HCA 570/2017

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO 570 OF 2017

BETWEEN

CHINA LIFE INSURANCE (OVERSEAS) COMPANY LIMITED Plaintiff

And

LI XIAOMING (李晓明) Defendant

Before: Hon Lisa Wong J in Chambers
Date of Hearing: 8 November 2017
Date of Decision: 11 December 2017

D E C I S I O N

APPLICATION

1. Before the court is the plaintiff's application by summons issued herein on 27 April 2017 ("Summons") for:

(1) summary judgment for:

(a) first, the principal and interest in sums totalling US$93,233,390.35 owed by the defendant to the plaintiff under the 2011 SPA (defined in paragraph 13 below) as at 15 April 2017 together with all further

interest accrued on this sum from 16 April 2017 pursuant to clauses 9 and 15 of the 2011 SPA, or in the alternative, damages for breach of the 2011 SPA to be assessed;

(b) second, the principal and interest in sums totalling US$57,620,980.76 owed by the defendant to the plaintiff under the 2011 Side Deed (defined in paragraph 14 below) as at 15 April 2017 together with all further interest accrued on this sum from 16 April 2017 pursuant to clause 3 of the 2011 Side Deed, or in the alternative, damages for breach of the 2011 Side Deed to be assessed;

(c) third, a decree of specific performance of clauses 2.3.3 and 3 of the 2016 Deed (defined in paragraph 30 below), or in the alternative, damages for breach of the 2016 Deed in lieu of specific performance to be assessed;

(2) alternative to summary judgment on the plaintiff's claims pursuant to the 2011 SPA and the 2011 Side Deed, an order for interim payment of the aggregate of the sums claimed thereunder by the plaintiff, i.e. US$150,854,371.11.

BACKGROUND

Parties and other relevant characters

Plaintiff and its personnel

2. The plaintiff, a limited liability company incorporated in mainland China and registered as a non-Hong Kong company under Part XI of the former Companies Ordinance (Cap 32), is a wholly-owned

subsidiary of the China Life Insurance (Group) Company, the largest insurance company and a state-owned enterprise in mainland China.

3. The following personnel of the plaintiff has been identified and referred to by the defendant as the "China Life Team":

(1) Liu Tingan, the President, and a member of the Investment Committee, of the plaintiff at the time of the plaintiff's negotiation with the defendant in 2011;

(2) Carol Mo ("Mo"), a member of the plaintiff responsible for the negotiation with the defendant in 2011;

(3) Gao An Feng, a member of the plaintiff's Investment Committee at the time of the plaintiff's negotiation with the defendant in 2011; and

(4) one Mr Yu whose full name the defendant is unable to give.

Lung Ming Mining Co Ltd

4. Lung Ming Mining Co Ltd[1] ("Lung Ming") is a Cayman Islands company formed in May 2008 as the intended listing vehicle for an iron ore mining business in *inter alia* Mongolia. Such business is operated through *inter alia* Iron Mining International (Mongolia) Limited ("IMIML") and Shiny Glow Ltd ("Shiny Glow"), both of which Lung Ming became and remained the holding company until the completion of the Share Transfer Agreements (as defined in paragraph 23(3) below).

Defendant and his interest in Lung Ming

5. Lung Ming was so established and organised by the defendant, an experienced businessman in the mining industry. The

[1] Lung Ming was named Iron Mining International Ltd prior to 2 February 2011.

defendant is and was at all material times the majority shareholder of Lung Ming through *inter alia* the following corporate vehicles owned and controlled by him:

(1) Yu Rui Holdings Ltd ("Yu Rui");

(2) Mongolia Yiluohe Steel and Iron Mining Company Ltd ("Yiluohe");

(3) City Ford Ltd ("City Ford");

(4) Successful Key Ltd ("Successful Key"); and

(5) HK Qinlong Group Ltd ("HK Qinlong").

6. The defendant is and was at all material times also a director of Lung Ming.

Thomas Tu and his interest in Lung Ming

7. Thomas Tu was at all material times the Chief Financial Officer of Lung Ming and held shares in Lung Ming through one Belmore Overseas Ltd ("Belmore"), a company controlled by him.

The 2010 investment

8. In about 2008 and 2009, the defendant prepared for the listing of Lung Ming's shares via an initial public offering ("IPO"). However, the IPO application could not be proceeded with due to the global financial crisis.

9. In about early 2010, Lung Ming contemplated a re-launch of its IPO application. The defendant was introduced to the plaintiff, which showed interest in investing in Lung Ming as a pre-IPO investor. The negotiation was made between the defendant for the vendors and for

himself as the vendors' guarantor on the one hand and the China Life Team for the plaintiff as purchaser on the other hand.

10. On 12 March 2010, Yu Rui and Belmore (as vendors), the plaintiff (as purchaser) and the defendant (as the vendors' guarantor) entered into a sale and purchase agreement ("2010 SPA") under which:

(1) The plaintiff would purchase from Yu Rui and Belmore 4.31% of the issued share capital of Lung Ming (being 172,247,500 shares comprising 163,635,125 shares from Yu Rui and 8,612,375 shares from Belmore) for a total consideration of US$200 million (clauses 2 and 3).

(2) If no IPO occurred within 12 months of the completion of the 2010 SPA, the plaintiff had the option to put the shares back to Yu Rui and Belmore who would have to purchase the same back from the plaintiff at a total consideration of US$200 million and pay the plaintiff a return of 12.5% per annum on such consideration (clause 5.3).

(3) The defendant was to guarantee Yu Rui and Belmore's performance of their obligations under the 2010 SPA (clause 11).

11. There was no IPO of Lung Ming within 12 months of the completion of the 2010 SPA. On 7 September 2011, the plaintiff exercised its put option under the 2010 SPA. Yu Rui and Belmore duly paid US$200 million plus the 12.5% annual return thereon to the plaintiff and the plaintiff transferred the Lung Ming shares acquired under the 2010 SPA back to Yu Rui and Belmore. No dispute arose from the 2010 SPA.

The 2011 investment

12. Then, on 3 November 2011, Yu Rui and Belmore as vendors ("Vendors" collectively), the plaintiff as purchaser and the defendant as the Vendors' guarantor executed the following documents for another sale and purchase of shares in Lung Ming.

2011 SPA

13. First, all 4 parties entered into a sale and purchase agreement ("2011 SPA") which contained, *inter alia*, the following terms and conditions:

(1) The plaintiff would purchase from Yu Rui and Belmore 3.33% of the issued share capital of Lung Ming (being 136,465,600 shares comprising 129,642,320 shares from Yu Rui and 6,823,280 shares from Belmore) ("Shares") for a total consideration of US$200 million ("Consideration") (clauses 2 and 3).

(2) Half of the Consideration (US$100 million) was payable on completion, while the remaining US$100 million was payable within 3 business days after share certificates representing 10% of Lung Ming's issued share capital, i.e. 409,396,800 shares ("Escrow Shares"), were deposited in an escrow account in accordance with clause 10.6 (clauses 3 and 10.7).

(3) Prior to the completion of a "Qualifying IPO"[2] of the shares of Lung Ming and so long as the plaintiff held the Shares, the

[2] Defined in clause 1.1 as an IPO on an internationally recognised stock exchange or market including the Hong Kong Stock Exchange.

plaintiff was entitled to an annualized return of 10% per annum on the Consideration, i.e. US$20 million per year ("Annual Return"), to be paid by Yu Rui and Belmont semi-annually by no later than 30 June and 31 December each year (clause 9).

(4) If the plaintiff did not receive full payment of the Annual Return, the defendant undertook to the plaintiff that he would repay to the plaintiff, *inter alia*, the outstanding balance thereof (clause 9).

(5) If no Qualifying IPO of the shares of Lung Ming occurred by 31 December 2014, the plaintiff had the option to put some or all of the Shares back to Yu Rei and Belmore, who would be required to purchase those shares back at the total consideration of US$200 million with interest thereon at 10% per annum accruing daily from 1 January 2014 (clause 5.3).

(6) The defendant guaranteed the full, due, punctual and complete observance by Yu Rui and Belmore of all of their obligations under the 2011 SPA (clause 12).

(7) Upon default of payment of any sum due and payable to the plaintiff under the 2011 SPA, the responsible party was required to pay interest on that sum from the date on which the payment was due until the date of actual payment at an annual rate of 20% compounded monthly (clauses 9 and 15).

(8) The defendant and the Vendors should, within 30 business days from the completion date of the 2011 SPA, procure the certificates of the Escrow Shares to be deposited with an escrow agent jointly appointed by the plaintiff and the

defendant, which shares were not to be dealt with in any way or released until all obligations of the Vendors and the defendant under the 2011 SPA have been fulfilled or otherwise discharged (clause 10.6).

2011 Side Deed

14. Second, the plaintiff and the defendant entered into a Side Deed of Undertaking ("2011 Side Deed"), by which the defendant gave the plaintiff, *inter alia*, the following undertakings:

(1) Without prejudice to the plaintiff's rights under the 2011 SPA, in the event that no Qualifying IPO[3] occurred before 31 December 2013, the defendant should compensate the plaintiff an amount equivalent to 15% of the Consideration, i.e. a sum of HK$30 million ("Compensation") (clause 2.2).

(2) Should the defendant default in the payment of the Compensation, he had to pay interest on the sum from the date on which payment was due until the date of actual payment at an annual rate of 20% compounded monthly (clause 3).

2011 Escrow Agreement

15. Third, an escrow agreement ("2011 Escrow Agreement") was signed by *inter alia* the plaintiff and the defendant to provide for the deposit of the certificates of the Escrow Shares (half of which were held by the defendant) with China Life Trustee Ltd ("Escrow Agent").

No Qualifying IPO

[3] As defined in the 2011 SPA.

16. There was no Qualifying IPO of the shares in Lung Ming at either of the said material dates (i.e. 31 December 2013 and 31 December 2014) or at all.

Zhongrun Investment

17. In the meantime, in about April 2014, Mr Li Pusheng ("Mr Li") who was at the time a director of Shengjie (Beijing) Investment Ltd ("Shengjie") and who had previously learnt about Lung Ming's iron ore mining venture, inquired of the defendant about potential investments into Lung Ming and introduced Zhongrun Resources Investment Incorporated Company ("Zhongrun"), a PRC company listed on the Main Board of the Shenzhen Stock Exchange, as the intended investor.

18. The initial plan was for Zhongrun to acquire the entire issued share capital of Lung Ming. Following further discussions, it was envisaged that such investment by Zhongrun ("Zhongrun Investment") would include:

(1) a share restructure whereby Lung Ming would spin off its subsidiaries, IMIML and Shiny Glow, to its own shareholders who would thereupon directly hold equity interests in IMIML and Shiny Glow *pari passu* their respective shareholdings in Lung Ming ("Share Restructure");

(2) a share transfer whereby Zhongrun would purchase from Lung Ming's shareholders all the shares in IMIML and Shiny Glow ("Share Transfer"); and

(3) the purchase by Zhongrun of the entire issued share capital of Mongolia New La Le Gao Te Iron Mining Company Ltd

which in turn held through its subsidiary various mining and exploration rights in Mongolia.

19. The net effect of the Zhongrun Investment was that:

(1) Zhongrun would become the sole shareholder of IMIML and Shiny Glow; and

(2) Lung Ming's shareholders including the defendant would achieve complete exit from their investments in IMIML and Shiny Glow but retained their respective shareholdings in Lung Ming.

20. The Zhongrun Investment would be financed by RMB28.37 billion in funds raised via private placements of Zhongrun's shares.

21. On about 10 May 2015, Zhongrun, the defendant and Shengjie entered into an Agreement of Intent in relation to the Zhongrun Investment. Zhongrun also paid US$80 million in earnest money pursuant to such agreement.

22. On 19 May 2015, Lung Ming, IMIML, the defendant and Shengjie entered into a Framework Agreement whereby they agreed to procure the Share Restructure and the Share Transfer and Shengjie agreed to identify an entity (intended to be Zhongrun) to acquire the entire issued share capital in IMIML and Shiny Glow from Lung Ming's shareholders.

23. In May 2015:

(1) With a view to achieving the Share Restructure, Lung Ming entered into separate share restructuring agreements with

each of its shareholders (including the plaintiff, Yu Rui and Belmore) (each a "Share Restructuring Agreement") whereby Lung Ming agreed to sell and each shareholder agreed to purchase shares in IMIML and Shiny Glow.

(2) The Share Restructuring Agreements were implemented shortly thereafter and Lung Ming's shareholders become direct shareholders of IMIML and Shiny Glow. Specifically:

(a) the plaintiff became a 3.33% shareholder in each of IMIML and Shiny Glow; and

(b) The defendant's said corporate vehicles ("Defendant's Corporate Vehicles"), namely, Yiluohe, City Ford, Successful Key and HK Qinlong, collectively held 57.1% of the issued share capital in each of IMIML and Shiny Glow.

(3) Following the implementation of the Share Restructure, Zhongrun as purchaser entered into share transfer agreements with each of Lung Ming's shareholders to acquire their shareholdings in each of IMIML and Shiny Glow (each a "Share Transfer Agreement"). Specifically:

(a) By a Share Transfer Agreement dated 21 May 2015, Zhongrun agreed to purchase the plaintiff's shareholdings in each of IMIML and Shiny Glow at the total consideration of US$64,499,355.

(b) By Share Transfer Agreements dated 21 May 2015, Zhongrun agreed to purchase the Defendant's Corporate Vehicles' shareholdings in each of IMIML and Shiny Glow for a total consideration of US$1,105,004,970 as follows:

Vendor	Shareholding	Consideration
Yiluohe	30%	US$580,500,000
City Ford	13%	US$251,550,000
Successful Key	13%	US$251,550,000
HK Qinlong	1.1062%	US$21,404,970
Total:	57.1062%	US$1,105,004,970

24. Zhongrun's acquisition of IMIML and Shiny Glow under the Share Transfer Agreements required the approval of the China Securities Regulatory Commission ("CSRC"), which was made an express condition precedent of the Share Transfer Agreements (clause 3.1(b)).

25. On 24 July 2015, Zhongrun submitted the relevant documents to the CSRC for approval ("Zhongrun Application"). On 3 August 2015, the CSRC issued a notice confirming its receipt and acceptance of the Zhongrun Application.

26. On 4 January 2016, the CSRC conducted a review of the Zhongrun Application and raised various requisitions to Zhongrun, requiring a written response. In March 2016, New Times Securities Co Ltd ("New Times") being the sponsor of the Zhongrun Investment submitted a 150-page response to the CSRC on behalf of Zhongrun to answer CSRC's requisitions.

27. In early April 2016, the CSRC's website showed that the Zhongrun Application for approval of the Zhongrun Investment was second on the CSRC's list of applications which, according to Mr Li (who made an affirmation at the request of the defendant), meant that approval of the Zhongrun Application was imminent.

Deed of Undertaking dated 2 April 2016

28. When the CSRC's approval of the Zhongrun Investment was still pending, in about December 2015, the plaintiff's parent company required:

(1) the defendant to enter into a Deed of Undertaking (i.e. the 2016 Deed to be mentioned in paragraph 30 below) with the plaintiff; and

(2) the defendant, Zhongrun and 3 of the Defendant's Corporate Vehicles (namely, Yiluohe, City Ford and Successful Key) to enter into a direct payment agreement ("Direct Payment Agreement") which provided that Zhongrun would pay to the plaintiff directly a sum representing the plaintiff's outstanding entitlements under the 2011 SPA (see paragraphs 36-38 below) out of the consideration payable by Zhongrun to each of Yiluohe, City Ford and Successful Key under the Share Transfer Agreements entered into by Zhongrun with each of these 3 corporate vehicles of the defendant.

29. Such demand culminated in a letter dated 30 March 2016 from the plaintiff's solicitors, Latham & Watkins ("L&W"), to the defendant, whereby the plaintiff demanded the defendant to execute, and procure the other relevant parties to execute, the 2016 Deed and the Direct Payment Agreement before 31 March 2016, failing which the plaintiff would take all appropriate legal actions, including making reports to the relevant regulatory departments and Zhongrun.

30. On 2 April 2016, the plaintiff and the defendant executed a Deed of Undertaking ("2016 Deed"), which *inter alia* gave the plaintiff the option ("2016 Option") to require the defendant to enter into a sale and purchase agreement ("Proposed SPA") under which the defendant or his nominees should purchase from the plaintiff all the shares in Lung Ming that were beneficially owned by the plaintiff at a price equal to the Consideration, i.e. US$200 million. Insofar as it is material:

(1) Clause 2.3.3 provided *inter alia* that "the completion of the transactions contemplated under the Proposed SPA shall not be later than June 30, 2016 unless extended in writing by [the plaintiff]".

(2) Clause 3 imposed upon the defendant the obligation to pay interest on any sum due but not paid to the defendant at an annual rate of 20% accruing daily without compounding from the due date to the date of actual payment (after as well as before judgment).

31. On 8 April 2016, the defendant, his said 3 Corporate Vehicles, Zhongrun and the plaintiff executed the Direct Payment Agreement.

Lapse of the Zhongrun Investment

32. In early April 2016, the plaintiff's parent company, China Life Insurance (Group) Company, wrote to the CSRC. The plaintiff has not produced this letter. However, according to the defendant, this letter requested the CSRC to suspend the imminent review of the Zhongrun Application on the bases that:

(1) The defendant owed money to the plaintiff.

(2) The Zhongrun Investment might lead to a loss by the plaintiff and its parent of more than RMB2 billion in state-owned assets.

(3) The application materials submitted by Zhongrun to the CSRC contained false statements

("Complaint").

33. The Complaint prompted further requisitions by the CSRC of the Zhongrun Investment. In response, New Times, Zhongrun and Zhongrun's PRC legal advisors prepared a composite written submission which was sent to the CSRC in June 2016. Following such submission, the CSRC made no further communications to Zhongrun in relation to the approval of the Zhongrun Application. This remains the position to this day.

34. Zhongrun's shareholders' approval of the Zhongrun Investment lapsed on 18 June 2016. As the CSRC's approval for the Zhongrun Investment had not been issued by that date, the Zhongrun Investment was not implemented.

Plaintiff's exercise of the 2016 Option

35. On 20 January 2017, the plaintiff, through L&W, issued to the defendant a notice under clause 2.3.3 of the 2016 Deed to exercise the 2016 Option and to extend the time of completion of the Proposed SPA to 27 January 2017 ("Notice").

PLAINTIFFS' CLAIMS

Under the 2011 SPA

36. As there was no Qualifying IPO of the shares of Lung Ming, pursuant to clause 9 of the IPO, Yu Rui and Belmore were liable to pay the Annual Return as follows:

Due Date	Amount Payable by Yu Rui (US$)	Amount Payable by Belmore (US$)	Total Amount (US$)
31.12.2011	3,071,232.88	161,643.84	3,232,876.71
30.6.2012	9,421,917.81	495,890.41	9,917,808.22
31.12.2012	9,578,082.19	504,109.59	10,082,191.78
30.6.2013	9,421,917.81	495,890.41	9,917,808.22
31.12.2013	9,578,082.19	504,109.59	10,082,191.78
30.6.2014	9,421,917.81	495,890.41	9,917,808.22
31.12.2014	9,578,082.19	504,109.59	10,082,191.78
30.6.2015	9,421,917.81	495,890.41	9,917,808.22
31.12.2015	9,578,082.19	504,109.59	10,082,191.78
30.6.2016	9,448,087.43	497,267.76	9,945,355.19
31.12.2016	9,551,912.57	502,732.24	10,054,644.81

37. As it turned out, the plaintiff had received only the following sums in part payment of the Annual Return due from Yu Rui and Belmore under clause 9 of the 2011 SPA:

Date of Receipt	Amount Paid (US$)
4.9.2012	13,654,590.86
6.2.2013	10,054,644.81
27.9.2013	3,500,000.00
27.11.2013	700,000.00
11.12.2013	1,000,000.00
17.12.2013	800,000.00
30.12.2013	900,000.00
15.1.2014	450,000.00
16.1.2014	1,950,000.00
24.9.2014	3,000,000.00
9.6.2015	4,020,000.00

38. Consequently, according to the plaintiff's reckoning, as at 15 April 2017, a sum of US$93,233,390.35 was due from Yu Rui and Belmore to the plaintiff for the outstanding Annual Return and interests thereon under clause 9 of the 2011 SPA as follows:

Due Date	Outstanding Annual Return (US$)	Outstanding Accrued Interest (US$)	Total Outstanding Amounts (US$)
30.6.2013	0	1,010,237.38 [4]	1,010,237.38
31.12.2013	3,885,871.04	5,565,403.84	9,451,274.88
30.6.2014	9,917,808.22	7,423,353.95	17,341,162.17
31.12.2014	10,082,191.78	5,856,146.47	15,938,338.25
30.6.2015	9,917,808.22	4,280,712.28	14,198,520.50
31.12.2015	10,082,191.78	2,967,730.63	13,049,922.41
30.6.2016	9,945,355.19	1,648,651.03	11,594,006.22
31.12.2016	10,054,644.81	595,283.73	10,649,928.54
Total	63,885,871.04	29,347,519.31	93,233,390.35

39. Thus, the plaintiff sues the defendant for US$93,233,390.35 plus contractual interest thereon from 16 April 2017 under the 2011 SPA.

Under the 2011 Side

40. As there was no Qualifying IPO of the shares of Lung Ming prior to 31 December 2013, the Compensation became payable. It was however not paid.

[4] No longer accruing as the Annual Return due in this relevant period has been paid.

41. In addition to the Compensation, according to the plaintiff's reckoning, interest on the Compensation under clause 3 of the 2011 Side Deed, calculated as at 15 April 2017, amounted to US$27,922,119.45.

42. The plaintiff claims against the defendant the Compensation plus contractual interest thereon up to 15 April 2017 (US$30 million + US$27,922,119.45) plus interest thereon from 16 April 2017 under the 2011 Side Deed.

Under the 2016 Deed

43. Following the issue of the Notice, on 23 January 2017, the defendant through one Wang Yuanheng, a Hong Kong solicitor and in-house lawyer of Lung Ming, confirmed the defendant's agreement that Yu Rui and Belmore will respectively enter into sale and purchase agreements with the plaintiff for the purchase of the Lung Ming shares owned by the plaintiff at a total purchase price of US$200 million.

44. Such agreements were, however, never entered into. The plaintiff claims specific performance of clause 2.3.3 of the 2016 Deed.

GROUNDS OF DEFENCE AND ISSUES SOUGHT TO BE RAISED BY DEFENDANT

45. In defence, the defendant contends the following:

(1) By way of general defence to the claims for interest under the 2011 SPA, the 2011 Side Deed and the 2016 Deed, the interest rate charged (i.e. 20% per annum compounded either monthly or daily) constituted penalty.

(2) By way of general defence to the claims under the 2011 SPA and the 2011 Side Deed, the defendant is entitled to set off against the plaintiff's claims his *bona fide* counterclaim for damages against the plaintiff as a result of the falling through of the Zhongrun Investment which, according to the defendant, was caused by the Complaint.

(3) Further, specifically in relation to the 2011 Side Deed, the parties entered into an oral agreement that the 2011 Side Deed[5] was merely executed as a formality and was not intended to have any legal effect and would not be enforced because the plaintiff needed some form of documentation to give the appearance internally that it was entitled to certain rights in addition to those set out in the 2011 SPA so that the 2011 SPA was no worse a bargain than the 2010 SPA.

(4) As for the 2016 Deed:

(a) First, the defendant entered into the same under economic duress in that the plaintiff applied illegitimate pressure on the defendant (within the meaning laid down by Mr Justice Godfrey Lam in *Zebra Industries (Orogenesis Nova) Ltd v Wah Tong Paper Products Group Ltd* [2016] 1 HKC 213) while the Zhongrun Application was pending by threatening *inter alia* to commence legal proceedings and make reports to mainland regulatory agencies against the defendant if the defendant refused to sign the 2016 Deed. The 2016 Deed is therefore voidable (and now

[5] As well as the Escrow Agreement.

avoided) and unenforceable by the plaintiff against the defendant.

(b) Second, the plaintiff did not exercise the 2016 Option or extend the deadline for the exercise of the same within time and thus no specific performance of the 2016 Option can be ordered.

46. According to Mr Daniel R Fung SC (leading Mr David Chen), counsel for the defendant, these grounds of defence raise the following 16 triable issues:

2011 SPA & 2011 Side Deed

(1) Whether the provisions for default interest constitute penalties and are therefore unenforceable;

2011 Side Deed

(2) What is the purpose of separating the 2011 Side Deed from the 2011 SPA;

(3) Whether the 2011 Side Deed was intended to be enforceable;

2016 Deed

(4) Whether the CSRC's approval of the Zhongrun Investment was imminent in April 2016;

(5) Whether the plaintiff knew that Zhongrun's application was about to be approved by the CSRC;

(6) Whether the plaintiff applied pressure on the defendant;

(7) Whether the defendant had a practical alternative;

(8) Whether the pressure was illegitimate in all the circumstances;

(9) Whether the illegitimate pressure was a cause of the defendant entering into the 2016 Deed;

(10) Whether the 2016 Deed is voidable on the ground of economic duress;

(11) Whether the plaintiff's exercise of the 2016 Option was within or out of time;

Counterclaim

(12) Whether or not the plaintiff owed to the defendant a duty of care in making the Complaint;

(13) What was the content of the Complaint;

(14) Whether or not the Complaint was true and accurate;

(15) If the Complaint was not accurate, whether it caused the CSRC not to approve Zhongrun Application; and

(16) Whether the lack of approval by the CSRC of the Zhongrun Application caused loss to the defendant, and if so the quantum of the defendant's loss.

PRINCIPLES GOVERNING THE GRANT OR REFUSAL OF SUMMARY JUDGMENT

47. The principles governing the grant or refusal of summary judgment under Orders 14 and 86[6] are well settled and do not require extensive citations. I previously summarised the principles applicable where the dispute is one of fact that I derived from the authorities in

[6] The same principles apply to an application for summary judgment whether Order 86: *Super Town Investments Ltd v Ives Developments Ltd*, HCA 86/2006 (unreported), 22 May 2007, *per* Deputy High Court Judge To (as he then was) at [5]-[6].

Menfond Electronic Art & Computer Design Co Ltd v Wong Wang Tat Victor [2013] 2 HKC 259 at [61][7] as follows:

> "It is for the defendant to show that there is an arguable defence or triable issue. In doing so, the defendant must condescend to particulars. The mere assertion in an affidavit of a given situation by the defendant does not, *ipso facto*, ground leave to defend. The defendant must satisfy the court that his evidence is capable of being believed and that on the basis of such evidence, there is a fair or reasonable probability of the defendant having a real or *bona fide* defence. In deciding whether there is a fair or reasonable probability of the defendant having a real or *bona fide* defence, the court does not isolate each factual issue and consider whether it is possible that the defendant's story on that issue is credible. Rather, the court must look at the whole situation. In assessing the credibility of the defendant's factual case, while the court will not embark on a mini-trial on affidavit evidence, the court is not obliged to suspend its critical faculties and assume that the defendant's evidence is accurate. If having regard to inherent plausibility, inconsistency with contemporaneous documents and other compelling evidence, the defence is not credible, the court must say so. If the defendant's defence is incredible in any material respect, it cannot be said that there is a fair or reasonable probability that the defendant has a real or *bona fide* defence. See e.g. *National Westminster Bank plc v Daniel* [1993] 1 WLR 1453, *per* Glidewell J at 1457; *Manciple Ltd v Char On Man* [1995] 3 HKC 459 (CA), *per* Mortimer JA at 466E-G; *Re Safe Rich Industries Ltd*, CACV 81/94, unreported, *per* Bokhary JA at page 5; *Microsoft Corporation v Electro-Wide Ltd* [1997] FSR 580, *per* Laddie J at 593; *DMT Finance Ltd v Ming Kee Investments Ltd*, HCCL 11/1998, unreported, *per* Stone J at page 4 and *Paul Y Management Ltd v Eternal Unity Development Ltd*, CACV 16/2008, unreported, *per* Cheung JA at §19."

48. These principles are not in dispute, though the parties understandably emphasize different aspects. In particular, referring to Roger VP's judgment in *Pacific Electric Wire & Cable Co Ltd v Harmutty Ltd* [2009] 3 HKLRD 94 at [4] and Lam VP's judgment in *UMG Recordings Inc v Profit Chart Development Ltd*, CACV 262/2012 (unreported), 19 February 2013, at [7], the defendant cautions against a mini-trial on affirmation evidence, stressing that summary judgment is for clear cases and is not appropriate where there is any serious dispute as to

[7] See also *Ontone Finance Co Ltd v Leung Siu Kee*, HCA 408/2011 (unreported), 28 June 2012 at [23].

matters of fact or any difficult question of law and that it is impossible for a court to put itself in the position of having to make findings of fact in a summary judgment application except in the most clear and blatant cases.

49. In the instant case, the parties have placed before me a 173-page bundle containing the relevant court documents including the affirmations in support of / in opposition to the Summons and 10 bundles of documents containing a total of 2,211 pages of exhibits to these affirmations. The point made by the defendant is that this action involves complex factual disputes and legal arguments; the plaintiff's evidence reveals merely a small fraction of the parties' relevant relationship and the chain of transactions *inter se* since the 2011 SPA, the 2011 Deed and the 2016 Deed form merely 3 among over 10 agreements surrounding an intended investment in Lung Ming by various investors including the plaintiff; that it is important for the court to understand the full background leading up to the execution of respectively the 2011 SPA, the 2011 Deed and the 2016 Deed all of which is set out in the evidence filed by and on behalf of the defendant.

50. While there is no quarrel with the caution against a mini-trial on affirmation evidence, it should also be appreciated that whether a dispute of fact is triable to ground leave to defend does not have any necessary correlation with, and should not be judged with reference to, the size of the plaintiff's claim or of the transaction from which it arises; the number of witnesses put forward to speak to the matter; or the volume of documentary exhibits placed before the court.

51. The present case is one on point. The defendant's evidence in opposition includes the affirmations of Mr Li, Xuan Xu (Mr Li's assistant) and Xiong Yun (the managing director of Hopu Investment Management Co Ltd, an investor in Lung Ming), which produce altogether the 1,453 pages of exhibits in 7 hearing bundles (B3-B9). Although these affirmations and exhibits relate to the Zhongrun Investment the failure of which is claimed to found the defendant's counterclaim/set-off, only a handful of documents running to 31 pages have been referred to the defendant's skeleton submissions even before the defendant has had the benefit of the concessions by the plaintiff (but only for the purposes of disposing of the Summons: see paragraph 64 below). And, rather ironically, I have come to the conclusion that, on proper analysis, the opposition based upon the counterclaim could be disregarded because, despite the voluminous materials on the Zhongrun Investment adduced by the defendant, he has still failed to deal one key aspect namely, the likely quantum of the loss caused to him by the abortion of the transaction.

52. I now turn to consider whether each of the grounds of defence raised by the defendant should be allowed to go to trial.

DEFAULT INTEREST

53. Neither the defendant's skeleton submission dated 6 November 2017 nor the draft defence and counterclaim exhibited to the defendant's second affirmation also dated 6 November 2017 makes any mention of clause 9 (insofar as it provided for the payment of default interest on the Annual Return) or clause 15 of the 2011 SPA or clause 3 of the 2011 Side Deed or clause 3 of the 2016 Deed being penalty clauses.

Mr John Bleach SC (leading Mr Law Man Chung), counsel for the plaintiff, has therefore understandably assumed that the defendant has abandoned the point and has expressly on this basis not dealt with the penalty interest issue in his opening submission in court. He has notably not been corrected by Mr Fung SC. Leading counsel was therefore unpleasantly surprised to see, and objected to, the inclusion of the penalty interest issue in the list of issues handed up by Mr Fung SC at the start of his oral submission.

54. This is of course unsatisfactory. It is however unnecessary to dwell on whether the defendant should be allowed to rely on the penalty interest issue as the same can in any event be disposed of shortly.

55. The only material placed by the defendant in support of the contention that clauses 9 and 15 of the 2011 SPA, clause 3 of the 2011 Side Deed and clause 3 of the 2016 Deed constituted penalties is paragraph 88 of the defendant's first affirmation:

> "Finally, I am advised by my legal advisers that the last part of Clause 9 and Clause 15 of the 2011 SPA, as well as Clause 3 of the 2011 Side Deed of Undertaking and Clause 3 of the 2016 Deed of Undertaking, which provide for interest at an annual rate of 20 percent and compounded either daily or monthly constitutes a penalty clause which is unenforceable under Hong Kong law. I shall leave it to Counsel for further elaborate on this point at the hearing."

56. It is true that the question whether a sum stipulated for in a contract is a penalty or liquidated damages is a question of law: *Chitty on Contracts*, 32nd edition, Volume 1, paragraph 26-182 citing *Sainter v Ferguson* (1849) 7 CB 716 at 712.

57. However, such question of law cannot be answered in a factual vacuum. This is apparent from the following summary of the law by Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 at 86-88:

> "(1) Though the parties to a contract who use the words 'penalty' or 'liquidated damages' may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The court must find out whether the payment stipulated is in truth a penalty or liquidated damages….
>
> (2) The essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party; the essence of liquidated damages is a genuine pre-estimate of damage.
>
> (3) The question whether a sum stipulated is a penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of at the time of the making of the contract, not as at the time of the breach.
>
> (4) To assist this task of construction various tests have been suggested which, if applicable to the case under consideration, may prove helpful or even conclusive. Such are:
>
> (a) It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss which could conceivably be proved to have followed from the breach.
>
> (b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid….
>
> (c) There is a presumption (but no more) that it is a penalty when 'a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage.'
>
> On the other hand:
>
> (d) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties." (emphasis added)

58. Particularly, in the context of clauses that impose higher rates of interest on a party who has defaulted, the court will uphold the clause provided that the increased rate of interest is not commercially

unreasonable: see *Chitty on Contracts*, *supra*, paragraph 26-194 and the cases cited therein.

59. The defendant has completely failed to adduce any evidence as to how the rate of interest now complained of was agreed under any of the 2011 SPA, the 2011 Side Deed or the 2016 Deed or what would otherwise have been a commercially reasonable rate of interest for a principal payment of US$20 million or US$30 million in 2011 or of US$200 million in 2016.

60. While the hearing of an Order 14 application is not the occasion for a mini-trial on affidavits, to discharge the burden to show a fair probability or reasonable grounds that a *bona fide* defence exists, the defendant has to do more than just barely asserting that the contractual provision is a penalty clause to be elaborated upon at the hearing.

SET-OFF BY COUNTERCLAIM

61. The precise nature of the personal counterclaim sought to be raised by the defendant out of the falling through of the Zhongrun Investment was not clear until the lodgment of the defendant's skeleton argument on 6 November 2017 and the exhibition of the draft defence and counterclaim to the second affirmation of the defendant filed on the same date.

62. The initial confusion led Mr Bleach SC to take *inter alia* the point, based on the principle that a shareholder (not even a 100% one) (i.e. the defendant here) does not have any interest in the company's assets (i.e.

the shares in IMIML and Shiny Glow to be sold to Zhongrun),[8] that any loss of the Zhongrun Investment is not the loss of the defendant but that of the vendors under the Share Transfer Agreements, i.e. the Defendant's Corporate Vehicles.

63. It has now been clarified that the counterclaim asserted by the defendant is that for damages for negligence in making the Complaint which delayed the CSCR's approval of, and therefore derailed, the Zhongrun Investment. It is premised upon the following:

(1) that the plaintiff owed to the defendant at all material times a duty of care when making the Complaint;

(2) that the plaintiff acted in breach of such duty in that the Complaint was untrue;

(3) that the plaintiff's lack of care derailed the Zhongrun Investment; and

(4) that the defendant has suffered loss to the tune of the total consideration under the Share Transfer Agreements entered into by the Defendant's Corporate Vehicles, i.e. US$1,105,004,970 which the defendant would ultimately receive.

64. To dispose of the defendant's counterclaim for the purpose of the Summons but not otherwise, Mr Bleach SC in his usual practical

[8] Citing *Macaura v Northern Assurance Co Ltd* [1925] AC 619; *Good Profit Development Ltd v Leung Hoi* [1993] 2 HKLR 176 and *Prest v Petrodel* [2013] 2 AC 415.

style is prepared to assume the arguability of such counterclaim and its connection with the plaintiff's claims to the requisite extent.[9]

65. With such concessions, the only remaining substantive point taken on behalf of the plaintiff is the defendant's failure to quantify the counterclaim or to do so credibly.

66. On this, the only evidence before the court is the defendant's assertions in paragraphs 51 and 86 of his first affirmation that he would have personally made a profit of approximately US$1.2 billion upon the completion of the Zhongrun Investment and that he has therefore lost approximately US$1.2 billion as a result of the non-completion of the Zhongrun Investment.

67. The loss recoverable by the defendant, if any, should be the profits that he would otherwise have made from the Zhongrun Investment as the owners of the Defendant's Corporate Vehicles: *McGregor on Damages (19th ed)*, paragraph 4-052.

68. I agree with Mr Bleach SC that such loss, if any, cannot be US$1.2 billion. US$1.2 billion is the approximate aggregate price to be paid by Zhongrun to the Defendant's Corporate Vehicles under the 4 Share Transfer Agreements mentioned in paragraph 23(3)(b) above. Those 4 companies still retain their respective shares in IMIML and Shiny Glow (through whom they hold their interests and licences in the

[9] Much of the parties' respective written submissions on the counterclaim are concerned with the degree of connection required between the plaintiff's claim and the defendant's counterclaim in order to ground equitable set-off and to stay summary judgment, which I do not need to repeat here due to Mr Bleach's very sensible concession.

iron ore mines in Mongolia). There is no allegation, let alone evidence, that the shares in IMIML or Shiny Glow have since the Share Transfer Agreements dropped in value. To the contrary, according to an announcement in respect of another transaction for the sale and purchase of 53% of the issued share capital of IMIML entered into on 11 January 2017, such shareholding was valued at approximately HK$6.36 billion. This valuation does not take into account of the value of the Shiny Glow shares.

69. Other than his said bare assertions, the defendant has not led any other evidence on the present day value of either the IMIML or the Shiny Glow shares. It behoves the defendant to particularise the amount of his set off or counterclaim or indicate how it is made up or calculated, so that the court has the necessary material on which to make the proper order: *Hong Kong Civil Procedure 2018*, Volume 1, paragraph 14/4/4. The defendant has utterly failed to do so.

ALLEGED COLLATERAL ORAL AGREEMENT NOT TO ENFORCE 2011 SIDE DEED

70. The plaintiff denies the alleged collateral oral agreement not to enforce the 2011 Side Deed.

71. It is trite law that, collateral contracts, the effect of which was to vary or add to the terms of an existing agreement, must be strictly proved. Not only the terms of such contracts, but the existence of an *animus contrahendi* on the part of all the parties to them, must be clearly shown. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably

entered into by them and would have the effect of lessening the authority of written contracts by making it possible to vary them by suggesting the existence of verbal collateral agreements relating to the same subject matter: *Bank of India v Surtani* [1994] 1 HKC 7 (CA) at 11-12, CA.

72. The present case is a *fortiori* – when the defendant's allegation is that the oral agreement did not just vary or add to the terms of the agreement; but effectively that the 2011 Deed was a sham of no legal effect.

73. The entirety of the defendant's case on evidence is contained in the 4th to 15th lines of paragraph 29 of the defendant's first affirmation, which simply asserts the alleged oral collateral agreement and the reason therefor allegedly put forward by the China Life Team.

74. The only point made in submission in favour of the existence of such alleged oral collateral agreement is to question why else would it have been necessary for the signing of a separate deed given that the 2011 SPA already catered for (1) a valuation shortfall upon an IPO of Lung Ming (clause 2.1 of the 2011 SPA) and (2) there being no IPO of Lung Ming prior to 31 December 2013 (clause 2.2 of the SPA). The terms set out in the 2011 Side Deed could have been incorporated into the 2011 SPA to create one single document which set out exhaustively all of the plaintiff and the defendant's rights and obligations. There is no apparent or logical reason for creating a separate document, the 2011 Side Deed, to set out further rights and obligations of the parties, other than that offered by the defendant, namely, that the 2011 Side Deed was created as a matter of formality so that the plaintiff's team could show to other

internal staff of the plaintiff that the 2011 SPA was *not* a worse bargain than the 2010 SPA.

75. This is of course a relevant angle, which I have duly taken into account.[10] However, I am obliged not to blindly accept the veracity of the defendant's allegation but should test it with reference to its inherent plausibility as well as against the undisputed or indisputable facts and contemporaneous documents available to me.

76. In this connection, first, I find it intriguing why the defendant should or would go along with the China Life Team in signing the 2011 Side Deed for the reason provided by the China Life Team. If what the defendant says were true, it should and would alert him (an experienced businessman and seasoned investor with an MBA degree) to the fact (or at least very strong possibility) that the senior management to which the China Life Team reported would not approve the transaction on just the terms of the 2011 SPA and that the China Life Team was acting without the necessary authority in coming to an agreement with the defendant on those terms (effectively if the 2011 Side Deed were indeed a sham).

77. Second, the defendant's allegation is unsupported by any contemporaneous documents. Rather, all the contemporaneous documents contradict such allegation.

[10] The plaintiff has explained why the 2011 Side Deed was by way of a separate document in paragraph 6.13(6) of the affirmation of Mr Hui Yee Hung.

78. Before the execution of the 2011 Side Deed, the parties went through several versions and revisions of the same: see the email dated 2 November 2011 from Mr Kenny Ip ("Ip"), the then Vice President's Assistant of Lung Ming.

79. After the execution of the 2011 Side Deed, there were numerous occasions for discussion and negotiation for repayment by the defendant to the plaintiff (which invariably included the payment of the Compensation under the 2011 Side Deed after 31 December 2013). See:

(1) the Chinese memorandum dated 18 March 2014 signed by the defendant which expressly referred to the Compensation with a promise to pay by 30 May 2014;

(2) the email dated 19 December 2014 from Ip (for the defendant) enclosing an Excel spreadsheet setting out the defendant's calculation that included a sum of US$30 million for "No IPO 15%";

(3) the 2 emails dated 31 December 2014 between Ip (for the defendant) and Mo (for the plaintiff) with another spreadsheet setting out the plaintiff's calculation that included US$30 million for "15% No-IPO Penalty", which Ip did not dispute;

(4) the email dated 4 February 2015 from Ip (for the defendant) to Mo, enclosing (a) a draft Chinese agreement proposed by the defendant for repayment which clearly included the Compensation and (b) a spreadsheet that referred to US$30 million for "No IPO 15%";

(5) the email dated 13 February 2015 from Ip (for the defendant) to Mo, enclosing yet another spreadsheet that referred to US$30 million for "No IPO 15%";

(6) the email dated 22 April 2015 from Ip (for the defendant) to Mo, enclosing a draft audit confirmation in Chinese to be signed by the defendant in respect of a sum which must have included the Compensation;

(7) the Chinese memorandum dated 20 May 2015 signed by the defendant which acknowledged his liability to the plaintiff for a sum which would have to include the Compensation with a promise to make full payment by no later than 31 August 2015;

(8) the email dated 27 May 2015 from Ip (for the defendant) to Mo, enclosing the defendant's comments on a draft letter of undertaking which expressly referred to the 2011 Side Deed and the defendant's obligation to pay interest on any outstanding amount payable thereunder without any comments from the defendant;

(9) the email dated 14 July 2015 from Ip (for the defendant) to Mo, enclosing a spreadsheet calculating the outstanding payment up to 30 June 2015 and containing an express reference to "No IPO Compensation (Px15%)".

80. One can see from such correspondence that the defendant never sought any clarification or made any protests when the plaintiff raised the Compensation payable under the 2011 Side Deed. Instead, he simply acknowledged the liability to pay the Compensation.

81. I agree with Mr Bleach SC that common sense dictates that if there were any agreement between the China Life Team and the defendant to the effect that the 2011 Side Deed was not intended to have any legal effect or that the plaintiff would not demand the defendant for any payment thereunder, the defendant would raise this and/or seek clarification from the plaintiff or the China Life Team to ascertain whether there was any misunderstanding on their part.

82. Third, the alleged oral collateral agreement apparently covered not just the 2011 Side Deed but also the 2011 Escrow Agreement. Yet, the 2011 Escrow Agreement had apparently been implemented in that certificates of the Escrow Agreement had been delivered to the Escrow Agent, though the defendant has insisted that he had not done so and cannot explain why the Escrow Agent has such certificates. Indeed, I note that by an email dated 1 November 2011 to Mo, Mr Tu (whose company Belmore was of the Vendors under the 2011 SPA) made it clear that the certificates of the Escrow Shares were to give comfort and assurance to the plaintiff that such shares would be set aside and would not be sold or disposed of.

83. For these reasons, I find the alleged oral collateral agreement not to enforce the 2011 Side Deed incredible.

WHETHER EXERCISE OF 2016 OPTION UNDER 2016 DEED OUT OF TIME

84. The plaintiff's claim under the 2016 Deed and the defence thereto can be dealt with shortly.

85. Much of the parties' submissions (both written and oral) focus upon whether the facts and circumstances surrounding the execution of the 2016 Deed relied upon by the defendant could or did amount to economic duress.

86. It is unnecessary for me to prolong this decision by dealing with such rival arguments for the following reason.

87. Insofar as it is material, clause 2.3.3 of the 2016 Deed stipulated as follows:

> "Mr. Li further agrees that China Life shall have the option to require Mr. Li or his nominee(s) to enter into a sale and purchase agreement with China Life (the **"Proposed SPA"**) under which China Life will sell to Mr. Li or his nominee(s) and Mr. Li or his nominee(s) will purchase from China Life all the shares of Lung Ming that are beneficially owned by China Life at a purchase price equal to the Consideration (as defined in the 2011 SPA) paid by China Life pursuant to the 2011 SPA. Mr. Li and China Life hereby agree that the completion of the transactions contemplated under the Proposed SPA shall not be later than June 30, 2016 unless extended in writing by China Life."

88. It is silent as to when the 2016 Option had to be exercised. However, one would have thought that it was implicitly intended by the parties that it should be exercised before 30 June 2016 given that the Proposed SPA, which was to be entered into if and when the plaintiff exercised the 2016 Option, was required to be completed by that date.

89. While clause 2.3.3 of the 2016 Deed did provide for a power for the plaintiff to extend the completion date of the Proposed SPA, it is silent as to whether the plaintiff could (as it did) exercise such power after 30 June 2016. If so, where did it leave the defendant under the 2016 Deed when he did not hear from the plaintiff by 30 June 2016?

90. I have not been shown any authority by either party as to whether, in the absence of an express provision, a party in whose favour an option was granted can or cannot extend and exercise the same after its expiry.

91. For this reason alone, the plaintiff's claim to enforce the 2016 Deed requires more consideration than appropriate for at an Order 14 hearing and should go to trial, without any condition.

INTERIM PAYMENT

92. The application for the interim payment does not arise in light of the conclusions that I have reached on the application for summary judgment on the 2011 SPA and the 2011 Side Deed.

ORDERS

93. For the reasons stated above, the plaintiff is entitled to summary judgment against the defendant for:

(1) principal and interest up to 15 April 2017 totalling US$93,233,390.35 under the 2011 SPA with further interest thereon at the rate of 20% per annum compounded monthly from 16 April 2017 until the date hereof and thereafter at judgment rate until payment; and

(2) principal and interest up to 15 April 2017 totalling US$57,620,980.76 under the 2011 Side Deed with further interest thereon at the rate of 20% per annum compounded monthly from 16 April 2017 until the date hereof and thereafter at judgment rate until payment.

94. The defendant shall have unconditional leave to defend the plaintiff's claim under the 2016 Deed.

95. I also make an order *nisi* that the defendant shall pay the plaintiff the costs of the Summons on a party and party basis with certificate for 2 counsel for the hearing on 7 November 2017, to be taxed if not agreed.

(Lisa Wong)
Judge of the Court of First Instance
High Court

Mr John Bleach SC and Mr Law Man Chung, instructed by Latham & Watkins for the plaintiff

Mr Daniel R Fung SC and Mr David Chen, instructed by Bird & Bird for the defendant