IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 244 OF 2021 (MRHJ)

BETWEEN

SHENG LU

Plaintiff

AND

BVCF MANAGEMENT LIMITED

Defendant

IN CHAMBERS

Appearances:	**Mr. Tom Lowe QC instructed by Ms Katie Pearson and Mr. Niall Dodd of Harney, Westwood & Riegels for the Plaintiff**
	Mr. Robert Levy QC (via video link) instructed by Mr. Rupert Bell and Mr. Blake Egelton of Walkers for the Defendant
Before:	**Hon Mrs. Justice Margaret Ramsay-Hale**
Hearing:	**3 December 2021**
Draft circulated:	**21 April 2022**
Reasons Delivered:	**26 April 2022**

HEADNOTE

Application to strike out claim as disclosing no reasonable cause of action - test to be applied - Order 18 rule 19 - *McKay v Essex Area Health Authority* [1982] QB 1166.

REASONS FOR DECISION

Introduction

1. By Originating Summons dated 11 August 2021 ("the OS"), the Plaintiff, Sheng Lu (“Mr. Lu” or "the Plaintiff”), formerly the head of Investor Relations and Communications, and later Partner, of the Defendant, BVCF Management Limited (“the Company”), made a claim for relief against the Company, an investment manager of several funds under the umbrella of

the Bio Veda China Fund ("BVCF") brand, including the fund known as BVCF III, LP ("the Fund"), a Cayman Islands exempted limited partnership.

2. Mr. Lu claimed, *inter alia*:

   (i) Declaratory relief that he was entitled to 5% of the "carried interest" payable to the Company from the Fund of which the Company was the investment manager;

   (ii) Specific performance of Schedule 2, Part III, of a contract of employment between himself and the Defendant dated 1 May 2014 ("the 2014 Employment Contract");

   (iii) In the alternative to (ii) above, damages for breach of the 2014 Employment Contract and breach of the statutory duty under section 6 of the **Labour Act (2021 Revision)** ("Labour Act") in the amount of the supposed 5% carried interest.

3. By Consent Order made on 10 September 2021, the proceedings were ordered to continue as if commenced by writ. Mr. Lu filed his Statement of Claim on 19 September 2021, which claimed relief in similar but not identical terms to the OS, including, *inter alia*:

   (i) A declaration that Mr. Lu is entitled to 5% of the carried interest payable to the Company by the Fund;

   (ii) An order, by way of specific performance of Schedule 2, Part III of the 2014 Employment Contract directing the Company to pay the Plaintiff 5% of the carried interest paid to the Company by the Fund;

   (iii) In the alternative to the order sought at paragraph 2 above, an order directing the Company to pay Mr. Lu 5% of the carried interest paid to the Defendant by the Fund by way of damages for breach of Schedule 2, Part III of the 2014 Employment Contract and of the statutory duty under section 6 of the **Labour Act.**

4. The Company filed a summons to strike out the entirety of Mr. Lu's claim on 30 September 2021. The Company succeeded in its application, which was heard on 3 December 2021 for reasons which I promised to set out in writing. This I do now.

The Claim

5. Under an agreement made between the Company and the Fund, the Company was entitled to share in the Fund's profits. This share in profits, which is essentially a performance fee paid to investment managers and /or general partners, is referred to as "carried interest"' in the private equity industry.

6. Mr. Lu claims to be contractually entitled to 5% of the carried interest payable to the Company by the Fund.

7. The way in which that entitlement is said to arise is set out in his Statement of Claim as follows:

> *19) Schedule 2, Part III of the 2012 Contract provided as follows:*
>
> > *"In consideration of the entry by the Employee into this Agreement, the Employer hereby grants the Employee the option to subscribe for up to fifty (50) Class B Shares, representing the Employee's proportional entitlement to participate in the distributions by the Employer of amounts received in respect of the Carried Interest received by the Employer from BVCF III, L.P., on the terms and conditions more fully set out in the Shareholders' Agreement attached as Appendix A.*
> >
> > *Any exercise by the Employee of any option to purchase Class B Shares shall be subject to, and conditional upon, the Employee having executed and delivered a Deed of Adherence to the Shareholders' Agreement substantially in the form appended hereto."*
>
> *20) Neither the 'Shareholders' Agreement' (the Shareholders' Agreement) nor the 'Deed of Adherence' (the Deed of Adherence), referred to in the extract from the 2012 Contract set out above, were appended to the 2012 Contract.*
>
> *21) The Plaintiff asked Dr Yang orally for a copy of the Shareholders' Agreement and the Deed of Adherence shortly after the Plaintiff joined the Company in September 2012. Dr Yang assured the Plaintiff that both documents would be provided to him when BVCF III had achieved final closing. Final closing in the private equity funds context means the date when the fund ceases to accept new investments.*
>
> *22) Between September 2012 and May 2014, the Plaintiff made several more oral requests for the Shareholders' Agreement and the Deed of Adherence to Ms Gandolfo. Ms Gandolfo also assured the Plaintiff that the documents would be provided to him after the final closing of BVCF III. The Company did not provide the Plaintiff with the Shareholders' Agreement or the Deed of Adherence.*
>
> *23) In 2014, Ms Gandolfo on behalf of the Company asked the Plaintiff, along with other employees of the Company, to sign a new employment contract.*

24) *Ms Gandolfo provided the Plaintiff with a copy of the 2014 Contract prior to 1 May 2014. Once again, the 2014 Contract had been drafted by the Company's attorneys, Walkers, and signed by Dr Yang on behalf of the Company.*

25) *Schedule 2, Part III of the 2014 Contract provided as follows:*

> *"In consideration of the entry by the Employee into this Agreement, the Employer hereby grants the Employee the option to subscribe for up to five (5) Class B Shares, representing the Employee's proportional five per cent (5%) entitlement, upon having been fully-vested, to participate in the distribution by the Employer of amounts received in respect of the Carried Interest received by the Employer from BVCF III, L.P., on the terms and conditions more fully set forth in the Shareholders' Agreement attached as Appendix A.*
>
> *Any exercise by the Employee of any option to purchase Class B Shares shall be subject to, and conditional upon, the Employee having executed and delivered a Deed of Adherence to the Shareholders' Agreement substantially in the form appended thereto."*

26) *Neither the Shareholders' Agreement nor the Deed of Adherence were appended to the 2014 Contract. The Plaintiff requested these orally from Ms Gandolfo prior to signing the 2014 Contract. Ms Gandolfo told him they would be provided at the final closing of BVCF III.*

27) *The Plaintiff signed the 2014 Contract on 1 May 2014.*

28) *On 31 March 2015, BVCF III achieved final closing.*

29) *The Company did not provide the Plaintiff with the Shareholders' Agreement or the Deed of Adherence on 31 March 2015.*

30) *Between 31 March 2015 and 31 January 2019, the Plaintiff made periodic oral requests of Ms Gandolfo for the Shareholders' Agreement and Deed of Adherence. Ms Gandolfo assured the Plaintiff that they would be provided. Notwithstanding these assurances, the Company did not provide the Plaintiff with the Shareholders' Agreement or the Deed of Adherence."*

8. It is Mr. Lu's case that it was expressly agreed between himself and the Company, which was represented by Ms Gandolfo prior to signing the 2012 contract, that he was entitled to carried interest and that this agreement is recorded in Schedule 2, Part III of the Plaintiff's 2012 contract of employment with the Company ("the 2012 Employment Contract") in the words: "*the Employee's proportional entitlement to participate in the distributions by the Employer of amounts received in respect of the Carried Interest received by the Employer from BVCF III, L.P*" and also recorded in the 2014 Employment Contract in the words: *"the Employee's proportional five per cent (5%) entitlement, upon having been fully-vested, to participate in the distribution by the Employer of amounts received in respect of the Carried interest received by the Employer from BVCF III, L.P".*

9. He avers that he was fully-vested in September 2016, having completed 4 years employment with the Company.

10. The particulars of Loss and Damage are set out as follows:

> *46) According to the express wording of the Employment Contracts:*
>
> *(a) the Plaintiff's entitlement to the Carried Interest was conditional upon the Plaintiff having subscribed for Class B Shares in the Company; and*
>
> *(b) the Plaintiff's ability to subscribe for Class B Shares was:*
>
> *(i) subject to terms and conditions more fully set forth in a Shareholders' Agreement which was said to be attached as Appendix A to the 2014 Contract, but was never provided to the Plaintiff; and*
>
> *(ii) conditional upon the Plaintiff having executed and delivered a Deed of Adherence to the Shareholders' Agreement substantially in the form appended thereto. This Deed of Adherence was never provided to the Plaintiff.*
>
> *47) It was an implied term of the Employment Contracts that the Company would not unreasonably or otherwise unfairly prevent the Plaintiff from complying with the conditions necessary to entitle him to receive the Carried Interest.*
>
> *48) It was an express term, alternatively an implied term, of the Employment Contracts that the Company would provide the Shareholders' Agreement and the Deed of*

Adherence to the Plaintiff within a reasonable time period and in any event, during the course of his employment with the Company.

49) In breach of the terms referred to at paragraphs 47 and 48 above, the Company failed to provide the Plaintiff with the Shareholders' Agreement and the Deed of Adherence upon request and thus prevented him from exercising his option to subscribe for Class B Shares.

50) The Company has further indicated in correspondence from its attorneys, Walkers, that it does not intend to honour the Plaintiff's contractual entitlement to the Carried Interest.

51) The Plaintiff has suffered loss and damage as he has been deprived of his right to subscribe for Class B Shares in the Company. "

The Law

11. The application is made pursuant to Order 18, rule 19(1)(a) of the Grand Court Rules 1995 (Revised Edition) ("GCR") on the ground that the Statement of Claim discloses no reasonable cause of action. A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleadings are considered: see *White Book* note 18/19/10. No evidence is admissible on this challenge to the sufficiency of a plaintiff's pleaded case.

12. The authorities also establish that, in determining the application, the Court should assume that the facts pleaded in the Statement of Claim are true and will be proven in evidence.

13. A number of authorities dealing with the test to be applied to an application pursuant to GCR Order 18, rule 19(1)(a) are helpfully summarised in the following passage from the judgment of Stephenson LJ in *McKay v Essex Area Health Authority* [1982] QB 1166 which was cited with approval in the Chief Justice's judgment in *Algosaibi v Saad Investments Company Limited* 2013 (1) CILR 202. At paragraph 156 of the judgment, Stephenson LJ said:

> *"The defendants have to show that the case is "obviously unsustainable": Attorney-General of the Duchy of Lancaster v. London and North Western Railway Co. [1892] 3 Ch. 274, 277, per Lindley L.J.; "obviously and almost incontestably bad": Dyson v. Attorney-General [1911] 1 K.B. 410 , 419, per Fletcher Moulton L.J.; "unarguable": Nagle v. Feilden [1966] 2 Q.B. 633, 651, per Salmon L.J.; "one which cannot succeed": p. 648, per Danckwerts L.J.; "quite unsustainable": Schmidt v. Secretary of State for Home Affairs [1969] 2 Ch.149, 171 per Lord Denning M.R.; "hopeless": Riches v.*

Director of Public Prosecutions [1973] 1 W.L.R. 1019, 1027, per Lawton L.J. This is all summed up in a sentence from the judgment of Lord Pearson in Drummond-Jackson v. British Medical Association [1970] 1 W.L.R. 688, 696, which Lawson J. followed in this case: "the order for striking out should only be made if it becomes plain and obvious that the claim or defence cannot succeed ..." But it need not become plain "so that any master or judge can say at once" - (my italics) - "that the statement of claim as it stands is insufficient ...": Hubbuck & Sons Ltd. v. Wilkinson, Heywood & Clark Ltd. [1899] 1 Q.B. 86 , 91, per Sir Nathaniel Lindley M.R. Though this court held in Dyson v. Attorney-General [1911] 1 K.B. 410, that the court's power to strike out a statement of claim disclosing no reasonable cause of action was never intended to apply to an action involving a serious investigation of ancient law and questions of general importance, and in that respect to take the place of the old demurrer on which such questions could be fully argued and decided (see [1911] 1 K.B. 410 , 414 per Cozens-Hardy M.R., and p. 418 per Fletcher Moulton L.J.), it can become plain and obvious to a master or a judge that a claim cannot succeed after "a relatively long and elaborate" hearing: Drummond-Jackson v. British Medical Association [1970] 1 W.L.R. 688 , 696B per Lord Pearson; and per Sir Gordon Willmer, at p. 700: "The question whether a point is plain and obvious does not depend upon the length of time it takes to argue. Rather the question is whether, when the point has been argued, it has become plain and obvious that there can be but one result.""

The Submissions

14. Despite Mr. Lu's apparent reliance on the 2012 Employment Contract, Mr. Levy QC, on behalf of the Company, submits, and I accept, that the 2014 Employment Contract is the only contract relevant to the pleaded claim. The primary submission by Mr. Levy is a simple one: he says that the provision in Schedule 2 of the 2014 Employment Contract on which Mr. Lu relies makes it plain that that his entitlement to carried interest was conditional upon his exercising the option to subscribe for shares granted to him by the Company as set out in para 7 *supra* which I reproduce in part below for ease of reference:

> *"In consideration of the entry by the Employee into this Agreement,* ***the Employer hereby grants the Employee the option to subscribe for up to five (5) Class B Shares, representing the Employee's proportional five per cent (5%) entitlement,*** *upon having been fully-vested, to participate in the distribution by the Employer of amounts received in respect of the Carried Interest received by the Employer from BVCF III, L.P.…."* [emphasis mine]

15. As there is no averment in the pleaded case that Mr. Lu ever exercised or sought to exercise the option on which his entitlement to 5% carried interest depended, Mr. Levy submitted that Mr. Lu's claim for a declaration that he was entitled to 5% carried interest must fail.

16. With respect to the claim for specific performance of the 2014 Employment Contract seeking an order directing the Company to pay Mr. Lu the 5% carried interest, Mr. Levy submitted that the claim was bad in law as the remedy of specific performance is not available after the contract comes to an end, as Mr. Lu's 2014 Employment Contract did in 2019.

17. The claim for breach of statutory duty under section 6 of the Labour Act was abandoned by the Plaintiff during the hearing.

18. Over Mr. Levy's objection, the Court heard Mr. Lowe QC, on behalf of the Plaintiff, on a proposed draft amended Statement of Claim, consistent with the practice of the Courts to give the Plaintiff an opportunity to amend, if his case can be improved by amendment. In his submissions on behalf of Mr. Lu, Mr. Lowe drew the Court's attention to the following clause in Schedule 2 of the 2014 Employment Contract:

> *"Any exercise by the Employee of any option to purchase Class B Shares shall be subject to, and conditional upon, the Employee having executed and delivered a Deed of Adherence to the Shareholders' Agreement substantially in the form appended thereto."*

19. Mr. Lowe submitted that, as a matter of construction, since the exercise of the option by an employee, in this case, Mr. Lu, was subject to and conditioned on his executing the Shareholders' Agreement and the Deed of Adherence, the only way to make the contract workable was for the Company, as employer, to give the documents to Mr. Lu, as employee.

20. Developing his submissions, Mr Lowe said that the Company knew Mr. Lu wanted to subscribe for the shares because he had asked for the documents repeatedly. The only reason he would have asked for the document is because he wanted to consider subscribing for the shares; if he is not given the documents then he cannot consider subscribing. As he was not given the documents, he was not put in the position by the Company to exercise the option. He submitted that the Company was in breach of contract in that the Company frustrated Mr. Lu's exercise of the option by not providing him with the documents to enable him to consider whether to subscribe.

21. Mr Lowe submitted that the Company's failure to provide the Shareholders' Agreement and Deed of Adherence amounted to the breach of the implied term to co-operate. In support of that proposition, Mr. Lowe relied on the authority of *Mackay v Dick* (1881) 6 AC 251. The

principle in *Mackay v Dick* was usefully summarised by Devlin J as he then was in *Mona Oil Equipment v Rhodesia Railways* [1949]2 All ER 1014 at 1017 where the learned Judge said this:

> *"Mackay v Dick…contains two separate and independent propositions, one enunciated by Lord Blackburn, and the other by Lord Watson and there is a danger of misunderstanding them, if, as in the headnote to the case, they are combined into one. The first is set out in the words of Lord Blackburn (6 App Cas. 263):*
>
> > *"…. Where in a written contract it appears that both parties have agreed that something shall be done which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect."*
>
> *"It will be observed that Lord Blackburn says nothing about prevention. The principle he enunciates may be put succinctly, as Viscount Simon LC put it in Luxor (Eastbourne) Ltd. V Cooper (2) ([1941] 1 All. E. R, saying that where co-operation is necessary, it is implied that it is forthcoming. If the matter rested there, the plaintiff's normal remedy for breach of the implied term would be damages. The second proposition, based on the opinion of Lord Watson advances a stage further and gives the plaintiff in appropriate cases an additional form of relief. If the breach of the implied term prevents the plaintiff from performing a condition binding on him, he is to be taken as having fulfilled that condition, and if the condition is one on which the right to payment depends, he may sue for payment instead of damages."*

22. On p 1018, the learned Judge noted that:

> "*The formulation of the implied term in this class of case depends, in my judgment, on the necessity for co-operation. Without co-operation the contract would lack business efficacy, and this class of case is, therefore, simply an exemplification of the general principle….I can think of no term that can properly be implied other than one based on the necessity for co-operation.*"

23. On the authority of *Mackay v Dick*, Mr. Lowe submitted that as Mr. Lu could not exercise the option because the Company breached the implied term of co-operation by failing to provide him with the Shareholder's Agreement, then the Court has two options open to it: to treat the option as having been exercised or award damages to Mr. Lu.

24. On the matter of whether the Company had breached an implied duty of good faith, Mr. Lowe referred the Court to *Astor Management v Atalay Mining* where Leggatt J observed at p 145 that the duty of good faith, where it exists:

> *"…does no more than reflect the expectation that a contracting party will act honestly towards the other party and will not conduct itself in a way which is calculated to frustrate the purpose of the contract …"*

25. Mr. Lowe submitted that it follows that if the employer does not deliver the very documents the employee needs to execute the option, he falls foul of the implied duty of good faith.

26. In line with his submissions, Mr. Lowe proposed the following amendments to the Statement of Claim:

> *"20). It was an implied term of the 2012 Contract that the Company would provide the Plaintiff with the documents to allow him to exercise the option and/or that the Company would act in good faith in allowing the Plaintiff to exercise the right to acquire the Carried Interest Shares.*
>
> *…*
>
> *21). The Company knew that the Plaintiff wanted to exercise the option to acquire the Carried Interest Shares in the Company because the Plaintiff asked Dr Yang orally for a copy of the Shareholder's Agreement and Deed of Adherence shortly after the Plaintiff joined the Company in September 2012…*
>
> *…*
>
> *26. It was an implied term of the 2014 Contract that the Company would provide the Plaintiff with the documents to allow him to exercise the option to acquire the Carried Interest Shares and/or that the Company would act in good faith in allowing the Plaintiff to exercise the right to acquire the Carried Interest Shares.*
>
> *…*
>
> *"26B). The Defendant knew that the Plaintiff wanted to exercise the option to acquire the Carried Interest Shares in the Company. The Plaintiff requested the Shareholders' Agreement and Deed of Adherence orally from Ms Gandolfo prior to signing the 2014 Contract…"*
>
> *…*
>
> *29). The Company did not provide the Plaintiff with the Shareholder's Agreement or the Deed of Adherence on 31 March 2015 or with the means of exercising the option to acquire*

the Carried Interest Shares in the Company when it knew that the Plaintiff wished to acquire the Carried Interest Shares."

27. The proposed amendments include amended particulars of breach of contract as follows:

"(46) ~~According to the express wording of the Employment Contracts~~ To the extent that the Plaintiff's entitlement to the Carried Interest Shares was conditional upon the Plaintiff having subscribed for Class B Shares in the Company, the Company failed to provide the Plaintiff within a reasonable time with:

~~(a) the Plaintiff's entitlement to the Carried Interest was conditional upon the Plaintiff having subscribed for Class B Shares in the Company, and~~
~~(b) the Plaintiff's ability to subscribe for Class B shares was~~

(i) ~~subject to terms and conditions more fully set forth in~~ a copy of the Shareholder's Agreement which was said to be attached as Appendix A to the 2014 Contract ~~but was never provided to the Plaintiff~~; and

(ii) ~~conditional upon the Plaintiff having executed and delivered a~~ the Deed of Adherence to the Shareholders' Agreement ~~substantially which was said to be~~ in the form appended thereto. ~~This Deed of Adherence was never provided to the Plaintiff.~~"

28. Mr. Lowe also proposed to amend the prayer for relief in the following terms:

1. *A declaration that the Plaintiff is entitled to 5% of the carried interest payable to the defendant from BVCF III or is entitled to the Carried Interest Shares;*

2. *An order, by way of specific performance of the Schedule 2, Part III of the 2014 Contract directing the Defendant to transfer to the Plaintiff the Carried Interest Shares or pay the Plaintiff 5% of the carried interest paid to the Defendant by BVCF III.*

3. *In the alternative to the order sought at paragraph 2 above, ~~an order directing the Defendant to pay the Plaintiff~~ damages equivalent to 5% of the carried interest paid to the Defendant by BVCF III by way of damages for breach of the express and implied terms of the 2012 and/or the 2014 Contract ~~Schedule2, Part III of the Employment Contract.~~*

Reasons for Decision

29. Having considered Schedule 2 of the 2014 Employment Contract, I concurred with Mr. Levy's submission that, as a matter of construction, Mr. Lu's entitlement to a 5% share of the carried interest paid to the Company by the Fund depended on his subscribing for shares in the Company. Mr. Lu did not aver that he had exercised the option to subscribe for shares or that he had sought to exercise the option and his failure to do so was fatal to his claim for a declaration that he was entitled to 5% of the carried interest paid to the Company.

30. I also concluded that Mr. Lu's claim for an order of specific performance directing the payment to him by the Company of a sum equivalent to 5% of the carried interest was for the same reason equally unsustainable.

31. Had Mr. Lu pleaded that he had exercised the option to subscribe for the 5 shares - assuming that equated to an entitlement to 5% of the carried interest paid to the Company, as Mr. Lowe contended - the Company would be bound to perform its part of the bargain and Mr. Lu would have been entitled to an order of specific performance of the Company's obligation to provide him with the Shareholders' Agreement and Deed of Adherence and issue the requisite number of shares. I make the further assumption here in Mr. Lu's favour that he would not have had to pay for the shares, as the shares, and the entitlement to the 5% carried interest once he had subscribed for them, formed part of his emoluments. It would not matter that the employment contract had been terminated, as Mr Levy submitted, but again, Mr. Lu did not exercise the option and is not now entitled to subscribe for and be issued the shares.

32. That the claim for damages for breach of statutory duty was unarguable was conceded by Mr Lowe, on behalf of the Plaintiff, at the hearing.

33. The Plaintiff's claim, therefore, fell to be struck out on the strength of the Company's submissions that the pleaded case failed to allege that Mr. Lu had subscribed for shares or had sought to do so by exercising the option.

34. In seeking to overcome the defect in his pleaded case, Mr. Lu proposed to amend the claim to plead his entitlement to the "*Carried Interest shares,"* that is to say the shares for which he ought to have subscribed in order to be entitled to a share of the carried interest paid to the Fund, and not 5% of the carried interest paid to the Company as originally alleged.

35. The central allegation supporting the amended claim is that the Company *knew* Mr. Lu wished to exercise the option to subscribe for shares because he had asked to be provided with the Shareholders' Agreement and the Deed of Adherence and that the Company had failed to provide them, thus failing to provide Mr. Lu with the means of exercising the option and/or

the means to subscribe for the shares in breach of an implied term that it would provide him with the documents to allow him to subscribe for the shares.

36. The allegation that the Company did not provide Mr. Lu with the means of exercising the option is unintelligible. To exercise an option to subscribe for 5 shares is to say, 'I would like to exercise the option to subscribe for 5 shares'. The Shareholders' Agreement and the Deed of Adherence are not the *means* of exercising the option but the means by which the exercise of the option is perfected, the pre-condition to the issuing of the shares to which he seeks to subscribe.

37. The principle in *Mackay v Dick*, that a term will be read into a contract as a matter of law to prevent one contracting party frustrating the performance of an obligation by the other contracting party where it was dependent on action being taken or not taken by the first party, is inapplicable on the facts alleged in the draft amended Statement of Claim.

38. In my view, there is no arguable case that, because the Company failed to give Mr. Lu the Shareholders' Agreement and the Deed of Adherence, Mr. Lu was unable to exercise the option to subscribe for the shares which had been granted to him by the Company.

39. The alternative claim for breach of good faith is also unsustainable and for the same reason, that to subscribe for the shares, Mr. Lu had to first exercise the option and was not prevented from doing so because he was not provided with the Shareholders' Agreement and the Deed of Adherence.

40. The allegation that the Company *"knew"* Mr. Lu wanted to exercise the option does not overcome the defect in the pleaded case. Even if it were enough to plead facts that would support the inference that the Company "*knew"* that Mr. Lu wished to exercise the option to subscribe for the shares - and was not merely "*considering subscribing"* to quote Mr. Lowe - the amended case would still fail as an option cannot be exercised inferentially. What must be alleged is that Mr. Lu exercised the option granted to him by the Company to subscribe for the shares on which his entitlement to carried interest depended as pleaded in the original Statement of Claim at para 46(a).

41. During the course of his submissions, Mr. Lowe submitted that the Company should have provided Mr. Lu with the documents because it knew he *"was contemplating the exercise of the option."* If it were, as Mr. Lowe asserted, that on a true construction of the contractual provision, the 5 shares represented Mr. Lu's 5% entitlement to carried interest and that he was not required to pay for the shares as they formed part of his emoluments, what was there to consider?

42. Mr. Lowe accepted that the proposed amendments where not exactly formulated but could be perfected if the Plaintiff were given more time. It was, however, apparent to the Court that Mr. Lu would be unable to plead that he exercised the option to subscribe for any amount of shares up to 5 and that his claim was bound to fail in the result and Mr. Lu's claim was struck out.

DATED THE 26TH APRIL 2022

RAMSAY-HALE J.