Cendekia Candranegara Tjiang v Yin Kum Choy and Others
[2002] SGHC 136

Case Number : Suit 198/2001

Decision Date : 30 June 2002

Tribunal/Court : High Court

Coram : MPH Rubin J

Counsel Name(s) : Shriniwas Rai and Arumugam Ravi (Hin Rai & Tan) for the plaintiff; Nazim Khan (Chan Ng Aqbal) for the first defendant

Parties : Cendekia Candranegara Tjiang — Yin Kum Choy

Companies – Winding up – Judicial manager – Judicial manager performing other roles for other defendants – Role of judicial manager – Whether conflict of interest – Legal standing and authority of judicial manager to pursue counterclaim after revocation of appointment and appointment of liquidators – s 272(2) Companies Act (Cap 50, 1994 Ed)

Contract – Formation – Signing of Memorandum of Understanding between parties – Clause in MOU requiring signing of further agreements between parties – Nature of MOU – Certainty of MOUÂ's terms and conditions – Whether MOU conclusive in scope and constituting a binding agreement – Whether plaintiff's counter-proposals constitute repudiation – Whether plaintiff personally liable for certain expenses relating to proposed deal – Whether plaintiff responsible for deal's collapse so as to preclude recovery of earnest money

Words and Phrases – "Earnest money"

Judgment

GROUNDS OF DECISION

Introductory

1 The plaintiff, an Indonesian businessman, a prospective investor in a Singapore company known as Yuan Guang Building Materials Pte Ltd ('the company') which was under judicial management since 18 February 1999, brought this action against the judicial manager, the first defendant herein, seeking the refund of a sum of $462,800, paid by him as earnest money as well as deposit to the first defendant. The plaintiff's allegation was that the Memorandum of Understanding ('MOU') entered into between them in relation to the purchase of the assets of the company was not binding, on account of its inherent uncertainty as well as due to problems encountered in relation to a host of new terms and conditions introduced in the eight formal agreements forwarded to the plaintiff for his signature, many months after the signing of the said MOU.

2 The defence of the first defendant was that the said MOU constituted a binding agreement; the execution of the eight formal agreements was but a mere formality and that all the essential or fundamental terms of the agreement between the parties had been incorporated in the MOU. For his part, the first defendant counterclaimed against the plaintiff for $596,817.81, as being rentals and other outgoings owing from the plaintiff arising from the operation of a new company ('Newco'), set up to implement the terms of the agreement reached between the parties.

3 In a nutshell, the principal issue to be decided in this case was whether the MOU entered into between the parties on 10 November 1999 was a binding final agreement. At the heart of the issue was cl 2 of the MOU which stipulates that: *"[T]he investor [i.e., the plaintiff] shall enter into the relevant agreements (the "contracts") with the JM [judicial manager] and with the directors of the respective company in the Group [.e., YGBM and its associated companies, named in the MOU], which terms and conditions will be agreed upon at a later date"*.

4 Another issue that was equally crucial concerned the status and authority of the first defendant in continuing to prosecute the set-off and counterclaim on behalf of the company even after the termination of his appointment as the judicial manager consequent upon the winding-up of the company by the court on 6 April 2001. The action herein was commenced by the plaintiff on 21 February 2001 against

him as the judicial manager of the company. The first defendant filed his defence and counterclaim as the company's judicial manager on 29 March 2001. The company was wound up on 6 April 2001 and three persons other than the first defendant were appointed by the court as the company's liquidators. The first defendant, despite an unambiguous statement from the solicitors for the liquidators, that he had no authority to continue with the action on behalf of the company, still persisted and would not let go his hold of the proceedings. The ensuing question therefore, was whether under the law the first defendant had any legal standing to continue with any claim on behalf of the company.

5 The allegations and counter-allegations of the parties by and large swirled around the inter-actions between the plaintiff and the judicial manager as well as a reported fall-out between the plaintiff and two of the company's directors, Kwan Yew Choong ('KYC') and Kwan Fatt Cheong ('KFC'), called jointly as the Kwan brothers, the second and third defendants respectively in this action. They did not appear at the trial; nor were they called to give evidence at the hearing although the roles played by them in the transaction were no less significant to the defence. Another material feature in this case was that the first defendant, in addition to being the judicial manager of the company was at all material times, representing the interests of the second and third defendants as their nominees, as declared by him in the MOU. The court was told that the action against the second and third defendants had been discontinued following an agreement between the parties that the two of them would abide by the decision of the court in this action. Consequently, after hearing evidence and arguments on behalf of the plaintiff and the first defendant, and having regard to the *locus standi* of the first defendant when he ceased to be the judicial manager of the company the court handed down a decision in favour of the plaintiff and dismissed the first defendant's counterclaim. The facts which gave rise to this action and the reasons for the court's decision are set out below.

Evidence

6 The plaintiff's evidence was to the following effect. He is in his forties, educated in Bahasa Indonesia, and is engaged in a business in Surabaya, Indonesia dealing with glass and furniture. He had known the Kwan brothers, directors of the company for more than 10 years. Sometime in September 1999, KFC, the third defendant approached the plaintiff and told him that his company had not been doing well and that he was looking for a buyer for the company. KFC suggested that the plaintiff speak with the company's judicial manager to enquire if the latter was interested. As a result, the plaintiff visited Singapore in September 1999 and met with KFC and subsequently the first defendant. It might perhaps be helpful at this stage to reproduce paras 3 to 15 of the plaintiff's affidavit of evidence-in-chief to fully appreciate the background which led to the present dispute. They are as follows:

> 3. I visited Singapore in September 1999 and met with the 3rd Defendant. He explained that the company was facing difficulties, and was presently under the supervision of the 1st Defendant.
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> 4. The 3rd Defendant requested that we assist him by taking over the Company at the price of about S$4 million and a personal debt of S$600,000.00. The 3rd Defendant promised that the 1st Defendant would have to be consulted.
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> 5. The 3rd Defendant informed me that if the deal went through the 1st Defendant would then help me find a Bank to finance the amount of S$3 million and the remainder of S$1.6 million were to be funded by me. With these funds I could assist to save him and his families and his brother and his families from bankruptcy.
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> 6. The 3rd Defendant also told me that the sale of the company and its related companies will also include trade marks and goodwill.
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> 7. The 3rd Defendant then arranged a meeting with the 1st Defendant. The 1st Defendant said no contract could be entered outright, he preferred the Memorandum of Understanding and later we would have several Agreements to embody the terms.

8. The 1st Defendant said I have to pay earnest money which would be 10% of the purchase price. He also told me that this money would be safe. It can earn interest on the 10%. If the parties enter into a formal contract this would become part of the purchase price. I believe what he said.

9. I did not consult any lawyers as I felt that this was a preliminary understanding and with the advice of my solicitors, the formal agreements would be properly studied concluded and executed in December 1999. The Memorandum of Understanding was signed on 10th November 1999. A photocopy of the same is annexed and marked "CCT 2".

10. The 1st Defendant told me that in order to facilitate, I would have to form a new company which will eventually take over the business of the company. As time was running short, he wanted this company to be incorporated as he expected the Agreement for the sale of the company to be reached by December 1999.

11. The 1st Defendant said that a Company need to be incorporated with a $2.00 paid up capital and later the capital would be enlarged.

12. I agreed to pay the necessary fee for the registration of the Company and the Company known as IS Glass Pte Ltd was incorporated with a paid-up capital of $2.00.

13. However, no Agreements were prepared by December 1999 and the Draft Agreements were only sent to me in April 2000. I then consulted my present solicitors, Messrs. Hin Rai & Tan. My solicitors and I had a meeting with the 1st Defendant together with the 2nd and 3rd Defendants.

14. I as the Plaintiff has to consider the following terms:-

a) The fact that the Company was under Judicial Management, the usual complexities in matters like finance, management, employees and operation problems arise. The Company has also claims by many creditors, some of them are banks with substantial loan.

b) The taking over of Company as a going concern and thus many detailed aspects of the business operation have to be looked into, such as checking and verification of stock, materials, finished products, plants, machinery, equipments, accounts, statutory documents, taxation, litigation matters, employees, sales data and forecasts, creditors and debtors lists, customers lists, etc.

c) In short, a very thorough due diligence needs to be done before a decision can be made as to whether or not the Plaintiff would like to proceed with the purchase.

> 15. In January 2000, the 3rd Defendant and I went to Europe to explore the market but before we can finish the task, the 3rd Defendant returned to Singapore. He wanted higher salary but I was not prepared. The salary of the 2nd and 3rd Defendants was fixed at S$5,00.00 per month and I was surprised that they were asking for higher salary. When I did not agree, he became very upset and in fact asked me not to proceed with the sale and he would search for a new investor. Then in April 2000, the 3rd Defendant approached me again. The 3rd Defendant informed me that he cannot get a purchaser for the Company.

7 The plaintiff commented on the various clauses in the draft agreements forwarded to him and found them to be unacceptable. According to him, some of them were not in accord with the terms found in the memorandum; some were totally new and plainly one-sided to safeguard the interests of the Kwan brothers. Having found them unacceptable, he consulted his solicitors and hence the present action. In the main, he claimed that the MOU he signed was only a preliminary document; it did not contain all the terms; and that the parties had to work out and agree on the terms of the subsequent agreements envisaged in the said MOU. He complained that the time schedule prescribed in the MOU, in relation to the preparation and execution of the formal agreements was not complied with by the first defendant for several months. This was due to the laxity of the first defendant and his legal advisers.

8 Amplifying the dispute he had with KFC in relation to KFC's remuneration, he said (page 294 of the NE) that KFC had told him over the phone that if the latter was not offered $12,000 a month ($7,000 over the sum of $5,000 per month stipulated in the MOU), KFC wanted the plaintiff to withdraw from the deal and that KFC would get someone else to buy the company. According to the plaintiff, the problem he was facing with the Kwan brothers was discussed by the parties at a meeting held on 26 February 2000 at the Grand Plaza Hotel at Coleman Street, Singapore, where he, the Kwan brothers, the first defendant and his manager Ramasamy were present. He said that at that meeting the Kwan brothers wanted one month to look for another investor (see the evidence of the first defendant at pages 777 and 882 of the NE). The plaintiff made it plain that he was not running away from the deal and in this regard he made reference to his solicitors' letter dated 11 August 2000. In that letter his solicitors set out the plaintiff's counter-proposals in response to the numerous complex and some altogether new terms appearing in the eight draft agreements forwarded to the plaintiff by the first defendant or their solicitors between 19 April and 26 July 2000 (see AB-693 and AB-744), although the said agreements were required to be executed by 1 December 1999 under the MOU. Another aspect which emerged during the testimony of the plaintiff was that he did not visit Singapore nor did he attempt to participate in the affairs of Newco since his fall-out with the Kwan brothers from about 26 February 2000. He confirmed however that the Kwan brothers, the first defendant and his manager Ramasamy met him at the Changi Airport on 8 April 2000 in relation to the deal which was under strain.

9 Before dealing with the evidence adduced on behalf of the first defendant, reference ought to be made to the MOU around which the whole action revolved. The said MOU, insofar as is material, reads as follows:

> **Memorandum Of Understanding**
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> This Memorandum of Understanding ("MOU") is dated the 10th day of November 1999 and entered among:
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> 1. Mr Cendekia Candranegara Tjiang ("the Investor") of Jl Dukuh Kupang Komp, Bintang Diponggo Kav. 833, Surabaya 60256, Indonesia, holder of Indonesian Passport No. H 304263.
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> 2. Mr Yin Kum Choy, the Judicial Manager ("the JIM") of Yuan Guang Building Materials Pte Ltd ("YGBM"), who is also the Special Accountant of Yuan Guang Safety Glass Pte Ltd ("YGSG"), Quarz Trading ("QT") and Quarz Trading Pte Ltd ("QTPL").

3. Mr Kuan Yew Choong ("KYC") and Mr Kwan Fatt Cheong ("KFC"), the directors and shareholders of YGBM and directors of YGSG.

4. Ms Ho Choy Lun ("HCL") and Ms Tjhan Soei Ngan ("TSN"), the directors and shareholders QTPL and partners of QT, who are also the respective spouses of KYC and KFC.

Whereas

1. YGBM, YGSG, QTPL and QT (collectively referred to herein as "the Group") are companies incorporated in Singapore with their registered offices at 10 Tuas Crescent Singapore 638704. QT is a partnership registered as a partnership in Singapore.

2. The Investor is interested to buy:

(a) the land and building of YGBM which is mortgaged with Four Seas Bank, a member of Overseas-Chinese Banking Corporation Group.

(b) the laminating machine line of equipment and related accessories of YGBM which are financed with OUT Ltd, Maybank Finance and DBS Finance.

(c) the tempering machine line of equipment and related accessories of QTPL which are financed through Sembawang Capital Pte Ltd.

(d) the double glazing line of equipment and related accessories of QT which are financed with UOB Ltd.

(e) the uncharged assets of YGBM.

(f) all the trademark and trade name in the Group and more particularly the trademark and trade name "Yuan Guang".

(collectively referred to a "Assets") from the respective companies and/or financial institutions which may claim title and/or who have an interest in the above-said Assets. The details of the Assets are set out in Appendix 1 of this MOU.

3. The Investor besides having an interest to acquire the Assets is also interested in employing certain of the personnel currently employed in the Group.

4. The Investor is also desirous of retaining one or more names of the companies in the Group for the purpose of the operations to continue under a company to be incorporated (the "Newco").

5. The Investor is interested to buy the Assets for a total consideration of S$4,028,000 ("the Consideration"), excluding GST, subject to terms and conditions herein stated.

6. The sellers for each of the Assets being the respective company in the Group having title to the Assets are agreeable in selling the Assets subject to obtaining the requisite consent from the respective financial institution ("the Secured Creditor") and the Court, where necessary.

7. The Investor is also desirous of retaining KYC and KFC as directors and shareholders of the Newco to manage the affairs, business and properties of the Newco and in this connection is willing to earmark an approximate sum of $600,000 ("the VA sum") to facilitate the entire payment of composition amounts under the voluntary arrangements of KYC, KFC, HCL and TSN.

8. The Investor, in consideration of KYC and KFC participating as directors and shareholders of the Newco, proposes to enter into a shareholder agreement with KYC and KFC the terms of shareholding, profit-sharing and remuneration to be agreed upon between KYC and KFC and the Investor.

9. KYC, KFC, HCL and TSN are currently negotiating with their personal creditors for a composition of the amount owed to these creditors. KYC, KFC, HCL and TSN are also exposed to several creditors under the various companies in the Group, KYC and KFC have already applied for individual voluntary arrangements under Part V of the Bankruptcy Act. HCL and TSN are seeking a similar voluntary arrangement on an informal basis with their respective creditors.

The Investor, The Jm, Kyc, Kfc, Hcl And Tsn Agree As Follows:

1. The Investor shall through the Newco acquire the Assets for the Consideration subject to written approval being received from each Secured Creditor to be paid for each of the Assets out of the Consideration and the Court, where necessary. A schedule of the tentative amount to be paid to each of the Secured Creditor is set out in Appendix II of this MOU.

2. The Investor shall enter into the relevant agreements (the "Contracts") with the JM and with the directors of the respective company in the Group which terms and conditions will be agreed upon at a later date.

3. The Consideration shall be paid as follows:

(a) 10% (or $402,800) to be paid to the JM as earnest money within 2 weeks from the signing of the MOU.

(b) 20% (or $805,600) to be paid to the JM upon signing of the Contracts.

(c) The remaining 70% and the respective GST to be paid within 4 weeks from the signing of the Contracts. The Investor shall with the assistance of the JM negotiate with each of the Secured Creditor as to the financing arrangement for this 70%

and/or alternatively endeavour on his own to procure such financing facility from his existing banker.

4. The Investor shall pay for the VA sum as follows:

(a) 10% (or $60,000) to be paid to the JM, acting as the Nominee of KFC and KYC and nominated person to administer the informal voluntary arrangement for HCL and TSN, within 2 weeks from the signing of the MOU.

(b) 20% (or $120,000) to be paid to the JM upon signing of the Contracts.

(c) the remaining 70% to be paid within 4 weeks from the signing of the Contracts and in any case shall be paid no later than 24th December 1999.

5. The Investor shall arrange to incorporate the Newco to commence operation with effect from 1st December 1999.

6. The Investor shall transfer the employment of all necessary personnel for the Newco with effect from 1st December 1999.

7. The Investor shall pay such rates and fees to the respective companies in the Group for the use of the Assets with effect from 1st December 1999 until the day when title to all such assets is transferred to the Newco should transfer of title for such Assets be delayed beyond 1st December 1999.

8. The Investor under the Newco shall apply to open such accounts as PUB, Telecom accounts and the like to be operated effective from 1st December 1999.

9. The JM, KYC, KFC, HCL and TSN shall endeavour to assist the Investor as regards to the matters referred in Para 5 to 8 in connection with the Newco operating effectively with effect from 1st December 1999 provided the Contracts are signed before 1st December 1999.

10. The JM shall procure the written agreement of the Secured Creditors as to the tentative amount to be paid to each of the Secured Creditor as set out in Appendix II of this agreement.

11. The JM, who is also the Nominee of KYC and KFC under their respective voluntary arrangements and the nominated person to handle the informal voluntary arrangements of HCL and TSN, shall procure the written agreement of each of the secured creditors to agree to approve the composition amounts proposed by KYC, KFC, HCL and TSN to be paid to each of the Secured Creditors under the respective voluntary arrangements, both formal and informal.

12. KYC and KFC shall enter into a binding shareholder agreement with the Investor under the Newco before 1st December 1999 on the following salient terms and conditions:

(a) The shareholding in Newco will be in the proportion of 70% in favour of the Investor, 15% in favour of KYC and 15% in favour of KFC.

(b) KYC and KFC shall be entitled to increase their respective shareholdings in the Newco to a maximum of 50% (25% in favour of KYC and 25% in favour of KFC) from the initial shareholding of 30%.

(c) The Consideration to be paid by the Investor shall be divided under the Newco into a paid-up

capital of S$1 million and the remaining S$3 million (save for such part thereof which is to be financed by new financial institutions under the Newco) treated as a loan by the Investor to the Newco. The Investor shall be entitled to charge the assets of the Newco as are deemed necessary to secure such amounts advanced by the Investor. The Newco shall enter into such agreements with the Investor as are necessary as regards to the repayment to the Investor of the S$3 million loan as well as how the assets of the Newco may be charged for this S$3 million loan.

(d) 30% of the paid-up capital ("30% shares") of the Newco which is paid for by the Investor pursuant to (c) above shall be treated as an amount paid for by the Investor on behalf of KYC and KFC pursuant to the shares that KYC and KFC is entitled to pursuant to (a) above. The 30% shares shall be issued in the respective names of KYC and KFC and shall be pledged to the Investor and shall remain so pledged as security until such time when these shares are paid for pursuant to k (i) below.

(e) KYC and KFC and the Investor shall be

entitled by virtue of their respective shareholdings to share the net profit after tax ("NPAT") on the basis of their respective shareholding for all NPAT recorded for each financial year.

(f) KYC and KFC shall together (individually 5%) be entitled to a bonus ("Bonus") of 10% of the profit before tax before the NPAT is shared pursuant to clause (e) above.

(g) KFC and KYC shall each be entitled to the Bonus commencing from the financial year 2001 inclusive (1st January to 31st December). KYC and KFC shall not be entitled to any Bonus for the year 2000, being the first year of operation of the Newco.

(h) KYC and KFC shall be entitled to a monthly remuneration of $5,000 each, subject to be changes upon mutual written agreement with the Investor.

(i) KYC and KFC, and HCL and TSN shall be indebted jointly and severally to the Investor for the estimated amount of $600,000 to be advanced by the Investor in his personal capacity towards the VA sum expected to be paid under the respective voluntary arrangements, both formal and informal

of KYC, KFC, HCL and TSN.

(j) The Investor shall also be entitled to debit the current accounts of KYC and KFC in the books of the Newco for the indebtedness of $600,000 arising from the respective voluntary arrangements, both formal and informal of KYC, KFC, and TSN.

(k) KYC and KFC's entitlements to dividends (computed pursuant to (e) above) would be utilised in the following order of priority:

(i) To pay the Investor and/or credit the account of the Investor in the books of the Newco towards the indebtedness of KYC and KFC for the 30% shares

stated in (d) above.

(ii) To credit their respective current accounts towards the amount of $6000,000 to be advanced by the Investor towards the VA sum expected to be paid under the respective voluntary arrangements, both formal and informal of KYC, KFC, HCL and TSN.

(iii) To pay to

KFC and KYC in cash any excess remaining after (i) and (ii) above are credited, provided both the cash position and future cash flow position of the Newco permit such cash payments.

(l) Both KYC and KFC shall agree to work diligently with the JM who will be supervising and monitoring the activities of the Newco on behalf of the Investor at a professional fee to be agreed under the Newco.

13. All parties shall agree to bear their respective share of all legal and other costs in undertaking their obligation under the MOU and the Contract.

14. Both the Investor on the one part and KYC and KFC on ther other part including their agents shall undertake to keep all matters relating to all terms of

this MOU strictly confidential and shall not disclose any information obtained under or pursuant to this MOU to any third party.

15. The JM who is also the Nominee, shall, however, be entitled to disclose to any third party, as he may deem necessary, all matters relating to all terms of this MOU and any information obtained under or pursuant to this MOU.

16. All parties undertake to do all things within its power which are necessary or desirable to give full effect to the spirit and intent of this MOU.

17. The 10% earnest money (referred to in 3(a) above) deposited with the JM shall not be refundable should the Investor decide not to sign the Contracts and no further action shall be taken against the JM by the Investor to recover this 10% earnest money. The 10% earnest money, forfeited in such an instant, shall be deemed to be an amount the JM is entitled to in consideration of the JM not considering the other offers received by the JM for the Assets of the Company.

18. This MOU is subject to the requisite consent and/or approval of the Secured Creditors of the Group and the Court, where necessary. In the event the Secured Creditors of the Group and/or the Court fail t o provide such requisite consent and/or approval, where necessary, to the Contracts and any agreements that may be executed pursuant to this MOU, the parties shall not be liable to any party to this MOU.

19. Any dispute(s) arising out of or in connection with this MOU including any question regarding its existence, validity or termination shall be governed by the laws of the Republic of Singapore and parties shall submit to the jurisdiction of the Courts of the Republic of Singapore.

[Signed by parties]

10 The evidence of the first defendant was to the following effect. He was appointed initially the interim judicial manager of the company by an order of court dated 5 October 1998 and later as its judicial manager by a later court order dated 18 February 1999. Besides being the judicial manager of YGBM, he was as from 16 October 1998, the special accountant of Quarz Trading ('QT'), Quarz Trading (Singapore) Pte Ltd ('QTSPL') and Yuan Guang Safety Glass Pte Ltd ('YGSG'), being companies related to YGBM, either through common shareholdings or through common management control exercised by persons related to the directors of the company. Both the Kwan brothers, KYC and KFC are directors and shareholders of the company. They are also the directors of YGSG, a subsidiary of the company. The respective wives of KYC and KFC, Ho Choy Lun ('HCL') and Tjhan Soei Ngan ('TSN') are directors and shareholders of QTSPL. HCL and TSN are also partners of QT. The first defendant was also the personal adviser of KYC , KFC and their respective wives.

11 It would appear from the account narrated by the first defendant that his appointment as special accountant and personal adviser to the Kwan family and their business ventures was through private arrangement between him and the Kwan family. There was more to come. Sometime between June 1999 and September 1999, owing to demands made by several creditors against KYC and KFC, both KYC and KFC had applied for a voluntary arrangement under the provisions of the Bankruptcy Act (Cap 20) and in the event the first defendant was appointed as their Nominees on 24 June 1999 and 6 September 1999 respectively. The reasons why he accepted appointment as nominee of KYC and KFC appear from paras 20 to 24 of his first affidavit of evidence-in-chief and they read as follows:

> 20. I accepted appointment as Nominees of KYC and KFC for various reasons. The majority of debts owed by both KYC and KFC and their respective spouses primarily arose from guarantees extended by them for loans and advances made by these creditors to companies in the Group. I therefore essentially had to deal with the same creditors. Further, both KYC and KFC were essential to me to assist me with the judicial management administration of the Company. They were crucial elements to the overall plan contemplated under the judicial management administration of the Company to rescue and recover the Company which was inextricably linked to other companies in the Group. In addition, the composition sums if any that were to be paid to the personal creditors of both KYC and KFC under their respective voluntary arrangements were substantially meant to advance the recovery to the secured creditors of the Group.
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> 21. Besides attending to the various operational and financial issues of the companies in the Group, I was also actively seeking to locate investors interested in either acquiring an interest to participate into the Group or to buy outright the assets and operations of the Group and to possibly involve KYC and KFC in subsequent operations. The participation of a potential investor was essential if any possible recovery for the creditors of the Group was to be considered.
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> 22. Based on my initial review of the Group, it was evident to me that the Group was insolvent. The estimated realisable value of the assets available for distribution to the unsecured creditors was negligible.
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> It was also evident, and I have also reported to both the Court and the secured creditors of the Group, that the turnover of the Group barely sustained the operations, let along meet any interest payments or principal repayments to the secured creditors of the Group.
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> There was therefore agreement among the secured creditors of the Group to continue with the operations of the Group as they were and to maintain the assets of the Group in as intact a manner as possible until a potential investor could be located to acquire all the assets of the Group as a single on-going package. There was agreement among the secured creditors that this strategy/approach of a rescue/recovery plan would maximise the realisable values of the assets of the Group.
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> 23. The secured creditors ("Secured Creditors") of the Group are:
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> a. OCBC Finance Ltd (Four Seas Bank Ltd) (for exposure under the Company)
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> b. Overseas Union Trust Ltd (for exposure under the Company)

c. United Overseas Bank Ltd (Far Eastern Bank Ltd) (for exposure under QT)

d. DBS Finance Ltd (for exposure under the Company)

e. Maybank Finance Ltd (for exposure under the Company)

f. Sembawang Capital Pte Ltd (for exposure under QTSPL)

24. I have therefore since my appointment as the Judicial Manager of the Company been negotiating with various potential investors, some of whom were introduced by both KYC and KFC.

12 The first defendant, after sketching out his endeavours to obtain the best deal for the company that would please the secured creditors, narrated the circumstances under which he met the plaintiff. He said that the plaintiff was introduced to him by KYC and KFC on 27 August 1999 and he also met him later on 11 September 1999. He said by the end of August 1999, the amount required for the voluntary arrangements of both KYC and KFC was in the region of $250,000 ('VA sum') with further sums to be made available by KYC and KFC to their personal creditors from profits and remuneration to be earned by them from new operations. At about this time, he had also learnt from the company's secured creditors that they were not prepared to consider any offer less than $4 million for the sale of the assets of the company.

13 By noon of 9 November 1999, the first defendant had received two written bids in response to his invitation to bid for the assets of the company. The plaintiff arrived at his office on 9 November 1999 accompanied by KYC and KFC at around 11.45 am. The first defendant then informed the plaintiff that if he were to consider the plaintiff's bid, 'it would have to be one that maximised the return for the secured creditors of the Group as well as one which catered to the aspects of remuneration, equity and the like relating to both KYC and KFC in the operations of the new company ('Newco') to be established by the investor to absorb the assets and operations of the Group' (see para 60 of his affidavit of evidence-in-chief).

14 As it transpired, the first defendant found the bid of the plaintiff more favourable than the two bids he had received in terms of price as well as the interests of various interested parties. He then advised that he would proceed to draw up the MOU for signing. In the event, on 10 November 1999, the MOU was signed by the plaintiff KYC, KFC and himself at his office. Copies of the signed MOU were then handed to KYC and KFC to procure the signatures of their respective spouses. They were duly signed later and consequently he instructed his then solicitors, David Lim and Partners to prepare all requisite contracts and agreements relating to the said MOU. In relation to the agreements to be executed by the parties, the first defendant averred in para 118 of his affidavit that on 19 April 2000, his manager Ramasamy handed to the plaintiff the draft of all the agreements that were to be entered into pursuant to the MOU. (This assertion was later retracted, accompanied by a claim that only four draft agreements were in fact handed over to the plaintiff on 19 April 2000, the remaining four being only mirror images of those handed to the plaintiff, were forwarded to the plaintiff's solicitors on 26 July 2000).

15 The first defendant, in outlining the developments since the signing of the MOU, said that his manager Ramasamy and his senior assistant Yap Chee Leong assisted the plaintiff to prepare amongst other things, a cash-flow report in relation to the company financial information including forecast for the Newco, the personal and business profile of the plaintiff and other details in order for the plaintiff to procure suitable banking facilities. The first defendant added that sometime in mid-November 1999, the plaintiff along with KYC and KFC instructed his associate company, Yin Services Pte Ltd, a corporate secretarial firm, to proceed with the incorporation of the Newco called 'IS Glass Pte Ltd'. He added that the incorporation was promptly done, bank accounts were opened in the name of Newco, and as from 1 December 1999, the plaintiff even remitted monies for Newco. (The supporting documents produced at the trial revealed that the plaintiff was not the registered shareholder of Newco, although he was one of the authorised signatories to the bank account together with the Kwan brothers, the first defendant and his manager Ramasamy).

16 The first defendant testified that although the MOU was signed on 10 December 1999, the 10% deposit/earnest money was not paid until 29 December 1999. As regards developments which took place in the course of December 1999 and February 2000, including the unhappy differences between the plaintiff and the Kwan brothers, what the first defendant averred in paras 95 to 113 of his affidavit of evidence-in-chief is as follows:

> 95. Between 8 December 1999 and 24 January 2000, Cendekia had remitted and/or advanced for the account of IS Glass Pte Ltd a sum of about S$300,000. A copy of the ledger account of IS Glass Pte Ltd relating to the account of Cendekia with IS Glass Pte Ltd is annexed herewith and exhibited as "YKC-37". I also refer to the above paragraph 82 and my exhibit "YKC-26" which are to be read together as to the amounts advanced by Cendekia for IS Glass Pte Ltd's operations.
>
> 96. In the meantime, on 5 January 2000, when Cendekia came to Singapore to attend to the secretarial matters of IS Glass Pte Ltd and to meet several bankers as regards the financing sought to fund the acquisition of the Group's assets and operations, a meeting was arranged by me between him and Heller Asia Capital (S) Ltd. This meeting was attended by my manager, Mr Rama.
>
> 97. During his visit to Singapore on 5 January 2000, Cendekia also requested me to assist him to apply for an employment pass for his own representative, one Sandiawati Pangestu, whom he informed me was meant to be the financial controller of IS Glass Pte Ltd and to be stationed in Singapore. Accordingly, I proceeded to assist him in this regard. A copy of the completed application form is annexed herewith and exhibited as "YKC-38".
>
> 98. Sometime in mid-January 2000, Cendekia organised a trip to Europe, Germany in particular. KFC went with Cendekia on this trip and I came to know from Cendekia that the main purpose of this trip was to procure export orders for IS Glass Pte Ltd as forecasted in the Cendekia's Profile which is exhibited at "YKC-16".
>
> 99. In the meantime, since 1 January 2000, IS Glass Pte Ltd proceeded:
>
> > a. to procure both local and export orders in the name of IS Glass Pte Ltd;
> >
> > b. to procure from Indonesian manufacturers float glass both for reprocessing as well as for trading orders (see paragraphs 82 and 95 above);
> >
> > c. to organise transfers of personnel from the various companies in the Group to IS Glass Pte Ltd; and
> >
> > d. to establish new accounts in the name of IS Glass Pte Ltd with local vendors and suppliers including transfer of telephone accounts.
>
> 100. In all my meetings with Cendekia, KYC and KFC in December 1999 and early January 2000, I had cautioned Cendekia, KYC and KFC to the fact that as from 1 January 2000, all costs and expenses of the Group's operations are to be borne by IS Glass Pte Ltd since this became the new operating entity. And that as the

Judicial Manager of the Company, I will seek to recover rent from IS Glass Pte Ltd for the use of the assets of the Group as from 1 January 2000, pursuant to the MOU, and reimbursement of all expenses incurred by the Company and the other companies in the Group.

101. On 1, 3 and 4 February 2000, my manager, Mr Rama, spoke to Cendekia to obtain approvals from Cendekia before certain cheques of IS Glass Pte Ltd were signed by me or Mr Rama to meet payments for certain advances requested by KYC and KFC and for payments to be made in view of the Chinese New Year festivities. Mr Rama also took the opportunity to advise Cendekia to make a visit to Singapore to resolve certain issues like advances and remunerations made to KYC and KFC under IS Glass Pte Ltd.

102. By early February 2000, I had also decided on an amount that the Company intended to charge IS Glass Pte Ltd for the use of the assets of the Company. In consultation with KYC and KFC, I had also arrived at a sum proposed to be charged by QTSPL and QT for the lease of the assets of QTSPL and QT to IS Glass Pte Ltd.

103. By mid-February 2000, I had prepared a first draft of the preliminary accounts of IS Glass Pte Ltd which I forwarded to Heller Asia Capital (S) Ltd on 17 February 2000 in response to their request. This is included at exhibited (sic) "YKC-19".

104. A copy of my letter dated 17 February 2000 to Heller Asia Capital (S) Ltd incorporating the preliminary accounts of IS Glass Pte Ltd was also faxed to Cendekia sometime in mid-February 2000.

105. The JM Order was expiring in February 2000 and I had made an application to Court to extend this Order. A copy of my affidavit and the Order of Court is annexed herewith and exhibited as "YKC-39".

106. On 21 February 2000, I instructed my manager, Mr Rama, to request Cendekia to pay a visit to Singapore to discuss certain issues. Mr Rama had sent to Cendekia an e-mail dated 21 February 2000 in that regard which is annexed herewith and exhibited as "YKC-40".

107. On 26 February 2000, I had a meeting with Cendekia at Singapore. The meeting was held at a coffee house at Grand Plaza Hotel at Coleman Street.

108. At this meeting, among other issues discussed, I informed Cendekia of the Company's proposal to charge IS Glass about S$80,000 a month for rental of the Company's assets, I also advised him about the other amounts that QTSPL and QT intended to charge for rental of their assets to IS Glass Pte Ltd. Cendekia did not take objection to the proposed amounts.

109. At this meeting, the amount of remuneration of KYC and KFC paid under IS Glass Pte Ltd and the advances if any made to KYC and KFC under IS Glass Pte Ltd and the manner in which these advances were to be repaid as well as treated in the accounts of IS Glass Pte Ltd were also discussed.

110. The paramount issue mooted by Cendekia at this meeting was Cendekia's intention to pull out from the MOU. This intention of Cendekia was indicated to me for the first time at this meeting. Cendekia informed me, after KYC and KFC had left the meeting, that he was afraid that he might not be able to work with KYC and KFC. I told him that this was not a valid reason for him to pull out from the MOU.

111. I was surprised with Cendekia's intention to pull out from the MOU. I told him at that meeting that if he had such intention he had to advise me in writing and if so, I would proceed to forfeit the deposit and/or look to him for an action in specific performance and/or alternatively to look to him for further damages.

112. I also informed him to consider carefully all his options and to see through to the completion of his obligations pursuant to the MOU since he had committed an amount not only as a deposit placed pursuant to the MOU but also made advances for account of IS Glass Pte Ltd and to manage the business operations of IS Glass Pte Ltd. I also highlighted to him that he was responsible for the rental sums charged to IS Glass Pte Ltd by the companies in the Group.

113. Cendekia also informed me that he had agreed with KYC and KFC for them to look for a period of one month for an alternate investor to stand in Cendekia's shoes to complete his obligations under the MOU, failing which Cendekia would proceed to complete his obligations under the MOU.

17 As regards the counterclaim what the first defendant averred in paras 205 to 219 his affidavit of evidence-in-chief is as follows:

205. I will in this section set out the issues concerning the Counterclaim which claim I made through my Defence and Counterclaim.

206. I had on 15 September 2000 through my previous solicitors, M/s David Lim & Partners made a demand for a sum of S$469,004.66 due to the Company for the total rental sum owing by Cendekia to the Company (see exhibit "YKC-60"). This sum of S$469,004.66 was included in the sum of S$688,197.41 then demanded by my solicitors, acting for the Company, QT and QTSPL, for rental sums owed by Cendekia to these three companies.

207. Since then the accounts of the Company have been updated and the revised amount of the Counterclaim against Cendekia as regards the total rental sums owed by Cendekia to the Company under the MOU is S$565,153.68. A detailed listing and statement of account of the Company as regards this sum of $565,153.68 is exhibited at "YKC-64".

208. Cendekia, at paragraphs 2 and 23 of his Reply and Defence to Counterclaim has stated that my Counterclaim for the rental sums charged to IS Glass Pte Ltd if at all is to be claimed by the Company through its Liquidators since the Company has been ordered by the Court on 6 April 2001 to be wound up.

209. Further, at paragraph 3 of his Reply and Defence to Counterclaim, Cendekia states that the 10% paid by him pursuant to Clause 4(a) of the MOU be paid to Cendekia as the 2nd and 3rd Defendants have decided not to make any claim for this S$60,000.

210. I have signed the MOU in my then capacity as the Judicial Manager of the Company, as an agent of the Company.

211. I have no choice in how I am named in this suit/action brought by the Plaintiff, Cendekia.

212. If Cendekia, through paragraph 23 of his Reply and Defence to Counterclaim, is suggesting that the rightful party to assert the Counterclaim is the Company, accordingly it should also follow that the Company should be named as the 1st Defendant and not me.

213. Nevertheless, until such time as such applications, if any, are made by Cendekia or by the Liquidators of the Company, I have to continue to defend this Suit.

214. Through paragraphs 2 and 23 of his Reply and Defence to Counterclaim, Cendekia has chosen to draw a distinction in that he has taken out this Suit against me as the 1st Defendant to recover the 10% deposit but put up a defence as to the Counterclaim by stating that the rightful party to assert such a Counterclaim is the Company. This position is not reconciliable since there is a privity of Contract, by virtue of the MOU, as between Cendekia and me, then acting for the Company. I therefore have a valid right to assert the Counterclaim against Cendekia, until directed otherwise by the Court.

215. Clause 7 of the MOU reads as:

> *"The Investor shall pay such rates and fees to the respective companies in the Group for the use of the Assets with effect from 1st December 1999 until the day when title to all such assets is transferred to the Newco should transfer of title for such Assets be delayed beyond 1st December 1999."*

216. Clause 7 is clear in its terms in that it reads that the "*Investor shall pay such rates and fees …..*..." (underlined to add emphasis). It does not read as the Newco as having to pay for such rates and fees.

217. Clause 7 clearly contemplates an obligation/responsibility on the part of the Investor (Cendekia) to pay for such rates and fees for the use by the Newco of the Assets.

218. At paragraphs 21 and 22 of the Reply and Defence to Counterclaim of Cendekia, Cendekia admits to the transfer of machinery and factory space by way of lease to IS Glass Pte Ltd and the transfer of personnel to IS Glass Pte Ltd, although he claims that such transfer was done without his approval and agreement. I have shown under the section on the Background Facts and in the previous sections that he actively participated in the incorporation of the Company in establishing the bank accounts of IS Glass Pte Ltd and in the commencement of the operations of IS Glass Pte Ltd by remitting advances to procure materials and to make business trips to procure export orders for the benefit of IS Glass Pte Ltd.

> Cendekia was therefore not *"going to invest through IS Glass Pte Ltd"* as stated at paragraph 21 of his Reply and Defence to Counterclaim. Rather, Cendekia consciously and voluntarily invested into IS Glass Pte Ltd.
>
> 219. I therefore maintain that, pursuant to Clause 7 of the MOU, I have a valid Counterclaim for S$565,153.68 against Cendekia who is obligated to pay for such rates and fees as charged to the Newco (IS Glass Pte Ltd) and in addition, pursuant to Clause 17 of the MOU, I am entitled to forfeit the 10% deposit sum placed with me by Cendekia because of his failure to sign the Contracts.

18 In essence, the first defendant averred that the plaintiff's conduct in not signing the eight contracts forwarded to him constituted a repudiation of the MOU; the plaintiff was not entitled to recover the deposit sum paid by him in pursuance of the MOU; and that the plaintiff owed the first defendant an amount of $565,153.68 (later amended to $596,817.81 – see 're-re-re-amended defence and counterclaim' of the first defendant) being rentals and other outgoings in respect of the assets of the company.

19 The evidence of Ramasamy, the first defendant's manager was in support of his employer and they require no re-capitulation at this point. No minutes or memoranda were made available either by the first defendant or Ramasamy in relation to what took place at the meeting held on 26 February 2000 at the Grand Plaza Hotel, where it was alleged by the first defendant and Ramasamy that the plaintiff did not raise any objection to the first defendant's communication that the first defendant would charge $80,000 a month for the rental of the company's assets.

The pleadings

20 In his statement of claim the plaintiff after making reference to the various clauses in the MOU signed between the parties, contended that the MOU was void for uncertainty. He further contended that the forfeiture of the sums paid by him constituted penalty under the law. However, the contention based on penalty was abandoned by the plaintiff's counsel during final arguments.

21 The first defendant denied in his defence that the MOU was void for uncertainty. He pleaded that the sum of $462,800, made up of two segments, ie, a sum of 402,800 being 10% earnest money payable under cl 3(a) of the MOU and a sum of $60,000 paid to him as nominee of the second and third defendants under cl 4(a) of the MOU was for the purposes of the second and third defendant's VA sum. The first defendant contended in para 8 of his defence that the plaintiff terminated and repudiated the MOU through his solicitors' letter dated 11 August 2000. The first defendant acting for and on behalf of the YGBM accepted the plaintiff's said repudiation and forfeited the said 10% earnest money. In para 9 of his defence, he averred that besides forfeiting the 10% earnest money, he was entitled to and was holding the VA sum of $60,000 as he had a valid set-off and counterclaim against the plaintiff in the amount of $596,817.81. Particulars provided disclosed that the counterclaim was in respect of rates and fees payable for use of the assets of the company from 1 December 1999 onwards by the plaintiff.

Arguments, issues and conclusion

22 As mentioned by me at the outset, there were two main issues to be decided in this case. The first one was whether the MOU signed between the parties was a binding and final agreement in the light of the very terms of the document. The second issue concerned the authority and legal standing of the first defendant to continue with this action.

23 In the first place, what was glaring in this dispute was the feature that the first defendant, in addition to his role as the judicial manager – needless to highlight the aspect that he was appointed to that position by an order of court - was seen to be wearing many other hats in connection with the responsibilities undertaken by him, ie, (a) special accountant to the related companies of the company (para 12 of his AEIC), (b) personal adviser to the Kwan family (para 15 of his AEIC), (c) nominee for the Kwan brothers in connection with their problems with their creditors (para 19 of his AEIC) and finally (d) corporate service provider to Newco. Could he have objectively managed all these in an even-handed manner? I will return to this question later in these grounds.

24 Let me now deal with the MOU under scrutiny. This was the handmaiden of the first defendant, an experienced accountant,

admittedly well-versed in corporate practice, liquidation and judicial management. The court was told that in the drafting of the MOU, he had some input from his legal advisers. A careful sweep of the MOU unmistakably showed that it was not meant to be a final document and that it required a great deal more to make it certain and final. In this regard, it was expressly and unequivocally stated in cl 2 of the MOU (vide para 3 infra), that the investor, namely the plaintiff '*shall enter into the relevant agreements*' with the first defendant and others '*which terms and conditions will be agreed upon a later date*'. Nothing could be clearer or more precise.

25 In his arguments, counsel for the first defendant attempted to downplay the import of cl 2 of the MOU. He contended that too much significance should not be attributed to the terminology of the said clause and that the MOU could stand on its own without any further agreements since all the essential and fundamental terms were found in that document. In my view, the contention put forward did not make much sense and appeared to introduce linguistic and semantic uncertainties to an otherwise plain and uncomplicated provision. Clause 2 of the MOU which by its very words was calling out for a number of *'relevant'* further *'agreements' 'which terms and conditions* [had to] *be agreed upon at a later date'* .

26 Counsel for the first defendant invited my attention to principles enunciated by the Singapore Court of Appeal in ***Klerk-Elias Liza v KT Chan Clinic Pte Ltd*** (1993) 2 SLR 417, and a High Court decision in ***Climax Manufacturing Co. Ltd v Colles Paragon Converters (S) Pte Ltd*** (2000) 1 SLR 245 and submitted that the MOU under reference was a contract that was certain in scope, meaning and application as was held in the cases cited.

27 In ***Klerk-Elias Liza*** the facts as appear in the head notes of the report are as follows:

> The respondents owned premises ('the premises') which he had leased to a company called Perrodo Offshore (S) Pte Ltd ('Perrodo'). The appellant had two businesses, a beauty salon and a jewellery retail shop which she ran from premises at a hotel. The offices of these two businesses were at another building. In early 1983, it became known that both the hotel and the building where the appellant had her offices were to be demolished. Alternative premises were found for the beauty salon and in mid-1983 the appellant reached an agreement with Perrodo whereby Perrodo would sublet the premises to her for the remaining months of their lease for $8,100 per month provided the respondents agreed.
>
> On 7 July 1983, the respondents wrote to the appellant on a letterhead which read 'KT Chan Clinic' referring to earlier discussions with the appellant and confirming the terms of rental of the premises. The material terms were as follows: rent was fixed at $7,740 per month, maintenance charges of $1,440 per month would be borne by the tenant, the lease was to be for three years commencing 1 December 1983, subletting was permitted 'details of which will be in the lease' and the lease was to be legally drawn up 'with the usual terms that apply in Singapore'. The letter called for the appellant to sign the attached copy of the letter and to return it to the respondents if she agreed to the terms, following which, the respondents would authorize Perrodo to sublet the premises to the appellant. The letter was signed on the appellant's behalf and returned to the respondents, accepting the terms. In late July or early August, the appellant moved into the premises.
>
> On 13 September 1983 a formal lease naming 'KT Chan Clinic' as landlord and the beauty salon as tenant, as the appellant had requested, was prepared by the respondent's solicitors and sent to the appellant. Clause 3(17) of the lease provided for the prior written consent of the landlord to be obtained before any assignment, sublease or parting or sharing of possession of the premises. Clause 3(21) provided that the premises could only be used as an office for the tenant's business and cl 5(5) provided, inter alia, an option to renew the lease for a period of one year and

the terms for such renewal. The appellant refused to sign the lease on the ground that the terms therein were unacceptable. On 14 December 1983, the respondents requested that the appellant vacate the premises in the course of the week; however, on 27 December, he countermanded his request and sought instead specific performance of the agreement for the lease of the premises entered into on 7 July 1983. The appellant denied the existence of any agreement and vacated the premises on 31 January 1984. The respondents eventually leased the premises to Blitz Advertising Pte Ltd ('Blitz') for 24 months commencing 9 November 1984 at $6,300 per month.

The respondents commenced proceedings for damages for breach of the tenancy agreement evidenced by or contained in the letter of 7 July 1983. The learned trial judge held that the appellant had breached the lease agreement contained in the letter of 7 July and gave judgment for the respondents for $167,378 and costs to be taxed. The appellant appealed and the respondents cross-appealed for interest on the judgment sum under s 9 of the Civil Law Act (Cap 43, 1988 Ed).

28 On the foregoing facts, the Court of Appeal, by a majority of two to one, dismissed the appeal and cross-appeal and held that**:**

(1) On the evidence, the appellant's discussions with the respondents were with a view to securing for herself a tenancy or lease of the premises for a fixed term of years with an option for renewal for another fixed term of years and the respondents only consented to the sublease by Perrodo to the appellant because an agreement had been concluded between him and the appellant for a lease of the premises as contained in the letter of 7 July 1983.

(3) An agreement had been reached on both the question of the option for renewal and that of subletting and although the details to be incorporated into the lease had not been agreed, there was no uncertainty which would render those two provisions void for uncertainty resulting in there being no concluded contract.

(5) All the essential terms for a valid agreement for a lease being either clearly defined in the letter of 7 July or there being no mistaking what they were, the letter of 7 July and the signed acceptance thereof constituted a valid and binding agreement for a lease of the premises.

(6) The evidence leading to the signing of the letter of 7 July indicated that it was the parties' intention that the document was to constitute a binding agreement between them for the lease of the premises on those terms pending the finalization and execution of a formal lease. An agreement to execute a formal agreement does not prevent there being a valid and concluded agreement in the meanwhile.

29 In ***Climax Manufacturing*** (*supra*) the facts as they appear in the headnotes are as follows:

The defendants were manufacturers of repositional adhesive memo pads. They developed a system for production of these pads at lower costs, the heart of the system being the machine designed by the defendants. The defendants were seeking a business partner to help them penetrate the Hong Kong and China markets. They were keen on marketing the technical know-how required to convert and print on special repositional adhesive paper. This would involve selling the machine

developed for this process and the know-how to convert and market the product. The plaintiffs found the defendants' proposition interesting. On 24 November 1995 their Chief Executive Officer, one Mr Fung Kin Yuen Kenneth, visited the defendants at their factory in Singapore. The parties subsequently decided to go ahead with the project and they signed a memorandum of understanding expressing the intention of the parties to enter into a joint venture agreement.

On 30 November 1995 the defendants sent the plaintiffs an agreement, which they had pre-signed, for execution by the plaintiffs. The plaintiffs were not happy with the terms of the agreement and, on 15 December 1995, they wrote to the defendants giving their detailed comments on its various clauses. One of these comments was that they wished the defendants to amend the agreement by adding the 'name, specification, machine number and photo for the Machine'. The 'Machine' in question was described in cl 2.2 as 'one (1) unit 2-colour Web Offset Printing Machine dedicated to the printing of Repositional Adhesive Memo Pads'. The defendants proceeded to redraft the agreement. However, they did not add all the particulars which the plaintiffs had requested in relation to the Machine. After the amendments, cl 2.2 of the agreement read: 'Supply of raw material plus one (1) unit 2-Colour Web Offset Printing Machine dedicated to the printing of Re-positional Adhesive Memo Pads (the Machine). The specifications of the Machine is (sic) attached hereto.' The sentence 'the specifications of the Machine is attached hereto' were added after the defendants had received the plaintiffs' comments, as had been the schedule with the specifications.

On 8 January 1996, the defendants' Chief Executive Officer brought the amended agreement to Hong Kong for execution, and the agreement was signed that same day. However, this was only after Mr Fung made some further hand-written amendments. The amendments included, *inter alia*, the addition of the words 'to be agreed by both parties' behind cl 2.2.

Under the agreement, the plaintiffs were to pay the defendants 30% of the contract price of $500,000 upon signing of the agreement. The remaining 70% was to be paid by letter of credit which the plaintiffs were to forthwith establish in favour of the defendants. After the signing on 8 January, there was a lot of correspondence between the parties, wherein the plaintiffs sought details of the Machine. The defendants them (sic) replied with a certain amount of information but the plaintiffs considered the information supplied inadequate and asked for further specifications. The correspondence thus continued.

On 6 February 1996, the plaintiffs paid the defendants $150,000 being the 30% down payment. They did not then or thereafter, despite various requests from the defendants, establish the letter of credit for the remaining 70% of the purchase price. The defendants considered this failure to be a repudiation of the agreement on the part of the plaintiffs and, on 10 June 1996, they purported to accept the plaintiffs' repudiatory breach of the agreement. The plaintiffs commenced this action in January 1997 for the return of the $150,000 down payment. The basis of their action was that the agreement was void for uncertainty because it provided for the specifications 'to be agreed by both parties'. Alternatively, they claimed that there was breach of an implied term to supply certain information relating to the machine so that the plaintiffs could assess the suitability of the Machine to their needs before deciding whether or not to agree to the Machine's specifications.

> On the application of the plaintiffs pursuant to O 14 r 12, the question of construction came before the court as to whether the agreement was a valid and legally binding document or, as the plaintiffs termed it, an 'illusory agreement'. The assistant registrar came to the conclusion that the agreement was not an illusory one. The plaintiffs appealed.

30 Upholding the assistant registrar's decision and dismissing the plaintiff's appeal, the High Court held that:

> (1) In construing a particular clause of an agreement one must not do so in isolation but must have regard to the contract as a whole and also, to a more limited extent, to the factual matrix in which the contract was negotiated or concluded. This principle holds true also when one was trying to decide whether a contract had actually come into existence. The words 'to be agreed' in cl 2.2 had to be construed in their context and their mere presence in the agreement did not ipso facto mean that no concluded contract was formed (see 25-26).
>
> (3) In the present case, everything necessary to be concluded between the parties had been concluded. The defendants were selling to the plaintiffs their system for the production of the pre-printed repositional memo pads and not just a machine. Reflecting that, the agreement went far beyond an agreement for sale and purchase of a single piece of equipment. When the terms of the agreement were looked at as a whole, it could be seen that the parties had a more complex arrangement in mind involving the transfer of know-how and the appointment of the plaintiffs as the distributor for the defendants' product in a new market which the defendants wished to penetrate. They had agreed on all the basic issues that were relevant to this relationship (see 27-28).

31 In my evaluation, the facts and circumstances of the case before me were vastly different from that of ***Klerk-Elias Liza*** or ***Climax Manufacturing***. In those two cases, the agreements referred to did not require the parties to enter into relevant agreements on terms and conditions to be '*agreed upon a later date*'.

32 In ***Courtney and Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd*** and another [1975] 1 All ER 716, the Court of Appeal in England held that a contract to negotiate even though supported by consideration was not a contract known to the law since it was too uncertain to have any binding force and no court could estimate the damages for breach of such an agreement.

33 Returning to the facts of the present case, quite apart from the express terminology of cl 2 of the MOU which in no uncertain language demanded further agreements to be entered on terms to be agreed later, the plethora of new terms incorporated in the draft agreements forwarded to the plaintiff for his consideration most certainly tended to diminish the first defendant's contention that the MOU by itself was all embracing, conclusive, certain in scope and that subsequent agreements were but a mere formality. The plaintiff's counsel had extensively set out in his final submissions the glaring differences in content between the MOU and the drafts (paras 68 to 141 of his written submission). What became clear at the trial was that many a term in the draft agreements did not feature at all in the MOU and that the draft agreements were in fact sent to the plaintiff by the first defendant for the purposes of negotiation (pages 904 lines 5 to 6, 950 lines 1 to 5 and 974 lines 21 to 213 of NE, where the first defendant himself had conceded this). The admissions made by the first defendant during his testimony alone would be sufficient to demolish his present stand that the drafts agreements were prepared only to give effect to the terms of the memorandum.

34 At this juncture, I ought to make reference to a few not too insignificant terms appearing in the draft agreements, forwarded to the plaintiff way out of time and that too after cracks had developed in the relationship between the Kwan brothers and the plaintiff over the Kwan brothers' remuneration and the intimation by them to opt out of the deal.

35 In this context I must first make reference to the Sale and Purchase of Assets Agreements between the company and Newco (AB- 785

to 809), between QTPL and Newco (AB-810 to 823) as well as between QT and Newco AB-824 to 837). Clause 4 of the said agreements (see AB-792, AB-816 as well as AB-830) is intituled 'conditions precedent'. It reads:

> **4 Conditions Precedent**
>
> 4.1 This Agreement is conditional upon the fulfilment of the following conditions precedent:-
>
> > (a) the Vendor and/or the Judicial Manager having obtained the requisite approval of the respective creditors and/or the Court, as applicable and as the case may be, in respect of the sale herein;
> >
> > (b) all the conditions for completion of the sale and purchase of the Property as set out in Schedule 3 hereto are performed and/or complied with;
> >
> > (c) the conditions precedent of each of the Sale and Purchase Agreements are fulfilled on or before the Cut Off Date.
>
> 4.2 If any of the conditions precedent in Clause 4.1 is not satisfied on or before the Cut Off Date, then the Agreement shall automatically be null and void and thereafter neither party shall have any claim or demand against the other, save for outstanding rental fees, and each party shall bear their own solicitors' costs and the Vendor shall refund to the Purchaser the Advance Payment without interest.

36 The first defendant did not disagree that this 'conditions Precedents' clause was a fundamental one and it was a complete variation of the MOU (page 976 of NE). His only explanation in this regard was that the said clause was put in place to make sure that all the agreements were executed simultaneously (page 977 of NE).

37 The rental provisions (cl 10 at AB-794) again posed difficulties. Clause 7 of the MOU was particularly vague as to the rental amount. It required payments by the plaintiff of such rates and fees for the use of the company's assets (AB-273) and clearly seemed to provide for further negotiations. As to how the first defendant could demand from the plaintiff a monthly rental of $80,000 or for that matter $78,000 and $74,000 per month as stipulated in the proposed agreement, there was very little credible evidence placed before me except for some bland claims from the first defendant and his employee Ramasamy. At any rate, the plain reading of cl 7 of the MOU tended to point towards only one direction, that was, that parties would have to negotiate further on the issue of rental, which from the facts placed before me established that it was not something of a negligible proportion.

38 The sale and purchase of the land and premises as appearing in Schedule 3 (AB-799 to 802) was again a subject of debate and concern. This schedule again was found to be heavily slanted in favour of the vendor. It seemed to include special conditions which a prudent purchaser would normally take objection to. For example, the vendor was not even obliged to produce any evidence that any caveat or other encumbrance notified or registered against the subject property would be cancelled on or after completion and the purchaser was nonetheless required to complete the sale on that basis (AB-799, condition 5). Next, time was made the essence in relation to the purchaser's obligations under condition 18 (AB-801), whereas under condition 7 (AB-799) the purchaser was not entitled to any compensation for any delay in completion occasioned by the vendor. Moving further, under condition 21 (AB-802), the vendor would not guarantee or assume any responsibility for the accuracy of any information given by him in respect of the subject property. The first defendant's counsel's argument that all these special conditions were mere inessentials and they did not alter the character of the MOU was, in my view, something that appeared to have been taken out of a page from 'Lewis Carrol's Alice in Wonderland'.

39 Still further, the clauses in the draft 'Investment Agreement' (AB-753 to 784) were also found to be riddled with controversial terms.

To mention only a few: First, cl 4(d) (AB- 761) of the said agreement deals with the subject of loans to be provided by the plaintiff. It stipulates that the said loans shall be interest free. There was no such term in the MOU. Second, cl 4(f) (AB-762) requires the plaintiff to make available to the Newco from time to time such funds as are necessary to meet its working capital requirements. There was no such provision in the memorandum. Next, provisions concerning the constitution of the board of directors of the Newco and the deadlock provisions were not only heavily weighted in favour of the Kwan brothers but they also appeared to give very little leverage to the plaintiff who was supposed to be the major shareholder of Newco.

40 A few observations about the service agreements between KYC and Newco (AB-838 to 847) and between KFC and Newco (AB-848 to 856) would also be appropriate at this stage. Clause 4 of these agreements (AB-842 and AB-852) contained provisions in relation to remuneration and benefits payable to the Kwan brothers by Newco. A noticeable feature of these clauses was that they were left blank. Under cl 12 (h) (AB-274) of the MOU the Kwans' remuneration was clearly delimited to only $5,000 per month each, although subject to changes upon mutual written agreement between them. But the question was why this clause had to be left blank even as of 19 April 2000? The only reasonable inference was that the festering issue that surfaced at the parties' meeting at the Grand Plaza Hotel on 26 February 2000, was still to be resolved and that there was no agreement on this issue even up to the time that these agreements were sent out to the plaintiff for his consideration. There was yet one other aspect. Clause 4.2 of the said service agreements (see AB-842 and AB-852) provided for the use of a motor-car of a model and price yet to be determined. There was nothing of this sort in the memorandum. Could it then be said that this clause conformed with the memorandum? The answer again was in the negative.

41 The opening phraseology of cl 12 of the MOU (AB-273) provided that the Kwans shall enter into binding shareholder agreement with the plaintiff before 1 December 1999 on the salient terms and conditions provided thereunder. Leaving aside the deadline of 1 December 1999 which was never complied with, cl 12 (l) (AB-275) of the MOU expressly required that the Kwans 'shall agree to work diligently…. at a professional fee to be agreed under the Newco'. In my view, the wording chosen was susceptible to only one interpretation - that was that the memorandum was merely a preliminary plank and the deal contemplated could not be completed unless parties settled all their terms amongst themselves by further negotiations.

42 Another feature that caught the court's attention was in relation to cl 12 (c) of the MOU (AB-274). The last sentence of the clause provided that Newco shall enter into such agreements with the plaintiff as are necessary as regards the repayment to the plaintiff of the $3 million loan as well as how the assets of Newco may be charged for the said $3 million loan. There was nothing in relation to this matter in any of the draft agreements sent to the plaintiff even as of 26 July 2000 (AB-744).

43 Finally, reference ought to be made to cl 7 of the MOU (AB-273) provided that the plaintiff 'shall pay *such rates and fees* to the respective companies in the Group for the use of the assets with effect from 1 December 1999 until the day when title to all such assets is transferred to the Newco, should transfer of title for such Assets be delayed beyond 1 December 1999.' It was not in dispute that the 1 December 1999 deadline was a dead letter. The first defendant's counterclaim was hinged to this clause. His claim was for a monthly rental of between $82,400 and 74,160 (vide his counterclaim). But the undisputed fact was that when the memorandum was signed on 10 December 1999, the rental issue was still at large. Counsel for the defendant in his inimitable manner tried to argue that inasmuch as the 'three 'P's' (price, parties, and property) had been identified and settled in the MOU, there was little else required. But in my determination, the rental aspect was clearly a significant segment of the three 'P's', adverted to by the first defendant's counsel, on which there was no credible evidence of any concluded agreement. In this regard, I found the evidence of the first defendant and that of his manager, claiming that the plaintiff agreed to the figure of $80,000 per month as on 26 February 2000 (page 853 of NE) to be laced with expediency. I found it odd that on that day when the Kwan brothers were reportedly agitating for a higher monthly pay, and the possibility of the plaintiff opting out of the venture was looming (paras 108 to 110 of the affidavit of evidence-in-chief of the first defendant), there could have been an agreement emanating from the plaintiff as regards rental amounting to such a substantial sum. I must further remark at this stage that the first defendant was found by me to be decidedly ambivalent on this so-called agreement and in this regard what he said during cross-examination indeed seemed to throw the spanner in the works. The relevant segments of his testimony read as follows:

> Q Please read Clause 7.
>
> A Yes, Clause 7 reads "The Investor shall pay such rates and fees to the respective companies in the Group for the use of the Assets with effect from 1st December 1999 until the day when title to all such assets is transferred to the Newco should

transfer of title for such Assets be delayed beyond 1st December 1999."

Q So there is no agreement. The figure has to be agreed between the parties.

A I agree with the statement, your Honour.

Q So that would be another uncertainty.

A No, your Honour. Uncertainty about what, sorry?

Q As to the figure, as to the certainty of the contract. We had to agree something. Without mechanism, I would say that it is uncertain.

A Your Honour, the amount had to be agreed, your Honour. We have to compute and tell Mr Cendekia how much we want to charge and that's what we did in January and February, your Honour.

Q But Mr Cendekia has to agree, you can't --- I mean, unless there is agreement. There is no agreement. All right.

A Mr Cendekia agreed, your Honour.

Q You mean to say Mr Cendekia agreed to pay the rental?

A He agreed to our computation of $80,000 but he wanted a discount, your Honour.

Q Where is this in writing?

A We have told him on the 26th of February meeting, your Honour, and we gave him the account factoring the $80,000 rental.

> His Honour: You gave him the figure only on the 26th of February?
>
> Witness: That's correct, your Honour.
>
> His Honour: Not before, not before?
>
> Witness: Before I don't know whether Rama gave it to him but I am sure there's some discussion.
>
> His Honour: But don't speculate. But as far as you are concerned, he was given the figure of $80,000 on the 26th of February 2000?
>
> Witness: Your Honour, I believe we had mooted the figure many times but on the 26th of February we specifically discussed this issue.

44 What Ramasamy, the first defendant's manager said in this regard should also be reproduced in order to capture its flavour. His

evidence as appears at page 1168 in reply to some questions from the court reads as follows:

> His Honour: I want you to testify to the best of your knowledge.
>
> Witness: Yes.
>
> His Honour: All right. According to your affidavit, the rental was first suggested to him on the 26th of February 2000.
>
> Witness: Yes, your Honour.
>
> His Honour: Right. You also agreed prior to that, there was no figure suggested to him.
>
> Witness: Yes, your Honour.
>
> His Honour: All right. From there I'm taking, you asked him for $80,000.
>
> Witness: Yes, your Honour.
>
> His Honour: Mr Yin asked for $80,000 you said.
>
> Witness: Yes, your Honour.
>
> His Honour: You did not mention the figure in the meeting at all?
>
> Witness: No.
>
> His Honour: No. You are sure of that?
>
> Witness: Yes, because it was --- they was speaking in Mandarin and he proposed the figure and I ---
>
> His Honour: But do you know---when they speak in Mandarin, when they say $80,000, you wouldn't understand?
>
> Witness: He would---immediately after---
>
> His Honour: You would not understand?
>
> Witness: I would not understand, your Honour.

45 In my evaluation and determination, the requirement under cl 2 of the MOU, phraseology of which was chosen by the first defendant, apparently with much care and deliberation, was clear and unmistakable. Under this clause, the parties were expected to enter into several relevant agreements upon terms and conditions which would have to be agreed upon at a later date. Similar purport seemed to feature in cl 7 of the MOU in relation to rates and fees for the use of the assets of the company.

46 In ***Shore v Wilson*** [1839, 1842] IX Clark & Finnelly, 355 (reproduced in 8 ER 450), a decision approved by the Singapore Court of Appeal in ***Chiang Hong Pte Ltd v Lim Poh Neo t/a Tai San Plastic Factory*** [1984-85] SLR 112, Lord Tindal CJ said at pages 532 and 533 of the English Reports:

> The general rule I take to be, that where the words of any written instrument

are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that in such case evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it; for the ablest advice might be controlled, and the clearest title undermined, if, at some future period, parol evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself.

The true interpretation, however, of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered as an exception, or perhaps, to speak more precisely, not so much an exception from, as a corollary to, the general rule above stated, that where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself; for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party. Such investigation does of necessity take place in the interpretation of instruments written in a foreign language; in the case of ancient instruments, where, by the lapse of time and change of manners, the words have acquired in the present age a different meaning from that which they bore when originally employed; in cases where terms of art or science occur; in mercantile contracts, which in many instances use a peculiar language employed by those only who are conversant in trade and commerce; and in other instances in which the words, besides their general common meaning, have acquired, by custom or otherwise, a well-known peculiar idiomatic meaning in the particular country in which the party using them was dwelling, or in the particular society of which he formed a member, and in which he passed his life. In all these cases evidence is admitted to expound the real meaning of the language used in the instrument, in order to enable the Court or Judge to construe the instrument, and to carry such real meaning into effect.

But whilst evidence is admissible in these instances for the purpose of making the written instrument speak for itself, which without such evidence would be either a dead letter, or would use a doubtful tongue, or convey a false impression of the meaning of the party, I conceive the exception to be strictly limited to cases of the description above given, and to evidence of the nature above detailed; and that in no case whatever is it permitted to explain the language of a deed by evidence of the private views, the secret intentions, or the known principles of the party to the instrument, whether religious, political, or otherwise, any more than by express parol declarations made by the party himself, which are universally excluded; for the admitting of such evidence would let in all the uncertainty before adverted to; it would be evidence which in most instances could not be met or countervailed by any of an opposite bearing or tendency, and would in effect cause the secret

undeclared intention of the party to control and predominate over the open intention expressed in the deed.

47 The first defendant could not run away from the express terminology of cl 2 of the memorandum. His counsel tried to bury its meaning by his 'three P's' argument. Sadly though, defence was hoist with its own petard, not only by the wording and terminology of the memorandum but also by the complete lack of agreement in relation to the rental segment. At any rate, the host of new conditions making their debut in the eight draft agreements forwarded to the plaintiff, many months after the 1 December 1999 deadline, further tended to fortify my view that there were innumerable terms which awaited discussion and agreement between the parties before it could be said that there was a binding deal between the parties. This must be so particularly when the MOU also seemed to make the contract conditional upon consent being obtained from the secured creditors, the Jurong Town Corporation for the transfer of the lease of the property and also from the court, although all these might well be a matter of technical formality.

48 In my opinion, there was an agreement in relation to the basic framework for the plaintiff to take over the company as contained in the MOU and nothing more. The phraseology employed by the first defendant in the MOU made it abundantly clear that many other matters had to be settled before a deal could be sealed. The introduction by the first defendant of a multitude of fresh terms in the draft agreements prepared on his and on behalf of the Kwan brothers and forwarded to the plaintiff most certainly created a great deal of uncertainty in respect of the proposed deal. It must be added here that the uncertainty bespoken was the making of the first defendant. The insistence of the Kwan brothers for a higher remuneration than what was mentioned in the MOU and their intention to part from the plaintiff added further complexity to the deal. The first defendant was found by me to be far too ambitious in his balancing exercise. He was indeed wearing too many hats and the resultant conflict of interest, substantially contributed to the collapse of this deal. A judicial manager appointed by the court is bound to carry out his tasks even-handedly and in an objective manner. He should at all costs avoid overt and unseemly bias in favour of those who in the first instance invited him to accept appointment. In the case at hand, it would seem that the objectivity and balance required of him were unwittingly lost when he tried to obtain a little too much for the Kwan family. This was borne out by the fact that when the company was finally wound-up, his application to assume the role of liquidator was not acceded to by the creditors (AB-2102) and hence the appointment of three other persons as the liquidators of the company on 6 April 2001.

49 In my view, having regard to the evidence presented, the plaintiff's contention that the MOU was riddled with uncertainty and consequently void, was held by me to be sound. On the other hand, I found the argument by counsel for the first defendant that the said MOU constituted a binding agreement and that all the essential and fundamental terms of the agreement between the parties had been incorporated in the said document, inexorably faulty and seemed to fly in the face of the very words of cl 2 of the MOU.

50 The train of events that followed from 10 November 1999 until 26 July 2000 further reinforced my view that the said MOU could never be regarded as a final document, particularly when one were to scrutinise the eight draft agreements forwarded to the plaintiff by the first defendant many months after the 1 December 1999 deadline for his review and consideration. These eight agreements which took a long time coming, contained several not so inessential terms and did not even feature in the MOU. In my view, the argument by counsel for the first defendant that these eight voluminous draft agreements were no more than a mere amplification of what was agreed to between the parties and purported to add a few inessential or less significant terms, went against the grain of truth and substance and found by me to be entirely unmeritorious. I must add that the first defendant's omission to call the Kwan brothers to rebut the plaintiff's evidence that the Kwan brothers wanted him out and as a result the whole deal came to grief in many ways tended to weaken the first defendant's case. It must be remembered that the first defendant was at all times the special adviser to the Kwan brothers.

51 It must also be remarked at this stage that the first defendant's plea in para 8 of his defence that the plaintiff terminated and repudiated the memorandum by way of his solicitors' letter dated 11 August 2000, was found by me to be equally flawed. First of all, the MOU itself, by its very language, envisaged further negotiations. When the first defendant forwarded four of the eight agreements, by his letter dated 18 April 2000 (AB-597 and 598), he himself invited the plaintiff to 'review these agreements and revert as soon as possible' (AB-598). Again, by a letter dated 29 May 2000, Ramasamy signing on behalf of the first defendant (AB-698 and 699), asked the plaintiff or his solicitors to revert to him on the 'suitability of the agreements', forwarded to the plaintiff. Given the complexity of the documentation and the web of new conditions making their appearance in the said drafts, the plaintiff's solicitors were well entitled to comment on these drafts and come up with their own proposal. And that was what seemed to have happened when the plaintiff's solicitors sent in their letter dated 11 August 2000 (AB 887-to 889). To characterise the counter-proposal a repudiation was in my view unreasonable.

52 The next issue was in relation to the counterclaim and the legal standing of the first defendant to continue with his counterclaim.

53 It should be remembered that the action herein was commenced by the plaintiff on 21 February 2001 against the first defendant in his capacity as the judicial manager of the company and against the Kwan brothers. The Kwan brothers would not and did not appear at the trial. The first defendant averred in paras 2 and 35 of his original defence and counterclaim, he was defending the action and counterclaiming against the plaintiff on behalf of the company. However, the company having been wound up on 6 April 2001, the first defendant's appointment as judicial manager came to an end on that day and the court appointed three persons, Mr Ong Yew Huat, Mr Nagaraj Sivaram and Ms Fang Ai Lian as liquidators of the company as of that date. The solicitors for the liquidators, Rajah and Tan wrote to the solicitors on 25 April 2001. The said letter, in fact addressed to the attention of the present counsel for the first defendant read:

> 1. We act for the Liquidators of Yuan Guang Building Materials Pte Ltd (the "Company") and understand that you act for the 1st Defendant Yin Kum Choy in the abovementioned Suit.
>
> 2. We refer to your Defence and Counterclaim against the Plaintiff Cendekia Candranegara Tjiang filed on 24th March 2001 wherein your client purported to assert a set-off and counterclaim against the Plaintiff, for and on behalf of the Company, in respect of the Plaintiffs' rental of the Company's assets. In view of the Order for Winding-Up by the Court dated 6th April 2001 and the appointment of Mr Ong Yew Huat, Mr Nagaraj Sivaram and Ms Fang Ai Lian as Liquidators of the Company, your client is not the appropriate party to assert such claim against the Plaintiff.
>
> 3. If, at all, any action in respect of such claim should be commenced and/or maintained by the Company, it would be the Liquidators of the Company who should be having the conduct of such action.
>
> 4. Kindly make the necessary amendments to the Defence and withdraw the said Counterclaim in the abovementioned Suit, failing which we may have no alternative but to make the necessary applications to Court.
>
> (Signed)

5 4 Despite the said communication from the solicitors for the liquidators, the first defendant still would not let his grip off the counterclaim, preventing as a result, the plaintiff taking his case to the liquidators. That was not all. He further proceeded to amend his defence and counterclaim by deleting the words in paras 2 and 35 of his defence and counterclaim which declared earlier that he was "acting for on behalf of YGBM". The plaintiff, left with no option, had to press on with the action and defend the counterclaim made against him.

55 Under s 272 (2) of the Companies Act (Cap 50) only the liquidator of the company may 'bring or defend any action or other legal proceeding in the name and on behalf of the company.' In the case at hand, the first defendant, having commenced the counterclaim for and on behalf of the company, had no further authority to continue with his action once his appointment had been revoked and the liquidators had been appointed. The court was told that the first defendant was continuing with this action because of his perception that he might be held liable for possible negligence during his tenure of office. In my view, such a perception as regards a contingency was not a valid ground to continue with his claim, especially in the light of clear instructions from the solicitors of the present liquidators.

56 The foregoing conclusion alone might be sufficient to dispose of the first defendant's counterclaim for want of authority and legal standing. However, the following few observations on the substance of the counterclaim should be made at this juncture.

57 The counterclaim was by and large in respect of the alleged rental for the assets of the company and for certain other outgoings. In my view, as I have noted earlier (para 42 infra), the evidence adduced by and on behalf of the first defendant in relation to the rental aspect was

far from satisfactory. In fact, what he claimed in his affidavit of evidence-in-chief was that he would 'seek to recover rent from IS Glass Pte Ltd [Newco] for the use of the assets of the Group as from 1 January 2000 pursuant to the MOU [the memorandum]' (para 100 of his affidavit of evidence-in-chief) and that he informed the plaintiff of the company's proposal to charge Newco about $80,000 a month for rental of company's assets, at the meeting on 26 February 2000 (para 108 of his AEIC). If this was the best he could come up with, in relation to this rental claim, what was the basis to require the plaintiff to bear the entire rental sum and any outgoings? In my determination, the first defendant had wholly failed to establish that the plaintiff assumed any personal responsibility to pay the rental or any other outgoings.

58 Before concluding, I must also briefly deal with the 10% earnest money paid pursuant to cl 17 of the MOU. The said clause stipulates that the said sum shall not be refundable should the investor decide not to sign the contracts. In Black's Law Dictionary (Sixth Edition), 'earnest money' is defined 'as a sum of money paid by a buyer at the time of entering a contract to indicate the intention and ability of the buyer to carry out the contract. Normally such earnest money is applied against the purchase price. Often, the contract provides for forfeiture of this sum if the buyer defaults'.

59 In the case before me, I could not on balance come to a conclusion that the plaintiff was in any way responsible for the collapse of the whole enterprise. Besides the elements of uncertainties intrinsic in the MOU, the actions by the Kwan brothers in demanding terms over and above what had been specified in the MOU and the emergence of some totally new and onerous terms in the draft agreements forwarded to the plaintiff were the factors that caused the demise of the provisional deal between the parties. In my view, the blame could not be laid on the doorsteps of the plaintiff. He was well entitled to come up with counter-proposals as he did through his solicitors' letter dated 11 August 2000, which in my opinion was not altogether unreasonable. Any term found in the 11 August 2000 letter of the plaintiff's solicitors, which was found to be contrary to the terms in the MOU, could well have been addressed, negotiated and settled. But it was not to be by the precipitous action of the first defendant in electing to treat the said letter as repudiation. In my finding, the course adopted by the first defendant, no doubt upon advice, was faulty, unreasonable and could not be supported.

60 In the premises, I ordered that the plaintiff be entitled to the relief as prayed for in paras 12 (i), (ii) and (iii) of the statement of claim. Consequently, I dismissed the first defendant's counterclaim. As regards para 12(ii) of the statement of claim, interest was awarded only from the date of writ, ie, 21 February 2001. I further ordered that the plaintiff shall have recourse to the deposit sum now being held in escrow by the liquidators and that costs shall be recovered from the first defendant, as undertaken by him at the commencement of the hearing in these proceedings.

Order accordingly.

Sgd:

MPH RUBIN

Judge