

HONG KONG / JUDGMENT

RE GOLDSTONE HOLDINGS LTD

[2025] HKCFI 2778

COURT

Court of First Instance

DECIDED

2 July 2025

CASE / FILE NUMBER

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HCCW 609/2024

[2025] HKCFI 2778

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

COMPANIES (WINDING-UP) PROCEEDINGS NO 609 OF 2024

IN THE MATTER of Goldstone Holdings Limited

and

IN THE MATTER of Section 177(1)(d) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32)

Before: Hon Linda Chan J in Court

Date of Hearing: 28 May 2025

Date of Judgment: 2 July 2025

J U D G M E N T

There is before the court a petition presented by the petitioner, Mr Joey Rocha Pena (“Petitioner”), seeking to wind up Goldstone Holdings Ltd (“Company”) on insolvency ground.

The petition was presented on 30 October 2024 (“Petition”) and amended on 15 January 2025 (“Amended Petition”), following determination of the summons issued by the Company on 8 November 2024 to strike out the Petition on the ground that it constituted an abuse of process. The strike out summons was dismissed by Anthony Chan J on 12 December 2024 [2024] HKCFI 3598 (“Decision”).

Background facts

The background facts have been stated in §§3-12 of the Decision and subsequently expanded by the parties in the further affidavits filed after determination of the strike out summons.

The Company is incorporated in Hong Kong and its sole director is Mr Carl Frederic Felix Georges Marcel Szantyr (“Szantyr”). Its paid-up capital is HK\$10,000 dividend into 10,000 shares. The shares are held by Mr Kelvin Khor (“Kelvin”) and Goldstone Capital Management Pte Ltd (“GCM”) as to 150 shares and 9,850 shares respectively.

In April 2024, through discussions amongst the Petitioner’s brother (“Gerard”), the Petitioner’s friend (“Kirpalani”) and Szantyr, the Petitioner learnt of the opportunity to invest in a fund by acquiring shares in the Company. There is a dispute as to the purpose of the subscription:

The Petitioner says that the subscription represents a financial investment introduced to him by Kirpalani, by subscribing for the Shares, he was investing in “Project Astraeus” to be set up by Kirpalani. The subscription proceeds would be lent by the Company to Kirpalani to launch Project Astraeus.

On the other hand, the Company says that it is a corporate vehicle used to generate and facilitate investments in Blockstone Assets Holdings Limited (“Blockstone BVI”) and Blockstone Digital Assets MultiStrategy Fund (“Blockstone Digital”). Blockstone Digital is an investment fund and a Cayman Island exempted company, which commenced operations on 1 March 2023. Szantyr is the portfolio manager of Blockstone Digital. The “Founder Shares” of Blockstone Digital are held by Blockstone BVI, of which Szantyr indirectly holds a controlling interest. Blockstone Digital facilitates investments by issuing “Participating Shares” to companies in which investors have shareholdings. The Company became one such owner of Participating Shares. In the discussions, Szantyr explained, and the Petitioner understood, that the intended investment would be structured by the Petitioner holding shares in the Company, the business of which includes contributing to these funds as a Participating Shareholder.

On 23 May 2024, the Petitioner sent copies of his passport and address proof covering the period from January to April 2024 to the Company. Szantyr acknowledged receipt of the documents on 29 May 2024.

By email dated 29 May 2024, Szantyr sent a draft subscription agreement to the Petitioner and requested him to review and sign the same, and pay the total investment amount of US\$1,500,000 (equivalent to HK\$11,718,751) to the Company. In the same email, a document entitled “Project Astraeus” prepared by Meliora Capital LLP was attached (“Presentation”). The Presentation described inter alia the investment strategy, competitive advantages, process summary, portfolio construction, portfolio risk management and the members of the “highly skilled team” of what appears to be an investment fund. In the team, Kirpalani was depicted as “Portfolio Manager” and Szantyr as “Capital Development”.

By the Subscription Agreement dated 29 May 2024 (signed by the Petitioner on 11 June 2024) (“Subscription Agreement”) made between the Petitioner (as Subscriber) and the Company, the parties agreed that:

The Petitioner subscribes for 100 ordinary shares of HK\$1 par value in the Company (“Shares”) on the terms and conditions set out in the Subscription Agreement and the Company’s articles of association, as amended from time to time (“Articles”) (clause 1).

The Shares will be allotted as fully paid shares at issue price of HK\$117,187.50 (clause 2).

The total subscription price of HK\$11,718,751 (equivalent to US\$1,500,000) will be paid to the Company by 31 May 2024 (clause 3).

The Shares will be registered in the name of the Petitioner in the Register of Members of the Company (clause 4).

The Petitioner acknowledges and agrees that “[his] subscription and holding of the Shares is entered into for commercial purposes related to the business of [the Company] and such business to be carried on by the [Petitioner] together with all other shareholders of the Company, always subject to the provision of the Articles” (clause 5).

The Subscription Agreement shall be governed by Hong Kong law and the Petitioner submits to the jurisdiction of the Hong Kong court (clauses 7, 9).

On 18 June 2024, the Petitioner paid the subscription price by cheque (“Fund”). On 19 June 2024, Szantyr confirmed that the Fund had been received and cleared.

The Company says that:

On 20 June 2024, it recorded the Petitioner as a shareholder in its internal record on SeedLegals.com with an electronic share certificate in the name of the Petitioner. SeedLegals is used by Szantyr as an electronic register of members for his UK Companies, which forms the basis for the annual confirmation statement submitted to the UK Companies House. However, there is no evidence to suggest that the Petitioner was aware of this internal record or the electronic share certificate.

The Fund was first put into a short-term time deposit account to maximise interest, pending organisational matters of Blockstone Digital being dealt with. Subsequently, the Fund was applied to the Company's commercial purposes.

On 1 July 2024, Szantyr executed a subscription agreement on behalf of the Company and Blockstone BVI (qua director of the respective companies) ("BSA"), whereby the Company subscribed for 1,500 ordinary Class B shares of US\$1.00 par value in Blockstone BVI for US\$1.5 million.

In turn, Szantyr caused the Company to remit US\$1.5 million to Blockstone BVI pursuant to cl.3 of the BSA, following which the Company was allotted 1,500 ordinary Class B shares in Blockstone BVI on 21 January 2025.

On 25 July 2024, the company secretary ("CoSec") emailed Szantyr, recording his instructions to transfer 100 shares from Kelvin and 50 shares from Kelvin back to him, and reminding him to provide "new partner HKID/passport copy & address proof (within 3 months)", and it would prepare "full set of documents for [his] signature once completed KYC checking". In his reply on the same day, Szantyr instructed CoSec to prepare the resolution for Kelvin to sign to transfer 100 shares to the Petitioner, and he would "be able to get copy of passport and proof of address when back to the office in London after August 3".

On 2 August 2024, Szantyr, Kirpalani and Gerard had dinner in Hong Kong, where Szantyr informed them that the Company was finalising allotment of the Petitioner's shares.

By WhatsApp messages sent to Szantyr on 6 August 2024, Kirpalani said that the Petitioner "would like to do the final \$500k this month", the Petitioner "wants the \$1.5mm in [Kirpalani's] DBS first and before he does the 500k, so that we can get started", and the Petitioner would arrive on 12-19 September and visit them at the office. In reply, Szantyr asked Kirpalani to send "passport copy, proof of address and bank details. Noted for September dates".

On 7 August 2024, Kirpalani sent messages to Szantyr saying that he had sent the information requested, and asked if "the 11718751 HKD remaining credit of about 18k HKD is still sitting within goldstone", and he was going to explain to the Petitioner "that the remaining balance within Goldstone is available to return to him along with the rest of his ROI as and when that occurs in the future", to which Szantyr replied "seems reasonable :)".

The matter took a complete turn shortly afterwards. In his email sent to Szantyr on 15 August 2024, Kirpalani referred to the breakdown in their working relationship and his decision to end any ongoing or proposed business dealings with Szantyr or Meliora Capital, and he "formally request that investor capital be returned in a timely manner", and stated that "investor capital should be transferred back to the investor on the 27th of August, following the end of the Time Deposit Period".

Internally, by email dated 15 August 2024, Szantyr updated CoSec that (1) he would be travelling for the next 2 weeks; (2) the KYC documents relating to the Petitioner were on file at his office; and (3) he would send them to CoSec upon his return. On 16 August 2024, Szantyr promised that he would be able to “send the details of the new shareholder” from 31 August 2024 onwards.

By email dated 24 August 2024 to Szantyr, the Petitioner requested for “Investment Redemption” in this way:

“It has come to my attention that the business plan associated with my investment into Goldstone Capital is no longer proceeding as originally intended. Given this change, please take this email as full redemption of investment request and proceed as such.”

As I understand it, the bulk of the investment is currently in a Time Deposit that expires on the 26 August 2024. I would therefore request that the funds are returned to me in whole on the 27 August 2024”.

In his email dated 26 August 2024, Szantyr said that he acknowledged and understood the Petitioner’s concerns and would keep him updated when the Company received the funds from the time deposit, and requested the Petitioner to provide his bank details to facilitate the necessary transactions. Szantyr went on to say this:

“I would like to clarify that your investment is solely a matter between yourself and Goldstone Capital. While the company is under no legal obligation to redeem the investment, we highly value our relationship with you. As such, I am instructing our legal counsel in HK to draft a share buyback agreement, subject to final legal review and feasibility.” (underlined added)

On 30 August 2024, the Petitioner provided details of his bank account and said as follows:

“For further clarity, and as you are aware, my investment into Goldstone Capital was solely in relation to ‘Project Astraeus’, as per my original signed Request for Information letter. This project is no longer continuing, hence my redemption request.”

I’ve taken legal advice, and it has been confirmed to me that no shares have actually been issued. This is evidenced by the lack of documentation filed at the Companies Registry, and the lack of a share certificate issued to me. A return of allotment should have been filed within one month of payment (i.e. by the end of July) as required by law and failure to do so is an offence under the Companies Ordinance.

Given that Goldstone cannot buy back shares that were never issued, and the Time Deposit has now expired, and having obtained legal advice, I request that you transfer the funds back to me immediately to put an end to this matter. In the absence of repayment within the next 24 hours, I will be forced to consider an escalation of the matter.”

On 31 August 2024, Szantyr arranged for sending copies of the Petitioner’s passport and address proof documents to CoSec.

On 3 September 2024, Szantyr replied to the Petitioner, saying that he would “ensure that all necessary steps are taken to finalise this matter promptly”.

Also on 3 September 2024 CoSec emailed Szantyr, stating that:

having reviewed the Subscription Agreement, it would take steps to inter alia allot the Shares to the Petitioner at HK\$117,187.50 per share and the date of the allotment would be 29 May 2024. As the Company should file a return of allotment within one month after the date of the allotment, a penalty may be incurred due to late filing; and

in respect of due diligence documents, for “the Petitioner (new shareholder)”, a copy of the passport and address proof (issued in May 2024) had been received, and it required one issued on or after July 2024 and “a selfie of the new shareholding holding the passport”.

On 12 September 2024, the Petitioner through his former solicitors, stated that the Fund should be returned to the Petitioner immediately for the following reasons:

“[The Petitioner] was in discussions with [Szantyr] and [Kirpalani] during May and June of this year regarding an investment into a new project called Project Astraeus to be established by [Kirpalani] and his partners. It was eventually agreed that [the Petitioner] would pay into [the Company], where [Szantyr] was the sole director, a sum of USD1,500,000 in order to further progress with Project Astraeus. As evidenced in an email sent from [Szantyr] on 29 May 2024 (with the hearing: ‘Subscription Documents – Investment Goldstone Holdings / Project Astraeus’), this investment was to be utilized for Project Astraeus, and there were potential discussions utilizing the Meliora Capital FCA licence; hence [his] inclusion of a draft Meliora Capital economics, alongside a copy of [Kirpalani’s] Project Astraeus presentation as well as a Cover Letter and Subscription Agreement dated 29 May 2024
...

As it turns out, [the Company] is no longer involved in Project Astraeus and therefore, [the Petitioner] has asked [Szantyr] repeatedly for the return of the funds. On 3 September 2024, [Szantyr] confirmed in an email that [he was] taking steps to return the money promptly.”

On 20 September 2024, the Company through its solicitors (“DCLO”) gave a holding reply.

On 24 September 2024, Szantyr informed Gerard that the Company required the identification documents (as described in §22(2) above) to formally register the Petitioner as a shareholder. The Petitioner disputes this, claiming that Gerard assured him no such request was made and that Gerard allegedly messaged Szantyr stating “There are no business dealings to discuss.”

Between 3 October 2024 and 4 October 2024, Szantyr (via DCLO) and CoSec exchanged further correspondence on the required documents to give effect to the allotment of the Shares.

By the 1st letter dated 4 October 2024, the Petitioner through its current solicitors (“TDW”), referred to the Subscription Agreement and the Fund received by the Company, and demanded the Company to return the Fund by 7 October 2024 in this way:

“It is not clear if the Company: (a) accepted [the Petitioner’s] application to subscribe for the Shares; or (b) the [Subscription Agreement] is a binding contract on the parties.

If (a), there has been a total failure of consideration on the part of the Company by failing to allot and issue the Shares to our client. That being the case, our client is entitled to an immediate refund of the [Fund] to him on the basis of restitution or money had and received for a consideration which wholly failed when the Shares were not allotted and issued to our client. This letter serves as a demand in this respect.

If (b), the Company repudiated the [Subscription Agreement] by not allotting and issuing the Shares to our client within a reasonable period of time. This letter serves as an acceptance of the Company’s repudiation of the [Subscription Agreement], and a demand for immediate repayment of the [Fund].

In any event, there is no basis for the Company to not immediately return the [Fund] to our client; on 3 September 2024, Szantyr sent an email to our client to the effect that the [Fund] would be refunded - no money has been received by our client as of the date of this letter. Further, on 12 September 2024, our clients’ former solicitors issued a letter to demand the immediate repayment of the [Fund] - similarly no money has been received by our client.”

By the 2nd letter dated 4 October 2024, TDW enclosed a statutory demand demanding payment of the Fund (“Debt”) within 21 days (“SD”). In the SD, the Petitioner described the Debt as having been “incurred in June 2024” and relied on the same facts and matters subsequently stated in the Petition (as described in §33 below).

By letter dated 8 October 2024 to TDW, DCLO stated that pursuant to the Subscription Agreement, the Petitioner subscribed for the Shares. As subscriber for the Shares, the Petitioner invested in the equity of the Company and hence is not a creditor. The SD is fundamentally defective and should be withdrawn immediately.

By another letter dated 28 October 2024 to TDW, DCLO stated that there is a bona fide dispute as to whether the Petitioner is entitled to rely on the SD and the same should be withdrawn given that:

the Petitioner paid the Fund pursuant to the Subscription Agreement and is not a creditor of the Company;

the commercial purposes of the Company included but not limited to the concepts outlined in the Presentation, together with a statement outlining the projected estimated returns up to 2031, and the Company continues to pursue such commercial opportunities;

upon receipt of the Fund, the Company promptly took steps to allot the Shares to the Petitioner and finalise his shareholding; and

the Company repeatedly requested the customary identity documents from the Petitioner, but other than the initial identity documents provided on 28 May 2024, the items remain outstanding. The Petitioner cannot rely on his refusal in providing documents for registration in support of a claim that the Company has breached the Subscription Agreement by not effecting registration or completing it within a short timeframe.

The Company did not comply with the SD.

On 30 October 2024, the Petition was presented.

Petitioner's pleaded case

In the Petition, the Petitioner pleaded 3 alternative “causes of action” (at §§8-13) in support of his contention that by reason of the Company’s failure to comply with the SD, it is insolvent and should be wound up (at §§14-18 of Petition). The 3 “causes of action”, as summarised in §13 of the Decision, are:

The Subscription Agreement was not a binding contract, but an offer to subscribe which was rejected by the Company, entitling the Petitioner to restitution of the consideration paid (§§8-11 of Petition).

Alternatively, the Subscription Agreement was a binding contract but it was repudiated by the Company by not allotting any shares to the Petitioner within a reasonable period of time. The repudiation was accepted by the Petitioner on 4 October 2024 (§12 of Petition).

In the further alternative, the Subscription Agreement was a binding contract but there was a total failure of consideration in the Company not allotting shares, thereby entitling the Petitioner to restitution (§13 of Petition).

At the hearing of the strike out summons, Ms Noel Chan, counsel for the Petitioner, confirmed that the Petitioner did not seek to rely on the first cause of action.

Upon hearing the parties’ arguments, the learned Judge dismissed the strike out summons and held that:

The first cause of action (i.e. Subscription Agreement was not a binding contract) was unsustainable, and struck out §9 and part of §10 of the Petition (§30 of Decision);

The second cause of action (i.e. repudiatory breach of Subscription Agreement) should not be struck out as “it is at least arguable that reasonable time had expired by the time the Petitioner demanded repayment on 24 August 2024 or on 4 October 2024 at the latest when the [SD] was served” (§19 of Decision).

The third cause of action (i.e. restitution for total failure of consideration) is not liable to be struck out:

As regards total failure of consideration, “it cannot be said that the Petitioner had received any benefit from the Company as agreed under the [Subscription Agreement] or at all unless he is a shareholder of it. Indeed, clause 5 referred to the Petitioner’s ‘holding of the Shares’”. Even assuming the Petitioner had received some benefit, “the law is that if that benefit does not form part of what was understood to be given for the payment, the claim for total failure of basis remains intact: see Goff and Jones on Unjust Enrichment, 10th edn, [12-24]” (§§26-27 of Decision).

“A claim in unjust enrichment is a claim in debt and not for damages and is a claim which is not founded on the commission of a wrong. Liability is strict ... The remedy to reverse an unjust enrichment is monetary”: see Chitty on Contracts, [33-016] and Investment Trust Companies v Revenue and Customs Commissioners [2018] AC 275, [45]” (§28 of Decision).

The equitable defence raised by the Company such as change of position does not assist in a striking out application (§29 of Decision).

In the Amended Petition, the Petitioner made substantial amendments to his case and added the following pleas:

It was an implied term of the Subscription Agreement that the Company was to perform the allotment of the Shares within a reasonable time of receiving the Fund (§8 of Amended Petition);

By one or more of the acts pleaded, the Company indicated its absolute refusal to perform its obligations pursuant to the Subscription Agreement and thereby “renounced and repudiated” the Subscription Agreement. The acts include:

the Company failed to allot the Shares to the Petitioner within a reasonable time after receipt of the Fund on 19 June 2024;

the Company never allotted the Shares or any shares to the Petitioner at all; and

by letter dated 4 October 2024, the Company through DCLO persisted in not performing the Subscription Agreement by requiring the Petitioner to provide (i) a certified true copy of his passport and (ii) address proof within the past 3 months before the Company could allot the Shares to the Petitioner. Such “extraneous condition-precedents” imposed by the Company were contrary to the terms of the Subscription Agreement (§9 of Amended Petition).

The Subscription Agreement has been terminated as the Petitioner has “clearly and unequivocally accepted the Company’s repudiation” of the Subscription Agreement in that:

At the earliest, by the Petitioner’s emails to Szantyr dated 24 August 2024 and 30 August 2024 requesting the Company to return the Fund. By emails dated 26 August 2024 and 3 September 2024, the Company assured and represented to the Petitioner that it would return the Fund to the Petitioner;

At the latest, by TDW’s letter dated 4 October 2024, the Petitioner accepted the Company’s repudiation of the Subscription Agreement and demanded immediate repayment of the Fund, followed by issuing the SD to demand the payment of the Fund (§9A of Amended Petition).

The Company has been unjustly enriched by the retention of the Fund (§11 of Amended Petition).

By the time the Amended Petition is heard, each of the Petitioner and the Company has filed 3 substantive affidavits to deal with their respective case and to refute the evidence adduced by the other party. This is the result of the Company choosing to pursue a strike out summons (instead of filing affidavits to oppose the Petition) and the Petitioner seeking to amend his case after determination of the strike out summons. This is undesirable. A winding up petition on insolvency ground is a summary proceeding and the parties are not expected to file multiple affidavits to deal with the minute details of their respective case. The reason is obvious. Winding up petition is not the avenue for the parties to litigate a dispute where the petitioner's entitlement to demand for payment of a debt is subject to a bona fide defence on substantial grounds. If the petitioner has to amend his case and file 3 affidavits to deal with the merit of his case, it rather suggests that the dispute is not be one which should be litigated through winding up petition.

In her skeleton arguments, Ms Chan devoted 7 pages (with single-lined spacing) to analyse the 3 affidavits made by Szantyr in support of her submissions on the "frivolity and unbelievability of the Company's evidence". This is not the right approach in dealing with winding up petition. Where, as here, the company adduced evidence in support of its contention that the debt is subject to a bona fide dispute on substantial ground, the court would examine the petitioner's case as stated in the statutory demand and subsequently pleaded in the petition, and would not allow the petitioner to go beyond its case. The principles are well-established:

Where, as here, a creditor is relying on the company's failure to satisfy a statutory demand as the basis for contending that the company is insolvent, the court would consider whether the demand is made in conformity with the requirements of rule 3B and 3C of the Companies (Winding-Up) Rules (Cap. 32H) ("CWUR") and Form 1A in the Appendix to the CWUR. This includes whether the creditor has stated, correctly, (a) the amount of the debt; (b) the way in which the debt arises; (c) the amount of interest not previously notified to the company as a liability of the company (if any); (d) any other charge accruing from time to time and the grounds on which the charge is claimed (if any); and (e) the amount accrued due as at the date of the demand (Re China Oceanwide Group Limited [2023] HKCFI 455, §§19, 24-25).

It is not open to a petitioner to rely on any facts or grounds not fairly stated in the petition, and asks the court to make a winding up order against the company on the bases of any unpleaded facts or grounds (Re China Oceanwide Group, §§18, 20-23, 26-32).

Petitioner's case as submitted by counsel

In §§51-65 of her skeleton, Ms Chan makes the following arguments in support of her contention that there is no bona fide dispute on substantial grounds in respect of the Debt:

"For the avoidance of doubt, the Debt is founded on only one cause of action, viz a restitutionary claim in unjust enrichment on the ground of a total failure of basis for the [Fund]".

“This is an independent cause of action from contract. It involves asking four questions: (i) was the Company enriched?, (ii) was the enrichment at P’s expense, (iii) was the enrichment unjust?; (iv) are any defences applicable?” (Shanghai Tongji Science & Technology Industrial Co Ltd v Casil Clearing Ltd (2004) 7 HKCFAR 79 at §67).

“The total failure of basis is a ground which makes the enrichment unjust ... Specifically, the test for the failure of consideration for a payment is that ‘the state of affairs contemplated as the basis or reason for the payment has failed to materialise, or if it did exist, has failed to sustain itself’” (Dargamo Holdings Limited, Sergiy Taruta v Avonwick Holdings Limited, Vitali Gaiduk, Olena Gaiduk [2021] 2 CLC 583 per Carr LJ at §80).

As explained by the Court of Final Appeal in Shanghai Tonji, §79, when considering the law of failure of consideration, “it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise. The money was paid to secure performance, and if performance fails the inducement which brought about the payment is not fulfilled.”

There can be no doubt that the Company is enriched by its retention of the Fund at the expense of the Petitioner who provided and therefore lost it.

It is plain from the terms of clauses 1-4 of the Subscription Agreement that the Fund was for the Shares and nothing else. Clause 5 relies upon by the Company simply provides that the Petitioners’ “holding” of the Shares is for commercial purposes related to the Company; it is not a provision which imposes any obligation on the part of the Company as the reason or basis for the Fund.

The Company’s failure to transfer the Shares clearly meets the test for a total failure of basis, as “the state of affairs contemplated as the basis or reason for the payment has failed to materialise, or if it did exist, has failed to sustain itself” (Dargamo).

The Petitioner’s primary case is that the correspondence in August/September 2024 was the earliest occasion which cemented the total failure of basis, evidenced by (a) the Company’s request for the Petitioner’s bank account details after the Petitioner had demanded return of the Fund; and (b) the Company’s representations that the Fund would be returned on the premise that no Shares had been allotted. As such, the Company had at least “conducted itself in a way which suggests that the Debt is payable”, if not acknowledged the Debt (Re Yueshou Environmental Holdings Limited, HCCW 142/2013, 16 July 2014, per Harris J).

While a claim in unjust enrichment is typically accompanied by the factual scenario that the contract governing the conferral of the benefit will have been terminated or discharged, this is not a necessary ingredient. The unjust enrichment claim may still lie as long as the claim is not inconsistent with the contract, particularly the contractual allocation of risk. It ‘fills the gap’ complementarily (Dargamo, §§66-67, 72-75).

In any event, the effect of the correspondence is that by 3 September 2024, the parties have terminated the Subscription Agreement or the Company has repudiated or at least renounced its contractual obligation to allot and register the Shares, and this was accepted by the Petitioner by consistently demanding return of the Fund on this basis, followed by issuing and serving the SD on 4 October 2024.

Further, by DCLO's letter dated 4 October 2024, the Company imposed a condition that it would not allot the Shares unless the Petitioner provides the so-called "customary identity documents", such condition cannot be found in the Subscription Agreement. Insofar as necessary, the continuing failure of the Company to allot and register the Shares amounts to a repudiation/renunciation. As observed by Anthony Chan J in §19 of the Decision "where a party to a contract undertakes to do an act, the performance of which depends entirely on itself, and the contract is silent as to the time of performance ... the law implies an obligation to perform the act within a reasonable time having regard to all the circumstances of the case, citing Chitty on Contracts, §25-013).

On the other hand, Ms Esther Mak, counsel for the Company, submits that the Amended Petition should be dismissed as there is a substantial dispute as to whether the Company is liable to pay the Fund to the Petitioner by reason of the following defences:

There is no implied term for the allotment of Shares within a reasonable time.

In any event, there was no breach of the Subscription Agreement.

There was no repudiatory breach of the Subscription Agreement which would have entitled the Petitioner to terminate the same.

There was no basis for restitution as the Fund was paid under a subsisting and valid contract.

There was no unjust factor for total failure of consideration.

Even if the Petitioner is entitled to make a restitutionary claim in unjust enrichment, the Company has a complete defence of change of position.

Discussion

In my judgment, there is a bona fide dispute on substantial ground as to whether the Petitioner was entitled to demand for payment of the Debt, whether in August 2024, September 2024 or on 4 October 2024 (when the SD was served).

First, it is common ground that the Fund was paid pursuant to the Subscription Agreement. The Petitioner has not been able to point to any term in the Subscription Agreement which gives him the right to demand for payment of the Fund. The Petitioner's contention that he is entitled to demand immediate return of the Fund is inconsistent with:

clause 1 of the Subscription Agreement, which provides that the Petitioner agreed to subscribe for the Shares “on the terms and conditions set out in the Subscription Agreement and the Articles”; and

clause 5 where the Petitioner acknowledges and agrees that “[his] subscription and holding of the Shares is entered into for commercial purposes related to the business of [the Company] and such business to be carried on by the [Petitioner] together with all other shareholders of the Company, always subject to the provision of the Articles”.

The Petitioner asserts that he invested the Fund “solely in relation to Project Astraeus” (see §19 above) and produced some documents in support of his assertion. This is not the basis for demanding payment of the Fund in the SD or the Amended Petition. In any event, the Company disputes this. Whether the Petitioner is able to establish his assertion is not an issue which the court can or should be determined in these proceedings.

Second, even if, which is not established, the Company was under an obligation to allot the Shares by August 2024, there is at least a bona fide dispute as to whether the Petitioner was entitled to terminate the Subscription Agreement so as to obtain the return of the Fund. The principles have been explained by the Court of Appeal in *Ho Wai Kwong v Ho Kam Chui* [2025] HKCA 174, §§53-58, per G Lam JA:

“53

... Termination of a contract by acceptance of a wrongful repudiation is a mechanism for the innocent party to be released from his obligation further to perform his own remaining obligations under the contract. It is prospective in operation and does not unwind what has been executed under the contract: see e.g. *Chitty on Contracts* (35th ed), vol. 1, §§28-078 & 28-082.

54.

In *Heyman v Darwins Ltd* [1942] AC 356 at 399, Lord Porter said:

‘To say that the contract is rescinded or has come to an end or has ceased to exist may in individual cases convey the truth with sufficient accuracy, but the fuller expression that the injured party is thereby absolved from future performance of his obligation under the contract is a more exact description of the position. Strictly speaking, to say that on acceptance of the renunciation of a contract the contract is rescinded is incorrect. In such a case the injured party may accept the renunciation as a breach going to the root of the whole of the consideration. By that acceptance he is discharged from further performance and may bring an action for damages, but the contract itself is not rescinded.’

55.

In the present case the Mother had already performed her part of the contract by assigning the Property to herself and the defendant as joint tenants. She had acquired an immediately enforceable right to the price, and the defendant had correspondingly incurred the liability to pay it, which was actionable as a debt. There was nothing that remained for the Mother to

perform, and nothing in reality for her to terminate. Termination is sometimes also used by the innocent party to discharge himself from his obligation to accept performance by the other party if made or tendered. But here what remained to be performed by the defendant was simply the payment of the purchase monies. The defendant had already incurred the liability to pay it, which would remain despite termination. It follows in our view that the use of the concepts of repudiation, acceptance and termination in the context of this case was inapt. Likewise, in sale of goods, it is stated in Benjamin's Sale of Goods (12th ed 2024), Vol. 1, §15-117 and §16-021 fn 160, that where the buyer has been given both possession of and property in the goods, a seller cannot terminate the contract for failure to pay the price so as to entitle him to retake the goods.

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...

57.

The fourth step is in our view erroneous in law. It appears to have stemmed from a mistaken assumption that upon termination of a contract, it can no longer provide the basis for property rights acquired before. As stated above, termination of a contract operates prospectively. It does not operate as a rescission *ab initio*, and does not negative the historical subsistence of the contract. Nor does it automatically operate to denude transfers of property made under the contract during its currency of all legal basis.

58.

In *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at 476-477, Dixon J explained the position in a classic passage, which had since been cited with approval in *Johnson v Agnew* [1980] AC 367 at 396 and *Bank of Boston Connecticut v European Grain and Shipping Ltd* [1989] 1 AC 1056 at 1098-1099, as follows:

‘When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected. When a contract is rescinded because of matters which affect its formation, as in the case of fraud, the parties are to be rehabilitated and restored, so far as may be, to the position they occupied before the contract was made. But when a contract, which is not void or voidable at law, or liable to be set aside in equity, is dissolved at the election of one party because the other has not observed an essential condition or has committed a breach going to its root, the contract is determined so far as it is executory only and the party in default is liable for damages for its breach.’”

Third, as submitted by Ms Mak, there can be no claim in unjust enrichment for the following reasons:

The payment of the Fund was made under a valid, subsisting contract. As Lord Sumption held in *DD Growth Premium 2X Fund v RMF Market Neutral Strategies (Master) Ltd* [2017] UKPC 36 §62:

“It is fundamental that a payment cannot amount to enrichment if it was made for full consideration; and that it cannot be unjust to receive or retain it if it was made in satisfaction of a legal right. As Professor Burrows has put it in his Restatement of the English Law of Unjust Enrichment (2012), para 3(6), “in general, an enrichment is not unjust if the benefit was owed to the defendant by the claimant under a valid contractual, statutory or other legal obligation”. The proposition is supported by more than a century and a half of authority ...” (underlined added)

The Petitioner’s submission that an unjust enrichment claim may still lie despite the contract subsisting in reliance on Dargamo is wrong. Dargamo in fact upholds the principle that an unjust factor will not override a valid and subsisting legal obligation, which was said to be “reaffirmed recently at the highest level by the Privy Council” (§70). Further, it would be a “rare case” when failure of consideration could be made out despite a valid contract (§74), and the exceptions are “limited” (§72).

It is at least arguable that the present case does not fall within either exceptions where allowing restitution (1) does not conflict with the contractual allocation of risk; or (2) does not conflict with the contract because the contract would not be enforced. The parties agreed that the Shares would be allotted to the Petitioner at the subscription price. By allowing the Petitioner to redeem or exit his investment by claiming unjust enrichment would be tantamount to allowing him to avoid the consequence of the risk that he agreed to bear.

Fourth, the Petitioner has failed to establish the unjust factor of total failure of consideration:

Failure of consideration, or failure of basis, identifies situations where a transfer of value has been made both voluntarily and conditionally, and the condition for its retention by the recipient has failed (Goff & Jones, 10th edn, §12-08).

The failure of basis must be total where the benefit conferred takes the form of money (Goff & Jones §12-16).

There was no failure of consideration for the Fund, as the Company accepted the Petitioner’s investment and has been taking steps to allot the Shares to the Petitioner. The Company never indicated that it would not allot the Shares to the Petitioner.

Nor has the Company conducted itself in a way which suggested the Fund invested by the Petitioner would be payable on demand. In correspondence, the Company indicated that it would take the necessary steps to look into a “share buyback agreement”, subject to legal review and feasibility.

Having concluded that there is a bona fide dispute on substantial grounds as to whether the Petitioner was entitled to demand return of the Fund in August or September 2024 or on the date of the SD, it is unnecessary to consider the other arguments advanced by Ms Chan.

For completeness, I would briefly explain why I am unable to accept the remaining arguments advanced by Ms Chan.

There is at least a bona fide dispute on substantial ground as to whether the Subscription Agreement is subject to an implied term that the Shares are to be allotted within a reasonable time, be it August or September 2024 or 4 October 2024. As submitted by Ms Mak, the Subscription Agreement does not specify any time frame for allotment of the Shares. The allotment requires the cooperation from both parties - the Petitioner to provide the requisite identification documents and the Company to process the paperwork. It is arguable that the implied term to the Subscription Agreement is that both parties must use reasonable endeavours to fulfil their respective obligations (Chitty on Contracts, §25-013). Such term is necessary to give business efficacy to the Subscription Agreement, is so obvious that it “goes without saying”, and is capable of clear expression (Lo Yuk Sui v Fubon Bank (Hong Kong) Ltd [2019] HKCA 261 §§30-32).

Even if the Subscription Agreement is subject to the implied term as contended by the Petitioner, it is by no means clear that there was a breach of the Subscription Agreement given that:

When determining whether or not performance occurred within a “reasonable time”, the court is not limited to what the parties contemplated or ought to have foreseen at the time of entry into the contract but can, with the benefit of hindsight, take into account a broad range of factors (Astea (UK) Ltd v Time Group Ltd [2003] EWHC 725 (TCC), §144).

By August 2024, only 2 months had passed since the Petitioner paid the Fund. Whether this is an unduly lengthy time for the Company to perform its obligation to allot the Shares is a matter to be determined at trial.

As to whether the Petitioner was entitled to refuse to provide an updated proof of address or other KYC document requested by CoSec after August 2024, this depends on whether the prevent principle operates to prevent him from doing so (Kensland Realty Ltd v Whale View Investment Ltd (2001) 4 HKCFAR 381 §§94-95, 97).

It is also arguable that there was no repudiatory breach of the Subscription Agreement. As Ms Mak submits:

A breach of the obligation to perform within a reasonable time does not mean that such breach is repudiatory, that is, one which would deprive the non-defaulting party of substantially the whole benefit which it was intended he should obtain from the contract (Peregrine Systems Ltd v Steria Ltd [2005] EWCA Civ 239 §15; Astea §148).

Whether a “delay” becomes so long as to go to the root of the contract depends on the facts. While a flat refusal to continue performance may probably amount to a repudiation however much work has been done, an indication of an intention to continue to perform at a speed considered by the other party to be unreasonably slow may not amount to repudiation. (Astea §151).

The Company has not indicated any refusal to perform its obligations under the Subscription Agreement at all, whether in August or September 2024 or on 4 October 2024 when the Petitioner claims to have accepted the Company's repudiation.

If and insofar the Petitioner is able to maintain a restitutionary claim in unjust enrichment, it seems to me that as matter now stands, the Company's defence on change of position is not one which can be dismissed summarily:

The elements of change of position, as summarised in *AXHT Co Ltd v Freeway Finance Co Ltd* [2020] 4 HKLRD 133 at §§65-67, per DHCJ Eva Sit SC, are:

The defence is available to a person who has in good faith changed his position so that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full.

In answering this question, the court adopts a broad approach based on practical justice, and avoids technicality.

The onus is on the defendant to make good the defence, while the court should not apply too strict a standard as it may well be unrealistic to expect a defendant to produce conclusive evidence of change of position, there must be a sufficient causal link between the payment and the change of position relied upon and there was no total failure of consideration.

The Company has adduced evidence to demonstrate that the defence is engaged:

The Company no longer retains the Fund, as it was paid to subscribe for Class B shares in Blockstone BVI.

There appears to be a causative link between the Company's receipt of the Fund and its payment to subscribe for Class B shares in Blockstone BVI given that (i) the BSA was executed less than 2 weeks after receipt of the Fund; and (ii) the payment for Class B shares was the exact same amount as the Fund.

For the above reasons, the Amended Petition must be dismissed.

As for costs, I make a costs order nisi that the costs of and occasioned by the Amended Petition, including the costs of the hearing and all costs reserved and the costs of the Official Receiver, be paid by the Petitioner to the Company, to be taxed if not agreed.

I have considered but decided not to order costs on a higher scale, in view of the fact that the Company had failed to persuade Anthony Chan J that the presentation of the Petition constituted an abuse of process.

(Linda Chan)

Judge of the Court of First Instance

High Court

Ms Noel Chan, instructed by Tanner De Witt, for the Petitioner

Ms Esther Mak, instructed by Eversheds Sutherland, for the Company

Attendance of the Official Receiver is excused

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