding, for instance, because of a breach of formalities or vitiating factors recognised in PRC law.

97 Prof Chen's evidence does not resolve the difficulty described in the preceding paragraph. He raised Art 33 of the SPC 2019 Notice to explain the consequences of the alleged Investment Agreement being invalidated under Article 52 of the Contract Law of the PRC for, among other things, "fraud or coercion", malicious collusion or an "attempt to conceal illegal objectives". For reference, Art 52 states as follows:

> A contract shall be invalid under any of the following circumstances:
>
> (1) Where either party enters into the contract by means of fraud or coercion, undermining national interests;
>
> (2) Where the parties concerned maliciously collude with each other, damaging the interests of the State, the collective or a third party;
>
> (3) Where the contract is an attempt to conceal illegal objectives under the disguise of a legitimate form;
>
> (4) Where social and public interests are undermined; or
>
> (5) Where mandatory provisions of laws and administrative regulations are violated.

The evidence of Mr Ma's PRC law expert, Professor Liu Qiao, also does not assist us on the interpretation of Art 33.

98 Importantly, HHBC's counsel clarified before us that the contractual entrustment argument is *not* a separate cause of action. He accepted that if HHBC fails to prove the Investment Agreement, the contractual entrustment argument falls away too.

Presumption of repayment

99 Lastly, HHBC relies on a presumption of repayment when money is transferred or credited to the recipient to recover, minimally, the Sum. We dismiss this claim.

100 HHBC derives the "presumption of repayment" from *Power Solar System Co Ltd (in liquidation) v Suntech Power Investment Pte Ltd* [2018] SGHC 233 ("*Power Solar*") at [81]. However, in *Tan Chin Hock* at [64]–[67], we declined to follow this aspect of *Power Solar* because the Court of Appeal in *PT Bayan Resources TBK and another v BCBC Singapore Pte Ltd and another* [2019] 1 SLR 30 had overruled it:

> 64 … In the case of *Power Solar System Co Ltd (in liquidation) v Suntech Power Investment Pte Ltd* [2018] SGHC 233 ("*Power Solar*"), Mavis Chionh Sze Chyi JC (as she then was), held that once a plaintiff proves payment (in the absence of circumstances justifying a presumption of advancement or any other plausible explanation as to why the sum of money was advanced), the court is entitled to infer that the sum of money was meant to be repaid, *ie*, a presumption of an obligation to repay arises. The question then is whether the circumstances surrounding the payment of money would disentitle the plaintiff from asking the court to draw such an inference: at [103(d)].
>
> 65 In making this proposition, she relied on the English decision of *Seldon v Davison* [1968] 1 WLR 1083 ("*Seldon*"). In Seldon the plaintiff had advanced the defendant a sum of money to purchase a house. The defendant admitted to receiving the money but asserted that it was a gift from the plaintiff. The English Court of Appeal held that the defendant bore the burden of proving that the payment was a gift. However, the Court of Appeal in *PT Bayan Resources TBK and another v BCBC Singapore Pte Ltd and another* [2019] 1 SLR 30 observed that *Seldon* was wrongly decided: see [140]–[144]. The court noted that in *Seldon*, ***the defence denied the essential ingredient in a loan, ie, the defendant did not admit that he had incurred a debt. Thus, it could not be presumed that such a debt had been incurred***.

> …
>
> 67 Thus, although it is undisputed that TTC made payments of the Sum to TCH or persons nominated by TCH, the burden is still on TTC to prove the purpose of the payments, as mentioned in *Choo Cheng Tong Wilfred v Phua Swee Khiang and another* [2022] SGHC(A) 5 at [15]. In other words, ***the court will not infer that the purpose is a loan just by the mere receipt of the Sum***.
>
> [emphasis added in bold italics]

101 In this case, Mr Ma clearly denies that he is legally obliged to repay the Sum and Investment Returns (by refence to, among other things, Zhang Wei's Arrangement). Hence, there can be no presumption that the Sum was a loan to Mr Ma that now has to be repaid. We reiterate that HHBC has also not established that the Sum was transferred to Mr Ma for the purposes of loans to HHBC.

Conclusion

102 For the foregoing reasons, we allow the appeal in part. We overturn the Judge's finding that the Investment Agreement exists and set aside his orders for Mr Ma to return the Sum and Investment Returns to HHBC and for the Investment Returns to be assessed (*Judgment* at [121] and [122]).

103 We also set aside the Judge's order for Mr Ma to return the RMB680,000 allegedly paid to him in reimbursement of part of his personal income taxes and the order for the assessment of the remuneration and expenses of Mr Ma. The Judge made these orders because while HHBC was obliged to reimburse Mr Ma for expenses incurred in the course of his duties under the Investment Agreement, Mr Ma had not proved that he did in fact pay the PRC tax authorities any such income tax (*Judgment* at [124]). As the Investment Agreement has not

been proved, there is no longer a basis to order the RMB680,000 to be returned to HHBC.

104 However, we uphold the Judge's dismissal of Mr Ma's counterclaim as we agree that the Asset Exchange Agreement has not been proved.

105 Each party is to bear his own costs of the appeal and the action below in light of our finding that neither side has proved his case on the existence of an oral agreement. The usual consequential orders apply.

Woo Bih Li
Judge of the Appellate Division

Quentin Loh
Judge of the Appellate Division

Hoo Sheau Peng
Judge of the High Court

Foo Yuet Min, Koh Boon Hao Samuel, Koh Will Sheng Wilson and Tan Yi Fan (Drew & Napier LLC) for the appellant;
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