IN THE SOLOMON ISLANDS COURT OF APPEAL

NATURE OF JURISDICTION:	Appeal from Judgment of The High Court of Solomon Islands (Commissioner Mildren)
COURT FILE NUMBER:	Civil Appeal Case No. 9023 of 2017 (On Appeal from High Court Civil Case No. 322 of 2012)
DATE OF HEARING:	7 August 2018
DATE OF JUDGMENT:	10 August 2018
THE COURT:	Goldsbrough P Hansen JA Young JA
PARTIES:	
APPELLANTS:	
First Appellant:	SHIYAO GUO
	CHINA UNITED (SI) CORPORATION LIMITED (Second Defendant) (not a party to the appeal)
Second Appellant:	KAY CHU
Third Appellant:	JUNBIN GUO
Fourth Appellant:	JUNZONG GUO
RESPONDENTS:	
First Respondent:	AUSTREE ENTERPRISES PTY LTD (CAN 127 935 004, AN Australian registered company)
Second Respondent:	ZONG WU ZHOU
Third Respondent:	LING YUN ZHOU
ADVOCATES:	
APPELLANT:	T. Mathews QC
RESPONDENT: Third Respondent:	C.A Johnstone M. Doyle

KEY WORDS:	Contract. Interpretation and variation. Proper Law and its application. Limitation periods. Electronic bundles and their contents. Counsel's responsibilities. Decision in Investor's Compensation Scheme Ltd v West Bromwich Building Society [1997] UKHC 28 applies in the Solomon Islands.
EXTEMPORE/RESERVED.	Reserved
ALLOWED/DISMISSED	Dismissed
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THE COURT:

Goldsbrough P

Hansen, JA

Young, JA

SHIYAO GUO

(First Appellant)

CHINA UNITED (SI) CORPORATION LIMITED

(Second Defendant) (not a party to the appeal)

RAY CHU

(Second Appellant)

JUNBIN GUO

(Third Appellant)

JUNZONG GUO

(Fourth Appellant)

–V–

AUSTREE ENTERPRISE PROPRIETARY LIMITED
(ACN127935004, an Australian Registered Company)

(First Respondent)

ZONG WU ZHOU

(Second Respondent)

LING YUN ZHOU

(Third Respondent)

ADVOCATES:

T Matthews QC and DD Keane for Appellant

C A Johnstone and M Doyle for Respondents

JUDGMENT OF THE COURT

1. This is an appeal against the decision of Commissioner Mildren, delivered on 3 July 2017. We will refer to the first appellant as Guo, and the second to fourth appellants as Guo's associates. We will refer to the first respondent as Austree, and the second respondent as Zhou. In truth, the second to fourth appellants and the third respondent are but bit players in this litigation. We will refer to China United SI Corporation Limited as CUSI. CUSI is not a party to this appeal.

2. In a somewhat scattergun approach, no fewer than 19 grounds of appeal have been relied on. Subsequently, upon inquiry from the Court, grounds 9(b) and (c) were abandoned. Given the content of those grounds and the circumstances surrounding this litigation, there was no possible basis for them to be advanced in any event.

Background

3. The factual and legal matrix of this dispute has been rehearsed in a number of interlocutory hearings both in the High Court and this Court, as well as at trial. Those matters are comprehensively set out in Commissioner Mildren's judgment and are well known to the parties. In the context of this appeal we are satisfied a brief outline will suffice.

4. The Solomon Islands Rugby Union Federation (SIRUF) wanted to establish an international-quality rugby field in the Solomon Islands. After negotiations with the Government they entered into a grant of a fixed term estate on 23 November 2005, which was registered on 30 January 2006. SIRUF then entered into a lease with CUSI for a term of 45 years commencing on 25 July 2006. The land contained in the grant is on Mendana Avenue just to the north of the Court complex. In simple terms, the lease required CUSI to develop an international rugby field with supporting infrastructure as well as commercial buildings at the Mendana Avenue end of the plot of land. The Commercial buildings now contain

restaurants, retail, apartments, an hotel and shops. The rugby ground has been completed and is operational.

5. Prior to the commencement of the project CUSI was owned by Guo and his interests. He controlled it. In the early stages of the project some shareholders came and went. They appear to have been no more than prospective funders. It is apparent that CUSI and Guo were unable to fund the development on their own. In his search for an investor, Guo approached Zhou in China. They were old school friends. Ultimately, Zhou agreed to become involved. In the course of negotiations, Guo had advised him CUSI had the lease of the ground and that he, Guo, held all the shares in that company. They agreed to form an Australian company, Austree, to hold all the shares in China United, of which Zhou interests would hold 67 per cent and Guo 33 per cent. On 30 August 2007, three contracts were signed in Chongqing People's Republic of China, finalising the terms. One dealt with development of the rugby stadium, known as the Town Ground project ('TGA'), another with a timber business, and the third with the Articles of Association of the Australian company to be formed. The timber agreement is of no relevance.

6. The terms of the agreements are fully set out and considered in Commissioner Mildred's decision. Again, we will not repeat them at great length here, but suffice to say we have taken them all into account, as well as the arguments put forward before Commissioner Mildren, and his judgment.

7. In relation to the TGA, it provided for the formation of an Australian company with a capital stock of RMB 15 million, with Zhou interests holding 67 per cent and Guo interests holding 33 per cent. Austree (not Zhou) was to purchase all the shares in CUSI for AUD $1. There was a later agreed oral variation of the original agreement that led to Austree holding 90% of the shares in CUSI with Guo to hold 10% with a consequential adjustment to the 67/33 shareholding in Austree so that the overall split of 67/33 investment in the project remained. This meant that Zhou held 74.44% of the shares in Austree and Gou 25.56%. But the obligation to purchase the 90 per cent of CUSI shares remained with Austree not Zhou.

8. Austree was formed. Attempts were made to carry out the legal niceties required in both Australia and Solomon Islands, to give effect to the agreement. In colloquial terms, what occurred in attempting this can only be described as "a shambles". This can be attributed to two main reasons: the parties not taking the proper professional advice at an early stage, and a language difficulty.

9. In fits and starts, the development of Town Ground proceeded. The parties did not stick to the strict letter of the agreement. Rather they made pragmatic, ad hoc decisions, and variations to the strict legal niceties so as to get the project moving forward. Significant sums of money, both in cash and kind, were invested in the project. Commissioner Mildren found that Zhou, both personally and through his China companies, invested somewhat over SBD $63 million. It is far from clear what Guo's contribution was but it was less than Zhou's.

10. The shares in CUSI were not transferred to Austree as required and later Guo and his associates took steps in Honiara to cut Zhou completely from the development. Up until that stage the parties seemed to have a good working relationship. Where relevant, the particular details of how the relationship unfolded will be considered when we deal with the grounds of appeal.

11. Taking a helicopter view of what occurred the clear intent of the parties was to form an Australian company to acquire all the shares of CUSI, later amended to the 90/10 split with the Austree shares adjusted so that the 67/33 split in overall ownership was preserved. Originally it may have been intended to use Austree to carry out the development but by agreement of Zhou and Guo CUSI and other entities associated with Zhou carried out the work. By agreement capital was provided in cash and kind which was not recorded as paying up the outstanding capital in Austree in a classical accounting sense. But again, clearly by agreement, it was recorded in the books of CUSI and by other means.

12. When Guo refused to transfer shares in CUSI to Austree, Zhou and Austree issued proceedings in the High Court seeking, amongst other relief, specific performance. Guo defended the proceedings on the grounds that conditions precedent to the TGA had not been met; that Zhou repudiated the contract; and in any event specific performance was not available. Commissioner Mildren ordered specific

performance requiring transfer of the CUSI shares to Austree. He also made alternative findings in the event he was wrong about specific performance. We do not need to deal with them here but will mention them later. It is from that decision Guo and the second, third and fourth appellants appeal.

General comments

13. This litigation has a long history of prolix pleadings, obfuscation and serial amendment. It also has a long history of interlocutory manoeuvring. It reflects very poorly on the legal profession. To be fair to the appellants the way the matter was initially pleaded by the respondents, including numerous amendments, left a lot to be desired. Despite the mountain of paper this case has produced at its essence it is relatively straight forward. It is simply a written contract that has been varied orally, in writing and by conduct. If this had been clearly pleaded at the start the proceeding it may not have descended into a Dickensian morass.

14. When the appeal was adjourned at the last session of the Court of Appeal the parties made an electronic record of the appeal. We appreciate this was done in great haste. However, in the future when material on the appeal is made available electronically it should be in a full, searchable format. The parties should also agree that only relevant material is included to avoid a great deal of extraneous material.

15. Events surrounding the trial can accurately be described as bizarre. Initially, a Commissioner had been arranged to hear the proceedings in February of 2016, but a last-minute application for extensive amendments to the claim was allowed. The matter could not proceed. At the last minute, in front of Commissioner Mildren, the appellants sought an adjournment apparently because there was no money to pay for counsel. This was refused by Commissioner Mildren and on appeal by a single Judge of this Court. (Later confirmed by the Full Court). At that stage counsel then appearing for the appellants were granted leave to withdraw. The appellants played no part in the trial, were not represented, did not adduce evidence or cross-examine and took no steps until the end of the trial when counsel now involved made closing submissions.

16. Commissioner Mildren leant over backwards to effect fairness to the appellants. At paragraph 203 he stated:

> 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.

17. This Court would not have allowed counsel to withdraw in such circumstances. Furthermore this Court considers, given how the appellants conducted this litigation and their behaviour at trial, that it would have been proper to strictly apply the rule in *Brown v Dunne.* In any event evidence adduced at trial in these circumstances can only be disregarded on appeal if it is so improbable as to be unbelievable or is contradicted by contemporary documents. We are satisfied that none of the evidence adduced at trial can be set aside on either of those grounds.

18. Guo and Zhou were well known to each other, having been friends from school days. It is clear that neither party, through the course of the Town Ground development, was particularly concerned with precise legal niceties. Rather, as one would expect from two friends, they got on in a pragmatic way with arranging the funding, the procurement of materials and equipment, and the construction of the commercial buildings. The same can be said to apply to their pre- and post-contractual discussions and informal variations to the contractual terms.

19. Up until mid-2010 the inference to be drawn from the evidence is that both Zhou and Guo assumed that the transfers had taken place. Without such an assumption it is impossible to believe that Zhou would invest large sums of money in a project to construct buildings owned by CUSI. One may ask rhetorically why would Zhou

invest SBD63 million plus if he did not have the majority and controlling interests in both Austree and CUSI that was always the common intention? Clearly a successful businessman like Zhou would not. Guo's actions and agreement to variations is also very much in keeping with an assumption that he also believed the share transfer to Austree had taken place.

The notice of contention

20. Before turning to the specific grounds of appeal raised, it is appropriate to first deal with the respondents' notice of contention. They say Commissioner Mildren erred in finding that the 'parole evidence rule' applied to render inadmissible evidence of pre-contractual negotiations in interpreting the TGA, and in failing to hold that agreement was properly interpreted as permitting the first and second respondents to make capital contributions directly to CUSI, be that in cash or kind to meet project expenses. This point is part of a three-pronged argument of the respondents as to the proper construction of the TGA.

21. The uncontradicted evidence of the expert in Chinese law, Professor Bing Ling, was that the law of China does not contain a rule similar to the parole evidence rule. He said evidence of pre-contractual conduct of the parties is admissible for the purposes of interpreting the contract unless the parties have agreed otherwise. There is no suggestion in this case that they have agreed otherwise by incorporating an entire agreement clause.

22. At paragraph [127] of his reasons, the Commissioner held the parole evidence rule as a matter of procedure rendered pre-contractual negotiations inadmissible in interpreting the TGA. But as the respondents point out, it has long been recognised that where a contract is governed by foreign law, it is to be interpreted according to the rules of construction of the foreign legal system, and this includes the facts that are admissible according to such rules (e.g. *Saint Pierre v South American Stores* 1937 3 All ER 349 (CA)).

23. We agree the Commissioner erred. The proper law for consideration of whether or not pre-contractual negotiations may be considered is the law of China. Clearly there is nothing in that law that prevents the admissibility of evidence of pre-

contractual negotiations or other pre-contractual conduct for the purposes of interpreting contracts.

24. For the sake of completeness we note that a number of common law jurisdictions also allow the use of the surrounding matrix of facts to be considered as an aid to interpretation. e.g.: *Investors Compensation Scheme v West Bromwich Building Society* [1997] UKHL 28. We heard submissions from both counsel as to the applicability of *Investors Compensation Scheme v West Bromwich Building Society* in the Solomon Islands given that the matter had not previously been determined by this Court. Although not strictly necessary in the context of this case we are satisfied that case should apply in the Solomon Islands thus aligning this jurisdiction with most of the common law world.

25. Zhou gave uncontested evidence that an express variation to the TGA provided that RMB10.05 million of his capital contribution "could be paid in cash or by way of purchase of materials, machinery, equipment, labour, transport of [sic] other services for the Town Ground project", and in respect of the RMB 2.68 million to be loaned by Zhou to Guo for the latter's capital contribution, it was also expressly agreed that Zhou "could make this loan by payment in cash or by way of purchase of: materials, machinery, equipment, labour, transport or other services for the Town Ground project." (Revised sworn statement of Zong Wu Zhou dated 16 March 2016). The Commissioner concluded this evidence breached the parole evidence rule.

26. We view this matter somewhat differently from the Commissioner. While our finding means that pre-contractual dealings can be taken into account in interpreting the contract, what the evidence of Zhou at para 24 establishes is something quite different from pre-contractual negotiations. It is an express and agreed variation of the terms of the contract allowing, among other things, Zhou's capital to be contributed in cash, goods, materials, machinery etc. and for that capital to go to CUSI or the project directly rather than through Austree. As there is no basis to challenge that uncontested evidence we accept it as proof of the agreed variation.

27. Indeed that is how the matter is pleaded at 5AB of the Amended Further Amended Claim (AFAC) that was alive at trial. There is a very specific pleading that the TGA had been varied partly in writing, partly orally and partly by conduct. Full particulars are given that were then established at trial by Zhou's evidence. For present purposes the variation allowed for contributions and loans to the project by both Zhou and Guo to be by cash or kind to CUSI or the project directly

28. Therefore, contributions by Zhou and Gou directly to CUSI or the project are consistent with this evidence and agreed variation. It is also inconsistent with the appellants' contention that TGA required capital contributions to be made only through Austree to fund the project and that this was to occur by incorporating the Australian company with an unpaid share value of RMB 15 million.

29. We also accept on the evidence that Guo was a party to the variation. That means he must have waived his rights for capital to only be introduced through Austree as he now seeks to contend.

30. We find on the uncontradicted evidence of Zhou the variation at 5AB of the pleading has been proved and is a complete answer to many of the appellants' contentions.

31. We now turn to the points of appeal, which we will deal with in the same order as they are found in the submissions of the respondents. We do this simply on the basis that we have found the respondents' submissions to be more structured, coherent and clearer than the appellants. However, in addressing the first arguments, which are said to address grounds 4, 5 and 8, we will turn first to grounds 5 and 8, which deal with the alleged conditions precedent in the TGA.

Conditions precedent

32. It is the appellants' argument that the terms of the TGA should be determined solely by the words used in the agreement. For reasons given we are satisfied there was an oral variation of the contract regarding payment through the provision of cash, materials and services which is essentially the complete answer to this argument. But we will consider the submissions of the appellants.

33. In the submissions from the appellant there is a repetition of their submission to Commissioner Mildren that no fewer than five conditions precedent are required to be satisfied. One of those, at 7 (c) of the written submissions, has a further seven subheadings.

34. It is argued by the appellants that the following conditions precedent needed to be met:

A. The Australian company contemplated by the TGA should be registered and established as a proprietary company in Australia;

B. The Australian company be registered with the name China United or Zhongliang;

C. That the registered capital and scope of business for the Australian company be in accordance with articles 1, 2 and 4 of the TGA, which require that:

i. The Australian company was to have an unpaid share capital equivalent to RMB 15 million;

ii. Shares in the Australian company be held by Zhou and Guo in respective proportions of two-thirds and one-third;

iii. The constitution of the Australian company was to include a board of directors;

iv. The appointment of the board and the identification of their particular function:

v. The establishment of a board of supervisors;

vi. The establishment of a financial management system;

vii. The establishment of a company accounts and cost accountant system.

D. The requirement for the capital of the Australian company to have RMB 15 million is expressly provided by Article II(2).

E. It was expressly provided by Article II(3) and II(4)(3) that the capital could be made available step-by-step based on the actual progress of the construction of the project.

35. Mr Matthews argued the proper construction of the contract required incorporation with share capital of RMB 15 million, and for those shares to be allotted upon registration of unpaid capital to the parties in the agreed proportions. He said this made commercial sense, because the call on capital would ensure the company was able to fund the construction. (This despite the fact that RMB 15

million was well short of both the estimated and actual cost of the project). Secondly, the incorporation in Australia ensured a closer connection to China than the Solomon Islands, avoiding issues arising from the Solomon Islands recognition of Taiwan. It thus avoided concerns about sovereign risk. It is said that the respondents never met these conditions, and, therefore, the first appellant was not obliged to take any steps to cause the shares in CUSI to be sold to Austree for A$1.

36. In fact the unpaid capital of Austree was 10,000 $AUD1 shares. The Commissioner mistakenly converted this AUD$10,000 to approximately RMB 15 million. Clearly that is mathematically incorrect but we are satisfied that this error has no relevance to the appeal.

37. The matter is dealt with in the decision of Commissioner Mildren at paragraphs [36] to [45] of his reasons. We agree with his analysis. He was right to find that the matters referred to in paragraphs I and II of the TGA would not come into effect until after the shares in CUSI were transferred. He also accepted the unchallenged evidence of Professor Bing Ling that Article IV, while void, could be severed from the contract. He has rightly rejected the appellants' submission that there was a long list of conditions precedent to be fulfilled. On our finding above there is uncontradicted evidence that the parties agreed that contributions of capital to Austree could be made by way of payments to CUSI or by contributions in cash and kind in the furtherance of the construction project. Zhou has contributed far more than any capital contribution he agreed to.

38. We will, however, undertake our own interpretation of the TGA on the strict wording of the agreement as invited to do by Mr Matthews. The TGA commences by stating Zhou and Guo agreed to invest in and to register and establish a "propriety limited company" in Australia. It says that after registration the company will purchase all the shares in CUSI for AUD$1. The company is then to take over the Town Ground project. Guo is to be responsible for all CUSI's debts before the "purchase". (As an interesting aside that could mean that Guo is still responsible for all debts CUSI may have which would include the money introduced by Zhou. This was not a matter explored at trial and we take it no further). Critically the agreement then continues: "When the purchase takes effect,

all the following documents will come into effect: firstly, this Agreement;.....". The reference to "purchase" in the agreement is clearly the purchase by Austree of all the shares in CUSI. This shows conclusively that Austree's purchase of all the CUSI shares (later amended to 90%) was the trigger required for the other terms of the TGA to come into effect. The Commissioner was correct in this finding. It is also the answer to the so called conditions precedent advanced by the appellants. Given the appellants' submission that the TGA should be interpreted simply on its own words it is ironic that the words of the agreement alone show what has been argued as conditions precedent are not.

39. Having insisted in front of us, and below, that the TGA must be interpreted strictly on its own words, Mr Matthews had a change of heart after the morning adjournment. He then submitted that we should not rely just on the words of the contract but also the surrounding facts in accordance with *Investors Compensation Scheme v West Bromwich Building Society*. Frankly this was no more than a late attempt to avoid the problems he faced by relying on the clear words of the TGA. But it does not assist the appellants as the only evidence surrounding the formation of the contract, and the variation, comes from Zhou which makes it clear that the so called conditions precedent did not come into effect until the transfer of the CUSI shares to Austree.

40. There is another point noted above. Austree was to purchase the CUSI shares not Zhou. As we have also noted previously we are satisfied on the evidence that the main protagonists proceeded on the assumption the shares had been transferred. But it appears at trial, and on appeal, the appellants argue that Zhou was not "ready, willing and able" to complete the purchase of the CUSI shares. (The Commissioner's decision and his orders show he was well aware the obligation fell to Austree. Whereas it seems to us the appellants seemed to view Zhou and Austree as interchangeable in this context). But it was not Zhou's but Austree's obligation to complete the purchase. In the circumstances that applied, from ad hoc decisions and variations to the agreement, no formal management structure of Austree was put in place. In those circumstances the obligation to complete the purchase fell equally on the two shareholders, Zhou and Guo. Guo was never going to fulfil this requirement on him. We deal with Zhou's position later.

41. To summarise there are three reasons why the appellants submissions on conditions precedent fail. Firstly, the clear words of the TGA are a complete answer to the submission. Secondly, Guo carried on with the contract as if the conditions had been met and, as the Commissioner found is estopped from denying the terms of the variation. Thirdly, as we have found above a number of variations to the TGA (such as the way capital of RMB 15 million was met) are also a complete answer as well.

42. It follows that appeals grounds relating to conditions precedent are dismissed.

Specific performance

43. The appellants submitted below and in this Court that the Commissioner should not have granted specific performance. This falls to be considered under a number of headings.

Repudiation

44. A number of matters that are alleged by the appellants to amount to repudiation were yet another rehearsal of the conditions precedent argument we have dealt with above. The appellants have failed on that submission, so equally they must fail in relying on the conditions precedent argument as amounting to repudiation.

45. There are some further brief points that can be made about this reliance. First, the appellants submit that Zhou was obliged by the TGA to satisfy all the conditions either upon the incorporation of the Australian company or within a reasonable time. For the reasons dealing with conditions precedent, the proper construction of the TGA means the Australian company did not need to be incorporated in compliance with the conditions as the respondents submit. On incorporation the other terms of the agreement did not take effect until the purchase of the CUSI shares had been completed.

46. At paragraph 47 of his reasons the Commissioner held the purchase by the Australian company of the shares in CUSI was a pre-condition of enforceability of the operative articles. He noted at the date of the judgment that the purchase had

not occurred. This conclusion is not appealed by the appellants. It also accords with our interpretation of the TGA.

47. Further, without more, even if one assumed that Guo's contention relating to conditions precedent was correct (contrary to our finding), that alone would not amount to repudiation.

48. The appellant makes the somewhat surprising submission that Zhou's fundamental obligation was to subscribe capital and in that he failed. Zhou expended over SBD$63 million on this project. We have already found this could be by way of cash or kind, so his fundamental obligation was clearly met. There appears to be no evidence that Guo met all of his obligations under the TGA.

49. A number of the repudiatory actions that are alleged by the appellants are contrary to the unchallenged findings of the Commissioner. It is submitted that Zhou was to use his own money and not use CUSI to borrow the money from elements of the PRC state-owned corporation." This is not expanded on, but along with the respondents, we assume it refers to the construction agreement between CUSI and Urban Construction, pursuant to which reimbursement of the first RMB 15 million of the construction expenses was deferred.

50. In his reasoning, the Commissioner made a specific finding that Guo authorised the execution of such agreement and, thereafter, acquiesced in its performance. (For the sake of completeness we also note that Guo was responsible for a duplicate seal of CUSI being made and the sent to China to be used in the execution of relevant contracts.) Clearly, if it did amount to a breach then, as the respondent submits, it was clearly waived. Secondly, Article III of the TGA specifically allowed for Zhou to use CUSI to raise additional funds once the initial RMB 15 million was exhausted. Thirdly, and fundamentally, CUSI did not borrow money from Urban Construction.

51. There are a number of submissions by Guo relating to Chongqing Chong An's (CQCA) guarantee of the construction agreement, CQCA's repayment of RMB 15 million, and the fact CQCA and other entities associated with Zhou were not bound as parties to the TGA. None of these entities were parties to the TGA and

we need not consider such matters further. We do not consider they have any relevance whatsoever to Zhou's alleged repudiation.

52. In the written outline of submissions the appellants list a number of acts that are said to amount to repudiation. They then identify evidence which is said to be only consistent with the appellants accepting Zhou's repudiation. There is little effort made in the outline to identify how these acts amount to repudiation. On any reading, some of these contentions are more consistent with Zhou attempting to give effect to the TGA than seeking to repudiate it.

53. As the respondent submits, the essential substantive argument raised by the appellants from these points is that Zhou sought to procure the transfer of CUSI shares in accordance with the TGA when all of the conditions had not been satisfied. We have concluded, however, that Zhou was entitled to call on the transfer of shares once Austree was incorporated. Any still operative conditions would then apply after transfer. We also repeat that both Zhou and Guo at this time believed the transfer of CUSI shares had taken place.

54. At paragraph 97, the Commissioner held correctly that Zhou was entitled to demand such transfer when Guo was unwilling to perform his obligations. By this stage the relationship had broken down. It was not just that Guo was unwilling to perform his obligations. Rather, he enthusiastically took active steps to defeat Zhou's contractual rights. He took advantage of the Solomon Islands legal requirement that all companies registered in the Solomon Islands had to be re-registered. He used this obligation to try and cut Zhou out of the project completely. Zhou's attempts to enforce his own contractual rights cannot, by any stretch of the imagination, amount to repudiation.

55. We are satisfied that Zhou did not repudiate the contract and this ground is dismissed.

The order for specific performance

56. This is a matter covered by grounds 1, 2, 3(a), 3(b) and 5(iii) C of the Notice of Appeal.

57. The appellants advance three reasons challenging the order for specific performance. The first is that Zhou was not entitled to specific performance because he had not "tendered a valid transfer or the consideration for performance; and was not ready willing and able to perform the TGA". Secondly, that the respondents only pleaded an entitlement to specific performance arising from a valid notice to complete; the notice to complete was ineffective because it was in objectionable form; it was not issued within a reasonable time; and that Chinese law required the issue of a notice to complete to compel performance. Thirdly, it is asserted the Commissioner failed to give reasons why damages were not an adequate remedy.

58. Some of these submissions were not specified in the notice of appeal, but notwithstanding this we will consider them.

59. As to the first, the appellants submit that the respondent's case was always pleaded on the basis that entitlement to specific performance only arose from the alleged failure to complete following a notice to complete. The appellants say that there is no pleading that the respondents were entitled to specific performance due to the first appellant otherwise repudiating the TGA. The claim for specific performance is clear from para 1 of the final claimants' pleading and the particulars in that pleading. It is not limited in the way the appellants contend.

60. The problem with their submission is that the TGA does not impose any obligation on Zhou to tender such instrument of transfer. It is not a pre-condition to an entitlement for specific performance. What the TGA provided is that, following incorporation, Austree was to purchase all those shares held by Guo for AUD$1. We can only assume that at the heart of this submission from the appellant is that Zhou/Austree had not tendered payment of AUD$1, and until they did there was no enforceable obligation to transfer the shares.

61. Generally parties to a contract of sale are assumed to have intended objectively concurrent performance of their obligations. At paragraph [107] of the reasons the Commissioner found the parties contemplated concurrent performance of the TGA There is no appeal from that conclusion.

62. He went on to say in that paragraph:

> 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.

63. He relied on established authority such as *Hasham v Zenab* [1960] AC 316; *Turner v Bladin* (1951) 82 CLR 463; and *Marks v Willey* [1959] 1 WLR 749.

64. The Commissioner continued:

> Plainly, unless the claimants were in breach of the contract such as to warrant Guo rescinding the contract, the fact Guo was doing everything he could to indicate he was not going to transfer the shares to Austree, would be enough to warrant the intervention of equity and grant the remedy.

65. We have already commented on Guo's enthusiasm for a course of action that was designed to defeat Zhou of his contractual rights. It follows, given the concurrent performance as found by the Commissioner, that the fact that Zhou or Austree had not tendered the AUD$1 is no bar to entitlement for specific performance.

Ready, willing and able

66. *Australian Hardwoods Proprietary Limited v Commissioner of Railways* [1961] 1 All ER 737, 742, states the well-established principle that a party seeking specific performance must be "ready, willing and able" to perform any future and continuing acts that are part of the consideration for the undertaking sought to be enforced.

67. In their submissions, the appellants claim that Zhou was not "ready, willing and able" to perform the TGA. That despite that all that was required in the present was that Zhou was willing, ready and able to cause Austree to pay AUD$1. We repeat this submission continues to overlook it was Austree that was to purchase the shares and in the circumstances pertaining at the relevant time it was the equal responsibility for both shareholders to ensure this happened.

68. In any event, the assertions in the outline expanded on in oral submissions, flow from the contention of the appellant that the conditions precedent have not been performed. That submission has failed.

69. If the submission is that Zhou was not willing and able to perform the conditions in Articles I and II of the TGA, it is incorrect. The time for that performance had not then arisen, as it was only enforceable following the completion of the purchase of the CUSI shares by Austree.

70. We find it ridiculous to suggest that a person who had invested over SBD$63 million in a project would not be "ready, willing and able" to pay AUD$1 to obtain his legal rights and benefits. It is quite clear on the evidence, and was found by the Commissioner, that the respondent, Zhou, was ready, willing and able to perform.

The pleading point

71. The appellants claim that the respondents' pleading only entitles them to specific performance arising from a valid notice to complete. They say there is no such notice. The Commissioner's conclusion against this submission has not been appealed. However, the appeal point now raised is without merit.

72. Paragraph 1 of the live pleading at trial contains no pleading that specific performance arises only from notice to complete. There can be no doubt from the pleading that specific performance was the major relief sought. We are quite satisfied the final version of the statement of claim properly allows for the relief granted by the Commissioner.

Notice to complete

73. As the respondent submits, it is strictly unnecessary to address this, as it was not an essential element of the Commissioner's reasoning.

74. In part, the appellants' argument is that the report of Professor Bing Ling, the expert in Chinese law, was based on an incomplete sampling of Chinese law caused by the question he was asked. They submit as a result the Commissioner had an incomplete view of the correct position in Chinese law. The appellants then purport to refer to Article 45 to support their view that Chinese law required a notice to complete to issue. This is against the background where, in the absence

of evidence as to Chinese law, the Commissioner applied the law of the Solomon Islands.

75. It is far too late to raise such matters in this appeal. The proper course was to attend the hearing and cross-examine Professor Bing Ling on these matters. It was the choice of the appellants not to adopt that course. Based on the evidence in front of him, we are quite satisfied that the conclusion reached by the Commissioner in relation to the notice to complete was correct. The authorities he cited clearly support the view he took that the matter was to be governed by the law of the Solomon Islands.

76. The major complaint here seems to be that the notice to complete was defective in that it sought the transfer by Guo to Austree of only 9000 CUSI shares, (which was only 9 per cent of the issued share capital), rather than the 90 per cent contemplated by the TGA. Indeed Mr Matthews submitted a letter from Mr McGuire of 23 August 2011 and the attached Notice to Complete by referring to 9000 shares was attempt by Zhou to obtain 99% of CUSI shares. This was on the basis that Austree were already registered owners of 90% of the CUSI shares. Mr Johnstone referred us to other documents to submit that although the reference to 9000 shares was incorrect all parties understood Zhou was seeking was the transfer of 90% of the CUSI shares. This Court commented in the course of the argument that it seemed Mr Matthews submission was misleading. It is appropriate, therefore, to review the documents more fully.

77. This review only requires a brief reference to some documents in Volume 12 of the Appeal Book. The first is at p 5068 (all page references are to the electronic record). It is a record of a meeting of the Directors of CUSI that occurred at Town Ground at 9.10 am on 19 August 2011. It was attended by Guo and Ray Chu. There the directors resolved to withdraw applications for proposed amendments to the directors and shareholders. Next it was resolved that CUSI revert to the original directors, Guo and Chu. It was further resolved that the shareholders also revert to the original shareholding with Guo holding 70,000 shares and Chu 30,000.

78. In chronological order the next document is a letter from Mr Radclyffe of 19 August 2011 the solicitor of SIRFU. It is addressed to the Managing Director of CUSI and copied to Mr Suri the solicitor for CUSI. It makes complaints of serious delay occasioned by a shareholders dispute and sets a timeline for various steps to be taken.

79. At p 5071 (are the minutes of a shareholders meeting of CUSI. It commenced 30 minutes after the conclusion of the directors meeting and was attended by Guo and Chu. They resolved that the company reverted to the original officeholders and shareholders as set out in the Director's resolutions. It matters not that both the directors and shareholders resolutions were said to be on the advice of the Attorney General.

80. Page 5072 is an email from Mr Suri to Mr Kingmele, of Sol Law, referring to Mr Radclyffe's letter. It is dated 20 August. On the same day Mr Kingmele responds saying he was forwarding the matter on to Mr McGuire who acted in the matter.

81. Next are a series of Company Office documents dated 22 August 2011 that state the shareholders of CUSI are Austree 90,000 shares and Guo 10,000. Given the actions of Guo and Chu the documents are wrong. While the lawyers may not have been aware of that at the time by the date of trial, and before us, all parties were well aware that Guo and Chu had removed Austree from the share register. Then starting at p5079 we have Mr McGuire's response and the Notice to Complete dated 23 August 2011.

82. We note that the solicitor acting for the appellants, Mr Suri, did not raise any issue in relation to this clear error. All parties, particularly Guo, were aware that the Austree entitlement was 90 per cent of the issued shares in CUSI. The references in the Notice to Complete and the covering letter refer to the original agreement and the subsequent variation to the 90/10 split. On the plain wording of Mr McGuire's letter nobody could have been in any doubt as to what was being sought and to submit otherwise is risible. But placed in the context of the documentation we have set out above, which was known to counsel by trial, any such submission was a misrepresentation of the position and should not have been made.

83. It was an inevitable finding of the Commissioner that the notice could only have been understood by Guo as a demand to perform the TGA by transferring the 90 per cent of the issued shares of CUSI that the TGA required. We reject this ground of appeal.

Timing of demand

84. There is no argument that Chinese law applied to the timing of the demand to complete. Chinese law requires any demand to be made within a reasonable time. However, Professor Bing Ling did not give evidence as to the relevant considerations in determining what a "reasonable" time is. Again, in those circumstances the Commissioner rightly found that the matter of what time was reasonable fell to be determined in accordance with the law of the Solomon Islands. He particularly considered whether there was any basis in the allegation of the appellants that in seeking specific performance, the respondents were guilty of delay and the principle of laches applied.

85. The Commissioner said it was relevant to consider when Zhou acquired knowledge of the breach giving rise to the claim and the steps he then took. He found, and there can be no challenge to this, that Zhou did not learn the CUSI shares had not been transferred to Austree until about October 2010. Notice to complete was not issued until August 2011, some ten months later. It is clear on the evidence accepted by the Commissioner and not challenged on appeal that Zhou had not delayed or acquiesced in the intervening period. Rather Zhou took steps to try and resolve the matter. We are more than satisfied the notice to complete was issued within a reasonable time.

Chinese law

86. There seems to be a submission by the appellants that the entitlement to specific performance must be available as a matter of Chinese law. This whole issue was addressed extensively by the Commissioner in paragraphs 99 to 105 of his reasons, and there is no appeal from these conclusions. In any event we concur in the Commissioner's reasons.

Adequacy of damages

87. In grounds 3(a) and (b) of the notice of appeal, it is said the Commissioner erred in stating the appellants did not submit damages would be an adequate remedy, and as a consequence failed to give reasons as to why damages would not be an adequate remedy.

88. The appellants do not contend in the appeal that the Commissioner erred in finding that damages were an inadequate remedy, or that he should have found damages were an adequate remedy. That in itself is a sufficient answer to these appeal points.

89. Whether or not the appellants argued the point below the Commissioner gave reasons as to why damages were inadequate at paragraph 109.

90. The basis of the appellants' submission is that, in the absence of evidence as to the value of the CUSI shares, they should be assessed value of $1 per share. This meant the appellants said that Zhou's loss was $90,000 being 90,000 shares at $1 each.

91. This conflates two issues, as the respondent submits. One is the correct measure of damages flowing from breach of contract, and the other the discretionary consideration as to whether an award of damages, properly assessed, could be considered an adequate remedy in the circumstances. The appellants' submissions are limited to saying the correct measure for Guo's breach is the face value of the shares.

92. Whatever the face value of the CUSI shares may be, it is far less than the value of the project. We have no evidence of the current value of the completed commercial buildings, but we do know that Zhou alone invested SBD $63.5 million in the project. So the face value of the shares would be but a fraction of the amount invested by Zhou and the completed value of the project and, therefore, any proper measure of loss to Zhou. And so the $1 value of a share would not reflect an adequate damages remedy.

93. The Commissioner correctly referred to *Re Schwabacher* (1907) 98 LT 127 as authority for his finding that the valuation of shares in a proprietary limited company is different because they are not readily available on the market. This submission also seems to fail to understand that it was Austree that was to receive the CUSI shares under the TGA, so the measure of Zhou's loss cannot be the value of those shares alone.

94. In all the circumstances of this case, we are satisfied that the Commissioner correctly exercised his discretion in determining that damages were not an adequate remedy. It follows, in our view, that the Commissioner was correct to order specific performance, and we uphold his decision in that regard.

Grounds 9(a), 15 and 16 supplementary report amendments and limitations

95. The appellants, in closing before the Commissioner, sought to obtain an additional report from Professor Bing Ling, advising he would be available to cross-examine on this via telephone. The additional evidence sought from Professor Bing Ling went to an argument relating to limitation. Encompassed in this is an argument that the amendments to the sixth amended ASOC should not have been made unconditional by the Commissioner. The appellants submit that in the Solomon Islands the decision of *Weldon v Neal* (1887) 19 QBD 394 applies, and the effect of the case is that amendments to include causes of action after the expiration of the limitation period should be refused. So it is submitted the Commissioner should have determined the correct limitation period including the proper law, and when the cause of action accrued by reference to Chinese law. By refusing the application to file the supplementary report, the Court denied itself proper material.

96. In oral submissions it was suggested the Commissioner may have benefitted from the Professor's view of whether Article 135 was procedural or substantive. In response to questions from the Court Mr Matthews conceded that the determination of whether Article 135 was procedural or substantive was to be

decided by the trial Court. This is what the Commissioner held at para [136] and we agree with his findings.

97. Clearly, the Law of The People's Republic of China was the proper law. Article 135 referred to in the passage of the Commissioner at para 87 above imposes a two year limitation period. But as Article 137 makes clear the People's Court may extend that period up to 20 years which is when the right is finally barred. The Commissioner found correctly that the 2 year limitation period was procedural and did not apply.

98. That means the limitation period is governed by Solomon Islands law. The pleading complained of was filed on 29 September 2016 just within the limitation period that the Commissioner found ran from October 2010. It follows the decision of the Commissioner to make the pleading unconditional did not offend the principle in *Weldon v Neal.* Indeed, Mr Matthews conceded that the pleading was within time under the law of this jurisdiction.

99. Furthermore, this point of appeal is against the discretionary decision of the Commissioner. It is against the background that the decision was made by the appellants not to participate in the hearing and the trial. To attempt to raise such matters in closing was simply far too late. No notice or consent had been given for Professor Ling Bing to attend by telephone as required by the Evidence Act and the Rules of Court. The respondent's case had been closed and it was accepted the Professor could not attend in person.

100. The appellants made a deliberate choice not to participate in the hearing, or to cross-examine. If they had not made that choice, they would have had ample opportunity to explore this with Professor Bing Ling at trial. This make weight application was rightly rejected by the Commissioner in the exercise of his discretion.

101. As well, the respondent properly points out that the appellants did not appeal the Commissioner's conclusions at paragraph [136] that Article 135 "touches the remedy"; that Zhou was not aware that the shares in CUSI had not been transferred until October 2010 (paragraph [108]); and the relevant causes of action

were not statute-barred as a matter of the law of the Solomon Islands (paragraph [187]).

102. Further the appellants do not take issue with the Commissioner's finding at paragraph [128] that he would, in the circumstances, in the exercise of his discretion have permitted the amendments to be made out of time.

103. These grounds of appeal are also dismissed.

Trust of shares

104. The Commissioner held that Guo's associates held their shares on trust for the first appellant. The appellants contend there was no evidence before the Commissioner that allowed him to say there was "not a scintilla" of evidence that anything had been paid by those appellants for their shares. It was submitted that prima facie the share transfer forms was evidence of the sum paid for the shares and there was no evidence to suggest they were not an accurate record.

105. This is an appeal against a factual finding of the Commissioner. The respondent cites from *Robertson Helicopter Company v McDermott* [2016] HCA 22 where the High Court held:

> ... a court of appeal should not interfere with a judge's findings of fact unless they are demonstrated to be wrong by "incontrovertible facts or uncontested testimony", or they are "glaringly improbable" or "contrary to compelling inferences".

106. The bases for the inference drawn by the Commissioner we consider to be compelling. At paragraphs [90] to [93], the Commissioner deals with the series of transactions of shares in CUSI, going back to July 2006. At [94], the Commissioner says that the circumstantial evidence points to the fact that the only shareholder who invested capital in exchange for shares was Guo. He draws the inference, which he was entitled to, and with which we concur , that the shares were purportedly allotted or purportedly transferred in the expectation that the "investor shareholders" (referred to earlier, except possibly Harris), would provide capital for the project. No such investments were ever made. That is why they say they have "pulled out" of their shares.

107. Turning, then, to the asserted share transfers made in September 2010 and following, which effectively purported to deprive Austree of the 90 per cent of shares in CUSI. The Commissioner dealt with that extensively at paragraphs [95] to [97] of his decision. He opened [97] by stating:

"In conclusion, all the shares are now and have at all times been either owned or held upon a resulting trust for Zhou".

He went on:

"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 he controlled all of the shares."

Later:

"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. 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 ...".

108. The Commissioner did note counsel for the appellants raised a pleading point but concluded, inevitably:

"The defendants were well aware that the Claimants were alleging that 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."

109. Frankly, on the evidence of this case and the activities of Guo we find the inferences drawn by the Commissioner to be inevitable, and we concur in them.

Grounds 6 and 7 — invalidity of TGA

110. In a very short submission, the appellants submit that the Commissioner ought to have held the entire TGA void, because of the importance of the Articles to the operation of the agreement.

111. The complete answer to that is the accepted evidence of Professor Bing Ling, that Article IV and the proposed articles of association were severable from the TGA. There is no evidence that an alternative conclusion could be reached under Chinese law.

112. In any event, the submission appears for the first time on appeal. There are a plethora of authorities that find against such a course of action. It is enough to cite from Herschell LJ in *Owners of the Ship 'Tasmania' v Smith* (1890) 15 App Cas 223 at 225:

> It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness box.

113. This question of invalidity of the TGA is a matter on which Professor Bing Ling could have given further evidence, and the parties were given opportunity to ask further questions in advance of the hearing in February 2017. His supplementary expert report was given on 12 March 2017. If the point had been raised in pleadings or submission, the respondents could have sought further evidence. Allowing this appeal point to be considered now would be highly prejudicial to the respondents. We are satisfied the ground cannot succeed, and is dismissed.

114. Given our findings in relation to specific performance, that is enough to dispose of this appeal and dismiss it. It is unnecessary for us to consider Grounds 12 and 14 dealing with the restitutionary claim and the loan except for one matter. The appellants submit that the amount of SBD63, 492,477.18 is incorrect. They allege the Commissioner double counted SBD15 million. They did not direct us to any satisfactory evidence to substantiate this claim.

115. The respondents pointed us to the careful analysis of what Zhou expended in cash and kind starting at para [119] of the Commissioner's judgment and following. That analysis also refers to relevant evidence and documents. We are

quite satisfied on that analysis and the basis for it that the correct figure is SBD63, 492,477.18. And we so find.

116. But in any event, in relation to the restitutionary claim, we are in agreement with the findings of the Commissioner. In relation to the point of appeal based on the loan this was another matter raised for the first time on appeal. Given it would involve factual enquiries we do not permit the appellants to raise it now.

The incorporation of Sol Plaza

117. For the sake of completeness, like the Commissioner, we will refer to the formation of Sol Plaza Limited as a Solomon Islands company on the 19th August 2010. This was incorporated by Zhou's daughter Joyce. She held 90,000 shares and her husband Duan David Wang held 10,000.

118. The purpose of the company was to act as a letting and marketing agent for CUSI. This may have occurred at this time because Zhou and Guo had finally fallen out. The TGA provided for Guo to carry out this role and to collect rent in advance that could be used to further finance the project. There is no evidence any rent in advance was so applied. But it does appear that Guo was not consulted about Sol Plaza strengthening the possibility that the falling out had occurred.

119. Obviously the formation of Sol Plaza was contrary to the TGA. Of course as this provision was not triggered until the CUSI shares were transferred it did not amount to a breach as they are still not transferred. But like the Commissioner we agree nothing turns on it. There is no evidence that Sol Plaza ever took any steps towards the letting and marketing of the Town Ground development. Essentially, it is a red herring.

Ground 17

120. This ground states:

> On the reasons given, his Lordship, Commissioner Mildren, erred in failing to dismiss the proceedings against the third, fourth and fifth appellants.

121. The outline of submission is silent on this ground and it is unclear what is intended by it. For completeness, it is dismissed.

Costs

122. Grounds 18 and 19 allege that the Commissioner erred in awarding costs against Guo's associates.

123. The appellants argue that the respondents acknowledged that these parties were joined simply to be bound by the terms of any order of the Court. It is submitted that this reflects the proposition that they are simply an extension of the first appellant. These appellants say they have approached the matter on the basis that is the only relief sought against them. In these circumstances the exercise of a proper discretion requires the Court to approach their costs on the basis that costs follow the event. Thus there should be a costs order in their favour, or no order at all

124. But the third to fourth appellants were separately represented and pleaded accordingly. They actively maintained in those pleadings that they were the true shareholders of CUSI. Chu participated in the directors and shareholders meetings of CUSI on 19 August 2011 that deprived Austree of its shares in CUSI. The others were part of the plot to further this plan.

125. Costs, again, are a matter of discretion.

126. *House v R* (1936) 55 CLR 499 has been applied in the Solomon Islands in *Penai v R* [2012] SBCA 17.

127. In *House*, the Court said:

> This Court would interfere with the exercise of such discretion only if he has acted upon a wrong principle or if he has allowed extraneous or irrelevant matters to guide or affect him or if he mistakes the facts or if he does not take into account some material consideration.

128. Here, the appellants are effectively submitting that the only claim against the second to fourth appellants, being the claim for rectification, failed.

129. What this ignores is that in the course of dismissing the claim for rectification, the Commissioner made adverse declaratory orders concerning the second to fourth appellants' beneficial interest in the shares concerned. Indeed, at paragraph [97] he is condemnatory of Guo's associates. This was a relevant factor for the Commissioner to take into account in exercising his discretion, and we find no grounds to interfere in that discretion.

130. It also ignores that what Guo and his associates argued was that the associates were genuine shareholders and did not hold their shares on Guo's behalf. The Commissioner found against this submission which is also a proper basis for the cost award against the 2nd, 3rd and 4th appellants. To order them to be jointly and severally responsible for costs was a proper exercise of discretion by the Commissioner.

131. The appeal relating to costs is also dismissed.

Costs of the appeal

132. Mr Matthews submitted that the grounds raised on the appeal were all properly arguable and costs should be on the normal basis.

133. We do not agree. In the course of the hearing the appellants conceded a number of their major arguments and we have found all others to be totally without merit. We are satisfied that costs of the appeal should be on an indemnity basis and should be met by all appellants jointly and severally.

Conclusion

134. There is an air of unreality about this appeal, as there has been in relation to the whole course of these proceedings. Guo was unable to finance the project on his own. He actively, but unsuccessfully, sought assistance from a number of other Chinese investors. Finally, he prevailed on his schoolmate Zhou. Given Guo and Zhou were former schoolmates and things went along well for a

considerable period. Formal legalities were deliberately overlooked as long as materials and cash were forthcoming to promote the project.

135. Zhou contributed in cash or kind in excess of SBD$63 million. Guo, but a fraction of this. Yet Guo takes the view that Zhou should receive nothing for his investment in the Town Ground development which is owned by CUSI.

136. There is no evidence of any specific falling out. Rather, it was when Guo consulted a solicitor in Honiara, Mr Leslie Kwaiga, and discovered that share transfers had not taken place, that things finally began to seriously unravel. (Although the evidence suggest the problems were becoming apparent by mid-2010). Up until then it is clear both Zhou and Guo assumed the transfer of shares had occurred. As it was such transfer that triggered the rest of the TGA it is an inevitable assumption. As we have already asked rhetorically if that was not the assumption why would Zhou invest SBD$63.5 million in a project he would have no ownership interest in? On what evidence there is before us, we infer that Guo was the driving force behind this plot (a word we use advisedly) to defeat Zhou's and Austree's contractual rights. That approach has been continued in the conduct of the proceedings. Criticisms of the pleadings must be shared by both appellants and respondent, but Guo and his associates made the decision to withdraw from participating in the trial and then only took part in closing submissions. In those submissions, and on this appeal, a great many technical legal points have been taken to try to defeat Zhou's rights. A great many of those had no possible basis for success.

137. We acknowledge Commissioner Mildren's careful and correct decision. We have disagreed regarding the parole evidence rule's application but otherwise any quibbles we may have had in our decision are very minor.

138. We also acknowledge the extensive and helpful submissions of the respondents. As the appeal was argued we did not need to address all of them.

Orders

139. There will be the following orders:

1. The notice of contention is upheld.

2. The appeal is dismissed.

3. There will be costs on the appeal against the appellants jointly and severally on an indemnity basis. We certify for overseas and second counsel.

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Goldsborough P

COURT OF APPEAL OF SOLOMON ISLANDS

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Hansen JA

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Young JA