

Lee Siong Kee v Beng Tiong Trading, Import and Export (1988) Pte Ltd
[2000] SGCA 57

Case Number : CA 37/2000

Decision Date : 17 October 2000

Tribunal/Court : Court of Appeal

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

Counsel Name(s) : Gregory Vijayendran and Kirindeep Singh (Wong Partnership) for the appellant;
Stanley Wong (Jing Quee & Chin Joo) for the respondents

Parties : Lee Siong Kee — Beng Tiong Trading, Import and Export (1988) Pte Ltd

Equity – Estoppel – Previous averment in legal proceedings against another party – Whether estopped from relying on inconsistent plea

Contract – Breach – Damage – Whether breaches causing damage or loss

Contract – Breach – Repudiatory breach – Principal breaching agreement with agent – Whether any repudiatory breach – Whether repudiatory breach, if any, being accepted

Contract – Remedies – Restitution – Quantum meruit – Implied term – Express term in contract for remuneration only upon happening of certain event – Whether term for payment on a quantum meruit basis could be implied

Restitution – Quantum meruit – Whether principle of quantum meruit on restitutionary basis applies

Words and Phrases – "Null and void" – Whether these words in agency agreement mean agreement automatically terminated or merely voidable

(delivering the grounds of judgment of the court): **The parties**

The appellant, Lee Siong Kee (`Lee`), entered into an agreement dated 10 August 1993 (`the agency agreement`), with the respondents, Beng Tiong Trading, Import and Export (1988) Pte Ltd (`Beng Tiong`), whereby in consideration, among other things, of a sum to be paid by Beng Tiong, Lee agreed to obtain the sale to Beng Tiong of certain immovable properties in Singapore (`the properties`) belonging to the estate of one Shaik Ahmad deceased (`the estate`) for the sum of \$8,260,000. Shaik Ahmad passed away in 1953 and by his will bequeathed his estate to 14 beneficiaries named therein. On the date of the agency agreement, the properties were vested in the Public Trustee, who was the trustee of the trusts as provided in the will.

The relevant facts

The terms of the agency agreement were briefly these. Beng Tiong agreed to pay to Lee a sum of \$4,640,000, and in consideration Lee agreed to provide `all necessary links and contacts with the legal personal representatives of the estate` and secure a contract for the sale of the properties by the estate to Beng Tiong for \$8,260,000. On the execution of the agency agreement, an advance of \$250,000 was made to Lee, and Beng Tiong agreed to make further advances to Lee up to \$150,000 during the period between 1 November 1993 and 15 July 1994. Beng Tiong undertook not to interact with any beneficiaries or the legal personal representatives or the solicitors of the estate without first obtaining Lee`s consent. Lee on his part undertook to provide certain assistance in the matter of the application before the court in Singapore for the appointment of new trustees in place of the Public Trustee; to make goodwill payments at the time of signing of the `Consent of Sale of Properties by the Private Treaty` between Beng Tiong and the beneficiaries of the estate; and to secure the

execution by the estate of the sale and purchase agreement for the sale of the properties to Beng Tiong for \$8,260,000 not later than 15 July 1994, failing which the agency agreement would become null and void and Lee would refund to Beng Tiong all moneys paid by the latter to Lee under the agency agreement. Subsequently, the deadline of 15 July 1994 was extended to 31 December 1994.

Some months prior to the execution of the agency agreement, Lee had been in touch with the beneficiaries and on or about 8 February 1993 came to an oral agreement with 12 out of the 14 beneficiaries of the estate (‘the oral agreement’), whereby these beneficiaries agreed to sell the properties to Lee and undertook to direct two persons, Syed Ali Redha Alsagoff (‘Syed Ali’) and Robert Ng Jer Leong (‘Robert Ng’), who had been proposed to be appointed the trustees of the estate, to execute the agreement for the sale of the properties to Lee upon their appointment as trustees of the estate in substitution of the Public Trustee. Pursuant to this agreement Lee paid the beneficiaries a sum of \$108,000.

On 26 May the beneficiaries filed an application in OS 489/93 seeking an order to appoint Syed Ali and Robert Ng as trustees of the estate in place of the Public Trustee. It was around this time that Beng Tiong became involved in a negotiation with Lee with a view to securing the purchase of the properties, and arising from the negotiation the agency agreement was concluded and signed on 10 August 1993.

Following the signing of the agency agreement on 10 August 1993, Lee procured the beneficiaries to execute an agreement with Beng Tiong on 12 August 1993 (‘the beneficiaries agreement’), under which the beneficiaries cancelled the oral agreement of 8 February 1993 made with Lee and consented to the sale of the properties to Beng Tiong for the sum of \$8.26m on the terms of a draft agreement annexed to the agreement. The beneficiaries also agreed to direct the proposed trustees, Syed Ali and Robert Ng, to execute the sale agreement of the properties upon their appointment in place of the Public Trustee. It was not disputed that the beneficiaries agreement was left with the Indonesian **Notaris**, in whose presence it appeared to have been signed. The beneficiaries received a sum of \$132,000 in consideration for executing the beneficiaries agreement. A receipt for the total sum of \$240,000 was issued in the name of Beng Tiong.

Soon after the beneficiaries agreement was signed, 11 of the 12 beneficiaries became hostile to the deal and took steps to repudiate it. The beneficiaries wrote to the Public Trustee on 14 August 1993 indicating their intention to revoke their proposal for the appointment of Syed Ali and Robert Ng as trustees. The beneficiaries began taking steps in September 1993 to revoke the proposed appointment of the two trustees and to withdraw the OS 489/93. The application was eventually withdrawn sometime between 3 November 1993 and 14 January 1994. All but one of the 12 beneficiaries on 3 August 1994 filed an application in OS 745/94 seeking an order to appoint four of them as trustees of the estate in place of the Public Trustee.

As of the date of the agency agreement, Lee received an advance of \$250,000 from Beng Tiong under cl 1.2. A further sum of \$110,000 was subsequently advanced by Beng Tiong on Lee’s request under cl 2.3, making a total \$360,000. On 3 November 1993 Lee requested yet a further advance of \$40,000 pursuant to cl 2.3, and upon Beng Tiong’s refusal to make the advance, repeated his request on 14 January 1994. Beng Tiong, however, still refused to make any further advance as requested.

Sometime in November 1993, Beng Tiong’s managing director, Ms Chiang Siew Chee, met some of the beneficiaries in Indonesia. When they were in Singapore, she invited them to a meal at a restaurant and these meetings took place without the prior consent or knowledge of Lee. At the meeting in Singapore, one of the beneficiaries named Quresh informed Ms Chiang that the majority of the

beneficiaries were opposed to the sale of the properties to Beng Tiong. Lee came to know of this meeting sometime in November 1993.

In view of the beneficiaries' refusal to comply with the beneficiaries agreement, Lee instituted legal proceedings against them in Suit 1550/94 on 22 September 1994 claiming specific performance of the beneficiaries agreement. In his statement of claim, Lee averred that he initiated that action for the benefit of Beng Tiong in pursuance of the agency agreement. Lee later abandoned his claim for specific performance of the beneficiaries agreement and opted for damages. On 28 January 1995, an interlocutory judgment in default of appearance was entered against all but one of the beneficiaries.

In the event, Lee failed to secure the contract for sale of the properties by the estate to Beng Tiong by the extended deadline of 31 December 1994. He was therefore unable to claim the agreed remuneration of \$4.64m.

Sometime after 31 December 1994, Beng Tiong managed to obtain the signed beneficiaries agreement from the Indonesian Notaris through their own sources. By a writ issued 11 July 1996, Beng Tiong instituted an action in Suit 1255/96 against the beneficiaries relying on the beneficiaries agreement. A declaratory judgment in default of appearance was entered against eight of the beneficiaries on 19 July 1999, declaring that Beng Tiong were entitled to their rights, interests, benefits and entitlements in the properties.

Lee on 4 November 1999 brought an action against Beng Tiong, claiming damages for breach of contract. In particular, two breaches were alleged to have been committed by Beng Tiong: first, a breach of cl 2.2 in that Beng Tiong interacted with the beneficiaries of the estate without Lee's prior consent, and second, a breach of cl 2.3 in that Beng Tiong failed or refused to make the advance of \$40,000 as requested by him. He also claimed damages for wrongful repudiation of the agreement on the part of Beng Tiong by reason of those breaches, which repudiation he accepted on 28 January 1995. In the alternative, Lee claimed a quantum meruit on the basis of an implied term or on a restitutionary basis. Beng Tiong in their defence denied the breaches and counterclaimed the sum of \$360,000 advanced to Lee. In defence to the counterclaim, Lee contended that Beng Tiong were not entitled to rely on cl 3.8 to recover the sum advanced and take advantage of their own repudiatory breaches, as it was their breaches which hindered and prevented him from securing the execution of the agreement of the sale of the properties to Beng Tiong.

The decision below

The trial judge found that Beng Tiong had breached cll 2.2 and 2.3 of the agency agreement, as they had interacted with the beneficiaries without Lee's prior consent in November 1993 and had failed to make the advance of \$40,000 as requested on 3 November 1993 and on 14 January 1994 under the terms of the agency agreement. The trial judge assumed that the breaches would amount to a repudiation of the agency agreement, but he held that Lee had not accepted the repudiation and accordingly the contract continued to subsist until it expired on 31 December 1994. The trial judge found that Lee had not suffered any loss or incurred any expenses in consequence of Beng Tiong's breaches of the agency agreement and he dismissed the claim. He also dismissed the alternative claim of Lee for a quantum meruit. As for the counterclaim, there was no dispute that a sum of \$360,000 had been advanced to Lee, and under cl 3.8 of the agency agreement that sum was refundable to Beng Tiong. He therefore gave judgment to Beng Tiong in the sum of \$360,000 with interest and costs.

Lee appealed against the whole of the decision of the trial judge. We allowed the appeal in part. We

affirmed the dismissal of the claim but reduced the amount of the judgment for the counterclaim to a sum of \$120,00. We now give our reasons.

Breaches of the agency agreement

Lee claimed that Beng Tiong had breached cl 2.2 and 2.3 of the agency agreement. These two clauses were in the following terms:

2 The Principal [Beng Tiong] undertakes:

2.1 ...

2.2 that the Principal, including the Principal's agents and employees, shall not interact with any of the beneficiaries or the legal personal representatives of the estate or the Solicitors of the estate without first obtaining the prior consent of the Agent;

2.3 if the Agent requests in writing (strictly for purpose of enabling the Agent to ensure the sale of the properties to the Principal), to make advances to the Agent up to the maximum limit of Dollars One Hundred And Fifty Thousand (\$150,000.00) within the period after 1st day of November 1993 and before 15th day of July 1994;

We turn first to the complaint of the failure or refusal to make an advance by Beng Tiong under cl 2.3. Lee requested for an advance of \$40,000 in November 1993 pursuant to cl 2.3 of the agency agreement, and as no advance was made, he repeated the request in January 1994. However, Beng Tiong still refused to make such advance to Lee. The trial judge found that the request for the advance was made pursuant to cl 2.3, and Beng Tiong committed a breach of this clause in failing or refusing to make the advance. He said at [para] 29:

In my judgment Beng Tiong failed, refused or otherwise neglected to effect payment of the balance of \$40,000 as an advance in breach of cl 2.3 of the agency agreement as alleged in the statement of claim.

As for cl 2.2 of the agency agreement, Beng Tiong admitted that their managing director, Ms Maggie Chiang, met some of the beneficiaries including one Quresh. She met them while she was in Indonesia, and subsequently when they were in Singapore she invited them to a meal at an Indonesian restaurant. This took place in or about November 1993. Beng Tiong claimed that these were purely social engagements. It was also admitted that at the meeting in Singapore Quresh told Ms Chiang that the majority of the beneficiaries had no intention of selling the properties to Beng Tiong. The trial judge found that Beng Tiong committed a breach of cl 2.2 of the agency agreement. He said at [para] 35:

I think Ms Chiang did interact with Mr Quresh and I find accordingly. She did not obtain Mr Lee's prior consent to do so. In my judgment Beng Tiong has by its managing director as its agent or employee interacted with Mr Quresh and another beneficiary in breach of cl 2.2 of the agency agreement.

Repudiation

Before us, Beng Tiong did not challenge these findings of the trial judge. Lee, on the other hand, contended that by these breaches Beng Tiong had repudiated the agency agreement. The trial judge did not make any finding or determination whether these breaches amounted to a repudiation of the agency agreement. He proceeded on the assumption that they amounted to a repudiation and considered whether Lee had accepted the repudiation. On the evidence before him, he found that Lee had not accepted repudiation, notwithstanding that he was aware of the breaches. He said at [para] 19-22:

*19 It is established law that where a party has repudiated a contract by breach the aggrieved party has an election to accept the repudiation or to affirm the contract. See **The Santa Clara; Vitol SA v Norelf Ltd [1996] AC 800** at p 810. The alleged breach by interacting with the beneficiaries took place in November 1993 and Mr Lee knew about it then. If this was a repudiatory breach then he was entitled to put an end to the agency agreement and at once treat himself as discharged from further performance. He must do so before the time for performance or further performance on his part expires.*

20 Mr Lee requested an advance in November 1993 and again in January 1994. He did this with the knowledge that Beng Tiong had as he alleged interacted with the beneficiaries in repudiatory breach of the agency agreement. Far from accepting the alleged repudiation he was quite clearly affirming the agency agreement.

21 It is also alleged that by cl 2.3 Beng Tiong would make advances of up to \$150,000 within the period 1 November 1993 and 15 July 1994. The alleged repudiatory breach by not making the advance would have occurred at the latest when the period expired which is also the same time by which Mr Lee himself was to perform or complete performance of his part of the agency agreement. In these circumstances he should have accepted the repudiation then.

22 It is alleged in the particulars of the work carried out and services performed by Mr Lee pursuant to the agency agreement that he instituted legal proceedings against certain parties in Suit 1550/94. This action was commenced by writ issued on 22 September 1994 and judgment in default of appearance was entered against all but one of the defendants on 28 January 1995. By carrying out the work and performing the services pursuant to the agency agreement as alleged Mr Lee could not have accepted the alleged repudiation.

We agreed entirely with the trial judge`s conclusion and reasoning on the issue of repudiation. Assuming that the breaches of the agency agreement by Beng Tiong amounted to a repudiation of the agency agreement, there was no acceptance of such repudiation by Lee. Unless and until the repudiation was accepted, the contract continued to be in existence, for `an unaccepted repudiation is a thing writ in water`: **Chitty on Contracts** Vol 1 General Principles (28th Ed, 1999) at para 25-

012. This position was adumbrated by this court in **Brown Noel Trading Pte Ltd v Donald & McCarthy Pte Ltd** [1997] 1 SLR 1 at [para] 26, where the court said:

There was thus a wrongful repudiation of the contract by the defendants. That, however, did not conclude the matter, because the repudiatory breach by the defendants did not automatically terminate the contract. The third party had a right to elect whether or not to accept the repudiation and treat the contract as at an end. They did not exercise their right and accept the repudiation by the defendants, and in consequence the contract was kept alive and remained in force for the benefit of both parties.

Lee was aware of Beng Tiong`s interaction with the beneficiaries as early as November 1993. This was a breach of contract, but despite knowledge of this breach, Lee treated the contract as continuing to have effect. He requested for an advance of \$40,000 under cl 2.3 of the agency agreement, and repeated his request in January 1994. Beng Tiong`s failure to comply with his requests for the advance of \$40,000 constituted a further breach, and this breach was clearly apparent to him. Despite this, Lee continued to attempt to perform services pursuant to the agency agreement and treated the agency agreement as subsisting. Among other things, he instituted an action in Suit 1550/94 on 22 September 1994 for the benefit of Beng Tiong. Of significance was a letter from Lee`s solicitors to Beng Tiong`s solicitors dated 16 September 1994, protesting the two breaches of `material terms`. The letter conspicuously omitted any statement that Lee accepted Beng Tiong`s repudiatory breaches. By then Lee had had the benefit of legal advice and could not claim to be unaware of his right to accept the breaches as repudiation of the agreement. There was no indication from him or his solicitors that he accepted the repudiation and terminated the agency agreement before the expiry on 31 December 1994.

There was also no evidence that Lee had expressly or impliedly communicated his acceptance of the repudiation to Beng Tiong prior to 31 December 1994. This was conceded by Lee at the trial below, when he admitted that before 31 December 1994, he had not informed Beng Tiong that the agency agreement was terminated. Lee pleaded that he accepted the repudiation on 28 January 1995; however, that came too late, as the time for his performance had already expired on the extended deadline of 31 December 1994. In any case, it appeared that the election was not communicated or otherwise made known to Beng Tiong. On the contrary, Lee kept the contract alive at all material times.

Finally, counsel for Lee argued that the term `null and void` in cl 3.8 did not mean that the agency agreement automatically terminated after 31 December 1994. The agency agreement was merely voidable and not void after the expiry of the deadline. He submitted that the respondents were not entitled to rely on their own breaches. In our opinion, this argument was a non-starter. Clause 3.8 clearly provided that the appellant undertook to secure the sale and purchase agreement executed by the estate by the contractual deadline of 15 July 1994, which was subsequently extended to 31 December 1994. The time for Lee to perform his obligation expired on 31 December 1994, and after that date the agency agreement ceased to have effect. The breaches committed by Beng Tiong could not prevent the contract from expiring on that day. However, they would entitle Lee to damages, if he had suffered any loss occasioned by such breaches.

Damages

To succeed on the claim for damages, Lee had to show that Beng Tiong`s breaches caused him to fail

in his efforts to secure the execution of the sale and purchase agreement by the personal representatives or trustees of the estate by the extended deadline of 31 December 1994. There was no evidence that Beng Tiong's breaches had in any way occasioned his failure to secure the sale and purchase agreement.

Under the agency agreement, Lee's primary obligation was to secure the execution by the estate of an agreement for the sale to Beng Tiong of the properties by 15 July 1994, which was subsequently extended to 31 December 1994. The agreement would have to be signed by persons in whom the properties were vested, whether they be the personal representatives or the trustees of the estate. At that time the properties were vested in the Public Trustee. Prior to the date of the execution of the agency agreement, it was contemplated by 12 of the 14 beneficiaries that two persons, Syed Ali and Robert Ng, would be appointed as the trustees of the estate in place of the Public Trustee. They filed an application in OS 489/93 on 26 May 1993 seeking an order that these two persons be appointed as the trustees of the estate in place of the Public Trustee.

Under the agency agreement, the sale agreement of the properties by the estate to Beng Tiong was to be signed 'upon the estate's successful application in OS 489/93'. Hence, unless the application was allowed, there would be no agreement for the sale of the properties to Beng Tiong as contemplated in the agency agreement. Pursuant to the agency agreement, Lee procured the twelve beneficiaries to sign the Beneficiaries Agreement with Beng Tiong. However, soon after the execution of this agreement, eleven of the twelve beneficiaries became hostile to the sale and resiled from the proposal to have Syed Ali and Robert Ng appointed as the trustees of the estate in place of the Public Trustee. Eventually, the application was withdrawn, and that was sometime between 3 November 1993 and 14 January 1994.

At the time of Lee's request for the advance of \$40,000 and Beng Tiong's interaction with the beneficiaries, both of which occurred in November 1993, 13 of the 14 beneficiaries were already against the proposed sale of the properties to Beng Tiong. Two beneficiaries had been opposed to the sale from the start, while 11 beneficiaries repudiated the beneficiaries agreement soon after the execution, the latest by 14 August 1993. In November, when some of the beneficiaries met Ms Chiang, the managing director of Beng Tiong, one of the beneficiaries, Quresh, expressly informed her that the majority of the beneficiaries were opposed to the sale of the properties to Beng Tiong. The change of mind on the part of the majority of the beneficiaries was not in any way caused by or attributable to Beng Tiong. These events fatally impinged on the proposed sale of the properties by the estate to Beng Tiong.

The trial judge after considering the evidence said at [para] 43:

I come back now to OS 489/93 for the appointment of Syed Ali and Mr Ng in place of the Public Trustee. By the time the agency agreement was signed the application was not going to be successful. It was not only opposed by the two beneficiaries who had not signed the document dated 12 August 1993. Eleven of those who had signed the document had supported the application to appoint four of themselves as trustees in place of the Public Trustee in OS 745/94.

Later he said at [para] 47:

*The application in OS 489/93 was opposed. The Public Trustee would have raised the same concerns as were raised in a similar application filed later. It was **an application that was doomed to failure** from the moment it was filed and certainly by 14 August 1993. It may or may not have been withdrawn only*

*'between 3 November 1994 and 14 January 1994' as Mr Lee said under cross-examination but what is relevant is that the court has not appointed either Syed Ali or Mr Ng to be a trustee or trustees together with or without any other person and whether in OS 489/93 or in any other application. **The failure occurred before the breaches of the agency agreement by Beng Tiong and not in consequence of any such breach.** [Emphasis is added.]*

On the evidence adduced, there were ample grounds for the trial judge to come to this conclusion, and we agreed with him entirely. In any event, even if the application was allowed, the sale, which required leave of the court as the deceased had died more than six years ago, would not have been sanctioned by the court. The trial judge assessed the position thus at [para] 49:

The sale would have to be sanctioned by the court if the sellers are selling as legal personal representatives of Shaikh Ahmad who died more than six years ago. If the sellers are selling as trustees upon trust for sale and one or more of the beneficiaries opposes the sale or is otherwise not competent to express his consent to it then an application to court would have to be made. In either case evidence of the value of the properties at the date of the hearing would have to be adduced and I cannot see that an order can be obtained either to sanction the sale or to empower the trustees to sell the properties to Beng Tiong for \$8.26m when Beng Tiong is willing to pay that price and another \$4.64m to Mr Lee to buy these properties.

Again, we were in full agreement with the trial judge. In our judgment, Lee had not suffered any damage or loss in consequence of the breaches of the agency agreement by Beng Tiong.

Damages for loss of chance

It was next argued on behalf of Lee that by reason of the breaches of the agency agreement on the part of Beng Tiong, he had lost the chance of earning the remuneration of \$4.64m. This argument had absolutely no merit whatever, and we rejected it. Beng Tiong's breaches of the agency agreement had nothing to do with the change of mind on the part of the 11 beneficiaries and their revocation of the proposal to appoint Syed Ali and Robert Ng as trustees of the estate. By reason of the events and matters which we have related above, Lee would be in no position to discharge his primary obligation under the agency agreement, ie to secure the execution by estate of the agreement for the sale of the properties to Beng Tiong for the sum of \$8,260,000, and he would be in no position to earn the \$4.64m or any part thereof.

Quantum meruit on an implied term

Lee made a claim for a quantum meruit for the work or services he alleged he had performed. He founded his claim on two basis: (i) an implied term, and (ii) restitution. His claim on both bases was rejected by the trial judge and, in our judgment, rightly.

In rejecting the claim on the basis of an implied term, the trial judge said at [para] 54:

Mr Lee attempted to plead the claim as a contractual claim founded upon an implied term. I see no ground for implying such a term. The agency agreement is not unworkable without it. There is nothing in the agency agreement pointing

to any obligation to pay Mr Lee anything other than the agreed fee for securing the agreement for sale and purchase of the properties. In my judgment there was no implied term as alleged and Beng Tiong was not in breach of any such term.

We agreed. In this case, implying a term for payment of a reasonable sum was not necessary to give business efficacy to the agency agreement. In addition, such an implied term would be inconsistent with or contradictory to the express terms of the agency agreement. The critical provisions of the agency agreement governing the payment by Beng Tiong and the repayment by Lee were these. Under cll 1.2 and 2.4, Beng Tiong were obliged to pay to Lee the sum of \$4,640,000 on 'completion of the sale of the properties by the legal personal representatives of the estate to the Principal [Beng Tiong] or the assigns of the Principal'. Lee in turn was obliged under cl 3.8 to secure the execution by the legal personal representatives or the trustees of the estate of the sale and purchase agreement for the sale of the properties to Beng Tiong for the sum of \$8,260,000 not later than 15 July 1994 (which was subsequently extended to 31 December 1994), failing which agreement was to be null and void and Lee was obliged to refund to Beng Tiong all moneys paid to him under the agency agreement. Thus, these provisions of the agency agreement expressly provided for a remuneration to be paid to Lee and for the refund by him of all monies advanced upon the happening of certain of events. They reflected the parties' intentions and the allocation of risk as agreed between them. If Lee was successful, he would gain a substantial remuneration amounting to more than 50% of the purchase price. On the other hand, if he was unsuccessful, he would receive no payment and would be out of pocket for any expenses. The parties' respective obligations had been explicitly set out in the agency agreement, and there was no room for implying a term as contended. **Chitty on Contracts** Vol 2 (28th Ed, 1999) at para 32-143 states:

*Remuneration under a quantum meruit may be awarded where there is a contract but it does not provide for remuneration, or does not do so for the circumstances which have arisen. **But where the contract makes express provision for the agent to be remunerated only upon the happening of a certain event, he will not normally be entitled to claim reasonable remuneration on such a basis. Such a claim would depend upon an implied promise to pay a reasonable sum if the event does not occur, and such an implication cannot normally be made because it would be inconsistent with the express terms of the contract.** Thus, an estate agent was held not to be entitled to payment on a quantum meruit when the principal sold the property elsewhere. **A term may only be implied where it is necessary to give business efficacy to the contract or otherwise to effect the intentions of the parties. The implication that a reasonable sum should be paid when the event upon which remuneration is due does not occur will therefore be rare.** [Emphasis is added.]*

Counsel for Lee submitted that the above position was inconsistent with the modern action of quantum meruit, and relied on the following passage of the judgment of Barry J in **William Lacey (Hounslow) Ltd v Davis** [1957] 2 All ER 712 at p 717; [1957] 1 WLR 932 at p 936:

*In its early history it was no doubt a genuine action in contract, based on a real promise to pay, although that promise had not been expressed in words, and the amount of the payment had not been agreed. Subsequent developments have, however, considerably widened the scope of this form of action, and in many cases the action is now founded upon what is known as quasi-contract, similar, in some ways, to the action for money had and received. **In these quasi-contractual cases the court will look at the true facts and ascertain***

from them whether or not a promise to pay should be implied, irrespective of the actual views or intentions of the parties at the time when the work was done or the services rendered. [Emphasis added.]

In that case, the defendants requested the plaintiffs, a firm of builders, to submit estimates for the work of reconstruction. Although there was no binding contract between them, the plaintiffs were led to believe that they would receive the contract for the reconstruction works. Various calculations and estimates were prepared at the request of the defendants. The defendants subsequently sold the premises instead of proceeding with the reconstruction. The plaintiffs successfully sued them for remuneration on a quantum meruit for the work which they had done. Barry J accepted that the work done by the plaintiffs fell outside the normal work which a builder normally performed gratuitously when invited to tender for the erection of a building. He therefore held that the court should imply a term that the defendants would pay a reasonable sum to the plaintiffs for the whole of the services which were rendered to them.

The facts in that case were far different from those in the present case. Here, there was an agency agreement which explicitly set out the circumstances in which Lee was to receive the payment of certain sum from Beng Tiong and also the circumstances where not only no such sum was payable but all monies advanced to Lee were refundable to Beng Tiong.

The appellant next relied on **Alpha Trading Ltd v Dunshaw-Patten Ltd [1981] QB 290**. In that case, the plaintiffs and the defendants entered into an agency contract, whereby the plaintiffs, in consideration of their introducing buyers to the defendants, would be remunerated with a commission on the sale of the cement by the defendants. The plaintiffs introduced a buyer to the defendants, who then entered into a contract with the buyer for the sale of a quantity of cement at a certain price per metric ton. However, the sale contract was not carried out owing to the defendants' unwillingness or inability to implement the contract. The plaintiffs had performed their part of the bargain and would have received substantial remuneration, if the sale contract had been performed. In those circumstances, the English Court of Appeal implied a contractual term that the defendants would not fail to perform their contract with the buyer so as to deprive the plaintiffs of their remuneration under the agency contract. Brandon LJ in the course of his judgment said at p 304:

The defendants were introduced by the plaintiffs to a buyer of cement. It was in the contemplation of the plaintiffs that the defendants would make a contract of sale with that buyer. The defendants did make a contract of sale with that buyer on the basis that, if the contract was performed, the agent would receive substantial remuneration. The only reason the contract was not performed was that the defendants were either unwilling or unable to perform it.

It seems to me that, in a case of that kind, it is right for the court to imply a term that the defendants will not fail to perform their contract with the buyer so as to deprive the agent of the remuneration due to him under the agency contract.

Similar pronouncements were made by Templeman LJ at p 305:

In the present case, the agents performed their part of their bargain with the vendors by providing a purchaser who was ready and willing to contract with the vendors. The vendors utilised and took advantage of the services provided

by the agents by entering into a contract with the purchaser on terms acceptable to the vendors and, no doubt, designed and intended by the vendors to produce a profit for themselves.

In my judgment, it is necessary to imply a term to prevent the vendors from making use of the agents' services without being under any liability to the agents to ensure, so far as the vendor were concerned, that the agents then received the stipulated reward for the agents' services, which were supplied to and utilised by the vendors.

The facts in **Alpha Trading** were clearly distinguishable from those in the present case. This was not a case where Lee had done the whole of the work for which, but for Beng Tiong's actions, he would have received the agreed remuneration. Here, Lee did not succeed in procuring a sale and purchase agreement to be made with the legal personal representatives or trustees of the estate for the sale of the properties to Beng Tiong. Beng Tiong was not in any way unable or unwilling to execute the proposed sale and purchase agreement with the personal representatives or trustees of the estate.

Quantum meruit on a restitutionary basis

Next, Lee rested his claim for a quantum meruit on a restitutionary basis. He relied on the principle which was stated in Goff and Jones **The Law of Restitution** (5th Ed, 1998) at p 531:

[I]f the innocent party has rendered services or has supplied goods under a contract, which has not been substantially performed and which has been determined by him because of the other party's breach, he may recover the value of the services rendered or the goods supplied, on a quantum meruit or a quantum valebat respectively, rather than sue for damages for loss arising from the breach. The party in breach cannot deny that he has received a benefit. It is said that because the contract is at an end, he cannot keep the innocent party to the contract price. [Emphasis added.]

The leading authority for this proposition is **Planche v Colburn** [1831] 8 Bing 14; 131 ER 305. The facts are well known. The defendant engaged the plaintiff to write a volume for publication in a proposed series. The plaintiff wrote part of the book and was ready to complete and deliver the whole. However, the defendant abandoned the series and refused to pay the plaintiff. Tindal CJ stated that the plaintiff 'ought not to lose the fruit of his labour' and awarded him a sum for the work done even though he had not substantially performed the contract or delivered any part of the product to the defendant. A more recent authority for this proposition is the following part of the speech of Lord Wright in **Luxor (Eastbourne) Ltd & Ors v Cooper** [1941] AC 108 at p 141:

[I]t all comes back to the same issue, namely, that there must be some breach of contract for which damages can be claimed. It has been said in some cases that the claim may be based on quantum meruit on the principles expounded in the notes to Cutter v Powell [1795] 6 Term Rep 320, according to which the special contract is treated as rescinded and the agent thereupon becomes entitled to claim a partial recompense for what he has done. Such a claim is in the nature of a quasi-contractual claim. It is properly made in cases of contracts for work and labour and the like, where the employer, who has got the benefit of part performance but before full completion has repudiated the contract, may be sued either for damages for breach or for restitution in

respect of the value of the part performance which he has received.

The crux of such a claim against a party for a quantum meruit on a restitutionary basis is the premise that the contract was terminated prematurely as a result of a breach of that party. That principle has no application here. The agency agreement was not terminated prematurely by reason of the breaches on the part of Beng Tiong. The agreement, pursuant to cl 3.8 thereof, came to an end on the expiry of the extended deadline by which Lee was to secure (which he did not) the execution by the personal representatives or trustees of the estate of the sale and purchase agreement for the sale of the properties to Beng Tiong.

Quantum meruit under a void contract

Lastly, counsel for the appellant also submitted that even if the agency agreement expired on 31 December 1994 by virtue of cl 3.8, the appellant could still recover on a quantum meruit for work was done under a void contract. He relied on **Craven-Ellis v Canons, Ltd** [1936] 2 KB 403 and **Rover International Ltd & Ors v Cannon Film Sales Ltd** [1989] 3 All ER 423[1989] 1 WLR 912, where a quantum meruit was awarded for work done under what were mistakenly thought to be valid contracts.

This argument was totally misconceived. These authorities concerned entirely different situations and had no relevance in this appeal. In the instant case, there was no question of the appellant performing work under what both parties mistakenly thought to be valid binding contracts. The agency agreement was a valid contract. It lapsed upon the expiry of the deadline as agreed. Counsel had misconstrued the effect of cl. 3.8. The provision that the agency agreement `shall become null and void` in the event of the appellant`s failure to secure the sale and purchase agreement before the deadline did not transform Lee`s labours to one performed under an invalid or non-binding contract.

The counterclaim

The trial judge gave judgment to Beng Tiong on the counterclaim and ordered the appellant to pay a sum of \$360,000 with interest pursuant to cl 3.8 of the agency agreement. Clause 3.8 provided as follows:

3 The Agent undertakes:

...

3.8 to secure the estate`s execution to the Sale and Purchase Agreement for the sale of the properties to the Principal at the agreed sale price \$8,260,000 not later than the 15th day of July 1994 (hereinafter referred to as `the deadline`) failing which this Agreement shall become null and void and Agent shall refund within fourteen (14) days after the sale of the properties to the Principal is aborted all monies that have been paid by the Principal to the Agent under the provisions of this Agreement;

Provided that the deadline may at the absolute discretion of the Principal be extended by the Principal upon:

(a) request made in writing by the Agent to the Principal fourteen (14) days before the deadline and the Principal agreeing to such extension in writing; or

(b) the Principal at their discretion granting the Agent extended deadline(s).

The appellant challenged this conclusion on the ground that the term `null and void` in cl 3.8 should be construed as `voidable`; and further, that the contract had not been avoided to date. This submission rested on the contention that in the light of Beng Tiong`s breaches of cll 2.2 and 2.3 of the agency agreement, Beng Tiong was precluded from taking advantage of their own default to bring about the rescission of the agreement or to claim damages in reliance of the terms contained therein. We disagreed. Here, the trial judge found, and we agreed, that Lee`s failure to secure the agreement for sale and purchase of the properties before the expiry of the deadline was not caused by and was unrelated to Beng Tiong`s acts. The failure was caused by the beneficiaries` objections to the proposed transactions and their objections came about prior to the Beng Tiong`s breaches of the agency agreement. The principle that a man shall not take advantage of his own wrong has no application in this case.

However, Beng Tiong were not entitled to recover the total advance of \$360,000. It was common ground that a sum of \$240,000 was paid to the beneficiaries, and the receipt of \$240,000 was made out in the name of Beng Tiong. The money was disbursed from Lee`s account and originated in part from the advance made to Lee by Beng Tiong. In their action against the beneficiaries in Suit 1225/96, Beng Tiong relied on the beneficiaries agreement and averred that they had paid the beneficiaries `a total of \$240,000 as advance payment of the agreed purchase price`. On this basis, among others, Beng Tiong obtained a declaratory judgment against eight of the beneficiaries. Having relied on their averment that they had paid \$240,000 to the beneficiaries and obtained a declaratory judgment in that suit, Beng Tiong were estopped from now putting forth an inconsistent plea that the sum was paid on Lee`s account. Further, by electing to take the position that they had paid the sum of \$240,000 to the beneficiaries, Beng Tiong implicitly acknowledged that Lee had paid \$240,000 to the beneficiaries on behalf of Beng Tiong. It was clear that Beng Tiong could not recover the sum of \$240,000 from Lee.

In the result, we dismissed Lee`s appeal against the dismissal of his claims and allowed his appeal against judgment on the respondents` counterclaim to the extent that Beng Tiong were allowed to recover only a sum of \$120,000 with interest.

Outcome:

Appeal allowed in part.