HCA 597/2021
[2022] HKCFI 3342

**IN THE HIGH COURT OF THE**
**HONG KONG SPECIAL ADMINISTRATIVE REGION**
**COURT OF FIRST INSTANCE**

ACTION NO 597 OF 2021

---

BETWEEN

| | |
|---|---|
| 李明實，方壘 AND 史洪源 (SUING ON BEHALF OF THEMSELVES AND THE OTHER EMPLOYEES EMPLOYED BY OR BY THE GROUP OF COMPANIES UNDER 和利時科技集團有限公司 (TRANSLATED AND KNOWN AS HOLLYSYS GROUP COMPANY LIMITED)) | 1st Plaintiffs |
| DR. CHANGLI WANG (王常力博士) | 2nd Plaintiff |
| PLUS VIEW INVESTMENTS LIMITED | 3rd Plaintiff |
| and | |
| ACE LEAD PROFITS LIMITED | 1st Defendant |
| SHAO BAIQING (邵柏慶) | 2nd Defendant |

---

Before: Hon K Yeung J in Chambers

Date of Hearing: 19 October 2022

Date of Decision: 4 November 2022

---

D E C I S I O N

---

*A. Introduction*

1. This is the hearing of the summons of 21 January 2022 (the "**Summons**") taken out by the defendants ("**D1**", also "**Ace Lead**" as appropriate, and "**D2**", also "**Mr Shao**" as appropriate, and collectively "**Ds**") for an order that the action be stayed. The main grounds are as follows (all the terms will be defined below):

(a) that the "**Trust Shares Claim**" is within the ambit of the "**Arbitration Agreement**", so that it should be stayed and referred to arbitration;

(b) the "**Ace Lead Claim**" and the "**Plus View Claim**" should be stayed on *forum non conveniens* grounds; and

(c) alternatively the Ace Lead Claim and the Plus View Claim should be stayed on case management grounds pending arbitration.

2. Mr Victor Dawes SC and Mr John CK Chan appeared for Ds. Mr Kenny Lin, Mr Jason Kung and Mr Ronald Ngan appeared for the plaintiffs ("**Ps**").

*B. The scope of the Summons*

3. I have summarized above the stays which Ds are seeking and the bases of their application.

4. Apart from those stays, §1 of the Summons seeks also an order pursuant to O.12 r.8(1) that (a) the concurrent writ be set aside, (b) the leave allowing service out be discharged, (c) the Court has no jurisdiction over Ds in respect of the relief and remedies sought, and

(d) the proceedings be stayed. During the hearing, Mr Dawes clarified that paragraphs 1(a) to 1(c) will no longer be pursued, and that the grounds relied upon in support of the stay sought under §1(d) will be the same as those otherwise put forward.

5. The above defines the scope of the application before this court.

*C. The pleadings and the evidence*

6. So far, only a Statement of Claim has been filed ("**SoC**").

7. For Ds, Mr Shao has filed 2 affirmations, the first dated 20 January 2022[1] ("**Shao/1**") in support of the Summons, and the second dated 30 June 2022[2] ("**Shao/2**") in reply.

8. For Ps, the 2nd plaintiff ("**P2**" or "**Dr Wang**") has filed:

(a) his first affirmation of 23 April 2021[3] ("**Wang/1**") in support of Ps' *ex parte* application for *inter alia* leave to serve the Writ out of jurisdiction, which contents remain relevant for the present purpose; and

(b) his second affirmation of 22 April 2022[4] ("**Wang/2**") in opposition of the Summons.

---

1 [A/7/80-93].

2 [A/9/110-118].

3 [A/6/62-79].

4 [A/8/94-109].

*D. The parties, and the entities involved*

9. The 1st plaintiffs (collectively "**P1**") comprises 3 individuals. They are 李明實、方壘 and 史洪源. They are employees employed by or by the group of companies under 和利時科技集團有限公司 (translated and known as HollySys Group Company Limited, "**HollySys Group**"). They are suing "*on their own behalf and on behalf of the employees employed by or by the group of companies under the HollySys Group eligible for subscription under the Trust Scheme* ..."[5] Those eligible employees as described therein are referred to collectively as "**HollySys Employees**". I will further explain what the "**Trust Scheme**" is below.

10. Dr Wang (i.e. P2) is an engineer by profession. In 1999, he together with Mr Lou An ("**Mr Lou**") founded in the Mainland 北京和利時系統工程股份有限公司 ("**Beijing HollySys**"). He was its Chief Executive Officer. Beijing HollySys specialized in industrial automation and railway transport automation.

11. The business of Beijing HollySys had been expanding. Between 1999 and 2008, there had been re-structuring in anticipation of public listing.

12. As part of the re-structuring, a number of overseas company were incorporated. Some were formed with the view of being used as corporate vehicles for holding shares. Amongst them were the 3rd plaintiff ("**Plus View**" or "**P3**") and D2:

---

[5] §6 of the SoC. Those employees are referred to collectively

(a) Plus View is a British Virgin Islands ("**BVI**") company. It was incorporated on 19 August 2005. Mr Lou has been its sole director and shareholder;

(b) Ace Lead is also a BVI company. It was incorporated on 15 September 2005. Until 12 August 2016, P2 had been its sole director and shareholder. On that day, P2 transferred his one share in it (the entire issued share capital at that time, the "**Ace Lead Share**") to D2.

13. In 2006, HollySys Automation Technologies Limited ("**HollySys**") was incorporated in the BVI. It has become the holding company of all the subsidiaries in China and Asia Pacific (including Beijing HollySys).

14. Amongst the subsidiaries under HollySys is HollySys Group. HollySys Group is a Mainland company. It in turn is the intermediate holding company of all subsidiaries in the Mainland, including Beijing HollySys and another company called Hangzhou HollySys Automation Co. Ltd.

15. HollySys was in 2008 listed on the Nasdaq Stock Exchange (Stock code: HOLI, and shares in it "**HOLI shares**").

16. As founding members of HollySys, Ace Lead and Plus View were allotted HOLI shares in accordance with their percentage-holding in Beijing HollySys.

17. During the financial year of 2010, the total amount of HOLI shares held by Ace Lead and Plus View were 4,144,223 (the "**Trust Shares**") and 6,057,303 (the "**Plus View Shares**") respectively.

18. D2 has since 2016 been the sole director and shareholder of Ace Lead. He had also served as the Chief Executive Officer (between 2013 and July 2020) and chairman of the board of directors (between 2016 and July 2020) of HollySys. On 7 July 2020, he was removed from those positons.

*E. The Trust Scheme*

19. Dr Wang has explained what according to Ps' case the Trust Scheme is, as follows.

20. To share the success of the enterprise with HollySys Employees, and to reward them, Dr Wang and Mr Lou gave out the Trust Shares and the Plus View Shares for the purpose of setting up the Trust Scheme. D2 was tasked to handle the setup of the same.

21. In August 2009, the HollySys Trust Committee (和利時信託權益委員會) (the "**Committee**") was formed. D2 was appointed as its first president.

22. The Committee is regulated by the Articles of the Committee (the "**Articles**").

23. As described by Dr Wang, and as summarized by Mr Lin, the Trust Scheme has different *layers*.

24. The **First Layer of Trust** is said to be between Ace Lead, Plus View and HollySys Employees[6]. It was implemented in turn in two stages:

[6] Wang/1, the heading above §15.

(a) The first stage commenced in October 2009. More than 200 HollySys Employees were eligible to participate in the Trust Scheme and could obtain HOLI shares either by: (i) payment of the subscription price set at RMB10.00 per share; or (ii) conversion of their own shares in Beijing HollySys at a specified rate;

(b) The second stage took place between July 2013 and 2017. Over 100 HollySys Employees were eligible to participate in the Trust Scheme. As all historic employee shares in Beijing Hollysys had been converted during the first stage, eligible employees could only obtain HOLI shares by subscription, at a price of RMB20.00 per share;

(c) Numerous Declarations of Trust ("**DoTs**")[7] were executed over those two stages. Each was signed by a participating HollySys Employee as beneficiary ("**DoT HollySys Employee**"), and Ace Lead and Plus View as trustees, alongside with Beijing HollySys (and eventually changed to the HollySys Group) as third party. Dr Wang and Mr Shao are not parties to the same;

(d) Each DoT follows a standard form template, the only differences being the individual participating HollySys Employees' particulars and the number of shares to be subscribed;

(e) The 88 HollySys Employees set out in Annexure 2 of the SoC are all DoT HollySys Employee;

(f) The DoTs contain the following preamble (the "**DoT Preamble**"), that:

---

[7] Each DoT was a standard form template, the only differences being the eligible HollySys Employees' particulars and the number of shares to be subscribed.

"根據香港信託法例，特別是《受託人法例》及其他成文法或不成文法信託權法例，本合約各方自願遵守上述法律，並在上述法例保護之框架內，達成對合約信託的一致理解和一致遵守。"

(g) Clause 8.5 of the same ("**Clause 8.5**") provides that:

"本合約以香港法例為准據法，信託人與受託人之間信託關係的任何爭議在調解無效時，均有權提交香港仲裁委員會裁決。"[8]

(h) It is Ds' case that Clause 8.5 constitutes an arbitration agreement (i.e. the "**Arbitration Agreement**").

25. As I will elaborate upon below, it is Mr Lin's submissions that this First Layer of Trust in fact comprises two tiers (different from the two stages). He describes[9] the first tier (the "**Overarching Trust**") as "*a de facto trustee-beneficiaries relationship between Ace Lead and Plus View as trustees and HollySys Employees over the Trust Shares*." The trusts created individually by any DoT (the "**DoT Trusts**") are in his submission different from the Overarching Trust, and are separate from it.

26. This distinction between the Overarching Trust and DoT Trusts, and whether it has been pleaded, are in dispute, and has become the focus of the application in relation to the Trust Shares Claim. I will come back to it.

27. The **Second Layer of Trust** is said to be between Dr Wang and Mr Shao. It refers to the transfer of the Ace Lead Share by Dr Wang to Mr Shao on 12 August 2016. As summarized by Mr Lin, upon the

---

[8] The agreed working translation being *"The governing law of this contract is Hong Kong law, and either party shall have the rights to, when mediation is ineffective, refer any disputes arising from the trust relationship between the settlor and the trustee to the Hong Kong arbitration committee for adjudication.*"

[9] §33(2) of his written submissions.

implementation of the Trust Scheme in 2009, Dr Wang entrusted the management of the Trust Shares and the Trust Scheme to Mr Shao. In or around November 2013, Dr Wang decided to retire. He resigned as HollySys' CEO. The position was then taken up by Mr Shao. On 12 August 2016, to effect further delegation of the management of the Trust Scheme, Dr Wang transferred the Ace Lead Share to Mr Shao. Mr Shao did not provide any consideration for the transfer. Dr Wang's case is that the beneficial ownership of the Ace Lead Share has never been intended to be transferred to Mr Shao.

28. In relation to the Plus View Shares, it is Ps' case that:

(a) the Plus View Shares had been liquidated by early 2014 in order to set aside funds in anticipation of redemption by the participating HollySys Employees (the "**Plus View Proceeds**");

(b) the Plus View Proceeds were transferred from Plus View's Hong Kong Credit Suisse account to Mr Shao, who was at the material time still the president of the Committee.

*F. The claims arising*

29. Ps say that despite Mr Shao's removal as the Chief Executive Officer, director and Chairman of HollySys, and despite requests, he has failed to return the Ace Lead Share. Ps say further that there is evidence showing attempts by Mr Shao to take over HollySys, and has treated himself as the beneficial owner of the Ace Lead Share. He has also failed to account for the Plus View Proceeds.

30. Arising from the alleged Layers and Tiers of trusts, the transfer of the Plus View Proceeds, and the alleged conduct on the part of Mr Shao, the following main inter-related claims have therefore been made:

(a) a "*Declaration that all the HOLI shares now held by and in the name of [D1] are held by [D1] on trust for the HollySys Employees (including [P1]) under the Trust Scheme*"[10] (i.e. the "**Trust Shares Claim**");

(b) a "*Declaration that [D2] holds the Ace Lead Share on trust for [P2]*"[11] (i.e. the "**Ace Lead Claim**"); and

(c) an Account by Mr Shao of the Plus View Shares and the Plus View Proceeds, which he retained in breach of trust and his fiduciary duties[12] (i.e. the "**Plus View Claim**").

*G. Trust Shares Claim*

31. To recapitulate, Ps case is that the Trust Shares Claim is within the ambit of the Arbitration Agreement, so that it should be stayed and referred to arbitration.

*G.1. The applicable legal principles*

32. The applicable legal principles are not in dispute. The starting point is Section 20(1) of the Arbitration Ordinance, Cap 609. Article 8 of the UNCITRAL Model Law has effect. It provides that:

> "A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so

[10] §(1) of the Prayer.

[11] §(2) of the Prayer.

[12] See §§(8) and (9) of the Prayer.

> requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."

33. In considering whether a stay pursuant to section 20(1) of the Arbitration Ordinance should be granted, the court asks 4 questions ("**Question #1**" to "**Question #4**"): (1) is there an arbitration agreement between the parties? (2) Is the arbitration agreement capable of being performed, in the sense that it is not null and void, inoperative or incapable of being performed? (3) Is there in reality a dispute or difference between the parties? (4) Is the dispute or difference between the parties within the ambit of the arbitration agreement? – see *Tommy CP Sze & Co v Li & Fung (Trading) Ltd & Ors* [2003] 1 HKC 418 at §§18-23, and *Magnus Leonard Roth v Vitaly Petrovich Orlov*, [2020] HKCFI 525 at §§20-22, and *Kinli Civil Engineering Ltd v Geotech Engineering Ltd* [2021] 6 HKC 524, §6.

34. The onus is on the applicant for stay to demonstrate that there is a prima facie case that the parties were bound by an arbitration clause, and unless the point is clear, the Court should not attempt to resolve the issue and the matter should be stayed in favour of arbitration, as it is for the tribunal to decide first on its jurisdiction – see *Kinli Civil Engineering*, §7.

35. The rationales behind the above principles and considerations may be found in *Fiona Trust & Holding Corporation & Ors v Privalov & Ors* [2007] 4 All ER 951, where Lord Hope observed at [31] that:

> "In *AT & T Technologies Inc v Communications Workers of America*, (1986) 475 US 643 at 650, the United States Supreme Court said that, in the absence of any express provision excluding a particular grievance from arbitration, only the most forceful evidence of a purpose to exclude the claim from arbitration could prevail. In *Threlkeld & Co Inc v Metallgesellschaft Ltd (London)* (1991) 923 F 2d 245 at 248, the court observed that federal arbitration policy required that any doubts concerning the scope of arbitral issues should be resolved in favour of arbitration and that arbitration clauses should be construed as broadly as possible. In *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192 at [165] the Federal Court of Australia said that a liberal approach to the words chosen by the parties was underpinned by the sensible commercial presumption that the parties did not intend the inconvenience of having possible disputes from their transaction being heard in two places, particularly when they were operating in a truly international market. This approach to the issue of construction is now firmly embedded as part of the law of international commerce. I agree with the Court of Appeal that it must now be accepted as part of our law too."

### *G.2. Question #1 – Whether an arbitration agreement between the parties*

36. There are two limbs to this Question #1 – whether an arbitration agreement existence, and between whom.

37. There is no dispute by Mr Lin that as between the signatories of a DoT, Clause 8.5 of the DoT constitutes, *between them*, an arbitration agreement[13].

38. That must be right.

---

[13] §§7 to 10 of Mr Lin's written Speaking Notes may be understood as raising an issue as to whether Clause 8.5 constitutes any arbitration agreement <u>at all</u>. However, in the course of his oral submissions, and upon invitation for clarification from this court, Mr Lin withdrew those paragraphs.

39. I have italicized *between them* above, because Mr Lin has raised an issue in relation to the identities of the parties:

(a) In Wang/2 at §8, Dr Wang, having referred to the two batches of participating HollySys Employees whom I have described above, says that:

> "… In the future, there may be another batch of Trust Shares to be subscribed by other eligible HollySys Employees. As such, the Trust Shares Claim covers the claim by HollySys Employees who have signed DoTs and those eligible to subscribe in the future but have not signed a DoT." (Emphasis added.)

(b) Parties have used the terms "**Residue Claims**" and "**Residue HollySys Employees**" to denote respectively this class of claims (or potential claims), and those HollySys Employees who have not executed any DoTs but are eligible to participate in the Trust Scheme, so as to distinguish them from the part of the Trust Shares Claim being pursued by those DoT HollySys Employees based on the DoTs they have signed (the "**DoT Claims**"). I will adopt the same terms;

(c) In respect of such Residue Claims, Mr Lin submits that:

> "[for] those [Residue HollySys Employees], it is difficult to see how they can be regarded as parties to any arbitration agreement even though the Trust Scheme was set up for their benefit."[14]

40. Mr Dawes criticizes the vague nature of such Residue Claims. He submits that they consist of "*claims by unidentified persons based on unspecified legal and factual basis against D1*. *Not only have*

[14] §32 of his written submissions.

*Ps failed to articulate any legal or factual basis for the Residual Claim, they have also not identified a single Residual Employee*"[15].

41. There is clear force in those criticisms.

42. But of even more importance in my view are the following considerations. The suggestion that Residue Claims exist, whilst notionally and theoretically correct, in my view lacks practical significance. Based on the literature before me, a HollySys Employee can only join the Trust Scheme by signing a DoT (and hence becomes a DoT HollySys Employee). Mr Lin accepted this in the course of the hearing. He is not putting forward another method by which a Residue HollySys Employee can join. That being the case, and upon a HollySys Employee joining by signing a DoT, he will become bound by the terms of the DoT, including importantly the Arbitration Agreement. His position will become precisely the same as that of those DoT HollySys Employee whom P1 are now suing on behalf of, and that his claim will equally be regulated by section 20 of the Arbitration Ordinance.

43. For the above reasons, I am not satisfied that the notional and theoretical existence of any Residue HollySys Employee makes any material and practical difference to the full picture.

44. I answer Question #1 in the affirmative.

---

[15] §12 of his written reply.

*G.3. Question #2 – Whether the Arbitration Agreement capable of being performed*

45. Mr Lin submits that the Arbitration Agreement is not capable of being performed. He raises two points in support:

(a) the non-fulfilment of a "precondition"; and

(b) the non-existence of "香港仲裁委員會".

*G.3.1. Whether any "precondition" not fulfilled*

46. Mr Lin points to the wording of Clause 8.5. He submits that parties' entitlement to submit the dispute to arbitration arises only when mediation is ineffective (在調解無效時).

47. Both the interpretation of that term (in particular whether the term "調解" means formal mediation or include informal and internal negotiations) and its fulfillment (and in particular, depending upon its interpretation, whether there has been "調解" and its results) are facts sensitive. Dr Wang has not raised the issue in any of his affirmations. Whilst the onus of proof is on Ds, it remains incumbent upon Ps to raise the issue so that Ds may address it by evidence. I accept Mr Dawes' submissions that it is not open to Ps to introduce this objection at this stage[16].

48. In any event, the submissions are not supported by authorities. The question raised is one of admissibility. As observed by Mimmie Chan J in *Kinli* at §8, quoting and applying *C v D* [2021] 5 HKC 65, [2021] HKCFI 1474:

---

[16] §20 of his written reply.

> "… the question of whether a party has complied with the procedure or conditions as to the exercise of the right to arbitrate, as set out in an arbitration agreement, is a question of admissibility of the claim, and the Court has no role to play in relation to such a question, as it does not go to the question of the jurisdiction of the tribunal. It is for the tribunal to decide on admissibility and such decision of the tribunal is final, and not for review by the Court."

49. I reject the submissions as a matter of law.

*G.3.2. The non-existence of "香港仲裁委員會"*

50. That there is no arbitration body which bears that name is not in dispute.

51. Mr Lin submits[17] that there is a dearth of authority in the English courts directly on point, and that guidance may be obtained from other civil law jurisdictions. Relying on a decision from the Danish Supreme Court[18], he submits further that the Arbitration Agreement cannot be carried out.

52. I do not accept those submissions. As Mr Dawes has pointed out, there are two direct authorities in Hong Kong, namely *Lucky-Goldstar International (H.K.) Ltd v Ng Moo Kee Engineering Ltd* [1993] 1 HKC 404 *per* Kaplan J at §§6-8 and *Chimbusco International Petroleum (Singapore) PTE Ltd v Fully Best Trading Ltd* [2016] 1 HKLRD 582. As Mimmie Chan J has observed in the latter at §22:

> "[Lucky-Goldstar] is clear authority that where the parties have clearly expressed an intention to arbitrate, the agreement is not nullified even if they chose the rules of a non-existent organisation".

---

[17] Relying on *Jurisdiction and Arbitration Agreements and Their Enforcement* (3rd ed.) at §4.86.

[18] *A/S Dregg EHF v CHR. Jensen Shipping* [2013] I.L.Pr.31, §45.

53. In my view, the intention to arbitrate has objectively been clearly expressed and evinced in Clause 8.5. It is not nullified by the non-existence of *"香港仲裁委員會"*.

*G.3.3. Conclusion*

54. In my view, The Arbitration Agreement is capable of being performed. I answer Question #2 in the affirmative.

*G.4. Question #3 – Dispute between the parties*

55. There are disputes between the parties. The writ herein has been issued, and the SoC filed.

56. Mr Lin submits that Ds have not revealed their defences.

57. Mr Dawes does not accept that. However, in the context of Question #3, I see no need to go to any detail of the evidence. In my view, Mr Dawes has sufficiently countered Mr Lin's submissions in this regard by referring to and relying on the observations of Ma J (as the former Chief Justice then was) at §§50 and 51 of *Tommy CP*, that:

> "*50. Prior to the enactment of the present section 6 of the Ordinance and Article 8 of the Model Law, the court's approach had been that proceedings would only be stayed (and the relevant dispute or difference referred to arbitration) if a genuine dispute existed between the parties. A genuine dispute was one in which there was a substantial or arguable defence to the claim brought by the Plaintiff in the action.*
>
> *51. That is no longer the law. A dispute will exist unless there is a clear and unequivocal admission not only of liability but also of quantum: see, among many other cases…*"

58. I answer Question #3 in the affirmative.

*G.5. Question #4 – Whether parties' dispute or difference within the ambit of the Arbitration Agreement.*

59. This has developed into the focus of this part of the application.

60. In gist, Mr Lin submits that the Trust Shares Claim relates to the Overarching Trust. It is different from the DoT Trusts created by the DoTs, which only implemented the Trust Scheme. The Arbitration Agreement is contained in the DoTs, and covers only the disputes arising from the trust relationship between the trustees and individual beneficiaries under the DoTs. The Overarching Trust being the dispute between the parties in the Trust Shares Claim, its ambit therefore outwith the Arbitration Agreement. He submits[19] in particular that:

> "… Ps' pleaded case has all along been that the Trust Shares themselves were held by Ace Lead and Plus View for the purpose of the Trust Scheme. This must also follow that Ace Lead and Plus View were not beneficial owners of the Trust Shares without the DoTs. They have been pleaded to be trustees in favour of the HollySys Employees as a whole. The mere fact that the Trust Scheme was implemented through the creation of individual trusts by the DoTs in favour of individual employees would not detract from the main premise."

61. Mr Dawes disagrees. He submits that a disciplined approach should be adopted. Ps' case as pleaded in the SoC should be looked at. He goes through the same. He submits that Ps' contention that P1's claims are not based on the DoTs and therefore not subject to the Arbitration Agreement therein are contrary to Ps' pleaded case.

---

[19] §6 of his written Speaking Notes.

62. I have considered the submissions. For the following reasons, I accept Mr Lin's submissions in this regard.

63. In terms of approach, when determining whether a particular "*matter*" is the subject of an arbitration agreement, "*the court should consider the substance of the controversy as it appears from the circumstances and evidence, and not just the particular terms in which the claimant has sought to formulate its claim in court… The focus is on the substance of the dispute, and not the pleadings*" – see *Polytec Overseas Ltd v Grand Dragon International Holdings Co Ltd* [2017] 3 HKLRD 258, *per* Mimmie Chan J at §25. That is indeed the approach which Mr Dawes urges[20] this Court to adopt when he addresses Mr Lin's submission in relation to the Residue Claims.

64. I have considered the overall scheme of things. The evidence suggests that Ace Lead and Plus View were set up respectively by Dr Wang and Mr Lou, and were incorporated as corporate vehicles for holding shares. HOLI shares had subsequently been allotted to them. As pleaded at §16 of the SoC, Dr Wang and Mr Lou decided to use the Trust Shares[21] and the Plus View Shares to set up the Trust Scheme. In Wang/1 at §15, Dr Wang actually says that he and Mr Lou "*decided to give out*" those shares for the purpose of setting up the Trust Scheme.

65. At §19 of the SoC, a meeting held on 25 August 2009 (the "**25/8/2009 Meeting**") and hosted by Mr Shao to announce the establishment of the Trust Scheme to the HollySys Employees is pleaded.

---

[20] Section D2 of his written submissions.

[21] It should be noted that the term "Trust Shares" is used in the SoC to denote the HOLI shares held by both Ace Lead and Plus View. In parties' submissions, and in this Judgment, that term is used to denote only those HOLI shares held by Ace Lead.

The contents of what Mr Shao said during the meeting, though not pleaded, are dealt with by Dr Wang, who has produced the relevant transcript. I have been taken through the transcript. What Mr Shao said is consistent with the overall scheme that the Trust Shares and the Plus View Shares were and were intended to be held on trust for the purpose of the Trust Scheme.

66. The Committee was then on 27 August 2009, 2 days after that meeting, set up. Various paragraphs of the Articles have been pleaded, which include the following:

> "1.1 信託人是指在和利時長期發展並作出突出貢獻的員工。信託人的產生受和利時設置的有效條件約束；
>
> 1.2 信託人通過信託合約将股票權益委託給信託公司 Plus View Investments Limited 和 Ace Lead Profits Limited 進行管理，從而形成最終的信託財產；
>
> 1.3 信託權益是指信託人通過信託一定規則取得的股票權益，並以此取得投資回報并承擔投資風險；
>
> 1.4 受益人是只因信託權益本身或信託權益產生孳息而享有處分權利的人，信託人本身為法定受益人；
>
> 1.6 信託權益委員會經信託人、受託人以及第三人三方授權，有權制定並管理有關信託財產的產生、變更、退出等規則，給對規則的實施、修改和解釋；其所作出的決定權於三方的法律授權，一經作出，為各成員所遵守；
>
> 2.1 信託人可以根據第三人（和利時集團）的設定以現金投資信託，或將其因歷史原因形成的職工股按照一定標準折算成股票權益投資於信託；
>
> 3.1 信託財產是由受託人集中投入於和利時在美國納斯達克上市公司的 HoLi 股票所產生的股票權益，形成信託財產，即信託權益；

3.2　持有股數：信託人根據認購或兌換所持有的信託財產對應的上市公司股票數量稱為持有股數，並以股作計量單位；

3.4　本金：信託人認購信託權益時所交納的現金，或以職工股兌換為信託權益時原認購職工股時交納的現金，稱為本金；

3.5　紅利：上市公司分紅時，信託人根據當時持有的信託股票權益同股同權分配的利潤；

3.8　可兌現信託權益、鎖定期和轉換比例：信託人持有信託權益在鎖定期以後，每年已認購信託權益總量按既定的轉換比例轉成可按市值兌現的可兌現信託權益，直到全部轉成可兌現信託權益，本金餘額同比例減少；

5.1　委員會根據當前需要和上市公司股票情況確定認購或兌換的總量和認購價格、起始日、鎖定期、轉換比例等；

5.2　委員會確定員工可以認購的數量上限，員工自願認購，不強迫，不攤派；

6.2　在下列情況下受託人無條件回購信託財產：信託人持有的可兌現信託權益向委員會提出兌現申請、信託人與和利時公司解除勞動關係、信託人特殊情況申請兌現並得到委員會批准；

6.3　信託財產回購時，可兌現信託權益按市值兌現，其他按本金及利息（按退出當時銀行公佈的一年期存款利率計算）兌現。信託人因故死亡的，兌現金額將交付至由信託人書名指定的受益者或信託人法定繼承人；

6.4　信託人在和利時退休，其持有的信託財產可延至鎖定期滿且已解除勞動關係時兌現，或退休同時解除勞動關係時兌現，可全部按市值兌現，其他情況同6.2 條；

6.5　信託人在和利時工作時因故死亡，其持有的信託財產可全部按市值兌現。”

67. The terms of the Articles, and in particular Article 3.1 thereof, is consistent with the existence of the Overarching Trust over the Trust Shares and Plus View Shares.

68. All the above predated the execution of any DoT.

69. Mr Dawes has highlighted §26 of the SoC and submits that Ps' pleaded case is based on the DoTs. §26 of the SoC pleads that:

> "The Trust Shares were thus held by Ace Lead and Plus View respectively on trust for the HollySys Employees under the Trust Scheme governed by the Articles and/or in accordance with the terms of the DoTs entered into with the HollySys Employees."

70. I note however the use of the alternative conjunctions "and/or" therein, as I have underlined above.

71. I note further, as Mr Lin has stressed, that whilst the terms of the Articles have been extensively pleaded, none of the terms in the DoTs have been pleaded and relied upon.

72. For the above reasons, I am of the view that in substances, the focus of the dispute in respect of the Trust Shares Claim is the existence and nature of the Overarching Trust. It is different in nature from the DoT Trusts created by the DoTs in implementation of the Trust Scheme, and is outwith the Arbitration Agreement.

73. Given my views above, I find that Ds have failed to discharge the onus on them to establish that the relevant dispute is within the ambit of the Arbitration Agreement.

*G.6. Conclusion in respect the Trust Shares Claim*

74. For the above reasons, I dismiss Ds' application for a stay of the Trust Shares Claim.

*H. The Ace Lead Claim and the Plus View Claim*

75. To recapitulate, the basis of the application in relation to the Ace Lead Claim and Plus View Claim is *forum non conveniens*. There is no suggestion by Ds that there exists any arbitration agreement covering those claims.

76. The applicable legal principles are not in dispute. They are set out in *SPH v SA* (2014) 17 HKCFAR 364 at §51 and *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460 at 476B-478E.

77. The following observations by Linda Chan J in *四川順利昌隆科技有限公司 v Sze Ming Yee and Others*, [2021] HKCFI 2289 have also been highlighted to me, that,

> "19. In determining the appropriate forum, the approach is not just an exercise in loading up factors which point to any jurisdiction. The Court is required to focus on the appropriateness of a forum from the point of view of the trial of the action …
>
> 20. Where, as here, a defendant contends that the action involves or may involve issues which would be more appropriate to be tried in an alternative forum, it is incumbent upon him to identify the issues, and demonstrate why such issues should be tried in another forum …"

78. I apply the above.

*H.1. The Ace Lead Claim*

79. The Ace Lead Claim relates to Dr Wang's transfer on 12 August 2016 of the Ace Lead Share to Mr Shao by an Instrument of Transfer. That Instrument of Transfer is on its face described to be made "*Pursuant to section 54 of the BVI Business Companies Act (as Amended).*"

80. In support of the proposition that Hong Kong is not the natural or appropriate forum, Mr Dawes submits that Clause 8.5 as a choice of law clause has no application to the Ace Lead Claim, as it only applies to disputes arising from the DoTs. He submits that the Ace Lead Claim has no connection to Hong Kong.

81. In reply Mr Lin points to the DoT Preamble. He submits that Hong Kong law is the governing law of the DoTs. He relies on section 2(1) and Article 6 of the Schedule of Recognition of Trusts Ordinance (Cap 76). The Trust Scheme is evidenced in writing by the Articles. Whilst there is no express choice of law therein in relation to the trust over the Trust Shares, he submits that Hong Kong law is the most closely connected system of law. He refers and relies on the observations by Longmore LJ at §108 of *Berezovsky v Abramovich* [2011] 1 WLR 2290[22]. He refers to the factual matrix in which the Trust Scheme was set up. He refers to the evidence of Dr Wang[23] on the intention to adopt Hong Kong as the governing law for the Trust Scheme.

---

[22] That "*Although there is currently no authority in relation to the correct approach of a court in deciding whether there is an implied choice of the law governing a potentially foreign trust, it must be arguable that what was said at the time when the trust was set up and the matrix within which that agreement was made are both highly relevant considerations.*"

[23] Wang/1, §18, that "*As the trust law has been a well-developed legal concept in Hong Kong, it has been intended that the Trust Scheme should be governed by the Hong Kong Law, and hence all the DoTs issued to the HollySys Employees have expressly provided that the DoTs and the trust created thereby are governed by the Hong Kong Law.*"

He refers to what Mr Shao was transcribed to have said during the 25/8/2009 Meeting. He submits that against those background, when the Ace Lead Share was transferred by Dr Wang to Mr Shao for the purpose of, according to Dr Wang, facilitating the operation of the Trust Scheme, which is intended to be governed by Hong Kong law, Hong Kong law must also be the system of law which has the most real and closest connection with the arrangement, and thus is the applicable law of the resulting/constructive trust.

82. Mr Lin's submissions are in my view consistent with the overall scheme of matters according to the evidence as presented to me.

83. I accept Mr Lin's submissions in the above regard.

84. In support of the proposition that the Eastern Caribbean Supreme Court in the BVI as the available forum which is clearly and distinctly more appropriate than Hong Kong, Mr Dawes has put forward three connecting factors in support, namely (1) that the Instrument of Transfer was executed pursuant to section 54 of the BVI Business Companies Act, so that issues of BVI law would "*very likely if not inevitably arise in revolving the Ace Lead Claim*", (2) Ace Lead being a BVI company, so that if Ps succeed in their claim, the registration of the Ace Lead Share would have to take place in the BVI, and (3) Mr Shao's evidence that the Ace Lead Share was sold pursuant to a sale and purchase agreement (the "**Share Sale and Purchase Agreement**"), which contained a clause to the effect that the agreement is governed by BVI law.

85. In my view, those are very weak connecting factors:

(a) As I have mentioned above, Ps have criticized Ds for failing to reveal their defences;

(b) Mr Dawes disagrees. He has set out various paragraphs in Mr Shao's affirmations which Mr Dawes submits have sufficiently disclosed and identified their defences to the Ace Lead Claim;

(c) I have considered those paragraphs. In my view, they constitute nothing but a broad denial of any trust over the Ace Lead Share. There is no elaboration by Mr Shao on the circumstances leading to the transfer, why the only share in the corporate vehicle holding the Trust Shares for use and implementation of the Trust Scheme would have been transferred to him with no or nominal consideration, and the basis for the alleged "*common intention and understanding between*" himself and Dr Wang that the Ace Lead Share was transferred to him as the legal and beneficial owner[24];

(d) Given the lack of details on Ds' defences, I have nothing to gauge Mr Dawes' submission that issues of BVI law would "very likely if not inevitably arise in revolving the Ace Lead Claim"; – and see *四川順利昌隆*;

(e) The relevant BVI law, and any difference between it and the Hong Kong law, has not been identified;

(f) In any event, Hong Kong Courts are used to receiving expert evidence on BVI laws;

[24] §12 of Shao/2.

(g) In relation to the enforcement of any judgment which Ps may successfully obtained, Mr Dawes has fairly accepted judgments in Hong Kong may be enforced in the BVI;

(h) In relation to Mr Shao's evidence about the alleged Share Sale and Purchase Agreement, Dr Wang "*strongly dispute(s)*" the same. He says he has never seen such document, and have never signed one. Indeed, the alleged Share Sale and Purchase Agreement produced by Mr Shao is an unsigned one, and he only barely asserts that "*I recall that the parties have executed the said Share Sale and Purchase Agreement, but so far I have not been able to locate the same.*"

86. On the other hand, apart from the above, BVI has no connection with the Trust Shares Claim or the Ace Lead Claim. The Instrument of Transfer was not signed there (but in Singapore according to Dr Wang). Neither Dr Wang nor Mr Shao is resident there. And there is no suggestion that any witness or document will come or emanate from there.

87. Also relevant is my decision above refusing Ds' application to stay the Trust Shares Claim in favour of arbitration. It is now going to be before Hong Kong Court. The Trust Shares Claim, Ace Lead Claim and Plus View Claim are all inter-related, share the common background, and all relate to the Trust Scheme. The fact that the Trust Shares Claim now being before Hong Kong Court is in my view a connecting factor.

88. In all the circumstances, I am of the view that Ds have failed to establish, in relation to the Ace Lead Claim, that Hong Kong is not the

natural or appropriate forum, and that the Eastern Caribbean Supreme Court in the BVI as the available forum which is clearly and distinctly more appropriate than Hong Kong.

*H.2. The Plus View Claim*

89. In contending that Hong Kong is not the natural or appropriate forum for the Plus View Claim, Mr Dawes repeats the same submissions he has made in relation to the Ace Lead Claim.

90. Mr Lin similarly adopts his submissions he has made in relation to the Ace Lead Claim. In addition, he:

(a) adds, in relation to the Plus View Claim, that the Plus View Proceeds were transferred from Plus View's account held with Credit Suisse Bank in Hong Kong;

(b) relies on the following passage from *Hong Kong Civil Procedure 2022* at §11/1/95, that:

> "There is a "distinct advantage" in having the English (Hong Kong) courts determine difficult or arcane points of English (Hong Kong) law … Especially where the foreign Court has a very different legal tradition and little experience in applying English law … Where the issue in question under a Hong Kong law agreement involves concepts that do not exist under the law of the proposed foreign Court eg equitable interests in shares and the PRC, Hong Kong is likely to be more suitable …"

91. The main issues of the Plus View Claim are going to be whether the Plus View Proceeds were transferred to Mr Shao as a trustee for the purpose of the Trust Scheme, whether he has acted in breach of trust for failing to disclose and account for their whereabouts, and if so what equitable relief should be awarded. Hong Kong is more appropriate forum to deal with those matters.

92. For the same reasons given in relation to the Ace Lead Claim, and for the additional reasons above, I accept also Mr Lin's submission in the above regard.

93. In contending that the Beijing Courts are clearly and distinctly more convenient forum for the Plus View Claim, Mr Dawes places reliance upon a number of matters:

(a) He refers to the Mr Shao's evidence and submits that there are already three extant sets of legal proceedings in the Beijing Courts that deal with three agreements between Plus View and Mr Shao;

(b) I have considered the relevant evidence of Mr Shao, which includes §17(b) and §20(c) of Shao/1 and §17 of Shao/2. The Plus View Proceeds are not expressly mentioned in the agreements concerned. As Mr Lin has submitted both in his written submissions and repeated during the hearing, Mr Shao has not revealed how those agreements, all reached in November 2020, would shed light on whether Mr Shao had committed an equitable wrong back in 2014. In this regard, the closest which Mr Shao has said is at §17 of Shao/2, that:

> "Entirely without prejudice to the position I adopt in the Application and any other arguments which I may advance to address the substantive merits of this claim in the proper forum, I would mention my position is that the Assignment Agreements (which do not indicate that any trust relationship between [P3] and myself exists) are valid. Further, I deny that [D1] or myself owe any fiduciary duties to [P3], and that it is wholly unclear the basis upon which it is alleged that such duties are owed."

(c) The evidence before me is unclear as to the exact relationship between those agreements and the Plus View Claim. The defence open to Mr Shao as a result is also

unclear. At §43.2 of his written reply, Mr Dawes submits that:

> "If the Agreements are held to be valid in the PRC Proceedings, they would clearly supply a myriad of defences to Shao against the Plus View Claim, the relief of which sought by Plus View is the return of the Proceeds, including but not limited to arguments in estoppel or waiver (that Plus View would then be contractually estopped by the Agreements from making the Plus View Claim against Shao or has by those agreements waived the Plus View Claim against Shao), counterclaims based on the Agreements and set-off (that Shao would be entitled to claim against Plus View for the Proceeds under the Agreements)."

With respect, that "myriad of defences" verges on being speculative.

(d) Mr Dawes relies on *China Construction Bank (Asia) Corp Ltd v Shanghai Pudong Development Bank Co Ltd* **(**CACV 14/2016, 3 February 2017) for the proposition that the existence of parallel proceedings is an important factor to take into account when considering the issue of *forum non conveniens*. That is no doubt correct. But the significance of those parallel proceedings is dependent upon whether the same matter is being litigated in parallel, or if they are only related, how.

94. I repeat §87 above, which equally applies here.

95. In all the circumstances, I am of the view that Ds have also failed to establish, in relation to the Plus View Claim, that Hong Kong is not the natural or appropriate forum, and that the Beijing Courts as the available forums which are clearly and distinctly more appropriate than Hong Kong.

*H.3. Conclusion*

96. For the reasons set out above, I dismiss Ds' application for a stay of the Ace Lead Claim and the Plus View Claim.

*I. The alternative application for a stay of the Ace Lead Claim and the Plus View Claim on case management grounds pending arbitration*

97. This alternative application is intended to cover the eventuality of this Court staying the Trust Shares Claim in favour of arbitration but refusing to stay the Ace Lead Claim and Plus View Claim on the basis of *forum non conveniens*.

98. I have refused to stay the Trust Shares Claim. This alternative application is not engaged.

*J. Overall disposition*

99. For the reasons set out above, I dismiss the Summons.

*K. Costs*

100. I make a costs order *nisi* that Ds shall bear the costs of the Summons, with certificate for 2 counsel, to be assessed summarily. Any application for variation shall be made within 14 days from the date of this Decision by letter to this Court, upon receipt of which further directions may be given in writing with the view of having the application dealt with on the papers. Upon expiration of 14 days and in the absence of any such application for variation, the costs order *nisi* will become absolute. Ps shall then within 14 days thereafter submit their statement of costs, Ds their statement of objections within further 14 days, and Ps

their reply within 7 thereafter. The summary assessment will be conducted on the papers.

(Keith Yeung)
Judge of the Court of First Instance
High Court

Mr Kenny Lin, Mr Jason Kung and Mr Ronald Ngan instructed by Alvan Liu & Partners, for the 1st to 3rd Plaintiffs.

Mr Victor Dawes SC leading Mr John CK Chan instructed by Gibson, Dunn & Crutcher, for 1st and 2nd Defendants.