Phillip Securities (Hong Kong) Ltd v 3i Capital Group Corp

22 December 2017

Court of First Instance

CFI

High Court Action No 1905 of 2014

HCA 1905/2014

Citations:	[2017] HKEC 2773
Presiding Judges:	Deputy Judge Sherrington
Phrases:	Contract law - breach of contract - agreement between securities house and client - claim against client for failure to settle obligations in accordance with agreement in relation to allocation of shares - whether defence/allegations of implied terms, misrepresentation or breach of duty of care by securities house made out
Counsel in the Case:	Mr Paul H M Leung, instructed by Edmund Cheung & Co, for the plaintiff Mr Laurence Li and Mr William K W Leung (solicitor advocate), instructed by William K W Leung & Co, for the 1st and 2nd defendants

JUDGMENT:

Deputy Judge Sherrington

Background

1. The plaintiff, Phillip Securities (Hong Kong) Ltd ("Phillip") is a securities house licensed to carry out Types 1 (ie dealing in securities), 4, 7 and 9 regulated activities under the Securities and Futures Ordinance (Cap 571). It is an exchange participant of the Hong Kong Stock Exchange.

2. The 1st and 2nd defendants are BVI Incorporated entities and were institutional clients of the plaintiff from early 2013. They are respectively 3i Capital Group Corp ("3i") and Dubai Growth Fund Ltd ("DGF").

3. The present dispute arose out of the subscription and placement of new shares which 3i and DGF had applied for in June 2014, namely, the shares in (1) Changgang Dunxin Enterprise Co Ltd and (2) Chang Fat Ginseng Holdings Co Ltd.

4. It is common ground that 3i's and DGF's account with Phillip was subject to express terms contained in the following documents:

> 3i's Customer Information Form (also known as Account Opening Form) dated 12 February 2013;
>
> DGF's Customer Information Form dated 23 May 2013; and
>
> Phillip's standard Securities Client Agreement dated April 2013.

5. In terms of the personnel dealing with each other, 3i and DGF acted through an employee Mr Al-Barazi. Phillip acted mainly through Mr Okada, an assistant manager in the International Sales department, and at times through Mr Shikita, the manager of that department.

6. The prior dealing between the parties is relevant to the defendants' pleaded case and I therefore summarize these. In each case the reference below to the date the allocation was agreed is the defendants' submission and is included because of its relevance to their pleaded case.

7. Before the two IPOs the subject of the present dispute, 3i and DGF through Phillip had subscribed for shares in seven IPOs:

> Hong Kong Finance Group Ltd ("HK Finance"): 3i submitted an interest on 13 September 2013. It was allocated shares and agreed to the allocation on 25 September 2013;
>
> China Ludao Technology Co Ltd ("China Ludao"): 3i and DGF submitted their interest on 26 September 2013 and were allocated shares and agreed to the allocations in letters dated 7 October 2013;
>
> Mega Expo Holdings Ltd ("Mega Expo"): 3i and DGF submitted their interest on 24 October 2013 revising it in the same day. They were allocated shares and agreed to the allocations on 1 November 2013;
>
> Yongsheng Advanced Materials Co Ltd ("Yongsheng AM"): 3i submitted its interest on 20 November 2013. It was allocated and agreed to the allocation of shares on 21 November 2013;
>
> ePrint Group Ltd ("ePrint"): 3i and DGF submitted their interest on 24 November 2014. They were allocated and agreed to the allocation of shares on 26 November 2014;
>
> Hong Wei (Asia) Holdings Co Ltd ("Hong Wei"): 3i and DGF submitted their interest on 23 December 2013 and were allocated and agreed to allocation of shares on 2 January 2014; and
>
> China Packaging Holdings Dev Ltd ("China Packaging"): 3i and DGF submitted their interest on 31 December 2013 and were allocated and agreed to the allocation of shares on 6 January 2014.

8. In addition there were six other IPOs where one or both of the defendants applied through Phillip for shares but received no allocation.

9. It is the plaintiff's case that the transactions in issue arise from a standard course of dealing at the IPO stage which they describe in general at paragraph 9A of the Re-amended Reply as follows:

> "The IPO Stage can be classified into (a) institutional offering and (b) public offering.
>
> Institutional offering is open mainly to professional institutional investors, both in Hong Kong and elsewhere.
>
> Professional institutional investors who are interested in any particular share offering can bid for shares by indicating the number of shares they require and the price at which they are prepared to pay for the shares.
>
> The underwriters for the offering build a book of bids received. This book-building process usually lasts for a number of days until shortly before the actual allocation of the shares on the day fixed for official allocation. At this point in time, the underwriters will review the final book and determine the final price and allocation to the institutional investors who have placed their bids.
>
> There can be no unilateral cancellation or modification of the bids by the institutional investors once allocation of shares has been determined by the underwriters.
>
> The underwriters inform the brokers or agents of the institutional investors in question of the allocated quantities, if any, and share price, if applicable.
>
> Public offering is open to the retail public in Hong Kong whereby anyone interested in the share offering can, in a 3 to 4 day window, complete an application form to subscribe for such shares. Members of the public usually apply for a fixed number of shares at the maximum offer price.
>
> Once the IPO is completed and the company has been listed, both the public and the

> institutional investors can trade or purchase shares at the market price through brokers. Once the orders are placed with the brokers, they are then handled by the Exchange's trading system. Where orders can be and are executed in this manner, settlement will take place 2 days after the day of the trade in question."

10. The defendants describe market practice at the IPO stage at paragraphs 11A-11E of the Re-Amended Defence. Their description is not materially different from that of the plaintiff, save in the following respects:-

> At the institutional offering stage they say that allocations are not made fixed and final until the allocation date and such allocations may be adjusted, and if needed, cancelled.
>
> They emphasize that in the public offering retail allocations may be scaled back so that public investors who have applied for a specific number of shares might receive refund cheques with such share allocations as are made to them.
>
> At the post-IPO stage they say that the amount of shares and their price will be impossible to change once an order is placed with the broker, in contrast they say to purchases at the time of an IPO.
>
> They say that before the official allocation date bids are sometimes adjusted or cancelled up until the time that allocations are fixed.
>
> Finally they say that after allocation brokers seek the acceptance from their respective subscribers of the proposed allocations via an official allocation letter and shortly thereafter the transaction is concluded when shares are exchanged for the funds plus commission.

The agreements between the parties

11. There is no dispute that the plaintiff and defendants are parties to the terms of the Phillip Securities (Hong Kong) Ltd Securities Client Agreement dated April 2013. Mr Paul Leung for the plaintiff drew attention to the following specific terms:

> " ' Transactions ' means any transactions concerning the purchase, subscription, sale, exchange or other disposal of and dealings in any and all kinds of Securities on any Exchange including (but not limited to) safe-keeping of securities and the provision of nominee or custodian service therefor and other transactions effected under or pursuant to this Agreement.
>
> Authority
>
> …
>
> The Customer acknowledges and agrees that the Customer retains full responsibility for all Transactions and the Company is responsible only for the execution, clearing, and carrying of Transactions and has no responsibility or obligation regarding any conduct, action, representation or statement of any introducing firm, investment advisor or other third party in connection with the Account or any Transaction therein. In relation to Transactions entered by the Customer not as a result of the Company's recommendation or solicitation, the Company is not responsible to the Customer with respect to the suitability of the Transaction. Nor is the Company responsible for the profitability, tax, legal or accounting consequences of any Transactions.
>
> Any advice or information provided by the Company, its directors, officers, employees or agents, whether or not solicited, shall not constitute an offer to enter into a transaction, or an investment recommendation. The Customer independently and without reliance on the Company, makes its own judgements on Transactions.
>
> …
>
> Instructions
>
> …
>
> The Customer acknowledges and agrees that any Instructions given or purported to be given by any means to the Company by the Customer or by any Authorized Person and which are acted on or relied on by the Company shall at all times be irrevocable and bind the Customer, whether or not such Instructions are in fact given or authorized

by the Customer. Under no circumstance should the Company have any duty to enquire or verify the identity or authority of the person giving instruction by any accepted means.

The Customer acknowledges that once an instruction has been made it may not be possible to cancel or change the instruction.

…

Events of default

Any one of the following events shall constitute an event of default ('Event of Default"):

the Customer's failure to pay any deposits or any other sums payable to the Company or its Associates or submit to the Company any documents or deliver any Securities to the Company hereunder, when called upon to do so or on due date;

…

If an Event of Default occurs, without prejudice to any other rights or remedies that the Company may have against the Customer and without further notice to the Customer, the Company shall be entitled to:

…

dispose of any or all Securities held for or on behalf of the Customer and to apply the proceeds thereof and any cash deposit(s) to settle all outstanding balances owing to the Company or its Associates including all costs, charges, legal fees and expenses including stamp duty, commission and brokerage properly incurred by the Company in transferring or selling all or any of the Securities or properties in the Account or in perfecting title thereto;

…

All amounts due or owing by the Customer to the Company under this Agreement shall immediately become due and payable if an Event of Default occurs.

…

Liability and Indemnity

…

The Customer agrees to fully indemnify and keep indemnified the Company and its Associates and its Correspondent Agents and their directors, officers, employees and agents ('Indemnified Persons') against any loss, cost, claim, liability or expense, including legal fees, that may be suffered or incurred by any and/or all of the Indemnified Persons, arising out of or in connection with any Transactions, or otherwise arising out of any action or omission by the Company in accordance with the terms of this Agreement, or arising out of any breach by the Customer of any of its obligations under this Agreement, including any costs reasonably incurred by the Company in collecting any debts due to the Company or any unpaid deficiency in the Account, in enforcing the rights of the Company hereunder or in connection with the closure of the Account, and any penalty charged as a result of any Transaction to the Company by any Exchange and/or Clearing House.

…

New Listing of Securities

…

The Customer shall familiarise itself and comply with all the terms and conditions governing the Securities of the new listing and/or issue and the application for such new Securities set out in any prospectus and/or offering document and the application form or any other relevant document in respect of such new listing and/or issue and the Customer agrees to be bound by such terms and conditions in any such transaction the Customer may have with the Company.

The Customer hereby gives the Company all the representations, warranties and undertakings which an applicant for Securities in a new listing and/or issue is required

> to give (whether to the issuer, sponsors, underwriters or placing agents of the relevant Securities, the Exchange or any other relevant regulator or person)."

12. I was also referred to the account opening form which is entitled "Customer Information Form Professional Investors—Institutional (15.2A)". These include a declaration signed by the client in the following terms:

" G Declaration by Client

I / We confirm and warrant that the information provided above is true, complete and correct and Phillip Securities (Hong Kong) Limited ('PSHK') is entitled to rely fully on such information and representations for all purposes, unless it receives notice in writing of any change. With the information provided, I / we instruct PSHK to open a trading account for conducting the service(s) specified under section E.

I / We confirm that I / we had read and fully understand by this Customer Information Form and the Client Agreement together with any Addendum in relation to the services provided by PSHK (together refers to as the 'Agreement'). I / We accept and agree to be bound by the terms and conditions set out in the Agreement with effect from the date upon which I / we signed hereunder. I / We undertake that I / we shall provide all information required (including customer identification of ultimate beneficiaries) to PSHK without delays upon request from both overseas and / or local regulators.

I / We undertake that I / We have developed written Anti-Money Laundering ('AML') and Counter-Terrorist Financing ('CTF') policies and procedures to comply with applicable provisions of Hong Kong laws. I / We shall perform Customer Due Diligence ('CDD') measures on my / our clients and beneficial owners as specified in section 2 of Schedule 2 of AML and CTF (Financial Institutions) Ordinance. I / We shall provide without delay the copy of document or record obtained in the course of carrying out CDD measures on behalf of PSHK upon request, or I / we cease trading, or do not act as an intermediary for PSHK anymore. The aforementioned documents shall be retained throughout the continuance of my / our business relationship and for at least six years beginning from the date my / our account is opened with PSHK.

I / We would like to be treated as professional investor(s) which is defined in Part 1 of Schedule 1 to the Securities and Futures Ordinance (Appendix I). I / we understand that I / we will not be entitled to the protection given to non-professional investor(s) under the Code of Conduct for Person Licensed or Registered with the Securities and Futures Commission, including not being provided with certain information upon signature hereunder. I / We have been explained and understood the consequences of being treated as professional investor(s) and the right to withdraw to be treated as professional investor(s). In light of this declaration, I / we confirm and accept to be treated as professional investor(s)."

13. Forms in essentially the same terms were executed by 3i and DGF on 12 February and 23 May 2013 respectively. These forms contain a Section H, marked in bold "For office use only", which contains boxes to be filled in by the plaintiff relating, inter alia, to the checking of documents, the verification of client information as well as space to insert a credit limit. It is the plaintiff's case, which was not contradicted by the defendants, that at the time the defendants signed these forms this section was blank, although at some point the defendants became aware of the manuscript additions because they plead a positive case that the details contained therein are express terms of the contract between the plaintiff and the respective defendant. The plaintiff contests this and says that Section H was not part of the contract.

The parties' pleaded case

14. The plaintiff's case is straight forward in the sense it proceeds on the basis that the defendants did not settle their obligations in accordance with the terms of the Securities Client Agreements between them in relation to their allocation of shares in the 2 IPOs the subject of the dispute and accordingly, in order to mitigate their loss, they sold the shares in question and in doing so made a loss being the difference between the defendants unsettled sum and the price obtained on sale.

15. It is the defendants' pleaded case that:

> There was an express term in their agreement with the plaintiff contained in Section H of the Customer Account Form providing a maximum trading limit of HK$1,000,000 on each of the defendants' accounts.

There were a number of implied terms arising from the parties prior course of dealing on the 15 IPOs to which I have made reference namely:

the plaintiff's allotment/allocation of shares would be in line with the defendants' real demand, which the defendants would communicate verbally to the plaintiff in precise terms;

the plaintiff would figure out the order amount, which would generally be inflated and larger than the defendants' real demand, which would subsequently be presented to the underwriter so that the amount of the issue to be allocated to the defendants would match their real demand;

the defendants would then instruct the plaintiff by email to present to the underwriter the inflated demand;

the plaintiff would subsequently send the defendants a letter stating the plaintiff's proposed allocation to the defendants ("Plaintiff's Letter of Proposed Allocation") for the defendants' consideration. The defendants had the right to change the size or even cancel the order up to their signature of this document;

upon verification of the contents of the Plaintiff's Letter of Proposed Allocation and the number of shares to be allocated consistent with defendants' real demand, the defendants would confirm by signing and returning to plaintiff the Plaintiff's Letter of Proposed Allocation. It was only once the letter was signed and returned to the plaintiff that plaintiff's allocation became effective and the shares could be allotted to the defendants'.

The plaintiff owed a fiduciary duty of care to the defendants which it breached because of the misrepresentation made by the plaintiff to the defendants about the size of the inflated demand they needed to indicate in order to arrive at their real demand.

The plaintiff was dishonest in making a false allegation as to the date when the shares had been allocated in the Changgang IPO or, in the alternative, that the plaintiff itself committed to the purchase of the shares in the Changgang IPO and was intent on selling these to the defendants as principal in conflict with the defendants' interest.

16. Thus it is the defendants' case that they are entitled to rescind the contracts in question. The essence of the case as put by Mr Li is that the plaintiff never signed the Plaintiff's Letter of Proposed Allocation and to the contrary had protested the allocation: on this basis they assert a counterclaim for a declaration that the contracts in question are void or in the alternative that the defendants' obligations thereunder are discharged. They also claim damages and interest.

17. It was unclear to me at trial the extent to which the defendants maintained all of these arguments but Mr Li did not resile from any of them even if he did not specifically address them other than to state this at paragraph 30 of his skeleton:

" On this basis, the Defence has raised various arguments including about implied terms, meaning of the instructions and the arrangements, breach of duty, and misrepresentation."

18. He went on however to conclude:

" It is respectfully submitted that, in the circumstances hereof, legal labels do not much matter. The present dispute will turn on key questions of fact as follows.

Were 3i and DGF bound at the time of a submission of interest or only after allocation and agreement?

Could the underwriters and, in turn, Phillip Securities require 3i and DGF to take up allocations days ahead of the stated allocation date?"

19. He accepted in opening that these questions would depend on canvassing the documents and the oral evidence, although by closing he sought to suggest that the case could best be determined by reference to the documentary evidence alone.

20. I note here that Mr Li argued the case in a manner not altogether consistent with the way the case was pleaded. He submitted that, as a matter of law, at the institutional offering stage allocations are not fixed until the allocation date and until that date may be adjusted and if needed cancelled and even beyond that the defendants were not committed until they had signed the Letter of Proposed Allocation which came even later.

21. I see force in the argument made by Mr Leung for the plaintiff that the "real demand" scenario put

forward by the defendants in their defence as an implied term of their agreement does not sit at all well with their additionally pleaded case that there was also an implied term that they were not bound until they had signed the Letter of Proposed Allocation, nor with their contention advanced at trial that as a matter of law no contract was formed until after they signed all the confirmation papers post-allocation. If that were the case then all of what goes before is irrelevant because the defendant would have been able quite properly to put forward huge bids, wait to see the size of the proposed allocation, and then decide how much, if any, they wished to take up.

22. It is necessary perhaps to put this somewhat confusing state of affairs in context. There was an eleventh hour application by the defendants to re-re-amend their defense to delete large swathes of the pleading and introduce additional and different arguments as to why they should not be bound, including on the basis that there was no binding contract until the plaintiff's Letter of Proposed Allocation was received by the defendants and duly signed. I did not allow that late application for detailed reasons I gave at the time and so the case proceeded on the basis of the pleadings already filed with the court.

23. I would only add in parenthesis that it is unfortunate that the pleading of the defence seemed to be in such an unsatisfactory state given that the claim was filed over three years ago, and as I said in dismissing the late application to re-re-amend, that so many opportunities to rectify matters had been sought, obtained and then ignored.

24. The result of all this was that the trial which was originally listed for 5 days barely lasted for half of that time since for the most part no submissions were made in respect of a number of the points made in the re-amended defense.

The evidence

25. There is no dispute that Mr Al-Barazi was authorised by 3i and DGF to place orders for shares in IPOs and secondary offerings for and on their behalves.

26. Pursuant to this authority Mr Al-Barazi instructed the plaintiff to place an order for shares:

> in Changgang Dunxin Enterprise Co Ltd in an aggregate sum of US$1.5 million for each defendant on 17 June 2014; and
>
> in Hang Fat Ginseng Holdings Co Ltd in an aggregate sum of US$1 million for 3i on 20 June 2014.

27. Pursuant to 3i's instructions, the plaintiff placed an order for:

> 3,826,000 units of shares in Changgang Dunxin in an aggregate sum of HK$5,356,400.00 on 20 June 2014; and
>
> 480,000 units of shares in Hang Fat in an aggregate sum of HK$950,400.00 on 24 June 2014.

28. Pursuant to DGF's instructions, the plaintiff placed an order for 3,826,000 units of shares in Changgang Dunxin in an aggregate sum of HK$5,356,400.00 on 20 June 2014.

29. On 20 and 24 June 2014, the plaintiff issued two Allocation Notices to 3i which purported to confirm the allocation of 3i's shares to it and stated that the settlement date in respect of 3i's shares in Changgang Dunxin and Hang Fat were 25 June 2014 and 27 June 2014 respectively.

30. On 20 June 2014, the plaintiff issued an Allocation Notice to DGF which purported to confirm the allocation of DGF's shares to it and stated that the settlement date in respect of DGF's shares was 25 June 2014.

31. These facts are not in dispute but the underlying basis of the defendants' instructions as well as the effect of the plaintiff's allocation are in issue. The parties' positions were canvassed in the evidence before the court including in the contemporaneous documents and the parties' submissions.

32. The defendants called Mr Toshiyuki Okada, an assistant manager in the International Sales department and Mr Yoshikazu Shikita, the manager of that department.

33. Mr Okada gave the primary evidence as he was the plaintiff's representative who handled the account opening procedures in respect of both defendants on 12 April 2013 and 11 June 2013 respectively. He was the principle account executive for both of the accounts.

34. Mr Okada had contact at various times with Mr Al-Barazi, Mr Ahmad Hassouna, Mr Raymond

Docot, and Marija Cerauskaite. Mr Al-Barazi was, he said, their main contact who placed orders and communicated with the plaintiff throughout, through him and in his absence Mr Shikita.

35. There is no dispute that the defendants were professional investors within the definition of the Securities and Futures Ordinance (Cap 571) and experienced such that the plaintiff was not required to fulfill the requirements set out in paragraph 15.5 of the Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission while serving the defendants in respect of their share dealings, namely, the need to establish the financial situation, investment experience and/or investment objectives of the defendants, and the need to ensure the suitability of a recommendation solicitation.

36. Mr Okada examined the circumstances of each of the successful prior occasions when the defendants were allocated shares. Significantly his evidence was that at no time did Mr Al-Barazi or anybody on behalf of 3i or DGF communicate with him verbally or otherwise the defendants' so-called real demand. It was never the case, he said, that the plaintiff would figure out an order amount to meet that real demand. Indeed Mr Okada's evidence was that the plaintiff is never in a position to give such advice since the allocation ratio is not something over which they have any control; furthermore as a matter of policy the plaintiff allocates to its clients on any particular deal on a fair allocation basis.

37. According to Mr Okada the prior dealing between the plaintiff and the defendants proceeded by way of the plaintiff placing orders in the amount specified by Mr Al-Barazi; the exact allocation was then communicated by way of a confirmation of allocation and not a proposed allocation; and at that point the defendants were not in a position to change or cancel the order because the plaintiff had a cut-off time to meet for the purposes of placing the defendants' order with underwriters.

38. All of the prior transactions progressed in this fashion resulting in allotted ratios to 3i of between 2% and 47% of its order size and in relation to DGF of between 4% and 47% of its order size.

Changgang Dunxin Enterprise IPO

39. Turning to the Changgang IPO, Mr Okada said that the defendants' offer was to purchase $1,500,000 for each account, which was accepted by the plaintiff's email of 17 June 2014 and was followed some 15 minutes later by a further email attaching a file for placement of the stock in question and informing Mr Al-Barazi, amongst other matters, that the plaintiff's cut-off time for the deal was 18 June 2014 at 18:00 HKT.

40. Mr Okada informed Mr Al-Barazi on 20 June 2014 that both of the defendants had been successful in their applications and each had accordingly been allotted 3,826,000 shares priced at $1.40 per share.

41. By letter of the same date the plaintiff gave final notice of the allocation and requested the usual confirmation, which comprise those contained in the placing agreement. The settlement amount and dates for both of the defendants was stated to be $5,437,174.51 and 25 June 2014 respectively.

42. Mr Okada's evidence was that after having received his email of 20 June 2014 Mr Al-Barazi telephoned him at about 18:30, requesting a reduction in the allocation of that stock to just US$200,000 for both 3i and DGF combined. He expressed the view that the actual allocation was "a very big allocation" and asked Mr Okada if there was any way they could minimize the number. He said he did not have the allocated funds for this IPO and they had been hoping only to get close to US$200,000. He explained that he had inflated the order to get close to what he wanted. He said the problem now was he only needed US$200,000, namely US$100,000 for each account making a total of US$200,000 in aggregate.

43. Mr Okada says that he called back Mr Al-Barazi afterwards at about 18:49 on the same day and informed him that the allocations could not be reduced. Mr Al-Barazi urged him to try again but Mr Okada insisted this was not possible.

44. Mr Al-Barazi then asked him if he could try to find out about the demand for the stock and Mr Okada said he would check. In a subsequent phone call at about 18:55 on the same day, Mr Okada told him the demand for the placement for the institutional tranche was 4 times over-subscribed and that the local tranche was more than 1 time covered.

45. According to Mr Okada, hours later, Mr Al-Barazi sent him an email stating that their "true demand" was US$250,000, and asking about scaling down the allocation to US$250,000 which he noted was different from the earlier figure of US$200,000 which had been mentioned over the phone.

46. Mr Okada's evidence was that although Mr Al-Barazi and he had a telephone conversation on 17 June 2014, Mr Al-Barazi did not at any time during that call or at any other time mention anything to him about the defendants' so-called "real demand" or any other objective.

47. Mr Okada emphasised that he did not represent to Mr Al-Barazi or the defendants any so-called "inflated demand" the plaintiff needed to present to the designated underwriter in order to secure the so-called "real demand" for the stock. There was simply no discussion with Mr Al-Barazi about the defendants' "real demand" or the "inflated demand" or anything similar.

48. At this point the narrative in the evidence was taken up by Mr Shikita, whose evidence was that he had been briefed about the situation by Mr Okada prior to his going on holiday on 21 June.

49. Mr Shikita had a telephone conversation with Mr Al-Barazi and his colleague, Ahmad Hassouna on 23 June 2014 at about 10:32 am. The call he said was initiated by the defendants' representatives. They wanted to talk about the allocation of the Changgang shares to the defendants — in particular, they wanted to find out from him if it was possible for the allocation to be reduced to US$250,000. Mr Shikita told them that he was not able to reduce the allocation but he would try to find suitable buyers, both before the listing date (ie before 26 June 2014) and if necessary also after the listing date to help the defendants reduce their holding to their desired level.

50. On 25 June 2014, Mr Shikita made a call to Mr Al-Barazi at about 9:15 am who said again that the defendants only really wanted US$250,000 worth of the stock in total, which would mean that some 3.1 million of the allocated shares in each of the defendants' accounts would need to be sold in order to reduce the holding to this level. Mr Shikita tried to confirm with him the number of shares of DVP settlement (ie delivery versus payment settlement), but he answered: "I'm not the decision maker. That is the problem. So, I am going to seek order from the management then I can get back to you."

51. At about 9:55 am on the same day, Mr Shikita said he called Mr Al-Barazi on the phone and mentioned the deadline for DVP settlement. He told him that the plaintiff needed to receive his confirmed instructions by 11 am to play safe, and by 11:30 am latest. Mr Al-Barazi replied that he did not think he could confirm by that time. Mr Shikita therefore asked him what he wanted the plaintiff to do if he did not hear back from him. Mr Al-Barazi told Mr Shikita to hold off and he would see what he could do, in terms of getting an answer from their management.

52. At about 11:40 am on the same day, Mr Shikita called Mr Al-Barazi on the phone again. He had tried to reach his colleague, Mr Docot, but without success because he had received an email from Mr Docot earlier that morning, claiming that the defendants could not settle the transaction for the purported reason that it was "very inconsistent with our understanding of the real demand communicated from our side by Mr Al-Barazi to your side." Mr Shikita mentioned this to Mr Al-Barazi and he replied he would get to his office and find out what had happened.

53. Mr Al-Barazi's office was in Dubai and because of the time difference between Hong Kong and Dubai it was about 7:40 am local time there when they had spoken. Mr Shikita says he reminded Mr Al-Barazi during that call that it was necessary to sort out the issue before 3:45 pm (Hong Kong time) or else the plaintiff would consider the defendants' situation as a default situation, leading to the plaintiff disposing of the shares in question.

54. In the afternoon of that day, Mr Shikita received an email from Mr Docot who stated "I regret at this point we can't do anything as the management is discerned [sic] not to settle the trade." Mr Shikita called Mr Al-Barazi again at about 16:07. He told him about Mr Docot's email and asked him if he knew the reason for Mr Docot's statement. Mr Al-Barazi replied that it was because the allocation was more than the true demand and added:

> " The problem is that we got allocation more than the true demand. Because you guys told me that, when you guys are not the underwriter on the deal, you have no control on the allocation, right? So you get whatever the underwriter gives you. As a broker, just trying to get as shares as on this IPO. And that is where the problem happened. We didn't know that the true demand doesn't exist and … when getting with the broker and the underwriter. So, that's why we are saying that over-allocated and we cannot settle only what we asked as the true demand which was 500,000 dollars …."

55. Mr Al-Barazi also suggested to Mr Shikita during this phone conversation that his company had threatened him by saying that he was going to lose his job if he could not scale down the allocation. It was during this call that Mr Shikita informed Mr Al-Barazi that the plaintiff was going to start disposing of the shares in question.

56. Mr Shikita then issued an email to Mr Docot that afternoon, informing him that if the defendants did not settle the trade by 15:45 Hong Kong time, it would be considered a default event. Mr Shikita followed that email with another email later in the afternoon notifying him that the plaintiff was selling the shares due to the defendants' failure to settle the trade and further reminded him that the settlement for the Hang Fat shares would be due by 15:45 that same day and in the event of default, the plaintiff would take the same action and sell those shares at its discretion.

Hang Fat Ginseng IPO

57. Mr Okada's evidence was that early in the afternoon of the 20 June 2014 Mr Al-Barazi had instructed him to subscribe on behalf of 3i to the book building of this IPO in the amount of HK$1,000,000 at the strike price. He had previously indicated to Mr Okada by email on 17 June that he was probably going to go long on this stock. Mr Okada's evidence was that the plaintiff had only one other client who also placed an order for those IPO shares and he gave evidence to the effect that the plaintiff carried out its usual fair allocation policy and allocated the shares on a pro rata basis to each of the two clients who had applied, each receiving about 12% of the total quantities ordered.

58. At that point the narrative is taken up once again by Mr Shikita owing to Mr Okada's holiday.

59. By email dated 24 June Mr Shikita informed Mr Al-Barazi that 3i had been allocated 480,000 shares and by a letter of the same date the plaintiff gave formal notice of allocation to 3i setting out the usual details of the allocation and requesting the usual confirmations from 3i. The settlement amount and date for 3i was stated to be HK$964,732.03 and 27 June 2014 respectively. It was Mr Shikita's evidence that just as the defendants had defaulted on the settlement of the Changgang Dunxin Enterprise trade, 3i also defaulted on the settlement of the Hang Fat Ginseng trade and as a result, the plaintiff decided to sell those shares as well.

60. Upon the completion of the disposal of all those shares, Mr Shikita sent Mr Docot an email on 27 June 2014 at 17:20, informing him of the completion of the disposal and further informed him that the 3,826,000 shares in Changgang Dunxin Enterprise allotted to 3i had been sold at an average price of $1.1104 per share, resulting in a negative balance of $1,107,787.99; that the 3,926,000 shares in the same listed company allotted to DGF had been sold at an average price of $1.1111 per share, resulting in a negative balance of $1,104,998.44; and that the 480,000 shares in Hang Fat Ginseng allotted to 3i had been sold at an average price of $1.566458, resulting in a negative balance of $201,267.10.

61. He then sent a further email to Mr Docot on 27 June 2014, putting on record that the transactions in dispute were based on clear instructions from the defendants and that the defendants had not communicated their "true demand" to the plaintiff when the defendants placed the order or before the allocation. That was followed up by another email to Mr Docot, dated 30 June 2014, giving details of the sale of the shares due to the Defendants' default and the outstanding debts owed by the defendants to the plaintiff as a result of the forced sale of the shares.

62. By an email of 1 July 2014, Mr Docot replied stating that their records clearly showed that the plaintiff had communicated a "true demand" well below the order sized placed, but Mr Shikita said he has not been shown any such document.

63. Mr Shikita also gave evidence about Section H of the Client Information Form. He explained that the trading limits were intended for the plaintiff's internal use only. The limits were put in place at the initial stage when the accounts were first opened. These limits were never formally advised to the defendants as they were at all material times internal limits for the plaintiff's control purposes. He said that he was aware that these limits could subsequently be adjusted by the plaintiff at its sole discretion upon approval by its management and indeed, that these limits were subsequently increased by virtue of the plaintiff accepting the defendants' instructions in regard to the Changang Dunxin IPO.

64. Mr Shikita explained the process by which management approved the level of a client's application for shares and said that only if an order is not approved is there any communication of the management decision and reasons to the client.

65. Mr Shikita confirmed that to the best of his knowledge the plaintiff never gave any advice to the defendants as to the demand they should make nor was he aware of any statement by the defendants of their real demand.

66. He also said that once the cut-off time for the application for IPO shares was past, the

underwriters were under no obligation to entertain any request from the investors who have placed bids, including any request for adjustments or cancellation of the bids. Once the books are closed for subscription and shares are allocated, the investors who have made bids for the shares and been allocated shares bid for must make payment for the shares by the deadline set for the allocation, irrespective of whether or not they have been sent, or replied to "allocation letters". This was the practice followed by the plaintiff and the defendants in all of its prior dealings.

67. In cross examination Mr Li suggested to Mr Okada that the terms of the Letter of Proposed Allocation were clear; it asked for confirmation and acceptance. Mr Li suggested that the defendants would not have been familiar with the need to sign such a letter before the first IPO they had done with Phillips and the terms of the letter were key to various compliance matters and so there could be no completed agreement prior to their signature.

68. Mr Okada said however that this was simply a notification after the allocation had been fixed.

69. Mr Li's arguments elevated what is pleaded as an implied term to a level which is not pleaded and therefore not responded to, namely that the defendants could not be bound until they had signed the Proposed Letter of Allocation in any particular case or alternatively until the respective allocation date. I cannot accept this submission. I would only add obiter and without having heard argument on the matter that what Mr Li argued for would appear to me to be an undesirable outcome given the nature of the book-building process and the commitments that have to be made by the various players from underwriters to brokers to investors prior to such a letter being signed. In the case of professional investors they have confirmed in the declaration signed by them that they are fully aware of their obligations and the requirements of the SFC in the Client Services Agreement such that I would be inclined to regard the signature of the Letter of Proposed Allocation as tantamount to a condition subsequent in the contract with the brokers, breach of which would give rise to a claim for damages. Alternatively, it seems to me that faced with the contractual matrix, the plaintiff could reasonably argue that the defendants were estopped from withdrawing from their commitment in circumstances where the plaintiff had acted to its detriment by committing to underwriters in reliance on the instructions its client had given.

70. Notwithstanding his primary submission Mr Li suggested that the defendants' instructions were in any event tentative and nonbinding as indicated by the repeated use by Mr Al-Barazi of the word "pencil in" when giving instructions to Phillip since that carried with it, he submitted, an implication of not necessarily being permanent but on the facts I saw no basis to conclude this was the case.

71. Mr Li's other principle points to Mr Okada were that:

> Given that the information circular specified an allocation date the defendants could not be bound by an earlier cutoff date. Mr Okada disagreed and said that as a matter of market practice and as between the parties, the position was always clear.
>
> Because necessarily there is some interdependence between the private professional investor tranches and the public tranches, including in relation to the possible need for a claw back of the former, there could be no concluded contract until late in the day. Again Mr Okada did not accept this.
>
> The Changgang IPO was unusual because of the higher than expected ratio of the defendants offer made available. Mr Okada's response was that whilst this might be true it reflected the lower market interest from professional investors in this offer.
>
> The plaintiff was acting dishonestly in seeking to impose an obligation on the defendants at the so-called cutoff date since they had themselves committed to buy the shares in question, they realized that the demand was not there to sustain the price, and wanted therefore to offload the shares at the earliest possible time. Mr Okada again denied this.

72. Mr Li sought to rely on the fact that Mr Okada had conceded in cross-examination that he might have thought the defendants' instructions were inflated, but I interpreted that as being his understanding generally of professional investors' bids at the book-building stage.

73. Mr Li's cross examination of Mr Shikita was limited to putting to him the propositions underlying the defendants case, with which Mr Shikita disagreed.

74. The defendants' evidence was limited to that of Mr Yusri Akram, the Managing Director of the 1st and 2nd defendants who lives in New Jersey and is based out of the defendants' office in Boston. At the critical time of the investments, the subject of the litigation, he was in Monte Carlo attending a

conference.

75. Mr Akram had no first-hand knowledge of the matters in dispute and was reliant to a large extent therefore on a purported statement from Mr Al-Barazi exhibited to his own statement. Although Mr Akram said at first that this was an attested statement, there was no evidence before the court that it was even signed let alone attested. It was also incomplete as it referred to attached documents where there were no such attachments. It was purportedly dated December 2014, prior to Mr Al-Barazi having left the defendants' employment.

76. Mr Akram confirmed that no attempt had been made to contact Mr Al-Barazi to ask him to give evidence and neither was any evidence adduced from Mr Docot, the other employee of the defendants, who had some involvement in the matters in issue.

77. Whilst I have no reason to doubt Mr Akram's experience in the securities industry generally, he was on his own admission as the Managing Director "the top dog in the hierarchy" and so his knowledge of the detail was perhaps not surprisingly wanting in a number of respects.

78. He did not have a detailed familiarity with the documents in the case, nor indeed more worryingly with his own statement, and proceeded by way of generalities based on his understanding of market practice generally although he had had no specific familiarity with the position in Hong Kong. His evidence appeared to derive wholly from the unsigned statement of Mr Al-Barazi, the documents themselves and what he had learned in preparing to give evidence.

79. Mr Akram's explanation for the insertion of the US$ figures for the so-called "real demand" in the table at paragraph 31 of his witness statement was unsatisfactory. When pressed he described these as "extrapolations" which inevitably led to the conclusion that they were not the actual figures of "real demand" given to the plaintiff at the time as his evidence contended. Mr Akram did not seem conversant with how the figures had been arrived at.

80. I accept Mr Paul Leung's submission in closing that it would in any event defy common sense to believe that the defendants' representatives would have told the plaintiff's representatives that their "real demand" for Hong Kong Finance Group shares, for instance, was US$39,615.38, accurate to the cent. Mutatis mutandis for all the other items in the table.

81. Mr Akram's repeated denials of his understanding of the phrase "Phillip cut-off time" were surprising but perhaps reflected no more than his lack of familiarity with the matters in issue since that phrase had been used in the past, including on 21 November 2013 for ePrint Group shares, on 30 December 2013 for China Packaging shares, on 12 May 2014 for Baguio Green shares as well as for Changgang Dunxin in June 2014. I note that in the case of China Packaging Mr Akram was himself a recipient of the email specifying the cut-off time.

82. Mr Akram's evidence was that there was a whole team of the defendants' staff who took part in an "investigation" of the Changgang / Hang Fat transactions and yet, there was not a shred of evidence produced of a report of their investigation in any shape or form. Mr Docot was said to be involved in the investigation and he was still in the employ of the defendants at the time of the trial and yet the defendants chose not to call him to tell the court what the investigation had revealed.

83. Mr Akram's approach to giving evidence appeared to me to be evasive at times and he was happy to depart from his own testimony where it seemed to him to serve his purpose. Similarly there were times when he struggled to accept facts if they did not suit his case as when asked to confirm the accuracy of certain telephone transcripts Mr Akram sought to say they might not be complete because he speculated that there might have been other calls between the parties by cellphone although there was no evidence at all of this. This, taken with his lack of familiarity with the detail, led me to conclude that I could place no weight at all on his testimony.

84. By contrast Mr Okada and Mr Shikita struck me as honest and straight forward witnesses seeking to help the court by their first hand direct evidence of the matters in issue supported by detailed references to contemporaneous emails, letters and telephone transcripts.

The court’s finding

85. I am satisfied that there was no express term contained in Section H of the Customer Information Form. I accept the plaintiff's evidence that this was an internal management sheet and was not made available to the plaintiff. I accept too that as the facts demonstrated, the plaintiff was entitled to and did vary the credit limits on the defendants' account, based no doubt on their experience of prior dealings with them. Whilst Mr Akram said that he was aware of this limit and that he had seen the

document with the manuscript additions, he did not say when or how he became aware of them, or indeed if he became aware of both or only one of them.

86. There is no credible evidence before the court of any communication between the parties as to the defendants' real demand nor of the plaintiff's advice as to the inflated demand of the defendants should indicate. Such evidence as there is suggests no more than that Mr Al-Barazi was surprised by the success of the application made by 3i and DGF in the case of the Changgang IPO and wanted to scale it back drastically — at first to US$200,000 in aggregate between the two defendants, then to US$250,000 and finally it was suggested on one occasion to US$500,000.

87. This lack of consistency and the plaintiff's robust response to those requests points to no indication having been given of the defendants' real demand.

88. It is significant too that there is no evidence of the defendants' real demand argument having been intimated by Mr Al-Barazi at the time beyond his indication in an email to Mr Okada on 20 June referring to the defendants' true demand as being for US$250,000 of stock which I note is more than the US$200,000 he had been suggesting in a telephone conversation earlier that same day. It first seems to have been raised by Mr Docot in a telephone call with Mr Shikita on 25 June when he referred to "the real demand communicated from our side by Mr Al-Barazi".

89. In any event the terms of the Securities Client Agreement make plain that the customer, in this case the defendents, independently and without reliance on the plaintiff makes its own judgment on transactions (paragraph 2.4) and furthermore that the customer acknowledges that once an instruction has been given it may not be possible to cancel or change the instruction (paragraph 4.4).

90. One can only speculate as to how this situation arose but it is to my mind consistent with the evidence that the defendants did not want the level of shares allocated to them, Mr Al-Barazi's attempt to persuade Phillip to reduce the allocation failed, Mr Al-Barazi was then in trouble with his employers as he himself suggested was the case in one of his telephone conversations with Mr Okada, and the defendants then sought other ways of seeking to avoid their liability.

91. The failure to call any witness of fact involved in the matters in issue and in particular not to call Mr Al-Barazi, when it was conceded that he had not even been approached to give evidence, is inexplicable. All the exchanges between the plaintiff and the defendants at the relevant time involved Mr Al-Barazi. The defendants' case on their alleged implied terms hinge on the court's acceptance of evidence adduced to substantiate the so-called "previous course of dealings", "real demand", "the objectives" and the "inflated demand" and so on. Without Mr Al-Barazi's evidence, it seems to me that Mr Paul Leung is right to say that the defendants' case on the implied terms it pleads does not get off the ground. In the circumstances it is difficult for me to do anything other than to reach the inference that Mr Al-Barazi's evidence would not have been helpful to the defendants' case.

92. Faced with this testimony Mr Li sought to persuade me in closing that I did not need to have regard to the witnesses since his case was legal one which turned on the documents alone. I could not accept this given the way the case is pleaded.

93. I cannot conclude on the basis of the evidence before the court that any of the implied terms suggested by the defendants would give effect to the intention of the parties by spelling out the meaning which their contract was intended to have but did not state in express terms. Neither is there any evidence to support a suggestion that both parties would as reasonable men have agreed to the implied terms in question if they had been suggested to them; indeed the implied terms argued for here are all inconsistent with the express wording of the contract between the parties.

94. In the same way there is no credible evidence to support the allegation of misrepresentation or breach of duty of care and in those circumstances these defences must inevitably fail as must the defendants' counterclaim.

95. Accordingly I find in favour of the plaintiff:

> against 3i in the sum of HK$1,404,161.63 together with interest at commercial rate which I feel should be 1% above base rate from the respective settlement dates until judgement; and
>
> against DGF in the sum of HK$1,185,772.95 with interest at the same rate and for the same period.

96. I believe the costs should follow the event and so make an order nisi that the defendants pay the plaintiff's costs of these proceedings.