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

[2024] SGHC 39

Originating Claim No 466 of 2022

Between

Tiger Pictures Entertainment Ltd

… *Claimant*

And

Encore Films Pte Ltd

… *Defendant*

And Between

Encore Films Pte Ltd

… *Claimant in Counterclaim*

And

Tiger Pictures Entertainment Ltd

… *Defendant in Counterclaim*

JUDGMENT

[Intellectual Property — Copyright — Infringement]
[Contract — Formation]

TABLE OF CONTENTS

Tiger Pictures Entertainment Ltd
v
Encore Films Pte Ltd

[2024] SGHC 39

General Division of the High Court — Originating Claim No 466 of 2022
Dedar Singh Gill J
2–3 October 2023, 14 November 2023

9 February 2024 Judgment reserved.

Dedar Singh Gill J:

Introduction

1 Originating Claim No 466 of 2022 ("OC 466") is the first case to be heard substantively under Part 2 of the Supreme Court of Judicature (Intellectual Property) Rules 2022 (the "SCJ(IP)R"). The case concerns copyright infringement. The defendant does not dispute that it carried out the acts complained of. It only submits that there was a distribution agreement between the parties. For the reasons stated in this judgment, I find that no agreement was reached between the parties.

Facts

The parties

2 The claimant is Tiger Pictures Entertainment Ltd, a company incorporated in the People's Republic of China. It is in the business of distributing and selling films around the world.[1] Mr Yang Gang (also known as Mr Owen Young) ("Mr Young") is the President of the claimant company.[2] The claimant has a related entity in Hong Kong under the same name ("HK Tiger").[3]

3 The defendant is Encore Films Pte Ltd, a Singapore-incorporated company which distributes films in Singapore and other countries in Southeast Asia.[4] The defendant's managing director is Ms Lee Huei Hsien (also known as Ms Joyce Lee) ("Ms Lee").[5]

The parties' relationship prior to OC 466

4 The parties have been in a commercial relationship since 2021. The claimant was the exclusive licensee of the distribution, reproduction and publicity rights to a Chinese film titled "Hi! Mom".[6] The claimant granted an exclusive licence to HK Tiger on materially similar terms.[7]

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1 Statement of Claim ("SOC") at para 1.

2 SOC at para 8.

3 SOC at para 7.

4 SOC at para 2; Defence and Counterclaim (dated 6 January 2023) ("Defence & Counterclaim") at para 6.

5 Affidavit of Evidence-in-Chief of Lee Huei Hsien (dated 13 September 2023) ("Ms Lee's AEIC") at para 1.

6 Affidavit of Evidence-in-Chief of Yang Gang (dated 29 September 2023) ("Mr Young's AEIC") at para 10.

7 Mr Young's AEIC at para 11.

5 HK Tiger subsequently granted an exclusive license for "Hi! Mom" in Singapore, Malaysia and Brunei to the defendant's related entity, Passion Entertainment Ltd ("Passion Entertainment").[8] Passion Entertainment proceeded to sub-license the distribution rights in "Hi! Mom" to the defendant for distribution and exhibition in Singapore.[9]

The background to OC 466

6 OC 466 is the parties' dispute regarding the rights to a Chinese film titled "Moon Man". The owner of the copyright in "Moon Man" is a Chinese company known as Kaixin Mahua.[10] Kaixin Mahua and the claimant entered into an exclusive licence agreement (the "Exclusive Licence Agreement") on 19 August 2022,[11] which was effective from 25 August 2022 to 24 August 2033.[12] Under the Exclusive Licence Agreement, the claimant is the exclusive licensee of the distribution, reproduction and publicity rights (the "relevant rights") to "Moon Man" in all jurisdictions worldwide except for the People's Republic of China and the Republic of Korea.[13] The claimant subsequently granted an exclusive sub-licence to HK Tiger for the relevant rights in respect of "Moon Man".[14]

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8 Defence & Counterclaim at para 12(i)(d).

9 Defence & Counterclaim at paras 12(i)(d) and 13(f).

10 SOC at para 4. Defence & Counterclaim at para 8.

11 SOC at para 5.

12 SOC at para 5.

13 SOC at para 5.

14 SOC at para 7.

7 On or around 18 August 2022, Mr Young contacted Ms Lee on the social media and messaging platform, WeChat, to negotiate entering into a distribution agreement for "Moon Man" in Singapore.[15]

8 From 20 to 22 August 2022, Mr Young and Ms Lee continued to negotiate the terms of the distribution agreement.[16] These comprised (the "WeChat and E-mail Negotiations"):

(a) Mr Young's 20 August 2022 e-mail to Ms Lee which contained the claimant's proposal for the parties' collaboration:[17]

> "… Our company, TPE, will provide the distribution rights for movie theatres, while your company will not need to pay MG. Your company will create a distribution plan and include it in P&A. After both parties agree to the plan, your company will implement it and TPE will provide an e-signature for joint distribution. When the box office is equal to or below 50k SGD, TPE will obtain a net[t] box office of 5%; and when the box office exceeds 50k SGD, TPE will obtain a net[t] of box office of 10%. In terms of the P&A plan and actual payment submitted by your company to TPE, TPE only needs to be informed in advance. Subsequent audits will not be required."

(b) Mr Young and Ms Lee's continued negotiations through WeChat messages on 20 August 2022 (the "20 August WeChat Messages").[18] The 20 August WeChat Messages indicated that the claimant was entitled to 5% of the nett box office amount if

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15 SOC at para 8; Defendant's Closing Submissions (dated 31 October 2023) ("DCS") at para 12.

16 Claimant's Closing Submissions (dated 31 October 2023) ("CCS") at para 4.

17 CCS at para 4; DCS at para 13; Agreed Bundle of Documents (Volume 1 of 3) ("1AB") at 319.

18 CCS at para 4; 1AB 242–246.

the nett box office was S$60,000 and below; and 9% of the nett box office amount if it was above S$60,000.[19] Mr Young also requested for the defendant to provide a promotions and advertising ("P&A") plan which would be given to the producer but not audited.[20] To this, Ms Lee replied that there were some difficulties with the provision of the "receipts".[21] Mr Young and Ms Lee arranged a WeChat call on 22 August 2022 to discuss whether the defendant was required to provide a P&A plan.[22]

(c) Mr Young's and Ms Lee's WeChat messages and WeChat call on 22 August 2022.[23] During the WeChat call, Mr Young and Ms Lee discussed their disagreements about the provision of promotional receipts and a right of audit.[24] Slightly less than three hours after the call, Mr Young sent a WeChat message to Ms Lee, stating: "Okay, let's proceed according to our plan".[25]

9 On or around 22 August 2022, the claimant and HK Tiger provided the defendant with a download link to the encrypted file containing the digital cinema package for "Moon Man" (the "DCP") and the distribution key delivery

19 1AB 242–244.

20 1AB 244.

21 1AB 244.

22 1AB 244–245.

23 CCS at para 4.

24 Ms Lee's AEIC at para 31.

25 1 AB 246.

message (the "DKDM").[26] The DKDM is a master password to decrypt the "Moon Man" DCP file.[27]

10 On 31 August 2022, the claimant reminded the defendant to send it the draft distribution agreement.[28] On the same day, the defendant sent a first draft of the distribution agreement for "Moon Man" (the "First Draft Agreement") to the claimant and HK Tiger via e-mail.[29] The First Draft Agreement stipulated that Passion Entertainment would be the distributor for "Moon Man" in Singapore from 31 August 2022 to 31 December 2022.[30] However, the claimant and HK Tiger did not accept the terms of the First Draft Agreement.[31]

11 Therefore, on 1 September 2022, the claimant and HK Tiger sent a revised draft of the distribution agreement to the defendant through e-mail.[32] On 7 September 2022, the defendant sent a further revised draft of the distribution agreement. This included the defendant's counterproposal for the defendant to act as the guarantor for Passion Entertainment.[33]

12 On 8 September 2022, the defendant informed the claimant and HK Tiger through e-mail that "sneak" sessions for "Moon Man" were planned from 9 to 11 September 2022 in Singapore (the "Sneak Sessions"). The defendant's position was that the parties had agreed upon the basic financial terms of a

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26 SOC at para 23; Defence & Counterclaim at para 21.

27 CCS at para 74.

28 SOC at para 17.

29 SOC at para 9; Defence & Counterclaim at para 13(a).

30 SOC at para 9.

31 SOC at para 10.

32 SOC at para 10; Defence & Counterclaim at para 14(a).

33 SOC at para 10.

binding distribution agreement through their WeChat and E-mail Negotiations.[34] In response, the claimant and HK Tiger challenged the existence of a binding distribution agreement and cautioned the defendant against proceeding with the Sneak Sessions.[35] The claimant and HK Tiger also reiterated through their lawyers that there was no binding agreement between the parties and demanded that the defendant cease any exhibition or exploitation of the film until a written agreement was executed.[36]

13 Nonetheless, the claimant and HK Tiger subsequently granted the defendant the rights to organise and exhibit "Moon Man" solely for the purposes of the Sneak Sessions.[37]

14 The parties continued to exchange further drafts of the distribution agreement from 9 to 12 September 2022.[38] However, the parties could not reach an agreement on several terms.[39] Specifically, the defendant alleged that the claimant's draft agreements contained unreasonable terms which the defendant was not agreeable to.[40] Hence, no written agreement for "Moon Man" was executed.[41]

15 On 13 September 2022, the defendant informed the claimant's lawyers that if the claimant did not respond by 5.00pm that day, the defendant would

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34 SOC at para 12(1); Ms Lee's AEIC at Tab 26, p 457.

35 SOC at para 12(2); Ms Lee's AEIC at Tab 26, p 457.

36 SOC at para 12(3); Defence & Counterclaim at para 16(d).

37 SOC at para 12(4); Ms Lee's AEIC at Tab 27, p 463.

38 SOC at para 13.

39 SOC at para 14; Defence & Counterclaim at para 17(a).

40 Ms Lee's AEIC at para 55.

41 SOC at para 14.

assume that the claimant had no objections to the theatrical release of "Moon Man" on 15 September 2022.[42] The claimant's lawyers responded at 4.34pm, insisting that there was no distribution agreement between the parties.[43] In reply, the defendant's lawyers alleged that a contract had been formed on 20 August 2022 and that the defendant would release "Moon Man" for general screening in Singapore on 15 September 2022.[44]

16 The defendant also contends that it had obtained Kaixin Mahua's consent to the release of "Moon Man" in Singapore between 11 September 2022 and 15 September 2022.[45] However, the evidence does not show that Kaixin Mahua consented to the defendant's release of "Moon Man" in Singapore. Instead, Kaixin Mahua informed the defendant through an e-mail on 14 September 2022 that all matters concerning the distribution of "Moon Man" were handled by the claimant or HK Tiger.[46]

17 Between 15 September 2022 and 26 October 2022, the defendant proceeded with the theatrical release of "Moon Man".[47]

18 On 20 September 2022, the claimant's lawyers sent an e-mail to the defendant, repeating that there was no agreement for the theatrical release of "Moon Man" except for the Sneak Sessions.[48]

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42 SOC at para 17.

43 SOC at para 18.

44 SOC at para 19.

45 Defence & Counterclaim at para 19(b).

46 Mr Young's AEIC at YG-14, p 670.

47 SOC at para 21.

48 Reply and Defence to Counterclaim (Amendment No. 1) (dated 21 February 2023) ("Reply") at para 17(4).

19 On 16 December 2022, the claimant commenced OC 466, claiming that the defendant had infringed its copyright in "Moon Man".[49] The defendant denies infringing the copyright in "Moon Man" on the basis that the parties had entered into a distribution agreement for "Moon Man" in Singapore through the WeChat and E-mail Negotiations (the "Alleged Agreement"). In its Defence, the defendant also raised two counterclaims against the claimant, which I summarily dealt with in *Tiger Pictures Entertainment Ltd v Encore Films Pte Ltd* [2023] SGHC 138 ("*Tiger Pictures 1"*) at [29] and [30].

Procedural history

20 On 19 December 2022, the claimant filed a form electing for Part 2 of the SCJ(IP)R to apply and a form abandoning any claim for monetary relief in excess of $500,000. This led to the application of the simplified process, pursuant to r 5(1) of the SCJ(IP)R.

21 The defendant filed Summons No 926 of 2023 ("SUM 926") on 31 March 2023, to challenge the applicability of the simplified process to OC 466. I dismissed the application and allowed OC 466 to proceed under the simplified process (*Tiger Pictures 1* at [39]). The full grounds of my decision are set out in *Tiger Pictures 1*.

22 On 21 July 2023, the defendant filed its Single Application Pending Trial ("SAPT"), Summons No 2172 of 2023 ("SUM 2172"). The defendant's SAPT included an application to strike out the entirety of the claim on the basis that the claimant had no standing to maintain its action in OC 466.[50] I dismissed the defendant's striking out application as the claimant was a statutory exclusive

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49 SOC at paras 21–23; CCS at para 2.

50 HC/SUM 2172/2023 (dated 21 July 2023) at para 6.

licensee within the meaning of s 103 of the Copyright Act 2021 (2020 Rev Ed) (the "Copyright Act 2021") and had standing to maintain OC 466. The full grounds of my decision are set out in *Tiger Pictures Entertainment Ltd v Encore Films Pte Ltd* [2023] SGHC 255 (*"Tiger Pictures 2"*).

The parties' cases in OC 466

23 The claimant's position is that the parties had not entered into a distribution agreement for "Moon Man" in Singapore.[51] Thus, the defendant was not authorised to distribute or exhibit "Moon Man" in Singapore apart from the "Sneak Sessions".[52] The claimant alleges two main grounds for its position:

(a) First, the parties did not intend for the WeChat and E-mail Negotiations to create legal relations.[53]

(b) Second, the Alleged Agreement was incomplete or too uncertain to be workable as several material terms had not been agreed as of 22 August 2022.[54]

24 The claimant therefore submits that the defendant had infringed the claimant's copyright in "Moon Man" by (the "Alleged Infringing Acts"):

(a) Authorising third parties to cause the visual images and sounds of "Moon Man" to be seen and heard in public without authorisation of the claimant and/or HK Tiger;[55]

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51 CCS at para 8; SOC at para 16.

52 Reply at para 9(4); CCS at para 8; SOC at para 16.

53 CCS at para 8(1).

54 CCS at para 8(2).

55 SOC at para 21.

(b) Communicating "Moon Man" to the public without the authorisation of the claimant and/or HK Tiger;[56] and

(c) Making copies and/or authorising third parties to make copies of "Moon Man" without the authorisation of the claimant and/or HK Tiger.[57]

25 The defendant's case is that the parties' WeChat and E-mail Negotiations constitute a legally binding distribution agreement for "Moon Man".[58] In justifying its position, the defendant challenges both grounds raised by the claimant above at [23]. Further, the defendant alleges that the claimant had unfairly withheld the execution of the written agreement for "Moon Man" to compel the defendant's cooperation in relation to legal issues regarding "Hi! Mom".[59] Accordingly, the defendant denies any infringement of copyright in "Moon Man".[60]

Issues

26 Under s 146(1) of the Copyright Act 2021, copyright is infringed if a person does or authorises the doing in Singapore of any act comprised in the copyright and the person neither owns the copyright nor has the licence of the copyright owner.

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56 SOC at para 22.

57 SOC at para 23.

58 Defence & Counterclaim at para 12(i)(e).

59 DCS at para 57.

60 Defence & Counterclaim at para 20(a).

27 It is undisputed that the defendant committed the Alleged Infringing Acts.[61] Therefore, the primary issue for my determination is whether the parties had entered into a valid and binding agreement for the defendant to distribute "Moon Man" in Singapore. There are two sub-issues:

(a) Whether the parties intended for the WeChat and E-mail Negotiations to create legal relations.

(b) Whether the Alleged Agreement lacked the requisite certainty for contractual formation.

Burden of Proof

28 The claimant raises a preliminary point regarding the burden of proof. It submits that the burden of proof rests on the defendant to prove the existence of a legally binding agreement (*viz,* a licence) between the parties because the defendant alleges the existence of a distribution agreement "as part of its defence".[62] The defendant does not take issue with this in its submissions. Nonetheless, for completeness, I clarify the legal position on the burden of proof for a copyright infringement claim.

29 The issue depends on whether the non-existence of a licence is an element of a copyright infringement claim. If so, the burden of proof should be placed on the claimant. This accords with the general principle underlying ss 103 and 105 of the Evidence Act 1893 (2020 Rev Ed) (the "EA") that he who asserts must prove (*Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank International), Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 ("*Cooperatieve"*) at [31]). On the other hand, if the

61 CCS at para 95; Defence & Counterclaim at para 20(a)–(j).

62 CCS at para 7.

claimant is correct that the existence of a licence is a legal defence to a copyright infringement claim, the burden of proof falls on the defendant. This is because the "legal burden of proving a pleaded defence rests on the proponent of the defence, unless the defence is a bare denial of the claim" [emphasis in original omitted] (*Cooperatieve* at [31]).

30 In my opinion, it cannot be seriously disputed that the claimant bears the burden of proving that there was no licence given to the defendant. On a literal reading of s 146(1)(b) of the Copyright Act 2021, it is apparent that the lack of ownership and the lack of a copyright licence are *conjunctive* requirements. The claimant needs to prove *both* when seeking to bring an action for copyright infringement. Hence, the lack of a copyright licence is an element of a copyright infringement claim. This is also established by the context of s 146 within the Copyright Act 2021 and the provisions regarding licences (ss 141–143 of the Copyright Act 2021). This is because ss 141–146 are situated under Part 3 of the Copyright Act 2021, which deals with "copyright in works". In comparison, the generally accepted defences for a copyright infringement claim, such as a fair use defence, are situated under Part 5 of the Copyright Act, which is concerned with "permitted uses of copyright works and protected performances". This indicates that the non-existence of a licence is an element of a copyright infringement claim and not a defence.

31 This position is also supported by academic opinion. George Wei, *The Law of Copyright in Singapore* (SNP Editions Pte Ltd, 2nd Ed, 2000) (at para 9.287) states that:

> Copyright infringement arises where the defendant, without the licence of the copyright owner, does one or more of the exclusive rights that are conferred on the copyright owner. It follows that where the defendant enjoys a licence to do the act complained of, the claim for infringement will fail. *It is submitted that the*

> *legal burden is on the copyright owner to establish the absence of a licence, although, in many cases, it may be that the plaintiff will not have to do much to cast an evidential burden on the defendant.*
>
> [emphasis added]

32 This is corroborated by the similar positions in the UK and Australia. The UK position is relevant as s 16(2) of the Copyright, Designs and Patents Act 1988 (c 48) (UK) is *in pari materia* to s 146(1) of the Copyright Act 2021. The UK cases indicate that the burden of proof rests on the claimant to prove the lack of a licence in a copyright infringement claim. In *Royal Mail Group plc (formerly known as Consignia plc) v i-CD Publishing (UK) Ltd* [2003] All ER (D) 113 (Aug) (at [6]), the court stated that "[s]ince absence of consent is an ingredient of liability for infringement, the Claimant carries the 'legal' or 'persuasive' burden…". This was similarly the case in *Barrett v Universal Island Records and others* [2006] All ER (D) 214 (May), where the court stated (at [395]) that in the context of a claim for copyright infringement and performance rights, "[s]ince the absence of the performer's consent is part of the definition of infringement… the burden must be on the performer to establish the lack of consent".

33 A survey of the academic opinion in the UK also indicates that the non-existence of a licence is an element of a copyright infringement claim. Gwilym Harbottle, Nicholas Caddick & Uma Suthersanen, *Copinger and Skone James on Copyright* vol 1 (Sweet & Maxwell, 18th Ed, 2021) states at para 7–09 that "it is a *necessary ingredient of the tort* that the act in question was done without the licence of the copyright owner" [emphasis added]. Similarly, it is stated in Adrian Speck *et al, Laddie, Prescott and Vitoria: The Modern Law of Copyright* vol 1 (LexisNexis, 5th Ed, 2018) at para 13.15 that "to amount to an

infringement an act must be done without the licence of the owner of the right…".

34 The Australian position is also relevant as ss 36(1) and 101(1) of the Australian Copyright Act 1968 (Cth) (the "Australian Copyright Act") are also *in pari materia* to s 146(1) of the Copyright Act 2021. Section 37 of the Australian Copyright Act also adopts a similar wording to ss 36(1) and 101(1) of the Australian Copyright Act, except that it addresses the specific situation of infringement by importation for sale or hire. Australian case law also supports the proposition that the burden of proving the absence of a licence should be placed on the claimant (see *Avel Pty Ltd v Multicoin Amusements Pty Ltd and another* (1990) 18 IPR 443 ("*Avel"*) at 466 and *ACOHS Pty Ltd v RA Bashford Consulting Pty Ltd and others* (1997) 37 IPR 542 at 558). This is because the lack of a licence is "a constituent element of infringement" (*Avel* at 455).

35 I am satisfied that the correct position is that the claimant bears the legal burden of proving that the defendant does not have the licence of the copyright owner under s 146(1)(b) of the Copyright Act 2021. Nonetheless, on the facts of this case, it is not entirely material who bears the burden of proof, as I find that there was no distribution agreement between the parties.

Whether the parties had entered into a valid and binding distribution agreement for "Moon Man"

36 In my judgment, there is no distribution agreement between the parties. I set out my reasons below.

Whether the parties intended for the WeChat and E-mail Negotiations to create legal relations

37 A key requirement for contractual formation is that the parties must have had an intention to create legal relations (*Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 ("*Gay Choon Ing"*) at [71]).[63] For a valid contract to exist, it must be demonstrated that both parties intended for the transaction they entered into to have legal effect (*Gay Choon Ing* at [71]).[64]

38 For business and commercial arrangements, there is a rebuttable presumption that the parties intended to create legal relations (*Gay Choon Ing* at [72]). Nevertheless, as stated by Tay Yong Kwang JC (as he then was) in *Hongkong & Shanghai Banking Corp Ltd v Jurong Engineering Ltd and others* [2000] 1 SLR(R) 204 ("*HSBC"*) (at [43]):[65]

> *[T]he operation of the presumption does not detract the court from its fundamental task, which is to ascertain the true bargain between the parties,* to seek the substance and reality of the transaction and to ascertain what common intentions should be ascribed to the parties.
>
> [emphasis added]

39 Additionally, there is an interplay between the contractual formation requirements of an intention to create legal relations and certainty. Generally, where parties have entered into a signed agreement which adequately sets out the essential terms of the transaction, the court would be extremely reluctant to infer that the parties had not intended to be bound (*The Law of Contract in*

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63 Claimant's Bundle of Authorities for Closing Submissions (dated 31 October 2023) ("CBOA") at Tab 6; CCS at para 10.

64 CBOA at Tab 8; CCS at para 11.

65 CBOA at Tab 16; CCS at para 13.

Singapore (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2nd Ed, 2022) ("*The Law of Contract"*) at para 05.030).[66] Conversely, uncertain and incomplete terms are "often viewed as strong evidence of a lack of contractual intent" (*The Law of Contract* at para 05.030).[67] However, even when parties have agreed upon all the essential terms, they may intend to only be contractually bound upon the execution of a formal written agreement (*China Coal Solution (Singapore) Pte Ltd v Avra Commodities Pte Ltd* [2020] 2 SLR 984 ("*China Coal Solution"*) at [26]).[68]

40 The claimant's position is that the parties did not intend for the WeChat and E-mail Negotiations to create legal relations. Instead, it was the parties' common understanding that all negotiations were always subject to and conditional upon the execution of a written agreement.[69]

41 The defendant instead argues that there was an intention to create legal relations through the WeChat and E-mail Negotiations, and that there was no common understanding that the WeChat and E-mail Negotiations were subject to a written agreement.[70]

42 Having considered the evidence before me, I conclude that the parties did not intend to create legal relations through the WeChat and E-mail Negotiations.

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66 CBOA at Tab 16; CCS at para 13.

67 CBOA at Tab 16; CCS at para 13.

68 CBOA at Tab 3; CCS at para 12.

69 CCS at paras 9 and 15; SOC at para 15.

70 DCS at para 34.

The WeChat and E-mail Negotiations show that the parties lacked an intention to create legal relations

43 The parties did not expressly agree to do away with a written agreement during their WeChat and E-mail Negotiations.[71] Instead, I find that the parties contemplated the execution of a written agreement during their WeChat and E-mail Negotiations. After the parties' WeChat call on 22 August 2022, Ms Lee informed Mr Young that she would ask the defendant's employee, Ms Ng Cheah Siew Shelin ("Ms Ng"), to "send the contract to [him]".[72] This indicates that Ms Lee also believed that a written contract had to be executed. I am therefore of the opinion that the parties did not intend for the WeChat and E-mail Negotiations to create legal relations.

Whether the terms of the Alleged Agreement evidence a lack of intention to create legal relations

44 The claimant further argues that there was no intention to create legal relations because the material terms of the Alleged Agreement are uncertain and incomplete.

45 First, I deal with the defendant's assertion that the claimant failed to plead that the Alleged Agreement was too incomplete or uncertain to be workable.[73] The principles regarding pleadings were reviewed by the Court of Appeal in *How Weng Fan and others v Sengkang Town Council and other appeals* [2023] 2 SLR 235 ("*How Weng Fan"*) at [18]–[20]:

> The general rule is that parties are bound by their pleadings and the court is precluded from deciding matters that have not been put into issue by the parties… The rationale of disallowing

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71 CCS at para 20.

72 CCS at para 16; 1AB 252.

73 DCS at paras 4, 69 and 75.

> a claim, or a defence, that is not pleaded, is to prevent injustice from being occasioned to the party who, because of the failure of the opposing party to plead, did not have a chance to respond to the claim or defence in question…
>
> There are two important principles that qualify the foregoing principle. First, only *material* facts need to be pleaded…On this basis, the particular legal result flowing from the material facts that the claimant wishes to pursue need not always be pleaded. Equally, the relevant propositions or inferences of law need not be pleaded…
>
> Second, a narrow exception exists where the court may permit an unpleaded point to be raised (and to be determined) where there is no irreparable prejudice caused to the other party in the trial that cannot be compensated by costs or where it would be clearly unjust for the court not to do so…

46 I disagree with the defendant. The law only requires the material facts, and not the legal consequences of those facts, to be pleaded (*How Weng Fan* at [19]). The claimant has pleaded in its Statement of Claim that the parties did not agree on several "key terms", "including (but not limited to) which entity was to be the distributor in the agreement".[74] In my view, this is sufficient.

47 Even if there is an insufficient particularity of pleadings, "evidence given at trial can, where appropriate, overcome defects in the pleadings provided that the other party is not taken by surprise or irreparably prejudiced" (*OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] 4 SLR 231 ("*OMG Holdings"*) at [18]). This may be established by showing that "the issue was raised in evidence, it was clearly appreciated by the other party, and no reasonable objections were taken at the trial to such evidence being led and the point in question being put into issue" (*How Weng Fan* at [29(b)]).

48 In the present case, I am also satisfied that there is no prejudice caused to the defendant because the issue was raised in evidence and was clearly

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74 SOC at para 14.

appreciated by the defendant. The claimant submitted in its opening statement that the parties had not reached an agreement on several material terms, rendering the agreement incomplete or too uncertain to be workable.[75] Mr Young's Affidavit of Evidence-in-Chief ("AEIC") also states that the WeChat and Email Negotiations did not amount to a valid and binding agreement "given that material terms, such as the licence period, the P&A budget and plan, and details of release requirements, had not even been discussed".[76] At trial, the claimant had also put to Ms Lee that "the parties had not reached an agreement on several key terms for the distribution of "Moon Man" as [of] 22 August 2022".[77]

49 I therefore consider the claimant's argument that the uncertain and incomplete terms of the Alleged Agreement show that there was no intention to create legal relations through their WeChat and E-mail Negotiations.

50 As mentioned at [39], the fact that the alleged terms of an agreement are uncertain and incomplete is strong evidence of a lack of intention to create legal relations (*The Law of Contract* at para 05.030). In contrast, where parties have entered into a signed agreement adequately setting out the material terms of the transaction, the court is likely to conclude that the parties had an intention to be bound (*The Law of Contract* at para 05.030).

51 Nonetheless, as noted in *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521 ("*R1 International"*) at [52]:

> …it is not uncommon for parties to first agree on a set of essential terms which the parties may be bound by as a matter

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75 Claimant's Opening Statement (dated 25 September 2023) ("COS") at paras 43–47.

76 Mr Young's AEIC at para 50.

77 HC/OC 466/2022 Notes of Evidence (3 October 2023) at p 61, lines 8–14.

> of law and on the basis of which they may act, even while there may be ongoing discussions on the incorporation of other usually detailed terms. The fact that the latter issue has yet to be resolved does not prevent the contract based on the essential core terms from coming into existence…

52 The claimant submits that the Alleged Agreement was incomplete or too uncertain to be workable as several material terms had not been agreed upon as of 22 August 2022.[78] Specifically, the claimant posits that the parties failed to agree on the following material terms (the "Alleged Terms"):

(a) the identity of the distributor;

(b) whether there was a need for the defendant to provide a P&A plan (the "P&A term");

(c) the scope or type of licensed rights; and

(d) the licence period.[79]

53 On the other hand, the defendant denies that the terms of the Alleged Agreement were incomplete. The defendant's position is that the Alleged Terms were neither material nor unclear.[80] Finally, the defendant submits that even if the parties were involved in ongoing discussions regarding the incorporation of additional terms, it does not preclude the existence of a contract as the parties had already agreed on the essential terms.[81]

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78 CCS at para 64.

79 CCS at para 62.

80 DCS at para 71; Defendant's Reply Closing Submissions (dated 14 November 2023) ("DRCS") at para 17.

81 DCS at para 88; DRCS at para 19.

54 Andrew Ang J stated in *Rudhra Minerals Pte Ltd v MRI Trading Pte Ltd (formerly known as CWT Integrated Services Pte Ltd)* [2013] 4 SLR 1023 ("*Rudhra"*) (at [27]) that in determining whether a term is a material term, "it is for the parties to decide whether and when they wish to be bound and, if so, by what terms".

55 I will consider if the Alleged Terms are material and if the parties have agreed on them.

(1) The uncertainty of the identity of the distributor evidences a lack of intention to create legal relations

56 The identity of the distributor of the film is a key term of the "Moon Man" distribution agreement.[82] Even if Mr Young did not expressly indicate the materiality of the term on or before 22 August 2022,[83] both Ms Lee and Ms Ng have conceded at trial that the identity of the distributor is a key term in any film distribution agreement.[84] In any case, it is well accepted that "[t]he identity of the parties to a contract is fundamental" and "goes to the very existence of the contract itself" (*The "Luna" and another appeal* [2021] 2 SLR 1054 ("*The Luna"*) at [35], citing Lord Millett in *Homburg Houtimport BV and others v Agrosin Pte Ltd and another (The Starsin)* [2004] 1 AC 715 at [175]–[176]). Hence, where the identity of the parties is uncertain, "there is no contract" (*The Luna* at [35]).

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82 CCS at para 53.

83 DCS at para 84.

84 HC/OC 466/2022 Notes of Evidence (3 October 2023) at p 19, line 20 to p 20 line 2. HC/OC 466/2022 Notes of Evidence (3 October 2023) at p 90, lines 13–19.

57 It is undisputed that the parties did not agree on the identity of the distributor.[85] Although the defendant alleged in its Defence that the claimant and/or HK Tiger agreed that the defendant would be the eventual distributor of "Moon Man", Ms Lee admitted at trial that the parties had not discussed the identity of the distributor as of 22 August 2022.[86] The defendant also conceded as such in its Reply Closing Submissions.[87]

58 I conclude that the identity of the distributor is a material term of the distribution agreement for "Moon Man" and the parties did not reach an agreement on it as of 22 August 2022. I am convinced that the failure to agree on the identity of the distributor is itself sufficient to conclude that the Alleged Agreement lacks certainty.

(2) The other Alleged Terms

59 There is no contention that whether the P&A plan must be provided is a material term.[88] However, the parties disagree as to whether they reached a consensus on this. The claimant contends that it had always required the defendant to provide a P&A plan while the defendant argues otherwise.[89]

60 On the evidence, the claimant had represented to the defendant on 20 August 2022 that the defendant had to provide a P&A plan, although it was not subject to an audit.[90] In response, Ms Lee had informed Mr Young that the

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85 CCS at para 54.

86 HC/OC 466/2022 Notes of Evidence (3 October 2023) at p 60, lines 23 to p 61, line 1.

87 DRCS at para 15.

88 CCS at para 67; HC/OC 466/2022 Notes of Evidence (3 October 2022) at p 29, lines 20-25 to p 30, lines 1–2.

89 CCS at para 33; DCS at para 62.

90 1AB 319; 1 AB 244; CCS at para 36(1)–(2).

"promotional receipts" and a right of audit were unnecessary and irrelevant and that the defendant would be unable to agree to the deal if the claimant insisted on an audit rights procedure.[91] Parties continued negotiations on whether a P&A plan must be provided during the 22 August WeChat call.[92] Slightly less than three hours after the 22 August WeChat call, Mr Young sent a WeChat message to Ms Lee, stating: "Okay, let's proceed according to our plan".[93]

61 The parties however take differing interpretations of Mr Young's WeChat message. The claimant's position is that during the 22 August WeChat call, Mr Young had explained to Ms Lee that a P&A plan was required, but agreed to compromise on the basis that Ms Lee would try her best to provide as many receipts as possible.[94] Therefore, the claimant avers that Mr Young's WeChat message was based on the understanding that parties would still include a requirement for the provision of a P&A plan in the written agreement.[95] Instead, the defendant's position is that during the 22 August WeChat call, Ms Lee expressed and maintained that she could not and would not provide a P&A plan.[96] The defendant denies that Ms Lee had informed Mr Young that she would try her best to provide as many receipts as possible.[97]

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91 DCS at para 18; HC/OC 466/2022 Notes of Evidence (2 October 2023) at p 38, at lines 21–24.

92 CCS at para 36(3); DCS at para 22.

93 1AB 246.

94 CCS at para 37(2); HC/OC 466/2022 Notes of Evidence (2 October 2023) at p 42, lines 7–25 to p 43, lines 1–4.

95 CCS at para 37(3).

96 HC/OC 466/2022 Notes of Evidence (3 October 2023) at p 48, lines 12–20.

97 DCS at para 26.

62 Mr Young's WeChat message of "proceed[ing] according to… plan" is ambiguous. Apart from the parties' bare assertions, there is no other evidence before me that would aid in interpreting Mr Young's WeChat message. Although I come back to this point at [107], at this stage, I am not able to conclude one way or the other.

63 The defendant's position is that there was an agreement on the scope or type of licensed rights on 22 August 2022,[98] but there is no evidence of this. I consider this issue later at [108]–[109].

64 The defendant does not dispute that no agreement was reached on the licence period as of 22 August 2022.[99] I therefore deal with this point at [110]–[113].

65 In any case, the parties' WeChat and E-mail Negotiations and the failure to agree on the identity of the distributor sufficiently demonstrate that the parties did not have an intention to create legal relations through their WeChat and E-mail Negotiations. That said, I will consider the parties' arguments regarding their prior dealings in "Hi! Mom" and their subsequent conduct for completeness.

The parties' prior dealings in "Hi! Mom" reinforce the lack of an intention to create legal relations

66 The claimant relies on the parties' prior dealings in "Hi! Mom" to bolster its claim that there was a common understanding that the WeChat and E-mail Negotiations were subject to a written agreement being executed.

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98 DCS at para 77.

99 HC/OC 466/2022 Notes of Evidence (3 October 2023) at p 59, lines 14–22.

67 However, the claimant has not raised such reliance in its pleadings. The claimant has only pleaded that "all negotiations between the parties… in respect of [Moon Man] were subject to and conditional upon the execution of a written agreement",[100] without pleading that the parties' prior dealings in respect of "Hi! Mom" are also a basis for its conclusion. Although the defendant does not take issue with this, for completeness, I will address the issue of whether the claimant has sufficiently pleaded its claim.

68 Even though the claimant has insufficiently pleaded its reliance on the parties' prior dealings, I am of the view that I can take into consideration the prior dealings in respect of "Hi! Mom". As stated above at [45]–[47], an unpleaded point may be raised and determined where there is no irreparable prejudice caused to the other party that cannot be compensated by costs. In the present case, there is no prejudice caused to the defendant by considering the parties' prior dealings. The claimant's reliance on the parties' prior dealings was sufficiently raised in evidence. The claimant's opening statement indicated that it was relying on the parties' prior dealings in respect of "Hi! Mom" to establish that the "Moon Man" negotiations were subject to and conditional upon a written agreement.[101] This reliance on the parties' prior dealings was also stated in Mr Young's AEIC and during the claimant's cross-examination of Ms Lee at trial.[102] The defendant has also not objected to the claimant's reliance on such evidence and has itself relied on the prior dealings between the parties in its pleadings, although it is in relation to a separate point on the identity of the

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100 SOC at para 15.

101 COS at para 40.

102 Mr Young's AEIC at para 25.

distributor.[103] In the circumstances, it would, in my judgment, be artificial to exclude such evidence.

69 In determining the existence of a distribution agreement between the parties, I can take into account "the parties' objective intentions as disclosed by their correspondence and interactions… in the light of the relevant background against which the contract has allegedly been made" (*China Coal Solution* at [26]). This includes "the industry the parties are in, the character of the documents allegedly containing the *contract as well as the course of dealings between the parties*" [emphasis added] (*China Coal Solution* at [26]). The court must consider "the whole course of the parties' negotiations, both before and after the alleged date of contracting" (*China Coal Solution* at [26]).

70 I proceed to consider if the parties' past dealings corroborate my finding that there was a lack of an intention to create legal relations through the WeChat and E-mail Negotiations.

71 The parties agree that in respect of "Hi! Mom", they had a common understanding that any discussions over email and WeChat were subject to the execution of a written agreement.[104] This is supported by Ms Lee's evidence at trial.[105] The claimant therefore avers that the parties had a similar understanding that a written agreement was necessary in respect of "Moon Man".[106]

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103 Defence & Counterclaim at para 13(i).

104 CCS at para 23.

105 HC/OC 466 Notes of Evidence (3 October 2023) at p 36, lines 12–17.

106 CCS at para 21.

72 However, the defendant takes issue with reliance on the parties' past dealings in respect of "Hi! Mom".[107] The defendant seeks to distinguish the specific factual contexts of the "Hi! Mom" and "Moon Man" transactions on the basis that the agreement for the former was contained in a deal memorandum, whereas the agreement for the latter is contained in the WeChat and E-mail Negotiations.[108] I am not persuaded by the defendant's attempts to distinguish the contexts of "Hi! Mom" and "Moon Man". The defendant's argument is circular. It is predicated on the presumption that the "Moon Man" agreement is contained in the WeChat and E-mail Negotiations, which is exactly the issue before the court.

73 The parties' past dealings in respect of "Hi! Mom" are as follows:

(a) First, Ms Lee sent Mr Young an offer for the distribution of "Hi! Mom" and a proposal on the financial terms.[109] These included a term that the defendant would pay the claimant a 'minimum guarantee'.[110]

(b) Second, Mr Young called Ms Lee over WeChat to propose that the 'minimum guarantee' for "Hi! Mom" be increased.[111]

(c) Third, Mr Young sent Ms Lee an email, confirming that the claimant would like to work with the defendant to distribute "Hi! Mom".[112]

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107 DRCS at paras 10–11.

108 DRCS at para 11.

109 CCS at para 22(1); 1AB 152.

110 CCS at para 22(1); 1AB 152.

111 CCS at para 22(2); 1AB 111.

112 CCS at para 22(3); 1AB 151.

(d) Fourth, Ms Lee proposed via WeChat message that due to time constraints, the parties should sign the deal memorandum first and execute a long form agreement a week after.[113] The deal memorandum provided that "the parties will prepare and sign, if necessary, a formal agreement incorporating the above terms" and that if no formal agreement was signed, the deal memorandum would constitute the binding agreement between the parties.[114]

(e) Fifth, Mr Young sent the executed "Hi! Mom" deal memorandum to the defendant by e-mail.[115]

74 For "Moon Man", the parties also discussed the financial terms on 20 August 2022, negotiated the terms of the Alleged Agreement over the WeChat and E-mail Negotiations and exchanged draft formal agreements through email.[116] However, there was no deal memorandum executed in respect of "Moon Man".

75 At trial, Ms Lee asserted that unlike "Hi! Mom", "Moon Man" did not require the execution of a deal memorandum. She alleged that the deal memorandum in "Hi! Mom" was merely to facilitate the payment of the 'minimum guarantee' by the defendant's finance department.[117] As "Moon

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113 CCS at para 22(4); 1AB 112.

114 CCS at para 22(5); 1AB 155.

115 CCS at para 22(6); 1AB 156–162.

116 CCS at para 17.

117 HC/OC 466/2022 Notes of Evidence (3 October 2023) at p 37, lines 15–24.

Man" did not require payment of a 'minimum guarantee',[118] there was no common understanding between the parties that a deal memorandum or other written agreement must be executed.

76 I reject this argument. Ms Lee's own email dated 24 March 2021 indicates her understanding that the deal memorandum "is an official legally binding agreement in accordance [with] Singapore laws" and not simply a document to facilitate the defendant's payment of a "minimum guarantee".[119] Additionally, there is no indication that both the parties understood that a formal agreement may be dispensed with where there was no payable 'minimum guarantee'.[120] Such an alleged understanding was not communicated by Ms Lee nor agreed to by Mr Young.[121]

77 In my view, the parties' previous dealings in respect of "Hi! Mom" are substantially similar to their dealings in respect of "Moon Man", save for the execution of a deal memorandum or formal agreement. In respect of "Hi! Mom", the parties operated under the common understanding that the deal memorandum would constitute a sufficient contract in the absence of a formal agreement being executed. On the contrary, there was no express agreement to do away with a written agreement in respect of "Moon Man". Consequently, the parties' previous dealings reinforce the existence of a common understanding that a written agreement was required for "Moon Man".

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118 HC/OC 466/2022 Notes of Evidence (3 October 2023) at p 36, lines 18–25 to p 37, lines 1–6.

119 1AB 198; CCS at paras 26–27.

120 CCS at para 28.

121 HC/OC 466/2022 Notes of Evidence (3 October 2023) at p 37, lines 7–25 to p 38, lines 1–2; HC/OC 466/2022 Notes of Evidence (3 October 2023) at p 38, lines 20–23.

The parties' subsequent conduct does not contradict the lack of an intention to create legal relations

78 The defendant takes the position that the parties' subsequent conduct contradicts the view that there was no intention to create legal relations. However, the parties' positions diverge on the relevance of subsequent conduct in ascertaining the existence of the Alleged Agreement.

79 The defendant cites *Simpson Marine (SEA) Pte Ltd v Jiacipto Jiaravanon* [2019] 1 SLR 696 ("*Simpson Marine"*) as authority for the proposition that evidence of subsequent conduct is admissible in determining contractual formation.[122] I acknowledge that the defendant accepts some unsettledness of academic opinion. However, it submits that the Court of Appeal in *Simpson Marine* distinguished between subsequent conduct occurring before a dispute has arisen between parties and subsequent conduct occurring after such a dispute, arguing that the former is admissible.[123]

80 The claimant disagrees with the defendant's interpretation of *Simpson Marine,* arguing instead that the admissibility of subsequent conduct in determining contractual formation remains unsettled.[124]

81 I disagree with the defendant's interpretation of *Simpson Marine.* Instead of pronouncing a clear position on the admissibility of subsequent conduct in determining contractual formation, the Court of Appeal clearly "decline[d] to reach any firm views on the admissibility, relevance and probative value of subsequent conduct for the purpose of either contract

[122] DCS at para 47.

[123] DCS at para 48.

[124] CCS at para 70.

formation or interpretation" (*Simpson Marine* at [79]). Additionally, while the Court of Appeal in *Simpson Marine* was inclined to place less weight on the subsequent conduct which had occurred after the dispute had arisen because "they could have been crafted with the intention of buttressing either party's subjective position" (*Simpson Marine* at [79]), this was *obiter.* On the specific facts of *Simpson Marine,* both parties did not raise any objections to the admissibility of the evidence of subsequent conduct (*Simpson Marine* at [79]), and there was a valid contract even without taking into account parties' subsequent conduct (*Simpson Marine* at [80]).

82 This interpretation better accords with the High Court's conclusion in *Spamhaus Technology Ltd v Reputation Administration Service Pte Ltd* [2023] SGHC 294 ("*Spamhaus Technology"*) (at [36]) that "the issue of whether subsequent conduct [is] admissible in determining the formation of a contract remain[s] unsettled in our courts".

83 Nonetheless, as pointed out in *Spamhaus Technology* (at [36])*,* the Court of Appeal in *The Luna* appears to have suggested that evidence of subsequent conduct is admissible for determining contractual formation. The Court of Appeal in *The Luna* (at [33]) first emphasised the distinction between contractual formation and interpretation. It thereafter concluded that in ascertaining whether the parties intended for the alleged bills of lading to have contractual effect, "the court is not limited by the more restrictive approach applied to the interpretation of a contract" (*The Luna* at [33]). Instead, "the court is entitled to take into account all the relevant circumstances of the case in order to draw the appropriate inferences as to what the parties had objectively intended" (*The Luna* at [38]). In *Spamhaus Technology* itself, subsequent conduct was deemed admissible in determining contractual formation, although the High Court ultimately concluded that the subsequent conduct of the parties

only *reinforced* the existing conclusion that an agreement had been formed (*Spamhaus Technology* at [37]).

84 Additionally, the Court of Appeal in *Simpson Marine* (at [78]) has also acknowledged that evidence of subsequent conduct has traditionally been regarded as admissible and relevant for the purposes of determining contractual formation, despite some instability in the rule.

85 Therefore, I am inclined to find that I can consider the parties' subsequent conduct in determining the existence of the Alleged Agreement.

86 That said, I accept that the court ought not to place undue weight on the parties' subsequent conduct when determining the existence of a contract between the parties.[125] This is the approach adopted in *Ramo Industries Pte Ltd v DLE Solutions Pte Ltd* [2020] SGHC 4 at [117] and *ARS v ART and another* [2015] SGHC 78 at [90].[126] Even in *Spamhaus Technology,* the evidence of parties' subsequent conduct was only to reinforce the existing conclusion that an agreement had been formed (*Spamhaus Technology* at [37]).

87 In any event, I take the view that the parties' subsequent conduct does not contradict my earlier finding that there was no intention to create legal relations through the WeChat and E-mail Negotiations.

88 The parties disagree on whether their subsequent conduct negates the lack of an intention to create legal relations. The defendant argues that the parties' subsequent conduct proves a common understanding that the WeChat

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125 CCS at para 71.

126 CCS at para 71.

and E-mail Negotiations constituted a binding distribution agreement.[127] This is allegedly evidenced by five categories of subsequent conduct:

(a) First, that the claimant had sent the DCP and DKDM to the defendant.[128]

(b) Second, that the claimant had engaged in various preparatory steps (the "claimant's preparatory steps") including:

(i) Creating a WeChat Working Group consisting of Mr Young, Ms Lee and employees of the claimant and the defendant to work on preparatory steps such as subtitling, artworks, editing of the trailer and the preparation and approval of advertising and promotional materials.[129]

(ii) Inquiring for the number and names of the theatres that would be screening "Moon Man" on no less than six occasions between 24 August 2022 to 9 September 2022.[130]

(iii) Preparing and circulating a draft poster in the WeChat Working Group stating the screening dates and theatres that will screen "Moon Man" in Singapore.[131]

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127 DCS at para 35.

128 DCS at para 35(1).

129 DCS at para 35(2).

130 DCS at para 35(3); Ms Lee's AEIC at para 37.

131 DCS at para 35(4).

(c) Third, that the claimant did not stipulate a timeline for the defendant to submit a draft agreement as it believed that a distribution agreement had already been reached.[132]

(d) Fourth, that the claimant did not propose additional contractual terms before 1 September 2022 as it believed that an agreement had already been reached on 22 August 2022.[133]

(e) Fifth, that the claimant, as part of the film industry, knew or must have known of the preparatory steps taken by the defendant (the "defendant's preparatory steps").[134] Some of the defendant's preparatory steps include Ms Ng writing to cinemas to make arrangements for "Moon Man" to be screened in theatres, inviting media outlets to attend the media preview screening for "Moon Man" and arranging for the printing of posters.[135] The defendant's preparatory steps also included the defendant creating social media posts and contest giveaways on the defendant's social media pages and purchasing an online advertising campaign on Facebook, Instagram and Tik Tok to promote "Moon Man".[136]

89 The claimant instead avers that the parties' subsequent conduct does not evidence a common understanding that the WeChat and E-mail Negotiations would form a binding distribution agreement for "Moon Man".

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132 DRCS at para 7.

133 DRCS at para 8.

134 Ms Lee's AEIC at para 38.

135 Ms Lee's AEIC at para 38(1)–38(7).

136 Ms Lee's AEIC at para 38(8)–38(9).

90 I address each category of subsequent conduct in turn.

(1) Whether the claimant's provision of the DCP and DKDM indicates a common understanding of an existing distribution agreement

91 The defendant opines that the claimant's provision of the DCP and DKDM suggests that the parties believed that a distribution agreement existed. According to the defendant, the claimant would have only sent over the DKDM if there was a valid distribution agreement.[137] In the absence of a valid distribution agreement, the claimant should have sent the defendant a one-time password (a "KDM") instead.[138]

92 On the other hand, the claimant submits that its provision of the DCP and DKDM does not prove the existence of a distribution agreement. According to the claimant, there is no practice in the film industry that a DKDM is only sent when a distribution agreement for a film has been reached.[139] The claimant also contends that it had only sent the DCP and DKDM to allow the defendant to seek regulatory approval for "Moon Man" and prepare subtitling internally.[140] Accordingly, the claimant avers that its provision of the DKDM does not amount to an authorisation for the defendant to screen "Moon Man" and/or distribute the DCP to cinema operators.

93 There is no support for the proposition that a DKDM is only sent upon the execution of a distribution agreement. Ms Lee admitted at trial that the defendant did not communicate the existence of any alleged industry practice to

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137 DCS at para 35(1); Ms Lee's AEIC at para 32.

138 DCS at para 35(1).

139 CCS at para 75.

140 CCS at para 78; Reply at para 17(2).

the claimant,[141] and there was no indication that the claimant was aware of such an alleged industry practice.[142] Additionally, the parties were still in the process of negotiating the key terms of a potential agreement when the DKDM was sent to the defendant (*Tiger Entertainment 1* at [34]).

94 The evidence also indicates that the DKDM was only provided for the purposes of preparing subtitles and seeking regulatory approval for "Moon Man" and not for distributing the film to cinema operators. The parties do not challenge the fact that the defendant had requested for the DKDM in order to subtitle the film and obtain regulatory approval in Singapore.[143] While Ms Lee testified that the provision of the DKDM enables her to "do anything to the content that [she] likes",[144] this merely evidences a *possible* action that one can take upon receiving a DKDM and does not amount to a legal right to perform such action. The defendant did not inform the claimant that it had requested the DKDM to distribute "Moon Man" to cinema operators and the claimant did not authorise the defendant to do so.[145]

95 For the foregoing reasons, I am unpersuaded that the claimant's provision of the DKDM proves that it believed a distribution agreement existed between the parties.

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141 HC/OC 466/2022 Notes of Evidence (3 October 2023) at p 69, lines 9–12.

142 HC/OC 466/2022 Notes of Evidence (3 October 2023) at p 70, lines 13–18.

143 HC/OC 466/2022 Notes of Evidence (3 October 2023) at p 71, lines 14–21. CCS at para 78.

144 HC/OC 466/2022 Notes of Evidence (3 October 2023) at p 72, lines 24–25.

145 HC/OC 466/2022 Notes of Evidence (3 October 2023) at p 74, lines 5–15.

(2) Whether the claimant's preparatory steps indicate a common understanding of an existing distribution agreement

96 The claimant's preparatory steps do not indicate a common understanding that a distribution agreement existed.

97 Ms Lee conceded at trial that the parties' preparatory steps for the screening of "Moon Man" do not necessitate that a binding agreement had been reached between the parties.[146] She also conceded that this extends to Mr Young's sending of promotional materials for "Moon Man".[147] The parties' previous dealings in respect of "Hi! Mom" indicate that the defendant was willing to take preparatory steps even before the execution of the deal memorandum.[148] Hence, the claimant's creation of a WeChat Working Group to work on preparations for the screening of "Moon Man" and the circulation of a draft poster do not prove that the claimant believed a distribution agreement existed.

98 The defendant alleges that the claimant's inquiries about the number and names of the theatres screening "Moon Man" indicate the claimant's belief that an agreement had been reached.[149] This is because to comply with the claimant's inquiries, the defendant would have had to approach cinema operators and they would have to view "Moon Man" before they would agree to screen it.[150] To do

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146 HC/OC 466/2022 Notes of Evidence (3 October 2023) at p 75, lines 24–25 to p 76, lines 1–3.

147 HC/OC 466/2022 Notes of Evidence (3 October 2023) at p 76, lines 18–25 to p 77, line 1.

148 HC/OC 466/2022 Notes of Evidence (3 October 2023) at p 75, lines 20–23. CCS at para 85.

149 DCS at para 40.

150 DCS at para 40.

so without a distribution agreement for the film would cause reputational damage to the defendant's business.[151] However, I take the view that the claimant's inquiries regarding the theatres screening "Moon Man" do not sufficiently evidence the existence of a distribution agreement. As stated above at [97], I have adjudged that the parties were prepared to take preparatory steps prior to the execution of a distribution agreement. If the defendant was agreeable to conducting its business dealings as such, it must bear the risk of the potential consequences (*viz*, that it might suffer reputational damage by approaching cinema operators prior to the execution of a written distribution agreement). If the defendant did not want to adopt such business risk, it should have promptly sent the First Draft Agreement to the claimant instead of only sending it after the claimant's chaser e-mail on 31 August 2022. Further, it should have insisted on the execution of a written agreement before the parties took any preparatory steps.

(3) Whether the claimant did not stipulate a timeline for the draft agreement because it believed a distribution agreement existed

99 The defendant posits that considering the urgency of screening "Moon Man", the claimant's failure to impose a timeline for the defendant to submit a draft agreement indicates that it believed that a distribution agreement had already been reached.[152] The defendant relies on the fact that the first time Mr Young had asked Ms Lee for a draft long form agreement was on 31 August 2022, nine days after the parties' WeChat and E-mail Negotiations.[153]

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151 DCS at para 40.

152 DCS at para 45.

153 DRCS at para 7.

100 I do not find the defendant's argument to be attractive. The absence of a distribution agreement between the parties is no reason for the claimant to bear the onus of stipulating timelines for the defendant. As a company in the business of distributing films, the defendant should be responsible and accountable for the efficiency and manner in which it chooses to conduct its own business dealings. If it chooses to delay executing a written agreement, it must bear the risk of doing so.

(4) Whether the claimant did not propose additional contractual terms because it believed a distribution agreement existed

101 The defendant further alleges that the claimant did not propose additional terms between 22 August 2022 to 1 September 2022 as it believed that an agreement had already been reached on 22 August 2022.[154] It is clear that on 1 September 2022, the claimant's Head of Distribution, Kathy Huang ("Ms Huang"), sent an email to the defendant proposing several amendments to the draft agreement, including a right for the claimant to audit the P&A statement.[155]

102 I am of the view that a party's omission to propose additional contractual terms is inconclusive of whether an agreement exists. It is likely that the claimant had only decided to propose additional terms on 1 September 2022 because it believed that negotiations were still ongoing, and an agreement had not been reached.

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154 DRCS at para 8.

155 DCS at para 63.

(5) Whether the defendant's preparatory steps indicate a common understanding of an existing distribution agreement

103 The defendant submits that the claimant did not prevent the defendant's preparatory steps as the claimant believed that a distribution agreement for "Moon Man" existed.[156] However, the defendant did not ever inform the claimant that it had taken such preparatory steps.[157] The defendant also did not provide any evidence that the claimant knew or should have known that the defendant would take such preparatory steps. Hence, I am unable to agree that the claimant's failure to prevent the defendant's preparatory steps shows that it believed a distribution agreement existed between the parties.

104 Considering the totality of the evidence before me, I conclude that the parties' subsequent conduct does not contradict my finding that the parties did not have an intention to create legal relations through the WeChat and E-mail Negotiations.

(6) The parties' subsequent conduct reinforces their lack of intention to create legal relations

105 Instead, the parties' subsequent conduct coheres with my earlier finding that there was no intention to create legal relations. Firstly, their subsequent conduct indicates a common understanding that any negotiations were subject to the execution of a written agreement. When Mr Young reminded Ms Lee to submit the draft written agreement on 31 August 2022, Ms Lee replied that Ms Ng would send it to him and that it had been delayed as Ms Lee was on

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156 Defendant's Opening Statement (dated 25 September 2023) ("DOS") at para 30; Ms Lee's AEIC at para 38.

157 HC/OC 466/2022 Notes of Evidence (3 October 2023) at p 75, lines 20–23. CCS at para 85.

vacation.[158] Ms Lee and the defendant did not take issue with the necessity of executing a written agreement even as of 31 August 2022.

106 The parties' subsequent conduct also indicates that there was no agreement on the material terms of the Alleged Agreement. This reinforces the conclusion that the parties did not intend to create legal relations from their WeChat and E-mail Negotiations. I elaborate on my views regarding the P&A term, scope or type of licensed rights and the licence period.

(A) THE P&A TERM

107 The lack of consensus on the P&A term is evidenced by the parties' subsequent dealings. The parties' draft written agreements from 1 September 2022 to 7 September 2022 show that the parties continued to disagree on whether the defendant needed to provide the claimant with a P&A plan even after 22 August 2022. The claimant included clauses regarding the P&A costs and the right to audit the P&A statement in its revised draft written agreement sent on 1 September 2022.[159] However, the defendant removed any reference to the P&A costs and/or statement in its further revised draft on 7 September 2022.[160] This cements my conclusion that there was no intention to create legal relations through the WeChat and E-mail Negotiations.

158 CCS at para 17; 1AB 253.

159 Agreed Bundle of Documents (Volume 2 of 3) ("2AB") 56.

160 2AB 75.

(B) SCOPE OR TYPE OF LICENSED RIGHTS

108 Both parties have conceded that the scope or type of licensed rights is a material term in a film distribution agreement, as in the case of "Moon Man".[161] However, the parties dispute whether an agreement on the scope or type of licensed rights had been reached.

109 In my opinion, the Alleged Agreement also lacks certainty on the scope or type of licensed rights. There was no agreement on the type of licensed rights for "Moon Man". The claimant's consistent position was that only theatrical rights were to be granted.[162] Although Ms Lee similarly testified at trial that only theatrical rights were to be granted to the defendant,[163] the defendant's first draft agreement dated 31 August 2022 states that the licensed rights included theatrical, non-theatrical and public video rights.[164] There is hence a discrepancy on the exact scope or type of the licensed rights under the Alleged Agreement. This also supports my conclusion that there was no intention to create legal relations through the WeChat and E-mail Negotiations.

(C) THE LICENCE PERIOD

110 The parties disagree on whether the licence period is a material term in the "Moon Man" distribution agreement.[165] The claimant submits that the licence period is a key term in any film distribution agreement. This is supported by the parties specifying the licence period as a key term in the deal

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161 CCS at para 55; HC/OC 466/2022 Notes of Evidence (3 October 2023) at p 20, lines 13–16.

162 CCS at para 56(4).

163 HC/OC 466/2022 Notes of Evidence (3 October 2023) at p 63, lines 9–13.

164 2AB 41.

165 CCS at para 46; DCS at para 77.

memorandum for "Hi! Mom".[166] While the defendant admits that the licence period is a key term for the "Hi! Mom" agreement, it argues that it is not a material term for "Moon Man".[167] The defendant seeks to distinguish "Moon Man" on the basis that it concerns the right to screen the film in movie theatres for the first time (*viz,* the first theatrical right).[168] In such situations, the defendant's view is that the licence period naturally refers to the period for which the movie is screened in theatres, which is dependent upon the film's performance.[169] It is therefore unnecessary to stipulate a licence period.[170] Ms Lee justified this on the basis of an existing industry practice and her "real life practices with other titles".[171]

111 In my view, the parties would have contemplated the licence period to be a material term of a distribution agreement for "Moon Man".

112 In the first place, the defendant's attempt to distinguish the context of "Moon Man" from "Hi! Mom" falls short. Both the first and last draft agreements for "Moon Man" state that the licensed rights included not only the first theatrical right, but also non-theatrical and public video rights.[172] Moreover, there is no evidence of an existing industry practice or the defendant's previous

166 CCS at para 46.

167 DCS at para 77; HC/OC 466/2022 Notes of Evidence (3 October 2023) at p 20, lines 17–19.

168 DCS at para 77.

169 DCS at para 77; HC/OC 466/2022 Notes of Evidence (3 October 2023) at p 22, lines 1–5.

170 HC/OC 466/2022 Notes of Evidence (3 October 2023) at p 21, lines 17–25 to p 22, lines 1–14.

171 DCS at para 78; HC/OC 466/2022 Notes of Evidence (3 October 2023) at p 23, lines 5–18.

172 CCS at para 50(1); 2AB 41; 2AB 52; HC/OC 466/2022 Notes of Evidence (3 October 2023) at p 67, lines 6–20.

dealings with other parties that a film's licence period need not be agreed upon when the licensed rights for a film only concern first theatrical rights.[173] Lastly, even if the licence period was dependent upon the film's performance, there was likely still a need to indicate a fixed licence period. Otherwise, there would be no end date to the defendant's ability to screen the movie in theatres after its first theatrical run. The parties could have stipulated for a longer licence period (such as a few years) to account for this fact. I am therefore unable to accept the defendant's justification that there is no need to stipulate a licence period for "Moon Man".

113 The parties accept that there was no agreement on the licence period for "Moon Man".[174] This is also evidenced by the parties' subsequent draft agreements. The first draft agreement sent by the defendant indicated an end date of 30 August 2032.[175] The plaintiff's revised draft agreement dated 1 September 2022 amended the duration of the licence period to end on 31 December 2022 instead.[176] In the defendant's further revised draft dated 7 September 2022, it inquired if the licence period could be extended to ten years.[177] This also gives credence to my view that the parties did not intend to create legal relations through their WeChat and E-mail Negotiations.

114 In conclusion, the uncertainty of the P&A term, the scope or type of licensed rights and the licence period further support my finding that there was no intention to create legal relations through the WeChat and E-mail

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173 HC/OC 466/2022 Notes of Evidence (3 October 2023) at p 23, lines 18–25 to p 24, lines 1–3.

174 HC/OC 466/2022 Notes of Evidence (3 October 2023) at p 59, lines 14–22.

175 2AB 41.

176 2AB 52.

177 2AB 71.

Negotiations. Although I accept that parties' ongoing discussions "[do] not prevent a contract based on essential core terms from coming into existence" (*R1 International* at [52]),[178] this is not such a case. The parties have not agreed upon the "essential core terms" of the distribution agreement, namely, the identity of the distributor, the P&A term, the scope or type of licensed rights and the licence period.

115 As I have concluded that the parties did not have an intention to create legal relations through their WeChat and E-mail Negotiations, there is no distribution agreement between the parties. Nonetheless, for completeness, I will proceed to briefly address the issue of whether the Alleged Agreement based on the WeChat and E-mail Negotiations satisfies the certainty requirement for contract formation.

Whether the Alleged Agreement fails for lack of certainty

116 Certainty and completeness are requirements for a valid contract to exist (*China Coal Solution* at [41]). Even if there is a valid offer and acceptance between the parties, an alleged contract may nonetheless be unenforceable for uncertainty and incompleteness (*The Law of Contract* at para 03.200). An incomplete agreement is one which "has certain terms that do not (but should) exist and the non-existence of these terms make[s] the agreement incomprehensible" (*The Law of Contract* at para 03.200).

117 For the certainty requirement to be satisfied and a binding contract to arise, the parties should have agreed upon all the *material terms* of the contract (*Grossner Jens v Raffles Holdings Ltd* [2004] 1 SLR(R) 202 at [14]).[179] If the

178 Defendant's Bundle of Authorities (dated 25 September 2023) ("DBOA") at Tab 4.

179 CBOA at Tab 7.

material terms of an agreement have been arrived at, "the agreement can still come into existence and be enforceable even though there are some minor terms to be worked out" (*T2 Networks Pte Ltd v Nasioncom Sdn Bhd* [2008] 2 SLR(R) 1 at [44]).[180] The key question is whether the parties have objectively demonstrated that they intend to be bound despite the unsettled terms (*Rudhra* at [27], citing *OCBC Capital Investment Asia Ltd v Wong Hua Choon* [2012] 4 SLR 1206 at [39]).[181]

118 The defendant has suggested that the claimant failed to plead the issue of uncertainty. I disagree for the reasons set out at [46]–[48] above.

119 The Alleged Agreement does not satisfy the certainty requirement for the reasons set out at [56]–[58] and [107]–[114] above. As the parties did not agree on the identity of the distributor, the P&A term, the scope or type of licensed rights and the licence period, there was no agreement on the "essential core terms" of the Alleged Agreement.

120 For completeness, I deal with one other point raised by the defendant. The defendant also avers that the claimant's claim for copyright infringement of "Moon Man" is motivated by its separate interest in certain issues in respect of "Hi! Mom".[182] Specifically, the defendant pleaded that the claimant was in breach of the "Hi! Mom" licensing agreement between the parties.[183] The defendant alleges that the claimant withheld executing the written agreement and brought OC 466 to wrongfully pressure the defendant and/or Passion

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180 CBOA at Tab 14.

181 CBOA at Tab 10.

182 Defence & Counterclaim at para 17(b)–(c).

183 Defence & Counterclaim at para 17(b).

Entertainment to surrender and revert the rights to "Hi! Mom" to the claimant. This was to avoid alleged liability for an infringement of the defendant's exclusive rights in "Hi! Mom".[184]

121 I agree with the claimant that these allegations are immaterial to determining the existence of a distribution agreement in respect of "Moon Man".[185]

122 In conclusion, as there was no intention to create legal relations through the WeChat and E-mail Negotiations and the Alleged Agreement lacks certainty, the parties had not entered into a valid and binding agreement in respect of "Moon Man".

Whether the defendant has committed the Alleged Infringing Acts

123 The defendant does not deny the claimant's allegations that it had engaged in the Alleged Infringing Acts.[186] The defendant states in its opening statement that it "does not deny that it did perform the [Alleged Infringing Acts]".[187] In any event, there cannot be any serious dispute that, absent an agreement, the Alleged Infringing Acts constituted "acts comprised in the copyright" of "Moon Man", pursuant to s 124 of the Copyright Act 2021.[188]

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184 Defence & Counterclaim at para 17(c).

185 Claimant's Reply Closing Submissions (dated 14 November 2023) ("CRCS") at para 13.

186 DOS at para 2.

187 DOS at para 2.

188 CCS at para 95; Defence & Counterclaim at para 20(a)–(j).

Conclusion

124 For all the foregoing reasons, the defendant has infringed the claimant's copyright in respect of "Moon Man" under s 146(1) of the Copyright Act 2021.

Counterclaim

125 As mentioned at [19], I summarily dismissed the defendant's counterclaims in *Tiger Pictures 1*. In its first counterclaim, the defendant sought to bring an action against the claimant for groundlessly threatening the defendant with actions for copyright infringement pursuant to s 499 of the Copyright Act 2021.[189] I dismissed this on the basis that no loss would have resulted from these threats (*Tiger Pictures 1* at [30]).

126 In its second counterclaim, the defendant alleged that the claimant had infringed the defendant's copyright in "Hi! Mom".[190] I dismissed this on the basis that the defendant had no standing to bring such a claim as it was not an exclusive licensee within the meaning of s 103 of the Copyright Act 2021 (*Tiger Pictures 1* at [29]).

Remedies

127 Under s 159(3) of the Copyright Act 2021, the claimant as the exclusive licensee of "Moon Man" is entitled to the same remedies the copyright owner would be entitled to under Division 1 of Part 6 of the Copyright Act 2021.

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189 Defence & Counterclaim at para 25.

190 Defence & Counterclaim at para 28.

128 I believe that there is a risk of the defendant continuing to infringe the claimant's copyright in "Moon Man" as it retains possession of the DCP and DKDM of the film. Accordingly, I grant the claimant's prayers (1) to (3) for:

(a) An order for an injunction restraining the defendant from infringing the copyright in "Moon Man" and from authorising, causing or procuring other persons to do such acts.

(b) An order for the delivery up and forfeiture or destruction of the infringing copies of "Moon Man" in the defendant's possession, custody or power.

(c) An order for an inquiry as to the damages, or at the claimant's election, an account of profits in respect of the copyright infringement in "Moon Man".

129 I reserve any determination on the award of additional damages (*viz,* the claimant's prayer (4)) to the damages inquiry. Due to the bifurcation of liability and damages in the present case, the parties have not tendered evidence during the trial on the matters to be considered in making an award for additional damages (*The Wave Studio Pte Ltd and others v General Hotel Management (Singapore) Pte Ltd and another* [2022] SGHC 142 at [217]). Pursuant to r 9(2) of the SCJ(IP)R, I also leave determination of the claimant's prayers (5) to (6), on interests and costs respectively, to after the damages inquiry is heard.

Dedar Singh Gill
Judge of the High Court

Toh Jia Yi and Justin Tay (Allen & Gledhill LLP) for the claimant and defendant in counterclaim;
Tan Tee Jim SC, Lee Junting, Basil and Yang Zhuo Yan (Lee & Lee) for the defendant and claimant in counterclaim.