IN THE CAYMAN ISLANDS COURT OF APPEAL ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS FINANCIAL SERVICES DIVISION

CICA (Civil) Appeal No. 0015 of 2022
(Grand Court Cause No. FSD 0244 of 2021 MRHCJ))

BETWEEN

SHENG LU

APPELLANT

-AND-

BVCF MANAGEMENT LIMITED

RESPONDENT

Before: **The Hon. John Martin KC, Justice of Appeal**
The Rt. Hon. Sir Alan Moses, Justice of Appeal
The Rt. Hon. Sir Jack Beatson, Justice of Appeal

Appearances: **Mr. Tom Lowe KC instructed by Ms Jessica Williams of Harney Westwood & Riegels for the Appellant**
Mr. Robert Levy KC instructed by Mr. Rupert Bell of Walkers (Cayman) LLP for the Respondent

Heard: **4th September 2023**

Draft circulated: **18 September 2023**

Judgment delivered: **4 October 2023**

JUDGMENT

Beatson JA

1. This is the appeal of Mr Sheng Lu ("the Appellant") against the Order dated 3 December 2021 of Ramsay-Hale J (as she then was) striking out his claim against BVCF Management Limited ("the Respondent"), his former employer. The judge gave an *ex tempore* ruling at the

end of the hearing but stated that she would hand down a written judgment which she did on 26 April 2022. Leave to appeal was granted by Goldring P on 29 June 2022: the Certificate of Order is dated 5 July 2022.

2. The issue is whether, contrary to the judge's decision, it is reasonably arguable that the Respondent was in breach of an express or implied obligation to provide the Appellant with copies of a Shareholders' Agreement and Deed of Adherence which were expressly stated to be annexed to his contract of employment but were not. The Appellant claims that without those documents he was unable either to exercise an option in the contract to acquire shares from the Respondent or to decide whether to do so. On his behalf, Mr Lowe KC argued that the judge erred in holding that it is not reasonably arguable that the contract obliged the Respondent to provide him with those documents.

3. There is little if any difference between the parties on the law governing striking out under GCR Ord. 18, rule 19(1)(a) or about the way the judge set out the requirement in [11] – [13] of her judgment. She referred to the approach by Smellie CJ in *Algosaibi and Brothers Company v Saad Investments Co. Ltd. and others* [2013] 1 CILR 202 at [156], citing the well-known passage from the judgment of Stephenson LJ in *McKay v Essex Area HA* [1982] QB 1166 at 1176-77 collecting many of the formulations of the principle. It suffices to refer to two of them. The party seeking the strike out must show that the case is "*obviously unsustainable*", and the order for striking out should only be made if "*once the point has been argued it becomes plain and obvious that the claim or defence cannot succeed*".

4. The Respondent is a Cayman Islands venture capital investment firm which manages funds invested in Chinese, US, and European companies in the healthcare and life science industries under the Bio Veda China Fund brand ("BVCF"). Between September 2012 and approximately the end of January 2019 the Appellant was employed by the Respondent as Head of Investor Relations and Communications, and, for part of that time, as a partner. Initially his employment was under a contract dated 18 September 2012. That contract was replaced by a contract dated 1 May 2014. Both contracts are governed by the law of the Cayman Islands.

5. One of the funds the Respondent managed was BVCF III LP, a Cayman Islands exempted limited partnership. The Respondent was entitled to a share of the profits of BVCF III LP, referred to as "carried interest", and the Appellant claims that he is entitled to up to 5% of the "carried interest" BVCF III LP paid to the Respondent. His entitlement is based on an option

in his contract of employment to subscribe for shares in the Respondent to which the entitlement to "carried interest" was attached. It is essentially a performance fee designed to incentivize the management of the fund.

6. The option is set out in Part III of Schedule 2 to the Appellant's contract of employment, headed "remuneration" which, by clause 1.3 of the contract has "*the same force and effect as if expressly set out in the body of the agreement"*. Parts I and II of Schedule 2 provide for salary, health insurance and other benefits. The wording of Part III of Schedule 2 in the 2012 and 2014 contracts is slightly different, but it is only necessary to consider the 2014 contract. It provides:

> "*In consideration of the entry by the Employee into this agreement, the Employer hereby grants the employee the option to subscribe for up to five (5) Class B Shares, representing the Employee's proportional 5% entitlement upon having been fully vested, to participate in the distributions by the Employer of amounts received in respect of the carried interest received by the Employer from BVCF III LP, on the terms and conditions more fully set forth in the Shareholders' Agreement attached as Appendix A."*
>
> "*Any exercise by the Employee of any option to purchase Class B shares shall be subject to, and conditional upon, the Employee having executed and delivered a Deed of Adherence to the Shareholders' Agreement substantially in the form appended thereto.*"

The contract thus expressly provided that the Shareholders' Agreement and Deed of Adherence were appended as Appendix A to Schedule 2. They were neither appended nor provided when requests were made for them.

7. The material parts of the Appellant's claim as originally pleaded were for:

a) a declaration that he was entitled to 5% of the carried interest payable to the Respondent by the fund,
b) an order of specific performance of Part III of Schedule 2 to the contract directing the Respondent to pay him 5% of the carried interest paid to it by BVCF III LP, and alternatively,

c) an order directing the Respondent to pay him 5% of the carried interest paid to it by way of damages for breach of Part III of Schedule 2.

A claim for damages for breach of statutory duty under section 6 of the Labour Act was abandoned during the hearing below: see Judgment [17].

8. Before the Judge, Mr Lowe relied on a proposed draft amended Statement of Claim and draft amendments to the prayer for relief: see Judgment [18] – [20]. He submitted on behalf of the Appellant that, as a matter of construction, the second paragraph of Part III of Schedule 2 to the contract set out at [6] above, made the exercise of the option by the Appellant "*subject to and conditional upon*" his executing the Shareholders' Agreement and the Deed of Adherence. Accordingly, the only way to make the contract workable was for the Respondent as the employer to provide the Appellant with those documents.

9. Mr Lowe maintained that the Respondent knew that the Appellant wanted to subscribe for the shares because he had repeatedly asked the Respondent for the documents. The only reason for asking for them was because he wanted to consider subscribing for the shares and without the documents he could not do that. As he was not given them, he was not put in a position by the Respondent to exercise the option. Relying on *Mackay v Dick* (1881) 6 App. Cas. 251 and *Mona Oil Equipment & Supply Co. Ltd. v Rhodesia Railways Ltd.* [1949] 2 All ER 1014 at 1017, Mr Lowe submitted that the failure of the Respondent to provide the Shareholders' Agreement and Deed of Adherence amounted to a breach by the Respondent of the implied term to co-operate, the remedy for which was either to treat the option as having been exercised or to award damages to the Appellant. Mr Lowe also submitted that the Respondent's failure to deliver the documents the Appellant needed to execute the option meant that it breached an implied duty of good faith by conducting itself in a way calculated to frustrate the purpose of the contract.

10. The judge stated (at [29]) that the Appellant's entitlement to a 5% share of the carried interest depended upon him subscribing for shares in the Respondent. As he did not plead that he had either exercised the option to subscribe or that he had sought to exercise it, his claim was fatally flawed. She struck out his claims for specific performance directing the Respondent to pay him a sum equivalent to 5% of the carried interest for essentially the same reason: see [30] – [31].

11. The judge also held (at [35] – [41]) that the flaw was not cured by the proposed amendments to the pleading. It was proposed to plead that the Appellant claimed an entitlement to the "carried interest shares", and that the Respondent knew he wished to exercise the option. This was because the Appellant had asked the Respondent many times to provide him with the Shareholders' Agreement and the Deed of Adherence which should have been but were not appended to the contract or provided, and which he had to sign to exercise the option. It was thus proposed to plead that the Respondent did not provide the Appellant with the means of exercising the option.

12. The judge considered (at [36]) that this allegation was "*unintelligible"*. The documents were "*not the means of exercising the option but the means by which the exercise of the option is perfected, the pre-condition to the issuing of the shares to which [the Appellant] seeks to subscribe*". To exercise the option all the Appellant needed to do was to say: "*I would like to exercise the option to subscribe for 5 shares*". She considered (at [37]) that the principle in *Mackay v Dick,* that a term will be implied to prevent one party frustrating the performance of an obligation by the other party was inapplicable on the facts alleged in the draft amended Statement of Claim because that principle depended on action being taken or not taken by the first party. She also concluded that the claim for breach of good faith was unsustainable for the same reason. The Appellant had first to exercise the option and "*was not prevented from doing so because he was not provided with the Shareholders' Agreement and the Deed of Adherence*": (see [39]).

13. The central point in Mr Lowe's very succinct oral submissions was that the contract provided that the exercise of the option was "*subject to and conditional on*" the Appellant "*having executed and delivered a Deed of Adherence to the Shareholders' Agreement substantially in the form appended thereto".* He submitted that the Appellant needed to sign these documents in order to exercise the option and that the Judge erred in finding that the documents were not the means of exercising the option but only a means by which its exercise is "perfected". His written submissions maintained that the Judge erred in not asking how the Appellant could practically be expected to fulfil the condition to which the exercise of the option was subject or considering the business efficacy of not giving the Appellant an opportunity to examine the Shareholders' Agreement before exercising the option. How, he asked, was the Appellant to decide whether to exercise the option without seeing the terms of the Shareholders' Agreement? He would not know how the rights and duties of shareholders had been modified in it and would not have been able to make a decision as to whether to exercise the option.

14. Mr Lowe submitted that the fact that the contract expressly provided that the option could only be exercised by the Appellant "*having executed and delivered a Deed of Adherence …. substantially in the form appended to*" the Shareholders' Agreement meant that the Respondent was expressly required to provide the document. Alternatively, he argued that it was impliedly required to do so because the Appellant could not comply with the condition by executing and delivering a Deed of Adherence without having the document. Mr Lowe submitted that the idea that a person "*should become obliged to execute such an agreement without seeing [it] is nonsensical*".

15. Mr Levy KC supported the judge's reasoning. His position was that it was fatal to the Appellant's case that he did not exercise the option. He had never said that he wanted to or might want to do so after seeing the Shareholders' Agreement and the Deed of Adherence. Mr Levy argued that asking to see the Shareholders' Agreement did not suffice because the Appellant, a senior employee, might have wanted to see that for any number of reasons apart from wanting to exercise the option. He relied on a four-year qualifying period for the entitlement of the Appellant to exercise the option and the fact that the Appellant had asked for the documents in 2012 or 2014 before the expiry of the four-year period. Paragraph 45 of the Statement of Claim refers to a four-year qualification period, but neither Mr Levy nor Mr Lowe showed the Court its basis for this in any of the contractual or other documents or the evidence before the court.

16. Mr Levy also submitted that the claim and the prayers were flawed. In relation to the claim for specific performance, the first limb of his submission was that a party seeking specific performance has to assert willingness and an ability to perform the contract, but this was not contained in the Appellant's pleading or the prayer. The second limb was that specific performance would be precluded in any event because the Appellant was required by the second paragraph of Part III to Schedule 2 to the contract to execute the documents but could not do so because he had not been provided with copies or seen them.

17. In relation to the claim for damages, Mr Levy at first submitted that the prayer claimed damages in lieu of specific performance rather than general damages in seeking damages equivalent to 5% of the carried interest but during the hearing accepted that it referred to damages for breach of the express or implied terms of the contract although he maintained that it did not refer to "general damages". Martin JA asked Mr Levy whether paragraphs 51 and 52 of the draft amended Statement of Claim, pleading that the Appellant has suffered loss and damage as he has been deprived of his right to subscribe for shares in the Respondent and

will suffer further loss and damage if his contractual entitlement to the carried interest is denied, were adequate pleas for breach of an implied term of the contract. Mr Levy's response that this was not in the prayer did not address the substance of the question and had rather a nineteenth century flavour to it.

18. Mr Levy also argued that it did not follow from the fact that the documents were not appended to the employment contract that any obligation to which those documents would have been relevant should be treated as satisfied. He also relied on the entire contract clause 12.1 of the employment contract as precluding reliance by the Appellant on pleaded agreements and understandings reached with representatives of the Respondent, notably Ms Gandolfo. But Lewison, *The Interpretation of Contracts,* 7th ed., §3.139 states that "*a conventional "entire contract" clause does not affect the question whether some matter of fact (whether or not in documentary form) is admissible as an aid to the process of construing a contractual document"* because the implication of terms is *"intrinsic to the agreement".* One of the decisions referred to is that of the English Court of Appeal in *NHS Commissioning Board v Vasant* [2019] EWCA Civ. 1245. Lewison states at §3.140 that this case (in which he gave a judgment with which the other members of the court agreed) held that *"neither an entire agreement clause, nor a no oral modification clause, precluded the admission of extrinsic evidence to explain the meaning of the written terms that the parties had agreed".* In considering whether to strike out a claim, these statements are fatal to Mr Levy's submission based on clause 12.1 of the contract.

19. In his responses to questions by the court about Mr Lowe's central point, Mr Levy was not able to explain why, without "having executed" the Deed of Adherence, the Appellant was in a position to exercise the option. Mr Levy agreed that the terms of the option required such execution of the documents but submitted that this did not answer the question why the Appellant was asking the Respondent for the documents. It might be thought that was not to the point. If, as Mr Levy recognised in this context and in the context of his submissions on specific performance, the Appellant was not in a position to exercise it, the Judge's conclusion that all the Appellant had to do to exercise the option was to say "*I would like to exercise the option …"* cannot stand.

20. I accept Mr Lowe's submission that it is reasonably arguable on the proposed amended Statement of Claim that the Respondent was obliged to provide the Appellant with the Shareholders' Agreement and Deed of Adherence. I do so because, without the documents, the Appellant was not in a position to exercise the option. Mr Levy's submission that the

Appellant's many requests for the documents were insufficient because he did not say why he wanted them has the air of formalism about it in a context where the contract of employment provided that the documents were to be annexed to it but they were not and the Appellant could not comply with the condition for the exercise of the option by executing and delivering a Deed of Adherence without having those documents.

21. As to whether the basis of the obligation was an express term obliging the Respondent to provide the Appellant with the documents, while the words "*having executed and delivered*" the deed of adherence in the specified form are not a form of recital and do not conclusively mean that the Respondent was expressly obliged to do so, they and the contextual circumstances pleaded are a strong indication that it is reasonably arguable that it was. Whether they are, will be a matter for trial. There was no requirement that the Appellant give prior notice of his intention or desire to exercise the option.

22. I have also concluded that, even if there is no express obligation to provide the documents, it is reasonably arguable that the considerations of practicality and business efficacy relied on by Mr Lowe mean that the Respondent was under an implied obligation under the principle in *Mackay v Dick* to give the Appellant an opportunity to examine them and consider their terms before deciding whether to exercise the option. Without the documents, it was not possible for the Appellant to exercise the option and, as I have stated, there was no requirement in the contract for him to give prior notice of his intention to exercise it or his desire to consider exercising it.

23. I am more doubtful about regarding the implied term as to co-operation as an aspect of a general duty of good faith in contract because English common law, which the courts of these islands have regard to, has not yet recognised such a general duty. The observations of Leggatt J (as he then was) in *Yam Seng Pte Ltd v International Trade Corporation Ltd.* [2013] 1 All ER (Comm) 1321, [2013] EWHC 111 (QB) have been given a rather lukewarm reception: see for example, *MSC Mediterranean Shipping Co. SA v Cottonex Anstalt* [2016] EWCA Civ. 789 at [45] *per* Moore- Bick LJ and *Candey v Bosheh* [2022] EWCA Civ. 1103 *per* Coulson LJ at [32]. The question whether it can be so regarded in this case is one for trial. I also regard a number of the other points raised by Mr Levy as ones for trial. These include whether the Appellant is entitled to claim 5% carried interest without paying for the subscribed shares, whether he would in fact have exercised the option, and the extent of any remedy in damages.

24. In conclusion, as the President stated when granting leave, it is reasonably arguable that:

a) the Appellant's contract of employment gave him an option to subscribe for up to five Class B shares in the Respondent,
b) the Respondent was obliged to provide him with the documentation to enable him to decide whether to exercise the option; that is the Shareholders' Agreement and Deed of Adherence.
c) If on the evidence at trial, the court concludes that the Appellant probably would have exercised the option had he been provided with the Shareholders' Agreement and Deed of Adherence to it he would be entitled to one or more of the legal remedies he is seeking.

25. For these reasons, I would allow the appeal.

Moses JA

26. I agree.

Martin JA

27. I also agree.