

Ng Chiat Boo and Another v Ng Kian Lee
[2000] SGHC 18

Case Number : Suit 968/1999
Decision Date : 31 January 2000
Tribunal/Court : High Court
Coram : Lai Siu Chiu J
Counsel Name(s) : Bonnie Lo and Yasmin Ali (Rajah & Tann) for the plaintiffs; Wong Kin Meng (Tang & Tan) for the defendant
Parties : Ng Chiat Boo; Ng Chit Boon — Ng Kian Lee

JUDGMENT:

Cur Adu Vult

The facts

1. The plaintiffs are siblings, the first plaintiff being the older brother. The plaintiffs have another brother called Ng Chiap Chye. All three (3) siblings are businessmen involved primarily in the business of manufacturing and distribution of cakes and other confectionery including snacks and desserts. At the material time, the brothers were the shareholders and directors of a company called Changi Tropical Foods Pte Ltd (Changi) which apparently was one (1) of the biggest and most reputable 'nonya' cake manufacturers in Singapore, having been founded by the plaintiffs' parents back in the '60s before it was converted into a limited company in 1988. Changi in turn is/was a shareholder (45%) of a company called Equatorial Delights Pte Ltd (Equatorial); another company called Four Seasons Food Manufacturing Pte Ltd (Four Seasons) is the only other shareholder of Equatorial. Four Seasons had been a customer of Changi since 1970. Four Seasons is wholly owned by Chiam Swee Hsu (Chiam) who is the plaintiffs' stepbrother, and his wife. Chiam and his wife are also directors of Four Seasons.
2. The plaintiffs were also directors and shareholders of a company called Ting Ting Snacks & Desserts Pte Ltd (Ting Ting) incorporated by the wife of one Lim Liang Chye (Lim) and two others in July 1997; Ting Ting's business was similar to Changi's and before its incorporation, it was a sole proprietorship of Lim. Ting Ting and Equatorial were put into voluntary liquidation on 24 September 1999.
3. The defendant is a businessman who, at the material time was the sole proprietor of a business called Teck Shin Food Catering Services (Teck Shin) and was also a director and majority shareholder (51%) of a company called Teck Shin Food Manufacturers Pte Ltd (TSF); both Teck Shin and TSF were suppliers of Ting Ting.
4. In early 1997, the second plaintiff and Chiam met Lim in order to market Equatorial's products; Lim agreed to take supplies from Equatorial. Lim's sole-proprietorship subsequently became Ting Ting which started taking supplies from Four Seasons but, defaulted in payment after a few months. In early 1998, Lim offered to sell Ting Ting to Chiam and the second plaintiff; he said the company's operating costs were too high and it was deeply in debt; Chiam and the second plaintiff accepted Lim's offer.
5. Consequently, on 17 March 1988, a sale and purchase agreement was signed between Lim's wife (and her co-shareholders) on the one part and Chiam and the second plaintiff on the other. Besides taking over the debts (\$1.8m) of Ting Ting, Chiam and the second plaintiff also promised to pay Lim

\$550,000 for goodwill but the payment was not spelt out in the agreement. Lim only received partial payment of the sum; he was also to have received 10% of the issued shares in Equatorial supposedly worth \$350,000 but did not. The second plaintiff and Chiam had arranged to pay part of the cash consideration to Lim in instalments but they stopped the instalments after Lim resigned from Ting Ting's employment.

6. Chiam jointly managed Equatorial with the second plaintiff while Chiam managed Four Seasons and Ting Ting with Lim's help; Lim was employed as Ting Ting's executive consultant. In November/December 1998, the second plaintiff quarrelled with Chiam, essentially over the issue of management; Chiam had succeeded the second plaintiff as the managing director of Equatorial. Because of the resulting friction between Chiam and the second plaintiff, Lim suggested that a new investor be brought in. Lim also informed Chiam and the second plaintiff that because of his own financial problems, he had offered to sell to the defendant 5% of his (Lim's) stake in Equatorial, for \$175,000. The defendant expressed an interest but felt that 5% share was too little. He proposed investing substantially in both Equatorial and Ting Ting instead.

7. At a meeting in January 1999 attended by Lim, the defendant, the second plaintiff and Chiam, it was agreed that:-

- a. the business of Ting Ting and Equatorial would be merged in order to reduce costs;
- b. the estimated worth of Equatorial made up of machinery, goodwill etc would be fixed at \$2m;
- c. the defendant would purchase Lim's (5%) share in Equatorial at the price of \$175,000;
- d. the defendant would invest \$500,000 in Equatorial (of which \$300,000 would be cash and \$200,000 would be set-off against debts owed to his company) and would be given 20% share in Equatorial and Ting Ting;
- e. the current chairman and managing-director of Equatorial and Ting Ting would resign and new ones would be elected.

8. Shortly before Chinese New Year 1999, the defendant changed his mind. Attempts by the second plaintiff and Lim to contact him were unsuccessful. A few weeks after Chinese New Year however, the defendant again met the second plaintiff and indicated he would still be interested in investing in Equatorial if Lim could reduce his price to \$100,000 for his 5% stake; Lim refused.

9. The friction between Chiam and the second plaintiff resulted in the plaintiffs' placing an advertisement on Changi's behalf in a Chinese newspaper blaming Chiam's mismanagement for Changi's financial difficulties and offering to buy over Four Season's 55% interest in Equatorial (and Ting Ting) on terms. Alternatively, the plaintiffs offered to sell their shares to Chiam; neither offer was accepted by Chiam. The plaintiffs then decided to sell their shares instead. The second plaintiff offered Changi's 45% interest in Equatorial to the defendant who accepted and requested the plaintiffs to prepare the necessary resolutions to effect the sale to him. At the defendant's request, the plaintiffs also agreed to and did, make the defendant and his brother Ng Kian Eng (NKE) authorised signatories to both companies' bank accounts on 6 May 1999, before the sale was even finalised.

10. According to the plaintiffs, at a meeting held at a coffee-shop on or about 6 May 1999, the

parties agreed on all the terms and conditions for the defendant's purchase of shares in Equatorial and Ting Ting. The second plaintiff contended that the price of Equatorial shares would be based on a valuation to be conducted by professionals at the defendant's instruction and expense; if the defendant was unable to revert on the value within one (1) month of the date of signing of the sale and purchase agreement, then the price would be \$1.00 per share. Accordingly, for 1,350,000 Equatorial shares, the price would be \$1.35m and for 112,500 Ting Ting shares, the price would be \$112,500. The defendant denied any such meeting took place. However, he did instruct valuers to conduct a valuation of the assets of Equatorial although the plaintiffs were not informed of the results nor were they shown a copy of the valuation report.

11. According to the plaintiffs, a term of the sale of Ting Ting shares was that the defendant had to pay them \$50,000 immediately upon signing of the sale and purchase agreement. As he did not have the means to pay the amount in one lump sum, the defendant requested to which the plaintiffs agreed, to pay the \$50,000 by five (5) monthly instalments, the first instalment being payable immediately.

12. The defendant told the plaintiffs he would arrange for his auditor Lim Lian Soon (LLS) to draw up the sale and purchase agreements for both Equatorial and Ting Ting. On 8 May 1999, the draft agreements (2) were faxed to the second plaintiff. He noted therefrom that there was no mention of the price of the shares. When he queried the defendant, he was informed that it was difficult to express in words the arrangements reached on 6 May 1999 and, the parties should trust each other. On 8 May 1999, the parties signed the sale and purchase agreements (2) at the defendant's office in the presence of LLS, one agreement pertained to sale of the plaintiffs' shares in Equatorial (the Equatorial agreement) and the other related to the sale of the plaintiffs' shares in Ting Ting (the Ting Ting agreement). Although the shares in Equatorial to be sold to the defendant were held by Changi (see para 1 above), counsel for the defendant informed the court (via his submissions) that his client no longer took issue with the fact that the plaintiffs were not the right party to sue, as the defendant had done initially.

13. The salient terms in the Equatorial agreement were inter alia, as follows:

(1). [the defendant] shall arrange and procure the discharge and release of the [plaintiffs] as guarantors to Overseas Chinese Banking Corporation (hereinafter referred to as the Bank) for an amount of up to \$2,600,000 (two million six hundred thousand dollars and hereinafter referred to as the limit) in respect of a term loan and overdraft facilities granted to [Equatorial] and that pending the discharge and release of the said guarantee [the defendant] warrants that the term loan and overdraft shall at all times not exceed the said limit) in respect of the said term loan and overdraft AND THAT [the defendant] shall be liable to [the plaintiffs] for any amount in excess of the said limit in the event [the plaintiffs] are liable for beyond this limit as guarantors.

(2) [the defendant] shall arrange and procure the discharge and release of [the plaintiffs] as guarantors to Keppel TatLee Bank Ltd (hereinafter referred to as the Bank) for an amount of up to \$300,000 (three hundred thousand dollars).

(3) [the plaintiffs] shall procure and irrevocably assign all debts due to them by [Equatorial] as at the date of this agreement to [the defendant] without any reservation and shall have no further claims against [Equatorial] and all post-dated cheques payable to them by [Equatorial] shall be void.

(4) [the defendant] shall cause clauses (1) and (2) to be carried out expeditiously subject to the said respective banks' approval and completion and that such failure in completion due to any one or both banks' refusal to release [the plaintiffs] as guarantors for reasons beyond the [defendant's] ability to procure shall not invalidate other clauses in this agreement.

There was also a restraint of trade provision against the plaintiffs which is not relevant to the dispute at hand.

14. The Ting Ting agreement contained clauses similar to those in the Equatorial agreement in particular cll (1), (2) and (3) set out above save that the defendant's obligation related to releasing the plaintiffs as guarantors in the sum of \$300,000 to Chung Khiaw Bank (CKB) for facilities granted to Equatorial. The Ting Ting agreement contained the following additional clause:-

(4) [the defendant] shall in addition to carrying out his obligations under clause 1 make a payment of \$50,000 (fifty thousand dollars) to [the plaintiffs] at the end of six months after the date of this agreement or earlier at the sole discretion of [the defendant] subject to the completion and execution of the said sale and purchase agreement as stated in clause 5 of this agreement.

15. The plaintiffs complied with the clause relating to assignment of debts in both agreements and executed the transfer forms relating to the shares in Equatorial and Ting Ting. Further, on 11 May 1999, the plaintiffs appointed the defendant and his brother Ng Kian Eng (NKE) as chairman and managing-director respectively of Equatorial, while a close friend of the defendant one Ang Boon Giap (Ang) was appointed a director.

16. The defendant however failed to complete his purchase. Neither did he pay the \$50,000 by the five (5) instalments he had agreed with the plaintiffs – instead of the first instalment being payable immediately, his cheque was post-dated to January 2000; the plaintiffs refused to accept. When pressed by the plaintiffs' solicitors to complete his purchase, the defendant through his solicitors claimed that the plaintiffs' brother Ng Chiap Chye had objected to the Equatorial agreement and, the necessary resolutions from Changi for approving the Equatorial agreement had not been effected. These allegations were refuted by the plaintiffs.

The pleadings

17. Thereafter, these proceedings were commenced in June 1999. In the statement of claim, the plaintiffs prayed for specific performance of both agreements alternatively damages.

18. The defendant raised a host of allegations in his lengthy defence. Firstly, he contended that the consideration for the transfer of 1.35m shares in Equatorial to him was to be a nominal \$1.00; similarly for the transfer of 112,500 shares in Ting Ting. The defendant pleaded that in late 1997 Ting Ting defaulted in its payment for supplies from TSF. He alleged that the plaintiffs had represented to him that Ting Ting would be able to discharge its debts (\$130,000) to TSF by May 1998 once Equatorial became its shareholder. Relying on that promise, the defendant alleged he withheld taking action on TSF's behalf against Ting Ting but no payment was made to TSF in May 1998 and, despite a further grace period, no payment was made by August 1998 either.

19. The defendant further alleged that the plaintiffs and Chiam represented to him that:-

- a. the businesses of Ting Ting and Equatorial had been merged and were viable;
- b. the goodwill, machinery and equipment of both businesses were valued at more than \$2m as they had invested substantially in both companies;
- c. Ting Ting and Equatorial suffered from cash-flow problems and some suppliers had threatened to discontinue their supplies. The companies were also indebted to Central Provident Fund Board, Power Supply, Jurong Town Corporation and others as well as for salaries to their workers;
- d. if he invested \$300,000 in Equatorial and Ting Ting, the defendant would be given 20% of the companies' shares. The defendant accepted the offer on condition that the positions of chairman and managing-director of both companies were occupied by his nominees. However, Chiam who was then the chairman and managing director, refused to resign.

20. The defendant pleaded that in April 1999, the plaintiffs made a fresh offer to transfer to him 45% of the issued shares in Equatorial and Ting Ting in exchange for their release as guarantors to CKB and, his injection of \$300,000 into the businesses. He averred that separately Chiam had agreed that Four Seasons would transfer 900,000 shares it held (representing 30% of the issued shares) in Equatorial to his brother NKE and Ang equally, in consideration for each of them injecting \$300,000 into Equatorial. Further, it was a condition precedent to the Equatorial and Ting Ting agreements that Chiam and his wife would each transfer 37,500 shares (representing 30%) in Ting Ting to NKE and Ang. The defendant contended that the Equatorial and Ting Ting agreements contained only some not all, the terms agreed between the parties as the agreements were partly oral.

21. The defendant further alleged that the plaintiffs, Chiam and Chiam's wife failed to discharge their contractual obligations and, the various representations they made to him turned out to be false, including the fact that both Equatorial and Ting Ting were doing well. In addition, the assets of Equatorial had been grossly inflated – a number of machines were missing from Equatorial's factory or they did not work and, the company's financial position was far worse than that reflected in the unaudited accounts given to him. The defendant asserted he was entitled to rescind both agreements and he counter-claimed for the loss and damage he allegedly suffered in consequence.

The evidence

(i) the plaintiffs' case

22. The second plaintiff was the main witness for the plaintiffs as the first plaintiff deposed that he left everything relating to the share transactions to the former to handle. The second plaintiff gave his views on the defendant's counterclaim – he denied that Equatorial and Ting Ting were not doing well. He contended that the monthly turnover of both companies was in the region of \$800,000. Although their business lacked professional management, the second plaintiff argued that the companies had potential and that was why the defendant was attracted to invest in them. He denied he and the first plaintiff approached the defendant, it was Lim who did.

23. The second plaintiff said he was not party to what had been agreed between the defendant and Chiam nor was he told. In any case, whatever arrangements the defendant had with Chiam or with Four Seasons did not concern the plaintiffs and did not form conditions precedent to the completion

of the Equatorial or Ting Ting agreements. Neither were the arrangements with Chiam spelt out as conditions precedent in the two agreements. The second plaintiff denied he had induced the defendant to invest in the two companies. He further denied Equatorial had practised false accounting and or he had withheld material facts from the defendant.

24. The second plaintiff said he realised subsequently that the defendant had no intention to invest in either company – the defendant's motive was to get himself into the management of Equatorial and Ting Ting in order to learn the trade secrets, siphon out funds, find out who were Equatorial's customers and induce staff to leave to work for companies associated with the defendant. For these reasons and because of the defendant's misdeeds as well as those of NKE, the plaintiffs removed both from their positions as chairman and managing director respectively of Equatorial, on 17 June 1999. The plaintiffs and Chiam also changed the authorised bank signatories of Equatorial so that the defendant could not issue cheques.

25. Elaborating on the misdeeds, the second plaintiff alleged that the defendant had, for the period 6 May to 17 June 1999 issued cheques totalling \$913,456 from Equatorial's account of which \$320,118.46 were made out in favour of the defendant or to TSF. Further, it had been agreed with the defendant that because of the company's tight cash-flow, Equatorial would withhold payments on old debts and pay new suppliers first. These old debts included \$700,000 owed to the second plaintiff/Changi. However, after he joined the company, the defendant paid the old debts owed to Teck Shin and or TSF rather than current suppliers. Further, it had been agreed that the defendant would inject \$600,000 into the company. He did pay but changed his mind subsequently and withdrew the amount.

26. Equatorial also suffered a spate of resignations in June 1999. The letters of resignation were all dated 14 June 1999, contained identical wording and were all addressed to Chiam and not to the then managing-director NKE. The second plaintiff suspected that the resignations were instigated by the defendant and or NKE.

27. The second plaintiff complained that the defendant virtually destroyed Equatorial and Ting Ting as both companies were put into provisional liquidation in September 1999. The figures of Ting Ting for production and sales were \$519,287.04 and \$385,982.84 respectively for May and June 1999. After the defendant and his brother joined, the figures dropped to \$182,631.53 and \$142,346.41 respectively for August and September 1999. In addition, United Overseas Bank on behalf of CKB set-off the sum of \$300,000 pledged by the plaintiffs (as guarantors) against the outstanding sums owed by Ting Ting, after the company was put into provisional liquidation.

28. The second plaintiff said the plaintiffs were still liable as guarantors (in the sum of \$16m) to Overseas Chinese Banking Corporation (OCBC) who are the mortgagees of Equatorial's factory, in the event that the sale price of the factory when realised, is less than what Equatorial owes to OCBC. The plaintiffs were similarly liable as guarantors for loans granted by Keppel TatLee Bank (KTL) to Equatorial for the purchase of machinery.

29. Cross-examined on the two sale and purchase agreements, the second plaintiff:-

a. agreed he was keen to procure his release as guarantor to the three (3) banks in question but denied that he had offered to assign the debts of Equatorial to the defendant because he well knew that the prospects of recovery were slim;

b. disagreed that there was no discussion on the price of the shares and that

was why it was omitted;

c. explained that besides drafting the agreements, the defendant's auditor LLS also prepared the share transfer forms (2) in which the consideration was also stated to be \$1.00 for all the shares instead of \$1.00 per share. He had in fact queried LLS about the \$1.00 consideration and was told that was the usual method to avoid 'trouble' which turned out to be the defendant's attempt to circumvent payment of stamp duty. In June 1999, he was also asked to go to court to sign a statutory declaration for the disposal of shares in which the consideration was again stated to be \$1.00; he did not know who had prepared the same;

d. pointed out that initially the defendant was not agreeable to the plaintiffs' price of \$1.00 per share and wanted to pay \$1.00 for all the shares. However, when the defendant requested the plaintiffs to assign the trade debts to him, the second plaintiff said he would agree only if the defendant paid \$1.00 per share as, the debts to be assigned were worth \$700,000 and, 45% of Equatorial based on a value of \$2m would be worth \$900,000;

e. explained that the defendant not he, was in a hurry to sign the agreements (as the defendant was anxious to join the company);

f. pointed out that he and the first plaintiff remained as guarantors for the loan of \$2.6m extended by OCBC as OCBC did not agree to their release;

g. explained that the payment of \$50,000 was inserted into the Ting Ting agreement because it was actually meant to be a loan to Ting Ting;

h. denied counsel's suggestion that he had shown the defendant an inventory list (totalling \$2.7m) of Equatorial to induce the latter to buy 45% of the company's shares. The list was prepared for purposes of applying for a 60 year lease from Jurong Town Corporation and he showed it to the defendant to let him know the value of the company;

i. denied he was told that the defendant would invest in the company and would assume liability under the bank guarantees only if the defendant had majority control; in any case, he could not promise majority control of the company to the defendant as he and his brothers jointly held 45% shares only through Changi. He was unaware that the defendant was negotiating with Chiam to purchase 30% of the shares in Four Seasons although he knew that they were having discussions. If indeed that transaction was a condition precedent to the plaintiffs' sale, the defendant would have put it into the sale and purchase agreements. Had the condition been inserted in the sale and purchase agreements, the plaintiffs would not have agreed.

30. Questioned on the discrepancy between the inventory figure and a subsequent valuation (\$92,645.00) done by Jones Lang LaSalle (on the instructions of Equatorial's liquidators), the second plaintiff explained that the inventory was based on the company's investment or purchase prices which were mainly expended in 1996. The inventory included the cost of renovations done to the boiler room and electrical fittings. Furthermore, some items were custom-made and cost more but when dismantled, they had no commercial value. In addition, Jones Lang LaSalle's valuation was done

for purposes of an auction. He disagreed that some of the items were used equipment and others were not in working condition.

31. The second plaintiff elaborated on para 29(c) above. The defendant hoped that the valuation he called for would show the shares to be worth less than \$1.00 each; the defendant said the price would be settled after the valuation had been obtained. The plaintiffs trusted the defendant. They themselves had previously signed similar agreements with third parties where the price of the shares they purchased was not stated but, they abided by their gentlemen's agreement to pay what they had orally agreed; they believed the defendant would do the same but he did not.

32. The second plaintiff acknowledged that his brother Ng Chiap Chye had opposed some of the terms of sale to the defendant. However, he had since resolved the dispute with his brother and the latter no longer opposed the sale to the defendant or the terms thereof.

33. Chiam's testimony corroborated the second plaintiff's. Chiam is also a director of Equatorial and a shareholder in Ting Ting. After Equatorial had purchased a factory for \$3.28m in July 1996, the equipment and business of Changi and Four Seasons were transferred to the former. He deposed he and the second plaintiff bought over the business of Ting Ting because they saw that it had potential and had synergy with Equatorial's business.

34. Chiam revealed that it was the defendant who advised him not to accept the plaintiffs' advertised offer in May 1999 to buy him out saying both companies' monthly sales of \$800,000 had potential. The defendant also said he would later offer to buy the plaintiffs' shares, which he confirmed to Chiam in April 1999 he had done. However, because he had to pay a substantial sum to the plaintiffs (which figure he did not disclose), the defendant told Chiam he was not able to pay Chiam but, he would bring in another investor, which he did by his close friend Ang.

35. The terms of investment agreed between Chiam and the defendant/Ang required the latter to each inject \$300,000 into the two (2) companies in return for which they would each be allotted 15% shares in Four Seasons. In the defendant's case, the shares were to be transferred to his brother NKE. The \$600,000 had to be paid within fourteen (14) days of signing of the agreements/transfer forms. Chiam emphasised that his agreement to transfer 30% of his Four Seasons shares was separate from and had nothing to do with the plaintiffs' agreement to transfer 45% Equatorial shares to the defendant nor, was his agreement a condition precedent to the plaintiffs' agreement with the defendant.

36. In view of his strained relationship with them, Chiam did not ask the plaintiffs the amount the defendant had to pay for the plaintiffs' shares in Changi. By late May/early June 1999, Chiam's relationship with Lim (who used to be his good friend for over 30 years) had also deteriorated. Because of his poor relationship with the plaintiffs and Lim, Chiam was receptive to the defendant's overtures. The defendant did not prepare any documents to evidence his agreement with Chiam, saying it was a friendly deal and an agreement was therefore unnecessary. He assured Chiam that once Chiam had signed the transfer forms, the defendant would immediately inject the required \$300,000 into the companies. Accordingly, on or about 8 May 1999, Chiam signed the share transfer forms prepared by the defendant's auditor.

37. In May 1999, the defendant deposited \$225,000 into the bank account of Ting Ting and \$50,000 into Equatorial's account. However, from 18 May 1999 onwards, he issued cheques for substantial sums in favour of his company (TSF) and stopped depositing funds into the companies' accounts from 21 May 1999 onwards, despite Chiam's protests that Ting Ting's account was already overdrawn (its overdraft limit with CKB was \$500,000). On his part, Ang withdrew \$12,000. Chiam was powerless to

stop the defendant because the defendant, his brother and Ang were authorised bank signatories.

38. Sometime in June 1999 Chiam discovered that his wife had omitted to co-sign the share transfer forms (2) he had previously executed on Four Seasons' behalf. He refused to arrange for her to do so unless an agreement was signed to ensure that:

- a. the defendant paid the balance \$300,000 to Four Seasons;
- b. the authorised bank signatories were changed such that Chiam and his wife had to countersign any cheques signed by the defendant, his brother or Ang.

The defendant refused.

39. In June 1999, Chiam terminated Lim's services as Lim wanted to dismiss several staff who were close to Chiam; this resulted in a number of staff resigning. Chiam suspected (and understood from some of the staff) that they had been enticed by Lim, the defendant or the defendant's brother to leave for better offers from a company called Ling Ling Snacks & Kuehs Pte Ltd (Ling Ling) which had been incorporated in September 1998. The staff who resigned included drivers, workers and order clerks as well as Lim's wife whose monthly salary was then \$6,000 (against Lim's salary of \$3,000). As Lim did not have the means to set up Ling Ling because of his and his wife's then financial difficulties, Chiam suspected that Ling Ling must have been the brainchild of the defendant/NKE. It was strange that although the defendant was then the chairman of Equatorial and his brother was the managing director, the letters of resignation were all addressed to Chiam.

40. It was then that Chiam and the second plaintiff decided to put aside their differences to repair the damage done to the companies by the defendant. Accordingly at a board meeting held on 17 June 1999, they removed the defendant and his brother as chairman and managing-director respectively and both were also removed as bank signatories. There were then two groups of authorised signatories, one group comprising of Chiam and Ang and the other, the defendant and his brother. Even if Chiam refused to co-sign cheques issued by Ang, the defendant and his brother could do so. Despite their removal from Equatorial's management, the defendant and his brother continued to cause damage by spreading rumours that Equatorial and Ting Ting were closing down resulting in the companies' having difficulties in obtaining supplies of raw materials. The defendant also instigated suppliers to sue the companies for outstanding debts. This action, coupled with Lim's poaching of customers on Ling Ling's behalf accelerated the collapse of Equatorial and Ting Ting. Chiam denied that suppliers lost confidence in the companies because Lim was dismissed. He said the final straw was when a supplier/judgment creditor executed a writ of seizure and sale on the office equipment and furniture on 22 September 1999. Chiam called for a directors' meeting two (2) days later and it was resolved to voluntarily liquidate both companies.

41. Cross-examination of Chiam revealed that the cause of his strained relationship with the second plaintiff was because the latter opposed his attempts to control the inventory of Equatorial and Ting Ting. Although he rejected the plaintiffs' offer to buy him out, Chiam said he himself was unable to buy out their 45% stake in Equatorial because of financial constraints. Chiam echoed the second plaintiff's denial that the defendant had imposed as a condition for his investment that the defendant must have majority control of Equatorial. Chiam also denied his relationship with Lim turned sour because Lim refused to give him access to recipes of Ting Ting without the consent of the defendant/the defendant's brother. He blamed the defendant for causing Lim's attitude towards him to change. Chiam disagreed that he refused to obtain his wife's signature to the transfer forms because he felt that the defendant and NKE did not treat him with respect.

42. As for the cheques issued by the defendant, Chiam conceded that one cheque for \$50,000 at least was rightfully issued as it included repayment (\$40,000) to the defendant for an advance the defendant made to the company for payment of salaries; the balance \$10,000 was taken by Lim. Chiam admitted he had co-signed some of the cheques issued by the defendant, pointing out that even if he had refused, the defendant could have arranged for another authorised signatory, to sign the cheques.

43. I need not refer to the evidence of the first plaintiff as essentially he relied on the testimony of the second plaintiff and, repeated the denials of the second plaintiff and Chiam that the defendant's purchase of the plaintiffs' shares was conditional upon the defendant's purchase of 30% shares from Chiam in Four Seasons. The first plaintiff pointed out that he was in charge of the factory and the production department while management of the companies was handled by the second plaintiff. Due to his limited knowledge of the affairs of the companies, cross-examination of the first plaintiff did not elicit any useful information.

(ii) the defendant's case

43. In his testimony, the defendant claimed that besides his condition to the plaintiffs that he must have majority control of both companies, he had also informed the plaintiffs (who agreed), that all payments due to suppliers must be paid promptly in order to avoid damage to the reputations of Equatorial and Ting Ting. Further, meetings relating to his investment in the three companies were held with the plaintiffs and Chiam separately because of their strained relationship but, he made known the outcome of the meetings to the absent party and Lim was present throughout the meetings.

44. The defendant did not dispute Chiam's version of the terms for the latter's transfer to him/his brother/Ang of 900,000 (equivalent to 30%) shares in Four Seasons. Neither did he dispute Chiam's testimony that in return for those shares, the defendant or his brother and Ang would each inject \$300,000 into Equatorial. Where the defendant's version differed from the second plaintiff's and Chiam's was in relation to his testimony on the alleged assurances and representations he claimed to have received from the latter two (2) and which induced him to enter into the agreements.

45. According to the defendant, the first misrepresentation related to the unaudited accounts of Equatorial. His auditor (LLS) had advised him to obtain audited accounts of Ting Ting and Equatorial to verify their financial position. When he asked the second plaintiff for the same, he was told the audited accounts would not be ready for several months but that a set of the unaudited accounts would be made available to him. When he saw the unaudited balance sheet, the defendant noticed several discrepancies in the quantum of director's loans to Equatorial. When he raised the discrepancies with the plaintiffs, they agreed that the loans they had made (together with Changi's) to Equatorial would be assigned to the defendant. The plaintiffs also assured the defendant that the unaudited accounts were substantially correct.

46. As to how the agreements (2) came to be signed, the defendant relied on the testimony of LLS which I shall refer to later. As earlier indicated (see para 10) the defendant denied a meeting had taken place between himself and the plaintiffs on 6 May 1999 let alone that it was then agreed that the price he would pay for shares in Equatorial and Ting Ting would be based on professional valuation and failing that, the price would be \$1.00 a share. There could not have been such a term as no reference was made to it in the agreements signed on 8 May 1999.

47. Cross-examined on the allegations he had levelled against the plaintiffs (including concealing one bank account with DBS from him), the defendant:-

a. explained that although he was shown a copy of the inventory list by the second plaintiff, he was not given a copy until the discovery stage before trial;

b. explained that although there was no agreement between himself and the second plaintiff to base the share price on valuation, he had nevertheless instructed Colliers Jardine to value the factory in May 1997 on the advice of M/s Lee Seng Chan (the company auditors for both Equatorial and Ting Ting) who arranged to stamp the share transfers, in which the consideration had been stated as \$1.00. The company auditors asked for a valuation in case there were 'problems' with the Stamp Office on the nominal consideration. He did not receive a copy of Colliers Jardine's (Colliers') valuation report as their fees (save for \$700) were not paid by Equatorial. However, his complaint that the plaintiffs' inventory list was inaccurate was not based on Colliers' valuation but on his own physical examination of the inventory in June 1999 after he joined Equatorial;

c. denied the second plaintiff had called him on 8 May 1999 after receiving the draft agreements to inquire why the price of the shares was not stated in the agreements, or that he had told the former that it was difficult to put into writing all the arrangements reached or said the parties should proceed on trust;

d. admitted (after initially denying) that the second plaintiff had indicated to him a figure of \$800,000 as the debts to be assigned;

e. revealed he had shown the unaudited accounts of Equatorial to LLS who had questioned the accuracy of the figures;

f. claimed he did not prepare an agreement for his arrangement with Chiam because Chiam had advised it was unnecessary – instead of engaging lawyers to prepare an agreement, Chiam said the money saved could be used to pay creditors;

g. claimed that the second plaintiff did not want Four Seasons' name to appear in the Equatorial or Ting Ting agreements, which fact he 'forgot' to mention in his affidavit;

h. testified that Chiam did not affix the common seal of Four Seasons to the transfer forms until pressed to do so and Chiam's wife's did not sign the forms;

i. denied his whole attitude towards the plaintiffs changed after he was appointed chairman of Equatorial;

j. contradicted the second plaintiff's testimony and alleged it was Chiam who told him to hold off paying new debts when he joined the company and to settle old debts first (including those owed to Teck Shin/TSF);

k. agreed that when the plaintiffs pressed him through their lawyers to complete his purchase, his lawyers did not allege there had been misrepresentation on the plaintiffs' part nor did his lawyers allege that Chiam's transfer of shares to him in

Four Seasons was a condition precedent to his purchase from the plaintiffs; that was because he had no actual/written proof;

I should point out that this factor of lack of proof did not stop the defendant from raising the two (2) allegations (for the first time) in his affidavit filed on 10 August 1999 to oppose the plaintiffs' application for summary judgment.

48. Re-examined by his counsel, the defendant claimed it was the plaintiffs not he, who were in a hurry to get him to sign the agreements – they told him they had issued many cheques but the banks would be freezing the companies' bank accounts once they saw the audited accounts, this would result in suppliers not getting their money and in turn they would stop supplying and, it would spell the end of the companies. Hence the defendant's investment and financial assistance was urgently needed.

49. To buttress his testimony, the defendant called three (3) other witnesses, including Lim and his auditor (LLS); I shall start first with Lim's testimony. Lim who described himself as a 'food consultant' currently working for Ling Ling (which he claimed had no association with the defendant) testified that Chiam dismissed him without giving him the shares (in Equatorial) and balance (\$84,000) goodwill payment promised to him. He readily admitted he asked 10-12 employees of Ting Ting and Equatorial to follow him when he left although he did not assist them to draft their identical letters of resignation. Lim confirmed the plaintiffs' testimony that he made the approach to the defendant after the fallout between the second plaintiff and Chiam in November 1998; he was worried that the result would be a break-up of the companies as, monies were owed to a number of suppliers with whom Lim was in close contact.

50. Although the defendant claimed Lim attended all the meetings, Lim deposed that he attended only some meetings in the early stages of negotiations between the parties; he was 'not very sure' when questioned whether at a particular meeting, the defendant was told by the plaintiffs and Chiam that Equatorial's equipment, machines, goodwill and other assets were worth \$2m. He opined that the figure of \$2m was very subjective, it had to be agreed upon or, verified from the books of account.

51. Lim supported the defendant's claim that the latter's agreement with the plaintiffs was conditional upon Chiam's transferring to the defendant 30% shares in Four Seasons and upon the defendant's gaining majority control of Equatorial. Cross-examination of this evidence revealed that Lim's knowledge came from the defendant who told him sometime in early 1999. He also claimed that the plaintiffs and Chiam were aware of this condition at an early stage of the negotiations with the defendant when he was present. There was also a meeting held at the office of the defendant's auditor LLS where the number of shares to be sold were discussed.

52. Lim explained he was allotted 10% stake in Equatorial which shares were not registered in his name. He asked for permission to sell 5% of that stake (150,000) to the defendant. Although Chiam refused to consent, Lim pointed out that as the shares belonged to him, he could sell them to whosoever he pleased. As Chiam said he had no funds to buy him out, Lim decided to offer his shares to the defendant. In fact, Lim (with the plaintiffs) also approached National Trades Union Congress (NTUC) at one stage when the defendant did not revert on Lim's offer. However, when the defendant indicated he would buy Lim's shares, the plaintiffs and Lim called off further negotiations with NTUC. This was then followed by a proposal from the defendant to take a bigger stake in the companies. The defendant also asked Lim on the performance of the companies; Lim indicated it was healthy, cash flow on paper was okay, future prospects 'were definitely bright' and 'it was a good buy' after he had checked the profit and loss accounts, as prepared by the accounts clerk, which figures were 90% accurate. In reality Lim testified, the company had a tight cash flow due mainly to the fact that a

number of customers (most of whom were handled by Chiam's wife) did not pay their outstanding accounts.

53. LLS confirmed he is/was the auditor of both Teck Shin and TSF and had recently been appointed auditor of Ling Ling as well. He was first apprised of the defendant's proposed investment in April 1999 when the defendant sought his advice. LLS was told that Teck Shin sold products to Equatorial and Ting Ting both of which were indebted to Teck Shin for about \$200,000. The defendant wanted to buy into the two (2) companies with a view to possibly rehabilitating them; if the defendant succeeded, he would be able to recover Teck Shin's debt. LLS advised the defendant to look at the companies' audited accounts to determine the extent of their assets and liabilities.

54. According to LLS, he was told by the defendant that audited accounts were not available whereupon LLS cautioned the defendant and advised that he should ask to look at the assets and liabilities. LLS pointed out that if a company could not get its accounts out after a long delay, it meant that the accounts were messy or, the management had something to hide. The defendant said he would check with the plaintiffs and Chiam. Despite his warning, LLS said the defendant was still interested to purchase the plaintiffs' shares.

55. LLS testified that at one of the meetings held at his office where the defendant was present, the plaintiffs told him that 1,350,000 shares in Equatorial and 112,500 shares in Ting Ting would be transferred to the defendant for only \$1.00 consideration because, the actual consideration would be the release of the plaintiffs from their personal guarantees given to OCBC, KTL and CKB totalling \$3.2m and payment to them of \$50,000 in 6 months' time. He recalled that the second plaintiff did most of the talking at meetings, some of which he did not attend but, the defendant would report on their outcome to him or, he would be informed at subsequent meetings at his office at which the plaintiffs were present.

56. LLS testified that for the sale from Chiam to the defendant, he was told there was no need for an agreement to be prepared as (according to the defendant) Chiam was anxious to complete the deal. Neither was he told to include Chiam as a party to the Equatorial and Ting Ting agreements. As for those agreements, LLS said the plaintiffs requested for and amendments were made to, the bank guarantee clause. He had asked the defendant the amount of debts to be assigned by the plaintiffs but he could not recall whether the figure told to him was \$700,000. He was unable to ascertain and therefore to insert, a figure for the assigned debts since no audited accounts were shown to him.

57. LLS said it was 'obvious' to him and to other reasonable person that the defendant and the plaintiffs intended to treat the transfer of 45% of shares in Equatorial and Ting Ting from the plaintiffs and 30% shares in Four Seasons from Chiam 'as one entire deal'. If any portion of the deal failed to materialise, then the whole deal would be aborted as the costs involved totalled \$4m. To support his argument, LLS put forward these figures presumably to show the extent of the defendant's outlay:

\$2.6m – OCBC plus \$300,000 – KTL plus \$300,000 – CKB plus \$800,000 –
creditors' claim plus \$50,000 payment to the plaintiffs.

Unfortunately, apart from making that statement, LLS was not asked to elaborate on his figures nor was he cross-examined on the same. One is left to surmise that his starting figure of \$2.6m came from the OCBC guarantee referred to in clause 1 of the Equatorial agreement (set out in para 13 above) to which he added the \$300,000 cash which the defendant, NKE and Ang were each supposed to inject into all three (3) companies.

58. Finally, there is the evidence of the valuer Lui Fook Kee (Lui) who testified that on the

defendant's instructions (supposedly as chairman of Equatorial) he carried out the valuation in early August 1999 at Equatorial's factory, on a 'fair market value basis'. I should point out that the defendant's testimony that Colliers had done a valuation in May 1999 was not substantiated by any document; Lui is not from Colliers but from the firm of Machinery Valuers & Consultants. As very little turns on Lui's testimony, I shall not dwell on it save to say that he testified the whole valuation process took him two (2) days including the taking of photographs, before he arrived at a figure of \$432,000. Lui was told that the equipment and machinery were for food production but not specifically for the making of 'nonya kueh'; he was not shown Equatorial's inventory list. However he knew that a number (10) of items were custom-made which factor he took into account in his valuation (albeit not stated); because that would result in a lesser demand, it warranted a lower value. Lui explained that his valuation did not take into account the value of Equatorial's commercial vehicles because he did not have the opportunity to inspect them; neither did it take into account the cost of renovations and fittings as the valuation was for disposal purposes.

The decision

59. The crux of the defendant's case, according to the convoluted defence filed for him was, he was entitled to rescind the two (2) agreements because of the plaintiffs' misrepresentations and, the contracts were conditional upon his securing 30% shares in Four Seasons from Chiam/Chiam's wife which he did not. I propose to first address the numerous other allegations the defendant raised in his defence before returning to this main issue.

60. Among the many peripheral allegations raised by either the defendant's solicitors before commencement of proceedings or in his defence were the following:-

- (a) that the plaintiffs' brother Ng Chiap Chye objected to the sale of Changi's shares to him;
- (b) that Chiam had refused to resign as chairman and managing director of Equatorial and Ting Ting respectively;
- (c) that the necessary resolutions to effect the transfer of shares to him were not passed;
- (d) that Chiam and Chiam's wife failed to execute the transfer forms for Four Seasons.

On the evidence, I find that the above allegations were either not substantiated or were rebutted; some elaboration is called for. On item (a), the second plaintiff had testified that after Ng Chiap Chye had voiced his objections to the sale to the defendant in his solicitors' letter dated 24 May 1999, the latter changed his mind subsequently, prior to commencement of these proceedings. It should also be noted that Ng Chiap Chye's objections were raised after Changi had passed the requisite board resolution (on 18 May 1999) to sell its 45% stake in Equatorial to the defendant, with his consent. Item (b) is clearly untrue since Chiam did step down as chairman and managing director and was replaced by the defendant and NKE. Similarly, item (c) is untrue as I note that exhibit NCB-10 (p 81) in the second plaintiff's affidavit shows a fax transmission dated 16 June 1999 from the company secretary (Allied Corporate Services Pte Ltd) to the defendant requesting payment for their services in effecting the transfer of 1.35m shares in Equatorial to him. It is also common ground that Chiam did execute the transfer forms and also affixed the common seal of Four Seasons thereon. What he did

not do was to obtain his wife's signature (which earlier omission was inadvertent) because he wanted the defendant to keep to his side of the bargain first – inject \$300,000 into Four Seasons. There was no indication from Chiam that his wife had refused or would refuse, to sign the transfer forms once the defendant had complied with his request. In any event it is my view that Chiam's agreement with the defendant has nothing to do with the plaintiffs (see para 63 below).

61. On the main issue, I had earlier pointed out (para 47) that the defendant's allegation of misrepresentation first surfaced in his O 14 affidavit (see para 59 of that affidavit). Prior to commencement of this action (on 28 June 1999), the plaintiffs and their solicitors had written to the defendant to demand that he comply with the terms of the agreements since the plaintiffs had discharged their obligations. In responding to those demands, the defendant at no time complained that the plaintiffs had misrepresented to him. On the contrary, his stand (as reflected in his solicitors' letter dated 4 June 1999 to the plaintiffs' solicitors) was, that he was not prepared to invest further funds because he required '*sight of satisfactory evidence that [the plaintiffs] are ready willing and able to proceed with the sale and purchase of shares in view of objections raised [by Ng Chiap Chye]*'. I have no hesitation in finding that the plea of misrepresentation was an afterthought and a ploy used by the defendant to renege on his obligations; it is clearly unmeritorious and a fabrication; accordingly I dismiss it. I should add that I did not find the defendant a credible witness; I disbelieve his denial no meeting was held at all on 6 May 1999 let alone at a coffee-shop.

62. Even if there is any truth in the defendant's complaint of misrepresentation, it could not have influenced the defendant let alone induced him to enter into the agreements. This is apparent from the testimony of LLS who said he cautioned the defendant against accepting the unaudited accounts of Equatorial despite which, the defendant chose to go ahead with his investment. One should also bear in mind that by his own testimony, he was shown but not given, a copy of Equatorial's inventory list until the trial; how could he then have been influenced by the list? The defendant must therefore bear the consequence of the risk he took. Further as part of the 'due diligence' he conducted, the defendant sought Lim's views on the performance of Equatorial and Ting Ting and the latter painted a rosy picture. If the defendant chose to rely on Lim's representations to his detriment, his recourse if any is against Lim, not the plaintiffs.

63. Next, I turn to the issue of condition precedent. The defendant had pleaded that the agreements reached with the plaintiffs were partly oral and partly in writing. No evidence was adduced by him on the oral aspects of the agreements apart from his allegation that he had told the plaintiffs his agreements with them were conditional upon his reaching agreement with Chiam/Chiam's wife and the undisputed testimony that the defendant or his nominees had to inject \$300,000 into each of the two companies. Again, this defence did not surface in the correspondence from the defendant's solicitors to the plaintiffs' solicitors before trial. What is more significant is the fact that the defendant could have easily instructed his auditor LLS to include such a condition in either the Equatorial or Ting Ting agreements but he did not, notwithstanding its importance to him. He did not give any let alone, a satisfactory explanation for the omission. As the second plaintiff and Chiam both denied there was such a condition precedent and the defendant's only corroborative evidence was pure hearsay (Lim said the defendant told him there was such a condition), I again reject this defence as wholly without merit.

64. There is one other important issue which I need to address before I give my decision. What was the price for the shares to be transferred to the defendant? Was it \$1.00 for 1.35m Equatorial shares and \$1.00 for 112,500 Ting Ting shares (as asserted by the defendant) or, \$1.00 per share as the plaintiffs contended? In this regard, I need to revert to the figures LLS put forward to support the defendant's stand, set out in para 57 above.

65. I do not accept LLS' figures because the reasoning is flawed as can be seen shortly. Clause 1 of the Equatorial agreement required the defendant to procure the plaintiffs' discharge from their personal guarantees to OCBC for an amount up to \$2.6m; clause 2 contained a similar obligation as regards the plaintiffs' personal guarantee to KTL in the sum of \$300,000. Both clauses did not require the defendant to come up with cash of \$2.6m or \$300,000. As no evidence was tendered by the defendant to show that the two (2) banks refused his request to discharge the plaintiffs from their personal guarantees, the conclusion must be that he did not perform either clauses 1 or 2 as the plaintiffs alleged. The plaintiffs remained liable to OCBC, according to the letter of demand from the said bank's solicitors dated 13 October 1999, where the sum outstanding and demanded was said to be \$2,623,048.40 under the guarantee. Consequently, \$2.9m should be removed from the equation of LLS. Under the Ting Ting agreement, the defendant was required to procure the plaintiffs' discharge from the personal guarantee they furnished to CKB in the sum of \$300,000. The defendant did not, as can be seen from the letter dated 5 October 1999 to the Receiver of Ting Ting from United Overseas Bank (on behalf of CKB) stating that it would set-off the outstanding sum of \$500,000 against the fixed deposit(s) inter alia of the second plaintiff and against the monies in the current account of the first plaintiff. The figure \$300,000 for CKB should similarly be removed from LLS' equation for the same reason.

66. Once that is done, what remained of the defendant's obligation was to pay \$50,000 to the plaintiffs (under the Ting Ting agreement) which he failed to do, according to the second plaintiff and which the defendant did not deny. Under the Equatorial agreement, no monies were payable by the defendant at all in addition to which the plaintiffs were required to assign to him (and which they did) all debts owed to them by Equatorial. According to a letter (dated 1 November 1999) he wrote to the company's Receiver which the second plaintiff tendered to court, Equatorial owed him \$164,818, \$92,000 to the first plaintiff and \$275,000 to Changi, totalling \$531,818.

67. The net result of the defendant's investment (according to his version) was, he would receive 1.35m and 112,500 shares in Equatorial and Ting Ting respectively and would be assigned debts worth at least \$500,000 in exchange for his payment of \$2.00 (plus \$50,000). Further, through his 45% shares, he would have an interest in the assets of Equatorial including its factory. Even if one were to discount the figure (\$2.7m) in Equatorial's inventory list which I would emphasise is an inventory value and not a valuation, Lui's valuation in August 1999 showed the factory's assets were worth \$432,000, still a substantial sum.

68. According to the second plaintiff, the defendant deposited \$275,000 into the bank accounts of Equatorial and Ting Ting. The defendant on his part said he (or his brother) and Ang invested \$300,000 in the companies. However, what the defendant omitted to mention was, after he or his brother and Ang had deposited the monies, the defendant made withdrawals totalling \$310,118.46 over a six (6) week interval from those accounts (see exhibit NCB-11 of the second plaintiff's affidavit) either to pay himself or his own businesses (TSF and Teck Shin). In this regard I totally reject the defendant's incredible claim that he was told by Chiam to settle old debts first. Assuming one accepts that the defendant with Ang did inject \$300,000 into the two companies, the defendant's investment was free added to which he benefited by at least \$10,118.46 (\$310,118.46 - \$300,000 = \$10,118.46). No evidence was adduced that he paid \$2.00 (for the shares in Equatorial and Ting Ting to be transferred to him) nor the \$50,000 due to the plaintiffs after they rejected his post-dated cheques. I have excluded from the \$310,118.46 Ang's withdrawal of \$12,000 even though Ang was in the defendant's 'camp'. Otherwise the \$10,118.46 would be increased to \$22,118.46. The defendant had secured for himself a very good bargain indeed. I find there is more than a grain of truth in the plaintiffs' complaint that he had an ulterior motive behind his purported investment. It is telling that neither Teck Shin nor TSF were listed in the list of unsecured creditors of Equatorial after the company went into provisional liquidation. Yet in his evidence in chief, the defendant had the gall

to complain that he had suffered loss and damage by spending five (5) weeks in the office/factory of Equatorial to solve the day to day problems and having to pay (\$2,500) for Lui's valuation report!

69. The defendant's benefits outlined above are to be contrasted with the consequences which resulted from the plaintiffs' compliance with their obligations under the two (2) agreements:-

- a. they allowed the defendant, his brother and Ang to become authorised signatories of cheques before the agreements were signed, causing them personal detriment and the companies' cash-flow to worsen;
- b. they appointed the defendant and his brother chairman and managing director respectively;
- c. they assigned to the defendant the debts owed to them personally by Equatorial;
- d. they accepted a restraint of trade provision;
- e. CKB forfeited their fixed deposits and other monies to set-off Ting Ting's outstanding overdraft of \$500,000; OCBC has a pending action against them as guarantors for the outstanding sums owed on facilities granted to Equatorial;
- f. both companies are now in receivership.

70. Something must now be said on the applicable law. Both parties prayed for equitable relief in their pleadings – specific performance by the plaintiffs and rescission by the defendant. Although neither counsel addressed me on this mode of relief in their closing submissions, there are certain maxims which need to be borne in mind when litigants apply for equitable relief. One of these oft-quoted maxims is, he who comes to equity must approach the court with clean hands. Put in another way, it means no court of equity will aid a man to derive advantage from his own wrong. Another maxim is, he who seeks equity must do equity. Applying those maxims to this case, it is my view that the defendant's conduct precludes him from being granted any equitable or other reliefs. His conduct is to be contrasted with that of the plaintiffs who are in their present unenviable predicament because of their naivete and trust in him.

71. One other point I need to address before giving my decision touches on the submission made by the parties on the parole evidence rule set out in s 94 of the Evidence Act Cap 97 (the Act). Counsel for the defendant relied on the section to submit that the plaintiffs were precluded from adducing any testimony that the defendant had agreed to pay \$1.00 per share, as it was not stated in and contradicted, the two (2) agreements. To reinforce his contention that the plaintiffs had fabricated (as an afterthought) their testimony that the agreed price for the shares was \$1.00 each, counsel referred to the statutory declaration sworn by the second plaintiff for purposes of stamping the transfer deeds as well as the transfer deeds. On the other hand, counsel for the plaintiffs relied on proviso (b) of the same section for his opposing submission. Section 94 of the Act states:

When the terms of any such contract, grant or other disposition of property or any matter required by law to be reduced to the form of a document, have been proved according to section 93, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its terms subject to the following provisions:

(a) any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law;

(b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved; in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document;

(c) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved....

72. While it is true that the plaintiffs cannot adduce any oral testimony to contradict the two (2) agreements, exceptions are provided by provisos (b) and (c) to section 94 as set out above. In this regard it bears mentioning that although it was not stated in either agreement, it was common ground that the defendant (or his nominee) was to inject \$300,000 into the two companies. That undisputed term although oral, formed part of the agreement between the parties; it did not contradict any term in the agreements. I am mindful that the defendant would argue that if this oral term is accepted, then similarly the court should also accept the defendant's testimony that there was an oral condition precedent to the two (2) agreements, on his requirement for majority control for Equatorial and that Chiam must also sell Four Seasons' stake to him. My rejection of this alleged oral term was not because of section 94 of the Act but because I disbelieved that it existed.

73. Consequently, the price of the shares not having been stated at all in the two (2) agreements, the plaintiffs are not precluded from testifying that the defendant had orally agreed it would be \$1.00 per share. This finding is consistent with the defendant's own testimony that he called for a valuation from Colliers subsequently (although the valuation report was not produced). Why would the defendant do that unless it was pursuant to his agreement with the plaintiffs to pay \$1.00 per share? Further, why would Lim ask for \$175,000 from the defendant for his 5% stake in Equatorial if the shares really had no value and refuse to reduce the asking price to \$100,000? Finally the agreements (2) and the statutory declaration were all prepared on the defendant's instructions, the plaintiffs were not the maker.

74. I therefore find that there was an oral agreement between the parties that defendant would pay the plaintiffs \$1.00 per share or a total consideration of \$1.35m for shares in Equatorial and \$112,500 for shares in Ting Ting. Accordingly, I find for the plaintiffs on their claim. However, as both Equatorial and Ting Ting are in provisional liquidation, I will not order specific performance of the agreements but award interlocutory judgment to the plaintiffs and costs with damages to be assessed by the Registrar; the costs of such assessment are reserved to the Registrar. In assessing the damages, the Registrar should take into consideration the cash injected by the defendant or NKE and Ang into Equatorial and Ting Ting which should however be set-off against the withdrawals which the defendant subsequently effected to pay the debts owed to Teck Shin and or TSF. Correspondingly, I dismiss the defendant's counterclaim with costs.

LAI SIU CHIU

JUDGE

31 January 2000

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