EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(COMMERCIAL)

CLAIM NO. BVIHC (COM) 0005 OF 2017
Between:

[1] CHAD HOLM
[2] FH INVESTMENT (BVI) LIMITED

Claimants

And

[1] SANCUS FINANCIAL HOLDINGS LIMITED
[2] CARSON WEN
[3] JULIA YUET SHAN FUNG

Defendants

Appearances:

Mr Hefin Rees QC and Mr Callum McNeil with him of Walkers for the Claimants
Mr Paul Chaisty QC and Mr Justin Davis and Mr Andrew Willins with him for the Defendants

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2018: November 5,6,7,8, 9, 30,
December 19

JUDGMENT

[1] ADDERLEY J: The claim relates to the recently established Bank of Asia (BVI) Limited **("Bank of Asia")**, an offshore digital bank based in the British Virgin Islands ("BVI").

[2] The way its founder Mr Carson Wen ("Mr Wen"), the second defendant, described the genesis of the idea for the bank was set out in a letter to the BVI Financial Services Commission ("FSC") on 6 November 2014 is as follows:

> *"The failure of BVI incorporated companies to open bank accounts easily is a major threat to the pre-eminence of the BVI in the offshore industry and if not effectively resolved promptly will result in a fall in the number of investment holding companies and special purpose vehicles which is the lifeblood to the BVI offshore industry and a major contributor to GDP, government revenue, and employment.* "

[3] The grant of a banking licence would *inter alia* "*…address the pressing need for BVI incorporated companies to open bank accounts without the hassle and pain that now pits the BVI against other competing offshore jurisdictions*."

[4] Alive to the importance of such a bank to the financial services sector of the economy the Premier, the Honourable Dr. D Orlando Smith, OBE took proactive steps to make it happen by meeting with the promoters while he visited Hong Kong on 23 September 2015. It was at a small dinner hosted by Mr Wen and Ms Julia Yuet Shan Fung, his wife, ("Ms Fung") to which Mr Chad Holm, the first defendant ("Mr Holm") and a few others were invited guests. The Premier's wife Lorna Smith TEP rendered advice and assistance in the BVI without relaxing the strict standards pertaining to the granting and holding of bank licenses in the BVI. It also seems to be common ground that Mr Wen and Ms Fung were long-time personal friends of the Premier and his wife.

[5] Bank of Asia applied for an internet banking license in 2014 and was granted a banking licence in March 2017. It began operations on 11 June this year following the launch of its banking platform.

[6] The case concerns Mr Holm's claim to 22 percent of the founder's shares in the Bank of Asia.

[7] The first defendant Sancus Financial Holdings Ltd ("Sancus"), is a company incorporated in the BVI.

[8] At all material times Mr Holm was the sole shareholder and director of the second claimant, FH Investment (BVI) Limited ("FHI").

[9] Mr Wen is an individual of considerable standing as a corporate lawyer, director of numerous companies presently and over the years, a Task Force Chairman of the United Nations, and a three term Deputy of the National People's Congress of China representing Hong Kong.

[10] At all material times Ms Fung was the beneficial owner of all the shares in Sancus. On 17 July 2017 Ms Fung transferred all her interest in Sancus to Sancus Group Limited **("Sancus Group")** a Hong Kong company owned 100% by her. On 3 August 2017 Sancus Group conveyed its entire shareholding in Sancus to BOA International Financial Group Limited **("BOA International")** (formerly International FinTech Holdings Limited), its wholly owned subsidiary. Therefore BOA International owns 100% of the shares of Sancus. Mr Wen and Ms Fung are both directors of Sancus and formerly directors of FHI.

[11] Mr Holm says that Mr Wen aided by Sancus and his wife failed to honour an oral agreement to issue him 22% of the initial shareholding in Bank of Asia. The agreement is said to be founded on an oral agreement reached at a meeting held on 26 September 2015 during discussions of plans to implement the project in the BVI. The contract ("the BVI Contract"), according to Mr Holm, envisaged the 22%/78% split and that both parties would experience share dilution when new investors bought shares in the Bank of Asia, but that their dilution would be proportionate.

[12] The offer was allegedly made because Mr Wen thought it was necessary for the successful launch of the Bank of Asia Project (as defined below in paragraph 6 excerpted from the statement of claim and also called "the Project") to have a person of the peculiar qualifications and professional experience of Mr Holm. Among other things Mr Holm had acted as Managing Director at Bank of America Merrill Lynch where he headed their Asia Pacific Financial Institutions Mergers and Acquisitions Initiative. Before that, he was Managing Director in Citigroups's Financial Institutions practice in New York. He had also worked as CEO of Asia Assets Partners Limited. Over his career he had advised on high value mergers and acquisitions. Past clients include Citigroup/Citibank, JP Morgan, Bank of America, Banco Santander, Societe Generale, BNP, Barclays, Blackrock, the New York Stock Exchange, Blackstone Group, and KKR among others.

[13] Mr Holm had come to the attention of Mr Wen mainly through one Ms Azura Mangunhardjono ("Azura") who was a sort of advisor to Mr Wen and a close friend of Mr Holm as well at the material times a friend of Ms Fung. In his first e-mail written to Mr Holm dated 26 August 2015 before they met Mr Wen explained that he was "… *in the course of setting up a new offshore bank licensed in the BVI to focus on serving the Asian, and in particular, Chinese market, where there are some 250,000 BVI companies owned by Chinese, if those in Taiwan-Hong Kong and Overseas Chinese are included. There is a captive market in south East Asia, India, Middle East and other Asian Territories, as well as Russia. We will build a robust KYC process to ensure we do not take in the wrong customers. Your reputation precedes you and so I would be keen to get your counsel on this initiative.*"

[14] On 28 August 2015 Mr Wen asked Mr Holm to review the business plan relating to the Project produced by Deloitte ("the Deloitte Business Plan"). He then met Mr Holm for the first time on 29 August 2015 and the meeting lasted two hours. On 8 September 2015 Mr Holm after reviewing hundreds of pages of analysis prepared by Deloitte and third parties, sent an e-mail attaching a succinct 17-page critique which was a strategic discussion document for use at the forthcoming meeting with Mr Wen.

[15] On 9 September 2015, Mr Wen wrote to Mr Holm thanking him for his "*brilliant analysis*" of the Deloitte Business Plan and inviting further deliberations. Mr Wen noted that "*it took Deloitte half a year to produce something less insightful and impressive*" and that Mr Wen was "…*not a trained banker and [Deloitte] are primarily accountants, and your analysis showed the shortfalls due to lack of professional training and experience*".

[16] On 26 September they met for over 4 hours at Harvey Nichols restaurant, Central Hong Kong. Mr Holm stated in evidence that 4 pages of diagrams were before him and Mr Wen and they both knew the structures that were envisaged by then having thoroughly reviewed them over the last few weeks. At that time Mr Wen reiterated that in addition to the Bank of Asia the plan called for a wide range of financial services businesses to be operated predominantly in Hong Kong (including the management of the Bank of Asia). The businesses included wealth management, asset management, securities brokerage, investment banking, and merchant banking, particularly for China's "Belt and Road" initiative, the over one trillion dollar economic plan of China to construct a 21st century 'silk road' made up of a 'belt 'of overland corridors and a maritime road' of shipping lanes across the world. Mr Wen said that he held the founding shares in Sancus and he agreed to give 22% of those shares to Mr Holm and he would retain 78% subject to dilution pari

passu as investors bought shares. At the meeting about 2 hours were spent on operations, about 2 hours on philosophical alignment and about 15 minutes on the share offer. Mr Holm said he thought it was a partnership. There was no evidence from any witness that the potential value of that share offering was discussed at the time and there was no mention of offering him shares directly in FHL, only Sancus.

[17] According to Mr Holm he understood the terms of the BVI Contract to include the parties' agreement to divide, on a 78%/22% basis, ownership in the Bank of Asia Project or such entity holding the financial interest in the Bank of Asia Project, whether that would be Sancus, as originally agreed, or another company that would be the highest ranking within the corporate structure in which the Bank of Asia Project would be held. He stated that Mr Wen and Ms Fung, through the BVI Contract, agreed to share the founder equity with him as they wanted him to enter into a joint venture whereby he would, along with them, deliver the Bank of Asia Project while agreeing to defer his salary (with Mr Wen as the other partner also deferring his salary) until the Bank of Asia Project had sufficient capital to pay them. At all material times at this formative stage for the purpose of determining interests, the Bank of Asia Project and the Bank of Asia were one and the same because it was the only existing entity in which the interest could be given.

[18] During the negotiations between Mr Wen and Mr Holm on 26 September 2015 when the agreement was reached, there is no evidence that any reference at all was made to FHL even though at the time that held all of the shares in the Bank of Asia. The contemporary documents show that the company that held the one founding share in FHL was Sancus which was another company beneficially owned by Mrs Fung and the company in which Mr Wen promised to give the shares.

THE 78% V 22% SPLIT

[19] In the weeks leading up to the 26th September meeting both Mr Wen and Mr Holm had reviewed the Deloitte Business Plan in very much detail. Mr Holm had reviewed what was being proposed by the Deloitte Business Plan based on a capital injection of US$150 million. The plan outlined an ownership structure which provided 25% for Mr Wen, 10% for employees, and 65% for outside investors. Mr Wen and Mr Holm agreed that Mr Wen would take 25% of the non- investor equity and Mr Holm 7%, and 3% for staff. In order for the ratio between he and Mr Wen to be maintained, as new investors took up shares it was necessary to place all of the shares in one company and as new investors bought shares the dilution of their shares occurred proportionately. Mathematically that required a 22%/78% split of the shares which Mr Wen would

otherwise be keeping for himself as "founder equity", meaning what percentage in the Bank of Asia Project Mr Wen and Mr Holm would each own before the issuance of shares to outsiders, implied that Mr Wen would own 78% of the initial shares. (i.e. 25% divided by 32%) and he would own 22% (i.e. 7% divided by 32%)."

[20] If the price to investors was higher than anticipated the percentage obtained by outside investors would yield a smaller percentage than 65% of the shares with the consequence that Mr Wen's proforma stake would exceed 25% and Mr Holm's would exceed 7%.

[21] Mr Holm claims that the terms of the BVI Contract were agreed at the 26 September 2015 meeting but it was understood that it was conditional on the indication of the approval by the Premier and the BVI authorities as to his suitability. The former approval came on 1 October 2015 and the latter on 15 October 2015. Mr Holm therefore pleaded in his amended statement of claim that a contract was entered into on or about October 2015 as follows:

> *"6. As will be set out more clearly below, in or around October 2015, Mr Holm and Mr Wen (on his own behalf and on behalf of Ms Fung and Sancus) entered into an oral contract. Under the terms of that contract Mr Wen would cause Ms Fung and companies which were owned or controlled by him and Ms Fung either wholly or in part, including Sancus, FHI and FHL to execute and/or enter into the requisite documentation in order that Mr Holm would own, indirectly, an interest equal to 22% (subject to dilution from third party investments that may be made) of what was known as the "Bank of Asia Project". The Bank of Asia Project was a broad-based set of financial services and financial technology businesses including the Bank of Asia (BVI) Limited ("Bank of Asia") and complementary operations in Asia and elsewhere in combination with Bank of Asia operating under the regulatory approval from the BVI Financial Services Commission ("the Bank of Asia Project"). It was agreed that Mr Holm would own, indirectly, 22% (subject to dilution from third party investments that may be made in the Bank of Asia Project (or such entity holding the financial interest in the Bank of Asia Project (as defined above) (the "BVI Contract").*

[22] Mr Holm commenced work on or about October 2015 and later executed an Executive Service Agreement with FHL which was mirrored, except for clause 5 and a 10% higher salary, by an Executive Service Agreement between Mr Wen and FHL. He was dismissed in June 2016 for allegedly commencing to set up a competing bank in another Tier 1 country, and making a trip to Europe allegedly to seek investors which yielded no results.

[23] The terms of the BVI Contract relating to the founder's share split is referred to in clause 5 of an Executive Service Agreement dated 25 January 2016 between FHL of the one part and Mr Holm of the other part in the following terms:

> *"5.1 Upon or prior to execution of this agreement, the Company shall, directly or indirectly, grant to the Executive 22% of the initial issued share capital in the Company (the "Equity Grant"). The initial share capital for purposes of the Equity Grant shall be determined prior to the issuance of the shares to any party other than the Group CEO, implying that the Group CEO owns 78% of the initial share capital, directly or indirectly, at the point of the Equity Grant."*

[24] In the Executive Service Agreement 'Company' refers to FHL.

[25] Clause 5.1 of the Executive Service Agreement actually acts to confirm the oral contract because from inception the founding shares of the Bank of Asia were always directly held by FHL. The way Mr Holm put it in both cross examination and re-examination was that he considered clause 5 to be a guarantee of the BVI Contract. The contemporaneous correspondence shows that a similar clause was not included in the mirror Executive Service Agreement with Mr Wen. The only reason for this was because it was accepted by both Mr Wen and Mr Holm that Mr Wen was already holding 100% of the founding shares.

[26] Although Mr Holm did not own the shares legally at the time he nevertheless owned them in equity and the Executive Service Agreement by clause 5 provided for the time for vesting it in him. The e-mail dated Sunday 25 October 2015 at 5:33 am from Mr Holm to Mr Wen reads in part as follows:

> *"Dear Carson,*

I am attaching revised EC's [employment contracts] per our conversation yesterday. Included is also a draft EC for yourself….

For your EC, it is essentially a back to back with mine. I have made the following changes…

Removal of equity grant section (since you already own the equity)…"

[27] In his reply by e-mail the same day on Sunday 25 October 2015 at 7:06 Mr Wen did not change that provision although he amended others.

[28] Nothing turns on the fact that the pleadings mentioned FHI which was not formed until March of 2015; it is simply another indication of Mr Holm's belief that it was envisaged that a number of SPVs would be used.

[29] In paragraph 32 of the statement of claim he further pleaded what in his view was the motive for the breach of the BVI contract :

"On 29 June 2016 Mr Holm met with Mr Wen in Bangkok where Mr Wen confirmed to Mr Holm that he had no intention of complying with his, and the other parties 'obligation under the BVI Contract to transfer 22% of the Bank of Asia Project to Mr Holm in breach of the BVI Contract and that he (Mr Wen) had deliberately been delaying the Share Transfer since March 2016. Mr Holm's employment by FHL was terminated after that meeting."

[30] Mr Wen denied the allegation. His defence is that the equity of 22% was not freestanding; it was part and parcel of the Executive Service Agreement with FHL and when that was terminated the entitlement to the shares went with it.

[31] Mr Holm pleaded[1] , and it was supported by contemporaneous documents , that the Executive Service Agreement was entered into with FHL because it was the only company in the chain that had a bank account at the time, but the Executive Service Agreement was distinct from the BVI Contract: This is the pertinent pleading:

> *"7 (b) FHL was an entity within the wider Bank of Asia Project structure that was (at the time) in place, inter alia, to enter into the contracts of employment for the Bank of Asia Project. At the time, FHL was the entity which held the only bank account for the Bank of Asia Project and thus the only entity that could pay salary and remuneration. It, therefore, made sense for FHL to enter into the Service Agreement, but that is different from the agreement that formed the BVI Contract."*
>
> (c) *The BVI Contract was-by contrast to the Service Agreement between Mr Holm and FHL (and Mr Wen with FHL)- a joint venture agreement between the individuals Mr Holm, Mr Wen, and Ms Fung, entered into in order to establish and operate the Bank of Asia Project. The terms of the BVI Contract included the parties agreement to divide, on a 78%/ 22% basis, ownership in the Bank of Asia Project or such entity holding the financial interest in the Bank of Asia Project, whether that would be Sancus, as originally agreed, or another company that would be the highest ranking within the corporate structure in which the shares in the Bank of Asia Project would be held.*
>
> (d) *The Bank of Asia Project is far wider in scope than that included in the Service Agreement, such that the Service Agreement cannot possibly be said to subsume the BVI Contract, which existed separately."*

THE DEFENDANTS' CASE

[32] On the defendants' case the Bank of Asia Project as described is not a legal entity in which an equity interest can exist. Mr Holm pleads that he has an agreement with Mr Wen to own 22% of the Bank of Asia

[1] In his Re-Amended Reply to the Re-Amended Defence of the First and Second Defendants and Amended Reply to the Amended Defence of the Third Defendant

Project which he defines as a broad based set of financial services and financial technology businesses, including the Bank of Asia and complimentary operations in Asia and elsewhere (or such entity or entities holding the financial interest in the related investment project).

[33] The context in which this all happened was that Mr Holm was out of a job for several months and Mr Wen gave him an opportunity by offering him a job.

[34] Mr Chaisty QC argued that given Mr Wen's background there was an inherent improbability that he would have incurred a personal liability on his own behalf and that of his wife of the kind and value claimed by Mr Holm. He relied on a principle of law oftentimes associated with fraud cases and shared both by the Privy Council which binds me, and the House of Lords, which was referred to in JSC BM Bank v Kekhman[2] that the more outrageous the allegation the less probable it is and the more cogent must be the evidence to support it. This is how Lord Nichols in In Re H(Minors) [1996] AC 563 referred to in that case put it:

> *"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not… this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established."*

[35] Furthermore, Mr Chaisty QC drew to the attention of the court BVI Court of Appeal authority of **Bryson's** Shipping v Purcell [3] delivered 28 February this year where the court allowed an appeal against the trial judge who had found for the claimant on breach of contract when the claimant in his pleadings did not plead breach of contract but had framed his claim in bailment instead. He propounded the view that in this case Mr Holm did not plead the cause of action for which he is now seeking damages from the court.

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[2] [2018]EWCH 791 (Comm)

[3] ANUHCVAP2011/0023

[36] These were all valid and helpful issues raised by Mr Chaisty QC and the court took them into consideration in making its determination. It also considered whether there were any material parts of the claimants' case not put positively to the witnesses in cross examination to make a determination whether the defendants had an opportunity to respond to the claimants' case orally in order that the court may access the witnesses' demeanor. Finally considering as it was an allegation of an oral contract the court was live to ensure that there was a sufficient electronic trail to prove its existence on a balance of probability.

[37] Other arguments made are outlined in this paragraph and paragraphs 39 to 43 below. They include that it is inconsistent that Mr Holm hired a law firm (Bird & Bird) to conclude his Executive Service Agreement, and didn't hire counsel to deal with his oral contract that was far more valuable.

[38] No final agreement was reached on the BVI Contract, everything claimed by Mr Holm is consistent with the Executive Service Agreement. That was drafted by Mr Holm with supervision from lawyers. "Sign up equity" in the Executive Service Agreement has a particular meaning. There is no rectification claim in the Hong Kong action to substitute Sancus for FHI in the Executive Service Agreement.

[39] Even if there was an oral contract it was subject to the term of an obligation that Mr Holm should act properly in the sense of loyally and faithfully. What led to the dismissal is that behind Mr Wen's back, together with two other individuals within the Bank, Ingrid Child and John Skinner, Mr Holm started to set himself up to exploit a new project, what one might call "Bank of Asia Number 2", and on 24 June 2016 Mr Wen discovered a plot of Mr Holm to form such a competing bank.

[40] Conditions were imposed by the BVI FSC which were not yet met by 26 September 2015 (Mr Holm now states the final approval was received in October 2015 which concluded the contract which until then was conditional).

[41] Mr Wen's use of the word "partner" in his letters was not in the legal sense.

[42] Estoppel: it is suggested that in June 2016 a decision was made that Mr Holm would take shares in the FHI. They say that on the evidence Mr Holm knew what the position was in terms of the negotiations on share structures by that time and accepted the position.

CROSS-EXAMINATION OF MR HOLM

[43] Mr Chaisty QC by his cross examination sought to show that Mr Wen did not enter into a personal agreement to give or guarantee equity in the Bank of Asia and that if the agreement was made it was on behalf of a company (FHL), and that Ms Fung was not a party to such agreement at all. He sought to show this in various ways:

(1) By seeking to demonstrate that the alleged agreement was equally consistent with the Executive Service Agreement

(2) Because Mr Wen was an experienced businessman and lawyer he would not enter into a personal contract

(3) That Ms Fung and Mr Holm never had any business conversations concerning the granting of such equity

(4) That the numerous references by Mr Wen to partner, and equity owner in reference to he and Mr Holm did not mean what they appear to mean on their face.

[44] Mr Holm came across as a thoroughly believable and knowledgeable witness. During and after the cross examination he was unfazed in his claim that Mr Wen entered the oral agreement with him, that the agreement was that their shareholding would be in the top tier company which was Sancus, not in FHL, because that is where Mr Wen held his shares at the time (although he made it clear that the shares were held in the name of his wife Ms Fung), and that the agreement envisaged that other companies would be formed along the way to facilitate implementation of the Project whose ownership would be captured by their ownership in Sancus. He stated that the Project as defined was very clear to both Mr Wen and Mr Holm because while they were discussing it in their four hour meeting on 26 September 2015, the organization charts for the Project including the various financial services envisaged were before them and they made reference to them at the meeting. He also stated that on several occasions at social functions he sat next to Ms Fung and the Project became part of the conversation. Ms Fung would ask how things were going with the Project and seemed perfectly aware of the arrangements.

[45] He reiterated that the entity in which they would own the shares was Sancus, and because the entities under Sancus were not all yet determined, and there was an expectation that other entities would be formed

as subsidiaries of Sancus, and the 78%/22% ownership percentages would trickle down to those companies.

[46] As proof of his claim Mr Holm drew attention to, among other things, an e-mail dated 3 January 2016 from Mr Wen to Mr Holm which comments on their Executive Service Agreements as follows:

> *"I have spent today reviewing the draft employment contract of you and I and have made revisions to my own EC [employment contract]. The key points that are applicable to both are as follows:*
>
> *… I have revised the provision in Termination circumstances under Clause 16, which are self-explanatory. It would be highly undesirable for employees who have left the Company to continue to hold shares or options in the Company so the revisions are to be reflected in the template employment contracts for all. Your vested interest and mine are encapsulated in the shareholding in Sancus Financial Holdings. [emphasis added]*
>
> *Please make corresponding changes to your employment contract as well.*
>
> *For your employment contract, one more revision that is needed is in the 22% that you are [sic] be given as Sign-on Equity Grant under Clause 5.1 That has not taken into consideration the 1,000,000 shares already issued to Xie Ailong's Land Harvest Holdings Limited. As such the equity grant should not be 22% of the company [FHL] but of Sancus Financial holdings Limited [emphasis added], which is the intended structure anyway. I think the clause was drafted as such only because counsel was unaware of the share structure…."*

[47] The term sheet relating to Mr Holm's Executive Service Agreement reads as follows:

> *"Upfront equity Grant*
>
> - *Amount based on a fixed ratio with the Founder's equity*

- *Grant will be deemed to have been made immediately upon execution of the agreement*
- *As Founder is expected to hold shares equal to 25% of the pro forma basic shares in the company, Partner would in such scenario, hold 7% of the pro forma basic shares (32% combined). Said differently, as Founder currently owns 100%, Partner would own 22% (28% of Founder) and Founder would own 78%, with each bearing pro rata dilution thereafter*
- *Consistent with a fixed ratio, in the event of Founder dilution from a change in outside ownership equity percentage without a corresponding change in management ownership or vice versa, Partner would bear pro rata dilution (or accretion) with Founder.*
- *Terms and conditions shall be pari passu with Founder, including being included in the same ring-fence so long as that concept applies and without any vesting restrictions, which would have detrimentally negative tax consequences to the Partner.*

[48] Mr Chaisty QC asked Mr Holm whether affiliated companies (not subsidiaries) recently formed in Hong Kong as also being subject indirectly to the equity split. He answered in the affirmative.

[49] In answer to the Court's question he confirmed that Mr Wen told him during their meeting that the shares in Sancus which he was promising were in the name of his wife Ms Fung and he had no reason to doubt that Mr Wen could carry out his promise.

CROSS EXAMINATION OF MR WEN

[50] Mr Wen in cross-examination admitted that he had agreed to Mr Holm obtaining a 22%/78% split but stated that it was in relation to FHL (incorporated 12 March 2015) not Sancus ; that is why FHI was transferred to Mr Holm, so that it could hold his shares in FHL. He admitted the original plan was to hold both of their shares in Sancus but that that changed on 18 February 2016 when he requested that the shares in Sancus all be held only by his wife and that he and Mr Holm's shares be held in another entity. The exchange of e-mails was as follows:

"Carson Wen to Chad Holm,

Dear Chad,

I will on second thought like to keep Sancus wholly held by Julia. We should set up a new company, probably called "Offshore Holdings (BVI) Ltd" or whatever other name is available, in which Sancus, yourself, and the employees will all be shareholders pro rata. After this is all done then Sancus will transfer its share in Financial Holdings to the new entity.

Regards.

Carson

Chad Holm to Carson Wen,

Dear Carson,

In order to properly draft the other documents can you help me understand the practical implications of keeping Sancus with Julia….

Carson to Holm

My only intent is to keep Sancus Financial Holdings a self-owned entity so that I have complete freedom to deal with its assets or make additional sector investments with it.

We should form a new company in which Sancus and yourself would be the shareholders along the lines that we discussed. We can call this company by any name, with or without Sancus.

The company will then hold a company in which the team can also hold shares and which will hold the controlling stake in Financial Holdings

Regards,

Carson

[51] This was different from the position on 3 January 2016. His position later further changed from holding his shares and Mr Holm's shares in the same vehicle at all.

[52] In answer to a question by the court he stated that Ms Fung did not hold shares for him on trust, and that he entered the agreement with Mr Holm as the director and Chairman of FHL. Asked what the case was where the shares vested and the holder was subsequently fired, he answered that Mr Holm's shares should have vested when he signed the Executive Service Agreement, but the structure was not yet in place and that is why he did not receive his shares in the company that directly owned the one share in the Bank of Asia.

[53] From the cross examination it appeared that conflicts first arose between Mr Holm and Mr Wen in the early days of raising capital when the company had only raised $4 million and $1 million had to be spent on employees' salaries. There was at that time a requirement by the FSC to capitalise the Bank of Asia in the sum of US$100 million. Mr Holm was insisting that he be paid his deferred salary[4] in preference to waiting and allowing the funds to be paid into the Bank of Asia so that an audit could take place and the paid in capital notified to the FSC so that the precondition at that time could be met and the bank licence issued. While he felt that an ordinary employee could act in this way Mr Wen did not think that this exhibited leadership from a person who was an equity partner, like himself, who was prepared to wait. He recounted this complaint, during the cross-examination many times unsolicited. From his demeanor the court formed the view that that bothered him greatly At the time in his email to Mr Holm dated 5 May 2016 he stated:

> *"I have today revised the standing instructions for the team members but have not given instructions for you and I. There is clearly not enough money today to even pay up the US$3 million capital, and as we are the founding partners we have to see this through... "*

[54] He followed that up with a 2 page e-mail three days later on 7 May setting out numerous things that he considered to be disappointing behavior from Mr Holm as his equity partner.

[4] which was then due since April

[55] All this served as further evidence that under the BVI Contract Mr Wen had agreed that Mr Holm obtained equity in the founding capital of the Bank of Asia (directly or indirectly). The fact that Mr Holm had agreed to delay his salary at all made the proposition that he was just an ordinary employee inherently improbable. While the court has no reason to doubt Mr Wen's statement that the word 'partner' is used loosely these days in the business world, in my judgment, having regard to the surrounding circumstances and e-mail trail, this was not one of those occasions.

THE ALLEGATION OF SETTING UP BANK OF ASIA NUMBER 2

[56] Mr Wen stated that it came to his attention through information provided by a staff member that Mr Holm and two of the other three members of the management team were in an advanced stage of investigations in setting up a competing bank based on the same principles as the Bank of Asia in one or other of tier 1 or tier 2 offshore jurisdictions.

[57] As this is the subject matter of the wrongful dismissal action in Hong Kong and I am not of the view that it is necessary to decide the issue of the BVI contract, I will make no findings on it.

CROSS EXAMINATION OF MRS FUNG

[58] Ms Fung said that upon the acquisition of his first property Mr Wen put it in her name and this has been the case over the years ever since. She said she trusts him implicitly and does not question his business decisions. He is the businessman and she knows very little about business. This was also Mr Wen's description of her.

[59] She stated that because of their mutual love and trust she holds the property and he deals with the business issues so much so that even though he attempts to explain the transactions to her before she signs documents she does not require an explanation because she has complete trust in him in business matters and does not question the exercise of his discretion in such matters.

[60] She said that they work as one. Mr Wen gave a similar account of how they work as one, saying that his wife knows very little about business and is a poet.

[61] On a proper analysis of the evidence given by Mr Wen and Ms Fung and the contemporaneous documents the inherent probability is that when he negotiated with Mr Holm to give him 22% of the founding shares of the Bank of Asia which were beneficially owned by Ms Fung that he was doing so both on his own behalf and that of Ms Fung and I so find. Both Mr Wen and Ms Fung gave unsolicited evidence that they act as one. I noticed that when Mr Wen gave this part of his evidence Ms Fung had already left the Court for a period apparently having temporarily taken ill, so her evidence was not induced by his testimony. The truth of their testimony in this regard is not doubted, and is corroborated by the fact that in all of the correspondence with Mr Holm even though Ms Fung was the beneficial owner of the shares Mr Wen referred to *"my shares"*, *"I gave you a percentage in my equity"* [emphasis added] thereby demonstrating how much he considered himself and Mrs Fung as one in the transaction. He stated during cross examination with apparent great pride: "*Myself and Julia [Ms Fung] are conceptually the same*".

[62] Based on their mutual love and trust and considering themselves as one, their course of conduct as revealed in evidence was such that he had the ongoing ostensible authority to commit the shares in Bank of Asia even though they were beneficially owned by Ms Fung. There was no course of conduct of consulting her before making business decisions and there was no evidence of a course of conduct of her not signing documents presented to her by Mr Wen. In fact her direct testimony confirmed that.

[63] Therefore to the extent that Ms Fung said in her cross examination by Mr Rees QC that she certainly did not authorise Mr Wen to enter in the transaction to bind her personally, from their course of conduct it is evident that she knew of the transaction and the issues arising in the negotiations. This came out in cross examination by Mr Rees QC as follows:

> *"Q. Now you were aware that your husband was going to meet Mr Holm on Saturday 26th of September, were you not?*
>
> *A. Of course not*
>
> *Q. this is a series of text exchanges between yourself and Azura on 26th September, 2015 in the morning. The one that I want you to look at is about five lines down. Its timed 11:41 in the morning. And your text says: "Please remember we are talking about the first few months only." Now, the context of that is that you were*

asking Azura to negotiate on your behalf, on behalf of your husband that Mr Holm would defer his salary for a few months. That's what that means, isnt't it?...

Q. Ms Fung, why on earth are you talking to Azura about a deferral of Mr Holm's payment.

A. I did not want him to join.

[64] Ms Fung did not take the opportunity to deny the suggestion that she was asking Azura to speak with Mr Holm before he met with Mr Wen to seek to persuade him that he would only be deferring his salary for a few months. No explanation was ever given for this nor any suggestion made to suggest a suitable answer by either of the defendants or their counsel that would make that suggestion improbable. Azura was a facilitator who was a close friend of Mr Holm who introduced him to Mr Wen and was, along with another person advising Mr Wen that he should engage Mr Holm. Azura had also become a personal friend of Ms Fung.

[65] Mr Holm gave evidence that on at least two occasions, one at a charity dinner in Hong Kong, and the other at a dinner held in honour of the visit of the Premier and his party they briefly discussed the Project. Ms Fung admitted that she sat next to Mr Holm but denied that they discussed the Project. On day 5 of the trial counsel put the following question to Ms Fung:

"Q. Your husband put all of your collective assets into your name and you trust him and you give him the assurance that whatever he wants to do with the assets that he can do so and you will accept it. That's the bottom line isn't it? You accept that's the position, isn't it, that's the true position of your relationship?

"A that is the truth of our relationship..."

[66] With respect to this particular transaction she stated in answer to the specific question:

"A: It was not authorised. I would not authorise him to do anything on my behalf. Why do I-as I have said, I am not a stupid woman, I would not authorise-in fact, I have never in the whole of my married life authorised him to do anything on my behalf, never, not even once , and not particularly no this man"

[67] The Court infers from her answer that Mr Wen was not authorised refers to her giving him express authorisation as opposed to implied authorisation, because in light of all the other evidence that is the only way in which the answer could be true. Otherwise her answer is entirely inconsistent with all the surrounding evidence, including that previously given by her, and the court would be entitled to and would reject it. Clearly she could not be saying that the multitude of transactions which she has ratified by signing the documents over the years in relation to her assets as negotiated by Mr Wen, as in this case, were not impliedly authorised by her when they all dealt with what was ostensibly her assets. Based on their previous course of conduct there was very little probability that she would have disagreed with such an important business decision made by Mr Wen had he first expressly sought her approval.

[68] On 26 September 2015 based on the way in which Mr Wen referred to Ms Fung's shares as his, Mr Holm was entitled to rely on his representation especially when Mr Wen expressly told him that his shares were held in Ms Fung's name. In the events which happened Ms Fung indeed signed the company documents when Tortola and FHI were incorporated as part of the corporate structure in February 2016 showing that the companies were intended to be beneficially owned 78% by her and 22% for Mr Holm. The court finds that Mr Wen had implied authority to enter agreements on Ms Fung's behalf and did so in this case. She then proceeded to ratify his actions.

[69] In deciding on an oral contract made many years ago, as memories tend to fade, I am mindful that "…*contemporary documents [which were generated at the time] and admitted or incontrovertible facts and probabilities must play their proper part*."[5] I share that view and the view expressed by Morris J in Chaggar v Chaggar [2018] EWCH 1203 (QB) at [187] and applied them in this case that :

> *"…The court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention looking at substance and not mere form. It will not be deterred by merely difficulties of interpretation. Difficulty is not synonymous with ambiguity so long as any definite meaning can be extracted*."

[70] That may have been made within the context of written agreements but it is clear in this case that the intention in the agreement was to give Mr Holm 22% of the founding shares of the Bank of Asia Project

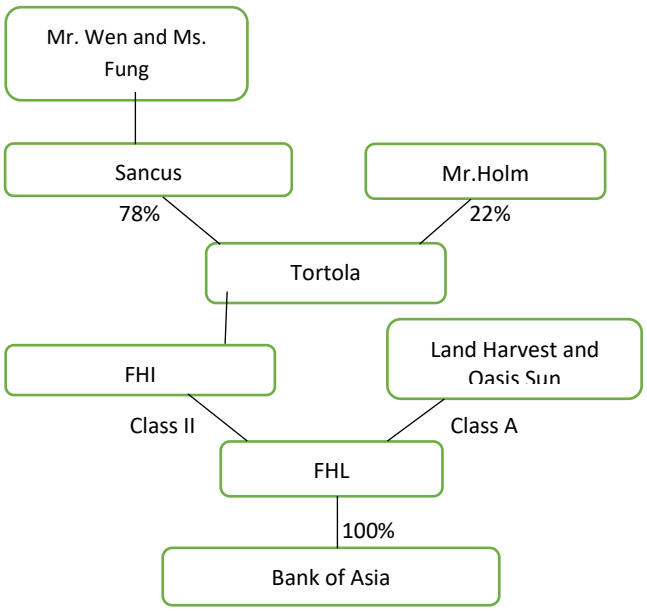
[5] Per Lewison J in Foodco UK LLP & Ors v Henry Boot Developments Limited [2010]EWCH 358 at [4]

which at that time was only developed to the stage of the Bank of Asia. Mr Wen honourably admitted that such an agreement was reached but says that the agreement was for Mr Holm's shares to be in FHL. He stated in answer to the court that in engaging in the 26 September 2015 meeting with Mr Holm he was doing so in his capacity as the Chairman and a director of the company. While this may well have been Mr Wen's honest intention, on the objective facts that have come out in the contemporary documents only in his personal capacity, not FHL, could he have committed Ms Fung's shares in the Bank of Asia on behalf of himself and Ms Fung.

[71] Whether it was done through Sancus, FHL, or FHI does not matter. As Mr Wen, a pre-eminent corporate lawyer of many years standing quite rightly stated, they were all just SPVs (special purpose vehicles) in a structure to achieve the objective. In my judgment the objective was clearly, in Mr Holm's mind, and on the objective evidence in Mr Wen's mind, that Mr Holm was to receive directly or indirectly his 22% in the founding shares of the Bank of Asia subject to pro rata dilution along with Mr Wen's 78% by third party investors whichever structure or SPVs was used.

[72] The structure went through several iterations of SPV's since then but it was always envisaged that Mr Wen and Mr Holm would share directly or indirectly 22%/78% in the structure that owned Bank of Asia Project. When the agreement was entered into the Bank of Asia and the Bank of Asia Project was one and the same because at that stage only that part of the business plan had come to fruition. The 22%, according to the structure, was in Sancus itself. The owner of the Bank of Asia was FHL. Sancus owned FHL, so at that stage Mr Holm would own 22 % of Sancus and through Sancus indirectly 22% of the Bank of Asia .

[73] On the instructions of Mr Wen Mr Holm had instructed the prestigious law firm of Conyers to set out the structure of ownership in accordance with their input. As it turned out on 18 February 2016 by e-mail Mr Wen expressed his desire to have complete control of Sancus and so a new structure was proposed by Conyers. (See diagram below.) That new structure envisaged Mr Wen and Mr Holm holding their shares in Newco 2 and the senior managers and Newco 2 holding shares in Newco 1 which would hold shares along with the ESOP [Employment Stock Option Plan] and third party investors in FHL which owned the Bank of Asia.



[74] The concept of the 78%/22% split did not come out of thin air. Obviously it was discussed between Mr Wen and Mr Holm. It made its way into the Conyers letters, and into the Executive Service Agreement which were executed on 25 January 2016 as well as numerous resolutions vesting documents prepared but not eventually signed. Significantly draft letters were prepared for the FSC to inform them that Mr Holm would be holding 22% of the founders' shares. Based on the then structure it was in FHL but the vehicle was not material as the clear intention was to convey his entitlement to 22% of the founding shares of the Bank of Asia.

[75] Mr Robert Briant of Conyers in a 23 February 2016 e-mail set out for Mr Wen and Mr Holm the then structure at the time the Executive Service Agreements were signed and setting the stage for the new SPVs that would hold the Bank of Asia shares instead of Sancus:

> **"***Dear Carson and Chad*
>
> *…I note the comment about Sancus. In essence it will hold Julia's interest in the structure and not be used for structuring purposes. However, we will then need Newco 1 and*

Newco 2. Specifically Newco 1 takes the place of Sancus, will hold the B Shares of Financial Holdings, and will issue shares to participating senior managers, and Newco 2 will be the vehicle for Julia/Sancus and Chad to structure their affairs. Please see attached chart. Please let me know if this is correct and we will update the documents on that basis..."

There was no disagreement by Mr Wen and so it was implemented. Shortly thereafter Newco 1 was incorporated as FHI and Newco 2 was incorporated as Tortola and Ms Fung as beneficial owner signed all the company documents to effectuate that arrangement.

It was pleaded and proved by the documents that the structure put forward by Conyers and agreed by both parties, that the FHL founder share would be converted to Class A and Class B Shares. Sancus as sole shareholder of the founder share would transfer 49 million class B shares to FHI. After allowing for third party investors by way of their purchase of class A shares[6] Mr Wen would indirectly own 38.22 million class B shares in FHL through his 78% shareholding in Tortola, and as a result Mr Holm would indirectly own 10.78 million Class B shares in FHL through his 22% shareholding in Tortola. This was the structure on 10 January 2016.

[76] In pursuance of this structure Newco 2 was incorporated as Tortola and Newco 1 was incorporated as FHI. Ms Fung signed all of the corporate documents for Tortola to evidence the 22%/78 % split, and a draft letter was prepared by Conyers to be sent to the FSC to inform them of the new structure and obtain their sanction. On 6 April, 2016, Mr Wen approved the draft letter.

[77] The reason for using these vehicles was so that the names of Mr Wen and Mr Holm would not appear in the Shareholders Agreement. This rationale was explained in a 14 December 2015 email from Mr Wen to Mr Holm as follows:

"*…Your shares and mine, and probably those of management, would be held through Sancus Financial Holdings Limited which currently holds the one issued Founder Share,*

[6] Land Harvest Holding 1 million and Oasis Sun Investments Limited 2.5 million class A shares,

So neither you nor I will be named in the Shareholders' Agreement, and instead Sancus Financial Holdings should "

All of the subsequent structures were iterations to achieve this same basic objective.

[78] Before the draft letter to the FSC (referenced in paragraph 75 above) was sent, Mr Wen redlined the draft stating that it would be a financial risk to use a structure where he and Mr Holm owned shares in the same structure because upon the investment by a third party corporate investor involving the then intended partial share swap there was a risk that their company would gain more than 30% of the investing company which under Hong Kong law would trigger a takeover bid in which he and Mr Wen may have been required to make an offer to buy out the shares of all the other shareholders of the investing company.

[79] He explained the 'concert parties' problem in an e-mail dated 16 May 2016 addressed to Robert Briant of Conyers and copied to Chad Holm and others:

"*I apologize for the delayed response to your e-mail below [3 May], I have been travelling for the bank's fund raising.*

There are a number of parties that are prepared to provide all the capital required for the bank to commence business, including BJ Maritime Silk Road Fund, the private equity firm China Science and Merchants, and HK listed Vodone Limited, of which Dr. Zhang Lijun is Chairman and his wife Wang Chun is a director. There are also a number of other parties, including a member of the Saudi Royal family, who are in discussions to make investments.

The transaction with Vodone Limited has to be so structured that no change in control (ie change in more than 30% shareholding) would occur at the listed company level. For that and other purposes it would be important that all shareholders of Financial Holdings (BVI) Limited be independent of each other. As such I would not want to put in place the Tortola Investments and FH Holdings layers of companies and please remove references to those in the response to the FSC".

[80] He elaborated in his witness statement that Dr Zhang (whose company V1 Group Limited, formerly Vodone Limited, ultimately became a major investor in the Bank of Asia), had raised a concern that needed to be addressed. In particular, he was worried that if the investment was done by way of part cash and part share swap (as was envisaged at the time), there could be a change of control in Vodone/V1 Group that would trigger takeover regulation requirements. These would mean that there would have to be a general meeting of the Vodone to approve it, and they would have to make an open offer to all of the shareholders of the company. This was the concern at the time even though eventually when the V1 Group invested after Mr Holm left, the investment was not structured as a share swap.

[81] No evidence was tendered to show if any calculations were made in advance to see whether the risk was in fact real, and as things turned out in the end that investment was made without the component of a share swap.

[82] Mr Holm took Mr Wen's and Ms Fung's failure to sign the transfer documents as a repudiation of the contract.

SUMMARY

[83] In analysing the contemporaneous documents it is clear on a balance of probability that that part of the agreement relating to the 22%/78% split between Mr Holm and Mr Wen was finalised.

[84] One would have to strain the bounds of inherent probabilities to conclude that there was not a contract and that it was not in respect of the Bank of Asia founding shares. Mr Wen's answers in the exchange of questioning by the court were precise enough for the court to draw a reasonable inference, and the court did draw the inference, that his repeated answers that Mr Holm would hold his shares "through Sancus to FHL" meant that Mr Holm's name was to be on the register of members of Sancus and thereby he would obtain his 22% shareholding indirectly in FHL.

[85] All of the contemporaneous documents including the statements by Mr Wen which may be construed as admissions are consistent with such a contract having been concluded and, on the evidence, it is more likely than not that such an oral contract was concluded between Mr Holm and Mr Wen on his own behalf and that of Ms Fung on the 26 September 2015 in respect of the founding shares in the Bank of Asia. That it was

concluded only weeks after the first meeting with Mr Holm redounds to Mr Wen's apparent decisive character; he wanted to move the Bank of Asia Project further along at that time and he believed he had found the right person to do it. It is immaterial that FHL is suing and Mr Holm is counterclaiming in Hong Kong action Financial Holdings (BVI) Limited v Holm, Skinner and Child [HCA] 2545/20169 ("Hong Kong Action"). That is a different contract and the action is essentially a labour dispute on an employment contract, not, as in this case, a corporate dispute, with different parties and a different subject matter even though they are related. Nevertheless, Mr Holm has undertaken that if he is successful, any damages received for this action is to be taken into account in the pending Hong Kong Action.

[86] Mr Wen also learned of activity which led him to believe that Mr Holm was leading his management team to form Bank of Asia Number 2. There was evidence given on both sides of the issue. Mr Holm stated that he was seeking alternatives in case the FSC's $100 million paid in capital requirement, and mind and management conditions in the BVI approval letter could not be met, and Mr Wen felt that the evidence showed that Mr Holm was trying to form a competing bank behind his back. I did not consider it relevant to the share issue and so make no finding on it particularly as it is the subject matter of a pending action in Hong Kong.

[87] I found Mr Holm, Mr Wen and Ms Fung credible witnesses generally and I have indicated where I could not accept certain answers. Mr Holm was an impressive witness and was not fazed in any material way by cross examination so as to place in doubt his evidence which was entirely consistent with his pleadings witness statements, and e-mail trail. In answer to Mr Chaisty QC's question he confirmed that he had personally drafted his witness statement with assistance of counsel. At one point Mr Chaisty QC asked him if he had had professional witness training. He didn't seem to know what that was and said that he had no training in how to be a witness.

[88] Mr Chaisty QC argued that Mr Rees QC did not put the pleaded case to the defendants so that they would have an opportunity to challenge it. He stated that Sancus was not pleaded, and when pointed out that it was in the Reply he countered that a cause of action must be in the pleading not in the Reply. There was nothing in this argument. Apart from the fact that the Reply is part of the pleadings the Reply seeks to remedy the very thing of which the defendants complain that is to have the case against them properly explained. The purpose of pleading and cross examination is to put the essential elements or ingredients of

the case against the defendant and in my judgment that was done and it was a case adequately pleaded. The plaintiff is not required to put every single allegation of fact in the statement of claim to the defendant. He must put the essential ingredients or essential elements of the case. The overriding objective is to obtain justice. The Court certainly recognises the fundamental principle that a claimant must plead and prove its case and must put his case to the witnesses. However, it is counter-productive to achieving the overriding objective of dispensing justice to be overly technical in doing so when at the very least the essential requirements, as in this case, and in fact considerably more, have been amply met. All that is required is that the claimant must plead the essential ingredients and put that case to the witness. There is no credible argument that this has not been done in this case. This was enhanced by the presence of the defendants in court during two days of skillful cross examination of the claimant where the case against the defendants was severely tested and clearly discerned.

[89] In my judgment Mr Holm's case was adequately put to the witnesses essentially as pleaded and appeared to be thoroughly understood by them and he proved his case to the requisite standard on a balance of probability.

[90] Mr Holm sought damages for breach of contract by Mr Wen, Ms Fung and Sancus in failing to execute and or enter into the requisite documents to give effect to the BVI Contract; further or alternatively as directors of Sancus inducing Sancus to breach the said contract, or further or alternatively as directors of FHI in breach of their statutory duty under section 120 of the Business Companies Act 2004 by failing to exercise their powers and fiduciary duties as directors of FHI to act honestly and in good faith in the best interest of FHI but instead acted in their own best interest by failing to execute the transfer documents to transfer the class B shares of FHL to FHI.

CONCLUSION

[91] I find that an agreement was reached between Mr Wen on behalf of himself and Ms Fung to transfer 22% of the founding shares of the Bank of Asia Project directly or indirectly to Mr Holm through an appropriate vehicle and structure. At the time the agreement was entered into that project was the Bank of Asia . Mr Wen in answering a question from the court admitted that the shares should have been issued to Mr Holm in January when the Service Agreement was signed. Therefore the shares ought to have been transferred to and vested in Mr Holm upon the signing of the Executive Service Agreement dated 25 January 2016. This,

of course, means that the subsequent dismissal and the reasons therefore are irrelevant to the determination of Mr Holm's entitlement to damages for the breach of the BVI Contract. Furthermore, under clause 17.5(a) of the Executive Service Agreement FHL was only entitled to redeem unvested shares. Accordingly, it is unnecessary for the court to make any findings on the alleged attempt by Mr Holm to form a competing bank and other issues leading to his dismissal under the Executive Service Agreement. They are the subject matter of an extant action in Hong Kong.

[92] Clause 5.1 of the Executive Service Agreement is simply written evidence of when the transfer and vesting of the shares under the BVI Contract was to take effect. A similar clause was not in Mr Wen's Executive Service Agreement because at the time the agreements were drafted 100% of the founding shares already reposed in Mr Wen through Ms Fung in line with their normal modus operandi.

[93] Clause 5.1 of the Executive Service Agreement provided that prior to its execution FHL would directly or indirectly grant Mr Holm 22% of its initial share capital. The "directly or indirectly" language in the Executive Service Agreement was intended to reflect the BVI Contract. This was reconfirmed by Mr Wen on 14 December 2015 ("*Your shares and mine, and probably those of management, would be held through Sancus Financial Holdings Limited which currently holds the one issued Founder Share*") and 3 January 2016 ("*the equity grant should not be 22% of the Company [FHL] but of Sancus Financial Holdings Limited, which is the intended structure anyway*") and thereafter it was for Sancus to be the issuer of the 22% of the Bank of Asia Project stake to Mr Holm. By the clause the equity stake was also fully paid up and did not have any vesting or similar restrictions.

[94] The fact that circumstances caused Mr Wen to take more time than envisaged to find the suitable structure and vehicle, or that he purported to fire Mr Holm in the interim cannot qualify as a reason to deny Mr Holm damages in lieu of his shares. It is necessary for business efficacy [7] to imply that what he agreed to was 22% of the founding equity of the Bank of Asia by whatever SPV or whatever structure was used.

[7] The Hofmann test in the Privy Council Cases of Att Gen of Belize v Belize Telecom [2009]UKPC 10, 1 WLR 1988 and Lord Hughes in Ali v Petroleum Company of Trinidad and Tobago [2017] UKPC 2 I.C.R. 531 at 15. In so far as they differ from Marks & Spencer Plc v BNP Paribas Securities Services Trust Co(Jersey)Ltd [2015] UKSC 72, [2016] AC 72 the Privy Council authorities are binding on this court.

[95] Equity regards that to have been done which ought to have been done. Accordingly the 22% ought to have been issued to Mr Holm on 25 January 2016, the date he signed the Executive Service Agreement. All of the documentation had been prepared over several months by Conyers at Mr Wen's request and delivered to Mr Wen to effectuate that. It goes against the internal probabilities that Mr Wen would have hired such a prestigious law firm to draw up the legal document to effectuate the issuance of the 22% in Sancus if he had not agreed to it with Mr Holm. It also goes against the intrinsic probabilities that Mr Holm would have agreed to a delay in the payment of his salary unless he had a greater interest in the Project than just being an employee. Mr Wen gave a credible reason why he thought there was a risk to hold his and Mr Holm's shares in the same vehicle (the"concert parties" problem) but it did not relieve him of the obligation to fulfil his agreement to deliver it in some appropriate vehicle.

[96] Quite frankly, I had very little difficulty in finding Mr Wen and Ms Fung liable for breach of the BVI Contract on a balance of probability. Having done so it is not necessary to find on the alternative claims of inducement of breach of contract, or breach of statutory duty.

[97] For the reasons given the defendants are liable for breach of the BVI Contract. The value of Mr Holm's interest is to be determined at assessment stage failing prior agreement. On the evidence it appears that on 29 June 2016 when the repudiation of the BVI Contract was accepted by Mr Holm the only part of the Bank of Asia Project that was in existence was the Bank of Asia, however, should further evidence prove otherwise the damages should include pro rata to Mr Holm as a 22% equity partner, an estimate of the value which necessarily flowed to Mr Wen in the Bank of Asia Project as a result of his 78% interest therein.

[98] Costs shall be paid by the Defendants to the Claimants to be assessed if not agreed.

[99] I wish to thank counsel for their valuable assistance given to the court both in the presentation of their cases and in the editing of the draft judgment which was circulated prior to delivery.

Hon Mr Justice K. Neville Adderley
Commercial Court Judge

By the Court

Registrar