Yeo Boong Hua and Another v Turf City Pte Ltd and Others
[2004] SGHC 38

Case Number	: OS 1634/2002/D, SIC 5348/2003, 5864/2003
Decision Date	: 24 February 2004
Tribunal/Court	: High Court
Coram	: Vincent Leow AR
Counsel Name(s)	: Oommen Mathew (Haq and Selvam) and Alice Yeo (Alice Yeo and Company) for plaintiffs; Patrick Ang and Mark Cheng (Rajah and Tann) for first to fifth defendants
Parties	: Yeo Boong Hua; Lim Ah Poh — Turf City Pte Ltd; Singapore Agro Agicultural Pte Ltd; Tan Huat Chye; Ng Chye Samuel; Koh Khong Meng; Teo Tian Seng

24 February 2004

Assistant Registrar Vincent Leow:

1. This was an application by the plaintiff to amend their Originating Summons No. 1634 of 2002 ("OS") via Summons-in-Chambers No. 5348 of 2003. Concurrently, the first to fifth defendants applied via Summons-in-Chambers No. 5864 of 2003 to expunge references to certain 'without-prejudice' correspondence and documents contained in the first plaintiff's affidavit filed in support of their amendment application.

The facts

2. By way of background, this action arose out of a shareholder's dispute. The first defendant is a company ("the Company"). Both plaintiffs along with the second to sixth defendants are shareholders of the Company. They each had about 12.5% shareholding in the Company with the exception of the second defendant who had 27.5% of the shareholding and the third and fourth defendant who had 11.25% each. Both plaintiffs alleged that they have been unfairly treated and oppressed by the majority shareholders, the details of which are mostly irrelevant to this application.

3 What is relevant is that the defendants had sought to call an extraordinary general meeting ("EOGM") of the Company pursuant to a notice of meeting issued on 18 October 2002 in which they had intended to alter the Memorandum and Articles of Association of the Company. This led to the OS in question being filed by the plaintiffs to injunct the defendants from calling the said EOGM and from passing any resolution to alter or ratify any alteration of the Articles of Association.

4 The matter came before Belinda Ang JC (as she then was) on 16 November 2002 and she granted an interim injunction restraining the EOGM from being held. Subsequently, the first to fifth defendants applied to discharge the injunction. The discharge application was fixed for hearing in January 2003 before Tay Yong Kwang J. At that hearing, the plaintiffs informed Tay J of their intention to amend the OS to include further reliefs. Tay J then adjourned the hearing to a date after the plaintiffs' application to amend the OS was heard.

5 However matters did not proceed. Instead the first to fifth defendants commenced negotiations with the plaintiffs with a view to an amicable settlement of the entire matter. As such, the parties mutually agreed to refrain from taking further steps in the court action. Subsequently, a number of faxes and letters were exchanged between the parties over the course of the next few months. These letters constitute the nub of the dispute here and I will examine them in detail.

6 The first letter of importance is that of the plaintiffs' solicitors' dated 28 February 2003 to the defendants' solicitors in which they rejected the defendants' offer and counter proposed the following terms:

1. Defendants are to pay the sum of S$2 million to both plaintiffs, such payment to be made forthwith;

2. Defendants are to fully discharge plaintiffs of all their liability to the first defendant and Turf Club Emporium Pte Ltd ("TCAE", this was a company incorporated to handle the business and operations of a complex known as 'Turf Club Auto Emporium' which was involved in the business of selling new and used cars) for loans given to them as directors. Defendants are also to fully indemnify the plaintiffs for any tax liability that may arise in relation to those director's loans;

3. Defendants are to procure a full discharge of all the plaintiffs' obligations as guarantors in respect of the term loans and overdraft facilities granted by DBS bank to the first defendant. In the event that DBS Bank fails to discharge the plaintiffs from the obligations under the guarantee, defendants are to indemnify the plaintiffs for whatever costs and legal expenses that may be incurred by the plaintiffs in procuring the discharge;

4. Defendants are to procure TCAE to grant Motor Way Credit Pte Ltd ("MWC") and Tai Huat Motor Trading Enterprise ("THMTE") (these were companies owed by the plaintiffs) rent free usage of the premises which are presently being occupied by MWC and THMTE from the date of this agreement to the expiry of the remainder licence period;

5. Defendants are to pay the plaintiffs' legal costs in relation to these proceedings and this settlement herein; and

6. Upon the defendants fulfilling the above, the plaintiffs are to transfer their shares in the first defendant and TCAE to the defendants or their nominees. All cost incidental and related to the transfer of the shares shall be borne by the defendants.

7 The defendants' solicitors replied on 5 March 2003 to the plaintiffs' solicitors. They stated that their clients' understanding was that solicitors would not be involved until the agreement was firmed up. However, given that the plaintiffs' solicitors were now involved, the defendants would be making their offer via their solicitors in writing. Their reply offer was that the defendants would in consideration for the plaintiffs transferring their 25% shareholding in both the Company and TCAE:

1. pay a sum of S$2 million;

2. obtain a full discharge of the plaintiffs from any guarantees they might have signed up for the first defendant and TCAE in relation to banking facilities;

3. to take over the plaintiffs' liability for loans taken from the first defendant and TCAE and to ensure that the plaintiffs are discharged for such loans, if any; and

4. Each party to bear their own legal costs.

8 By this letter, the defendants had specifically rejected the second half of term (b) and the whole of term (d) in the plaintiffs' offer dated 28 February 2003.

9 The next salvo from the plaintiffs' solicitors was fired on 7 March 2003 where they agreed for

each party to bear their own legal costs. However, they insisted upon the defendants indemnifying the plaintiffs for any tax liability in relation to the directors' loans and included two new terms. First, the defendants were to procure the consent of TCAE for the plaintiffs' surrender of one vacant unit in respect of the lease/licence at Turf City and the full discharge of all liability thereunder. Second, the defendants were to procure TCAE to grant MWC and THMTE a 50% reduction of rent in respect of their lease/licence of the remaining three units at Turf City from the date of the agreement to the expiry of the remainder lease/licence period.

10 The defendants' solicitors replied on 18 March 2003 stating that they were prepared to obtain the consent from TCAE for the surrender of the lease of one unit. They were however unable to assist with the granting of rental discounts from TCAE or the indemnification of the plaintiffs against tax liability on the sales.

11 The next letter to arrive from the plaintiffs' solicitors was dated 26 March 2003 in which the plaintiffs stated that they accept the defendants' "offer in-principle" and that "the settlement shall be on the following terms". They proceeded to list the terms. In addition to all the agreed terms, the plaintiffs again stated that the defendants were to fully indemnify the plaintiffs if they were liable in any way for all or any of the loans extended to them by the Company and TCAE. They further required that this be evidenced in a separate agreement. The plaintiffs also stated that the defendants in addition to the releasing of the lease for one unit were also to obtain the repayment of the security deposit of S$24,000 and the construction deposit of S$50,000 (the repayment of the construction deposit was waived subsequently by the plaintiffs by letter on the same day). The last new term was that the defendants were to make payment of S$25,000 to each of the plaintiffs being the payment of dividends to the shareholders and the re-issue of a cheque for S$10,000 which had expired.

12 The defendants' solicitors sent a reply on 2 April 2004. This was a critical letter and much was made of this letter by both counsel. This letter was stamped 'without prejudice & subject to contract'. Given the importance of this letter, I set it out in full below:

> We refer to your two (2) letters of 26 March 2003.
>
> We note your clients' request for separate agreement (for an indemnity for the relevant loans). We propose that all obligations be incorporated in a single agreement. Please let us have your views on this.
>
> Your clients were surprised to note item 4 of your first letter, in that, the said issue had never been raised in any prior discussions.
>
> Save as stated above and that our clients are not agreeable to the repayment of the security deposit of S$24,000.00 to Motor Way Credit Pte Ltd, our clients do not object to the other terms.

13 The item 4 mentioned above referred to the repayment of the security deposit of S$24,000.00. The plaintiffs' solicitors replied to this letter on 29 April 2003 attaching a draft Deed of Settlement for the defendants' approval and comments, if any, by 2 May 2003 "so that matters can be finalised expediently".

14 In reply, the defendants' solicitors wrote back on 30 April 2003 stating that they needed to take instructions and would revert by the next week. 30 April 2003 came and went. No reply came. Instead, on 2 May 2003 the defendants notified the plaintiffs of their intention to hold another EOGM

on 23 May 2003 for the purpose of considering and passing a resolution for the second defendants to buy over the shares of the existing shareholders.

15 Startled, the plaintiffs' solicitors wrote to the defendants' solicitors on 8 May 2003 stating that this was a breach of the interim injunction and was wholly inconsistent with the settlement reached as detailed in the Deed of Settlement. The defendants' reply on 13 May 2003 stated that the EOGM was called "to effect the terms of the intended settlement." Further, they stated that they had advised their clients "that the resolution should be passed if, and after a settlement is reached" and informed the plaintiffs that the EOGM would not be held." [underlining not mine]

16 The plaintiffs' solicitors then wrote on 14 May 2003 asking again for the defendants' comments on the draft Deed of Settlement by 17 May 2003. The defendants' solicitors did not reply until 21 May 2003 when they wrote to the plaintiffs stating that they would be meeting their clients soon and would revert as soon as possible. They further stated that they would be "grateful if [the plaintiffs] do not take any precipitous action."

17 The plaintiffs' solicitors wrote back on 29 May 2003 stating that they were giving the defendants a final notice to revert by 2 June 2003, failing which the plaintiffs shall continue with the proceedings as may be best advised.

18 On 3 June 2003, the defendants wrote back their final letter in this saga stating that their delay was due to their clients' failure to raise financing. They proposed that the issue of the purchase of the plaintiffs' shares be kept in abeyance. They further urged the plaintiffs "not to take any precipitous action that may detriment the position of the company in respect of the Originating Summons."

19 The next move of any consequence occurred on 22 August 2003 when the plaintiffs then filed their above mentioned application to amend their OS. They pleaded that they wished to amend their OS to include the following prayers:

> 3 A declaration that the plaintiffs and the 1st to 5th defendants have reached an agreement terms of which are set out in the Settlement Agreement on 3 June 2003 ("Settlement Agreement").
>
> 4 That 2nd to 5th Defendants be directed to purchase the 1st and 2nd plaintiffs' shares in the 1st Defendant by making payment of $1,000,000.00 each to the 1st and 2nd Plaintiffs as per the Settlement Agreement.
>
> Alternatively
>
> That the 1st Defendant be wound up.
>
> Costs of the proceedings be paid by the 1st to 5th Defendants to the Plaintiffs.

20 The defendants' counter application on 16 September 2003 in gist contends that there was no such settlement agreement and as such, they applied to strike out the parts referring to the negotiations as they were conducted on a 'without-prejudice' basis.

21 I would just mention for completeness that the sixth defendant is not involved in these proceedings as he was not involved in the negotiations, and he is not included when I make

references to the defendants below.

Preliminary points

22 Mr Ang, counsel for the defendants, submitted that the plaintiffs' application must necessarily fail on two points of procedure. First, he submitted that the plaintiffs' application was in relation to s 216 of the Companies Act ('CA") and there is no mention under s 216(1) CA of enforcing a settlement agreement. Second, he argued that the Originating Summons was filed prior to the settlement agreement and it was hence wrong to amend the Originating Summons to include a course of action subsequent to the filing.

23 Mr Oommen, counsel for the plaintiffs, chose not to address me on these preliminary points. Nevertheless, I turned to consider these points. Looking at the proposed amendments, I was unable to agree with Mr Ang on his first point. Section 216 CA deals with personal remedies in cases of oppression or injustice. It has two operative parts. The first being the grounds under sub-section (1). That states that any member of a company may apply for relief where the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of members or in disregard to their interests as members of the company. Alternatively, the member can apply for relief where some act of the company or resolution is done/passed or is threatened to be done/passed that unfairly discriminates against or is otherwise prejudicial to one or more of the members. The second part under sub-section (2) provides for remedies that the court can make.

24 As such, the operation of S 216 CA necessarily entails the plaintiffs showing that the grounds relied upon in sub-section (1) exist before they are entitled to beseech the court to grant the remedies sought under sub-section (2). Further, sub-section (2) clearly provides that the orders listed in sub-sub-section (a) to (f) are without prejudice to generality of the orders that the court can make. This clearly makes sense. The court is entitled to make such orders as it deems fit to remedy the matters complained of. These broad words must clearly include the remedy that the plaintiffs are seeking. As such, I cannot see how the defendants can maintain their position that the remedy sought falls outside the scope of S 216(2) CA.

25 As for the defendants' second objection, I find that there is more force to this objection. Order 20 Rule 5 of the Rules of Court ("O20R5") deals with amendment of writs and it applies to the present case by virtue of Order 20 Rule 7. It is trite law that an amendment of the OS would date back to the original issue of the OS and the action would continue as if the amendment had been inserted from the beginning: *Teo Gracie v Tay Leng Hong* [1987] 1 SLR 319. This means that a party cannot amend the OS to add a cause of action which had accrued to him since the issue of the OS: *Saga Foodstuffs Manufacturing Pte. Ltd. v Best Food Pte. Ltd.* [1994] 2 SLR 802; Singapore White Book 20/8/3. This is the position at law.

26 The principle here does not however exclude amendments that relate to the remedy claimed rather than introducing a new cause of action: see *Tilcon Ltd v Land and Real Estate Investments Ltd* [1987] 1 WLR 46. As I feel that this is an important distinction in the present case, I will elaborate on the *Tilcon* case further. There, Dillon LJ accepted that there was a distinction to be drawn between amendments which are options for a particular form of remedy or which crystallises a remedy and amendments which seek to introduce new causes of actions. He noted that one obvious example would be in the matter of special damages in an action for damages for personal injuries. Such damages would, in the ordinary course of proceedings, have to be pleaded. Another example in his opinion would be an action for breach of contract for failing to adequately repair some article or machinery and further consequential damage was caused after the issue of the writ. Then it would

be possible to amend the writ to set out the further damage.

27 Thus, the question to be answered here is whether the proposed amendments go to the remedy or to a cause of action. I was of the opinion that these are amendments that merely go to the nature of the remedy sought. The new prayers sought to be introduced merely quantified the amount of damages to be awarded in the event that the court does find that there is oppressive conduct or discriminatory conduct under S216 Companies Act. It does not seek to allow the defendants to sue upon a new cause of action. As such, I did not allow the second preliminary objection either and proceeded to hear the merits of the matter.

The issue

28 Before me, the parties framed their dispute as being the existence of a settlement agreement. They were in agreement that if I found that there was a settlement agreement, then the plaintiffs' application to amend would succeed and the defendants' application to strike out would fail. Conversely, the reverse was true (although the parties agreed for certain amendments to be allowed in any event). Further, the parties agreed that this issue would be determined from an examination of the letters that passed between the parties and that there would be no need to call witnesses for cross examination.

Existence of the Settlement agreement

29 In examining this issue, counsels for both parties brought me through the flood of letters that passed between their clients, each casting their particular spin on the wording, timing and nature of the letters. Before turning to examine the letters, I will just set out how I intend to approach the question of the existence of the settlement agreement.

30 I will first examine the letters in detail to examine whether the parties' negotiations had crystallised into a contractually binding agreement at any point. At this juncture, I will ignore the fact that the letter of 2 April 2003 was marked 'subject to contract'.. Second, if I do find that there is no agreement, then the matter ends. If however, the reverse is true, I will have to decide whether the fact that the above mentioned letter was marked 'subject to contract' means that the agreement reached was 'subject to contract'. Lastly, if the agreement was 'subject to contract', I will have to determine whether there is 'a very strong and exceptional context' that justifies me not giving the words 'subject to contract' their prima facie meaning thereby holding that the settlement agreement does apply.

Has an agreement been reached

31 Before, I turn to examine whether an agreement has been reached, I pause here to consider the law on determining the existence of an agreement. I turn first to the case of *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 3 SLR 405, where Yong Pung How CJ in delivering the grounds of the Court of Appeal stated at [40] that:

> the task of inferring an assent and of extracting the precise moment, if at all there was one, at which a meeting of the minds between the parties may be said to have been reached is one of obvious difficulty, particularly in a case where there has been protracted negotiations and a considerable exchange of written correspondence between the parties. Nevertheless the function of the court is to try as far as practical experience allows, to ensure that the reasonable expectation of honest men are not disappointed. To this end, it is also trite law that the test of agreement or of inferring consensus ad idem is objective. Thus, the language used by one party,

whatever his real intention may be, is to be construed in the sense in which it would reasonably be understood by the other. [Underlining mine]

32 Next, I refer to the case of *Projections Pte Ltd v Tai Ping Insurance Co Ltd* [2001] 2 SLR 399 where LP Thean JA in delivering the grounds of the Court of Appeal agreed at [16] with the observation of Lord Denning MR in *Butler Machine Tool Co v Ex-Cell-O corporation (England)* [1979] 1 All ER 965 that :

> In many of these cases our traditional analysis of offer, counter-offer, rejection, acceptance and so forth is out-of-date. This was observed by Lord Wilberforce in *New Zealand Shipping Co Ltd v AM Satterthwaite* [1974] 1 All ER 1015 at 1019-1020, [1975] AC 154 at 167. The better way is to look at all the documents passing between the parties and glean from them, or from the conduct of the parties, whether they have reached agreement on all material points, even though there may be differences between the forms and conditions printed on the back of them. [Underlining mine]

33 From these two cases, the approach to be adopted is clear. The Court must examine all the letters passing between the parties and decide objectively based on them whether the parties had reached agreement on all material points.

34 Adopting this approach, I would just comment that the constant theme that runs through the letters is that both sides, while trying to reach a consensus in their negotiations, were being highly competitive. In particular, the plaintiffs had moved the goal posts each time an agreement was in sight. This is of course not a criticism of their behaviour as one is entitled to search for the best possible bargain in the circumstances. This was further not to say that the parties were widely divergent in their positions or interests. Instead, the converse could be said to be true given that the main term of S$1 million to each plaintiff had been agreed to at the outset with the other main term of a discharge of the plaintiffs' guarantees in the Company and TCAE being agreed to swiftly afterwards.

35 As an illustration of the constant moving of goal posts, I would just refer to the plaintiffs' solicitors' letter of 26 March 2003 where they stated that their clients accept the defendants' offer in-principle. If this was the end of the matter, it would *prima facie* appear that an agreement had been reached. But of course, the letter did not end there. It went on to describe the terms of the settlement. What is pertinent to note is that the terms stated differed from those offered by the defendants' last letter. This thus meant that this letter was merely a counter-offer dressed in the skin of an acceptance.

36 Despite this constant moving of goal posts, it was clear that by 2 April 2003, the only divergence in views were first for the need for the indemnity clause to be contained in a separate agreement and second for the repayment of the security deposit of $24,000. Further, it was clear that the plaintiffs had agreed to the first issue by their letter dated 29 April 2003 and it was only the second issue that was still in dispute. Mr Oommen, counsel for the plaintiffs referred me at this juncture to *Pagan v Food Products* [1987] 2 Lloyds Rep 601, a decision of the UK Court of Appeal, where Bingham J (as he then was) had at 613 felt that

> the parties regarded [these terms] as relatively minor details which could be sorted out without difficulty once a bargain had been struck, as in the event they were. I have no reason to doubt that [the parties] intended to bind themselves in advance of settling these terms and when [the buyer] did suggest detailed terms the sellers accepted them at once and without demur... I do not think either party thought these points at all likely to give rise to disagreement, and I doubt if

either gave any thought to the consequences if they disagreed. I conclude that this is a case in which the parties did mutually intended to bind themselves on the terms agreed on Feb. 1 leaving certain subsidiary and legally inessential terms to be settled later.

37 A similar point was also made in the recent Singapore case of *Tan Yeow Khoon v Tan Yeow Tat & Anor (No 1)* [2000] 3 SLR 341 where Rubin J stated that

> I was of the view that to deny specific performance of the agreement reached between the parties would be to abrogate a fairly balanced agreement reached and encourage fruitless litigation, when all the elements essential for a settlement were in place.

38 Mr Oommen argued that this present case was similar as all the essential terms had been agreed to. Thus, since the repayment of the security deposit was not essential to make the bargain work, the court should be adverse to such legal and technical arguments raised to negate the agreement reached. While, I wholly agree with the principle enunciated by the learned judges in both cases, I am unable to agree that it applies to the present case.

39 I shall explain. In *Pagnan v Food Products* [1987] 2 Lloyds Rep 601, the negotiations involved the sale and purchase of a quantity of corn gluten feed pellets. Telexes were exchanged between the parties regarding price, terms of shipment and payment. In particular, a telex was sent that set out a long series of contract terms. The buyers had advised the sellers through the intermediary broker that certain terms were not acceptable. Various telexes followed and both the seller and the intermediary broker thought that the points of differences had been settled. The sellers thus prepared formal documentation for the sale, but the buyers contended that there was no agreement as there was no agreement on certain terms. In particular, the terms with regard to loading rate, demurrage, despatch and carrying charges were missing.

40 As for *Tan Yeow Khoon*, letters had similarly been exchanged between the parties. An agreement had also been reached on all the essential terms except the 'device or 'mechanism' to set those terms in train'. In holding that an enforceable agreement was reached, Rubin J stated that:

> my conclusion was that the letter agreement did incorporate and comprehend all the essential terms of a valid and binding agreement leaving only a subsidiary aspect concerning the device or mechanism as to who should be the expert or valuer to be charged with the task of determining the adjustments to the audited book value of the companies.

41 In comparison, the term in dispute here is that of the repayment of a security deposit of $24,000. This cannot be characterised as a 'relatively minor detail which could be sorted out without difficulty once a bargain had been struck' nor of a 'subsidiary aspect'. I further cannot say that this was a term unlikely to give rise to disagreement. Instead, I would say that a simple perusal of the letters would show that this was an essential point that the parties had given clear consideration to and had disagreed on. As such, I do not therefore think that Mr Oommen's argument is a good one on the facts of the present case.

42 Mr Oommen further submitted that the fact that the plaintiffs' letter of 29 April 2003 asked for comments by 2 May 2003 must have meant that agreement had been reached and it was merely a question of refining the issues given the very short period for commenting given. This argument raises difficulties in two aspects. The first is that all that I can draw from the plaintiffs' letter of 29 April 2003 is that the plaintiffs, felt that agreement had been reached. While the belief of one party is relevant, it cannot be conclusive. Agreement cannot be reached unilaterally. There must be a basis for the plaintiff's belief that agreement had been reached. In particular, the plaintiffs must be

able to say that whatever the defendants' real intentions, they had conducted themselves through their letters such that a reasonable man would believe that he was assenting to the terms proposed by the other party. This cannot be the case here. The parties were dithering via their counter offers and it cannot be said that any reasonable man would believe that the defendants had consented. Second, the fact that the plaintiffs asked the defendants for their comments can also mean that they were aware that the terms had not been agreed to, especially since they had in clause 10 of the Draft settlement agreement included what the defendants had specifically in their last letter rejected. As such, I am unable to place the weight that Mr Oommen wishes me to place on the plaintiffs' letter of 29 April 2003.

43 Similarly, Mr Oommen tried to place great emphasis on the defendants' solicitors letter of 21 May 2003 where they stated that "we will be grateful if your clients do not take any precipitous action." He suggested to me that this meant that the defendants had known that an agreement had been reached and that the plaintiffs could sue on the agreement. I am again unable to agree with the slant that counsel wishes to place on the letters. The letters were exchanged in the background of a pending legal action. The gloss that counsel seeks to cast on the words cannot be said to be unequivocal. Instead, the principle of parsimony or Occam's razor dictates that I adopt the simpler interpretation cast upon the words by Mr Ang: i.e that they were simply asking the plaintiffs not to carry on with their s 216 CA action.

44 Lastly, Mr Oomen referred me to the defendants' letter of 13 May 2003 which he labelled as a clear admission by the defendants that they had reached agreement as they had sought the EOGM "to effect the terms of the intended settlement." If the letter had ended there, I may have agreed with Mr Oommen. Unfortunately for him, the letter did not. It went on specifically to state that the defendants had advised their client "that the resolution should be passed <u>if, and after</u> a settlement is reached" and informed the plaintiffs that the EOGM would not be held." [underlining not mine] As such, I am unable to agree with Mr Oommen that this is a clear admission of an agreement: refer to *Aircharter World Pte Ltd v Kontena Nasional Bhd* [1999] 3 SLR 1 at [34] where the court emphasised that letters must be looked at as a whole and one cannot merely lift one line and read it out of context.

45 Hence, I would find that from an objective analysis and examination of all the documentation passing between the parties that the test of consensus *ad idem* has not been met and that there was no agreement between the parties.

'Subject to contract'

46 Having reached the conclusion that there is no agreement, I need not determine the effect of the words 'subject to contract'. However, in the event that a different view is taken, I would comment on the parties' submissions on the effect of these words in light of the numerous authorities and submissions brought to bear on this factor. I would at this juncture just add that even with this difference in the factual matrix, my conclusion is unchanged.

47 In this area, it is trite law that where an agreement is subject to contract, then unless and until a formal written contract has been executed and exchanged between the parties, then there is no binding and enforceable contract between the parties: *Thomson Plaza (Pte) Ltd v Liquidators of Yaohan Department Store Singapore* [2001] 3 SLR 437 at [27]. In addition, the effect of a 'subject to contract' clause is not just restricted to conveyancing contracts. It has been applied in other areas of law as well: see Belinda Ang JC's (as she then was) decision in *United Artists Singapore Theatres and Anor v Parkway Properties Pte Ltd and Anor* [2003] 1 SLR 791 where it was applied to a lease. Further, I see no reason on principle why it should not apply to an agreement to purchase

shares.

48 Indeed, the effect of a 'subject to contract' agreement was not disputed by the parties. Instead, the main issue here is whether the agreement was subject to contract in the first place. In this respect, one thing must be noted: i.e there was only one letter in which the words 'subject to contract' ever appeared. Mr Oommen seizes upon this as a reason why the agreement formed cannot be 'subject to contract'. On this point, I am doubtful that Mr Oommen's point can be said to be true. However, before going further, I would agree that speaking generally, one would expect to find the words 'subject to contract' at the preliminary stage of the negotiations and not as here near the very end. Further, the cases involving a 'subject to contract' term have generally been where the 'subject to contract' term was clearly incorporated into the agreement, normally by the signing of some document and not by unilateral insertion by one party: see for example *Low Kar Yit v Mohamed Isa & Anor* (1963) 29 MLJ 165 where the term was contained in the option given or *Thomson Plaza (Pte) Ltd v Liquidators of Yaohan Department Store Singapore Pte Ltd (In liquidation)* [2001] 3 SLR 437 where the term was clearly set out in the letter of offer. This does not however in any way suggest that it is insufficient for a party to unilaterally insert the qualification into his offer.

49 Moving back to Mr Oommen's point, I turn first to the case of *Food Convertors Ltd v Meeres* (Unreported decision of Fox LJ in the UK Court of Appeal dated 4 June 1987). In that case, there was an exchange of letters between the parties proposing various terms for a lease. One of the letters in between was headed 'subject to lease'. In relation to this point, Fox LJ stated that

> This correspondence seems to me to be an ordinary example of parties negotiating the terms of a formal lease in circumstances where neither is bound until the lease is executed by both of them. That is confirmed, it seems to me, by the fact, first that they plaintiff's solicitors' letter of 255 September was headed 'Subject to Lease'. They plainly did not intend their client to be bound until a formal lease was executed. There is nothing surprising about that. It is a perfectly reasonable precaution for them to take.

50 Although I acknowledge that *Food Convertors* is a case of 'Subject to Lease' while the instant case is one of 'Subject to contract', I felt that the principle to be drawn from this case is equally applicable to the current case, being that it would be sufficient for one party to unilaterally mark their letter 'subject to contract' to make it 'subject to contract'. I would further recognize that *Food Convertors* involves the party who wrote the 'subject to lease' letter trying to disregard the clause to his own advantage. However, this does not change the applicability of the principle enunciated.

51 Further assistance can be found in *Sherbrooke v Dipple* [1981] 41 P&CR 173. In that case, solicitors for the sellers' opening letter to the buyer stated "Can you please let us know by the end of the month whether this offer which is subject to contract, is acceptable." The buyer was unable to raise the necessary amount by the expiry of the offer. Time passed. 4 months later, the buyer reopened negotiations as he had raised the money. Subsequently, an agreement was supposedly reached. Although Lord Denning MR found that there was no agreement, he nonetheless considered if there was an agreement, whether that agreement was subject to contract. In dealing with this issue, Lord Denning MR stated:

> Everything in the opening letter was "subject to contract." All the subsequent negotiations were subject to that overriding initial condition. We were referred by Mr. Parish to a decision of Brightman J. in 1972. It is *Tevana v Norman Brett (Builders) Ltd.* Brightman J said that "parties could get rid of the qualifications of 'subject to contract' only if they both expressly agreed that it should be expunged or if such an agreement was to be necessarily implied." In this particular

case, it certainly was not expunged. There is nothing to be implied in it. The term "subject to contract" seems to me to be a decisive answer to the claim. It seems to me that it is in keeping with the whole matter. Solicitors would negotiate like this in this sort of transaction, realising that everything is being negotiated "subject to contract". [Underlining mine]

52 Three important points can be drawn from the learned Master of the Rolls' decision. First, he had accepted, as a matter of law, that a single 'subject to contract' letter was sufficient to change the nature of the entire negotiations. Second, once parties started their negotiations under the umbrella of the 'subject to contract' clause, then this status would continue notwithstanding a break in the negotiations. Third he established that parties can only get rid of the 'subject to contract' nature by express agreement or necessary implication.

53 In view of the authorities cited, it is clear to me that if an agreement had been reached in this instant case, that agreement would have been 'subject to contract'. This must be so. Here, it was clear that the defendant's offer was marked subject to contract. Further, the plaintiffs had purported to accept this offer. There was no express or implied agreement that the 'subject to contract' qualification was removed. As such, it must be that any purported agreement reached must have been 'subject to contract'.

54 I would also comment that this does not to mean that the mere use of the phrase 'subject to contract' in a subsequent letter can unravel a previously reached agreement. Indeed, all it can do is to state that any agreement reached post this point is made 'subject to contract'. This is however not the case here. Counsel for the plaintiffs had conceded that the earliest point where agreement could have been reached was on 29 April 2003 when the draft deed was sent to the defendants. This would of course be after the 'subject to contract' letter was sent.

55 I would further highlight that the letters here were written between solicitors. All competent solicitors would of course be aware of the legal significance of the magic words 'Subject to contract'. It must have been drummed into them that these words have the effect of allowing either party to withdraw from the agreed arrangement without incurring any legal liability until a contract is formally signed. As such, the effect of the phrase can be imputed to the parties involved. In fact, I would point out that the conduct of the plaintiffs' solicitors indicates that they were well aware of the practical significance of the 'subject to contract' clause given that they were constantly hurrying the defendants to approve and sign the draft agreement.

56 In the final analysis, I would hold that even if there was an agreement, that agreement must have been made 'subject to contract' and thus since no contract was actually entered into, the contract is not binding or enforceable.

Exceptional Circumstances

57 Lastly. for the sake of completeness, I would also consider whether there is 'a very strong and exceptional context' to justify not giving the words 'subject to contract' their prima facie meaning. The test of 'a very strong and exceptional context' was applied by Nourse J in *Alpenstow v Regalian Properties plc* [1985] 2 All ER 545 at 552 and he had found that there was a very strong and exceptional context which must induce the court not to give the words 'subject to contract' their clear prima facie meaning. In particular, the circumstances that he relied upon was the fact that the liberty conferred on the parties to withdraw at any time by the 'subject to contract' clause was not consistent with the duty imposed on the parties to exchange contracts within a specific time of approval of the draft contract.

58 A slightly different spin was put on this test by MPH Rubin J in relation to a 'subject to tenancy agreement' qualification in *Teo Teo Lee v Ong Swee Lan* [2002] 4 SLR 344 at [61] as being whether the phrase was:

> Merely an expression of a desire by the parties to draw up a formal document to incorporate the terms agreed.

59 In that case, Rubin J noted that the plaintiff had been required to deposit a non-refundable deposit of $10,000. Relying on what he stated to be a "not insignificant amount", he held that the inclusion of the phrase must have been no more reflective of the parties' desire to have a formal document for the sake of regularity and nothing else.

60 With these two cases in mind, I turn now to the present case and considered whether there was a strong and exceptional context or evidence that the parties intended it to be merely a desire for a formal document to incorporate the terms agreed. I answered this question in the negative. This was because the only circumstances that Mr Oommen could highlight to me was the fact that the solicitors for the defendants did not at any time after the draft settlement agreement had been sent refer to the fact that their agreement was 'subject to contract'. I do not think that this constitutes a strong and exceptional context. The fact that the solicitors for the defendants had kept mum is at best neutral. As such, I was unable to agree with counsel that I should not give the words their prima facie meaning.

61 In closing, I would just mention that parties in a 'subject to contract' negotiations would speak and behave as though there was a contract or there would be a contract. This is simply a matter of commercial necessity because if parties dealt with each other as if there was going to be no agreement, then it would hardly be surprising if no agreement was in fact reached. The fact of the matter however is that the beauty of having a 'subject to contract' qualification is that either party can immediately determine whether or not there is a binding agreement. Thus if one departs from these concrete and well established principles and starts to make arguments based on inferences to be drawn from odd phrases snatched from the various correspondence between the parties, then this merely produces uncertainty which was really what the 'subject to contract' term sought to eradicate. The law as it stands is very clear and the end result must be that there is no binding or enforceable agreement that the plaintiffs can rely upon against the defendants.

Rulings

62 Given my above finding, I make the following rulings: I dismissed prayer (1) of SIC 5348 of 2003 in so far as the amendment referred to the settlement agreement, but allowed the addition of the prayer that the company be wound up. Both parties then consented to the amendment of the OS to include a prayer in the alternative that the defendants be ordered to purchase the plaintiff's shares in the first defendant. I then allowed prayers (1) – (3) of SIC 5864 of 2003. I also made certain orders as to costs.