Pacific Century Regional Development Ltd v Canadian Imperial Investment Pte Ltd [2001] SGCA 21

Case Number : CA 130/2000, 133/2000

Decision Date : 06 April 2001

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ

Counsel Name(s) : Kasiviswanathan Shanmugam SC, Edwin Tong with Prakash Pillai and Vikhna Raj (Allen & Gledhill) for the appellant in CA 130/2000 and respondent in CA 133/2000; Davinder Singh SC with Hri Kumar and Siraj Omar (Drew & Napier) for the respondent in CA 130/2000 and appellant in CA 133/2000

Parties : Pacific Century Regional Development Ltd — Canadian Imperial Investment Pte Ltd

Contract – Contractual terms – Rules of construction – Evidence on factual matrix – Scope of "factual matrix" – Admissibility of evidence of previous negotiations of parties and their declarations of subjective intent

Contract – Contractual terms – Rules of construction – Whether "tag-along" clause applicable in circumstances of case – Regard to substance of transactions

(delivering the judgment of the court): This appeal concerns the interpretation of a `tag-along` clause in a Shareholders` Agreement between the appellant and the predecessor company of the respondent, Orient Freedom Property Ltd (`OFPL`).

The appellant, Pacific Century Regional Development (`PCRD`), is a public company listed on the Stock Exchange of Singapore. PCRD is a subsidiary of Pacific Century Group Holding Ltd (`PCG`) of Hong Kong. PCG is a company incorporated in the British Virgin Islands. Both PCRD and PCG are controlled by one Mr Richard Li (`Mr Li`) of Hong Kong.

The respondent, Canadian Imperial Investment Pte Ltd (`CIIP`) is a Canadian company. By way of a novation and amending agreement, the rights and obligations of OFPL under the Shareholders` Agreement have been assumed by CIIP as if CIIP was the original party to the Agreement.

Background to Shareholders` Agreement

Sometime in 1996, the parent company of OFPL saw an opportunity to develop an underground car-park in Shanghai, the People`s Republic of China (`PRC`). It then approached PCRD. They agreed to enter into a joint venture on that development. In pursuance thereof, a company, Quinliven Pte Ltd (`QL`), was incorporated in Singapore to undertake the project. The Shareholders` Agreement, dated 31 January 1997, was entered into under which PCRD was to hold 75% of the shares in QL, and OFPL to hold 25%. QL, in turn, entered into an arrangement with Shanghai Tian Chang Economic Development Co Ltd to jointly undertake the car-park project.

Sometime in early 1999, PCRD decided to restructure its operations, a decision due in part to its desire to enter into a contract with the Hong Kong Government on a Cyber-Port project. PCRD felt that this was a way for it to venture into the Hong Kong technology market. As part of the overall scheme, PCRD also decided to acquire a listed shell company, and in this manner to obtain a `back-door listing` on the Hong Kong Stock Exchange. The arrangement involved the carrying out of a series of transactions whereby assets of PCRD and PCG in the PRC (including Hong Kong) were to be transferred to Newco, a company incorporated in the British Virgin Islands on 28 October 1998. The

transfer would also cover all the shares which PCRD held in QL. In return for the transfer of all the assets, PCRD and PCG would receive 100% of the shares in Newco. The next stage of the arrangement would involve the transfer by PCRD and PCG of all their shares in Newco to the listed company, Tricom Holdings Ltd (`Tricom`), and in return PCRD and PCG would receive shares and convertible bonds of Tricom.

The scheme was carried out by way of an agreement dated 30 April 1999 (`the Acquisition Agreement`), entered into between PCRD, PCG, Tricom and Star Telecom International Holding Ltd (`Star`). Prior to this arrangement, Tricom was a subsidiary of Star. Following the execution of the transactions provided in the Acquisition Agreement, PCRD became the controlling shareholder of Tricom. Accordingly, Tricom has become a subsidiary of PCRD.

A useful summary of what was envisaged in this elaborate exercise may be found in a paragraph in a letter dated 7 July 1999 issued by PCRD to its shareholders, which reads:

> *As part of a corporate restructuring to facilitate the Proposal, PCRD will transfer all its property interests and activities in Hong Kong and the PRC other than the Excluded Properties to a new intermediate holding company, Newco, in exchange for new ordinary shares in Newco amounting to approximately 91 per cent of the enlarged issued share capital of Newco. PCG, the ultimate holding company of PCRD, will also transfer certain property interests in Hong Kong, inter alia, comprising the Hong Kong Computer Centre, to Newco in exchange for which it will also receive new ordinary shares in Newco amounting to approximately 9 per cent of the enlarged issued share capital of Newco. Tricom will then acquire all the issued shares in Newco from PCRD and PCG. PCRD and PCG will transfer their aforementioned assets to Newco for an aggregate consideration of HK$2,460 million which is to be satisfied by the issue of new shares in Newco. PCRD and PCG will then transfer their shares in Newco to Tricom for the same consideration and which is to be satisfied by Tricom through the issue of the Consideration Shares and Convertible Bonds.*

In view of the arrangements set out in the Acquisition Agreement, CIIP claimed that PCRD had breached cl 11(E) of the Shareholders` Agreement as PCRD had failed to obtain a corresponding offer from Tricom to acquire the shares which CIIP held in QL. In its response, PCRD averred that cl 11(E) had no application in the circumstances of this case, as the transfer of the QL shares was to a subsidiary, an associated company.

Relevant provisions

Before we proceed any further, it may be useful for us at this juncture to set out cl 11(E) and other clauses which may have a bearing on the matter in hand:

> ***Clause 1(A)***
>
> *`Associated company` means in relation to any Shareholder, any subsidiary or holding company of such Shareholder and any subsidiary of any such holding company.*
>
> ***Clause 11(A)***

Subject to the provisions hereof, no transfer of any Shares shall be made by the Shareholders unless:

(i) the transferee is an Associated Company of the transferor, and the transferee shall remain as such Associated Company after the transfer and the obligations of the transferor under this Agreement shall remain unaffected by such transfer; or

(ii) the provisions contained in Schedule 1 are complied with in respect of such transfer.

Clause 11(B)

It shall be a condition precedent to the right of any Shareholder to transfer any Shares that:-

(i) the transferor (if not already bound by the provisions of this Agreement) executes in such forms as may be reasonably required by and agreed between the other Shareholder(s) a deed of ratification and accession under which the transferee shall agree to be bound by and shall be entitled to the benefit of this Agreement as if it were an original party hereto; and

(ii) the transferor assigns and the transferee accepts an assignment of all or, in the case of a transfer of part of the Shares of a Shareholder, a proportionate part of the loans made to or given on behalf of the Company by the transferor or any of its Associated Companies and for the time being outstanding.

Clause 11(E)

If PCRD receives from a third party an offer to acquire its Shares (together with the related Shareholder`s loans) and such offer when accepted would result in PCRD holding less than 51 per cent of the issued share capital of the Company, before accepting such an offer (the `first offer`) it shall forthwith inform OFPL of the terms and conditions of the first offer and it shall procure for OFPL an offer for an equivalent proportion of the Shares held by OFPL (together with the related Shareholder`s loans) on the same terms and conditions as those contained in the first offer so that after OFPL`s acceptance of the offer, the ratio of OFPL`s shareholding in the Company to PCRD`s shareholding in the Company shall always be 1:3.

Clause 19(A)

This agreement shall take effect from the date of this Agreement without limit in point of time and shall cease and determine upon the dissolution of the Company. If any Shareholder shall transfer the entirety of its Shares, it shall be released from its obligations under this Agreement (except for its obligations under Clause 15) but if at that time there are two or more Shareholders bound by the provisions of this Agreement, this Agreement shall continue in full force and effect as between such continuing Shareholders until the dissolution of the

Company.

In the above, we have quoted cll 11(B) and 19(A) because they are relevant to other related issues which are dealt with later in [para]46-52.

Decision below

The main question, as formulated by the learned judge below, is whether as on the date of the Acquisition Agreement (30 April 1999) PCRD had received an offer from a third party for its shares in QL, which, when accepted, would result in PCRD holding less than 51% of the issued share capital of QL.

In construing cl 11(E), CIIP sought to admit the evidence of one Dr Steven Funk, a director of CIIP, who was involved in the negotiations with Mr Patrick Cheung of PCRD on the terms of the Shareholders` Agreement. The judge, applying the principles enunciated by the House of Lords in **Investors Compensation Scheme v West Bromwich Building Society** [1998] 1 All ER 98relating to `factual matrix` said that any evidence that would have affected the way in which the language of the document would have been understood by a reasonable man would be admissible as evidence. He ruled that Dr Funk`s oral and affidavit evidence of `the mutual understanding which led to the insertion of clause 11(E)` constituted admissible evidence, and all the more so since that evidence was not even contradicted as PCRD did not call Mr Cheung to rebut what Dr Funk said. That mutual understanding was that CIIP would be afforded the same benefit or opportunity which PCRD would itself obtain in a situation where the requirements of cl 11(E) were satisfied.

Following from that understanding, the learned judge proceeded to address the question as to whether there was an offer from a third party to acquire PCRD`s shares in QL. He held that there was either an actual or notional offer, that it came from Tricom, and that as far as Newco was concerned, it was no more than a vehicle through which Tricom was to acquire PCRD`s shares in QL. He felt that it was the substance of the transactions between PCRD and Tricom that was crucial, not the form in which the transactions were carried out.

The judge also held that in determining whether cl 11(E) was triggered, it was the position as at the time the offer was made, that was crucial, ie the date of the Acquisition Agreement which was 30 April 1999, and not the date on which the offer was accepted or the transfer of shares effected. As of that date, Tricom was a third party as it was not a subsidiary of PCRD. He ruled that the word `holding` in cl 11(E) meant what it would ordinarily mean, and would not include indirect `holding` through a subsidiary company. He referred to the fact that in the Shareholders` Agreement, where associated companies were intended to be covered, express reference to `associated companies` would be made such as in cll 2B(A) and 7(B): `PCRD or its associated companies`.

Finally, the judge held that the series of transactions were not cl 11(A)(i) transactions. This was because the point of time at which the status of the transactions should be considered was not as of the time of the transfers but prior to that and at that point Tricom was not, as yet, an associated company of PCRD.

Appellant`s argument

Basically, what PCRD contends is that the events which occurred did not trigger the operation of cl 11(E). There was no offer of any sort from a third party. What took place was in form and in fact a restructuring exercise which included a transfer of PCRD`s shares in QL to Newco. In turn, PCRD acquired 91% of the shares in Newco. PCRD`s shares in Newco were then transferred to Tricom and in turn PCRD and its parent company, PCG, acquired shares and bonds of Tricom. Counsel for PCRD submitted that the learned judge below came to an erroneous conclusion because of the following.

(i) The judge was of the view that `the eventual outcome (of the whole exercise) was that Tricom became the legal owner of PCRD`s shares in Quinliven`. This is not correct because Tricom never became the legal owner of the QL shares. Those shares were transferred to Newco after Newco had become a subsidiary of PCRD. At all material times thereafter Newco held the QL shares and remained a subsidiary of PCRD. The QL shares held by Newco were never transferred to Tricom. What was transferred to Tricom were the Newco shares held by PCRD.

(ii) The judge failed to appreciate that the transactions as a whole (including the transfer of QL shares from PCRD to Newco) were a restructuring exercise. There was no bona fide offer by a third party to acquire PCRD`s QL shares. He seemed to have concentrated on the separate components of the arrangement rather than looking at the overall picture.

(iii) The judge erred in admitting evidence adduced by CIIP relating to the negotiations on cl 11(E) and treating it as part of the factual matrix.

(iv) The judge erred in his appreciation of cl 11(A)(i) and failed to see that the transfer of the PCRD`s QL shares to Newco fell within that clause.

Admission of evidence on negotiation

We shall first deal with the question whether the learned judge is correct to have admitted the evidence of Dr Funk. It is trite law that evidence on factual matrix may be admitted to assist in the construction of a document: per Lord Wilberforce in **Reardon Smith Line v Hansen-Tangen** [1976] 3 All ER 570[1976] 1 WLR 989 at 995-996.

In ***Investors Compensation*** (supra) Lord Hoffmann (at 114), while stating that `factual matrix` includes `absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man`, expressly said that it is subject to the exception that the law excludes the admission of `previous negotiations of the parties and their declarations of subjective intent`.

In ***Chitty on Contracts*** Vol 1 (28th Ed), the learned authors explain the difference between factual matrix and negotiation/subjective intent as follows (at [para]12-117):

> *On the other hand, although evidence of the facts about which the parties were negotiating is admissible to explain what meaning was intended, the court is not entitled to look at what the parties to the contract said or did whilst the matter was in negotiation nor are drafts or preliminary agreements admissible in aid of its interpretation, except where it is sought to rectify the document or to show that the parties negotiated on an agreed basis that the words used bore a particular meaning. Evidence will also not be admitted to show what were the parties` subjective intentions with respect to the words used. "The general rule seems to be that all facts are admissible which tend to show the sense which the words bear with reference to the surrounding circumstances of and concerning which the words were used, but that such facts as only tend to*

show that the writer intended to use words bearing a particular sense are to be rejected."

However, while the learned judge below cited in extenso that part of the judgment of Lord Hoffmann in Investors Compensation relating to the scope of `factual matrix`, it would appear that he nevertheless allowed the admission of evidence of negotiation and of the intent of one party to the negotiation. In his affidavit of evidence-in-chief, Dr Funk gave a detailed account of his discussions with Patrick Cheung on the question of the `tag-along` rights. He recounted having told Cheung that he wanted a clause which would have the effect that `if anything good happens to you concerning this deal, let it happen to us as well.` He also gave evidence on the negotiations leading to the drawing up of cl 11(E). While these, in a loose sense, could be considered to be the background, they are not `factual matrix` which are admissible in evidence. Such evidence clearly falls within the exception enunciated by Lord Hoffmann, of `previous negotiations of the parties and their declarations of subjective intent` which should be excluded. Admission of such evidence would undermine the very object of a written agreement. What happened during the course of negotiation is wholly irrelevant unless the relief claimed is for rectification.

In this regard, we ought to mention that in coming to his decision to admit the evidence of Dr Funk, the judge noted that PCRD did not adduce any evidence to refute what Dr Funk said, nor was he cross-examined on that evidence. Accordingly, he felt that the understanding alluded to by Dr Funk must be the understanding of the parties, the factual matrix, when cl 11(E) was negotiated. Therefore, cl 11(E) should be construed in the light of that backdrop. While it is true that PCRD did not refute Dr Funk`s evidence, it must not be overlooked that at the beginning of the trial, counsel for PCRD had already objected to the admission of this aspect of the evidence of Dr Funk. Having regard to the stand taken, it would have been inconsistent for PCRD to tender its side of the story from Mr Cheung or to cross-examine Dr Funk on it. Thus, no adverse inference should have been drawn against PCRD.

The evidence which was erroneously admitted clearly affected the way in which the learned judge viewed cl 11(E), as the following part of his judgment demonstrates:

Therefore, the relevant portion of PW1`s evidence which formed part of the "factual matrix" of clause 11(E) include his evidence that Cheung, the defendants` representative, was agreeable to his idea of giving the plaintiffs "tag-along" rights such that in the event the defendants were to receive offers or be presented with opportunities in respect of the defendants` majority shareholding in Quinliven, the plaintiffs would have the right to the same benefit or opportunity proportionately. Accordingly, it was in fulfillment of this common intention that clause 11(E) was inserted into the agreement.

Proper construction of cl 11(E)

We now turn to consider cl 11(E). In construing this clause it must be borne in mind that it is not a stand-alone clause. It has to be construed not only in the light of the other provisions in cl 11, but also the other provisions of the Agreement as a whole. In this regard we think the following passage in [para]174 of 13 ***Halsbury`s Laws of England*** (4th Ed, 2000 Reissue) is germane:

It is a rule of construction applicable to all written instruments that the

instrument must be construed as a whole in order to ascertain the true meaning of its several clauses, and the words of each clause must be so interpreted as to bring them into harmony with the other provisions of the instrument, if that interpretation does no violence to the meaning of which they are naturally susceptible. The best construction of deeds is to make one part of the deed expound the other, and so to make all the parts agree.

Clause 11 relates to the `transfer of shares` and in it we find restrictions on the right of the parties to transfer the QL shares. The objects behind such restrictions are really twofold: (i) to ensure that all the original shareholders are fully committed to the project, particularly during the initial years; and (ii) no new members should be admitted to become shareholders unless the other shareholders are comfortable with the new members; thus the right of pre-emption in favour of the other shareholders.

The opening sentence of cl 11(A) is a general provision against any transfer unless permitted. Clause 11A(i) allows a party to transfer QL shares to an associated company of that party. An associated company is defined in the definition clause to include a subsidiary or holding company. In relation to the present case, we are only concerned with the position of a subsidiary.

Clause 11(A)(ii) permits a transfer which is effected in accordance with the provisions in sch 1 to the Agreement. This clause relates to the other shareholders` rights of pre-emption in the event that a shareholder wants to transfer its QL shares to a third party pursuant to an offer from a third party. Upon the receipt of such an offer, the transferor-shareholder is required to give a transfer notice to the other shareholder. Obviously, cl 11A(ii) applies only to the case where the third party is not an associated company of the transferor.

Clause 11(B) sets out further requirements which the transferor-shareholder and the transferee should comply with before effecting the transfer. Clauses 11(C) and (D) do not appear to have any bearing on the question under consideration.

The last provision in cl 11 is para E and unlike the earlier provision of that clause, which applies to both parties, the obligation prescribed in cl 11(E) is only imposed on one party, PCRD. It is triggered when PCRD receives an offer from a third party to acquire PCRD`s share in QL, which when accepted would result in PCRD holding less than 51% of the issued shares in QL. When that clause is triggered, PCRD is required to procure an equivalent offer from the third party for CIIP, such that, upon acceptance by CIIP of the offer, the ratio of CIIP`s and PCRD`s shareholdings in QL will always be in the proportion of 1:3.

Reading cl 11(A) and (E) together, it is clear that not only is a proposed transfer of QL shares to an associated company permitted, it is also not subject to the pre-emptive right of the other shareholders under cl 11(A)(ii). It is also not in dispute that where a transfer is made pursuant to cl 11(A)(i), cl 11(E) will not be triggered.

At this juncture, it might be appropriate to consider what exactly is the object of cl 11(E). Mr Davinder Singh, counsel for CIIP, submitted that its object was to give CIIP the `right to participate in any and all economic opportunity or benefit that might come to PCRD in connection with the QL shares.` He argued that the clause was not to protect the shareholding of CIIP in QL but to ensure that whatever benefits PCRD was able to obtain from its QL shares, should also be shared and enjoyed by CIIP.

We see at least two obstacles in the way of this argument. First, how can this argument hold when

the clause is only triggered if PCRD should transfer more than 24% of its QL shares to a third party? Clearly, if PCRD should only transfer 23% of the QL shares and obtain benefits in consequence thereof, CIIP would not be entitled to ask for any corresponding participation in those benefits. Second, nowhere in cl 11(E) can one reasonably read that there is implicit in it the idea of sharing of benefits. A plain reading of that clause does not convey that sense to an objective reader.

The setting of the triggering point at 51% suggests to us that CIIP basically wanted an assurance that PCRD would remain in control of QL. We accept the rationale behind the clause was the faith which CIIP had in PCRD and, in turn, the person behind PCRD, Mr Li. It would be noted that we said `basically` because we recognise that under the clause PCRD could transfer so much of the QL shares such that it would no longer be in control of QL, provided that what remains of the number of QL shares held by PCRD are always three-times that held by CIIP. What comes out clearly from the clause is that so long as PCRD is in control of QL, CIIP is not concerned. That explains why even if PCRD should reduce its QL shareholding from 75% to 51%, CIIP did not ask for a corresponding adjustment to its own shareholding. But should PCRD cease to be in control, then what CIIP seeks is really the same ratio of commitment on the part of PCRD in QL. Presumably, the rationale for this is, if PCRD is comfortable with only being a minority shareholder in QL, CIIP would be happy to rely on that judgment, so long as the ratio of commitment in QL between CIIP and PCRD remains the same.

The above premise could be criticised on the ground that PCRD would still be in control if it holds 50.1% of the QL shares. So why 51%? We accept the argument that the parties could have used 50.1% as the triggering point. But they did not. However, looking at the matter objectively, we think it more likely than not that the parties probably took a broad view and adopted whole numbers instead of going into fractions. That must have been the case. Otherwise we cannot imagine any other sensible reason for adopting 51% as the triggering point.

The question that remains is whether, in the circumstances of this case, cl 11(E) has been triggered. On this, quite clearly, the fact situation here must be looked at as a whole. What is the substance of the arrangement contemplated by the Acquisition Agreement? On that, the evidence is overwhelming. The facts indisputably show that what was carried out was a restructuring of the business of PCRD and its parent company, PCG. This was clearly described in the circular letter issued by PCRD to its shareholders (quoted in [para]7 above). When the QL shares were transferred by PCRD to Newco, the latter was a subsidiary of PCRD. There was no further transfer of the QL shares from Newco to Tricom. And when the Newco shares issued to PCRD were transferred by PCRD to Tricom it was done concurrently on the day Tricom became a subsidiary of PCRD. What we must emphasise is that everything was arranged by PCRD and/or Mr Li. They initiated and directed all that took place.

The judge below seems to have taken the view that, through the Acquisition Agreement, Tricom became the legal owners of PCRD`s shares in QL. This appears from the following passages of his judgment:

> *In the present case, there was no dispute that the defendants and Tricom came to an agreement where* ***there was a transfer of the defendants` shares in Quinliven to Tricom*** *in return for shares and convertible bonds in Tricom. In other words, there must have been an actual or notional offer made by Tricom to acquire the defendants` shares. [Emphasis is added.]*

This was, of course, not the case.

Counsel for CIIP further sought to booster the point by submitting that for all material purposes, the

substance of the acquisition was that PCRD shares in QL have been acquired by Tricom. Newco was just a vehicle.

But the difficulty with this submission is that the QL shares held by PCRD were transferred not to Tricom but to Newco and they were not transferred further to Tricom. We recognise that in a loose layman sense, one can say that the benefits of the QL shares have been passed on to Tricom. That is all that can be said. But multi-tier corporate structure is an arrangement sanctioned under the Companies Act. One does not unravel the corporate structure each time an issue arises as that would undermine the very foundation of business arrangements. Corporate structure must be maintained unless there are compelling reasons why the corporate veil should be pierced. No grounds have been advanced as to why such a lifting of the corporate veil should be done here, and on our part, we can perceive none. We do not see anything unconscionable or unreasonable in the entire arrangement worked out by PCRD.

Was there an offer from a third party

In the light of what is discussed above, clearly neither Newco nor Tricom could be considered to be a third party. As mentioned before, at the time the QL shares were transferred to Newco, the latter was a subsidiary of PCRD. And when the shares in Newco held by PCRD were transferred to Tricom the latter had also simultaneously become a subsidiary of PCRD.

The approach advocated by CIIP, and which was accepted by the learned judge below, is that the critical date to determine whether cl 11(A)(i) applies or cl 11(E) applies was the date of the Acquisition Agreement, 30 April 1999. As on that date, neither Newco nor Tricom was a subsidiary of PCRD, cl 11(A)(i) could not apply and only cl 11(E) does. But the problem with this approach is that it is not consistent with a plain reading of cl 11(A)(i). The words there are `no transfer of any shares shall be made by the shareholder unless the transferee is an associated company.` So it is the date of transfer which is determinative. It is the moment of the transfer which is decisive in determining whether the transferee is an associated company.

There is furthermore another difficulty in the way of CIIP`s contention. It would be noted that Newco was not a party to the Acquisition Agreement. So the date 30 April 1999 could have no relevance to Newco. So how could it be contended that on that date there was an offer from Newco to acquire the QL shares from PCRD?

Turning next to the question of the form in which an offer could be made, we accept that it could come not only by way of a conventional letter, but also in some other manner. There could be a notional offer or it could be inferred. Bearing in mind that it is substance and not form that we should be concerned with, can it truly be said that there was a notional offer even from Newco for the QL shares? Far less can it be said with regard to Tricom. In the circumstances of this case, to say that there was such an offer from either Newco or Tricom for the QL shares would be extremely strained.

In our opinion the correct approach to determine the true nature of the entire arrangement is not to examine each transaction in isolation but to view them as a whole. It was clearly a restructuring exercise, involving the acquiring of two companies, Newco and Tricom, one of which is a listed company, and both companies were to be subsidiaries of PCRD and PCG. The ultimate object of the exercise was to obtain a `back door` listing on the Hong Kong Stock Exchange. There was no real offer from any party for the QL shares held by PCRD. PCRD and PCG (ultimately the person in control of both companies, Mr Li) had orchestrated everything to attain the ultimate objective. None of the original businesses of Tricom were continued after PCRD took over Tricom. New businesses were

introduced into Tricom. This comes out clearly from the affidavit of evidence-in-chief of Mr Peter Allen, the Chief Financial Officer of PCRD:

> *In early 1999, the Defendants decided to restructure their operations. It was decided that the Pacific Century Group would acquire a listed company in Hong Kong for purposes of this restructuring.*
>
> *The plan was that the listed company would become a subsidiary of the Defendants and the Defendants would run some of their businesses through the listed company, by way of acquiring the listed company and injecting the Defendants` businesses into the listed company.*

The intention also appears from the circular which PCRD sent to its shareholders explaining the rationale for acquiring Tricom:

> *The proposed Acquisition will provide PCRD with control of Tricom, which is listed in Hong Kong and hence an additional access route to the capital markets.*
>
> *It is the intention of PCRD and PCG that the Tricom Group will continue to be engaged in telecommunications and will also engage in property investment and development in Hong Kong and the PRC immediately following Completion ... It is intended that Tricom will become the listed flagship of PCRD and PCG in Hong Kong ... It is proposed by the directors of PCRD and PCG that the name of Tricom be changed to Pacific Century CyberWorks Limited on completion of the Proposal to reflect the introduction of new management.*

We agree with Mr Shanmugam that what we should be looking at are (i) what was the scheme underlying the Acquisition Agreement, (ii) the result which was intended to flow therefrom, and (iii) what in fact transpired. There was no offer in any real sense by any third party to acquire PCRD`s shares in QL. PCRD had not sold the QL shares to any third party. What had happened was the transfer by PCRD of its QL shares to an associated company, Newco. This was only one component of an overall restructuring exercise of the businesses of PCRD and PCG.

In CIIP`s submission to counter the construction placed upon cl 11(A)(i) and cl 11(E), it has engaged in speculation and hypothesis, asking what would happen if this or that should occur. The fact that the consequences of certain eventualities are not provided for in the Shareholders` Agreement does not mean that what is provided for should not be given effect to. CIIP contended that if PCRD`s position is correct, what would happen if Tricom or Newco should subsequently cease to be an associated company? But this question can also arise even in a straightforward situation where PCRD merely transfers its QL shares to a subsidiary simpliciter. What happens if that subsidiary should later cease to be a subsidiary? Would CIIP thus be left without a recourse? These are questions which have to be addressed if they should arise, taking into account the circumstances. But the fact that the Agreement does not provide the answers, or there are no obvious and ready answers to those questions, does not mean that a transfer of the QL shares to a subsidiary would not therefore be permitted or would instead trigger cl 11(E). The answers to those questions might well have to invoke the doctrine of implied terms. We need say no more.

Clause 19(A)

We now turn to consider cl 19(A) which, on the face of it seems to be inconsistent with cl 11(A)(i). Under cl 11(A)(i), it is provided that `the obligations of the transferor under this Agreement shall remain unaffected by such transfer.` However, cl 19A provides that `if any shareholder shall transfer the entirety of its shares, it shall be released from its obligations under this Agreement.`

We would, at the outset, state that even if the inconsistency cannot be reconciled, it does not follow that a transfer of shares which is clearly to an associated company would cease thereby to be such a transfer, or would instead trigger the application of cl 11(E). The fact that there is constructional difficulty between the two clauses cannot alter the essential nature of such a transfer. Therefore, in relation to the present matter, as we have, for the reasons given, held that what was involved was a restructuring exercise and that the transfer of the QL shares to Newco comes within cl 11(A)(i), the difficulties in reconciling part of cl 11(A)(i) with cl 19 cannot transform the transfer into one which is affected by cl 11(E).

In view of what we have just stated, there is really no need for us to attempt a reconciliation of the apparent inconsistency, but we will do so briefly, as the learned judge below had dealt with it and the parties hereto have also submitted thereon. There are, at least, two possible ways of reconciling the two provisions. First, is to say that under cl 11(A)(i) the transferor may not transfer all the shares it holds to an associated company. On this interpretation, it would mean that the transferor should, at least, retain one share. Here, we would note that there are no such restrictive words in cl 11(A)(i) and there does not appear to be any logic in requiring the transferor to hold onto one share. Second, is to recognise that this apparent inconsistency arose from an oversight in drafting. Bearing in mind the object of the Shareholders` Agreement, which is to ensure the commitment of PCRD to QL, and in turn to the project, it makes commercial sense to continue to bind PCRD to the Agreement notwithstanding the transfer of its shares to an associated company. We are inclined to favour this approach, and to construe cl 19(A) as being subject to cl 11(A)(i).

But even if the first approach is the correct one to adopt, namely, that the transferor may transfer all shares except one, the fact that the transferor does transfer all the shares it holds in QL does not mean that in consequence cl 11(E) would be triggered. The transferor may be in breach, but certainly not of cl 11(E). The remedy may well be to require the transferor to have the re-transfer of one share back to itself.

Clause 11(B)(i)

Finally, we turn to consider cl 11(B)(i) (which has been set out in [para]9 above) where two points would appear to arise for consideration. The first concerns the opening words `the transferor`. Mr Davinder Singh for CIIP submitted that there was a typographic error there and that the word `transferor` should be read as `transferee`. The learned judge below accepted this view. So do we. To read it as the `transferor` would make no sense as the transferor would already have been bound by the Agreement. Why would there be a need for the transferor to execute a `deed of ratification and accession` to state that `the transferee shall agree to be bound?` It is clearly a mistake. It should be the `transferee`.

The second point is this. Clause 11(B)(i) states that it shall be a condition precedent to the right of any shareholder to transfer any share that the transferee executes a deed of ratification and accession to be bound by the Agreement. No such deed was executed by the transferee, Newco. So there was a breach. The QL shares should not have been transferred to Newco without the latter having executed the deed. In this regard we note that cl 13(A) of the Shareholders` Agreement provides:

> *Where a Shareholder fails to perform its obligations hereunder or to comply with the terms and conditions of this Agreement (the `Defaulter`), any of the other Shareholders shall be at liberty to issue to the Defaulter a notice (the `Default Notice`) specifying the breach or default and stipulating, unless specific provisions for such time are contained in this Agreement, a reasonable period of time in the circumstances during which such breach or default shall be remedied or steps taken in pursuance thereof.*

If cl 13(A) applies to the present breach, then CIIP would be entitled to give notice to PCRD requiring the latter to ensure that Newco should now remedy the default. On the other hand, if cl 13(A) is considered not applicable to such a default, it seems to us that CIIP may be entitled to insist that status quo ante be maintained, namely, that the QL shares be restored to PCRD. Perhaps, there could also be other remedies. Whatever may be the appropriate remedy for the default, we would reiterate what we have opined in [para]47 above that such non-compliance does not thereby convert the transfer into one affected by cl 11(E), as there is no question of the purported transfer being made to a third party.

Judgment

Following from the above, while PCRD would not be entitled to transfer the QL shares to Newco since Newco has not fulfilled the condition precedent specified in cl 11(B)(i) and for that breach CIIP would be entitled to an appropriate remedy as discussed above, the claim of CIIP in the present action is not for reliefs in respect of a breach of cl 11(B)(i) but for damages in respect of a breach of cl 11(E). On that claim, CIIP must fail.

In the result, we would allow the appeal with costs here and below and set aside the judgment and dismiss the claim of CIIP. The security for costs (with any accrued interest) shall be refunded to PCRD or its solicitors.

Outcome:

Order accordingly.