IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2023] SGCA(I) 6

Court of Appeal/Civil Appeal No 5 of 2023

Between

Lim Chang Huat

… *Appellant*

And

Stronghold Global Holdings Limited (in liquidation)

… *Respondent*

EX TEMPORE JUDGMENT

[Contract — Breach]
[Evidence — Admissibility of evidence — Hearsay]
[Evidence — Admissibility of evidence — Foreign law]

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Lim Chang Huat
v
Stronghold Global Holdings Limited (in liquidation)

[2023] SGCA(I) 6

Court of Appeal — Civil Appeal No 5 of 2023
Steven Chong JCA, Belinda Ang Saw Ean JCA and Arjan Kumar Sikri IJ
13 September 2023

13 September 2023

Steven Chong JCA (delivering judgment of the court *ex tempore*):

1 This appeal turns on a question of fact: whether the appellant, Mr Lim Chang Huat ("Mr Lim"), had provided the requisite financial documents and complied with requests made by the respondent, Stronghold Global Holdings Limited ("Stronghold"), pursuant to certain provisions of a share purchase agreement (the "SPA") dated 30 June 2017. Under the SPA, Mr Lim agreed to sell to Stronghold his shares in NEP Holdings (Malaysia) Berhad ("NEP Holdings"), which is the parent company of several subsidiaries (collectively referred to as the "NEP Group"). The consummation of the SPA was conditioned on, amongst others, the following obligations: the satisfaction of Stronghold with the results of its due diligence on the NEP Group (see section 6.02(d) of the SPA); and that, pursuant to this due diligence process, Mr Lim was obliged to deliver to Stronghold the audited financial statements of the NEP Group for the financial year ending 30 June 2016 ("FY16") and the consolidated

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management accounts of the NEP Group from 1 July 2016 to 31 May 2017 ("11M17") (see section 6.02(f) of the SPA). In this connection, Mr Lim was also obliged to provide to Stronghold "reasonable access … to the offices, properties and books and records of the [NEP] Group, … and operating data and any other information relating to the [NEP Group] as [Stronghold and its representatives] may reasonably request" (section 5.02 of the SPA), and covenanted to take "commercially reasonable efforts" to consummate the transaction (section 5.03 of the SPA).

2 In the present proceedings, Stronghold claimed that Mr Lim and/or his representatives had failed to provide the financial documents it had requested either through the employees of its parent company (referred to as "Ozner"), or by the professional auditors Stronghold had engaged, Ernst & Young (China) Advisory Limited ("EY"). Stronghold also alleged that Mr Lim failed to meet the requests made by EY and Ozner for interviews with the management teams of the NEP Group, and the inspection of NEP Holding's commission calculating system (*ie,* items that went beyond the scope of section 6.02(f) of the SPA) were not met. The International Judge (the "Judge") found that Mr Lim failed to fulfil these requests in breach of sections 5.02, 5.03, 6.02(d) and 6.02(f) of the SPA, and that Stronghold was therefore entitled to terminate the SPA. His reasons are set out in a written judgment (the "Judgment").

3 In the present appeal, Mr Lim makes five principal points. First, he submits that the Judge had erred in failing to consider the laws of Malaysia, which was the governing law of the SPA under section 10.05 of the SPA. Second, he avers that the Judge's decision to admit (a) a note provided by one Mr Runald Li ("Mr Li") of EY to Ms Violet Wei ("Ms Wei") of Ozner dated 1 August 2018, which set out the challenges faced by EY in conducting its due

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diligence on the NEP Group (the "EY Note"); and (b) a host of e-mails sent by the representatives of EY and/or Ozner which recorded their requests for financial statements and documents from personnel of the NEP Group (the "E-mail Correspondence") under ss 32(1)(*b*) and 32(1)(*j*) of the Evidence Act 1893 (2020 Rev Ed) (the "EA") was wrong and prejudicial. Third, that as a matter of the relevant obligations under the SPA, he had: (a) delivered the FY16 audited financial statements of all companies within the NEP Group to either Ozner or EY; (b) had provided the consolidated management accounts of the NEP Group for 11M17, and if not, that the data already provided, *when put together*, comprised such consolidated management accounts; and (c) that EY and Ozner representatives were allowed and did in fact visit NEP Holdings' office in Malaysia for interviews from 10 May 2017 to 2 June 2017. Mr Lim also alleges that EY was given the opportunity to inspect the commission calculating system when they attended NEP Holdings' office in Malaysia. Mr Lim's fourth point is that Stronghold had repudiated the SPA either during a meeting on 28 December 2017, where Mr Xiao proposed to Mr Lim revised timelines for his submission of the requisite financial documents (the "28 December 2017 Meeting"), or on the following day by sending to Mr Lim an "Advancement Plan" which reflected the very revised timelines Mr Xiao had tabled the day before. This repudiatory act meant that Stronghold was not entitled to terminate the SPA under the relevant subsections of section 8.01.

4 Mr Lim's final submission pertained to a deposit of RM5m (the "Deposit") that Mr Xiao had caused to be paid to him for the purposes of the share acquisition. The Judge found that Mr Lim had indeed agreed to return the Deposit to Mr Xiao, but had not done so. He thus ordered Mr Lim to return the Deposit to Stronghold. On appeal, Mr Lim argues that he did not need to return the Deposit as (a) he had a private arrangement with Mr Xiao in August 2017

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where Mr Xiao allegedly indicated that Mr Lim could keep the Deposit; and (b) that the correct party to the claim was the payor of the Deposit, Glorious Shine Holdings ("GSH") and not Stronghold.

5 We deal with these points in turn.

Our decision

Foreign law was not pleaded

6 We begin with Mr Lim's argument on foreign law. In our view, this submission is devoid of any merit. First, it is not disputed that Mr Lim had failed to plead and prove foreign law as an issue of fact. In this regard it is well-established that our courts will apply Singapore law if the parties elect not to prove the content of foreign law: *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 at [56].

7 Secondly, we note that counsel for Mr Lim had previously agreed in a Case Management Conference dated 12 June 2020 before the Judge that he would not be adducing evidence on Malaysian law which explained why Mr Lim's counsel confirmed that the parties were content for *Malaysian law to be treated as the same as Singapore law* for the purpose of these proceedings.

8 Thirdly, and in any event, Mr Lim's reliance on the two Malaysian decisions is misplaced. In making the submission that "[Stronghold] could not rescind the SPA" unless it proved that Mr Lim "had breached the SPA in its entirety," Mr Lim relies on the case of *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597 ("*Berjaya Times Squares*"). In *Berjaya Times Squares,* the plaintiff

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had purchased a commercial lot in a property from the defendant, who was the developer of the property. There was a delay in the delivery of vacant possession. For such a breach, the parties' contract provided for the payment of liquidated damages. The issue was whether the plaintiff was entitled to rescind the contract in common law and demand the return of instalments that were previously paid. It was in this context that Gopal Sri Ram FCJ, in rejecting the plaintiff's claim, affirmed that it was *only* when there was a total failure of consideration that the innocent party could, "as an alternative to claiming damages, sue for recovery of the money…; if the consideration has partially failed, his only action is for damages". The present case, however, is entirely distinguishable insofar as Stronghold seeks a return of the moneys paid to Mr Lim not by way of rescission of the SPA in common law, but by the exercise of its express contractual rights that accrue upon the occurrence of an event of termination.

9 In any event, it must be borne in mind that the object of Mr Lim's obligations to provide financial documents was to facilitate the due diligence of the NEP Group. Put in its proper commercial context, it seems meaningless to speak of *part-performance* of these due diligence obligations. Due diligence cannot be satisfactorily undertaken based on the partial provision of the documents.

10 Mr Lim also relies on the Malaysian decision of *Hock Huat Iron Foundry (suing as a firm) v Naga Tembaga Sdn Bhd* [1999] 1 MLJ 65 at 73C for the proposition that "[i]f the party who is in the right allows the defaulting party to try to remedy his default after an essential date has passed, he cannot then call the bargain off without first warning the defaulting party by fixing a fresh limit, reasonable in the circumstances". Mr Lim thus argues that the

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Termination Notice did not stipulate "a reasonable time for [him] to comply with the terms of the SPA". Here, the provision of the financial information was to take place on or prior to the End Date, 31 December 2017 (see section 8.01(b) of the SPA). The issue of reasonable time is thus irrelevant. There was also no question that Stronghold had permitted Mr Lim to remedy his default of the SPA.

The admissibility of evidence

11 The next issue concerns the admissibility of evidence. The impugned evidence comprises the EY Note and the E-mail Correspondence.

12 We do not propose to rehearse the Judge's careful analysis of both ss 32(1)(*b*) and 32(1)(*j*) of the EA, which, in our view, led to the correct decision to admit the impugned evidence: see Judgment at [24]. What we will say, however, is that the evidence in question, contrary to what Mr Lim asserts, appeared to us to be wholly reliable and of great probative value. The impugned evidence chiefly comprised communications as to whether certain financial documents had in fact been provided by NEP Holdings. These communications occurred in the context of the due diligence process that Mr Xiao and his team were quite eager to complete, as evident from the persistent efforts they took to accommodate Mr Lim's delays in furnishing the requisite documents, going so far as to table fresh timelines under the Advancement Plan. For this reason, and perhaps for the fact that the sums involved were fairly substantial, Stronghold engaged EY, a *professional accounting firm*, to represent them in conducting the due diligence exercise. In the circumstances, and as the Judge rightly found at [65] of the Judgment, there was no conceivable reason for these communications to be fabricated, nor does any doubt arise as to their veracity.

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In short, the EY Note and the E-mail Correspondence contained reliable statements recorded in the conduct of ordinary business.

13 Further, the EY Note and the E-mail Correspondence were highly probative, as they spoke to the very fact in issue: whether the requisite financial documents (in particular, those stipulated in section 6.02(f) of the SPA, such as the consolidated management accounts for 11M17) were in fact provided by NEP Holdings to Ozner and/or EY. The E-mail Correspondence, taken as a whole, also contemporaneously reflected the efforts taken by Ozner and EY to obtain the financial documents, as well as the reasons given by NEP Holdings for the delays or their inability to provide the said documents. This was relevant to establishing whether Ozner and/or EY's requests were reasonable in the circumstances, and also whether Mr Lim and his representatives had taken "commercially reasonable efforts" (*per* section 5.03 of the SPA) given the delays that followed. In short, we cannot see any basis to disturb the Judge's decision, and do not agree with Mr Lim that the evidence should be excluded under s 32(3) of the EA.

14 As we are of the view that the impugned evidence was rightly admitted under s 32(1)(*b*) of the EA, there is no need for us to elaborate on s 32(1)(*j*); save to say that we did not think that the Judge had erred in accepting Mr Xiao's evidence on the unavailability of the relevant witnesses. We note in this regard the Judge's assessment of Mr Xiao as a reliable witness: Judgment at [27].

Whether Mr Lim had breached the SPA

15 The next issue we turn to is the one at the heart of this appeal – whether Mr Lim had breached sections 5.02 and 5.03 of the SPA. This turns on whether he had performed section 6.02(f) of the SPA, which is premised on two

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conjunctive requirements: first, the provision of the FY16 audited financial statements; and second, the provision of the 11M17 consolidated management accounts. To the former, the Judge found that the e-mail dated 28 December 2017 (the "28 December 2017 e-mail") from EY to two representatives of NEP Holdings, Mr Kong Kian Huat ("Mr Kong"), and Mr Sun Kee Siong ("Mr Sun"), provided a true and accurate record of the documents that remained outstanding. The 28 December 2017 e-mail indicated that the audited financial statements of a number of subsidiaries in the NEP Group were not provided: Judgment at [107]. These subsidiaries were NEP Diamond Marketing Sdn Bhd ("NDM(M)"), Wilco Global Ltd ("Wilco"), Shenzhen Diamond Trading Co Ltd ("ShenZhen") (collectively, the "Three Subsidiaries"). To the latter, the Judge found that the 11M17 consolidated management accounts were not provided at all. As such, the Judge held that Stronghold's exercise of its right to terminate the SPA under section 8.01(b) was entirely justified: Judgment at [108].

16 In our judgment, there is no reason to disturb the Judge's findings. In arriving at the conclusion that Mr Lim had not fulfilled section 6.02(f) of the SPA, the Judge had comprehensively assessed all the relevant evidence. As we had alluded to above, much of this evidence comprised objective, contemporaneous and probative business records that plainly spelt out *the financial documents which remained outstanding*. Put another way, the documentary evidence spoke for itself. For instance, the 28 December 2017 e-mail reflected, amongst numerous other things, that the "FY17 management consolidation working and each entity financial statements" of the NEP Group and the "FY16 audit report" of the Three Subsidiaries were outstanding. What is especially telling is that at no time did Mr Lim or any representative of NEP Holdings dispute the content of the 28 December 2017 e-mail. As we explain below, we are unpersuaded by Mr Lim's tenuous interpretations of the clear

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evidence on record. This is to say nothing about the fact that the bulk of Mr Lim's arguments on appeal were mere repetition of the points he had made before the Judge.

17 For instance, in arguing that he had furnished the FY16 audited financial statements, Mr Lim relies on two items of evidence: first, an e-mail from Mr Kong to Ms Wei amongst others (with representatives of EY, Ms Lilian Feng ("Ms Feng") and Mr Li, copied) dated 10 October 2017 (the "10 October 2017 e-mail"). Mr Lim's position on appeal is that the FY16 audited financial statements for the Three Subsidiaries were contained in the attachments to that e-mail. Second, an e-mail by Mr Kong to EY on 31 October 2017 (the "31 October 2017 e-mail"), which Mr Lim argues indicates that the FY16 audited financial statements were previously provided in the 10 October 2017 e-mail.

18 However, the attachments to the 10 October 2017 e-mail do not support Mr Lim's position. While Mr Lim claimed that the audited financial statements of the Three Subsidiaries were provided amongst the three attachments to that e-mail, he did not identify *which of the three attachments* contained the said financial statements, let alone point out where amongst the relevant attachment these financial statements may be found. In any event, what was attached to the 10 October 2017 e-mail were: (a) the minutes of a meeting between representatives of Ozner and NEP Holdings for the purposes of tracking NEP Holdings' progress in furnishing documents (the "Taskforce Meeting"); (b) an "Information Request List", which contained a table setting out several categories of financial and accounting data which Ozner had sought from the NEP Group; and (c) the income statement and balance sheet of ShenZhen for FY16 (the "ShenZhen Attachment"). Significantly, the minutes of the Taskforce

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Meeting and the Information Request List, however, do not state that the audited financial statements of the Three Subsidiaries had been provided. As for the income statement and balance sheet of ShenZhen in the ShenZhen Attachment, these would ordinarily constitute financial statements. However, there appears to be no indication that these were the *audited* financial statements of ShenZhen. The contemporaneous documentary evidence suggests that this was not so:

(a) In an interim due diligence report by EY dated 28 June 2017 (the "EY Interim Report"), it was observed that "the audited financial statements, consolidated working papers, *detailed audit adjustments* and audited and adjusted trial balances of the target group and individual companies in FY16 were not available. As of the report date, the management had only provided us with *unaudited consolidated financial statements for FY16 (the financial manager expressed that some post-period adjustments had been recorded, but it is still necessary for the management to provide adjustment entries and details for confirmation)*" [emphasis added].

(b) Following this, Ms Feng e-mailed Mr Kong on 29 June 2017, setting out a list of "key financial outstanding items". Items 2 and 3 of the said list stated that the "[u]pdated FY16 trial balances by entity which should tie to FY16 audited consolidation working by entity. All the updated elimination entries, later adjustments and *audit adjustments for FY 16*" remained outstanding [emphasis added].

(c) The minutes of the parties' Taskforce Meeting dated *9 November 2017* reflected that the "2016 Audit Report for consolidation and individual entities" had not been provided despite having been due on 24 October 2017. It was also noted in these minutes that the "Individual

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Audit Report – Mr Sun *will* upload to iCloud Drive" [emphasis added], and that the "audited report for the individual entities [would be provided] *shortly*" [emphasis added]. Notably, these minutes date close to a month after the 10 October 2017 e-mail, and *even the minutes attached to the 10 October 2017 e-mail* reflect that the "2016 Audit Report" remained outstanding for the reason that the "[a]udtiors requires [*sic*] 1 month preparing the report".

(d) On 20 December 2017, Mr Sun sent Ms Feng an e-mail informing her that the audited reports for (i) Nature Environment Products (HK) Ltd, (ii) NEP Holdings Hong Kong Limited, (iii) NEP Diamond Marketing (HK) Ltd, (iv) NEP International (HK) Ltd and (v) Nature Environment Products Sdn Bhd were uploaded – *ie*, five other subsidiaries that *did not include the Three Subsidiaries*.

(e) In the 28 December 2017 e-mail, Ms Feng requested for Mr Kong and Mr Sun to upload the "FY16 audit report" of ShenZhen, NDM(M) and Wilco "in icloud".

19 In our judgment, the above evidence amply supports the finding that even if the ShenZhen Attachment did amount to a FY16 financial statement, it did not appear to have been audited as required under section 6.02(f) of the SPA. This is reinforced by the fact that, at no point after the 10 October 2017 e-mail did NEP Holdings respond to say that the audited financial statements for ShenZhen had already been provided: Judgment at [76]. In any case, nothing in the 10 October 2017 e-mail and the attachments thereto support Mr Lim's case that the financial statements of *NDM(M)* and *Wilco* were provided.

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20 Nor does the 31 October 2017 e-mail go as far as Mr Lim contends. It is clear on its face that the e-mail related to requests for the FY16 *trial balances* (*ie,* the "TB") for the Three Subsidiaries and not their audited accounts.

21 A consideration of the other contemporaneous evidence only serves to reinforce the Judge's conclusion that the audited financial statements of the Three Subsidiaries were not provided. Beyond the clear statements in the 28 December 2017 e-mail, coupled with the persistent chasers sent by EY or Ozner personnel, it is also relevant that the FY16 financial statements of the Three Subsidiaries were absent from the virtual data rooms which were created for the purposes of document-sharing by NEP Holdings to EY and Ozner.

22 Finally, on the consolidated management accounts for 11M17, Mr Lim has not provided a basis for this court to interfere with the Judge's finding that the 11M17 consolidated management accounts remained outstanding. Putting aside the objective documentary evidence for a moment, Mr Lim's other difficulty is overcoming the Judge's finding that Mr Kong had "lied time and again" about the provision of these documents: Judgment at [30]. This, he makes no attempt to do in the present appeal.

Whether Stronghold repudiated the SPA prior to the End Date

23 Mr Lim's case below was that Stronghold's Termination Notice dated 30 September 2018 was a repudiation of the SPA and amounted to a wrongful termination of the same. On appeal, Mr Lim instead submits that Stronghold had repudiated the SPA at an *earlier date*: either at the 28 December 2017 meeting, or by way of the Advancement Plan sent a day after on 29 December 2017 through the common proposal on both these dates that Stronghold should purchase a smaller shareholding in NEP Holdings moving forward. While this

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is not made clear in Mr Lim's submissions, it is presumably his case that this repudiatory act was a breach of the SPA, thereby disentitling Stronghold from terminating the SPA under sections 8.01(b) and 8.01(d).

24 We cannot agree with Mr Lim. First, this new claim was not pleaded in Mr Lim's defence, with the consequence that neither party led evidence on whether the discussions at the 28 December 2017 meeting or the contents of the Advancement Plan were repudiatory in the circumstances.

25 Second, and even on a consideration of the available evidence, it cannot be said that Stronghold's acts on 28 and 29 December 2017 were repudiatory. A repudiatory breach is established where, by his words or conduct, the party alleged to have renounced the contract "evinces an intention not to perform or expressly declares that he is or will be unable to perform his obligations in some material respect, and short of an express refusal or declaration, the test is to ascertain whether the action or actions of the party in default are such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions": *iVenture Card Limited and others v Big Bus Singapore City Sightseeing Pte Ltd and others* [2022] 1 SLR 302 at [64]. As the Judge highlighted at [96] of the Judgment, it was Mr Xiao's evidence that it was "obvious to all that the transaction could not be completed by the End Date of 31 December 2017" at the point when the 28 December 2017 Meeting took place. At that belated juncture, the SPA would have in all probability been terminated in accordance with section 8.01(b) or varied such that the stipulated timelines would be extended. Faced with the virtual certainty that the consummation of the SPA would not occur by the End Date, the proposals at the 28 December 2017 Meeting and as captured in the Advancement Plan were advanced with a view to "come up with [Stronghold's] proposed next steps"

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(even if pre-emptive). Even Mr Lim's representative appeared to entertain that possibility, replying to Ms Wei's e-mail setting out the Advancement Plan that they would "review the same with [their] management team and revert on [their] plan on the summary points as soon as possible". However, as the Judge had found, and which findings Mr Lim does not contest on appeal, no reply from Mr Lim and his representatives was forthcoming. Nor were they responsive to subsequent attempts to establish contact, leading to the Judge's conclusion that "Mr Lim [had] effectively closed the door on [the possibility of re-negotiations] by the stance he took from January 2018 onwards": Judgment at [105]. When the events surrounding the End Date are seen in this light, it is clear that no reasonable person would conclude that Stronghold no longer intended to be bound by the provisions of the SPA. To the contrary, Stronghold appeared keen to consummate the transaction but *could not* (nor, in any event, was it contractually obliged to do so pursuant to section 6.02(f)) due to the host of financial documents that remained outstanding.

The Deposit

26 The final issue pertains to the Deposit, which the parties accepted was paid by GSH to Mr Lim, but was not returned to Stronghold, GSH and/or Mr Xiao. Mr Lim's case below, and which he reiterates on appeal, was that he and Mr Xiao had a private arrangement in August 2017 such that Mr Lim did not need to return the Deposit. He referred to the fact that, under the terms of the second of two memoranda of understanding that he and Mr Xiao had signed, part of the consideration to be paid for the Shares comprised shares in Ozner. He thus claimed that in August 2017, Mr Xiao had voluntarily proposed to pay the Deposit in view of the risk that the price of Ozner shares might fluctuate.

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27 The Judge found that there was no evidence of the alleged private arrangement for Mr Lim to retain the Deposit, and further noted that the alleged private arrangement was only raised close to three years after the filing of his initial defence: Judgment at [136]. The Judge did not accept Mr Lim's evidence as to Mr Xiao's motivation for doing so, particularly as by the time the SPA was signed (in June 2017, *prior* to the alleged private arrangement), there was no longer any provision for the acquisition of the Shares with Ozner's shares: Judgment at [135]. Mr Lim was also unable to explain why section 2.01(b) of the SPA provided that the sum of RM29.682m was to be paid "less the amount of the Deposit", which was defined as "the refundable deposit in the amount of RM 5 million paid by the Purchaser… prior to the date of this Agreement". Instead, the Judge accepted Mr Xiao's evidence that Mr Lim had agreed to repay the Deposit to Stronghold upon receipt of the RM29.682m sum. This was supported by an e-mail dated 12 July 2017 by a representative of Ozner to NEP Holdings querying whether the Deposit would be repaid. The Judge therefore found Mr Xiao's account "consistent with the documentary record and with commercial probability": Judgment at [141]. We see no reason to disturb the Judge's findings on this issue.

28 While Mr Lim also argued that the correct party to claim the Deposit was GSH, and not Stronghold, this argument was adequately addressed at [142] of the Judgment:

> … Because the agreement was reached for payment by Stronghold of the larger sum, it was Stronghold that entered into the oral agreement, in the person of Mr Xiao with Mr Lim, and it gave good consideration for the refund of the Deposit, which it was entitled to claim from Mr Lim as a matter of contract, although it was bound to pass that sum on to [GSH].

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Conclusion

29 For the foregoing reasons, we dismiss the appeal. Having heard the parties' respective positions on costs, and taking into account section 7.02(b) of the SPA which essentially provides that Stronghold is to be indemnified of its costs and expenses in these proceedings, we order that Mr Lim pay to Stronghold costs fixed at $80,000 (all-in).

Steven Chong
Judge of the Court of Appeal

Belinda Ang Saw Ean
Judge of the Court of Appeal

Arjan Kumar Sikri
International Judge

Leo Cheng Suan, Ng Khai Lee Ivan and Phyllis Wong Shi Ting (Infinitus Law Corporation) for the appellant;
Ong Boon Hwee William, Lim Jun Rui Ivan, Wong Pei Ting and Wong Ling Yun (Allen & Gledhill LLP) for the respondent.

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