IN THE HIGH COURT

OF SOLOMON ISLANDS

(Civil Jurisdiction)

Civil Case No.322 of 2012

BETWEEN: **AUSTREE ENTERPRISE PTY LTD**

First Claimant

AND: **ZONG WU ZHOU**

Second Claimant

AND: **LING YUN ZHOU**

Third Claimant

AND: **SHIYAO GUO**

First Defendant

AND: **CHINA UNITED (SI) CORPORATION LTD**

Second Defendant

AND: **RAY CHU**

Third Defendant

AND: **JUNBIN GUO**

Fourth Defendant

AND: **JUNZONG GUO**

Fifth Defendant

Hearing: 12, 13, 14, 15, 16, 19, 20, 21, 22, 23 September 2016; 27, 28, 29 March 2017; 2 April 2017; 10, 11 May 2017.

Judgment:

For the claimants: J. Sullivan QC and J Ward;(from 27 March 2017) C. Johnstone, M.Doyle, D. Murahari, and M. Coates.

For the First Defendant: B. Upwe; K. Ziru.

For the Second Defendant: D. Smallbone, B. Buckland

For the 3rd,4th and 5th Defendants: Lazarus Kwaiga

For all Defendants (from 10 May 2017): T. Matthews QC and D.E. Keane.

Commissioner Mildren:

Introduction

[1] This is an action seeking the specific performance of an agreement for the transfer of certain shares in the Second Defendant, (hereinafter referred to as China United) to the First Claimant Zong Wu Zhou (hereinafter referred to as Zhou). As part of the relief sought, the claimants are also seeking rectification of the share register of China United to give effect to the order for specific performance. Alternatively, Zhou seeks either damages against the First Defendant Shiyao Guo (hereinafter referred to as Guo) in the sum of SBD63,492,477.18 or an order that China United pay to Zhou the said sum of SBD63,492,477.18 as restitution for money had and received and *quantum valebant*, and interest.

[2] The relief sought by the claimants is resisted on a number of grounds, including: the alleged contract was subject to a condition precedent which was never performed; alternatively the claimants were never ready willing and able to perform the contract according to its terms; alternatively Zhou repudiated the contract, which repudiation was accepted by Guo; alternatively relief should be refused because of laches by Zhou; alternatively relief should be refused for various other reasons including a claim that the causes of action are statute barred.

Background facts

[3] China United was incorporated under the provisions of the Companies Act 1959 of the Solomon Islands on 28th June 2006 as a private company limited by shares. The initial subscribers were Zhou and the Third Defendant, Ray Chu (hereinafter referred to as Chu). The authorised share capital was 100,000 shares of SBD$1.00 each. Originally, Chu subscribed for 30,000 shares and Zhou 70,000 shares. Chu and Zhou were the original directors. On 18 July 2006, Chu purported to transfer 15,000 shares to Zhou. A notation to that effect was written on the Memorandum of Association of China United and signed by Chu. The principal objects of China United, as set out in the Memorandum of Association was "to operate in sawmilling, purchasing and processing of timber products for export and to undertake commercial, industrial and residential property development." China United was granted a certificate of approval pursuant to the Foreign Investments Act, 1990 on 20 June 2006, reflecting these objects.

[4] In 2005, The Commissioner of Lands granted to the Solomon Islands Rugby Union Federation a fixed term estate over land known as the Town Land for a term of 50 years commencing from 1st August 2005. The land is situated at the western end of Mendana Avenue, not far from the High Court. The estate was registered in the Land Registry on 30 January 2006. The estate was granted pursuant to The Land and Titles Act. The purpose of the grant was for the land to be used for "the development of a National Rugby stadium and all other ancillaries annex (sic) to the rugby stadium as approved in writing by the Honiara City Council, Town and Country Planning Board and costing not less than SBD$15 million dollars." It was provided that the grantee "shall develop the site within 24 months from the date of the grantor signs the grant instrument." The name of the grantee was subsequently corrected in the Land

Registry to "Solomon Islands Rugby Union Federation (SIRUF) Executive Trust Board (Incorporated)" (hereinafter referred to as SIRUF).

[5] By a lease dated 26 July 2006, SIRUF granted a lease to China United over the whole of the Town Ground land for a term of forty-five years commenting on 25th July 2006. The purpose of the grant was set out in clause 15 of the Deed for Lease. In short, it provided for the construction of a rugby stadium, rugby field, sporting and recreational facilities, and a double storied commercial building and amenities in accordance with an architectural plan annexed to the lease and approved by the Honiara City Council "or other government departments or authorities" (hereinafter referred to as the "Town Ground Project"). Under the terms of the Deed, China United was required to commence work within 12 months from the date of planning approval and complete the whole work within 3 years. The Deed provided for penalties in the event of default. Under the terms of the Deed, SIRUF would get the use and benefit of the rugby stadium, rugby field and associated facilities and China United would get the use and benefit of the commercial building. However, there was no intention by the parties to subdivide the estate. China United's lease covered the whole of the land.

[6] At the time of incorporation of China United, Guo was residing in Shanghai. Chu was an Australian resident. Neither were apparently Solomon Islands citizens. For this reason, approvals were required under the Foreign Investments Act 2005 (SI) before China United could become incorporated with Chu and Guo as its shareholders.[1] Further, if there were to be a change in shareholding of an existing company which results in the body corporate becoming a foreign investor because at least one member was a foreign investor who was entitled to exercise at least one vote or hold at least one voting share , the said Act required the body corporate to apply to register the investment activity or activities.[2] However, there was no requirement under the Act that I can see to notify changes in shareholding of a company already registered under the Act merely because there was a change in the shareholders, whether the new shareholders were foreign investors or not.[3] Nevertheless the practice was that such companies were required to notify the Foreign Investment Division of any changes to the certificate issued, whether it related to changes of shareholders, directors, investment plan employment or addresses or contact details.[4] During the period between incorporation and 30 August 2007, China United applied under that Act to register a number of changes in its shareholding as follows:

a. 15/8/2006 Chu 5%

Guo 70%

Ngu Ket Siong (Siong) 10%

[1] Foreign Investments Act 2005, s.15 (1).
[2] Foreign Investments Act 2005, s.15 (3) and (4).
[3] Certain changes did have to be notified: see s.22.
[4] Evidence of Derick Ahari, tr 28/3/17, session 4, pp11-12.

		Junzong Guo 15%
b.	23/3/2007	Sun Fei 40%
		Guo 34%
		Junzong Guo 15%
		Jianjun Wu 10%
		Sun Jing 1%
c.	15/8/2007	Guo 75%
		Junzong Guo 15%
		Jianjun Wu 10%

[7] The evidence is that Siong was involved in Earthmovers Logging Group, (whoever that may be), and I infer that he was a potential minor investor. Junzong Guo, otherwise known by his English name "Harris", is one of Guo's sons. Sun Fei and Sun Jing were apparently other potential Chinese investors. Nothing is known of Jianjun Wu, who was presumably another potential minor investor.

[7] Soon after the dates of these applications, approvals were obtained and China United, shortly after that, purported to give notice of the changes to the Companies Office by lodging in each case a Form 4 indicating that shares had been allotted accordingly. In fact, the only allotment of shares occurred, if at all, at the commencement of incorporation. Thereafter the changes in shareholding which the form 4s intended to reflect were the result of purported transfers of shares, rather than allotments of shares. However, at the time of the alleged transfers, and indeed not until much later, China United had not established a register of members as required by s.105 of the Companies Act 1956, and further, no instruments of transfer had been signed by the transferors of the shares as required by s.73.

[8] There is, however, evidence that the potential investors Chu, Siong, Sun Fei, and Sun Jing have each signed a document stating that they have "pulled out my shares and no longer a shareholder of China United (SI) Corporation Limited" (sic). There is nothing to indicate that they had paid anyone for the shares when they were allegedly acquired, nor do the signed documents indicate that they received any consideration for "pulling out" [their] shares.

[9] There are also minutes of purported Annual General Meetings of directors and shareholders. The first is dated 16 August 2006 at which it was allegedly resolved that:

"1. RAY CHU shall relinquish and transfer 10,000 shares in his name to NGU KET SIONG;

2. SHIYAO GUO shall transfer 15,000 shares to JUNZONG GUO."

The second is dated 27 March 2007, at which it was allegedly resolved that:

"1. RAY CHU shall relinquish and transfer 5,000 shares in his name to SUN FEI;

2. SHIYAO GUO shall transfer 35,000 shares in her (sic) name to SUN FEI;

3. SHIYAO GUO shall transfer further 1,000 shares to JING SUN;

4. JUNZONG GUO shall continue holding on his 15,000 shares;

5. NGU KET SIONG shall transfer 10,000 shares to JIANJU WU;"

The minute records the meeting of 16 August 2006 as having taken place at the Town Ground. At that time, there were no buildings erected there, but that does not prove that this meeting did not take place. In any event, neither minute records an actual transfer of a "proper instrument of transfer" as required by s.73 of the Companies Act 1956, and nor does it authorise registration of the transfers in the register of members. What these minutes prove at best is an intention to transfer the shares in the manner recorded in the minutes. Once again, there is no mention of any consideration being given for the transfer of the shares.

[10] The position therefore is that, as at 30 August 2007, only the original shareholders, Chu and Zhou, were lawfully shareholders, albeit that in equity it is possible that Junzong Guo (hereinafter called Harris) and Wu may have had a claim to become shareholders if there were evidence supporting an entitlement, because, for instance, they had paid for their shares. There is no evidence that either Harris or Wu or anyone else paid anything for their shares. Whether Chu, or for that matter, anyone else held their shares on trust for Zhou will be considered later.

[11] So far as the original allotment of shares is concerned, the Form 4 lodged indicated that 100,000 $1 shares were allotted and all were fully paid up. [5] If Chu had paid $30,000 for his 30,000 shares, (or even $15,000 for 15,000 shares) it beggars belief that he would have parted with his shares by giving them away. This raises the question of whether anyone paid for the shares and if so, who. No bank records have been discovered which evidence receipt by China United of $100,000. However, the Deed for the lease recites that China United was required to pay a premium of SBD$50,000 on signing the Deed and a further SBD$50,000 payable by monthly amounts of SBD$8000 "until completion", although the total amount to be paid is expressed to be SBD$100,000. I infer that those payments were made, as otherwise it is difficult to imagine that SIRUF would have allowed the lease to be registered, and did nothing to collect the payments. It is likely that the money came from Guo initially, given Chu's subsequent disinterest in his shares in China United. Likewise, it is difficult to imagine that the other alleged shareholders parted up with their shares for no consideration if in fact they paid anything for them. The likelihood is that the shares were not paid for, but were given as an inducement to provide finance for the Town Ground Project contemplated. The inference is that the proposed investors decided against investing in the Town Ground Project, and wanted nothing more to do with the shares in China United.

Zhou and Guo enter into three contracts

[5] See Ext 1, p24.

[12] According to the evidence of Zhou, at sometime in late 2006 Guo visited him at his office in Chongqing, in the Peoples' Republic of China. The purpose of the visit was to interest Zhou into becoming the major investor in the Town Ground Project. Guo explained that he had a partner, whom he did not name, but if Zhou decided to invest, the partner would transfer his shares in China United to him. He also said that he would ensure that Zhou would have a controlling interest in China United if he financed and ran the development of the rugby stadium, commercial precinct and the timber business. Guo said that the project cost would be about CNY20,000,000. At that time, this amounted to approximately SBD$20,000,000. Guo said that it was his intention to focus initially on the commercial precinct and use incoming rents to finalize the project. Zhou was shown a copy of the Deed. However, as neither Guo nor Zhou speak or read English, presumably the purpose of doing so was to indicate the architectural drawing annexed to it.

[13] Initially, Zhou made no commitment, but indicated that he would consider the proposal. Zhou had known Guo for many years, since they were children. They had lived in nearby villages and attended the same primary school. Their grandfathers had been friends and their families were still close. They maintained a social relationship, albeit intermittently. In 2005, Zhou had employed Guo in one of his businesses in Chongqing.

[14] Zhou travelled to Honiara in July 2007 in order to inspect the Town Ground Project site. He was accompanied by Mr. Fan Chorming whom he believed was experienced in real estate marketing, and could assist him to decide whether or not to become involved in the Project. They were met by Harris who showed them the site. He was told that Guo was in China at the time. They stayed in Honiara for three days and visited the local market and other places which might impact on the potential investment. He had no discussions with Harris. At the time, he was not aware of the involvement of Ray Chu, Sun Fei, Jing Sun, Harris or Wu, or of any other investors.

[15] After returning to China, Zhou had several meetings with Guo at various places in China in relation to the Project. During these discussions, he became aware that China United was involved in the harvesting and export of timber. Guo explained that the timber business would provide an alternative income stream during the construction of the Project. Guo suggested that the project could be completed for about CNY 20,000,000. After some discussion, Guo accepted Zhou's estimate that the Project would cost at least CNY 30,000,000. Zhou asked if there was still another partner in China United. He was assured that Guo held all of the shares in China United. During their discussions, agreement was reached that an Australian company would be formed to hold all of the shares in China United, that Zhou would hold 67% of the shares in the Australian company, and Guo 33%. It was also agreed that each party could either hold the shares in the Australian company in their own names, or through nominees, such as their children.

[16] At a meeting held at Zhou's office in Chongqing on 30 August 2007, the terms of their agreement were finalised. Three contracts were prepared; one dealt with the Town Ground Project; another with the timber business; and the third dealt with the articles of association of the Australian company to be formed. They are written in Chinese, were drafted in Zhou's office, and typed by his secretary. From time to time, alterations were made to the drafts to reflect changes agreed during the

course of their discussions. At the end of their meeting, which lasted three hours, both parties signed the agreements.

The Town Ground Contract- conditions precedent?

[17] The main contract relied upon by the claimants is what I will call the Town Ground contract. This agreement has been translated and is Exhibit E to the sworn statement of Leong Ko, an accredited translator.[6] This translation was later replaced by Ext 9 as a result of evidence given at the first trial before Commissioner Holderness.[7] The translation of the agreement is not in dispute. The contract is headed "Cooperation Agreement on China United Sports Trade Centre Project." The parties to the contract are Zhou, described as "Party A" and Guo, described as "Party B." and is signed by the parties and dated 30 August 2007. After some recitals referring to the contract between China United and SIRUF and certain other matters which are not presently relevant, the contract provides that:

> "Both parties agree to invest in Melbourne, Australia to register and establish a proprietary limited company. The company name, registered capital and scope of business shall be determined in accordance with the registration. After the establishment, the company shall purchase all shares of China United originally established by Party B in the Solomon Islands at the price of one Australian dollar. The Company will take over the development project of China United Sports Trade Centre (tentative name) entered into by and between China United Co., Ltd and Solomon Islands Rugby Union Federation. Party B shall be fully responsible for China United Co. Ltd's debts and financial support obligations before the purchase. When the purchase takes effect, all the following documents will come into effect: firstly, this Agreement; secondly *the Company Law of the People's Republic of China;* Thirdly, *the Company Law of Australia* and *the Articles of Association* of the proprietary limited company. In case of a conflict between the above-mentioned documents, they shall be implemented in this sequential order."

The contract then provides for a number matters to which I will return later.

[18] The claimants submit that the Town Ground Contract is subject to a condition precedent, namely the establishment of the Australian company in Melbourne and the purchase by that company of all of the shares in China United.

[19] It is an agreed fact established by the pleadings that the law of the contract is the law of the People's Republic of China.[8] Article 45 of the Contract Law of China provides:

> The parties may agree to attach conditions on the validity of the contract. A contract with collateral conditions on its entry into effect shall become

[6] See Ext 8.

[7] One of the main changes was to change "Zhonglian" to read "China United." Consistently with this change, all references to "Zhonglian" throughout the three contracts should be read as "China United."

[8] Para 5B of the 6th Amended Claim; para 14 (1) of the first defendant's defence; para 12 of the second defendant's amended defence at Court Book p 51; para 12 of the 3rd, 4th and 5th defendants 4th amended defence.

> effective upon the fulfilment of the conditions…. Where either party, for the sake of its own interests, unjustifiably prevents the fulfilment of the aforesaid conditions, the conditions shall be deemed to have been fulfilled; where either party unjustifiably hastens the fulfilment of the conditions, the conditions shall be deemed as not fulfilled.

Chinese law does provide rules for the interpretation of civil contracts. Article 125 (1) of the Contract Law states:

> If there is a dispute between the parties over the understanding of a term of the contract, the true meaning of that term shall be determined in light of the words and expressions used in the contract, the related terms in the contract, the usage of transaction and the principle of good faith.

Professor Bing Ling, in his first report observes that the "usage of transaction" means, in effect, the course of dealings and the usage of trade applicable between the parties. In the circumstances of this case, there is nothing to indicate that prima facie, at least, the words of the contract recited in paragraph [17] above should not be given their ordinary meaning. That being so, I accept that prima facie, the Town Ground Contract did not come into force until the Australian company was formed and purchased all of the shares in China United. I will return to this subject later.

[20] The formation of the Australian company was the subject of a separate agreement which is headed "Articles of Association of Zhonglian Co., Ltd." Article 1 of this agreement provides that "the shareholders", namely Zhou and Guo, "agree to contribute jointly to raise the capital to establish a proprietary limited company, and to formulate the Articles of Association of the Company in accordance with the *Company Law of the People's Republic of China, the Regulations of Administration of Regulation of the People's Republic of China* and other relevant laws and rules of China. Although the name "Zhonglian Co., Ltd" was used, article 2 provided that this was a tentative name only.

[21] The expert opinion of Professor Bing Ling is that the provision in the Town Ground Contract requiring the Company Law of China to have effect is inconsistent with Article 2 of the PRC Company Law as is the agreement relating to the articles of association for the Australian company, essentially because these provisions purport to apply Chinese company law to a company to be incorporated outside of China. In his opinion, these provisions and the whole of the agreement relating to the Articles of Association of Zhonglian Co., Ltd are void under Article 52(5) of the PRC Contract Law. However, he is also of the opinion that these provisions can be severed and do not affect the validity of the Town Ground Contract nor the Timber Agreement. I accept his opinion. It follows that the establishment of the Australian company must comply with the law of the State of Victoria.

[22] Before considering the rest of the Town Ground Contract, I shall briefly deal with the Timber Agreement. This agreement is made between Zhou, who is described as "Party A" and Guo, "Party B". The first few lines of the preamble are word for word the same as in the Town Ground Agreement up to and ending with the words "one Australian dollar". This agreement then goes on to provide:

"….and take over Zhonglian Co. Ltd.'s existing import and export trade business of square timber blocks in the Solomon Islands. Zhonglian Co. Ltd.'s debts and financial support obligations before the purchase becomes effective shall be fully undertaken by Party B. When the purchase takes effect, all the following documents will come into effect: firstly, this agreement; secondly *the Company Law of the People's Republic of China;* thirdly, *the Company Law of Australia* and *the Articles of Association* of the proprietary limited company; and fourthly, *the Company Law of the Solomon Islands* and *the Articles of Association* of the proprietary limited company. In case of a conflict between the above-mentioned documents, they shall be implemented in this sequential order."

[23] Both the Town Ground Agreement and the Timber Agreement set out provisions relating to the structure and management of the Australian company when formed. Some of the provisions are identical. The provisions of the Town Ground Agreement are as follows:

"I. The structure of the company and its major management staff.

1. "The company shall establish a shareholders' meeting, board of supervisors and board of directors.

2. A person from Party A shall take up the post of Chair of the board of directors, who shall be responsible for the overall work of the company and the development of China United Sports Trade Centre.

   Persons from party A shall take up the post of finance manager and cashier. Party A shall be responsible for establishing a financial management system.

3. Persons from Party B shall take up the post of vice Chair of the board of directors, who shall assist the Chair of the board of directors in the latter's work and be responsible for public relations, external liaison affairs and import and export trade.

   Persons from Party B shall take up the post of accountant, who shall be in charge of the company's accounts and cost accounting.

II. The investment scale of the project, the company's capital stock and shares.

   1. The project's budgetary investment is RMB 30 million[9], which shall be subject to the settlement of actual investment after completion of the project.
   2. The capital stock will be RMB 15 million.
   3. Party A's shares shall account for 67% of the total capital stock and contain RMB 10.05 million in cash, which shall be mainly used for the construction of China United Sports Trade Centre, including but not limited to the purchase of main materials, auxiliary materials, machinery and equipment for the construction of the project, labour cost and the cost of shipment of materials, etc. The capital can be made available

[9] RMB is another abbreviation for CYN or Chinese New Yuan.

step by step based on the actual progress of the construction of the project.

4. Party B's shares shall account for 33% of the total capital stock and contain RMB 4.95 million in cash, of which
   (1) RMB 600,000 has been contributed to cover the preliminary expenses, cost of project design, land lease and other relevant taxes of the China United Sports Trade Centre.
   (2) Party B shall invest RMB 1.67 million in cash for the purchase of, including but not limited to, basic building of approximately 600 square metres, and basic fencing, auxiliary materials and the transportation cost of containers.
   (3) Party A shall lend party B RMB 2.68 million in cash for the construction of China United Sports Trade Centre. The capital can be made available step by step based on the actual progress of the construction of the project. Upon completion of the project, party B shall make priority repayment to party A with the dividends it receives.
5. Due to the characteristics and actual situation of the project construction, the time differences of the two Parties in making the capital stock available shall not be taken into account.

III. Additional loans and collection of rent in advance

1. When the capital stock investment is exhausted and the capital for subsequent construction of the project is insufficient, the company can raise additional loan and collect shop rent in advance.
2. Party A shall be responsible for raising additional loan, while Party B shall be responsible for preparing for collecting shop rent in advance, to be used for the subsequent construction of the project.
3. The company shall prioritise repayment of the additional loan and offer appropriate reward (the interest shall be calculated at a rate of 18% per annum) in accordance with the amount of the additional loan (not exceeding RMB 5 million), the term of the loan and the investment return of the project, etc.
4. If the additional loan and shop rent collected in advance run out and the capital for subsequent construction is still insufficient, Party A and Party B shall contribute necessary funds in proportion to their respective equity in the company.

IV *The Articles of Association of the Company* are an attachment of this Agreement and shall be implemented with the same legal effect of this agreement.

V. Both parties shall fully fulfil the terms of the Agreement. If there are any matters not mentioned herein or any disputes, they shall be resolved through negotiation. If negotiation fails, they can be submitted to the People's Court of Chongqing for coordination (sic).

VI This Agreement is made in quadruplicate, and Party A and Party B shall have two copies each. It shall become effective after the signature of the two Parties.

[24] The provisions of the Timber Agreement which are identical to the provisions of the Town Ground Agreement are clauses I. 1; I. 2, (except that the words "and development of Zhonglian Sports Trade Centre" have been omitted and "finance" has become "financial"; I. 3 except "in his work" has become "in the latter's work" and "Persons from Party B" has become "A person from Party B"; clause II. 5 is essentially the same as clause II. 5 of the Timber agreement, although the wording used is slightly different; clause IV is the same as clause IV of the Timber agreement; clause V is the same except that the words "they can be submitted to the People's Court of Chongqing for mediation" have been replaced with "a lawsuit can be filed with the People's Court of Chongqing."; clause VI is the same in both cases. However, the provisions relating to the capital stock and shares of the Company are quite different. Without going into unnecessary detail, the amount of the capital stock is said to be RMB 4 million "which shall be used as investment for import and export trade of square timber blocks". Clause II. 2 provides that party A's shares shall account for 67% of the total shares and contain RMB 2.68 million in cash; Party B will lend the RMB 2.68 million to Party A and party A will repay that sum as a priority payment out of Party A's fixed dividends. Party B's shares shall account for 35% (sic) of the total and contain RMB 1.32 million in cash. Clause III is totally different:

> "1. Party B is given full authority to contract and operate the business and trade of square timber blocks.
>
> 2. Party B shall take full responsibility for its own profits and losses and shall pay a fixed profit amount of RMB 2.28 million to the company (fixed profit: RMB 1 million for six-month operation and a further RMB 1.28 million at the end of the term).
>
> 3. The contract term starts from 1 November 2007 and ends in one year.
>
> 4. On the expiry of the contract term, Party B shall transfer to the company square timber blocks worth RMB 4 million based on the purchase price in the Solomon market at the time and domestic sales channels in China."

[25] The Claimants are not suing on the Timber Agreement and no submissions were made by the parties in relation to it. It is mentioned only for completeness to see if it throws any light on the construction to be given to the terms of the Town Ground Agreement, particularly as Article 125 of the Contract Law requires "related terms of the contract" and "the usage of transaction" to be taken into account. Whatever the true meaning of the Timber Agreement may be, it does not affect the provisions of the Town Ground Agreement relating to when the shares in China United fall to be transferred to the Australian company, except possibly in relation to whether or not the capital of the Australian company was intended to be RMB 15 million as stated in the Town Ground Agreement, or whether the RMB 4 million referred to in the Timber Agreement was intended to increase the total capital to RMB 19 million, or

merely be part of the RMB 15 million, assuming that the company to be formed referred to in both agreements is the same company, and it has not been suggested otherwise. It may be that the reason for this is that Zhou's contribution of RMB 2.68 million in cash provided for in the Timber Agreement was to be by way of a loan from Guo, and as the Timber Agreement had a fixed term of 1 year, it was thought to be no longer relevant. As no submission was made that the total capital was intended to be RMB 19 million, I will assume that the total capital of the Australian company was intended to be RMB 15 million.

The formation of the Australian company, Austree Enterprise Pty Ltd.

[26] The evidence of Zhou is that at some time after signing the agreements, he asked his daughter Ling Yun Zhou, (otherwise known as Joyce), who was studying in Melbourne, to incorporate the proposed company and "to be its director and majority shareholder." Zhou's evidence is that during the negotiations between he and Guo, it was agreed that either party could act through agents, intermediaries and nominees, and that this is common in Chinese business dealings. Joyce Zhou's evidence is that she had been given to understand by Zhou that he and Guo would be acting through nominees who would hold the shares on their behalf, and that this is consistent with Chinese business customs with which she is familiar.

[27] In accordance with Zhou's instructions, Joyce engaged a Mr. David Ren, the principal of a firm of accountants in Box Hill, to incorporate the company. She chose the name "Austree" because one of the contracts related to timber or trees, which are considered to be lucky in China. Joyce states that she was given copies of the contracts, although it is not clear how this came about and whether she had them at the time of the incorporation. It is probable that they were in her possession when she engaged Mr. Ren because she knew that one of the contracts related to timber, and it would have been a natural thing to have been done, given her role in the formation of the company. The company, Austree Enterprise Pty Ltd (hereinafter referred to as Austree) was incorporated in Melbourne on 10 October 2007. It is not clear on the evidence what the nominal share capital of Austree was. Originally, 100 A$1 shares were allotted, 95 to Joyce, and 5 to Yun Jiang Liu, otherwise known as Peter Liu, who is Zhou's brother-in-law. The initial directors were Joyce and Peter Liu. She regarded herself and Peter Liu as Zhou's nominees. This was accomplished on Zhou's instructions, but she understood that this would change once Guo's intentions were known.

[28] Joyce flew to Honiara for the first time on 20 November 2007 and stayed at Guo's house there. She spent most of her time with Harris. After her arrival, she had a telephone conversation with Zhou who told her that he had agreed to a request from Guo to alter the arrangements so that instead of Austree holding 100% of the shares in China United, Guo would retain 10%, and Guo's interest in Austree would be altered to 25.55% so as to maintain the 2/3:1/3 equity overall.

[29] According to Zhou, on or about 20 November 2007, he received a phone call from Guo who asked to change the share-holding in China United so that he would retain 10% of the stock and Austree the remaining 90%. Zhou was not concerned about this change so long as Guo's share-holding in Austree would be proportionately reduced from 33% to 25.55% of the 90% of the shares held by Austree in China United. The result was that Guo would control 22.99%, rounded up to 23%, of the 90 % shares which Austree held in China United, which, when added to Guo's 10% in China United, came to 33% Guo, and 67% Zhou, in the overall project. Consequently, Zhou's shareholding in Austree would be increased to 74.45%.

[30] Zhou says that after this agreement was reached with Guo, he spoke to both Peter Liu and Joyce by telephone, told them of the change in the arrangements, and asked Peter Liu to confirm them with Guo. Peter Liu has not given evidence, but Joyce's testimony is that at one of her meetings with Guo, he confirmed that he and her father had agreed to this new arrangement. She later confirmed this with Zhou. No written record was made of this change in the shareholdings.

[31] Before returning to Australia, Joyce was given a copy of a Foreign Investment Certificate of Registration No. 00573, dated 4 December 2007, which she noted showed Austree holding 90% of the shares in China United and Guo 10%. She inferred from this that the new arrangement was now legally in place, although she knew that it would be necessary to alter the shareholding in Austree as well. She was clearly mistaken about the effect of the Certificate and its purpose. At some stage before she returned to Melbourne, she states that it was agreed that Harris, who spoke better English than Guo, would accompany her to Melbourne to ensure that the shares in Austree were changed accordingly. She and Harris left Honiara and flew to Melbourne, departing on 11 December 2007.

[32] Certificate of Registration No 00573 issued under the Foreign Investment Act 2005 is dated 4 December 2007, and shows that it is issued to Austree Enterprise Pty Ltd in relation to China United, in respect of the business activities of "design, achitect" (sic), engineering and construction of commercial, Industrial and resident properties", timber milling operations and other activities. It shows that Austree holds 90% of the shares in China United and Guo 10%.

[33] The evidence of Jennifer Sifoni is that she was employed by China United from 31 July 2006 until November 2011 in an administrative capacity. One of her functions was to type letters. She took her instructions from Harris, who made it clear to her that he was passing on Guo's instructions because of his lack of English skills. Early on 21 November 2007, there was a meeting at China United's office between Peter Liu, Harris and Guo. During the meeting, Harris introduced her to Liu and asked her to type a letter to the Registrar of Foreign Investment in relation to a change of shareholding in China United. Her instructions from Harris was that Austree would hold 90% of the shares and Guo 10% of the shares in China United. After typing the letter, she made two copies and gave one to Harris for signing. The letter was checked by Liu and then handed to Guo who signed it. At Harris's request, she then took the letter to the FID office together with SBD$200 cash for the fee to amend the existing certificate. She collected the certificate the following day and gave it to Harris. It was examined also by Peter Liu. Guo was also there. Peter Liu noticed that there was an error in the certificate because it referred to Austree Enterprises Pty Ltd instead of Austree Enterprise Pty Ltd. She then retrieved the file copy of the letter, Liu struck out the "s" in "Enterprises" in her original letter, and the copy was signed again by Guo. She then returned to the FID office with the altered letter and explained that she had made a mistake in typing up the original letter, and asked them to alter the certificate. Sometime later, Certificate of Registration number 00573 arrived in the office and she gave the original to Harris. The letters of which she speaks are documents numbered 91 and 92 in Ext 1.

[34] The evidence of Sifoni, and the letter which she typed and which was twice signed by Guo in the circumstances related above, are compelling evidence supporting the oral agreement to change the proposed shareholding arrangements in China United and strongly support the evidence of Zhou. There is no evidence to the contrary and I accept Zhou's evidence on this topic as truthful and accurate.

[35] On about 14 December 2007, Joyce and Harris met David Ren at his office in Box Hill and instructed him to change the shareholding in Austree to reflect the agreement. Ren advised to increase the issued shares to 10,000 so that the new shareholding arrangement could be implemented. The effect of this was that Guo would hold 2,556 shares and Zhou 7,444. This advice was accepted. Harris made a phone call to Guo to find out who would hold Guo's shares. Harris told Ren and Joyce that Guo's shares would be held by Harris as to 2,000 shares, and 500 shares by Mei Juan Dai (Dai), an accountant employed by China United. Joyce instructed Ren to allot a total of 6,994 shares to her and 500 to Peter Liu. Ren prepared the necessary forms and paper-work to reflect these new arrangements which she signed. The Change of Company Details Form 484 lodged with the Australian Securities and Investment Commission dated 17 December 2007 reflects these changes. The Form indicates that none of the shares have been paid up. Ren also prepared minutes of a meeting of the directors of Austree held on 16 December 2007. The directors are said to be Joyce, Liu, Harris and Dai who approved the issue of the shares. The minute was signed by Joyce. In fact, no such meeting was held. Austree's register of members and directors[10] does not record the shareholding changes and nor does it record the appointment of Harris and Dai as directors of Austree. No other documentation has been produced showing that Harris and Dai were appointed directors of Austree. Neither party made any reference to this in their final submissions.

The conditions precedent to the Town Ground Agreement

[36] The submission of Mr. Johnstone for the claimants was that the only conditions precedent were the formation of the Australian company and the payment of $1A. One possible interpretation of the contract is that all that was required initially was the formation of a company in Melbourne by both parties. All the preamble says is that "the company name, registered capital and scope of business shall be determined in accordance with the registration", seemingly leaving such things to be determined at the time of registration. That construction is supported by the provision that "when the purchase takes effect, all the following documents will come into effect: firstly, this Agreement…" This seems to imply that the provisions of clauses I and II would come into effect later, after the transfer of the shares in China United to Austree.

[37] How does this stand with clause VI which says that the agreement "shall come into effect upon signing by both parties"? One possible explanation is that what the parties intended was that the agreement to form the Australian company and to transfer the shares would be binding as an executory contract immediately, with the other provisions to come into force once the transfer of China United's shares took place. That is what I think is meant.

[38] The other possibility is that the agreement required Austree, when formed, to have complied with clauses I and II at the time of incorporation, or at least, at the time when Austree was entitled to seek the transfer of the shares in China United. Counsel for the defendants submitted that what is meant by the expression "in accordance with the registration" is that the company must be incorporated with the agreed capital at the outset as unpaid shares, with the parties thereafter to be bound to meet calls made from time to time as the directors might require for the capital needed as the works progressed. I do not see why the shares had to be allotted in this way at the outset. It seems to me to be perfectly in accordance with the agreement that the shares could be allotted to suit the

[10] Ext 1, pps 83- 87

parties' requirements at some later time after incorporation. I do not see how all of the provisions of clauses 1 and 11 could be implemented at the time of incorporation. Clearly, a number of these provisions were intended to be implemented after incorporation, e.g. the investment of capital "step by step based on the actual progress of the construction of the project", and the appointment of the finance manager, cashier and accountant.

[39] It was submitted by Mr. Matthews on behalf of the defendants that in order to satisfy the condition precedent the following requirements had to be met:

1. the Australian company had to be registered and established as a proprietary company in Australia.

2. the Australian company had to be registered with the name Zhonglian or China United.

3. The registered capital and scope of the business had to be in accordance with articles I, II and IV of the agreement, which meant that:

   (i) the Australian company was to have an unpaid share capital equivalent to RMB 15 million.

   (ii) the shares in the Australian company to be held by Zhou and Guo in respective proportions of two thirds and one third.

   (iii) the constitution of the company was to include a board of directors

   (iv) the appointment of the board and the identification of their functions.

   (v) the establishment of a board of supervisors

   (vi) the establishment of a financial management system.

   (vii) the establishment of company accounts and cost accounting.

[40] One of the criticisms made by Mr. Matthews was that the company's share capital was not RMB 15 million. In fact, 100 S1 shares of the company were initially allotted, later changed to 10,000 $1 shares which were also allotted as unpaid shares. According to the document "Solomon Islands Monetary Statistics[11] the Australian dollar mid-rate varied between SID$7.16 to $6.33 in the 12 months between 30 April 2007 and 30 April 2008. It is also the case that the Chinese Yuan and the Solomon Islands dollar was then roughly par. On those facts, I find that a share capital of 10,000 S1A is at least equal to RMB 15 million.

[41] However, in my opinion, for the reasons which are discussed below, the only conditions precedent were:

(i) that the parties register and establish a proprietary limited company in Melbourne;

(ii) that the company name, registered capital and scope of the business would be determined in accordance with the registration;

[11] Ext LYC to the sworn statement of Lan Yu Chen at p78 (Ext 49)

(iii) after the establishment of the company, the shares in China United would be transferred to the company for $1A.

[42] In my opinion, the matters referred to in paragraphs I and II of the contract would not come into effect until after the shares in China United were transferred. As to paragraph IV, I accept the opinion of Professor Bing Ling that Article IV is void and can be severed from the contract.

[43] The clearest expression of the parties' intentions is the sentence "when the purchase takes effect, all the following documents will come into effect; firstly, this Agreement…" As noted in paragraph [37] above, clause VI intends to convey the meaning that the agreement to form the company and purchase the shares was binding immediately. There is no reason why clauses I and II cannot take effect after the sale of the shares have taken place. I note that the contract does not specify a time for performance of either the conditions precedent or of the other clauses once the agreement becomes unconditional. The opinion of Professor Bing Ling, which I accept, is that in such circumstances the contract is not void for uncertainty. In those circumstances, the "debtor may perform the contract at any time and the creditor may demand performance at any time, but the other party shall be given the necessary time for preparation".[12] On this basis, once Zhou was in a position to demand the transfers of the shares, he could demand that performance at any time upon reasonable notice, and likewise, once the contract had become unconditional, Guo could demand compliance with the rest of the conditions of the contract at any time upon reasonable notice.

[44] A question arises as to what is meant by the words "register and establish" a company in Australia. Do the words "and establish" mean that something else apart from registration is required, and if so, what? No submissions were made on this by either party. Assuming that I can take judicial notice of the Australian Corporations Act 2001[13], the process of registration is dealt with in s.117. An application is required to be lodged with ASIC and to state certain information contained in s.117 (2) which includes information as to who consents to be a member and a director or secretary. S.119 provides that a company comes into existence as a body corporate at the beginning of the day that it is registered and remains in existence until it is deregistered. In this case, the evidence establishes that Austree came into existence on 10 October 2007[14]. S. 120 (1) provides that a person becomes a member, director or company secretary on registration if they are specified in the application and consent accordingly. S.120 (2) provides that the shares to be taken up by the members are taken to be issued to the members upon registration. As the company has been registered, there can be little doubt that if the words "and establish" mean only that directors are appointed and shares issued, that has been complied with. Australian companies which do not have constitutions are governed by the provisions of the Act. In addition, s. 129 provides that a person may assume, for example, from information provided by ASIC as to who are

[12] Contract Law, Article 62(4).

[13] The provisions of foreign law must be proved in evidence: Evidence Act 2009 (SI) s.111. The Corporations Act 2001 (Cth) which applies uniformly in Australia was not formally proved. In this case both parties are represented by Australian counsel. Reference to the Australian Corporations Act 2001 (Cth) was made by counsel for the defendants in their written submissions (see fn18) and by the counsel for claimants in their written submissions (see fns 338, 339). Presumably I am being invited to have regard to that Act pursuant to s.17 (1) (b) and (2) of the Evidence Act 2009 (SI).

[14] Ext 10

the directors, that they have been duly appointed. It may be that that the parties assumed that a company, although registered, had to do something else to become "established". It is possible that they had in mind the appointment of the office bearers and the taking up of initial shares. If that is what is meant, this all occurred at the time of registration. No other explanation is offered by the parties.

[45] Another reason for rejecting the defendant's submission is that if it was intended that the provisions of clauses I and II were to apply at the time of registration, why not state so? Instead, the contract says only that "the company name, registered capital and scope of the business shall be determined in accordance with the registration." As noted previously, I think that this was something left to be agreed at the time of applying for registration. Even the proposed articles left the name as "tentatively" Zhonglian Co., Ltd. and the place of the company's domicile was also left to be determined. The evidence shows that the company name was not considered to be an issue by Guo, as he did not raise any objection to it when he signed the letters addressed to the Registrar of Foreign Investment, and no question was then raised about who the directors and shareholders of Austree were. Similarly, when Harris accompanied Joyce to Melbourne to arrange for the issue of the shares to himself and Dai, no objection was raised then either.

[46] Another matter for comment is the reference in clause I. 1 of the contract to the establishment of a board of supervisors. There is no evidence as to what the purposes, functions and powers of this board were intended to be, and how such a board was to be constituted. The most one can glean is the reference to such a board in the void contract for the proposed articles of the Australian company: see Articles 23-27. The proposed board included employees' representatives to be elected by employees through "affirmative votes of over half employees". If that is what was intended, it is hard to imagine how such a board could be established at the time of incorporation when at that stage the company had no employees.

[47] On any view of the matter, as the purchase of the shares in China United never came into effect, the provisions of articles I and II remained dormant.

The status of the shareholding in China United after 30 August 2007

[48] Apart from the letters to the Registrar of Foreign Investment and the issue of Foreign Investment Certificate No. 00573 referred to in paragraph [33] above, there is no evidence that a meeting of the directors of China United was held to approve a transfer of any of its shares to Austree. There was still no share register at that time. There is no evidence that anyone on behalf of Austree or Guo prepared a transfer form to give effect to the transfer. There was a Return of Allotment of Shares (Form 4) signed by someone in Chinese[15] dated 1 October 2007 indicating that Guo had been allotted 85,000 fully paid up shares, with Harris holding 15,000 shares and Wu holding 10,000 shares. This form is obviously incorrect as the total shares allotted is 110,000 when only 100,000 were allotted. Also, presumably the wrong form was used to record a transfer, rather than an allotment of shares. If this was intended to reflect the changes referred to in paragraph [6] item c above, Guo's shares should have numbered 75,000. It is not clear who prepared this form. According to Jennifer

[15] The signature does not look like Guo's and is not Chu's who signs in English. The signature resembles Harris' signature when compared with his signature on the Minutes of the AGM dated 27 March 2007, but it may not be his either.

Sifoni, it was not typed by her and she had nothing to do with Companies Office forms at that time.

[49] Nothing else was done in relation to advising the Companies Office of any changes involving Austree until November 2008, when Jennifer Sifoni was asked by Harris to complete Companies Office forms to record the shareholders in China United. Not having any forms, she went to the Companies Office and obtained a Form 4 Return of Allotment of Shares and a Form 32 Particulars of Directors or Secretary. She typed up the forms showing that 900,000 of the shares in China United were held by Peter Liu and 100,000 by Zhou, and that the directors were now Austree and Guo, with Harris and Wu having resigned. She then asked Harris who should sign them, and was told that they should be signed by Liu. She then took the forms to Liu who signed them, and she lodged them at the Companies Office the same day. Miss Sifoni in her statement accepted responsibility for the many errors contained in these documents, including the fact that the number of shares had blown out to 1,000,000 instead of 100,000. According to Miss Sifoni, sometime in 2009, China United employed Leslie Kwaiga, a Honiara lawyer, as a part time legal adviser, and he raised with her that the registration of the shareholders and directors in the Companies Office had not been properly recorded. Following discussion between Kwaiga, Guo and Liu, Kwaiga was instructed to make the necessary changes to the documentation, but apparently this did not occur. Not much turns on this, but it is just another one of the comedy of errors which has befallen that parties to this litigation brought about by inadequate attention to detail and the failure to engage competent professional assistance in the preparation of their documentation. These errors were compounded by subsequent efforts to rectify the situation.

[50} There was then no form for recording share transfers. Nevertheless, apparently an attempt was made in October 2009 to rectify the mistake. On 5 October 2009, China United wrote to the Registrar of Foreign Investment:

> "Because our company's secretary pointed out to directorate by herself about she made the mistake of CERTIFICATE AND ALLOTMENT OF SHARES so we want to rectify the mistake. The additional information about investor shall be Austree Enterprise Pty Ltd in possession of 67% shareholding. Mr. Shiyao Guo in possession of 13% shareholding. Mr. Junzong Guo in possession of 10% shareholding and Mr. Junbin Guo in possession of 10% shareholding. And also the ALLOTMENT OF SHARES.
>
> The directors feel so sorry about the mistake and wish it can be rectified as soon as possible."

The letter is signed by the Fourth Defendant, Jun Bin Guo (known as Chris) (Chris), Guo's other son, in the capacity of General Manager. The evidence of Sifoni is that Harris had returned to China earlier in 2009 and Chris had taken over his responsibilities in Honiara.

[51] It is not put that this letter was evidence of an attempt by Guo to alter the agreed 90%/10% shareholding structure in Austree, but as yet another error, which if anything made the situation more confusing than it already was. Moreover, the documentation which needed rectification was with the Companies Office, not the Register of Foreign Investment. The Registrar wrote back requesting evidence of consent of transfers of shares to Harris and Chris. No further information was given and no new certificate was issued. Nevertheless, it

was put that it was an admission against interest that Austree was the major shareholder in China United at that time.

[52] The mistakes continued in 2010. On 28 May 2010, China United lodged a Form 32 with the Companies Office showing the continuing and existing directors of China United as Austree, Guo, Harris and Chris. A form 4 was also lodged showing the shareholders as Peter Liu 670,000 (or possibly 67,000), Guo 100,000, Harris 100,000 and Chris 130,000. The signature on this form is apparently Chris'.

Chongqing Urban Construction Holdings (Group) Co Ltd and the letter of 5 January 2008

[53] Between 31 December 2007 and 8 January 2008 Zhou visited Honiara accompanied by Tang Jian Hua (Tang) and Xiao Zhuo (Xiao). Tang was at that time the managing director of Chongqing Urban Construction Holdings (Group) Co Ltd (Urban Construction). Xiao was a senior executive of Chongqing Blasting and Construction Co Ltd (Blasting). Both of these companies were owned by the Chinese Government. Zhou hoped that Urban Construction would be engaged as the builder to construct the project. The main purpose of this visit was to discuss with Guo what was required to be done to mobilise for the commencement of the construction and to introduce Tang and Xiao to Guo.

[54] During the visit a number of matters were discussed including the need to engage a contractor, matters relating to the purchase and shipment of materials and equipment, and the provision of funds. Zhou told Guo that they might be able to obtain some funding assistance if they engaged Urban Construction. Agreement was reached between Zhou and Guo that Zhou would negotiate a construction contract and that Urban was the preferred contractor. Interestingly, Zhou says in his statement that the construction contract was to be negotiated on behalf of China United, rather than Austree.

[55] Zhou claims that it was also agreed that any construction contract made in China may need to be executed under seal, and that Guo asked him to have a duplicate common seal made for use in China.

[56] Another matter Zhou raised with Guo was that Zhou intended to use a number of his companies in China, including Chongqing Chong An, for the provision of funds, materials and equipment, as well as for the selection of the design or architectural company to prepare the construction plans, and that Guo agreed to this[16].

[57] During that visit, Zhou claims that it was also agreed that the commercial precinct would be designed to have three stories, instead of two, as originally agreed, although the provisional budget for the project had not been revised from CNY 30,000,000.

[58] Because of these discussions, Zhou claims that Guo had prepared in the latter's office a document relating to the duplicate common seal, and the use of Chongqing Chong An in the manner described above. In his revised statement, he says that he was at the Mendana Hotel where he was staying at the time when he asked Guo to have the document typed up

[16] In Zhou's statement at para 167 he refers only to "Chongqing Chong An" which, in para 8 is indicated to refer to Chongqing Chong An Real Estate Development Co Ltd. He goes on to explain that this company is also known as Chongqing Chong An Estate Development Co Ltd and Chongqing Chong An Property Development Co Ltd. The Chinese translator's note is that the Chinese characters for the name of that company could be translated as any of those names. For the sake of clarity, I will refer to it as Chongqing Chong An.

at his office, but that he does not know where it was typed. He further says that Guo returned with the document already sealed with the seal of China United on both the first and second pages. He then signed the document and took it with him when he returned to China. When he got back, he instructed Zhang Li to have the seal to be used in China prepared and affixed it to the second page of the letter. It is the smaller of the two seals.

[59] The text of that document, which has been translated into English is as follows:

Letter from Chairman of the Board of Directors

In accordance with the Cooperative Agreement of China United Sports Trade Centre signed on 30 August 2007 and the Articles of Association of China United Co. Ltd., Austree Enterprises (sic) Pty Ltd was established in Melbourne, Australia, on 10 October 2007. At the same time, it is necessary for Chongqing Chongan (sic) Property Development Company Limited to establish a project preparation and management team for China United Sports Trade Centre in China, with Zhang Li[17] as head of the team to coordinate investment and financial activities relevant to the project among Golden Elephant (Group) Enterprise Limited and its associated Shenzhen Nanyang Gold Elephant Enterprise Limited, Shanghai Gold Elephant Diamond Co. Ltd., Chongqing Gold Elephant Market Operation and Management Co. Ltd., Chongqing Chongan Property Development Company Limited Chongqing Aishun Trading Co, Ltd., and Chongqing Minqing Electricity Development Co Ltd.[18] Specifically,

1. Organise project feasibility study, conduct analysis and positioning, and provide a feasibility study report and development plan.
2. Based on the feasibility study and development plan, select a design institute and discuss the design plan and intention of cooperation with them.
3. Jointly invite capable enterprises with good reputation and the first level qualification of the state to engage in the construction project and cooperation.
4. Obtain an understanding of business firms, manufacturers and exporters in the major building material market, develop intentional (sic, international?) material purchasing plans and export plans.
5. In order to conduct the above work, it is necessary that China United Company of Solomon (sic) sign a contract of intention and formal cooperation contract with relevant parties. For this purpose, Zhang Li will arrange to have the following round or oval seal in English made in China. She will keep the seal and be responsible for its usage. The seal has legal effect. The principle of using the seal is that whoever uses the seal will assume the responsibility, and will be responsible for the financial and legal consequences cause by improper usage of the seal.

(seal) The Common Seal of China United (SI) Corporation Ltd

(signature) Zhou

[17] Zhang Li was one of the managers employed by Chongqing Chong An.
[18] These are apparently all companies in China controlled by Zhou.

Date: 5 January 2008

[second page]

Sample

Sample of the seal of China United Company made in China	Common Seal of China United (SI) Corporation Ltd.[19]
Sample of the seal of Solomon China United	Common Seal of China United (SI) Corporation Ltd.[20]

[60] No submissions were made by either party as to the significance of this document. It is not alleged to be a forgery and there is no reference to it in the pleadings. It seems unlikely that Guo returned to his office to have the letter typed up from memory. Perhaps he took notes or there was a draft made of it when they were together at some stage. It is impossible to say, as there is no evidence about it one way or the other. One thing that gives this letter cogency is the fact that the common seal of China United is affixed to it, and it is difficult to believe that anyone other than Guo had access to such an important instrument. Further, if contracts relating to shipping or building and construction work were to be entered into in China, it makes commercial sense that a duplicate common seal would probably be required.

[61] Counsel for the defendants did however, submit that any agreement that China United would have a "foreign" common seal was contrary to the terms of the Companies Act 2009. So far as this is concerned, that Act was not in force in 2008. The Companies Act 1956, s.36 (1) provided that a company could have a common seal for use abroad if it was authorised by its articles. Such a seal was required to be a facsimile of the original seal and in addition, have on its face the name of every "territory, district or place where it is to be used." Clearly the seal did not comply in this respect. I accept also that China United's Articles did not authorise the use of a seal abroad. However that may be, I think the importance of the letter is that it goes some way to acknowledge Zhou's understanding that he was able to act as a director of China United, that Guo was comfortable with this, that Guo was aware that Zhou intended to operate through his companies in China in performance of the Town Ground Contract, and that both parties were of the belief that the Town Ground Contract was then fully in force.

[62] Counsel for the defendants submitted that the letter was contrary to the terms of the Town Ground Contract, the point being that the letter seems to imply that China United was to be the party developing the project, whereas the contract envisaged that the developer would be Austree. I will return to this later.

Preparations for the construction of the project

[63] In February 2008, Zhou arranged for the transfer of Lan Yu Chen, known as Angela (Angela) and her husband, Xiao Chun Liu, known as Mark (Mark) to move to Honiara. Angela had for

[19] The seal made in China

[20] The original seal.

some years previously been employed as a cashier and bookkeeper in businesses owned by Zhou in China. She agreed to take up the same employment with China United. Mark, who was Zhou's nephew was to be employed by China United as the warehouseman.

[64] Angela and Mark flew to Honiara to take up their employment in mid-February 2008. They had been given their tickets by Dai who was employed by China United as its accountant, and who was on the same flight from China. Although appointed by Guo, Dai had previously been employed by Zhou. On arrival, they were met by Guo and Harris, and shown the Town Ground Project and their accommodation. At this stage, all that had been done was the erection of a temporary site office and some fencing. Angela was told by Guo that he had met with Zhou in China, that they had sourced the materials to begin construction work which Zhou was organising. Peter Liu was already in Honiara, employed by China United as the project manager. Whilst working for China United, Zhou paid Angela and Mark's wages through one of his companies in China.

[65] By March 2008, Zhou had negotiated a construction agreement with Urban Construction, which he signed under the duplicate seal of China United.[21] It is not necessary to set out the terms of this agreement in full. One of the advantages of the construction agreement was that Urban Construction agreed to provide initial funding towards the project of CNY15,000,000 repayable by China United at a later time. The contract provided for payment to Urban Construction for its work on a costs plus fixed remuneration basis. The contract had a provisional price of CNY75,000,000. Once the initial funding had been provided, China United was required to provide funds for the balance of the project costs. One consequence of this arrangement was that Urban Construction would pay for the initial materials to be purchased in China and shipped to Honiara for the project. According to the evidence of Tang, the actual amount advanced throughout the project totalled CNY14,581,640 some of which was made to third parties to pay for the construction materials and the rest was paid to Chongqing Chong An. According to the sworn statement of Tang, Chongqing Chong An has repaid that sum. This is confirmed by Zhou and I accept this evidence.

[66] Subsequently, on 2 April 2008, a supplementary agreement was executed between Urban Construction, China United and Chongqing Chong An whereby Chongqing Chong An became a party to the construction agreement[22]. The purpose of the supplementary agreement was to make Chongqing Chong An liable to Urban construction for its remuneration under the Construction Contract. In effect, Chongqing Chon An became a guarantor for China United's liabilities. Once again Zhou executed this agreement under the duplicate seal of China United.

[67] The actual construction work for the project was carried out by Urban Construction's subsidiary, Blasting. Blasting's manager in Honiara was Xian Ze Tang, known also as Tom (Tom).

[68] Zhou claims that he faxed a copy of the construction contract to Guo. He also says that, following discussions with Tang, it became necessary to significantly increase the labour force. He discussed this with Guo. On 24 April 2008, an application was made to the Registrar of Foreign Investment to increase the labour force to 100 Chinese workers and 300

[21] Ext 1, pps 116-127.
[22] Ext 1 pps 133-136

local workers. The application was written on China United's letterhead and signed by Casper C. Luiramo, "Architectural Consultant" possibly because Guo was overseas at this time. According to Sifoni, this letter was directed by Harris and Peter Liu. Subsequently a new certificate of registration was issued (Certificate number 000637) dated 29 April 2008 to Austree although it says nothing about the labour force; this is recorded in a separate document.

[69] In April 2008, Zhang Li, Guo and representatives from Blasting visited Shanghai and Jiangsu to purchase materials. In May 2008, Zhang Li and Guo found a ship through Walbert Steamship Co Ltd which was available to be chartered for the first shipment. This ship was the *MV Feng Sheng* which Zhou chartered through his company Shanghai Golden Elephant. The first shipment contained two groups of materials for which there were separate bills of lading, exts. ZWZ-30 and ZWZ-31 to Zhou's sworn statement. This included cement and steel, and a heavy-duty truck. The consignee was China United. Construction began soon after the *MV Feng Shen* arrived in June 2008. By this time, almost 2 years of the three-year time limit provided for completion of the project in the lease agreement between China United and SIRUF had elapsed.

[70] Over the next two years, further shipments of materials were purchased and arrived from China in a similar fashion on various vessels chartered by Zhou through one of his companies. The last shipment arrived in Honiara in about mid- August 2010. Jennifer Sifoni handled the shipping arrangements when the shipments arrived. The paper-work and processes involved are discussed in her sworn statement.[23] It is not necessary to summarize it. The various costs and expenses involved in each shipment were recorded by Angela in China United's business records.

[71] During the period 2008-2010 Zhou made 6 visits to Honiara to check up on the progress of the construction, the last being between 2-9 July 2010. Zhou also had telephone and QQ service (the Chinese equivalent of Skype) communications with Peter Liu, Angela and Guo in relation to financial matters from time to time. Zhou's evidence is that up until October 2010 his relationship with Guo was "reasonably good." In October 2010, Zhou was informed by Angela that Guo had transferred Austree's shares to Harris and himself.

The Incorporation of SolPlaza Ltd.

[72] In mid-2010, because the project was nearing the stage when the project was ready for occupancy, Zhou asked Joyce to arrange for the incorporation of a Solomon Islands company to act as a letting and marketing agency for China United. Joyce applied for registration of the proposed company with the Foreign Investment Division and received a certificate of registration dated 9 July 2010. She then sought registration of the new company which was incorporated as SolPlaza Limited on 19 August 2010. The shareholders were herself, 90,000 shares and her husband Duan David Wang, 10,000. She and her husband were the only directors. Apparently, Guo was not consulted about this development.

The transfer of shares to Guo and Harris excluding Austree as a shareholder in China United.

[72] On 1 July 2010, the new Companies Act 2009 (SI) came into force requiring all existing companies to re-register under the new Act within 9 months of its commencement. The

[23] Paras. 139-157.

applicant was required to specify, inter alia, "the full name of every shareholder of the proposed company, and the number of shares to be issued to every shareholder." [24]

[73] In about September 2010, Harris returned from China and Chris left Honiara for a short period. On the 1st of September, Leslie Kwaiga applied to the Foreign Investment division and obtained copies of the documents in China United's file. I infer that he also searched the Companies Office records.

[74] By letter dated 6 September 2010, Kwaiga set out the results of the share transfers according to the searches he had made. After setting out the various share transactions, including those which the records indicated had been made to Austree, he concluded:

> "12. These are requirement[s] under the Articles and Memorandum of China United (SI) Corporation Ltd:
>
> a) That any increase of share capital must be done in a General Meeting.
> b) Any transfer of shares must be done by way of Instrument of Transfer and where no instrument has been signed such transfer may be deemed invalid.
> c) Any two members present in person or by proxy or attorney or representative shall constitute a quorum.
>
> In short, the consequent (sic) of the above listed transactions are that most of them or all of them excepting the initial shareholders and directors, are invalid transactions.
>
> I recommend that the company conduct itself according to its Articles and Memorandum and then sort out its records with Foreign Investment and the Companies Registrar."

I infer from this letter that Kwaiga must have thought that there had been no meetings of directors approving of the alleged transfers, and no signed instruments of transfer approving any of the purported share transfers. Nevertheless, the alleged minutes of 17 September 2007 relating to the transfers to Guo from Sun Fei and Jiang Sun are written in such poor English that I doubt that they were prepared by Kwaiga. I cannot find that they are not genuine.

[75] Initially, it appears that Kwaiga conferred with the Registrar of Companies, Mr. Edwin Saramo and was shown some documents showing some problems with the allotment of shares in China United. Consequently, on 21 September 2010, Samaro wrote to Kwaiga pointing out that the shares allotted had exceeded the company's authorised share capital, and consequently "the new share holders and their share[s] cannot be registered in our share register."

[76] By letter dated 23 September 2010, Kwaiga wrote again to Guo setting out the history of the share transfers in China United obtained from the records of the Foreign Investment Division and the Companies Office, omitting all reference to Austree, in respect of which he said:

> "The share transfer to Austree never eventuated and even if it so eventuated the transfer would be unlawful in view of the share capital of the company which stands at 100,000 shares only and that such shares had been allotted."

[24] S. 210(5) (f) and Part 4 of the Companies Act Regulations 2010 (SI).

Kwaiga purportedly enclosed draft share transfer instruments to comply with the Companies Act and the memorandum and Articles of the Company, and if acceptable, to be signed and lodged with the Foreign Investment Division and the Companies Office.

[77] The share transfer instruments drafted apparently by Kwaiga purport to transfer the shares in accordance with all of the previous documentation, apart from any transfers to Austree or anyone on Zhou's behalf. However, the transfer from Ngu Ket Siong to Jianju Wu is not signed by anybody. Most of the other transfers are signed only by one party. The only transfers signed by both parties are Chu to Guo of 15,000 shares and Guo to Harris of 15,000 shares. Except for the transfer from Ngu Ket Siong to Jianju Wu, the transfers are dated 25 September 2010 and purportedly witnessed by an illegible signature which looks remarkably like that of Kwaiga, when compared to his signature on correspondence. There is also a transfer instrument apparently signed by Wu transferring 10,000 shares to Guo. This transfer is dated 25 September 2010 and witnessed apparently by Kwaiga. This instrument may have been typed in Kwaiga's office, because the font looks the same, but the line spacing and punctuation is different. It appears that even at that stage, China United did not have a registry of members, as the first time such a register appears according to the evidence is not until 20 September 2011.

[78] The Articles of China United required the instrument of transfer to be signed by both the transferor and the transferee. Further, the Articles provided that the transferor shall remain the holder of such share until the transferee is entered in the share register.[25]

[79] On 27 September 2010, Kwaiga wrote to Samaro in response to his letter of 21 September enclosing the transfer instruments and an application to re-register China United with the only shareholders being Guo 85,000 and Harris, 15,000. On 11 October 2010, China United was re-registered and it adopted the model rules provided for under the Companies Act 2009. Preeviously, Samaro had indicated by letter dated 30 September 2010 that upon re-registration, the only shareholders would be Guo 85,000 shares and Harris 15,000 shares. Ultimately, on 22 September 2011, Austree changed its rules back to its old articles.

[80] At a time probably in October 2010, Sifoni was called to a meeting with Guo and Harris at Guo's apartment at the Town Ground. By this time, the commercial precinct was largely complete. She was told by Harris that the shareholders had changed and that she was to avoid doing any work for Austree and to instead work for Guo and his sons exclusively. She was offered $200,000 and an apartment if she accepted. It is not clear if the money was intended as a lump sum or just a raise in her salary. She said that she was not interested in money and that they should sort out their own problems with Austree. She was then told that they would destroy all evidence of any agreement with Austree. Apparently, she inferred that Austree had been removed as a shareholder, probably because she had previously been asked to type some documents to remove Austree and Joyce as shareholders, leaving Guo and Harris as the only shareholders, which she had declined to do. Because of the later meeting, she advised Angela what she had been told. The following day, she repeated what she had said to Ding Qian (Ivan)[26]. Subsequently Angela told Zhou who requested her to find out what she could about this. Zhou says that this was a complete surprise to him and that he believed up until then that Austree was the major shareholder in

[25] Article 7

[26] Ivan had arrived in August 2008. She had been employed by Zhou to do research in relation to rental marketing and to assist in the office.

China United. At Angela's request, Sifoni went to Company Haus and obtained a copy of the new certificate of incorporation, but was refused access to any other documents.

The directors of China United

[81] The position relating to the directors of China United is more elusive. Under Article 21, it was provided that the subscribers would appoint the initial directors. Thereafter, directors could only be appointed by the company in General Meeting. No minute book has been tendered in evidence and such minutes as have been tendered do not deal with changes in the directors. Whether any persons other than Guo and Ray Chu had at any time been validly appointed as directors of China United up until the time of the re-registration of China United remains unclear. Further, pursuant to Article 25 and 26, a director ceases to hold office if he or she resigns by notice in writing, or is removed at a General Meeting. There is no evidence that any director has given his written resignation, and no evidence that any director has been removed at a General Meeting.

A flurry of activity following the re-registration of China United

[82] As might be expected, the claimants and those representing them were at a loss to understand how Austree's shareholding in China United suddenly evaporated. Zhou flew to Honiara on 20 October 2010 to meet with Guo in an attempt to resolve the issue. Although he met with Guo, there was no resolution of their differences. Guo commenced proceedings in the High Court seeking various relief in December 2010 (action number 490 of 2010) An interlocutory application in that matter came on before Chetwynd J on 4 March 2011 and was dismissed on 8th March. Thereafter, the proceedings were discontinued. Joyce also took various measures in an attempt to restore the position, at least so far as Companies Haus and Foreign Investment Division was concerned. At one stage, as a result of her efforts Austree's position as a shareholder was restored in the official records temporarily, but eventually the records were changed so that only the original shareholders and directors came to be recognized. So far as Company Haus is concerned, the registry effected the change in shareholding on 6 September 2011 such that the only shareholders were Guo, 70,000 shares and Chu 30,000. It is not necessary to go into this tortuous part of the history in detail.

A Notice to complete is given

[83] At some stage, and certainly by March 2011, Joyce instructed solicitors in Honiara, Sol-Law, to act on behalf of the claimants. By letter dated 17 July 2011, SIRUF wrote to both Guo and Joyce setting out a list of complaints and demands. According to this letter, the facilities which China United were contractually bound to provide in relation to the rugby stadium had hardly been started; a fourth floor had been started on the commercial building without SIRUF's approval; no substantial work had been done in relation to the project since mid-2010; the three-year construction phase provided for in the Town Ground Agreement had passed on 30 June 2011; and many other matters. Sol-Law replied by letter dated 29 July 2011 addressing the concerns raised, advising that Austree was not going to involve itself in completing the project until the share issues between it and Guo were resolved, and stated that the claimants (sic) were considering whether or not to rescind the contract or to seek specific performance of the contract between Zhou and Guo. Eventually, on 23 August 2011 a notice to complete was sent by e-mail to Mr. Suri, who was then acting on behalf of China United and Guo. The notice, which is also dated 23 August 2011, seeks completion of the

transfer of 9,000 shares from Guo to Austree, completion to take place at Sol-Law's office on 9 September 2011. The notice, and the accompanying share transfer instrument contain an obvious error as to the number of shares required to be transferred; it should have required the transfer of 90,000 shares. Other demands were also made in Sol-Law's e-mail relating to the circumstances under which the claimants would be prepared to "resume control of the project", but these were not the subject of the notice to complete. Mr. Suri replied by email on 30 August 2011:

> "My Client still disputes your client's 90% shares……
>
> Our client would not accept Notice of Completion or the Share Transfer document attached."

No point was taken by Mr. Suri concerning the number of shares being only 9,000 instead of 90,000.

Subsequent share transfers after 6 September 2011

[84] On 7 September 2011, a meeting of the directors of China United (Guo and Chu) was held at which Mr. Suri was present. A number of resolutions were passed. In summary:

- A written consent to act as directors by Harris and Chris was tabled and they were appointed additional directors.
- It was resolved that the Company revert to its original articles.
- It was resolved to create a share register.
- It was resolved to create and keep a minute book.
- Guo was appointed managing director for 5 years.
- It was resolved to approve the re-allotment of shares: Guo 35%; Chu 10%; Harris 25% and Chris 30%.
- That transfer instruments be executed to effect the "re-allotment or transfer" of shares.
- The re-allotment be registered in the Share/Members register.
- That new share certificates be issued to reflect the result.
- That the changes be notified to Companies Haus and that approval be obtained from FIB.

[85] On 8 September 2011, a shareholders meeting was held to ratify, inter alia, the reversion of the company to its original articles. On the same date. Transfer instruments appropriately signed transferring the shares to give effect to the meeting of directors were created[27]. The share transfer instruments recorded that the shares had been sold. A Members Register was apparently created indicating that all of the shares had been registered by 20 September 2011. The end result was:

- Guo, 35,000 shares
- Chu, 10,000 shares
- Harris 25,000 shares

27

Ext 1, pps 421-422 show only two transfer instruments Guo transferred 5,000 shares for a consideration of $SBD5,000.00 to Harris and Guo transferred 30,000 shares for SSBD30,000 to Chris. Chu's transfer to Harris is Ext 19 (20,000 shares) $SBD20,000.

- Chris 30,000 shares.

This remains the current shareholding.

[86] Appropriate documentation and certification was obtained by the Foreign Investment Division and the relevant changes were notified to Companies Haus.

Specific performance of the Town Ground Contract is sought

[87] On 23 September 2011, an action was brought in the High Court seeking specific performance of the Town Ground Contract. The action was brought by each of the present claimants against each of the present defendants, although Austree Enterprise Pty Ltd is recorded (apparently) as Austree Enterprises Pty Ltd. Nothing turns on that now. An application was made by the defendants to dismiss the claim because, so far as it relied on the Town Ground Contract, that agreement had not been stamped for payment of stamp duty under the *Stamp Duties Act* (Cap. 126) and was incapable of being pleaded therefore inadmissible in evidence and therefore unenforceable in law.[28] The application came before Mwanesalua J on 7 December 2011. A copy of the agreement had been produced showing that it had been stamped for $SBD200 on 28 October 2011, about a month after the action was commenced. The main point of His Honour's decision delivered on 2 March 2012[29] was that the proper amount of stamp duty had not been paid, and therefore, so far as the claim for specific performance was concerned, it was struck out.

[88] From this decision, the present claimants appealed. The Court of Appeal held[30] that ad valorem duty was not payable on the contract, that the correct duty had been paid, but that because the appropriate duty had not been paid before the proceedings had been commenced, those proceedings must be dismissed. However, the Court ordered that an Amended Further Amended Statement of Claim filed in that proceeding on 7 June 2012 be deemed to be an originating application and be allocated a new 2012 number in the registry. Consequently, that document became the originating application filed in action number 322 of 2012 (this proceeding). A consequence of this order, which may or may not have been noticed at the time, is that it affects an argument based on Chinese Law as to whether or not the present action is statute barred. I will discuss this later.

Was a trust created?

[89] Counsel for the claimants submitted that the claimants were entitled to specific performance, notwithstanding that at the time when the Town Ground Contract had reached the stage that they were entitled to the transfer of the shares Guo did not legally hold 90% of the shares in China United and notwithstanding that when proceedings were deemed to have commenced on 7 June 2012 the shareholdings had changed so that Zhou only legally held 35% of the shares, because, so it was submitted, at all times all of the shares were held, apart from those held by Guo, on trust for Guo. Alternatively, it is

[28] Such an application is totally foreign to me. It has long been considered unethical conduct in the jurisdiction in which I have long presided, it being the responsibility of the Court to ensure that documents have been properly stamped, but I was assured by Mr. Sullivan QC that that is not the position in the Solomon Islands. Neither the High Court, nor the Court of Appeal commented on the appropriateness of the procedure adopted.
[29] [2012] SBHC 21.
[30] [2012] SBCA 19

submitted that Austree acquired a beneficial interest in China United's shares which may be traced into the hands of the third, fourth and fifth defendants, Chu, Chris and Harris.

[90] The starting point of the claimant's argument is that Chu had, in equity, completely disposed of his interest in his shares until they were re-allotted to him on re-registration of the company. The series of transactions which the claimants point to show that Chu signed a note dated 18 July 2006 written on China United's Memorandum of Association to the effect that he was transferring 15,000 of his shares to Guo. As far as was then known, no consideration was given for that transfer. One possibility, although not contended for by the claimants, is that this gave rise to the presumption of a resulting trust in favour of Chu.[31] The circumstances of this transfer are not known. In the absence of any evidence to the contrary, the presumption would not be rebutted. The next transaction is a transfer by Chu of 15,000 shares to Siong as recorded in the Minutes of the Annual General Meeting of 16 August 2006 at which Chu was present. Once again there is no record of any consideration being paid for those shares, which also gives rise to the presumption of a resulting trust in favour of Chu. Then, on 23 March 2007, there is a declaration by Chu that he has "pulled out my shares and no longer a share-holder of China United (SI) Corporation Limited. " This is followed up by a minute of a Meeting of the AGM on 27th March 2007 where it is recorded that "Ray Chu shall relinquish and transfer 5,000 shares in his name to Sun Fei." Chu is not recorded as having been present at that meeting. It is not until 25 September 2010 that share transfers are signed. Chu's transfer to Guo is recorded as being in consideration for the sum of $15,000 for "the said ten thousand shares" but the transfer is for 15,000 shares. Chu's transfer to Siong of 10,000 shares for $10,000 is signed by Chu, but not Siong. Chu's transfer of 5,000 shares to Sun Fei is said to be in consideration of $5,000. The transfer is not signed by Sun Fei. In these circumstances, one possibility is that the presumption in favour of Chu is rebutted, and Chu possibly held the legal interest in those shares under a resulting trust for Sun Fei and Siong. Evidence is admissible after the transactions have taken place to show that the presumption is rebutted if the evidence consists of admissions made by the transferor.[32]

[91] The position with Chu's shareholding after the re-registration of China United proves only that Chu was restored as a legal owner of the shares only because the legal ownership had not been given effect to by valid transfers. There is no suggestion that new shares were allotted to Chu. To the extent that the legal ownership had not passed, Chu may have remained a trustee for Siong and Sun Fei, subject to the creation of any further equities by them. Whilst the latter have signed declarations that they no longer hold any shares in China United, and have "pulled out all my shares" there is no evidence that they authorised the transfer of their shares to anybody. A possible inference to be drawn is that they abandoned any interest that they had in the shares, with the intention of leaving it to the remaining shareholders to dispose of them as they see fit, perhaps as their agents. This is not necessarily inconsistent with any resulting trust in their favour.

[92] The position with Wu's alleged shares is not clear. Nothing is known of Wu except that according to the transfer which he allegedly signed, he was living in Yangzhou City in

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[31] *Vandervell v I.R.C.* [1967] 2 A.C. 291 at 312 per Lord Upjohn; *Charles Marshall Pty. Ltd v Grimsley* (1956) 95 C.L.R. 353 at 363-364; *Napier v Public Trustee (W.A.)* (1980) 32 A.L.R. 153 at 158; *Shephard v Cartwright* 1955] A.C. 446 at 365 per Viscount Simonds.

[32] *Shephard v Cartwright* and *Charles Marshall Pty. Ltd v Grimsley,* supra fn 31,

September 2010. He is not known to be present in Honiara. There is no evidence he paid anything for the shares.

[93] So far as Harris is concerned, he was allegedly transferred 15,000 shares in August 2006, and remained, so far as the Companies Office records show, as a shareholder until the return is lodged showing Austree's alleged interest. The is no evidence he paid anything for the shares, although if the transfer had been legally effected, it would have given rise to a presumption of advancement.

[94] However, there is another way of looking at these transactions. The circumstantial evidence points to the fact that the only shareholder who probably invested any capital in exchange for the shares was Guo. There is not a scintilla of evidence that Chu actually paid anything for his shares, and the same applies to all of the other alleged shareholders, Chu, Siong Sun Fei, Wu and Harris. The inference is that the shares were purportedly allotted or purportedly transferred in the expectation that these people, except possibly Harris, would provide the capital for the Town Ground Project, and that this never occurred. Why else would they have all said that they have "pulled out" of their shares? Sun Fei was Siong's father, and it is explicable that it was intended that he would hold his 5000 shares as Sun Fei's nominee, in accordance with the common practice amongst the Chinese community. It is difficult to believe that Sun Fei would voluntarily abandon 40,000 shares in China United if he had paid for them at $1 per share. Why would Chu abandon his shares if he had invested $30,000 for the shares in the first place?

[95] So far as the purported share transfer instruments are concerned made in September 2010, they were ineffective because many remained unsigned and in any event, were never registered in the register of members of the company, which at that stage did not exist. Counsel for the claimants submitted that the activities of Mr. Kwaiga in September 2010 are consistent only with a strategy which he devised at the bidding of Guo to deprive Austree of its interest in China United, because, despite the records of Foreign Investment Division and the admittedly inaccurate return of allotment of shares showing Austree as a shareholder, the documents he produced omitted any reference to Austree. I accept this submission. These documents were only an afterthought; a ruse to try to bring about a situation where the public record at the Companies Office and the records of the Foreign Investment Division would show that Austree had no interest in China United's shareholding. Once this was achieved, the second step in the plan was to re-register China United under the new Companies Act. However, Mr. Saramo's letter of 30 September 2010 changed the plan. It was made clear by Saramo that on re-registration that the only shareholders would be Guo 85,000 shares and Harris 15,000 shares. This must have been music to their ears, at it achieved the required result. The transfers were then abandoned and there things remained until September of the following year when Companies Haus, following Ministerial advice, the opinion of the Attorney-General and an application filed by China United changed the shareholding to the original subscribers. China United's letter dated 19 August 2011 indicates that it was then aware that only the original subscribers were legally shareholders in the company, and on 9 September 2011 China United lodged an application to Companies Haus to revert to its original subscribers.

[96] As noted previously, by September 2011, China United's solicitors had already received the notice to complete which fixed September 9th as the date for completion and threatened legal action to enforce the contract if the notice was not complied with. It is no co-incidence that on 8th September 2011, the share certificates changing the share structure to its present

structure were executed and registered the following day. The inference is that this was done to frustrate any attempt by Austree to obtain an order for the transfer of the shares from the Court. The transfers from Guo to Harris and Chris are said to be in consideration of the sums of $5,000 and $30,000, respectively. The transfer of 10,000 shares From Chu to Harris was said to be in consideration of the sum of $10,000. I do not accept that these were genuine transactions. There is no evidence that any money changed hands. There is no evidence of bargaining the price of the shares or having some attempt to value them. By this time, although there was still some work to be done to finalise the Town Ground Contract, parts of the commercial precinct had already been tenanted for some time and the commercial precinct was substantially completed. Although there is no evidence as to the precise number of tenancies and the income that was being obtained by way of rental, when I conducted the view of the commercial premises[33], it was a massive building and was clearly very valuable. There is no doubt that Chu, Guo and his sons were completely aware of Austree's claim to be entitled to be recognized as a shareholder. I do not consider that Guo intended to make genuine gifts to his sons. To the extent that the presumption of advancement might be called in aid so far as Harris and Chris are concerned, it is rebutted.

[97] In conclusion, all the shares are now and have at all times been either owned or held upon a resulting trust for Zhou. This conclusion is further supported by the fact that there is no evidence that Wu, Siong, Sun Fe or Sun Jing ever paid anything for any shares, or for that matter, were even aware that shares had been subsequently purportedly transferred to them by the scheme invented by Kwaiga, (except for Wu who was the only one to sign a transfer.) I consider that, to the extent that they had any knowledge that they were to be shareholders, they abandoned any entitlement to them for the reasons discussed in paragraph [94] above. Further, the whole of the evidence shows that Guo was the controlling mind behind China United, subject only to Zhou's involvement. It was Guo who entered into the contracts with Zhou and who assured him that he controlled all of the shares. Harris' involvement was to act as his father's interpreter and to convey his wishes to others. The evidence shows that at a time when Harris was purportedly a minority shareholder in China United, Harris accompanied Joyce to Melbourne to arrange for the shares in Austree to be changed and was involved in passing on Guo's wishes to give effect to the change in Guo's interest in the shareholding of Austree. Clearly Harris knew about the change to a 90%/10% split in China United's shareholding. This is only explicable if Guo was the beneficial owner of all the shares in China United. Similarly, Harris and Chris were both involved in notifying the Foreign Investment Division and the Registrar of Companies Austree's interest in China United. Finally, I note that no evidence was given to the contrary by any of the defendants and no submission was made to the contrary by counsel for the defendants, although he did raise the contention that there is no pleading that Harris Chris or Chu were trustees for Guo. The pleadings do assert that Guo was the legal or beneficial owner of 90% of the shares, that Chu held 15% of the shares as agent nominee or trustee for Guo and Wu held 10% of the shares as trustee for Guo (paragraph 3 of the Statement of Case). There is no specific pleading that Chris and Harris held their shares on trust for Guo, but this failure was probably due to the draftsman misconceiving the nature of the transfers which took place in 2011. The defendants were well aware that the Claimants were alleging

[33] The view was conducted on 14 July 2016. Under the Evidence Act (SI), s.73, I am entitled to draw reasonable inferences from what I saw during the view.

that the other alleged shareholders were only Guo's nominees. I do not think that there is anything in this objection. The pleaded facts are sufficient to raise this issue.[34]

Should specific performance be ordered?

(1) Is the contract subject to a condition precedent which has not be performed?

[98] The defendant's first submission is that the Town Ground Agreement was subject to a condition precedent which was never performed by Zhou. I have already discussed this submission which depends upon the construction to be given to the Agreement. There is no substance to that contention for the reasons given in paragraphs [36]- [47] above, Zhou was not required to transfer shares in Austree before Austree was entitled to the transfer of the shares in China United; nor was Austree required to do anything else other than incorporate Austree and pay the sum of SA1.

(2) Is it a requirement that an action for specific performance must be available under Chinese Law?

[99] The second submission relies upon the argument that specific performance can only be ordered if the entitlement to it was available under Chinese Law, and it was put that the entitlement was not available in this case. In short, it was put that the right to the remedy arises under the *lex causae,* i.e. Chinese law, whilst the remedy itself is an incidence of the *lex fori,* the law of the Solomon Islands. In support of the first part of this proposition, I was referred to *First Laser Ltd v Fujian Enterprise (Holdings) Co Ltd*[35] and *Falcon Private Bank v Barry Bernard Charter Ltd*[36]. I was not directed to any passage in the *First Laser* case which supported this proposition in clear terms, and on reading it, I could not find anything directly on this point. Similarly, I could not find any clear statement of principle to this effect in the *Falcon Private Bank* case. The classic distinction is between matters of substance which are governed by the *lex causae* and matters of procedure, or which relate only to the remedy, which are governed by the law of the forum[37]. The problem is often in deciding whether the law of a foreign country provides for a liability which can be enforced in another jurisdiction. If the law of the foreign country which governs the matter does not provide for an enforceable liability, or to put it another way, for a remedy at all, no action will usually lie in the courts of the forum. On the other hand, if the law of the foreign country places a statutory limitation on the remedy as part of its substantive law, there will usually be no remedy available in the *lex fori* in respect of the matter beyond that which is available in the law of the *lex causae*. Thus, if an action is brought in England for damages for personal injuries in respect of an accident which occurred in a foreign country, as a rule no damages can be awarded in respect of a head of damage which is not available under the foreign law.[38] I accept that in order for this court to order specific performance of the Town Ground Agreement, which is subject to Chinese law, the contract must be enforceable under Chinese law, and it may be enforceable even if the remedy of specific performance is not

[34] Cf *Vasivapada Trading Company Limited v Attorney-General* [1999] SBCA 8.
[35] [2012] HKCFA 52
[36] [2012] HKFCI 1039.
[37] *Huber v Steiner* (1835) 2 Bing. (N.C.) 203 at 210; 132 ER 80 at 83 per Tindal CJ; *Don v Lippmann* (1837) 5 CL & Fin 1 at 13 per Lord Brougham (H of L); *Boys v Chaplin* [1971] AC 356 at 379 per Lord Hodson.
[38] *Cox v Ergo Versicherung AG* [2014] 2 All ER 926 but cf *Boys v Chaplin* [1971] AC 356 at 379, 389-392 where the result was different because both the plaintiff and the defendant were British servicemen temporarily in Malta.

available in China.[39] Thus, it would be sufficient if there exists a remedy available under Chinese law, as long as the remedy was not too different from the remedy available under Solomon Islands law. In *Phrantzes v Argeni*[40] Parker LCJ said:

> "It is true, of course, that a plaintiff seeking to enforce a foreign right here can demand only those remedies recognized by English law, and that the claim will not be defeated merely because those remedies are greater or less that those in the courts of the foreign country: c.f. Dicey's Conflict of Laws, 7th Ed. P. 1089, and *Baschet v London Illustrated Standard.* But the remedies available must harmonise with the right according to its nature and extent as fixed by the foreign law: c.f. Cheshire, Private International Law, 5th ed. (1957), pp 667 and 668. Put another way, if the machinery by way of remedies here is so different from that in Greece as to make the right sought to be enforced a different right, that right would not, in my judgment, be enforced in this country."

[100] *Phrantzes v Argeni* was referred to with approval by the United Kingdom Supreme Court in *Cox v Ergo Versicherung AG*[41] where Lord Sumption said:

> [19] There are certainly cases in which English law has no suitable remedy for breach of a foreign law duty. As Lord Parker CJ observed in *Phrantzes v Argeni* …. to be available in support of a foreign cause of action, the remedies afforded by English law 'must harmonise with the right according to its nature and extent as fixed by the foreign law'. But the ordinary consequence if it does not is that English law cannot give effect to the foreign cause of action at all, which is why Lord Parker declined in that case to order a father to provide the dowry to which his daughter was entitled under the law of Greece where the father was assumed to be domiciled.

[101] Counsel for the Claimants submitted that Chinese law recognises a remedy analogous to specific performance for breach of contract. According to the expert opinion of Professor Bing Ling:

> "Where a party breaches a contract, the other party is entitled under Chinese law to demand actual performance of the obligation that has not been performed. In this regard, the Contract Law provides for different rules on the remedy depending on the nature of the obligation in question …
>
> …if the obligation is other than the payment of money, Article 110 of the Contract Law prescribes three situations in which the remedy of specific performance is not available, stating,
>
> *Where a party fails to perform a non-monetary obligation or if his performance of the non-monetary obligation is not in conformity with the agreement, the other party may demand performance, except in one of the following situations:*
>
> *(1) Performance is impossible in law or fact;*
> *(2) The subject matter of the obligation is unsuitable for enforced performance or the cost of performance would be excessively high;*

[39] *Boys v Chaplin* [1971] AC 356 at 394.
[40] (1960) 2 QB 19 at 35-36.
[41] [2014] 2 All ER 926 at 937

(3) The creditor fails to demand performance within a reasonable time.

…The remedy of specific performance under Articles 108 and 109 of the Contract Law applies to all types of contract and I know of no exception for the contract to transfer corporate shares in Chinese Law.

[102] The claimants submit that, there being a similar remedy under Chinese law, the question of whether or not the remedy should be granted is a matter to be decided according to the law of the Solomon Islands. It is conceded that only Zhou is entitled to an order, as he is the only party to the contract. On their case, Zhou became entitled to seek an order once Austree had become incorporated and shares were issued to Guo's nominees on 17 December 2007. However, as explained above, I consider that any entitlement to seek specific performance arose, not on that date, but on the date Austree became incorporated, viz 10 October 2007 once reasonable notice had been given.

[103] In case I am wrong in my interpretation of the Town Ground Contract, and at least those provisions relating to the formation of Austree envisaged by clauses I and II of the contract were also required to be complied with before Zhou could demand that the shares in China United be transferred, I find that Zhou did not fully perform his end of the bargain. It is not entirely clear what clause I 1. means. What does "the company shall establish a shareholders' meeting" mean? Does this mean that the articles should provide for the calling of shareholders' meetings, or does it mean that there must be a meeting of shareholders? If the former, I note that the articles were required to comply with the law of China, and for the reasons given, this was not possible. If it means only that there be provision in some fashion for shareholders' meetings to be called when required, this was complied with because the Corporations Act 2001 provided for such meetings[42]. If it means only that there shall be a shareholder's meeting, the purpose of it is not evident to me. It may have been to approve the appointment of directors other than the original subscribers. I note that s. 201H (2) permits the directors of a company to appoint another person as a director, although the appointment must be confirmed within 2 months: s.201H (2). The directors were said to be Joyce, Liu, Harris and Dai. It is not clear how they were appointed. There is simply no evidence of a directors' meeting or shareholders' meeting regarding their appointment. For an appointment to be valid, a written consent to act as a director is required.[43] It could hardly be the case that Liu and Dai signed a consent form unless they signed one before Joyce and Harris left Honiara. Failure to comply with this requirement results in the company committing an offence, but that does not necessarily mean that the appointment is invalid. The documentation does not persuade me that anyone from Guo's side was ever validly appointed a director. Presumably what was envisaged is that someone from Guo's side would be appointed as the vice Chair of the Board: see clause I 3. This does not appear to have occurred either. That does not necessarily mean that specific performance will not be ordered: see paragraph [107] below.

[104] The only other relevant clauses would appear to be clauses II.2, 3 and 4. Clause II.2 relates to the "capital stock". I have already found that that requirement had been complied with. (see paragraph [40].) As to clauses II 3 and 4 relating to the shares to be allotted, I have also

[42] See ss.249C to 249G
[43] See s. 201 D

found that the actual number of shares to be allotted to Guo's interests was changed and the numbers of shares allotted complied with the contract as amended.

[105] Another matter raised by counsel for the defendants is that Article [45] of the Contract Law provides that "where either party unjustifiably hastens the fulfilment of the conditions, the conditions will be deemed as not fulfilled." It was submitted that as Zhou had not carried out the things required to be done by him under the Agreement, he was not entitled to give notice when he did. This is just another way of saying that the contract was subject to conditions precedent which were unfulfilled, and must be rejected for the reasons already given.

3. Is a valid notice to complete necessary?

[106] The next submission made by the defendants is that no notice was given, or that such notice as was given was ineffective. Counsel for the defendants submitted that whether any notice to complete given was effective depended upon Chinese Law. The only requirement under Chinese law is the requirement for reasonable notice. There is no requirement under Chinese Law for notice to be in any particular form. Although the notice to complete given was defective in that it mistakenly referred to 9,000 shares instead of 90,000 shares, Guo was well aware that Zhou wanted the 90% of the shares in China United transferred to him. The mistake was obvious and Guo was not deceived by it. Guo's position was then that he was not willing to transfer any of the shares either then or at all, as was clear from his solicitor's e-mail to Sol-Law. Prior to the notice, Guo had gone to considerable lengths to remove Austree as a shareholder from the records of the Companies Office and the Foreign Investment Division through the scheme planned and carried out by Kwaiga. Further, it was a position which he continued to adopt thereafter and still continues to adopt. To the extent that the requirements of notice under Chinese Law govern the matter, the requirements of Chinese Law have been met.

[107] To the extent that a notice to complete had to comply with the law of the Solomon Islands, it was put that the notice must be correct and accurate and tell the recipient exactly what is required of the recipient. Counsel for the Claimants in reply drew my attention to the decision of the Privy Council in *Hasham v Zenab*[44] which is authority for the proposition that equity will grant relief even if there is no breach or even an anticipatory breach of the contract in some cases. In *Turner v Bladin*[45] the High Court of Australia held that it was not a defence to a suit for specific performance that some part of the contract was not immediately performable, and that proceedings for specific performance of a contract could be commenced as soon as one party threatened to refuse to perform it or any part thereof, or actually refused to perform any promise for which the time for performance had arrived. In *Marks v Willey*[46] Vaisey J held that the equitable right to a decree had arrived even though time had not been made essential, and even though the party against whom the order was sought was not in breach.[47] Accordingly, I find that the alleged failure to give a proper notice is not a defence to the action if the Claimants are able to show a threatened or actual breach of the contract by Guo. Plainly, unless the claimants were in breach of the contract such as

[44] [1960] AC 316
[45] (1951) CLR 463
[46] [1959] 1 WLR 749
[47] See also *Gillespie v Wolseley Investments Pty Ltd* [2007] NSWSC 189 and *Wolseley Investments Pty Ltd v Gillespie* [2007] NSWCA 358.

to warrant Guo rescinding the contract, the fact Guo was doing everything he could to indicate that he was not going to transfer the shares to Austree, would be enough to warrant the intervention of equity and grant the remedy.

[108] Next it was put on the defendants' behalf that the action was statute barred. In this respect reliance was placed upon the law of China. Article 135 of the Contract Law provides for a two-year time limit. However, as Professor Bing Ling notes, Article 137 provides that the period of limitations of actions is calculated from the time that it was known, or should have been known, that a right was infringed upon. The evidence on this aspect of the matter is that Zhou was not aware that the shares in China United had not been transferred to Austree until October 2010. There is nothing in the evidence to suggest that he should have known about this at some earlier time. As explained in paragraph [88] that these proceedings were deemed to have commenced on the 7th of June 2012. Even if the time limits under the Law of China are substantive and not procedural, and that the law of China prevails over the law of the Solomon Islands in respect of what time limits apply, a matter which the Claimants dispute, the action to enforce the contract specifically is not statute barred.

4. Are damages an adequate remedy?

[109] It was not submitted on behalf of the defendants that damages were an adequate remedy in this case. It is well established that specific performance will not be ordered for the transfer of shares which are available on the stock exchange, because the purchaser can always buy more on the market.[48] But the position with shares in a propriety limited company is different because they are not readily available on the market.[49] Accordingly, I find that damages would not be an adequate remedy.

5. Are the claimants themselves in breach or not ready, willing and able to perform the contract?

[110] The matters relied upon to establish breaches of contract by Zhou are all referable to those provisions of the Town Ground Agreement which only came into force once the shares in China United were transferred to Austree. As that did not happen, and the contract remained executory, there were, strictly speaking, no breaches of it by Zhou. It was not put in so many words that the principles of anticipatory breach applied in the circumstances, but nevertheless I consider that I should decide whether those principles have any application in this case, and if so, whether Guo was entitled to rescind and did rescind the contract on that basis.

[111] Counsel for the Defendants drew my attention to Article 108 of the Contract Law which provides:

> If either party explicitly expresses or indicates by act its intention not to perform its obligations under the contract, the other party may, before the expiration of the period of fulfilment, demand that the party in question bear the liability for breach of contract.

[48] *Re Schwabacher* [1907] 98 LT 127 at 128 per Parker J.
[49] *Dunculft v Albrecht* (1841) 12 Sim. 189; 59 ER 1104; *Dougan v Ley [*1946] 52 Argus LR 183 at 186 per Dixon J (High Court of Australia).

[112] The rule, thus expressed, is relevant to future conduct, and suggests that the party concerned must by words or conduct indicate that that party will not perform its obligations in the future. What is not clear, is whether the obligations must be essential terms, or all of the terms, or whether it is enough if even the most minor breach of the future obligations is enough.

[113] In the absence of any clear evidence concerning the position of Chinese Law on this aspect of the problem, the matter must be resolved according to the law of the Solomon Islands.

[114] The starting point is that although the expression "anticipatory breach" is in common use, in truth, what we are speaking about is an implied promise by both parties not to repudiate his obligations without just cause, whether the time for performance has arrived or not.[50] In *Peter Turnbull & Co Pty Ltd v Mundus Trading Co. (A'Asia) Pty Ltd*[51] Dixon CJ and Kitto J indicated that a renunciation by one party of his obligations may be seen as a breach of an implied promise not to render further performance nugatory. In such circumstances, the injured party is entitled to rescind the contract even though the time for performance has not arrived.

[115] It is not every anticipated breach which will give to a right to rescind the contract. First, it must be shown that the other party will not perform it at the time of completion. This may be because the other party is not able to perform, or is unwilling to perform what is an essential term[52] or possibly that the breach was a fundamental breach in the sense explained by Lord Diplock in *Afovos Shipping Co. v Pagnan.*[53] In order for a party to rescind for breach of an essential or fundamental term, the party must first give notice, and secondly, show that he was ready willing and able to complete the essential obligations on his side of the bargain[54]. The defendants allege that they were entitled to terminate the contract, and in fact did so, because of Zhou's alleged breaches, and even though no notice was given.

[116] In a suit for specific performance, relief will not be granted unless the party seeking this remedy has pleaded and proved at trial his own readiness and willingness to perform the contract. If the claimant is in substantial breach of the contract, relief will be refused. However, it is not every breach which will deprive a party of a decree. Zhou does not have to prove that he has in the past literally and strictly complied with his obligations under the contract[55], or that he is ready and willing to do so in the future[56]. The question of whether the claimant is ready and willing to perform the contract is one of substance, not to be resolved in any technical or narrow sense. What is important is what is the substantial thing that for which the parties have contracted and what are the claimant's essential obligations.

[117] A number of matters relied upon by the defendants to show that Zhou was not ready willing and able to perform the contract have already been discussed to some extent, in a different context. If and when Parts I and II of the Town Ground Contract came into force, I agree with

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[50] *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd* (1938) 38 SR (NSW) 632 at 646 per Jordan CJ, citing *Frost v Knight (1872)* LR 7 Exch. 111 at 114; *Bradley v Newsum Sons & Co* [1919] AC 16, at 33, 53-54.
[51] (1954) 90 CLR 235 at 246-247; 250.
[52] *Foran v Wight* [1989] HCA 51 at para [18] per Mason CJ
[53] (1983) 1 WLR 195 at 203; (1983) 1 All ER 449 at 455.
[54] *Foran v Wight* [1989] HCA 51 at [17] per Brennan J.
[55] *Fuller's Theatres Ltd v Musgrove* (1923) 31 CLR 524
[56] *Mehmet v Benson* (1965) 113 CLR 295 per Barwick CJ at 307-308.

the submission of the defendants that what was envisaged was that Austree, and not China United, would take over the Town Ground Project, as the agreement provided that "the Company will take over the development project of China United…" It is not clear that this was not in fact done. The evidence shows that the materials purchased were consigned to China United. The staff employed, such as Jennifer Sifoni, Angela and Dai were employed by China United, or at any rate regarded themselves as so employed. The construction contract was entered into between China United and Urban Constructions under China United's duplicate seal. Nevertheless, Guo in paragraph 12 (16) of his Defence asserted that Blasting and Urban Constructions were the second Claimant's contractors and subcontractors, and further asserted in paragraph 12 (17) that Austree had "mismanaged" the project. There is also evidence that Liu and Joyce as well as others were employed by Austree and that their wages, as well as the wages of other senior workers, were paid for by Zhou. Finally, it is not pleaded by the defendants that Austree failed to take over the project, and nor was that asserted in final submissions by counsel for the defendants.

[118] One of the main complaints by the defendants is that Zhou did not make payments of the cash capital injections into Austree which he had promised to make. I shall put to one side the fact that until Austree became the owner of shares in China United, no such obligation had arisen, and assume, contrary to my findings, that such an obligation did arise, the question then arises, when did it become necessary? Clause II. 3 of the contract provides that Zhou will contribute RMB 10.05 million in cash "which can be made available step by step based on the actual progress of the construction of the project." Clause II.4 (3) provided for Zhou to lend Guo RMB 2.68 million in cash, also on a step by step basis. Consequently, Zhou was required to pay a total of RMB12.73 million in stages over the project. No particular times are otherwise provided for, and it could not be said that time was of the essence of the contract. RMB 12.73 million converts to roughly $SBD12.73 million. However, Guo had agreed to lend Zhou RMB 2.68 million under clause 2(1) of the Timber Agreement which would be used as Zhou's "capital stock" in that agreement. This did not alter Zhou's obligation to contribute/lend a total of RMB12.73 million.

[119] The evidence is, which I accept, that Zhou made, or cause to be made through either Austree or one of his companies in China the following cash payments to China United or to Guo or to a third party at Guo's request:

(a) SBD950,000 on 29 August 2008

(b) A$58,000 in January-March 2008.[57] China United's bank statement records these amounts as totalling $SBD 403,346.29.

(c) $SBD226,243.94 on 4 August 2008.

(d) SSBD221,182.21 on 22 August 2008.

(e) $SBD332,958.29 on 25 September 2008.

(f) SSBD338,911.89 on 13 October 2008.

(g) CNY300,000 to Guo via Fu Qing City Southern Hotel on 20 August 2007. (approximately SBD 330,000.)

[57] See Sworn Statement of Ling Yun Zhou (Joyce) paras 57-60 and exts. LYZ -16 to 18.

(h) CNY250,000 on 21 September 2007. (Approximately $SBD250,000).

(i) CNY150,000 on 9 November 2007 (approximately $SBD150,000).

(j) CNY100,000 on 30 April 2008 (approximately $SBD100,000)

(k) CNY200,000 on 6 May 2008 (approximately $SBD200,000).

(l) CNY250,000 on 28 May 2008 (approximately $SBD250,000)

(m) CNY300,000 on 28 August 2008 (approximately SSBD300,000)

(n) CNY200,000 on 26 October 2008 (approximately $SBD200,000).

(o) CNY200,000 on 15 November 2008 (approximately $SBD200,000).

The total of these cash payments, many of which were made at Guo's request to third parties total about $SBD4,442,642.62.

[120] In addition, a further amount of approximately $SBD7,500,000 was paid to China United between 27 October 2008 and 29 September 2010 by way of loans made to Zhou by a local businessman Jian Ming Zhou (Jimmy Zhou) who operated a business in Honiara called POMA. These loans were repaid by Zhou. These amounts were recorded by Angela in China United's records. The money was intended to be used to purchase building materials or equipment that were needed urgently and could not wait for a shipment from China. A reconciliation of the loans and repayments was made by Angela and Ivan on behalf of Zhou and a man called Ben and another man called Zhou on behalf of Jimmy Zhou in January 2011.

[121] In their Amended Defences, the first and second defendant have pleaded that as neither Zhou nor Jimmy Zhou was an authorized dealer in foreign exchange the transactions were somehow invalid as contravening Regulations 3(1)(a) and 3(2) of the Exchange Control (Foreign Exchange) Regulations 1977. No evidence was tendered in support of these contentions and no submissions were made to support them. These allegations are therefore not made out.

[124] The total cash injection into the project by Zhou is therefore in the order of almost $SBD12 million. ($SBD11,383,263.80 is claimed in the Sixth Amended Statement of Claim). Although this falls short of the $SBD12.73million in cash which Zhou was required to make in stages once the contract became unconditional, it cannot be said, assuming that there is no problem with the cash being made to China United and Guo rather than Austree, that Zhou had displayed either an inability or an unwillingness to complete his side of the bargain, bearing in mind that no time had been fixed for the performance of Zhou's cash injections.

[125] In as much as the cash was paid to China United or to Guo, rather than to Austree, the evidence is that both Guo never made any cash contributions to Austree, although he is recorded in the accounts kept by Angela as having made considerable cash contributions to China United. Counsel for the Claimants submitted that the Town Ground Agreement contemplated this, but in my opinion, the preferable construction to be given to the agreement is that the contributions were to be made to Austree. There is attraction in the defendant's submission that the original intention was that these payments would be the result of calls on the unpaid share capital. However, that never happened, as Guo well knew, as cash transactions were either paid for in cash provided from the POMA loans or out of

China United's cheque account, and no calls were ever made. I consider that the parties did not consider that it was important whether the cash was made through Austree or whether they were made through China United. The important thing was that the cash was provided one way or the other to enable the project to go ahead. Similarly, I do not think Guo regarded it as important that Zhou made contributions through his companies in China direct to entities in China, as he had done the same thing himself, and he was clearly aware of this when he fixed China United's seal to the document authorising the duplicate seal. He was well aware that this was happening and raised no complaint about it at the time. Whilst it may have been the original intention that from an accounting perspective, the money would be sent from China to Austree's account in Australia, and then sent back to China in payment of the goods and services obtained in China, it would have made more commercial sense to avoid the foreign exchange problems and expenses that this would have involved and make the payments direct. Admittedly, this might have made it more difficult to keep track of who was paying for what, but sufficient of the records of what was spent were kept by Angela and Jennifer Sifoni, so it was not impossible.

[125] In addition, Zhou, through his companies in China, made a number of other payments in relation to materials, the purchase of shipping containers, the payment of freight and insurance on the materials shipped, architect's design fees, building design fees, the payment of subcontractors' fees for items manufactured in China, CNY14,500,000 to Urban Construction and Blasting, the cost of air travel, and salaries for Angela, Mark, Ivan, an electrical supervisor called Mao Xiong Lin, a bricklayer supervisor called An Yun Huang, a painting and interior supervisor Su Bing Wen, a painting and interior specialist called Tong Di Han, and two other specialists Zhang Ping and Wu Jian Xin. These payments were not made directly to either Austree or China United, but were made to the various suppliers and individuals involved. Zhou's evidence, which is not contested, is that these payments were all made in connection with the project. The total paid in respect of these items is $SBD52,109,213.32. I accept the extensive evidence given by Zhou, Joyce, Jennifer Sifoni Xian Ze Tang, Jian Hua Tang and Angela that these payments were made. No submission was made to the contrary on behalf of the defendants, other than to complain of the ever-increasing amount claimed as the Statement of Claim went through several amendments, the suggestion being that the figures were not reliable. However, I think it is understandable in a claim of this nature that the figures will alter as more information comes to hand, especially as the book-keeping was not up to the best standard, much of the claim focused on obtaining and translating documents from China written in Chinese and recorded in CNY rather than $SBD[58].

[126] As I understand it, the contention was made by the claimants that this all went to show that Zhou was ready, willing and able to carry out his side of the bargain, notwithstanding that the monies were not expended in the most part by making cash payments through Austree. I accept this submission.

[127] Counsel for the Claimants submitted that there was an oral agreement made between Zhou and Guo prior to the signing of the Town Ground Agreement to the effect that capital contributions to the project could be made either in cash or in kind. At an earlier stage of the proceedings I ruled that most of the evidence contained in Zhou's statement in relation to

[58] According to Jennifer Sifoni, many of the records relating to the shipping documents which she had kept were removed from the office at about the time that Guo caused the records of Austree's shareholding to be altered in September 2010.

this alleged agreement was inadmissible because his statement merely made assertions. I did not then rule on the parole evidence rule. The sworn statement of Zhou was later amended to overcome these difficulties. The rules of evidence to be applied in this case are the laws of the Solomon Islands, which, to the extent that they are not governed by the Evidence Act 2009, are governed by the common law: see section 3. I find that the parole evidence rule applies, so that evidence of pre-contractual negotiations in this case cannot be received to contradict, add to or vary or qualify the terms of the written agreement.[59]

[128] Subsequently, I permitted the Claimants to amend their Statement of Claim to plead that the agreement was varied by conduct, and that the Defendants were estopped from denying the variation. Waiver was not pleaded and not relied upon. This amendment was allowed provisionally only, as it was subject to an objection that the amendments raised new causes of action which were statute barred. Be that as it may, I consider that the Claimant Zhou should be allowed to argue, as part of his case that he was ready willing and able to meet his obligations under the contract, as if the matters were pleaded in reply to the defences which raised that he was not ready and able etc. because he had not complied with conditions I and II of the Town Ground agreement which were conditions precedent, even if the alleged variations to the agreement are statute-barred. In fact, in the Claimants' Reply, these allegations are repeated by way of reply to the defences where these matters were raised for the first time in late 2016, i.e. that the Town Ground Agreement was subject to conditions precedent which included compliance with Conditions I and II, in particular, of the Town Ground Agreement. The other matter raised for the first time is that because Zhou had not complied with the agreement in this respect, Guo had treated this a repudiation of the agreement, and was no longer bound.

[129] Before dealing further with the alleged breaches, I think the true position is that both parties assumed that the shares in China United had been transferred to Austree until it was discovered by Leslie Kwaiga much later on that no such transfer had in fact taken place. During the period from the commencement of construction until September 2010, the project seems to have progressed through a number of ad hoc decisions which were made from time to time as circumstances dictated; for example, as to what materials were required and when, where they were to be resourced from and so on. The decision to put a fourth floor onto the building to provide accommodation is another example. There is no evidence as to how this came about. Up until mid-2010, the building works had been moving along, albeit more slowly than either Guo or Zhou might have wanted, and then, for some unexplained reason, work by Blasting and Urban Construction seems to have halted. There is no evidence as to why this occurred. It may have been another ad hoc decision by the parties that the project had by then progressed to the stage where their services were no longer required. At any rate, there is no evidence as to why this happened. So far as Zhou was concerned, his relationship with Guo was on good terms until he found out that the shares had not been transferred after all. Perhaps, as Mr. Johnstone surmised, that the tipping point was the formation of SolPlaza Limited in August 2010 to act as the marketing agent for China United. The shares in that company were held by Joyce and her husband. The Town Ground Agreement provided, in clause III.2 that Guo would be responsible for "preparing for the collection of shop rent in advance, to be used for the subsequent construction of the project." There is no evidence that SolPlaza Ltd in fact did anything prior

[59] *Bank of Australasia v Palmer* (1897) AC 540 at 545; *Goss v Lord Nugent* (1833) 5 B. & Ad. 58; [1824-34] All ER Rep 305

to the events in September 2010. In his sworn statements filed in matter 490 of 2010, Guo refers to the incorporation of SolPlaza as affecting his interests, but does not assert that it had begun to market the project or to collect any rents. Nor did he assert that he had rescinded the agreement because of Zhou's breaches of contract. His argument was that "Austree owes an obligation to prove the amount of monies it has invested in CUSIL [China United] or the Town Ground Project. This is the crux of the matter."

[130] It was conceded by counsel for the defendants that no notice was given to any of the Claimants that Guo was intending to rescind the agreement because of Zhou's alleged breaches. The argument that the contract had been rescinded had not, so far as I can tell on the evidence before me, been raised until many years later.

[131] The burden of establishing that Zhou was ready, willing and able to perform his part of the bargain in the future rests with Zhou, whilst the burden of proving that Zhou had breached an essential or fundamental term of the agreement such as to give rise to a right to rescind, and that Guo had in fact rescinded the contract, rests with Guo. I find that Guo has not proved his case, but that Zhou has proved his case.

The alleged variation by conduct

[132] In case I am wrong about this, I consider that I should make findings about the alleged further variation of the agreement relating to whether or not Zhou could make his contributions by the provision of materials etc, rather than cash. For the moment, I will leave to one side any question of limitation of actions.

[133] The claimants contend that under the law of China, a contract may be varied by conduct. This should be accepted. The evidence of Professor Bing Ling is that a contract may be varied by consensus, that it need not take any particular form and may be varied by writing, orally or by conduct, and whatever the form of the original contract, there is no need for consideration. Furthermore, the conduct of a party that is consistent with the alleged agreement to vary the contract is admissible in evidence to prove the alleged variation.[60] The law in China in this respect is not different from the common law.[61] As it was put by Alsop J as he was then, speaking for the Federal Court of Australia in *Branir*[62] :

> "Sometimes this failure [to record in writing] occurs because, having discussed the commercial essentials and having put in place necessary structural matters, the parties go about their commercial business on the clear basis or some manifested mutual assent, without ensuring the exhaustive completeness of documentation. In such circumstances, even in the absence of clear offer and acceptance, and even without being able (as one can here) to identify precisely when a contract arose, it can be stated with confidence that by a certain point the parties assented to a sufficiently clear regime which must, in the circumstances, have been intended to be binding, the court will recognise the existence of a contract. Sometimes this is said to be a process of inference or implication. For my part, I would see it as the inferring of the real intention expressed through, or to be found in, a body of conduct, including, sometimes, communications, even if it be the case that the parties did not consciously advert to, or discuss, some aspect of the relationship and

[60] See Professor Bing Ling's Report, paragraphs [44], 45], [46 and [47]
[61] See *Branir v Owston ((No.2) Pty Ltd (*2011) 117 FCR 424 at paragraphs [369] [407] and [408].
[62] Fn 60 at [369].

say: "and we hereby agree to be bound" in this or that respect. The essential question in such cases is whether the parties' conduct, including what was said and not said and including the evident commercial aims and expectations of the parties, reveals an understanding or agreement, or as sometimes expressed, a manifestation of mutual assent, which bespeaks an intention to be legally bound to the essential elements of the contract.

[134] As I have already found, both Zhou and Guo, to each other's knowledge, contributed capital to the project by meeting construction costs directly. Further, Guo knew both from experience and from the terms of the document relating to the use of a foreign seal, that Zhou would be acquiring construction equipment and materials through his companies. See also my comments in paragraph [125] above. The evidence in this case in only consistent with a consensus that the capital contributions could be made under the Town Ground Agreement either in cash or in kind, so long as the contributions were in relation, either directly or indirectly, to the Project's construction costs.

Is reliance on the alleged variation statute barred?

[135] In my ruling of 26 September 2016, I held that the action, in so far as it was based on the alleged variation, was not statute barred.[63] I adhere to what I then said and see no reason to change my opinion. There is no evidence that the statutory time limit of two years provided for by the Contract Law of China is part of China's substantive law. Counsel for the defendants relied upon the decision of the Court of Appeal of Western Australia in *Mercantile Mutual Insurance (Australia) Ltd v Neilson & Ors*[64]. However, that case is distinguishable. First, the action was an action in tort, not in contract. But more importantly, the Court found that the trial Judge had been wrong to reject the uncontradicted evidence of the Chinese Law expert that the limitation period in relation to torts under Chinese Law was substantive and not procedural. In this case, there is no such evidence.

[136] In any event, even if evidence had been led from Professor Bing Ling that time limits for bringing claims in contract were substantive, in my opinion whether the limitation provided by Article 135 of the General Principles of Civil Law is procedural or substantive is a matter to be determined as a matter of construction by this Court, notwithstanding what was said in the *Mercantile Mutual* case.[65] This is because the decision in *Phillips v Eyre*[66] on this aspect of the decision is binding on me[67] whereas in Australia, it has not been followed.[68] The question then is whether the law of China "touches only the remedy or procedure for enforcing the obligation, as in the case of an ordinary statute of limitations" or whether it "extinguishes the right".[69] Article 135 provides that "the limitation of action *regarding applications to a people's court for protection of civil rights shall be two years"* (emphasis

[63] See paragraphs [14]- [31]
[64] [2004] WASCA 60
[65] See Report of the Law Commission (Eng. and Wales) *Classification of Limitation In Private International Law (*1982) Law Com. No 114 at paras 2.3 and 2.4 The law in England was altered by statute: *Foreign Limitation Periods Act 1984.* English statutes passed after 1st January 1961 do not apply in the Solomon Islands: Constitution, s.76 (a) and Schedule 3 para 1.
[66] (1870) 6 LR QB 1 ; and see *Huber v Steiner* (1832) 132 ER 80; *Black-Clawson International Ltd v Papiewerke Waldhof Aschaffwenburg AG* [1975] AC 591 at 628,630 per Lord Wilberforce.
[67] *Cheung v Tanda* [1983] SBCA 1; [1984] SILR 108.
[68] *John Pfeffer Pty Ltd v Rogerson* (203) CLR 503.
[69] *Phillips v Eyre* [1870] 6 LR QB 1 at 29.

added*).* Article 137 of the General Principles of Civil Law permits a People's Court to extend time, and there is only an absolute bar after twenty years. Article 137 states that "*the people's court shall not protect* [the claimant's] *rights if 20 years have passed since the infringement."* (my emphasis). Accordingly, the two-year limitation provision only touches the remedy and has not barred the right. The wording of these articles clearly indicates that until 20 years have passed, the rights still exist but that they cannot be enforced in a people's court after 2 years unless the time is extended, and that time cannot be extended after 20 years. That being so, the two-year limitation is procedural and not substantive, and therefore does not apply.

Estoppel

[137] Alternatively, even if the claim, in so far as it is based on the alleged variation is statute-barred, the claimants submit that Guo is estopped from denying that contributions could be made in kind and directly to the project.

[138] In my ruling of 26 September 2016, I considered whether reliance on estoppel by the claimants would give rise to a cause of action, which might be statute barred. My ruling then was that estoppel does not give rise to a cause of action, but rather it is a principle of justice and equity. However, I have since reconsidered that question. It is my opinion now that an estoppel by convention can be pleaded as either a cause of action or as a defence. In so far as it is pleaded as a cause of action I found that reliance on estoppel was not the subject of a limitation period according to the law of the Solomon Islands. I have not changed my mind on that question. If the foundation of the cause of action is an equitable remedy, it is not caught by s.2 of the Limitation Act 1984 because it is not a legal remedy. However, if this is wrong, the relevant time period would have commenced to run 6 years after the cause of action accrued, which, in this case, would be in October 2010 when time for the claimant Zhou's claim for specific performance started to run. In that case, the action would not be statute barred. In any event, the claimant Zhou is entitled to plead it in answer to the defendants' defence and has done so in paragraph 29 of the reply to the second defendant's defence, and in paragraph 13 of the reply to the first defendant's defence.

[139] The facts which the claimants assert give rise to the estoppel are essentially the same as those which are relied upon to support the alleged variation of the contract. Counsel submitted that whether or not the conduct of Guo amounted to an estoppel was to be decided according to the law of the Solomon Islands, because the proper law of an estoppel is the legal system with which the relevant conduct has its closest and most real connection, citing *Furness Withy (Australia) Pty. Limited v Metal Distributors (UK) Limited*[70]. In this connection, it is strongly arguable that the conduct has its closest and most real connection to the Solomon Islands. The project was situated in Honiara, most, but not all, of the materials were purchased in China to be delivered and used in the construction of the project in Honiara, and the shares which are the subject of this suit are shares in a Solomon Islands company. On the other hand, the contract was made in China, written in Chinese, and was entered into between two Chinese citizens. So far as the share transfers are concerned, these were to be carried out in the Solomon Islands and would of necessity have to comply with Solomon Islands law. The relevant conduct was the provision of capital towards a venture being carried out in Honiara. Although the contract envisaged that the capital would be invested in Australian company not incorporated in the Solomon Islands as

[70] [1990] 1 Lloyd's Rep 236 at 247

a foreign company, for the reasons given previously, the fact that the capital was provided to China United rather than to Austree is not a matter of substance.

[140] The question was considered in some detail by the Hong Kong Court of Final Appeal in *First Laser Limited v Fujian Enterprises (Holdings) Company Limited and Jian An Investment Limited*[71] . Lord Collins of Mapesbury NPJ, with whom the other members of the Court agreed, concluded that whether an estoppel by convention is available "is a question of substance to be determined according to the law of the transaction to which it relates."[72] In that case, the relevant transactions were a contract made in Mainland China and subject to the laws of Mainland China and the ownership of shares in a company incorporated in Mainland China. Accordingly, it was held that, on the assumption that the substantive law of Mainland China has no equivalent of estoppel by convention, there was no basis for the application of Hong Kong law to either of the matters to which the estoppel was said to relate.[73]

[141] However, the position is otherwise if there is no evidence about whether estoppel by convention is recognized by Chinese Law. In that case, the rule is that the law of the foreign country is assumed to be the same as the law of the forum.[74] In this case, the evidence of Professor Bing Ling is pertinent:

> "Chinese law does not recognise the concept of estoppel as such. But a fundamental principle of Chinese contract law is that the exercise of rights and performance of duties must comply with the requirement of good faith. Where a party makes a statement of fact or intention which is not intended to be binding, the person may nevertheless be legally bound by the statement if good faith so requires (for instance, where the other party has reasonably relied on the statement to his or her detriment), and the party who makes the statement will be liable for the loss suffered by the other party."

[142] In *Republic of India and Another v India Steamship Co. Ltd*[75] Lord Steyn said:

> It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption. …a concluded agreement is not a requirement for estoppel by convention.

[142] In *Amalgamated Property Co. v Texas Bank*[76] Lord Denning MR said:

> When the parties to a transaction proceed on the basis of an underlying assumption- either of fact or law- whether due to misrepresentation or mistake makes no difference- on which they have conducted their dealings between them- neither of them will be allowed to go back on that assumption when it would be unfair or

[71] [2012] HKFCA 52 at paras [84] to [106].
[72] Fn 70 at [105]
[73] Fn 70 at [106].
[74] *Neilson Overseas Projects Corporation of Victoria Ltd* [2005] HCA 54; (2005) 223 CLR 331.
[75] [1998] AC 878 at 913
[76] [1982] 1 QB 84 at 122

unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

[143] As these authorities show, it will be unjust where the party seeking the estoppel would suffer detriment if the other party were permitted to depart from the assumed state of affairs.

[144] The statement of principle which Professor Bing Ling referred to and which I have quoted above is based on similar considerations. That the exercise of rights and the performance of duties must be exercised in good faith is not different in principle from equity's power to hold parties to assumptions they have made if to allow them to renege would be unjust or unfair.

[145] On the facts of this case I am satisfied that both parties assumed that 90% the shares in China United had been transferred to Austree, both parties assumed that capital contributions could be made in kind. If it were necessary to do so, I would find that it would be unjust and unfair, and not good faith, for Guo to depart from the assumptions upon which the had conducted their affairs and I would find that Guo is estopped from denying that Zhou had made or was ready willing and able to make, the contributions towards the project which he agreed to make.

Laches

[146] Lastly, the question of laches has been raised. Counsel for the defendants has relied on Article 110 of the Contract Law which they say requires the claim to be brought within a reasonable time. It was put that if the right to specific performance arose in December 2007, and was not pursued until 2012, "there is no way that this could be considered a reasonable period." In the circumstances of this case, when did time begin to run so as to require the claimants to bring action to enforce their rights? In the absence of any clear statement of Chinese law in this respect, I will assume that Chinese Law is no different from the law of Solomon Islands. It equity, laches is a defence to the remedy of specific performance. It may consist of delay with acquiescence, or delay with prejudice to others. In either case, the delay is counted from the time when the claimant becomes aware that his rights have been infringed. As Lord Blackburn said in *Erlanger v New Sombrero Phosphate Co*[77] :

> "… a court of equity requires that those who come to it to ask its active interposition to give them relief should use due diligence, after there has been such notice or knowledge as to make it inequitable to lie by."

Thus, the defendants will be entitled to resist the making of an order if they can show that, the claimants, by delaying the institution or prosecution of the case, has either (a) acquiesced in the defendants' conduct or (b) caused the defendants to alter their position in reliance upon the claimants' acceptance of the status quo, or otherwise permitted a situation to arise which it would be unjust to disturb.[78]

[147] On the facts of this case, the Claimants brought their action in less than 2 years after they had discovered that the shares had not been transferred. They did not acquiesce in the meantime. They made what efforts they thought were appropriate to remedy the situation. They clearly thought that if the steps which they took relating to the records of the Foreign

[77] (1878) 3 App Cas 1218 at 1279
[78] *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221.

Investment Division and Companies Haus were successful, they would achieve their object, and for a time, these records were changed in Austree's favour. They were wrong in thinking that changes to these records would alter anything either in law or equity, but it is apparent that Guo and his interests were labouring under the same mistake until the shares were eventually transferred back to the third, fourth and fifth defendants in 2011. There is no evidence that the defendants altered their position in reliance on the claimant's acceptance of the status quo. On the contrary, they altered their position in order to defeat the claimants' claims. There is no other reason why equity should not intervene.

Conclusion in relation to the action for specific performance

[148] Accordingly, the claimant Zhou is entitled to an order for specific performance in relation to the transfer of 90% of the shares in China United to Austree.

Rectification of China United's share register

[149] In support of the order for specific performance, the Claimants are seeking rectification of China United's share register pursuant to s.41 of the Companies Act 2009. Subsection 41(1) provides:

> "If the name of a person is wrongly entered in, or omitted from the share register of a company, the person aggrieved, or a shareholder, may apply to the Court for rectification of the share register, or compensation for loss sustained, or both."

[150] The defendants raised a number of objections to the making of such an order. First, they maintain that "the prayer for relief only addresses the share transfers undertaken when the Guo interests regained control of the company in 2011 following the Attorney-General's intervention. There is no mention of a right to relief vesting in the plaintiff (sic) under the *Companies Act.* It is not relief sought in the Claim. It is not the subject of the Second Defendant's Defence at any stage as it was not raised."

[151] The defendants maintain that this is not just a pleading point, but a matter of natural justice and procedural fairness: "The Claimants are asking the court for relief of which they had no notice until these final submissions were received."

[152] Mr. Matthews in his oral submissions pointed out that Rule 5.3 (c) of the Solomon Islands Courts (Civil Procedure) Rules 2008 also requires a party to identify any statute or principle of law on which the party relies in their statement of case, and that this had not been done.

[153] Mr. Matthews is correct that the statement of case does not deal with the rectification claim, although it is mentioned in the Prayer for Relief as paragraphs 1A and 1B, and therefore the 6th Amended Statement of Claim does not comply with Rule 5.3 (c).

[154] Mr. Johnstone for the claimants reminded the Court that it may, in the interest of justice, dispense with compliance, or full compliance with any of the rules at any time, and of the Court's inherent power to grant the relief that it considers is appropriate to the facts as pleaded and proved, provided that such relief is not inconsistent with the relief that has been explicitly claimed[79]. "There is certainly nothing which has been explicitly claimed which is inconsistent with the claim for rectification, and the only question arises is whether it

[79] *Cargill v Bower* (1878) 10 Ch D 502 at 508 per Fry LJ; *Rawson v Hobbs* (1961) 107 CLR 466 at 485 per Dixon CJ; *Belmont Finance Corp Ltd v Williams Furniture* [197] Ch 250 at 269-270 per Buckley LJ; *Refaat v Barry* [2015] VSCA 218 AT [109] per Warren CJ, Ashley and Tate JJA.

would be unfair to the defendants to permit the claimants to seek this remedy on the facts as proved.

[155} This leaves the question of any possible prejudice to the defendants. In their written submissions, the Defendants resist the claim on the same grounds as they have resisted the claim for specific performance. As they say, the success or otherwise of the claim rises or falls on their specific performance claim. In those circumstances, no prejudice to the defendants has arisen. It must be remembered that the orders sought are merely consequential relief.

[156] The statutory power to correct the share register can be brought by a proceeding in which only rectification is claimed and where there are no pleadings. There is authority that the statutory power may also be used as giving a discretionary remedy in addition to the remedies available in equity in support of a claim for specific performance where there are pleadings.[80] One of the advantages of the statutory remedy is that it cures the *locus standi* problem which applicants would otherwise face under the rule in *Foss v Harbottle.*[81] The main decision which stands in the way is the recent decision of the Privy Council in *Nilon Ltd v Royal Westminster Investments SA*[82] where their Lordships held, after a lengthy examination of the authorities, that proceedings for rectification can only be brought where the applicant has a right to registration by virtue of a valid transfer of legal title, and not merely a prescriptive right dependent on the conversion of an equitable title to a legal title by an order for the specific performance of a contract. Counsel for the claimants submitted that I should follow the decision of the Court of Appeal in *Re Hoicrest*[83]. That decision is not binding on me as is post-dates Independence Day.[84] The position in Australia, for example, where there is no barrier to bringing this type of application in an action for specific performance, is explicable on the basis that Australian courts are usually required by statute to give whatever remedy is required to avoid a multiplicity of proceedings. The High Court is governed only by the provisions of the Solomon Islands Constitution, there being no statute of which I am aware providing for matters of procedure, other than the Solomon Islands Courts (Civil Procedure) Rules which are also silent on that subject. In my opinion, in the absence of any such statutory power or rule, the reasoning of the Privy Council is to be preferred, particularly as there is at this stage no instrument executed by either Zhou or Guo to give legal effect to the transfer of the shares. The consequence is that the statutory remedy is not available in these proceedings. However, that does not mean that the Claimants are not entitled to other remedies in order to force a transfer of the shares. I will hear the parties as to what orders should be made in these circumstances.

Alternative claim for damages

[157] The alternative claim for damages need only be considered if the claim for specific performance fails. However, I will indicate what order I would have made if I am wrong about the entitlement to an order for specific performance.

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[80] *Whitehouse v Carlton Hotel Pty Ltd* (1983} Qd. R. 336 per Thomas J; *Re Hoicrest Ltd: Keen v Martin* [2000] 1 WLR 414; *Eichelbaum v Joint Action Funding Limited* [2015] NZHC 2163;

[81] (1843) 2 Ha. 461; 67 ER 189: see *Provident International Corporation v International Leasing Corporation* [1969] 1 NSWR 424 at 441-442 per Helsham J.

[82] [2015] UKPC 2; [2015] 3 All ER 372

[83] *Re Hoicrest Ltd: Keen v Martin* [2000] 1 WLR 414.

[84] *Cheung v Tanda* [1983] SILR 108.

[158] I am not in any doubt that on the findings that I have made, Zhou would be entitled to damages against Guo for breach of contract. The defendants say however, that the only damages which could be awarded is the difference between the market value of the shares on the day fixed for completion less the contract price, citing *Chitty on Contracts* (31st Edn.) para 26-170. The authorities cited in support of that proposition are all cases where the disappointed party could have gone back into the market and bought other shares as soon as the contract was broken. But that assumes that the shares agreed to be sold were available on the market, and it seems to me to be inapplicable to a situation where the shares are in an unlisted company, and part of the loss relates also to shares transferred or allotted to Guo or his interests in Austree. In cases where the company's shares are not listed, the general rule seems to be that the damages are to be assessed by reference to the actual value of the property. Either way, there is no evidence on which an award can be made on these principles, there being no evidence as to the actual value of the shares at the time of the breach.

[159] Another way that the defendants put their case is that on the facts the 90,000 shares were worth $1 each, but this overlooks the fact that the defendant Zhou and his interests are still in possession of the shares in Austree; and it also overlooks the obvious fact that as the building was almost complete, it [the sub-lease] could well have had a significant value if placed on the market which would have affected the share value. It also overlooks the obvious fact that in those circumstances Zhou would have recovered only a small fraction of the money he had spent on the Project.

[160] The claimants assert that the damages should be assessed on the basis of "reliance damages." At common law, the measure of damages is that sum which will place one in the same situation as if the contract had been performed.[85] The expression "reliance damages" or "wasted expenditure damages" is simply a manifestation of that principle.[86] Where a party is not able to demonstrate whether or to what extent the performance of a contract would have resulted in a profit, one can seek to recover expenses already incurred.[87] Such damages are called "reliance damages" or "damages for wasted expenditure."[88] In the present case, the only evidence is that so far as the latest profit and loss account records demonstrate, China United has only made a loss. The reasoning behind reliance damages is that the claimant would have recouped his expenditure if the contract had been fully performed.[89] If the claimant would not have recovered all of the expenditure, only such losses as would have been recovered are recoverable.[90] There is a presumption that the claimant would have recovered all of his expenditure if the contract had been fully performed. The burden of proving otherwise is on the defendant.[91]

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[85] *Robinson v Harman* [1843-1860] All E Rep 383 at 385.
[86] *The Commonwealth v Amann Aviation Pty Ltd* (199) 174 CLR 64.
[87] *Anglia Television Ltd v Reed* [1972] 1 QB 60.
[88] Ibid, fn 82.; *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377; *T.C. Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd* [1963] 37 ALJR 289.
[89] *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 84; 100; *Omak Maritime Ltd v Mamola Challenger Shipping Co* [2010] EWHC 2026 Comm at [42]- [44].
[90] *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 84.
[91] *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 84, 86, 89; *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] 1 Lloyd's Rep 526 at [188], [190]; *Grange v Quinn* [2013] EWCA Civ 24 at [100] [102]; *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377 at 414; *Omak Maritime Ltd v Mamola Challenger Shipping Co* {2010] EWHC 2026 at [47].

[161] The claimant Zhou has the onus of proving: (1) that the expenditure was incurred in reliance of or performance of the contract; (2) the expenditure cannot be recovered due to the breach of contract by Guo; and (3) that the expenditure had been in the contemplation of the parties within either of the two limbs of remoteness of damage in *Hadley v Baxendale.*[92]

[162] As to these elements, I find that each has been proved. Zhou would not have expended any money if he had thought that the shares had not been transferred to Austree. Altogether, Zhou expended $SBD63,492,477.18 in various ways which was spent in performance of the Project. In arriving at this finding, I have not overlooked that most of the money came from Zhou's companies, but I find that those monies were paid on his behalf. On the assumption that specific performance is not granted, he will have lost the entire amount of his outlays. The cause of that loss is Guo's failure to transfer the shares to Austree. Had that occurred, Zhou could have recovered his expenditure eventually out of the profits generated by future rental income, or possibly out of a sale of the sub-lease. The profits would have been generated by China United. As a shareholder, Austree could have expected to have earned dividends which would have flowed into those of its shareholders who held their shares on Zhou's behalf. Clearly the expenditure was in the contemplation of the parties at the time that they made the contract, and it was reasonably foreseeable that if the expenditure took place, but the shares were not legally transferred, the loss of the money expended would flow from the breach. The defendant Guo has not proved that Zhou would have eventually recovered all of his expenditure. In the result, I would have awarded Zhou damages against Guo in the sum of $SBD63,492,477.18.

The alternative claim for restitution

[163] Although I will grant the primary relief claimed, Appellate Courts have urged Judges at first instance to decide all issues in order to avoid the necessity of a retrial, and for that reason I will deal with the alternative claims. However, this claim is premised on the basis that not only has specific performance been refused, but that Zhou is not entitled to damages, or full damages for his loss, against Guo.

[164] The claim based on unjust enrichment principles is brought by the claimants against China United, which they claim has been unjustly enriched by the monies and benefits conferred by Zhou though his companies in the construction of the Town Ground Project.

[165] The defendants assert that such claims are not recognized as causes of action by the law of the Solomon Islands. As Deane J said in *Pavey & Matthews Pty Ltd v Paul*[93] the concept of unjust enrichment …"constitutes a unifying legal concept which explains why the law recognizes, in a variety of distinct categories of case, an obligation on the part of the defendant to make fair and just restitution of a benefit derived at the expense of the plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognize such an obligation in a new or developing category of case." The claimants assert that the relevant causes of action here, where money and non-pecuniary benefits have been transferred to another by mistake, are, respectively, money had and received, and *quantum valebant.*

[92] (1854) 9 Exch. 341; *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377 at 414; *The Commonwealth v Aviation Pty Ltd* v *Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 80.
[93] (1987) 162 CLR 221 at 256-257

[166] The first question is a choice of law one. Is the claim or claims to be determined according to the law of China, or the law of the Solomon Islands? Mr. Johnstone submitted that the proper law of the obligation to make restitution is the legal system with which the obligation has its closest and real connection. In cases where the obligation arises in connection with a contract which is unenforceable, the obligation will often be regarded as having its closest connection to the law of the contract. However, where the contract was void ab initio, the proper law of restitution requires a consideration of all of the facts and circumstances of the case because the proper law of the obligation is the law of the country where the critical events had their closest connection, even where the void contract had a choice of law clause.[94] The claimants argue, relying on *Dicey, Morris and Collins,* (14th Ed) para [34-014], that the country which had the closest connection is the Solomon Islands because that is where the unjust enrichment occurred.

[167] Counsel for the defendants submit that the place which has the closest connection is China, even though the contract was for the completion of the Town Ground Project. He points to the fact that most of the claim relates to the provision of materials paid for and sourced in China, and that the building work was performed to a large extent by a Chinese company under a contract entered into in China. Counsel also submitted that in the circumstances the fact that the contract was subject to the law of China cannot be overlooked, citing *Lumbers v W Cook Builders Pty Ltd (in Liq)* where Gleeson CJ said that "in considering the Builder's restitutionary claim, the contractual relations between Lumbers and Sons, and between Sons and Builders, cannot be put to one side as an inconvenient distraction" and further, that "it is always recognised that serious difficulties arise if the law seeks to expand the law of restitution to redistribute risks for which provision has been made under an applicable contract."[95] Of course, in the present case, there was no contract between Zhou and China United. Zhou's contract was with Guo. This does not necessarily mean that the contract between Zhou and Guo is irrelevant. In considering this aspect of the alternative claims, I am assuming that the contract between Guo and Zhou is not able to be enforced by Zhou because Guo validly terminated the contract. The facts in the *Lumbers* case were that the Lumbers brothers entered into a contract with W. Cook & Sons Pty Ltd (Sons) to build a house. Most of the work in building the house was not performed by Sons, but by W Cook Builders Pty Ltd, (Builders) a member of the same group as Sons, but with some different shareholders and directors. The house was completed. The contract between Lumbers and Sons was not reduced into writing. There was no assignment of the contract to Builders. Builders engaged the sub-contractors. Lumbers were unaware that Builders and not Sons was performing the work. They made progress payments to Sons. It was found as a fact that they would not have consented to an assignment to Builders and that they had good reasons for not wanting to do so. Builders went into liquidation and sued Lumbers and Sons for the moneys it had expended on the house, plus a 10% supervision charge. The claim against Sons did not go ahead, and at trial the only claim was against Lumbers. Its claim was based on unjust enrichment principles. The High Court held that the claim failed because the arrangements between the parties were governed by their contractual relations. Builders may still have had a claim against Sons and it is the contractual arrangements which allocated the risks between the parties. Furthermore, as Lumbers did not know that Builders were constructing the house, there was no acquiescence by them, and no mistake by

[94] *Baring Bros. & Co Ltd v Cunningham DC* [1997] C.L.C. 108; *Dexia Crediop S.p. Av Comune di Prato* [2016] EWHC 2824 at [164]- [165].
[95] (2008) 232 CLR 635 at [45] and [47].

Builders. In those circumstances, it is not surprising that the claim in restitution failed. As Gleeson CJ points out at [54], if the Lumbers had been enriched, it was at the expense of Sons, and if anyone has been enriched at the expense of Builders, it was Sons. Furthermore, as was pointed out in the joint judgment of Gummow, Hayne, Crennan and Kiefel, the work which Builders performed was not done at the request of Lumbers, but at the request of Sons. Their Honours said, that if the work had been done at Lumbers' request, whether the request was explicit or could be implied from the circumstances, Builders were entitled to recover.[96]

[168] Is the present case relevantly distinguishable from the facts in *Lumbers?* The first and most obvious point is that that case was not concerned with questions of private international law, as to what is the proper law of the restitutionary claims. The second point is that irrespective of the contract between Guo and Zhou, there was no contract between either or both of them and China United. China United, through its directors was aware that Guo and Zhou were between then responsible for the ProFject and one way or the other, investing funds in the project. To the extent that these were not loans to it, and no loan contract has been proved between it and Zhou, China United either impliedly requested the work to be done on its behalf, or at the least, acquiesced in it. In those circumstances, I think that the proper law of the claim is the law of the Solomon Islands because it was a Solomon Islands company which was enriched, the enrichment occurred in the Solomon Islands, and there were no contractual relations between it and Zhou.

[169] Claims made under restitutionary principles have been recognized by the courts of the Solomon Islands. In *Aerolift International Ltd v Mahoe Heli-Lift (SI) Ltd*[97] Palmer J (as he was then) considered a claim by the lessor of a helicopter against the hirer for the recovery of hire payments. The claim was made under a contract between the parties which was unenforceable for illegality. An alternative claim was made upon "quantum valebant/meruit principles." His Honour accepted that such a claim was possible, but rejected it because the contract was illegal, and to be consistent with the legislative policy of the relevant Act, the claim was rejected. On appeal, the Court of Appeal found that the contract was not illegal, and allowed the appeal. In those circumstances, the Court did not need to consider the claim based on restitutionary principles.[98]

[170] In *Vasivapada Trading Company Limited v Attorney General*[99] the Court of Appeal considered an action brought by a judgment debtor against a bailiff for the return of surplus monies held by the bailiff after the sale of a vessel owned by the judgment debtor. The claim was originally in negligence and breach of statutory duty. The court held that the Claimant had misconceived the form of action available to it, and held that the moneys were recoverable as moneys had and received.

[171] In *Quarter Enterprises Pty Limited v Alladyce and Others*[100] Mwanesalua J appears to have accepted the right of the claimant to recover money paid pursuant to orders of the High Court made for the benefit of the respondents in accordance with the terms of a bank

[96] Fn 94 above at [89] – [90].
[97] [2001] SBHC 139
[98] [2003] SBCA 16.
[99] [1999] SBCA 8
[100] [2011] SBHC 21 at

guarantee issued at the respondent's request in accordance with the principles of restitution and unjust enrichment.

[171] In any event, there are many decisions of the Court of Appeal in England and of the House of Lords which pre-date Independence Day where restitutionary claims have been accepted. [101]

[172] Modern English authority has established that when a claim for unjust enrichment is made, the court must ask itself four questions: whether the defendant has been enriched, whether that enrichment was at the claimant's expense, whether it was unjust and whether there are any defences available to the defendant.[102]

[173] Relevantly to this case, it was put that the defendant China United was enriched in two ways. First, by the receipt of money, which is generally accepted as incontrovertibly beneficial to the defendant.[103] Second, the defendant may be enriched by the receipt of a non-monetary benefit, such as the provision of goods and services.[104] In the latter case, the defendant may seek to argue that the value of the benefits is less than the benefit's objective market value, but not where the benefit is incontrovertible or where the defendant has either requested or freely accepted the benefit.[105] In any event, the subjective value is irrelevant in the absence of evidence that the goods or services were worth less to the defendant than their market value.[106] In this case, there is no such evidence lead by the defendant China United.

[174] On the facts of this case, there can be no doubt that China United was enriched.

[175] It is not essential that China United was enriched directly at the expense of the claimants. The court is required to look at the reality of the situation to see if there is a sufficient causal link or nexus between the loss to Zhou and the gain to China United.[107] The money was sourced in part from Zhou's own pocket, or in one case from his wife's account, and from Austree. The materials were sourced from Zhou's companies, primarily Chongqing Chong An, at his direction. Whether this meant that he borrowed the money from his companies or loans owing to him from them were repaid is not important. So far as Urban Constructions and Blasting are concerned, the monies claimed in payment for their work came from Chongqing Chong An. The reality of the situation is that the losses were indirectly suffered by Zhou. Guo was not only a director of China United but its Chairman, and he was its guiding mind. Guo well knew that Zhou was financing the Project through his companies and acquiesced in the arrangements. It follows that his knowledge and acquiescence can be brought home to China United. I do not think that it matters whether or not China United was also bound to pay Urban Constructions for its work. China United claims that it was not bound because Zhou had no authority to enter into the contracts with Urban Constructions. It says that the seal used by Zhou not in accordance with law. Even if that is so, it does not follow that Chongqing Chon An is released from its obligations under the so-called guarantee

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[101] See for example *Fibrosa Spolka Akcyjna v Fairbbairn Lawson Combe Barbour, Ltd* [1943] AC 32; *James v Thomas H. Kent & Co Ltd* [1951] 1 KB 551 at 556 per Denning LJ.; *Kirili Cotton Co Ltd v Dewani [*1960] AC 192 at 204-205 (Privy Council).

[102] See *Menelaou v Bank of Cyprus plc* [2016] AC 176 at 187 and cases cited.

[103] *BP Exploration Co (Libya) Ltd v Hub (No.2)* [1982] 1 All ER 925 at 937H per Robert Goff J.

[104] *Benedetti v Sawiris* [2014] AC 938.

[105] *Benedetti v Sawiris* fn 103, at [12]- [16] and [25] per Lord Clarke, with whom Lords Kerr and Wilson agreed.

[106] *Benedetti v Sawiris fn* 103.

[107] *Menelaou v Bank of Cyprus plc* [2016] AC 176 per Lord Clarke at [27]- [28]; [33]; per Lord Neuberger at [73].

to Urban Constructions. In any event, Chongqing Chong An later entered into another agreement to pay off what it in fact paid by instalments, which it did. These facts are very different from the situation which arose in the *Lumbers* case, where there was no request by Lumbers and no acquiescence. In the present case, it cannot be doubted that the payments made, whether in cash or kind, were made at the request of China United, through Guo. In the whole of the circumstances, the reality of the situation is that China United was enriched at Zhou's expense.

[176] As to whether the enrichment was unjust, the claimants submit that the claims are for money had and received and for work and materials supplied. Both kinds of case are well recognized categories of unjust enrichment cases: see paragraph [173] above. Moreover, the payments and materials were supplied by Zhou's mistake in thinking that the shares in China United had already been transferred to Austree. His evidence is that he would otherwise not have made the payments or arranged for any of the other benefits conferred on China United. There is nothing implausible about this, and I accept it. It is well established that a payment made by mistake, whether or fact or law, gives rise to a right of recovery in these circumstances.[108]

[177] This leaves the question of possible defences. The principle argument which I have not fully dealt with is the contention that the restitutionary claim cannot be made in a manner inconsistent with the relevant actors' contractual allocation of responsibility and risk. In this case, there is no contract between anyone other than between Zhou and Guo personally, and certainly no contract between Zhou and China United. On the assumption that Guo has rightly terminated the contract, does this prevent Zhou from making a claim on restitutionary principles? I accept that this claim would not succeed if Zhou and China United were in a direct contractual relationship: see *Lumbers.* It is often suggested that a claim in unjust enrichment is available only where the relevant contract is void, frustrated, or rescinded *ab initio* or where there has been a total failure of consideration, but that is not the only type of case where restitutionary principles have been called in aid.[109] There is also some authority which supports the notion that a claim can be made where the contract has been discharged for breach, although this is said by one commentator to be subject to "some lingering controversy."[110]

[178] Counsel for the claimants referred to *Roxburgh v Rothmans of Pall Mall Australia Ltd*[111] as an example of a case where, although there was a contract which had been fully performed, the contract did not allocate the risk. That may be so in that case, and it appears to have been the basis of the decision that there was no defence to the claim. In the present case, it was put that the contract between Zhou and Guo did not allocate the risk either. Certainly, there is nothing that I can see in the contract which specifically deals with that subject. I

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[108] *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349; [1998] 3 WLR 1095; *Nurdin & Peacock Plc v DB Ramsden & Co Ltd [*1999] 1 WLR 1249; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353,

[109] Lord Mansfield referred to other examples such as "for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express or implied); or extortion, or oppression; or undue advantage taken of the plaintiff's situation contrary to laws made for the protection of persons under those circumstances": *Moses v Macferlan* [1760] 97 ER 676 at *681*.

[110] Lord Goff and Jones *the Law of Restitution* 7th Ed, 58, 496; A.O'Brien, *The Relationship between the laws of Unjust Enrichment and Contract: Unpacking Lumbers v Cook* (2011) 32 (1) Adelaide Law Review 83, at 89 and see fn 44 in the article.

[111] (2001) 208 CLR 516

think that the important point here is that there was never any contract between China United and Zhou, and as the shares never passed, there was a total failure of consideration. However, the authorities also, when discussing this topic, observe that the remedy, to the extent that it relies upon monies had and received, or where there has been a failure of the consideration, lies only where there has been no fault by the claimant. It might be said in this case, that if Guo was entitled to rescind because of Zhou's breaches, Zhou ought not in conscience be able to recover from China United. This might be so if Guo had suffered a loss as a result of Zhou's breaches, but no loss has been proved and it is difficult to see what loss could have resulted by Zhou's failure to comply with the terms of the contract in the manner contended for by the defendants. Similarly, there is no evidence that China United had changed its position in such a way as to preclude relief to Zhou.

[179] The conclusion which I have reached is that upon the assumptions that I have made, Zhou would be entitled to recover the sum of $SBD63,492,447.18 from China United upon unjust enrichment principles.

Tracing

[180] Because I have decided that an order for rectification cannot be made in these proceedings, it is not strictly necessary that I decide whether Austree has standing to seek an order for rectification of the share register. However, in case this matter goes further, I will deal with the argument. It is put by the Claimants on the assumption that Harris and Chris were not trustees of their shares for Guo.

[181] First, although no alternative claim is made in the 6th Amended Statement of Claim based on tracing as such, the statement of claim pleads in paragraph 5AC that Guo has caused China United to issue shares in itself to the Third, Fourth and Fifth Defendants, and those defendants have accepted the shares with knowledge or constructive knowledge of the right of Austree to be a shareholder in China United. I do not think that the fact that the shares were not so much issued, as transferred, matters in this context. Subsequently it is pleaded in paragraph 13l that the transfers of the shares on 8 September 2011 to the 3rd, 4th and 5th defendants are void and that Zhou and Austree are entitled to rectification of the share register, consequent upon an order for specific performance being made. The only indication given as to why this might be so is what is pleaded in paragraph 5AC and in paragraph 13H, namely that the third, fourth and fifth defendants gave no consideration for the shares, the directors had no power to "re-allot" the shares, and no transfers of shares in the second defendant were validly executed or validly approved by China United. No particulars of paragraph 13H are provided.

[182] The question whether this claim is sufficiently raised by the pleadings I will deal with later.

[183] It was argued by the claimants that because the contract was specifically enforceable, this conferred on Austree a beneficial interest in the shares notwithstanding that Austree was not a party to the contract. No authority was cited for this proposition, the only cases to which I was referred were not cases where the property was contracted to be transferred to a third party. The argument would have validity if the action for specific performance could be brought by Austree.

[184] The claimants have not contended that under Solomon Islands law, an order for specific performance could be brought by Austree. There is no evidence that such an action would be enforceable under Chinese Law. On the contrary, their argument is that the contract is

only enforceable by Zhou, the only limited exception to the general rules as to privity of contract being a case where the beneficiary of a policy of insurance can sue, although not a party to the contract of insurance.[112]

[185] There are cases where the courts have got around the problem of privity of contract, by implying an express trust for the beneficiary of the contract[113], but this has not been pleaded.

[186] The conclusion that I have reached is that Austree is not entitled to seek an order for rectification in these proceedings.

Statute of Limitations Defences and the Provisional Amendments to the Pleadings

[187] I have already dealt with the question as to whether or not the claim for specific performance of the contract is statute barred. In this respect, the claim does not depend on whether or not the claimant's assertion that the contract was varied by conduct to enable performance by Zhou by providing goods and services in lieu of cash is made out, for the reasons I have already given, except in so far as they are relevant in answer to the defendant's defence that the contract was terminated by Guo, or that Zhou was not ready willing and able to perform his side of the bargain. I have also found that the alleged variation of the contract, in so far as it gives rise to a separate cause of action, is not statute barred.

[188] As I have dismissed the claim for rectification, the questions of whether it is statute barred or properly pleaded are not relevant. However, in case this matter goes further, I will indicate my views.

[189] The statutory procedure for rectification cannot be brought in these proceedings for the reasons which I have explained. To the extent that the statutory procedure might be a cause of action, it cannot arise until the court has ordered specific performance, and this has not yet occurred. At the moment, Zhou has only a prescriptive right which has not yet been converted into a legal right.[114] Therefore, time has not yet begun to run. Alternatively, if it did begin to run, it could not run until, at the earliest, Zhou became aware of his right to specific performance in October 2011. If the law of Solomon Islands does apply to this matter, and the action had been validly commenced in October 2017, it is not statute barred for the reasons previously given in relation to the claim based upon the 2nd variation to the contract.

[199] In relation to the alternative claim for damages, this claim is not statute barred for the same reasons as the claim for specific performance is not statute barred.

[200] In relation to the alternative claim for restitution, that action is not statute barred. First, such a claim arises upon payment by the claimant of the monies and or goods and services that gives rise to the obligation to make restitution.[115] As this occurred between April 2008 and December 2010, the claim would not be entirely statute barred, if the limitation period

[112] *Trident General Insurance Co Ltd v McNiece Bros Proprietary Limited* (1988) 165 CLR 107, at 121-124; 168-172.
[113] *Bahr v Nicolay (No 2)* (1988) 164 CLR 604; *Korda v Australian Executor Trustees (SA) Limited* [2015] HCA 6; (2015) 255 CLR 62
[114] *Nilon Ltd v Royal Westminster Investments SA* [2015] UKPC 2; [2015] 3 All ER 372.
[115] *Williams v Attorney-General* [2009] SBCA 5

was 6 years, although some of the claims would be, bearing in mind that the amended pleading was made in September 2016. However, s.32(2)(c) of the Limitation Act provides that where the claim is based on relief from the consequences of a mistake, the prescribed period does not commence to run until the claimant discovers the mistake. The relevant mistake was Zhou's belief that the shares had been transferred. Zhou did not discover the mistake until October 2010 when he was told by Angela that Guo had transferred the shares to himself and Harris. The amendments to the Statement of Claim which I provisionally allowed, which included the claim for restitution, were first made on 26 September 2016 which is less than 6 years after Zhou became aware of the mistake.

[201] The other claims which were permitted to be made provisionally have been abandoned and it is therefore not necessary to consider whether or not they are statute barred.

[202] So far as the pleadings are concerned, and their provisional nature, except for those matters raised for the first time in September 2016 which have been abandoned, namely the claims in paragraphs 1C, 2A. a and 3 of the prayer for relief and the paragraphs in the statement of claim which relate to those matters, the amendments sought will be allowed.

The Court's duty to assess the evidence.

[203] In this case, the defendants have not given any evidence, and the matter has proceeded without the defendants having cross-examined the Claimant's witnesses. That does not mean that I ought to accept everything that the Claimants or their witnesses depose to at face value. I am not required to accept evidence which is glaringly improbable or fanciful, or contrary to the primary documents in evidence, or even evidence that better advocacy might have raised an uplifted eyebrow. I have scrutinized the evidence as best I can with this in mind. As will be seen from these reasons, I have not relied on the rule in *Browne v Dunn* to draw adverse inferences from the absence of cross-examination of the Claimants' witnesses. Moreover, because of the limited opportunity that counsel for the defendants had to prepare his submissions, I have attempted to deal with matters which I think would have been, or ought to have been raised by the defendants in their closing submissions, but which were not. For example, no argument was put to me that Guo was entitled to terminate the contract because of Zhou's possible anticipatory breaches.

Conclusions

[204] There will be an order for specific performance of the contract for the sale of the shares to Austree, subject to the payment by Zhou of the sum of A$1.00, and subject to the provision to Guo of a proper transfer instrument relating to the shares and signed by Zhou. There will also be an order granting to the Claimants leave to amend the Statement of Case in accordance with the amendments in the 6th Amended Statement of Case filed 28 October 2016, save for the claims in paragraphs 1C, 2.a and 3 of the prayer for relief and the corresponding pleadings in the statement of claim. The order for rectification of the share register is refused. The plaintiffs are directed to file minutes of order in accordance with these reasons for settling.

[205] As no evidence was led to support the counter-claims of the first and second defendants, they are dismissed for want of prosecution.

[206] I will hear the parties as to costs.

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