

Wu Fu Ping and Another v Ong Beng Seng and Others
[2000] SGHC 122

Case Number : Suit 1087/1999
Decision Date : 29 June 2000
Tribunal/Court : High Court
Coram : Tay Yong Kwang JC
Counsel Name(s) : Teo Guan Teck and Lim Siew Kuan (Guan Teck & Lim) for the plaintiffs; Chiah Kok Khun and Chan Pui Yee (Wee Swee Teow & Co) for the defendants
Parties : Wu Fu Ping; Thia Tong Meng — Ong Beng Seng; Ong Tiow Seng; Ong Kok Beng

JUDGMENT:

Grounds of Decision

1 This suit is the continuing saga of three earlier actions between two opposing camps of erstwhile friends and business partners which were settled in 1998 after the parties met in my chambers to work things out. Back then, the parties had, after intense negotiations, worked out a comprehensive agreement which was incorporated as a Consent Order of Court dated 28 October 1998.

2 The present dispute concerns the interpretation of certain clauses in that Consent Order. The essential background facts are not in dispute and the parties agreed on the first day of trial to proceed with this action as one concerning legal interpretation of a document.

THE FACTUAL BACKGROUND

3 In 1997, the Defendants here commenced Originating Summons 767, 776 and 781 of 1997 against the present Plaintiffs in respect of the conduct of the Plaintiffs as directors and shareholders of a company known as Koh Yee Huat Enterprises Pte Ltd ("KYH"). The Defendants were also directors and shareholders of the company which was incorporated in July 1992 by the Plaintiffs, the Defendants and one Juay Chong Lee.

4 As the company grew, it bought shares in PJ 88 Enterprise Pte Ltd ("PJ 88") and incorporated Teng Tong Corporation Pte Ltd and Wueyfu Investment (S) Pte Ltd. All the companies were managed by the parties like a quasi-partnership. Everyone involved had the same number of shares save for the Third Defendant here.

5 In June 1997, the Plaintiffs purportedly purchased all of Juay Chong Lees shares in KYH without giving the Defendants the opportunity to do the same in contravention of KYHs Articles of Association. The Defendants then commenced Originating Summons 781 of 1997 for a declaration that the transfer of shares from Juay to the Plaintiffs was invalid and obtained an interim injunction against the Plaintiffs. No application was taken out to set aside the injunction.

6 After the transfer of shares, the Plaintiffs appointed three additional directors in KYH. This resulted in Originating Summons 776 of 1997 seeking a declaration that such appointment was invalid. An interim injunction was also obtained.

7 Originating Summons 767 of 1997 concerned the Defendants application to Court in respect of alleged oppressive acts of the Plaintiffs as majority shareholders of KYH and sought an order for the sale of their shares in KYH to the Plaintiffs or for the company to be wound up.

8 All three Originating Summonses were subsequently consolidated for trial scheduled from 20 October 1998 to 30 October 1998. Juay Chong Lee was a party in those proceedings.

9 The trial did not commence as the parties were engaged in negotiations. On the second day, the Plaintiffs informed the Court that they were prepared to buy over the Defendants shareholding in KYH. As this would effectively put an end to the consolidated actions, the parties proceeded to negotiate on the price to be paid for the shares. That entailed a valuation of KYH.

10 In view of the deterioration in the parties relationship and to avoid the delay which would have been the natural consequence if a proper valuation was to be done by independent auditors, the parties agreed to adopt a broad brush approach in determining the value and hence the price of the shares.

11 After much haggling, the parties finally agreed that only the following matters would be considered in the valuation of the shares:

- (1) the value of the real properties owned by the companies;
- (2) the cash in the bank accounts of the companies; and
- (3) the estimated value of one of KYHs subsidiaries, Teng Tong Corporation Pte Ltd ("Teng Tong"), as a going concern.

All other items of accounting such as KYHs profits, Teng Tongs cash in hand, KYHs expenses and amounts due to the companies from trade debtors were not to be considered.

12 The next step was to work out the value of each of the items to be considered. More negotiations followed with much haggling between the parties. After several days, an agreed valuation of the shares was finally reached, with each KYH share valued at \$8. The details of the settlement were spelt out in 26 clauses embodied in the Consent Order of Court dated 28 October 1998.

13 Pursuant to the settlement, the Plaintiffs were to pay a total of \$3.68 million to the Defendants for the 460,000 shares and some \$1.1 million to Juay Chong Lee. As the Plaintiffs did not have the necessary funds, the parties agreed that the Defendants would take over a commercial property (a coffee shop) which was the principal asset of PJ 88 in place of the price for the shares. As that commercial property was valued by consent at \$9 million, the Defendants became the ones who had to pay the Plaintiffs the difference between \$9 million and \$3.68 million.

14 The mechanism for such transfer and payment was provided in Clause 5 of the Consent Order which reads:

"5. Subject to the 1st and 2nd Defendants complying with the conditions laid down in section 76(10) and 76(11) of the Companies Act on or before the completion date, the 1st, 2nd and 3rd Plaintiffs shall pay the 1st and 2nd Defendants a sum of monies on the completion date calculated in the following manner:-

\$9,000,000.00 less the amount due to the Bank in respect of the mortgage loan of Blk 640 #01-04 Bukit Batok Central less all other debts of PJ88 which accrued before the completion date less the sum of \$3,680,000.00 being the agreed valuation of the 1st, 2nd and 3rd Plaintiffs shares in the Company less the 1st and 2nd Defendants share of the hearing fees of the above actions. The payment herein is subject to settlement of account under Orders 6, 16, 17 hereof, if any."

The "1st and 2nd Defendants" referred to in all the Clauses of the Consent Order are the Plaintiffs in this present action while the "1st, 2nd and 3rd Plaintiffs" are the Defendants here.

15 Clauses 6, 16 and 17 referred to above are in the following terms:

"6. There shall be verification of the Bank balances, rental of food stalls deposits as at 21 October 1998 before the completion date provided that any adjustments shall not affect the share valuation but shall be by settlement of account.

16. The 1st and 2nd Defendants are to indemnify the 1st, 2nd and 3rd Plaintiffs of all liabilities, including all government taxes, levies, fees and/or charges incurred up the completion date owing to third parties and/or government bodies of PJ88.

17. The 1st, 2nd and 3rd Plaintiffs are to indemnify the 1st and 2nd Defendants of 46% of all liabilities, including all government taxes, levies, fees and/or charges incurred up 21 October 1998 owing to third parties and/or government bodies by the Company and the 8th Defendants."

The 8th Defendants referred to at the end of Clause 17 are Teng Tong. Pursuant to Clause 23 of the Consent Order, the original completion date of the settlement was to be 2 February 1999. This was extended by the parties subsequently to 12 April 1999. 21 October 1998 was chosen as the cut-off date for computation purposes as it was the date that active negotiations commenced between the parties. The Defendants aggregate shareholding in KYH amounted to 46%.

16 Pursuant to Clause 5, the Defendants paid \$5,169,817.28 to the Plaintiffs on 12 April 1999 (the completion date). The Plaintiffs were the ones who prepared the revised completion account.

THE PLAINTIFFS CASE

17 In this action, the Plaintiffs are claiming a 46% indemnity from the Defendants pursuant to Clause 17 of the Consent Order in respect of the various liabilities of KYH and of Teng Tong as at 21 October 1998 ("the cut-off date"). These were particularised in Annexures A and B attached to the Statement of Claim.

18 In their Reply to Defence, the Plaintiffs also averred that the share value of KYH was computed on the estimated value of its assets and that liabilities were not taken into consideration. Accordingly, all liabilities of KYH and of Teng Tong were dealt with in Clause 17. The payment directed by Clause 5 was expressly stated to be subject to settlement of accounts under Clauses 6, 16 and 17 and the completion account under Clause 5 did not include the matters covered by Clause 17, which remained outstanding. Rental deposits (of stallholders and of tenants) in the bank accounts of KYH and of Teng Tong were treated as assets when computing the share value and therefore remained as liabilities to be indemnified by the Defendants under Clause 17.

19 The Plaintiffs relied on Chan Kwang Cheng, a Certified Public Accountant, who stated on affidavit that the items claimed by the Plaintiffs were considered liabilities in accordance with accounting principles and standards applicable to financial statements. The Statements of Accounting Standards issued by the Institute of Certified Public Accountants Singapore stated that an essential characteristic of a liability is that the enterprise has a present obligation and an obligation is a duty or responsibility to act or perform in a certain way.

20 On 7 April 1999 (before the extended completion date of 12 April 1999), the parties appeared before me for the purpose of resolving the completion account. The Plaintiffs solicitors then wrote to the Defendants solicitors the same day as follows:

"1. We refer to the attendance before the Judicial Commissioner Tay Yong Kwang this morning on the matter of the Settlement Account for completion.

2. We enclose herewith revised Completion Account and in respect of which please take note the manner of payments requested.

3. With regard to your clients liability to indemnify our clients to the extend of 46% of the Companys and Teng-Tong Corporation Pte Ltds liabilities, our clients will seek your clients payment in discharge of their indemnity for each and every of the liabilities when discharged. In this regard, we shall forward to you as soon as possible a statement of all the liabilities subject to your clients indemnity. Amongst others, the liabilities will include the Companys and Teng-Tong Corporation Pte Ltds liability to third parties for the refund of rental deposits and tax liabilities."

The revised Completion Account reads:

"REVISED

COMPLETION ACCOUNT

Amount payable under Order of Court		9,000,000.00
Less:	redemption amount	2,090,821.65
	(subject to adjustment)	
	rental deposit and GST of PJ88	142,587.00
	agreed valuation of 1 st , 2 nd and 3 rd Plaintiffs share	3,680,000.00
	1 st and 2 nd Defendants hearing fee for the action	5,580.00
	purchase price of furniture at Blk 640 Bukit Batok Central #01-04 by 1 st and 2 nd Defendants	2,300.00

Add:	the redemption amount	2,092,821.65
	M/s Lee & Lees bill	284.28
Total payable by your clients		5,169,817.28

Manners of Payment

1. Cashiers order for S\$2,092,821.65 issue in favour of Oversea-Chinese Banking Corporation Limited for account of PJ88 Enterprise Pte Ltd;
2. Cashiers order for S\$1,111,891.80 issue in favour of M/s C S Lee;
3. your firms cheque for S\$284.28 issue in favour of M/s Lee & Lee; and
4. your firms cheque for S\$1,964,819.55 issue in favour of M/s Guan Teck & Lim."

21 The same day, the Defendants solicitors replied. In their three-page letter, they objected to the Plaintiffs attempt to include in Clause 17 KYHs and Teng Tongs liability for the refund of rental deposits. They alleged that taking such refund into account must necessarily upset the valuation of the shares. There was also no dispute that the rental deposits had been paid to the two companies which could have used the funds in the course of business. The Defendants, however, did not take any of these funds. The letter concluded by saying:

"It is only in respect of items 27 and 31 of the settlement account, i.e. the provision for taxation, that the Judicial Commissioner have indicated that the parties be indemnified at a later stage, when the amounts are in fact confirmed. Our clients do not dispute this and will indemnify your clients in respect of 46% of the liability for such taxes, as provided in item 31. Our clients trust that your clients would honour their word that they would similarly indemnify our clients in respect of the taxes payable by PJ88.

It is therefore, beyond any doubt that your statement "the liabilities will include the Companys and Teng Tong Corporation Pte Ltds liability to third parties for the refund of the rental deposits" cannot stand and it is but an attempt by your clients to lower the valuation of the shares at a future date.

Our clients will resist all your clients claim in this regard and will look to your clients for all costs and expenses incurred in such an event."

22 The Plaintiffs solicitors wrote to the Defendants solicitors on 13 April 1999 (after the completion date) maintaining that the liabilities to be indemnified by the Defendants (up to 46%) included tax liabilities and the liability to refund the rental deposits. They ended by stating that "We shall in due course forward to you a statement of the liabilities to be indemnified by your clients".

23 Completion took place on 12 April 1999 on the basis of the Revised Completion Account which only provided for the settlement of account of matters covered by Clause 16 and not those within the

ambit of Clauses 6 and 17.

24 The Plaintiffs submitted that the Consent Order was clear in its terms and neither the pleadings nor the history of the proceedings could be utilised to give it a different meaning. They maintained that the liabilities detailed in the Annexures following the Statement of Claim were within the scope of Clause 17 and have not been settled at the completion on 12 April 1999. They also argued that Clause 5 did not require the parties to settle all matters covered by Clauses 6, 16 and 17 by the completion date.

THE DEFENDANTS CASE

25 The crux of the Defendants case was that the parties intended to have finality and certainty to the dispute in view of the unsalvageably bad relationship between the parties and in the light of the constant vacillations in the Plaintiffs stand during the negotiations. The Defendants wanted to ensure that nothing in the settlement terms would change the final valuation of the shares which had been agreed after much difficulty. Clauses 16 and 17 were to take into account any outstanding liabilities of the respective companies as at the cut-off date so that they could all be settled at completion. The parties would then have a clean and complete break from one another.

26 In order to facilitate the preparation of the settlement account by the completion date, Clauses 18 and 19 made provision for "due diligence" exercises to be conducted on the respective companies so that all liabilities could be uncovered. The Plaintiffs did engage accountants to carry out such an exercise on KYH and Teng Tong fully before the completion date.

27 The comprehensive Revised Completion Account prepared by the Plaintiffs did not reflect any liabilities as defined in Clauses 16 and 17 and it must be taken that the parties have settled on that basis and no further claim could be raised after 12 April 1999. Counsel for the Defendants would put the issue rhetorically thus, "If they did not agree, why complete?".

28 Where the tax liabilities were concerned, as at 7 April 1999, they were only estimates. If they were confirmed by an assessment from the tax authority by the completion date, they would be liabilities within the meaning of Clause 17. If they were not confirmed by that date, they fell outside the scope of that clause. The Defendants solicitors accepted that there were tax estimates on 7 April 1999, as evidenced by their letter quoted earlier in this judgment. They saw no need to reply to the Plaintiffs solicitors letter of 13 April 1999 as completion had already taken place and, in their minds, that was the end of the matter.

THE DECISION OF THE COURT

29 As can be seen from the train of events outlined, the issue here is not really an accounting one. It is plainly a matter of interpretation of a clause in an agreement read in its context and then applying it to the events that have unfolded.

30 I agree with the Defendants that the agreement contemplated finality and certainty but would add that those ideals could not be, and were not, achieved in the circumstances. There was therefore an unavoidable open-endedness where Clauses 16 and 17 were concerned.

31 The parties have fairly and rightly accepted that my interpretation of Clause 17 would apply equally to Clause 16 so that any benefit or detriment would apply to both sides where the respective companies were concerned. In my view, the factual situation showed clearly that the parties did not complete on the basis that the Revised Completion Account was the last word.

32 It therefore remains for me to consider the items in dispute individually or as a group, where appropriate, to determine whether they fall to be considered as liabilities within the meaning of Clause 17. I will detail my findings on the items claimed by the Plaintiffs in the way they appeared in the Annexures attached to the Statement of Claim.

ANNEXURE A (KYH)

(1) This was an invoice dated 30 March 1999 rendered by the accountants in respect of an audit for the year ending on 31 March 1998. The accountants were appointed before 21 October 1998 although the bill was rendered after that cut-off date. It concerned work done for matters occurring before the cut-off date. I therefore allowed this item to the Plaintiffs in full.

(2) This was also an invoice dated 30 March 1999 for auditing and accounting services in respect of the accounts for the period ending on 21 October 1998. However, the invoiced amount of \$6,000 for one item (AB 139) included the words "together with attending to queries arising from the due diligence". The due diligence exercise was obviously post-21 October 1998 and the costs thereof should not be charged to the Defendants. I compared this to the previous invoice which charged \$4,000 for accounting services only for a full financial year. Although the invoice in question covered a period of about seven months only, I did a rough estimate and deducted \$2,000 from this invoice. This invoice was therefore allowed save that \$2,000 would be deducted.

(3) This again was an invoice dated 30 March 1999 for auditing work for the year ending on 31 March 1997. It was allowed in full for the same reasons in item (1).

(4) This was an invoice dated 3 November 1998 by another firm of accountants for work done in respect of matters dating back to 1995. It was disallowed because of the unexplained overlap in accounting periods between this and the earlier invoices.

(5) This concerned payment of conservancy charges for October 1998 to the town council. Payment was made post-21 October 1998 and the bill included the whole month of October 1998. This item was disallowed.

(6) This was a composition fine paid on 17 June 1999 for late filing of tax returns for year of assessment 1998. As the date of the summons was not provided, I disallowed this item.

(7) to (10) These were invoices rendered in June 1999 by a company for "business services" in connection with KYHs tax matters dating from April 1994 to March 1998. The company was engaged by the Plaintiffs only after the completion date on 12 April 1999. Clearly, Clause 17 could not have been intended to include new expenses incurred after the cut-off date although the matters covered were pre-21 October 1998. These items were obviously liabilities which were post-21 October 1998 and were therefore disallowed.

(11) to (13) These were the rental deposits which would have to be returned to the tenants upon termination of their tenancies. I disallowed these items. While such items could be liabilities in the

drawing up of financial statements, they did not come within the ambit of Clause 17 in the factual scenario here. It was not disputed that all rental deposits have been credited into the company's bank accounts. The fact that the credit balances in the bank accounts were taken into consideration for the purpose of the valuation of KYH's shares did not mean that they must now be deducted as liabilities of the company. As stated earlier, the valuation was a rough and ready one and was never intended to be an exercise in precise accounting. Certain items were included like others were excluded only for the sake of speed and simplicity. In any event, it was not just assets that were considered by the parties in the rough and ready exercise. Liabilities like mortgage loans were also taken into consideration. It was also possible that the rental deposits were utilised for the company's other purposes after they were banked into the accounts. Further, if precise accounting was the aim of the Plaintiffs, subsequent payments by trade debtors to the company for debts accruing before the cut-off date would have to be returned proportionately to the Defendants. Clause 6 of the Consent Order allowed verification that such deposits were properly banked into the company's accounts so that any shortfall could be made good in the completion account. If they were in the company's accounts and had not been siphoned off, all the Plaintiffs had to do when the time came was to return the deposits to the tenants.

(14) to (18) These were the tax liabilities of the company for the years of assessment 1997, 1998 and 1999. There was also an item pertaining to the year of assessment 1995 where additional tax could be payable. I was informed by the Plaintiffs Counsel that these five items were now confirmed in AB 242 which was a statement of account dated 19 April 2000 rendered by the Inland Revenue Authority of Singapore ("IRAS") to the company which showed that \$346,013.29 was payable. This group of items was allowed at this amount subject to the Plaintiffs confirmation that it related to tax payable up to 31 March 1998 rather than to the entire calendar year. If it was for the whole year, then the proportionate amount of tax for the period after 21 October 1998 should be deducted.

ANNEXURE B (TENG TONG)

(1) This was an invoice dated 12 April 1999 from the accountants for work done in connection with the tax matters of Teng Tong for the year of assessment 1999. As the invoice apparently covered the entire year of 1998, I allowed the amount claimed proportionately (i.e. calculated up to 21 October 1998).

(2) to (15) These concerned the rental deposits of stallholders in the coffeeshop. I disallowed all these items for the same reasons given earlier in respect of the other rental deposits.

(16) to (21) These were tax liabilities for periods before 21 October 1998 but were paid only between March and May 1999. Items 18 to 21 were supposed to be in Annexure A as they related to KYH and not to Teng Tong. I allowed these items in full as they covered the pre-21 October 1998 period and it did not matter that payment was made post-21 October 1998.

33 As there could be tax refunds by IRAS in the future for the relevant items allowed, I directed the Plaintiffs solicitors to inform the Defendants solicitors within two weeks of my order whether any objections had been lodged with IRAS. The Plaintiffs undertook in any event to return to the Defendants proportionately any refund or rebate given in respect of the tax stated in AB 242. I also directed the parties to adopt the same approach where tax liabilities of PJ 88 up to 21 October 1998 were concerned.

34 As the parties each succeeded or failed in about 50% of the value in dispute, I thought it right

that they should bear their own costs for this action and I so ordered.

Tay Yong Kwang

Judicial Commissioner

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