

HONG KONG / JUDGMENT

SUNG CHUN PIU v. BASIC ASSET MANAGEMENT LTD

[2026] HKDC 641

COURT

District Court

DECIDED

17 April 2026

CASE / FILE NUMBER

DCCJ1523/2021

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DCCJ 1523/2021

[2026] HKDC 641

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

CIVIL ACTION NO 1523 OF 2021

BETWEEN

SUNG CHUN PIU

Plaintiff

and

BASIC ASSET MANAGEMENT LIMITED

Defendant

Before: Deputy District Judge Damian Wong in Court

Dates of Trial: 4 and 7 November 2025

Date of Judgment: 17 April 2026

JUDGMENT

INTRODUCTION

This is a claim by the Plaintiff (“Mr Sung”) against the Defendant (“Basic Asset”) for outstanding service fees said to be payable under an oral agreement allegedly made in November 2016 between him and Mr Kwong Wai Him, Derek (“Mr Kwong”), acting on behalf of Basic Asset (“P’s Agreement”).

At trial, Mr Sung was represented by Ms Koo of counsel. Basic Asset appeared in person and was represented by its director, Mr Kwong.

Mr Kwong denied the existence of P’s Agreement and contended that Basic Asset owed no service fees to Mr Sung. It is Basic Asset’s case that Mr Sung was merely its employee and that, under an employment agreement signed on 6 June 2016 (“Employment Agreement”), he was entitled only to salary and discretionary bonus. Mr Kwong alleged that Mr Sung fabricated P’s Agreement in order to claim a discretionary bonus which Basic Asset had no contractual obligation to pay.

Mr Sung accepted that he was an employee of Basic Asset at the material times, but maintained that P’s Agreement was a separate agreement from the Employment Agreement.

BACKGROUND

Both Mr Sung and Mr Kwong were fund managers by profession. They had been business acquaintances for about 8 to 9 years by 2016 although they had never worked together.

Basic Asset was an investment advisory company (“IA”) owned by Mr Kwong and held a Type 9 licence issued by the SFC (“Type 9 Licence”).

In around May 2016, Mr Sung left his employment with China Minsheng Bank (“Minsheng Bank”) and started his own asset management business. At that time, Minsheng Bank was undergoing restructuring and, due to a lack of relevant licences, had to outsource the management of its funds. As sponsor of MSQ Fund SPC (“Fund”) and the investment manager MSQ Investment Management Limited (“MSQ”), Minsheng proposed to sell the Fund and MSQ to Mr Sung.

Mr Sung was keen to take up this opportunity. To prepare for the acquisition of the Fund and MSQ, he needed an IA holding a Type 9 Licence. He had two options. The first was to set up a new IA and apply for a Type 9 Licence from the SFC, which would take around 8 to 12 months. The second was to acquire an existing IA which already held the Type 9 Licence, which would be quicker but more costly. As Mr Sung wished to start his own business as soon as possible, he decided to take the latter option.

From around June 2016, Mr Sung and Mr Kwong negotiated for the sale and purchase of 75% of the shares in Basic Asset (“Intended Acquisition”). There is a dispute as to whether it was Mr Kwong who insisted on retaining a 25% share in Basic Asset or whether it was Mr Sung wished to keep Mr Kwong as a 25% minority shareholder but nothing turns on this.

As Minsheng Bank was the sponsor of the Fund, Mr Sung’s former supervisor, Mr Doby Loo (“Mr Loo”), was involved in the negotiations. On Mr Loo’s advice, Messrs Adrian Yeung & Cheng (“AYC”) were engaged in July 2016 to draft a sale and purchase agreement.

On 6 June 2016, Mr Sung and Basic Asset entered into the Employment Agreement. The employment commenced on 4 July 2016 and the position was “Director”. The job duties were “to be prescribed and determined by Basic Asset and set forth from time to time which is subject to amendment and adjustment in the employer’s sole discretion”. The remuneration included monthly salary and a performance bonus in the sole discretion of Basic Asset.

Under SFC rules, an IA must appoint a Responsible Officer (“RO”) to supervise its regulated activities and ensure compliance with regulatory standards. There is no dispute that the Employment Agreement was signed to facilitate the application to the SFC to appoint Mr Sung as an RO of Basic Asset.

Whilst negotiations on the Intended Acquisition were ongoing, on 28 June 2016 MSQ entered into an Investment Advisory Agreement with Basic Asset whereby MSQ appointed Basic Asset as investment adviser to provide services in relation to the management of the Fund (“IA Agreement”). The IA Agreement took effect from 1 July 2016. Under it, Basic Asset was entitled to an advisory fee from MSQ equal to 100% of MSQ’s profits, after deduction of MSQ’s expenses and costs, payable every three months in arrears.

On 1 July 2016, Mr Sung became the sole shareholder of MSQ and a director of both MSQ and the Fund. MSQ remained the Fund’s sole shareholder.

On 16 August 2016, the SFC approved Mr Sung’s appointment as Basic Asset’s RO and he was authorized to carry out Type 9 (asset management) regulated activities under the SFO.

The negotiations for the Intended Acquisition were abruptly called off by Mr Kwong in November 2016. Mr Sung’s case is that, after the Intended Acquisition had fallen through, he and Mr Kwong (on behalf of Basic Asset) concluded P’s Agreement, under which Mr Sung would be entitled to 90% of the net advisory fees received by Basic Asset from MSQ.

Basic Asset’s case is that Mr Sung proposed sharing the net advisory fees on a 9:1 basis but that Mr Kwong rejected this proposal. Basic Asset contends that Mr Sung was only entitled to performance bonus under the Employment Agreement. Whilst Basic Asset would take into account the amount of net advisory fees received from MSQ when deciding the amount and timing of any performance bonus, such bonus was always within its sole and absolute discretion and that it had no contractual obligation to pay Mr Sung any performance bonus.

Thereafter, Mr Sung continued to manage the Fund through Basic Asset.

On 24 November 2016, MSQ paid Basic Asset advisory fees for the third quarter of 2016, ie from 1 July 2016 to 30 September 2016 (“2016 Q3”), in the sum of US\$225,758.38 pursuant to the IA Agreement.

After receiving those fees, Basic Asset compiled a spreadsheet setting out in detail the costs and expenses incurred in relation to the management of the Fund in 2016 Q3, totalling HK\$508,533. The advisory fees received from MSQ were converted to HK\$1,748,732. After deducting Basic Asset’s costs and expenses, the net advisory fees were HK\$1,240,199. The spreadsheet further showed a deduction of 10% from the net advisory fees for Basic Asset, and the “Final” sum (ie 90% of the net advisory fees) was HK\$1,116,179.

By a letter dated 31 December 2016, Basic Asset informed Mr Sung that “a discretionary bonus payment of HK\$800,000 will be paid to you in December 2016”. By another letter dated 12 January 2017, it informed him that a further “discretionary bonus payment of HK\$300,000 will be paid to you in January 2017”. Mr Sung said he did not recall seeing these two payment letters.

Subsequently, Mr Sung received from Basic Asset a sum of HK\$800,000 on 10 January 2017 and another sum of HK\$300,000 on 24 January 2017, totalling HK\$1,100,000. There is a dispute as to the nature of these payments. Mr Sung’s case is that they were service fees paid under P’s Agreement whereas Basic Asset’s case is that they were performance bonuses paid under the Employment Agreement.

On 6 February 2017, Basic Asset received from MSQ advisory fees for the fourth quarter of 2016, ie from 1 October 2016 to 31 December 2016 (“2016 Q4”), in the sum of US\$206,840.63 pursuant to the IA Agreement.

After receiving those fees, Basic Asset prepared another spreadsheet and sent it to Mr Sung on 2 May 2017. The spreadsheet was in the same format as that prepared for 2016 Q3. Basic Asset’s costs and expenses incurred in that quarter were HK\$740,515.42 and the advisory fees were converted to HK\$1,602,353.40. After deducting those costs and expenses, the net advisory fees were HK\$861,837.51. After further deducting 10% for Basic Asset, the “To Bill Bonus” was HK\$775,654.

By a letter dated 31 March 2017, Basic Asset informed Mr Sung that “a discretionary bonus payment of HK\$300,000 will be paid to you in March 2017”. By a further letter dated 31 May 2017, it informed him that “a discretionary bonus payment of HK\$500,000 will be paid to you in May 2017”.

Mr Sung received from Basic Asset a sum of HK\$300,000 on 31 May 2017 and a further sum of HK\$500,000 on 1 June 2017, totalling HK\$800,000. Mr Sung said that these were service fees paid under P’s Agreement whereas Mr Kwong said that they were performance bonuses paid under the Employment Agreement. Mr Sung recalled that Mr Kwong showed him the payment letters in May 2017 when handing over the cheques but he did not read them.

On 4 May 2017, Basic Asset received from MSQ advisory fees for the first quarter of 2017, ie from 1 January 2017 to 31 March 2017 (“2017 Q1”), in the sum of US\$181,449.17 pursuant to the IA Agreement.

By a letter dated 5 July 2017, the SFC requested Basic Asset to explain a transaction that had taken place on 9 November 2016 in relation to the management of the Fund and to provide all documents relating to that transaction (“SFC Investigation”). On 11 July 2017, Basic Asset provided the requested information and documents to the SFC.

On 20 July 2017, Basic Asset received from MSQ advisory fees for the second quarter of 2017, ie from 1 April 2017 to 30 June 2017 (“2017 Q2”), in the sum of US\$185,217.35 pursuant to the IA Agreement.

On 28 July 2017, MSQ served a notice on Basic Asset terminating the IA Agreement with effect from 1 September 2017.

On 1 August 2017, Mr Sung tendered his resignation as a director of Basic Asset. By a letter dated 11 August 2017, Mr Sung and Basic Asset agreed to waive the threemonth notice period and that his resignation would take effect from 31 August 2017.

Also by a letter dated 11 August 2017, MSQ and Basic Asset agreed that the advisory fees under the IA Agreement would be calculated up to 10 August 2017 at US\$20,514.20. That sum was paid on 14 November 2017.

On 29 August 2017, Mr Kwong sent a further spreadsheet to Mr Sung by email. This spreadsheet was similar to those prepared for the previous two quarters. It showed total costs and expenses incurred in 2017 Q1 of HK\$613,610 and advisory fees were converted to HK\$1,269,610. After deducting costs and expenses, the net advisory fees were HK\$656,526. After further deducting HK\$94,128 for Basic Asset, the “To Bill Bonus” was HK\$562,397.

By a letter dated 30 August 2017, Basic Asset informed Mr Sung that “a bonus payment of HK\$600,000 is to be paid to you in August 2017. Further discretionary bonus may be made to you within 6 months, subject to the profitability of the Company”.

On or about 1 September 2017, Mr Sung received from Basic Asset a sum of HK\$600,000. The same dispute arises as to whether this payment was a service fee paid under P’s Agreement or a performance bonus paid under the Employment Agreement.

From January 2018 to May 2020, Mr Sung repeatedly approached Mr Kwong through WhatsApp to follow up on the SFC Investigation and to ask when the outstanding balance of his “bonus” would be settled. Mr Kwong’s responses were that the SFC Investigation was still ongoing and it was better to wait for the resumption of trading in the shares with HKEX code 1236 (“Share 1236”).

On 7 February 2021, Mr Sung sent a final WhatsApp message to Mr Kwong stating that, if Basic Asset failed to repay HK\$1 million within seven days, he would take legal action against it.

THE PARTIES’ CASES

As both parties complain that the other has changed his or its case, it is necessary to set out the positions advanced at different stages.

Preaction stage

As Basic Asset had failed to settle the outstanding payment, Mr Sung instructed Messrs K B Chau & Co to issue a preaction letter dated 28 January 2021 to Basic Asset. In that letter, it was asserted that Mr Sung and Basic Asset had entered into an oral agreement in July 2016 whereby Basic Asset agreed to pay Mr Sung a service fee equivalent to 90% of the advisory fees received by Basic Asset, after deduction of Basic Asset's costs and expenses. It was alleged that Basic Asset had failed to pay the service fees due under that oral agreement and that the outstanding sum was US\$205,859.68. It is noted that the terms of the oral agreement described in the preaction letter are the same as P's Agreement, but the date of the agreement is different.

By a letter dated 9 February 2021, KCL & Partners ("KCL"), acting for Basic Asset, stated that Mr Kwong had been admitted to hospital and sought an extension of 28 days to provide a substantive response.

In the substantive reply dated 24 February 2021, KCL did not mention the employment relationship between Mr Sung and Basic Asset. Instead, KCL referred to an oral agreement allegedly reached in June 2016 between Mr Sung and Basic Asset under which Mr Sung agreed to bring in a fund of around US\$100 million for a minimum period of two years. It was alleged that Mr Sung was in breach of that oral agreement because the fund he brought in was wound up within 12 months, and that Basic Asset accepted his breach. It was further alleged that, having accepted the breach, Basic Asset was absolved from further performance of the oral agreement and had no continuing obligation to pay Mr Sung.

In other words, Basic Asset's position at the pre-action stage was that there existed an oral agreement under which it was obliged to pay Mr Sung, but its obligation to pay came to an end upon its acceptance of Mr Sung's breach.

KCL further alleged that, as a result of Mr Sung's breach, Basic Asset had suffered loss and damage comprising (a) 10% of the advisory fees, after deduction of Basic Asset's costs and expenses, and (b) part of the expenses which Basic Asset had incurred as a result of Mr Sung's breach, totalling HK\$1,630,698. In addition, Basic Asset was said to have suffered further loss of HK\$500,000 by way of loss and damage and loss of goodwill arising from the SFC Investigation. KCL demanded that Mr Sung pay HK\$2,120,698 within seven days, failing which legal proceedings would be commenced without further notice.

Pleadings stage

On 9 April 2021, Mr Sung commenced the present proceedings against Basic Asset. In the Statement of Claim filed with the writ, he pleaded that an oral agreement was entered into with Basic Asset in July 2016 whereby he would take charge of and supervise the services to be provided by Basic Asset to MSQ pursuant to the IA Agreement, and that he would be entitled to

service fees equal to 90% of the advisory fees received by Basic Asset from MSQ, net of Basic Asset's costs and expenses, payable quarterly within a reasonable period after receipt of the relevant advisory fees. He sought an order that the outstanding service fees be assessed.

In the Defence and Counterclaim filed on 21 May 2021, Basic Asset pleaded that it had entered into an oral agreement with Mr Sung in around July or August 2016 whereby, after deduction of Basic Asset's costs and expenses, 90% of the advisory fees would be paid to Mr Sung as his remuneration for providing advisory and management services to MSQ, on the conditions that (a) the IA Agreement remained in force for at least two years and (b) Basic Asset received advisory fees from MSQ ("D's Agreement"). It was further pleaded that, pursuant to D's Agreement, Basic Asset had paid "management fees" to Mr Sung. Basic Asset alleged that Mr Sung was in breach of D's Agreement because the IA Agreement was terminated within two years and no advisory fees were received after 11 August 2017. As a result, Basic Asset claimed to have suffered loss and damage and counterclaimed against Mr Sung in the sum of HK\$1,922,434.60.

In the Reply and Defence to Counterclaim filed on 11 August 2021, Mr Sung clarified that the oral agreement with Basic Asset as pleaded in the Statement of Claim was entered into in November 2016, rather than July 2016. He denied the existence of D's Agreement.

Amendments to pleadings

By an order dated 21 February 2023, Basic Asset was granted leave to amend its Defence and Counterclaim.

Basic Asset's amendments were drastic in that the entire original Defence and Counterclaim was crossed out and replaced by a wholly new Amended Defence. In the Amended Defence, there was no longer any plea of D's Agreement. Instead, for the first time almost two years after the commencement of the proceedings, Basic Asset pleaded the Employment Agreement and averred that Mr Sung was only an employee of Basic Asset. It alleged that, pursuant to the Employment Agreement, Mr Sung was entitled only to discretionary performance bonus and that, in about mid2017, Basic Asset exercised its sole and absolute discretion not to award him any further bonus. The counterclaim against Mr Sung was abandoned.

In his Amended Reply, Mr Sung denied that his claim arose under the Employment Agreement and denied that the payments made by Basic Asset were discretionary bonuses.

WITNESSES

Both Mr Sung and Mr Kwong gave evidence at trial.

Mr Sung's evidence

Mr Sung started his career in the banking and securities industry in 1983 and moved into the asset management sector in about 1987. He joined Minsheng Bank in 2014.

The Fund was launched in 2015. Minsheng Bank was its sponsor and MSQ was its investment manager.

Mr Sung was introduced to Mr Kwong in around 2012 through a broker and that they became business acquaintances. He formed a positive impression of Mr Kwong and considered him to be a decent person. His supervisor at Minsheng Bank, Mr Loo, also gave positive feedback on Mr Kwong.

In April 2016, Mr Sung met Mr Kwong by chance. In the course of their conversation, Mr Kwong mentioned the challenges Basic Asset was facing and expressed concerns about its future. Mr Kwong indicated that he was considering selling Basic Asset.

In May 2016, Mr Sung decided to leave Minsheng Bank. He was asked whether he would be interested in acquiring the Fund and MSQ, as Minsheng Bank was undergoing restructuring and had to outsource the management of the Fund to a third party. He was keen on this opportunity and needed to secure an SFClicensed IA. He could either set one up from scratch or acquire one already in operation; the former option would take more time, whereas the latter would be more costly.

Mr Sung thought of Mr Kwong and regarded this as an opportunity to “secure the last piece of the puzzle” in his business plan, namely an SFClicensed IA. He therefore approached Mr Kwong and indicated that he was interested in acquiring Basic Asset. According to him, Mr Kwong was unwilling to give up Basic Asset completely but was prepared to sell 75% of the shares to him. The parties then began negotiating the terms and conditions of the Intended Acquisition.

During the negotiations, Mr Sung sought advice from Mr Loo from time to time, and Mr Loo introduced AYC to advise on the Intended Acquisition and to prepare the necessary agreement.

According to Mr Sung, both he and Mr Kwong were adamant that the Intended Acquisition would be completed, pending the signing of a formal agreement. It was on that basis that the Employment Agreement was signed on 6 June 2016 and an application was submitted to the SFC to appoint him as Basic Asset’s RO so that he could take charge of the management of the Fund.

On 28 June 2016, Basic Asset and MSQ entered into the IA Agreement. On 1 July 2016, Mr Sung completed the acquisition of MSQ (which was the sole shareholder of the Fund) and became its sole shareholder.

On 16 August 2016, the SFC approved his appointment as Basic Asset’s RO and granted him a Type 9 Licence. Thereafter, he took charge of the management of the Fund.

In November 2016 Mr Kwong suddenly called off the negotiations for the Intended Acquisition. Mr Sung described this as “most shocking” to him. However, as the management of the Fund was already up and running, he had very limited options. Even if he wanted to move the Fund to another SFClicensed IA, it would take time to set up a new IA and apply for an SFC licence.

In those circumstances, Mr Sung discussed an interim arrangement with Mr Kwong. His evidence was that Mr Kwong, on behalf of Basic Asset, proposed that Basic Asset would continue to provide advisory services for the management of the Fund until such time as the IA Agreement was terminated by MSQ and, during this interim period, Mr Sung would be entitled to 90% of the advisory fees received from MSQ, after deducting Basic Asset's costs and expenses in relation to the management of the Fund, with retrospective effect from July 2016.

Mr Sung explained that the Fund's size was US\$100 million which exceeded the total assets then managed by Basic Asset and Mr Kwong was keen to keep the Fund under Basic Asset's management because it would substantially increase Basic Asset's total fund size and have a positive effect on its business. As Mr Sung had limited choice, he accepted Mr Kwong's proposal and entered into P's Agreement with Basic Asset. Thereafter, he continued to manage the Fund through Basic Asset, while at the same time setting up his own IA. He denied that there was any oral agreement reached in June 2016 to share the net advisory fees on the same 90:10 basis.

On or about 24 November 2016, Mr Sung caused MSQ to pay US\$225,758.38 to Basic Asset pursuant to the IA Agreement as the advisory fee for 2016 Q3.

In or around January 2017, Mr Sung received two cheques from Basic Asset totalling HK\$1,100,000. Before that, Mr Kwong had shown him a spreadsheet indicating that his entitlement to the net advisory fees for 2016 Q3 was HK\$1,116,179. Mr Kwong told him that he would round his entitlement to the nearest ten thousand (ie HK\$1,100,000) and the underpayment of HK\$16,179 would be paid together with his entitlement for 2016 Q4.

In February 2017 Mr Sung caused MSQ to pay US\$206,969.59 to Basic Asset pursuant to the IA Agreement, being the advisory fee for 2016 Q4.

On 2 May 2017, Mr Sung received another spreadsheet by email from Mr Kwong showing that his entitlement was HK\$775,654. Shortly afterwards, he received two cheques from Basic Asset totalling HK\$800,000. Mr Kwong told him that this was his entitlement for 2016 Q4, paid in the rounded sum of HK\$800,000, and that the amount also included the underpayment of HK\$16,179 from 2016 Q3. After receipt of HK\$800,000, there was an overpayment of HK\$8,167 and credit would be given to the said amount when Basic Asset paid his entitlement for next quarter.

On 4 May 2017, Mr Sung caused MSQ to pay US\$181,577.74 to Basic Asset pursuant to the IA Agreement, being the advisory fee for 2017 Q1.

Mr Sung said that, some time in the first half of 2017, Mr Kwong informed him that his entitlement under P's Agreement would be classified as "bonus" for "accounting issues". As Mr Sung was no longer interested in acquiring Basic Asset's shares, he was not particularly concerned about the accounting treatment so long as he was paid. In his view, how Basic Asset recorded his entitlement in its accounts was an internal matter beyond his control.

Mr Sung recalled that Mr Kwong showed him the payment letters in May 2017 and September 2017 when handing over the cheques, but he did not read them at the time. He did not receive copies of those covering letters until much later and could not recall exactly when.

On or around 20 July 2017, Mr Sung caused MSQ to pay US\$185,345 to Basic Asset pursuant to the IA Agreement as the advisory fee for 2017 Q2.

Around the same time in July 2017, a new IA company was incorporated (in which Mr Sung held 49% of the shares) with a view to replacing Basic Asset as IA.

At the end of July 2017, on behalf of MSQ, Mr Sung informed Basic Asset that the IA Agreement would be terminated with effect from 1 September 2017. On 1 August 2017, he tendered his resignation as a director of Basic Asset also with effect from 1 September 2017.

After service of the termination notice and his resignation, Mr Sung and Mr Kwong amicably sorted out the advisory fees payable for the final period prior to termination on 1 September 2017. It was agreed that advisory fees were payable only up to and including 10 August 2017 and a letter dated 10 August 2017 to that effect was signed by Mr Kwong on behalf of Basic Asset and by Mr Sung on behalf of MSQ.

On 1 September 2017, Mr Sung received a cheque for HK\$600,000 from Basic Asset. Mr Kwong told him that this was his entitlement for 2017 Q1. After payment of HK\$600,000, there was an overpayment of HK\$45,770 in total, and Mr Kwong said that credit would be given for that sum when Basic Asset paid his entitlement for 2017 Q2.

In or around November 2017, Mr Sung caused MSQ to pay US\$20,514 to Basic Asset pursuant to the IA Agreement as the advisory fee for the period from 1 July 2017 to 10 August 2017 (“Final Period”).

However, Basic Asset failed to settle his entitlement under P’s Agreement for 2017 Q2 and the Final Period.

When Mr Sung pressed for payment of the outstanding service fees, Mr Kwong asserted that a transaction conducted by the Fund was under investigation by the SFC and that payment would be held up pending clearance of that transaction. Mr Sung said that, even though there was no followup from the SFC, Mr Kwong continued to rely on the SFC Investigation as a reason for not paying, and insisted that they should wait for the resumption of trading in Share 1236. Mr Sung emphasized that at no point in their WhatsApp communications did Mr Kwong say that his entitlement was a discretionary performance bonus under the Employment Agreement, nor did Mr Kwong expressly deny liability to pay.

Mr Kwong’s evidence

Mr Kwong claimed that he was already a very experienced fund manager by 2016 and there had been constant offers to invest in or acquire Basic Asset. He had always been willing to sell if an attractive offer was made and that Mr Sung was just one of the potential investors.

On or around 19 March 2016, one of Basic Asset's ROs, who was licensed by the SFC to carry out Type 9 activities, tendered his resignation by giving six months' notice and Basic Asset required a replacement.

In around April or May 2016 Mr Sung approached him proposing to acquire 75% of the shares in Basic Asset. Mr Sung told him that he could bring in a fund of US\$100 million (ie the Fund) to Basic Asset for a period of two years. Mr Kwong said that Mr Sung was keen to keep him as a 25% shareholder because of his good reputation in the field.

While Mr Kwong did not resist Mr Sung's proposal, he was not optimistic that they would eventually reach agreement on the terms and conditions of the Intended Acquisition. According to him, Mr Sung overestimated the attractiveness and benefits of bringing the Fund into Basic Asset and the Fund itself had no track record. Nevertheless, he decided to keep the option open and continued discussions with Mr Sung.

Mr Kwong said that, as the investment negotiations dragged on without much progress, the option of Mr Sung working as RO of Basic Asset emerged as a more viable solution. He considered this to be a "winwin" arrangement; Basic Asset could fill the vacancy and Mr Sung could resume his RO qualifications. It was in that context, he said, that the parties signed the Employment Agreement.

On 16 August 2016, the SFC granted approval and Mr Sung became an RO of Basic Asset. After that, Mr Sung's primary role was to manage the Fund.

The negotiations for the sale and purchase of 75% of Basic Asset's shares were called off by Mr Kwong in November 2016 because he found the terms and conditions proposed by Mr Sung to be too ambitious. After the Intended Acquisition fell through, the parties discussed an arrangement under which Mr Sung would be remunerated for his involvement in managing the Fund by way of bonus under his employment with Basic Asset.

Mr Kwong said that Mr Sung proposed that Basic Asset pay 90% of the net advisory fees to him. According to Mr Kwong, this proposal was unacceptable because he still had the same concerns about the "rosy picture" painted by Mr Sung. However, from a commercial point of view, if a steady stream of revenue could be generated for at least two years as promised by Mr Sung, a 90:10 split was not unacceptable. He therefore decided to adopt a "waitandsee" approach. As long as Mr Sung's promise held true, he said he would be prepared to pay him 90% of the net advisory fees.

Mr Kwong emphasized that any payment of 90% was, in his view, not a contractual right but a matter of absolute discretion on the part of Basic Asset. He accepted that the size of the Fund exceeded the total portfolio he then managed, but denied that keeping the Fund under Basic Asset's management would have a positive effect on its business. According to him, Basic Asset had stable longterm clients and an increase in fund size would not benefit its business.

Mr Kwong said that Basic Asset thereafter paid discretionary bonuses to Mr Sung from time to time. He maintained that the contemporaneous documents supported his case that those payments were discretionary bonuses. In particular, he relied on the payment letters, the tax returns filed by Basic Asset and Mr Sung, and the WhatsApp messages between them.

Mr Kwong said that, after the IA Agreement was terminated in September 2017, it was entirely reasonable for Basic Asset to cease paying discretionary bonus to Mr Sung, as Mr Sung had failed to keep his alleged promise to keep the Fund at Basic Asset for at least two years. He said that the SFC Investigation provided an additional reason for refusing to pay any further bonus.

WHETHER P'S AGREEMENT EXISTED

As noted above, the main issue in this case is whether Mr Sung and Basic Asset entered into P's Agreement in November 2016 as alleged. As Basic Asset no longer relies on D's Agreement as a defence, it is unnecessary to determine whether D's Agreement existed. However, Mr Kwong's evidence about D's Agreement remains relevant to the assessment of credibility.

When assessing credibility, the Court considers the inherent plausibility of a witness's testimony and whether any part of it is materially contradicted by undisputed or indisputable evidence, such as contemporaneous documents. Where a witness is discredited on one or more matters in this way, that fact is relevant to his overall credibility. The Court may also take into account a witness's motive for deliberately not telling the truth, for example where the truth would prejudice his own interests or where the outcome of the litigation may affect those interests: see *Hua Tyan Development Ltd v Zurich Insurance Co Ltd* 4 HKLRD 827 at §27, per Chung J.

Having considered all the evidence, I find Mr Sung to be an honest witness. His evidence is internally consistent, reasonable and commercially sensible.

By contrast, I have grave reservations about Mr Kwong's evidence and do not find him to be a reliable witness. He strikes me as a person who was prepared to distort the truth to suit his own interests without hesitation. A salient example concerns his evidence about D's Agreement.

In Mr Kwong's witness statement which he adopted as his evidence in chief, not only was there no mention of D's Agreement, he even said that "I was in fact not optimistic that we could eventually reach an agreement on the terms and conditions of the [Intended Acquisition]". However, under cross-examination, he accepted that D's Agreement was entered into in June 2016, but claimed that it was terminated in November 2016 when the Intended Acquisition fell through. But if D's Agreement had indeed been terminated in November 2016, it was impossible for Mr Sung to have breached it in July 2017 when MSQ terminated the IA Agreement. Yet the alleged breach of D's Agreement was relied upon in KCL's letter dated 21 February 2021 and again in the Defence and Counterclaim (to which Mr Kwong signed the Statement of Truth) as the basis for resisting Mr Sung's claim and for counterclaiming against him.

When Mr Kwong was further crossexamined on why, if he now said the “true reason” was that Mr Sung was merely an employee entitled only to discretionary bonus, Basic Asset nevertheless advanced a case based on Mr Sung’s breach of D’s Agreement at the preaction and pleading stages, his answer, which I found quite shocking, was that he wanted to counterclaim against Mr Sung but could not do so if he relied on the Employment Agreement as a defence. If what he said under cross-examination is true, it means that he knowingly pleaded a false case in the Defence and Counterclaim in order to mount a counterclaim against Mr Sung.

In my view, Mr Kwong’s answers on this topic, whether they are true or not, had completely destroyed his credibility as a witness. As will be seen below, there are other examples where his answers reflect badly on his credibility. His evidence was also inconsistent with both common sense and commercial sense.

The inherent probabilities

The undisputed commercial reality is that Mr Sung was the sole shareholder of MSQ and that MSQ was the sole shareholder of the Fund. In other words, he was the person in control of both MSQ and the Fund.

As noted above, Mr Sung could have set up his own IA, used it to enter into an investment advisory agreement with MSQ and received all advisory fees from MSQ. In that scenario, he would have been entitled to 100% of the advisory fees.

Mr Sung chose Basic Asset as the IA because he wanted to start his own business earlier. He was prepared to share part of the advisory fees from MSQ with Basic Asset as the price of having an immediately available Type 9 Licence but it is clear from the negotiations for the Intended Acquisition that he still expected to receive a substantial share of the advisory fees.

By way of example, in an email dated 11 September 2016 to both Mr Sung and Mr Kwong, Mr Loo proposed that “For any revenue contributed by Mr Sung in excess of HK\$8 million in a single calendar year and the cost condition stated below was met, Mr Sung will be entitled to a 75% sharing of that excess part of revenue first and remaining 25% will be treated as the company overall income and split according to the sharing holding of the company after deduction of the all cost and expenses”. In his reply dated 18 September 2016, Mr Kwong did not comment on this proposed profitsharing arrangement. His only suggestion was to shorten the dividend payment time from 180 days to 90 days.

If the Intended Acquisition had been completed, Mr Sung would have acquired 75% of the shares in D and, on Mr Loo’s proposal, would have been entitled to more than 90% (in fact 93.75%) of the net advisory fees from MSQ.

Against this background, it was entirely reasonable that, when Mr Kwong abruptly called off the Intended Acquisition in November 2016, Mr Sung would insist to have a separate agreement with Basic Asset as to how the advisory fees from MSQ would be shared between them. It is wholly implausible that he would accept Mr Kwong's "waitandsee attitude" and leave payment of his entitlement to Mr Kwong's absolute discretion.

From Mr Kwong's perspective, he had previously raised no objection to Mr Loo's proposed profitsharing structure and it was his own evidence that the parties had already entered into D's Agreement in June 2016 to share the net advisory fees in the same 90:10 ratio. It was therefore commercially sensible for him to agree, on behalf of Basic Asset, to P's Agreement in order to keep the Fund under Basic Asset's management. As a matter of common sense, fund size is important to a fund manager in building his reputation and profile.

Mr Kwong's evidence was that, when Mr Sung proposed in November 2016 to receive 90% of the net advisory fees, he found the proposal unacceptable because he still had concerns about the "rosy picture" painted by Mr Sung. Yet, on his own account, he already had the concerns that the "rosy picture" painted by Mr Sung might be too good to be true when he, on behalf of Basic Asset, entered into D's Agreement with Mr Sung in June 2016 to share 90% of the advisory fees with him. If Mr Kwong was willing to enter into D's Agreement in June 2016 despite his alleged concerns, I fail to see why he would find the same ratio of sharing to be unacceptable in November 2016 because of the "same concerns".

Mr Kwong further submitted that it was inherently improbable that P's Agreement was not in writing, given Mr Sung's experience as a market participant at the material times.

With respect, Mr Kwong must have forgotten his own evidence that D's Agreement was also made orally. The main term of both P's Agreement and D's Agreement was the same, ie the net advisory fees from MSQ would be shared between Mr Sung and Basic Asset in the ratio 90:10. If D's Agreement could be entered into orally, it was not inherently improbable that P's Agreement was also entered orally.

Nature of Basic Asset's payments to Mr Sung

Secondly, I consider that the payments made by Basic Asset to Mr Sung at the material times support the conclusion that P's Agreement existed.

If those payments were truly discretionary bonuses under the Employment Agreement, there would have been no need for Mr Kwong to explain their amount by providing a spreadsheet showing Mr Sung's "entitlement" every time Basic Asset received advisory fees from MSQ.

Under cross-examination, Mr Kwong said that the spreadsheet was "for reference" only. I take this to mean that the net profit figure was, on his case, a reference when he considered the amount of discretionary bonus to be paid.

I accept that an employer may wish to know how much net profit a particular employee has generated when deciding on a discretionary bonus. What was not explained was why, having calculated the net profit that Mr Sung brought to Basic Asset, it was then necessary to deduct 10% “for Basic Asset” and to show a “Final” figure. If the spreadsheet was for “reference” only as alleged by Mr. Kwong, the calculation should have stopped at the net profit. In my view, the only reasonable explanation why the calculation in the spreadsheets went on to show Mr Sung’s entitlement at 90% of the new profit is because Basic Asset was obliged under P’s Agreement to pay such amount to Mr Sung.

It is noted that, in the spreadsheet for 2017 Q1, the deduction for Basic Asset was HK\$94,128, representing 14.3%, rather than 10%, of the net advisory fees of HK\$613,084. Although the spreadsheet was sent by Mr. Kwong, he was unaware of the discrepancy until it was raised by me and naturally he was unable to give any explanation on it. Nevertheless, in closing statement, he relied on it to challenge Mr. Sung’s case that he was entitled to 90% of the net advisory fee. In my view, that point was not available to Mr. Kwong, as there was no evidence explaining how the figure of HK\$94,128 was derived. Further, given that the deduction for Basic Asset in the spreadsheets for 2016 Q3 and 2016 Q4 was 10%, I consider it more likely than not that the 14.3% deduction in the 2017 Q1 spreadsheet was a clerical error, and that the deduction should instead have been 10%.

Mr Kwong further relied on the fact that the payments to Mr Sung were described as “staff bonus” in the payment vouchers and as “discretionary bonus” in the payment letters. They were also recorded as “bonus” in the Employer’s Return of Remuneration and Pensions filed by Basic Asset. He contended that these contemporaneous documents support his case that the payments were bonuses under the Employment Agreement.

In my view, these documents do not assist Basic Asset as they were self-serving. Mr Sung’s evidence, which I accept, is that Mr Kwong told him Basic Asset would categorize the service fees payable under P’s Agreement as “bonus” in its accounts for accounting reasons. Mr Sung’s concern was that he should receive what he was entitled to under P’s Agreement. Once the Intended Acquisition had fallen through, how Basic Asset chose to label those payments in its accounts was an internal matter which did not affect his rights.

As a matter of fact, Mr Kwong showed a habit of changing the document description to suit his account purpose. For instance, in the email dated 23 January 2017, he requested AYC to change the invoice for drafting of shareholders’ agreement for the Intended Acquisition to “Advisory fee for structuring of Basic Asset Management” such that it could be settled by Basic Asset.

On the other hand, the last payment letter dated 30 August 2017 (which was Mr Sung’s last day of employment with Basic Asset) stated that “Further discretionary bonus payment may be made to you within 6 months, subject to the profitability of the Company”. This is plainly inconsistent with the Employment Agreement, which provides that bonus was payable only if the employee was still employed on the bonus payment day and had not given notice to terminate his employment. If the payments to Mr Sung were truly discretionary bonuses under the

Employment Agreement, the payment on 30 August 2017 should have been the last, and there could have been no “further discretionary bonus payment” irrespective of Basic Asset’s profitability.

Under cross-examination, Mr Kwong insisted that the Employment Agreement governed and that Mr Sung was not entitled to any discretionary bonus after his resignation took effect on 1 September 2017, but he denied that the statement in the last payment letter was inconsistent with the Employment Agreement. He said the statement had been added “as a matter of courtesy”.

With respect, I do not accept this explanation. I do not see why it was necessary to include such a statement “out of courtesy”. When Basic Asset issued the last payment letter, it had only recently received the advisory fee from MSQ for 2017 Q2 (on 20 July 2017). In my view, when Basic Asset stated that “further discretionary bonus payment may be made”, it was clearly referring to Mr Sung’s entitlement to the net advisory fee for 2017 Q2, which remained outstanding.

My view is reinforced by the WhatsApp communications between Mr Sung and Mr Kwong from January 2018 onwards. Faced with repeated demands from Mr Sung for payment of “bonus”, Mr Kwong never said that Mr Sung was not entitled to any bonus after leaving Basic Asset, or that the sums were wholly discretionary and he had decided not to pay them (as Basic Asset now contends). Nor did he allege any breach of D’s Agreement by Mr Sung (as previously contended). Instead, he said that the SFC Investigation had not concluded and that he wished to wait until Share 1236 resumed trading. It is clear from his messages that his focus was on the timing of payment rather than on any denial of liability to pay.

When asked why he did not say in his WhatsApp messages that Mr Sung was not entitled to any further payment because he had left Basic Asset, Mr Kwong replied that it was unnecessary to say so. When it was further put to him that he had not only failed to give what he now says was the “true reason” but had in fact advanced a “false reason” (the suspension of trading in Share 1236) for refusing payment of the alleged bonus, he had no answer. This is yet another example of Mr Kwong’s preparedness to distort the truth to serve his own interests, regardless of its veracity.

In addition to Basic Asset’s own documents, Mr Kwong also relied on Mr Sung’s WhatsApp messages, in which he referred to the outstanding payments as “bonus”, and on Mr Sung’s tax returns, in which he reported all income from Basic Asset (including salary and the payments of the disputed nature) under salaries tax.

In my view, these documents also do not assist Basic Asset. Mr Sung’s choice of the word “bonus” in WhatsApp messages must be understood in context, not in isolation. Although he used the term “bonus”, he never accepted that payment was discretionary. On the contrary, he repeatedly rejected Mr Kwong’s contention that the SFC Investigation justified nonpayment or deferral until the resumption of trading in Share 1236. Likewise, the fact that Mr Sung treated the payments received from Basic Asset as part of his salary for tax purposes and reported them to the IRD under salaries tax does not mean that he accepted that his entitlement to those payments was discretionary.

Further, I do not accept that it was a mere coincidence that, on each occasion when Basic Asset received advisory fees from MSQ, the total amount paid to Mr Sung happened to be the closest tenthousand of his 90% entitlement as shown in the spreadsheet. This is entirely consistent with the operation of P's Agreement and inconsistent with a discretionary scheme as alleged by Mr Kwong.

Nor do I accept that it was coincidental that payments were made to Mr Sung after Basic Asset received advisory fees from MSQ on a quarterly basis. As Mr Kwong accepted, all other staff of Basic Asset received discretionary bonus only once a year.

Taken together, these matters strongly support the conclusion that P's Agreement existed on the terms alleged by Mr Sung.

Drastic change of case by Basic Asset

Conversely, I reject Basic Asset's case that Mr Sung was only entitled to discretionary bonuses under the Employment Agreement.

As noted above, this case was not advanced until almost two years after the proceedings began. When Mr Kwong was asked why this case was not raised in KCL's reply dated 24 February 2021, he said that he was in hospital undergoing a major operation. There is no suggestion from him that the contents of KCL's reply were not based on his instructions.

With respect, I do not find this explanation convincing. From the WhatsApp communications, I accept that Mr Kwong was hospitalized in early February 2021 for an urgent appendectomy. That might explain some difficulty in giving detailed instructions, but it cannot explain why an entirely different substantive case was advanced.

Mr Kwong also relied on an "extended period of recovery" and COVIDrelated disruptions to explain the late amendments. However, this is not a situation where a party simply omitted certain details from its initial pleadings and later sought to fill the gaps. Here, Basic Asset completely changed its case. That cannot be explained away by reference to recovery time or pandemicrelated disruption. Indeed, in light of Mr Kwong's own explanation that he ran a case based on Mr Sung's alleged breach of D's Agreement because he wished to make a counterclaim, it is clear that it was a conscious decision not to plead the Employment Agreement in the original Defence and Counterclaim.

In my view, the amendments to the Defence and Counterclaim amounted to a complete change of case. While Basic Asset's overall stance remained that it was not liable to pay Mr Sung anything, the basis on which "no liability" was contended for was entirely different. The earlier "breach of agreement" defence accepted that there was an agreement under which Basic Asset was obliged to share 90% of the net advisory fees with Mr Sung (ie D's Agreement) and treated the earlier payments as "management fees" under D's Agreement, with nonliability said to arise from Mr Sung's alleged breach. The later "employment" defence denies any agreement to share net advisory fees and re-characterizes the earlier payments as discretionary performance bonuses under the Employment Agreement.

In Zenith Chemical Group Limited HKCA 253, one of the reasons the trial judge rejected the company's defence of cancellation was that "The Company's case has changed substantially from Alleged Extension, to Alleged NonPayment, and eventually to Alleged Cancellation. The defence of Alleged Cancellation is diametrically opposed to the initial defence of Alleged Extension." On appeal, the Court of Appeal held that the trial judge was "entitled to take into account the apparent inconsistencies in the lines of defence pursued at different times and the documentary evidence adduced, and the doubts generated by logical reasoning" (§40). The same approach is appropriate here.

By contrast, I do not accept Basic Asset's criticism that Mr Sung changed his case. Mr Sung merely made a mistake as to the month in which P's Agreement was entered into in the Statement of Claim filed in April 2021, and that mistake was promptly corrected in the Reply filed in August 2021.

Mr Kwong attempted to attack Mr Sung's credibility by arguing that he did not mention that he was an employee of Basic Asset until Basic Asset produced the Employment Agreement. In my view, this attack backfires.

Mr Sung's case is that P's Agreement was separate from the Employment Agreement. As he did not rely on the Employment Agreement to found his cause of action, there was nothing objectionable in his not mentioning the employment relationship in the Statement of Claim or not disclosing the Employment Agreement.

The position was very different for Basic Asset. Since Basic Asset relied on the Employment Agreement as its defence, it was incumbent upon it to plead the employment relationship and to disclose the Employment Agreement. It did not do so until February 2023.

In my view, if there was any omission in pleading the employment relationship or in disclosing the Employment Agreement, that omission lay with Basic Asset, not with Mr Sung.

Conclusion on liability

For the reasons set out above, I have no hesitation in finding in favour of Mr Sung and concluding that P's Agreement existed on the terms alleged by him. I also find that the payments made by Basic Asset to Mr Sung from January 2017 to September 2017 mentioned above in the total sum of HK\$2,500,000 were services fees paid under P's Agreement.

For completeness, I confirm that I have considered all the evidence and submissions of both parties. I do not consider it necessary to lengthen this already long judgment by dealing with every argument raised.

QUANTUM

Having found that P's Agreement existed, the next question is the amount of service fees which Basic Asset are liable to pay Mr Sung.

According to P's Agreement, Mr Sung's entitlement is 90% of the net advisory fee after deduction of Basic Asset's costs and expenses. However, Basic Asset has adduced no evidence as to its costs and expenses incurred for the 2017 Q2 and the Final Period.

In the absence of such evidence, I once considered whether to calculate Mr Sung's entitlement simply by reference to the advisory fees received from MSQ without any deduction. At the end, I have decided not to adopt that course as it is undeniable that Basic Asset incurred costs and expenses during those two periods in managing the Fund. I consider it fairer to use the average amount of costs and expenses incurred in the previous three quarters for assessment purposes.

According to the spreadsheets prepared by Basic Asset, total costs and expenses incurred in the previous three quarters from 1 July 2016 to 31 March 2017 (a period of 9 months) were HK\$1,862,132.42, which equates to an average of HK\$206,903.60 per month. Applying that average to the period from 1 April 2017 to 10 August 2017 (4 months and 10 days), the costs and expenses for that period are: $\text{HK\$}206,903.60 \times 4 + \text{HK\$}206,903.60 \times 10/30 = \text{HK\$}896,582.28$.

The total advisory fees received from MSQ for 2017 Q2 and the Final Period were US\$205,731.55. Applying an exchange rate of US\$1:HK\$7.75, this is equivalent to HK\$1,594,419.51.

After deducting Basic Asset's costs and expenses of HK\$896,582.28, the net advisory fees are HK\$697,837.24. Mr Sung's 90% entitlement under P's Agreement is therefore HK\$628,053.51.

After further deducting the overpayment of HK\$45,768.72 accumulated from 2016 Q4 and 2017 Q1, the service fee payable by Basic Asset to Mr Sung is HK\$582,284.79.

DISPOSITION

For the reasons given above, I enter judgment against Basic Asset in favour of Mr Sung and order that Basic Asset do pay Mr Sung the sum of HK\$582,284.79. I further order that Basic Asset do pay Mr Sung interest on the said sum at half judgment rate from the date of writ to the date of this judgment and thereafter at judgment rate until payment.

Costs should follow the event. I make an order nisi that Basic Asset do pay Mr Sung's costs of this action, including any reserved costs, to be taxed if not agreed, with Certificate for Counsel. Any application to vary the costs order nisi should be made within 14 days from the date of this judgment.

I thank Ms Koo for her assistance to the Court.

(Damian Wong)

Deputy District Judge

Ms Koo Yeuk Lan, instructed by K B Chau & Co, for the Plaintiff

The Defendant appeared in person

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