

RHB Bank Berhad v Koon Hoe & Company Pte Ltd and Others
[2000] SGHC 216

Case Number : Suit 146/2000/J, RA 5/2000
Decision Date : 27 October 2000
Tribunal/Court : High Court
Coram : Tay Yong Kwang JC
Counsel Name(s) : Chan Kia Peng (Khattar Wong & Partners) for the plaintiffs; P Selvadurai and Muralitharpany (Rodyk & Davidson) for the defendants
Parties : RHB Bank Berhad — Koon Hoe & Company Pte Ltd; Tan Sioh Lwee; Nam Wing Fiegh; Nam Wen Kai Paul

JUDGMENT:

Grounds of Decision

1 On 22 August 2000, I dismissed the Defendants' appeal against the decision of the learned Assistant Registrar Sia Aik Kor given on 23 June 2000 ordering that judgment be entered against the Defendants under Order 14 of the Rules of Court. The Defendants have appealed against my decision.

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THE CLAIM

2 The Plaintiffs' claim against the Defendants was for breach of a settlement agreement. The Plaintiffs averred that Sime Bank Berhad commenced Suit No. 945 of 1999 in the High Court on 23 June 1999 against the present four Defendants for the sum of \$11,253,878.20, interest on the overdraft facility, the term loans, the overdue trust receipt facilities and other advances, all or any of the contingent liabilities amounting to \$145,000 relating to the banker's guarantees issued by Sime Bank Berhad and costs on an indemnity basis. The First Defendant was the principal debtor while the Second, Third and Fourth Defendants were sued as guarantors. By an order of Court dated 24 July 1999, the Plaintiffs, as successors-in-title of Sime Bank Berhad, were substituted as the Plaintiffs in that suit.

3 The Plaintiffs and the Defendants settled Suit No. 945 of 1999 by way of a Letter of Offer dated 2 March 2000 from the Plaintiffs to the First Defendant which was accepted on 9 March 2000. The Letter of Offer was in the following terms:

"02 MARCH 2000

KOON HOE & CO PTE LTD
17 BUKIT PASOH ROAD SUBJECT TO CONTRACT
SINGAPORE 089831

ATTN : MR JAMES NAM

Dear Sirs

SETTLEMENT OF BORROWINGS

We refer to your banking facilities with us with outstanding amount of SGD12,042,121-92 as at 31 Jan. 2000 and your request for settlement of the facilities at a lower amount. We are pleased to inform that after due consideration, the Bank has agreed to the settlement of your facilities at a lower amount subject to terms and conditions as follows:

1. Payment of SGD50,000-00 via a Cashier's Order within 7 days from the date of this letter.
2. Immediate liquidation of Fixed Deposit in the name of James Nam Wing Feigh presently held as security for the facilities granted, proceeds of which are to be applied in full towards part payment of the facilities
3. A compromised sum of \$9,727,000-00 is to be repaid in the following manner:
 - Payment of SGD 6,300,000-00 towards discharge of our mortgage over 4 Brighthill Crescent and 17 Bukit Pasoh Road within 4 months from the date of your acceptance of this letter.
 - Payment of SGD3,427,000-00 over 5 years together with interest accrued thereon. Payment is to be made on a step-up basis in the following manner:
 - 1st 6 months : Interest to be serviced monthly
 - Next 6 months : SGD30,000 per month (inclusive of interest)
 - 2nd year : SGD40,000 per month (inclusive of interest)
 - 3rd Year : SGD50,000 per month (inclusive of interest)
 - 4th Year : SGD60,000 per month (inclusive of interest)
 - 5th Year : SGD70,000 per month (inclusive of interest)
 - All remaining balance owing at the end of the 5th year, estimated at SGD1,671,000-00 is to be settled by a lump sum payment together with the last instalment payment.
4. Interest will only be charged at our Prime Lending Rate (PLR) + 2%, calculated on monthly rest basis on all of item (3) above with effect from 1 March 2000 to date of full payment. Our PLR is presently at 6.375 p.a.
5. Interest for the month and any other payment due for the month is to be paid not later than the last day of each month. The first interest payment is due on 31 March 2000.
6. All existing and fresh legal and professional charges and disbursements are to be borne by you on a full indemnity basis and are to be paid within 14 days from the date of issuance of the invoices.
7. Formal valuation is to be conducted by one of the Bank's approved panel of valuers on the properties mortgaged to the Bank, indicating a total open market value of SGD6,800,000-00. Such valuation is to be done within 7 days of acceptance of this letter.
8. Statutory Declaration of Assets by Mr Nam Wing Feigh, Mdm Tan Sioh Lwee and Mr Nam Weng Kai in the presence of a Commissioner of Oath is to be forwarded to the Bank together with this Letter of Offer, together with an undertaking from the abovenamed persons not to transfer, dispose or encumber any assets without the written consent of the Bank.
9. A Regulating Agreement is to be executed in form and substance acceptable to the Bank and such

Agreement, together with the Annexure attached herewith will represent an integral part of this Letter of Offer.

Other existing terms and conditions pursuant to the granting of the facilities are to remain unchanged as per existing security and loan agreements.

Upon default of any of the terms of this letter and the Regulating Agreement to be executed, including but not limited to the non-payment of interest or an instalment upon its due date, the Bank shall be entitled to demand the full outstanding amount, inclusive of all accrued interest under the respective facilities from 1 February 2000 to be paid immediately, such sum to include the amount of compromised debt accepted by the Bank as at the date of this agreement being accepted, failing which the Bank shall be entitled to commence action against you and the guarantors, and both you and the guarantors shall agree to a consent judgement being entered against each and everyone of you jointly and severally.

Kindly signify your acceptance of the terms of this letter and the Annexure as attached by signing and returning to us the duplicate copy hereof within 7 days from the date of this letter, failing which the offer will lapse.

Yours faithfully,

RHB Bank Bhd

(signed)
Zulkifli Abdullah
Manager, Special Assets

(signed)
Rozita Abd Hafiz
Unit Head, Special Assets Unit

Date : 9th March 2000

To : RHB Bank Berhad

We accept the terms and conditions as stated in your Letter of Offer dated 2 March 2000, together with the Annexure comprising of the Standard Terms and Conditions governing Banking Facilities.

We enclose herewith our Board of Directors' Resolution accepting the terms and conditions of the said Letter of Offer and authorization on the due execution of all security documents as may be required by the Bank.

(signed)

Authorized Signatory

.....

Company Stamp

4 Pursuant to the compromise spelt out in the Letter of Offer, the First Defendant paid \$50,000 to the Plaintiffs on or about 9 March 2000 in partial settlement of the outstanding amount of \$12,042,121.92. On 13 March 2000, the Plaintiffs liquidated the fixed deposit account of Nam Wing Fiegh and utilised the money therein amounting to \$252,112.19 (after deducting the Plaintiffs' administrative costs) to partially settle the outstanding amount, which, after deducting the two partial payments,

stood at \$11,925,214.44 as at 31 March 2000.

5 In breach of Clause 8 of the Letter of Offer, the First Defendant did not forward to the Plaintiffs the Statutory Declaration of Assets and the undertaking by the Second, Third and Fourth Defendants when it signed and returned the Letter of Offer.

6 The Plaintiffs' solicitors then wrote a letter dated 15 March 2000 to the Defendants' solicitors stating as follows:

"KOON HOE & CO PTE LTD

1. We refer to the above matter.
2. We are instructed by our clients that in response to their letter of offer dated 2 March 2000 to your clients, your clients have complied with Clause 1 of the said letter of offer by paying the sum of \$50,000.00 via a UOB Cashier's Order dated 9 March 2000.
3. However, our clients have yet to receive the acceptance copy of the said letter of offer duly executed by your clients. Please advise your clients to do so immediately.
4. In respect of the other clauses, please note that our clients expect them to be duly complied with, in particular, kindly advise your clients to prepare the Statutory Declaration of Assets and forward the same with the acceptance copy.
5. Finally, a regulating agreement will be drawn up upon the receipt of the above."

It appeared that paragraph 3 was erroneous as the acceptance copy had apparently been sent to the Plaintiffs but not the Statutory Declaration and the undertaking specified in condition number 8 of the Letter of Offer dated 2 March 2000.

7 By a letter of the same date, the Defendants' solicitors replied that "As stated in their fax to your clients dated 9th March 2000 our clients think it best for your clients to let them know the format of the Statutory Declaration required by them so as to avoid any confusion and to enable the matter of the Statutory Declaration to be dealt with efficiently." The relevant sentence in the said fax of 9 March 2000 asked the Plaintiffs to "please furnish us with the format of the Statutory Declaration to enable us to comply".

8 The Plaintiffs averred that it was not provided in the Letter of Offer nor was it agreed by them that they would provide the format of the Statutory Declaration. Nevertheless, by their letter of 17 March 2000 to the Defendants' solicitors, the Plaintiffs' solicitors informed them that the Plaintiffs required the Second, Third and Fourth Defendants to each make a Statutory Declaration on their current assets and liabilities as at the date of execution of the Statutory Declaration and that such assets should include details of share holdings in companies, ownership of motor vehicles, club memberships including any encumbrances or financing for the acquisition of those assets as well as their market value.

9 Ten days passed and the default continued. By their letter dated 27 March 2000 to the Defendants' solicitors, the Plaintiffs' solicitors gave the following ultimatum:

"We refer to your letter dated 17 March 2000, and would inform you that since that letter, we have still not received the Statutory Declarations of Nam Wing Fiegh, Tan Sioh Lwee and Nam Wen Kai Paul.

We write to inform you that these three (3) Statutory Declarations must be delivered to our offices **no later than 4.00 p.m. on Tuesday, 28 March 2000**, together with a written undertaking from each of the abovenamed 3 persons that he/she shall not sell, transfer, alienate, encumber or otherwise dispose of any of their respective assets without the prior written consent of our clients – See paragraph 9 of the Letter of Offer.

All our clients' rights are hereby expressly reserved."

10 Another three days passed. The Statutory Declarations and the undertakings were still not forwarded to the Plaintiffs. By a letter dated 31 March 2000, the Plaintiffs' solicitors wrote to the Defendants' solicitors accepting the First Defendant's breach of contract and, pursuant to the Letter of Offer, demanded that the Defendants pay the outstanding amount of \$12,042,121.92, as at 31 January 2000 together with default interest thereon from 1 February 2000 until full payment, within five days failing which the Plaintiffs would commence legal action. The Plaintiffs' solicitors also indicated that they would be returning the Defendants' cheque for \$17,299.31. Bearing in mind the two partial payments, the amount owing as at 31 March 2000 was \$11,925,214.44.

11 The Defendants' solicitors responded on 4 April 2000 thus:

"We refer to your letter dated 31st March 2000.

Our clients find it difficult to believe your clients' position as stated therein which flies in the face of reason and commercial reality.

Your clients accepted the Settlement Agreement without the said Statutory Declarations on 9th March 2000.

Subsequent correspondence between the solicitors on this point clearly shows that our clients were in the process of preparing the Statutory Declarations.

You will appreciate that such things take time to ensure that the list of assets to be included in the Statutory Declarations were complete.

Your said fax of 27th March 1999 imposed an impossible deadline which cannot be seen otherwise as manifest bad faith particularly in view of the fact that your clients accepted the sum of \$50,000.00 which was paid by our clients pursuant to the Settlement Agreement.

In light of the above your clients' current stance cannot be fathomed and is clearly unnecessary and excessive. Ironically we note that your clients are also, and still, in the process of preparing the other documents required by the Settlement Agreement.

Our clients' position is that your clients remain bound by the said Agreement and this issue of the Statutory Declarations does not constitute a breach on our clients' part.

Our clients have acted in good faith and have paid the first installment payment of \$17,299.31.

In addition our clients have sourced for buyers for their properties.

To this end our clients seek your clients approval to sell their property at No. 17 Bukit Pasoh Road for not less than \$3 million less the usual costs and expenses of the sale (such as agent's fees, lawyers fees, insurance etc).

As there appear to be a number of possible purchasers, our clients are unable to provide further details until negotiations are concluded and an Option/Sale and Purchase Agreement signed.

Please let us have your clients' immediate consent as time is of the essence.

We are endeavouring to let you have the Statutory Declarations within this week and trust this will be acceptable.

Otherwise kindly confirm by 6th April 2000 that your clients intend to maintain their stand as stated in your said fax upon which we will have no option but to apply to the Court for the appropriate relief."

12 Although the above letter indicated that the statutory declarations might be ready "within this week", the Defendants' solicitors faxed three draft statutory declarations to the Plaintiffs' solicitors some two and a half hours later that same day (4 April 2000).

13 The Plaintiffs' solicitors replied on 6 April 2000 as follows:

"2. Our clients had received the Letter of Offer duly signed as accepted by your clients on 9 March 2000, and had granted your clients' indulgence by not insisting that the Statutory Declarations and the undertakings be furnished at the same time.

3. Our clients' indulgence was clearly not open-ended, and neither was it to be construed as a waiver of their rights to insist on the Statutory Declarations and undertakings be provided forthwith.

4. By our letter dated 27 March 2000, we informed you in no uncertain terms that the Statutory Declarations and undertakings were to be delivered no later than 4.00 p.m. on Tuesday, 28 March 2000.

5. This was an eminently reasonable deadline, bearing in mind that your clients knew full well about their contractual obligation to furnish the Statutory Declarations and undertakings as early as 2 March 2000.

6. Your clients even saw fit not to reply to our said letter dated 27 March 2000 despite the fact that almost one month had passed since they had sight of the Letter of Offer and Clause 8 therein referring to their obligation to furnish the Statutory Declarations and undertakings.

7. Accordingly, our clients dispute and deny all your baseless allegations of "impossible deadline" and "manifest bad faith". Our clients further deny that their current stance is unnecessary and excessive."

14 Clause 19 of the Standard Terms and Conditions Governing Banking Facilities (which were annexed to the Letter of Offer and accepted by the Defendants) provided as follows:

"19. WAIVER

19.1 The Bank may at its absolute discretion waive either unconditionally or on such terms and conditions as it may deem fit any breach by the Borrower of any of the terms and conditions contained herein and in the Facility Letter or grant such indulgences as may be agreed provided that such waiver or forbearance shall not prejudice or affect the rights, powers or remedies of the Bank at any time afterwards to act strictly in accordance with the originally agreed terms and conditions and shall not prejudice the rights of the Bank in respect of any other existing or subsequent breach of any of the terms and conditions aforesaid.

19.2 No failure to exercise and no delay in exercising on the part of the Bank of any right, power or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any right, power or privilege preclude any other or further exercise thereof or the exercise of any other right, power or privilege. The rights and remedies herein provided are cumulative and not exclusive of any rights or remedies provided by law."

Accordingly, the Defendants' allegations of estoppel and of a new agreement were misconceived.

15 Sometime soon after the First Defendant received the Plaintiffs' fax dated 21 March 2000 demanding the payment of \$49,107.93 as the first payment of interest pursuant to the settlement agreement, the Third Defendant telephoned the Plaintiffs and requested that the interest instalment demanded which was in excess of \$49,000 be capitalised and repaid at the end of the fifth year. The Plaintiffs replied on 29 March 2000 to the First Defendant that they were unable to accede to the request and asked that the said amount be forwarded by 31 March 2000.

16 Condition 4 of the Letter of Offer allowed the Plaintiffs to charge interest on the whole \$9,727,000 as it provided that interest would be charged "on all of item (3) above".

17 The Plaintiffs' letter of 8 March 2000 to the First Defendant's auditors merely stated the principal monies due and owing by the First Defendant as at 31 December 1999, without the element of interest. The demand dated 31 March 2000 clearly demanded the sum as at a precise date, in this case, 31 January 2000. The Statement of Claim has given credit for the two partial payments.

18 As indicated earlier, the Second, Third and Fourth Defendants were sued as guarantors. By their guarantees dated 16 August 1996, they jointly and severally agreed to guarantee and indemnify the Plaintiffs' predecessor-in-title in respect of all monies owing by the First Defendant. Under Clause 12 of the guarantees, any admission or acknowledgement in writing by the First Defendant of the amount of indebtedness shall be conclusive and binding on the Second, Third and Fourth Defendants.

19 The outstanding amount of \$11,925,214.44 as at 31 March 2000 and further interest accruing thereon remained unpaid by the First Defendant. It was also averred that the Letter of Offer accepted by the First Defendant constituted an admission or acknowledgement in writing by the First Defendant within the meaning of the said Clause 12 of the guarantees and that the outstanding amount and interest were therefore due and owing to the Plaintiffs by all four Defendants.

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THE DEFENCE AND COUNTERCLAIM

20 The Defendants pleaded that pursuant to the settlement agreement contained in the Letter of Offer dated 2 March 2000, which was accepted by the First Defendant on 9 March 2000, the Plaintiffs' claim was compromised at \$9,727,000 in addition to the two partial payments. They averred that although the statutory declarations had not been delivered to the Plaintiffs by 9 March 2000, they were nonetheless delivered on 10 April 2000, and that time was not made of the essence in the settlement agreement. Further, the Plaintiffs had waived this condition and were not entitled to rely on it. Such waiver was evidenced by the correspondence between the parties' solicitors and by the conduct of the Plaintiffs. The Defendants were thereby induced to believe that the settlement agreement still subsisted and acted upon that belief by liquidating his fixed deposit account and making payment to the Plaintiffs which was accepted.

21 The Plaintiffs had failed to give the First Defendant any notice requiring the statutory declarations within a reasonable time and their letter dated 27 March 2000 was not a reasonable notice in the circumstances. The Plaintiffs were therefore estopped from saying that the period for the delivery of the statutory declarations expired on 9 March 2000 or on 28 March 2000 or from asserting that the settlement agreement ceased to be valid on either of those dates.

22 The Defendants further alleged that a new agreement was to be implied from the correspondence and the conduct of the parties that the period for the delivery of the statutory declarations should be extended beyond 9 March 2000 and until the Plaintiffs had given a notice to the Defendants requiring delivery of the same within a reasonable period. The Plaintiffs' letter dated 27 March 2000 was not such a reasonable notice.

23 The Defendants also asserted that the Plaintiffs' act of issuing the notice of 27 March 2000 and/or of purporting to terminate the settlement agreement was unconscionable and/or done in manifest bad faith. On 21 March 2000, the Plaintiffs demanded \$49,107.93 as the first payment of interest pursuant to the settlement agreement. On 30 March 2000, the First Defendants

informed the Plaintiffs that their calculation of interest was incorrect as it was based on the total compromised sum of \$9,727,000 and not on the sum of \$3,427,000 as provided in condition number 3 of the said agreement. The next day, the Plaintiffs' solicitors' letter claimed that the agreement had been breached due to the failure to furnish the three statutory declarations by 28 March 2000 as demanded by their letter dated 27 March 2000. The purported termination was motivated by the Plaintiffs' realisation that the conditions of the settlement agreement did not permit them to charge interest on the full compromised sum and was an attempt to escape and avoid the effect of the conditions.

24 As further evidence of the Plaintiffs' bad faith, the Plaintiffs had stated in their Letter of Offer dated 2 March 2000 that the outstanding balance as at 31 January 2000 was \$12,042,121.92 whereas they had by their letter dated 8 March 2000 to the First Defendant's accountants certified that the outstanding balance as at 31 December 1999 was \$10,770,176.24.

25 The Plaintiffs' letter of 31 March 2000 also failed to give any credit for the two payments made by the First Defendants after accepting the settlement agreement on 9 March 2000.

26 By way of Counterclaim, the Defendants relied on the same averments and sought a declaration that the Plaintiffs' notices dated 27 March 2000 and 31 March 2000 to the First Defendants were wrongful, ineffectual and invalid to determine the settlement agreement made on 9 March 2000 and that the said settlement agreement remained a binding and enforceable contract and that there had been no breach by the First Defendant. The Defendants therefore claimed specific performance of the agreement. Alternatively, they asked for an order that they be relieved of the forfeiture (if any) of their right and interests under the agreement on such terms as the Court thought fit and for damages that may have been sustained by them by virtue of the wrongful termination of the agreement.

27 In the affidavit filed by the Third Defendant (a director) on behalf of all four Defendants, the Third Defendant said that he executed the settlement agreement on behalf of the First Defendant on 9 March 2000 and caused it to be delivered by hand to the Plaintiffs together with a cashier's order for \$50,000 and a letter dated 9 March 2000 from the First Defendant to the Plaintiffs (referred to earlier in paragraph 7 of this judgment). The statutory declarations were not delivered to the Plaintiffs on that date as he was unsure as to the format to adopt and did not want to waste time, money and effort should they be rejected. He had therefore asked the Plaintiffs to furnish them with the required format.

28 The Plaintiffs accepted the executed settlement agreement and the cashier's order without protest. No mention was made of the statutory declarations and no deadline for their delivery was given then. The Defendants were thereby led to believe that the Plaintiffs did not regard the non-delivery of the statutory declarations as crucial or material or as a breach of the agreement. They believed that the statutory declarations could be given at a later date and that the Plaintiffs would give them reasonable notice to do so since time was not made of the essence in the agreement, the other terms of which both parties would perform in the meantime. On or about 13 March 2000, he liquidated the fixed deposit as required and paid the money to the Plaintiffs. Again there was no protest about the statutory declarations.

29 His "belief was cemented by the subsequent conduct of the Plaintiffs" when their solicitors sent the letter dated 15 March 2000 claiming that the First Defendant had not returned the acceptance copy of the agreement and asked for it to be done immediately. In that letter, they also asked for the statutory declarations to be prepared and forwarded to them but no time was specified. The Plaintiffs have accepted that the acceptance copy had been returned on 9 March 2000.

30 While providing the format was not a term of the settlement agreement, it was a reasonable request and one made solely for the Plaintiffs' benefit to enable the statutory declarations to be completed efficiently and to the Plaintiffs' satisfaction. In the Plaintiffs' reply of 17 March 2000, they provided a basic and general description of the format of the statutory declarations but again made no mention of any urgency or deadline. The Third Defendant was therefore "led to believe that there was still time to provide the same and that the Plaintiffs would give us reasonable notice in the event time became of the essence and they wanted the Statutory Declarations to be delivered to them".

31 The Defendants were not doing nothing while all this was going on. They were making efforts to recollect, search and collate all the information to be included in the statutory declarations. Relying on the Plaintiffs' conduct, the Third Defendant focused

on fulfilling the other terms of the settlement agreement, in particular, sourcing for a purchaser of the First Defendant's property. That property was sold for \$3.25 million and the sale proceeds would go to the Plaintiffs.

32 When he received the Plaintiffs' letter dated 21 March 2000 asking for the first interest payment, the Third Defendant was extremely startled by the amount as it appeared to have been incorrectly calculated and inconsistent with the "step-up" basis of payment as it was greater in amount than the subsequent payments. He then proceeded to do his own sums and to discuss the matter with his solicitors.

33 Subsequently and out of the blue, the Defendants' solicitors received a letter dated 27 March 2000 from the Plaintiffs' solicitors demanding that the statutory declarations be delivered to the Plaintiffs by 4 pm the next day. This letter was faxed at 8 pm on 27 March 2000 and was therefore seen by the Defendants' solicitors only in the morning of 28 March 2000.

34 The Defendants' solicitors contacted the Third Defendant immediately about the matter. The period for compliance was less than eight hours and was clearly unreasonable. It was also impossible to comply with the deadline set as the asset information had not been fully compiled and the Fourth Defendant was then out of the country.

35 On 29 March 2000, the Third Defendant called the Plaintiffs about the demand for the interest payment and told them it was wrongly calculated. This was followed by a letter dated 30 March 2000 from the First Defendant delivered by hand to the Plaintiffs setting out the correct position, i.e. that interest for the first six months was to be calculated on the amount of \$3,427,000 and not \$9,727,000. A cheque for the correct amount of interest for 22 days (\$17,299.31) was enclosed.

36 The Plaintiffs' response of 29 March 2000 was received by the First Defendant only on 31 March 2000 and appeared to have totally missed the point and talked instead about capitalisation of interest, something never requested or mentioned by the Third Defendant. Nevertheless, this letter also said nothing about the statutory declarations or anything about termination of the settlement agreement.

37 On 31 March 2000, the Defendants' solicitors received the Plaintiffs' solicitors' letter purporting to terminate the settlement agreement pursuant to their earlier letter of 27 March 2000. Notwithstanding this, the Defendants continued to honour the agreement by delivering the draft statutory declarations on 4 April 2000 and the executed ones on 10 April 2000, which were returned by the Plaintiffs' solicitors the same day. The First Defendant also continued to make the interest payments due for March and April 2000 until told not to forward any more payments. The Third Defendant has also obtained refinancing for a property to enable the First Defendant to pay up the balance of the \$6.3 million due under the agreement.

38 Unable to understand the Plaintiffs' motive behind their actions in ending a settlement that took more than two years to reach, the Third Defendant could only infer that they were merely seeking any excuse to renege on the agreement. After all, the lateness in providing the statutory declarations had not prejudiced the Plaintiffs in any way. Further, the Plaintiffs were themselves guilty of non-compliance with the terms of the agreement in that they did not carry out a valuation of the properties within seven days from 9 March 2000 and failed to furnish the Regulating Agreement.

39 Throughout the dispute, the First Defendant had questioned the Plaintiffs' accounting procedures and calculations which were consistently error-prone. For instance, the fixed deposit of \$250,000 placed on or about 26 July 1995 yielded only a sum of \$252,112.19 when liquidated in March 2000. Administration costs, not provided for in the settlement agreement, were deducted by the Plaintiffs. After deducting the two partial payments, the balance ought to be \$11,740,009.73 and not \$11,925,214. Such manifest errors raised serious doubts as to the accuracy of any of the Plaintiffs' figures. The Plaintiffs were unsure of the actual amount owing at any one point in time. This was evidenced by the need to amend the Statement of Claim three times.

40 Although the Defendants' solicitors' letter of 4 April 2000 indicated that the statutory declarations would be provided within the week, that was a conservative estimate made in the event all the information could not be gathered as some of the information related to Malaysian shares which the Third Defendant had to obtain or confirm with his accountants in Malaysia. Fortunately, all the information could be garnered and the draft statutory declarations were sent the same day. The Defendants did not deny that the Plaintiffs were entitled to demand for the statutory declarations at any time but they were obliged to give

reasonable notice for the delivery of the same and Clause 19 of the Standard Terms and Conditions did not detract from this.

41 The Plaintiffs' letter dated 8 March 2000 to the First Defendant's auditors could not have left out the interest payable or accrued on the account as the First Defendant's auditors would have required this information for the purposes of the statutory accounts. The Plaintiffs' demand dated 31 March 2000 was invalid and bad in law as it failed to give credit for the payments made.

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THE DECISION OF THE COURT

42 The Plaintiffs posed the following issues to be decided:

- (1) Did the Defendants breach the settlement agreement by failing to deliver the statutory declarations and undertakings of the three guarantors (i.e. the Second, Third and Fourth Defendants) by the 28 March 2000 deadline set out in the Plaintiffs' solicitors' letter of 27 March 2000?
- (2) If they did, do the terms of the settlement agreement permit the Plaintiffs to terminate the said agreement, accelerate payment and demand for the whole sum owing?

43 The Defendants summarised the issues in the following manner:

- (1) Whether the Plaintiffs by their conduct/actions have waived the right to rely on the Defendants' failure to deliver the statutory declarations;
- (2) The effect of the Plaintiffs' conduct/actions.

44 *Chitty on Contracts* (27th Edition, 1994) at pages 1087 to 1089 makes the following statements on waiver:

"Waiver or forbearance. Where one party voluntarily accedes to a request by the other that he should forbear to insist on the mode of performance fixed by the contract, the court may hold that he has *waived* his right to require that the contract be performed in this respect according to its original tenor. Waiver (in the sense of "waiver by estoppel" rather than "waiver by election") may also be held to have occurred if, without any request, one party represents to the other that he will forbear to enforce or rely on a term of the contract to be performed or observed by the other party, and the other party acts in reliance on that representation.

Form of waiver

. A waiver may be oral or written or inferred from conduct

Effect on party forbearing

. The party who forbears will be bound by the waiver and cannot set up the original terms of the agreement. If, by words or conduct, he has agreed or led the other party to believe that he will accept performance at a later date than or in a different manner from that provided in the contract, he will not be able to refuse that performance when tendered. However, in cases of postponement of performance, if the period of postponement is specified in the waiver, then, if time was originally of the essence, it will remain so in respect of the new date. If the period of postponement is not specified in the waiver, the party forbearing is entitled, upon reasonable notice, to impose a new time-limit, which may then become of the essence of the contract. Similarly, in other cases of forbearance, he may be entitled, upon reasonable notice, to require the other party to comply

with the original mode of performance, unless in the meantime circumstances have so changed as to render it impossible or inequitable so to do. He cannot treat the waiver as entirely without effect.

...

Although consideration need not be proved, certain other requirements must be satisfied for such an estoppel to be effective: first, it must be clear and unequivocal; secondly, the other party must have altered his position in reliance on it, or at least acted on it."

45 The Defendants submitted that the Plaintiffs, having not asserted the non-delivery of the statutory declarations from 9 March 2000 until 27 March 2000 had "patently waived" the Defendants' non-delivery of the documents during that period and were therefore not entitled to rely on this to terminate the agreement. Further, the Plaintiffs had accepted payment under the other terms of the agreement and it would be inequitable for them to go back on their representation at their whim and fancy. They had to give reasonable notice if they wished to assert their strict legal rights. Further, the Plaintiffs had also waived compliance with their ultimatum of 27 March 2000 as their letter of 29 March 2000 asked the Defendants to perform the agreement by 31 March 2000. There was therefore no valid notice requiring delivery of the statutory declarations.

46 Looking at the sequence of events, even though strict compliance with the settlement agreement had been waived (i.e. delivery of the statutory declarations and undertakings by 9 March 2000), it was clear that delivery of the documents was never waived. A fair reading of the letter of offer shows that all the terms pertaining to time demanded strict compliance, i.e. time was of the essence. The Plaintiffs' solicitors' letter of 15 March 2000, while evidencing a misunderstanding that the acceptance copy had not been received, nevertheless demanded in paragraph 3 that the acceptance copy be duly executed and delivered "immediately". Paragraph 4 of that letter then proceeded to remind the Defendants that all other terms had to be duly complied with, particularly delivery of the said documents together with the acceptance copy. Read in their context, surely the Plaintiffs were demanding delivery of the documents "immediately" as well.

47 Even if the Defendants were sincere in asking the Plaintiffs for the desired format of the statutory declarations, clear guidelines had been given by 17 March 2000. The Plaintiffs granted them the indulgence of another ten days before delivering their ultimatum of 27 March 2000. Ten days to execute and deliver the documents, a requirement known to the Defendants since 2 March 2000 and accepted by them since 9 March 2000, must be more than reasonable notice. Despite the ultimatum giving effectively another eight hours to comply, the Defendants were apparently content to let things be and displayed a completely lackadaisical attitude. Whatever difficulties they professed to have had in compiling the information for the statutory declarations, the fact remained that what was produced finally was a one-page document per person.

48 The Plaintiffs' solicitors' letter of 29 March 2000 was merely one written in response to the Defendants' request. It did not seek to qualify in any way their ultimatum of 27 March 2000 which set out the time for delivery of the documents but did not state that the settlement agreement would otherwise be deemed terminated as at 4 pm on 28 March 2000.

49 Apart from the circumstances showing clearly that more than a reasonable period of time for compliance had been given, the Plaintiffs could rely on Clause 19 of the Standard Terms and Conditions in any event to overcome any contention on estoppel or waiver.

50 It appeared also that the Defendants were reading into the settlement agreement and the correspondence whatever they wanted to see. They were attempting to re-interpret the clear provisions pertaining to interest which had to be paid on the entire compromised amount and not \$3,427,000. The "step-up basis" in the settlement agreement obviously referred to the gradually increasing monthly instalments ranging from \$30,000 to \$70,000. Further, despite the clear wording that interest would be charged with effect from 1 March 2000 (i.e. for 31 days as on 31 March 2000), the Defendants proffered payment of interest for only 22 days, apparently treating interest as running only after the date of their acceptance of the settlement agreement on 9 March 2000.

51 I saw no evidence of bad faith or ill intentions on the part of the Plaintiffs. I accepted their explanations pertaining to the

alleged discrepancies in the amount owing. Clearly, the First Defendant was in breach of the settlement agreement by its failure to deliver the requisite documents by 28 March 2000 and the Plaintiffs were entitled to demand the full outstanding amount with interest pursuant to the default provision in the settlement agreement. Although the two partial payments were not taken into account in the letter of demand, the error has since been rectified and due credit has been given. There was no confusion or prejudice caused to the Defendants by that error in any event. The Second, Third and Fourth Defendants were liable under the terms of the guarantees.

52 I therefore affirmed the decision of the learned Assistant Registrar ordering that judgment be entered against all four Defendants. I also ordered the Defendants to pay \$3,500 costs for the appeal.

Tay Yong Kwang

Judicial Commissioner

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