Leow Tiak Cheow & Another v Pan-United Industries Pte Ltd
[2002] SGHC 250

Case Number : Suit No 1568 of 2001

Decision Date : 28 October 2002

Tribunal/Court : High Court

Coram : Woo Bih Li JC

Counsel Name(s) : Jeffrey Beh Eng Siew (Lee Bon Leong & Co) and Leow Tiat Hong (T H Leow & Co) for both plaintiffs; Francis Xavier and Mark Tan (Rajah & Tann) for the defendant

Parties : —

Contract – Contractual terms – Warranties – Whether breach of warranty in share sale agreement on net tangible asset value of company – Whether revaluation of company property necessary to reflect correct net tangible asset value

Held, giving judgment to the plaintiffs for part of their claim:

Nam Kee's statutory accountant Irving Tan did not carry out a further audit up to 15 January 2001 in respect of the 16 May 2001 and 8 August 2001 Completion Accounts. This was because Irving Tan himself had used the word 'review' in each of his cover letters enclosing the respective Completion Accounts and also because he had failed to take the necessary steps which would have been done in an audit. (See [12] – [13]).

It was not the NTA value per se that was important in the dispute but the NTA value as determined in accordance with clause 8.4.1 that was important. (See [19].)

The plaintiffs' suggestion that the 16 May 2001 Completion Accounts, under which the NTA as determined according to clause 8.4.1 was $2,038,808.95, were for discussion purposes only was a desperate excuse to justify its revision. (See [22], [26]).

Clause 6.2 of the SSA did not require a revaluation of the Property and the plaintiffs had breached the NTA warranty. This was because there was no specific plea by the plaintiffs that the Statement of Accounting Standards would require revaluation of the property and in any event, the Property being last revalued on 30 August 1997, needed another revaluation only in August 2002 in the absence of evidence of volatile market conditions. Moreover, Irving Tan did not seek a revaluation of the Property when auditing the 16 May 2001 Completion Accounts and neither did the plaintiffs propose a revaluation. The idea of using Mr Wong's 3 January 2001 valuation came about only after it was admitted on behalf of the plaintiffs that they had not met the NTA warranty. The case of *Pacific Century Regional Development Ltd v Estate of Seow Khoon Seng* was distinguished from the one at hand. (See [36] – [37], [50] – [54], [57]).

The NTA value, as determined in accordance with clause 8.4.1 had resulted in a shortfall of $461,191.05. After setting off the shortfall against the Retention Sum, PUI still had to pay the plaintiffs $38,808.95. Judgment was granted to the plaintiffs for this sum and interest thereon at 6% per annum from the date of the writ to the date of judgment. (See [79]).

Case(s) referred to

Pacific Century Regional Developments Ltd v Estate of Seow Khoon Seng

[1997] 3 SLR 761 (not flld)

Lim Bio Hiong Roger v City Developments Ltd

[2000] 1 SLR 289 (not flld)

Judgment

Cur Adv Vult

GROUNDS OF DECISION

Introduction

1. Leow Tiak Cheow, the first plaintiff, was the beneficial shareholder of all the issued shares in Nam Kee Asphalt Pte Ltd ('Nam Kee') i.e 5,014,000 shares. In 2000, Pan-United Industries Pte Ltd ('PUI'), the defendant, was interested in buying all the issued shares in Nam Kee. There were negotiations resulting in a Memorandum of Understanding dated 12 October 2000. Subsequently, a Sale and Purchase of Assets Agreement dated 23 December 2000 was entered into between Nam Kee, Tiak Cheow and Pan-United Engineering Pte Ltd (a related company of PUI) and a Share Sale Agreement ('SSA') dated 8 January 2001 was entered into between Tiak Cheow, Leow Tiak Chuan who is the second plaintiff and PUI. There was also a Put Option and a Deed of Indemnity but these agreements are irrelevant for present purposes.

2. Tiak Chuan came to be a registered shareholder of two shares in Nam Kee in the following circumstances. Out of the 5,014,000 shares, two had been held by one Leow Lee Choo as nominee for Tiak Cheow. The rest were registered in Tiak Cheow's name. As Lee Choo was in London at the material time and in anticipation of the sale of his shares in Nam Kee to PUI, Tiak Cheow caused Lee Choo to transfer the two shares to the name of Tiak Chuan.

3. It was agreed that the Pan-United group would buy certain assets of Nam Kee and the shares beneficially owned by Tiak Cheow in Nam Kee at a certain aggregate price. It was also agreed that the price be apportioned so that the consideration for the shares was $3,985,000. I would add that there was also a sweetener on top of the aggregate price but that is not material to the dispute before me and only the terms of the SSA are material.

4. Clause 3 of the SSA provides for the consideration to be payable in the following manner:

> '3.1 S$3,485,000 at Completion; and
>
> 3.2 S$500,000 ("the Retention Sum") less any deductions by [PUI] pursuant to Clause 10.3 without interest at the expiry of 6 months after the Completion Date.'

The Completion Date was defined to mean 15 January 2001 or such other date as the parties may agree in writing. The actual completion was on 17 January 2001.

5. As stated, the Retention Sum is subject to any deduction by PUI pursuant to Clause 10.3 of the SSA. Clause 10.3 entitles PUI to deduct from the Retention Sum the amount of any claim which PUI may have pursuant to Clause 10.1 which in turn provides for the Plaintiffs to indemnify PUI for any breach of the warranties in the SSA.

6. The material warranty is Clause 8.4.1 of the SSA. It states:

> '8.4 The Vendors further jointly and severally represents and warrants to and undertake with the Purchaser and its successors in title … that:-

> 8.4.1 the net tangible asset value of the Company as at the Completion Date as reflected in the Completion Accounts, adjusted to exclude the Completion Account Receivables, the Completion Liabilities and any amount owed to the Company by Pan-United Engineering Pte Ltd pursuant to the Asset Sale Agreement, will not be less than S$2,500,000;
>
> …'

I will refer to the warranty under clause 8.4.1 as 'the NTA warranty'.

7. The Completion Accounts are defined in the SSA to mean 'the audited balance sheet of the Company as at the Completion Date and the audited profit and loss statement for the period from 1 January 2001 to the Completion Date'.

8. Clause 6.2 of the SSA provides

> '6.2 The Parties shall jointly procure, as soon as practicable and in any event within 30 days after Completion, the preparation of the Completion Accounts which shall be prepared by the Company on the basis of the same accounting principles as the Audited Accounts and the Nine-Months Audited Accounts and audited by the Company's auditors, who shall also be instructed to certify the Completion Account Receivables and Completion Liabilities.'

9. The Plaintiffs' position is that they are entitled to the payment of the Retention Sum and that there is no breach of the NTA warranty. The Plaintiffs' position on the NTA warranty is based on their assertion that there should be a revaluation of Nam Kee's leasehold land, and buildings thereon, at 15 Sungei Kadut 3, Singapore ('the Property') and the revaluation would result in a net tangible asset ('NTA') value which, when determined in accordance with clause 8.4.1, will meet the NTA warranty. In respect of the revaluation, the Plaintiffs rely on a valuation of the Property done by one Wong Kum Sek dated 3 January 2001. That valuation was done actually for the purpose of stamping the transfer of shares from Lee Choo to Tiak Chuan.

10. PUI's primary position is that there is a breach of the NTA warranty in that the NTA value of Nam Kee as at the Completion Date and as reflected in the 16 May 2001 Completion Accounts, which I shall come to, and as determined in accordance with clause 8.4.1, is $2,038,808.95 only. Therefore the shortfall is $461,191.05. PUI's primary position is based on its stand that the Property need not be revalued for the Completion Accounts. There was also evidence for PUI that even if revaluation should be carried out, the Plaintiffs would still be in breach of the NTA warranty because the valuation which PUI has obtained is even lower than the book value of the Property before revaluation. However PUI's pleadings do not assert this alternative. This means that the minimum that the Plaintiffs are entitled to is the difference between the Retention Sum and the shortfall in the NTA warranty as determined in accordance with clause 8.4.1 from the 16 May 2001 Completion Accounts i.e $500,000 - $461,191.05 = $38,808.95. In its pleadings, PUI also alleges other breaches by the Plaintiffs and counterclaimed damages. However, in the course of the trial, PUI abandoned its allegation of other breaches and relied solely on the breach of the NTA warranty. This means that PUI's counterclaim is effectively abandoned.

Further facts and allegations

11. The statutory auditor of Nam Kee's accounts was Tan Peck Leng, Irving of Irving Tan & Co. After some chasing, he provided the Completion Accounts purportedly audited by him with his cover letter dated 16 May 2001. I have refereed to this set of Completion Accounts as 'the 16 May 2001 Completion Accounts'. These Completion Accounts were prepared and purportedly audited as at 15 January 2001, the contractual completion date even though the actual completion date was 17 January 2001. However, no issue was taken on the difference of two days.

12. I would add that Irving Tan insisted that he did audit the 16 May 2001 Completion Accounts, as well as a revised set of Completion Accounts forwarded with a cover letter dated 8 August 2001 ('the 8 August 2001 Completion Accounts'), even though each of his cover letters enclosing the respective Completion Accounts used the word 'review' and not 'audit'. Although he has about ten years' experience as a certified public accountant, he said he was not aware that the Singapore Standard of Accounting made a distinction between a review and an

audit. To him, the two words were used interchangeably. On the other hand, PUI's expert witness Mr Foong Daw Ching was of the opinion that Irving Tan did not do an audit, partly because Irving Tan himself had used the word 'review' and also because Irving Tan had failed to take certain necessary steps which would have been done in an audit, for example, a bank reconciliation, and a debtors and creditors circularisation as at 15 January 2001 (NE 216 and 217).

13. I accept Mr Foong's evidence on this point. I would add that although Irving Tan said he did not exhibit all the work he had done before coming up with the first set of Completion Accounts i.e the 16 May 2001 Completion Accounts, it is clear to me that, in any event, the work he had not exhibited pertained to the audit of the accounts up to 31 December 2000 only as he himself admitted (NE 55). True, that work would assist him to follow up with an audit of the accounts up to 15 January 2001, but that is a different point. I am of the view that he did not carry out a further audit up to 15 January 2001 in respect of the 16 May 2001 and the 8 August 2001 Completion Accounts. I find his assertion that he had done an audit up to 15 January 2001, notwithstanding the omissions mentioned by Mr Foong and notwithstanding his cover letters that he had done a review, to be incredible. I also do not believe his assertion that he was not aware of a distinction between a review and an audit in the Singapore Standard of Accounting and that he used 'review' interchangeably with 'audit'.

14. However, as the Plaintiffs are taking the position that the 16 May 2001 Completion Accounts were audited and Mr Francis Xavier, Counsel for PUI, accepts that an audit would not yield a different figure for the purpose of the NTA warranty, I am treating the 16 May 2001 Completion Accounts as having been audited for the purpose of this action only. Strangely enough, Mr Xavier was still taking the point that for the 8 August 2001 Completion Accounts, such Accounts were not audited even though an audit per se would also not yield a different figure for the purpose of the NTA warranty. The primary difference between the 16 May 2001 and the 8 August 2001 Completion Accounts was the inclusion in the latter of Mr Wong's 3 January 2001 valuation of the Property. Accordingly, for the purpose of this action only, I am also treating the 8 August 2001 Completion Accounts as having been audited by Irving Tan. Whether the Completion Accounts should include a revaluation of the Property is another matter.

15. Mr Xavier also took the point that, as regards the 8 August 2001 Completion Accounts, these Accounts were prepared more than 30 days after completion. On the other hand, he was content to accept the 16 May 2001 Completion Accounts even though they too were prepared more than 30 days after completion. It seems to me that he was blowing hot and cold again, depending on which set of Completion Accounts was in favour of PUI. In my view, the fact that each of the Completion Accounts was prepared more than 30 days after the completion does not in itself make the respective Completion Accounts invalid. There might be a breach by one or both of the parties but that is a different matter.

16. Mr Xavier also took the point that the 8 August 2001 Completion Accounts were not jointly procured as envisaged by clause 6.2 of the SSA. Mr Xavier was using this point to argue that Irving Tan should not have unilaterally adopted Mr Wong's 3 January 2001 valuation for the 8 August 2001 Completion Accounts, without giving PUI a chance to address Irving Tan on that valuation. There is some merit in this point but, in any event, it is no longer material since each side has adduced evidence before me on the valuation report it relies on, should a revaluation be necessary.

17. Coming back to the 16 May 2001 Completion Accounts, it was not disputed that these Accounts showed the NTA value of Nam Kee to be $2,038,808.95 if determined in accordance with clause 8.4.1. This would mean a breach of the NTA warranty of $2.5 million, the amount of the breach being $461,191.05, as stated above.

18. I digress briefly to deal with a suggestion by both Counsel for the opposing parties during the trial that the 16 May 2001 Completion Accounts had not been prepared and audited in accordance with clause 8.4.1. This turned out to be a misleading suggestion and caused confusion. The SSA does not require the Completion Accounts to be prepared and audited in accordance with clause 8.4.1. It simply requires the Completion Accounts to be prepared by Nam Kee under clause 6.2 'on the basis of the same accounting principles as the Audited Accounts and the Nine-Months Audited Accounts and audited by the Company's auditors …'. In other words, clause 6.2 does not require Nam Kee to take into account clause 8.4.1 when it is preparing the Completion Accounts. Nor does it require Irving Tan to take into account clause 8.4.1 when he does his audit. It is only after the Completion Accounts have been prepared and audited in accordance with clause 6.2 that the parties will then apply the formula in clause 8.4.1 to determine whether the Plaintiffs have met the NTA warranty or not.

19. In this connection, paragraph 10(d) of the Reply and Defence to Counterclaim was misleading. It states that the 16 May 2001 Completion Accounts shows an NTA value of $2,723,263.74. While that may be true, this figure is not determined in accordance with clause

8.4.1 and hence irrelevant to the dispute about the NTA warranty. In other words, it is not the NTA value per se that is important in the dispute but the NTA value as determined in accordance with clause 8.4.1 that is important.

20. After the 16 May 2001 Completion Accounts were submitted to PUI, PUI's solicitors Rajah & Tann took the position that there was a breach of the NTA warranty while the Plaintiffs' then solicitors Leong Kwok Yan disputed the breach. I would add that the exchange of correspondence between solicitors on the NTA warranty is confusing. For example, Rajah & Tann had assumed, even then, that the Completion Accounts had to take into account the formula in clause 8.4.1 and hence alleged that these Completion Accounts were not correct (AB 416). On the other hand, Leong Kwok Yan was relying on a figure from the Completion Accounts as having met the NTA warranty without taking into account the formula in clause 8.4.1 (AB 420). As I have said, the Completion Accounts do not, per se, have to take into account clause 8.4.1 It is only when the parties want to determine whether the NTA warranty has been met, that the formula in clause 8.4.1 kicks in.

21. There was subsequently a meeting on or about 2 August 2001 ('the 2 August 2001 meeting') at Rajah & Tann's office attended by representatives from PUI and from Rajah & Tann and Tiak Cheow, his solicitor Leong Kwok Yan and Irving Tan. There was some dispute as to whether this meeting was on a 'without prejudice' basis but as the substance of the meeting was referred to by both sides in the course of the trial without qualification, until the qualification was raised at a late stage in the trial, I am of the view that it is too late for the parties, and in particular the Plaintiffs, to assert that evidence as to what was said at the meeting is inadmissible.

22. It transpired that at the 2 August 2001 meeting there was an admission on behalf of the Plaintiffs that the NTA warranty had not been met because the NTA value of Nam Kee based on the 16 May 2001 Completion Accounts, and determined in accordance with clause 8.4.1, was $2,038,808.95 (NE 11 line 16, 22 and 28, see also AB 447/448). Indeed, during cross-examination, Tiak Cheow again acknowledged that under the 16 May 2001 Completion Accounts, the NTA warranty had not been met (NE 11 line 11).

23. There is a dispute whether Ng Bee Bee, a director and Senior General Manager of PUI, had told the meeting that if the Plaintiffs could come up with another set of Completion Accounts which would show Nam Kee's NTA value to be not less than $2.5 million, PUI would be happy to release the Retention Sum to the Plaintiff. However, I do not have to rule on this dispute because the Plaintiffs have not pleaded this allegation either as constituting a variation of the SSA or an estoppel of some sort.

24. What is not in dispute is that Tiak Cheow, his solicitor, and Irving Tan had had their own discussion as they were leaving the meeting and had come up with an approach which would allow the Plaintiffs to meet the NTA warranty. This was to adopt the valuation of the Property which had been done by Mr Wong on 3 January 2001 for the purpose of stamp duty in relation to the transfer of the two shares from Lee Choo to Tiak Chuan. Mr Wong had valued the Property at $2.5 million which was more than the book value of the Property. According to Mr Jeffrey Beh, Counsel for the Plaintiffs, the book value was $2.003 million (NE 3). Using Mr Wong's valuation, Irving Tan then revised the 16 May 2001 Completion Accounts and the revised Completion Accounts were then forwarded to Nam Kee with his cover letter dated 8 August 2001. As a result, the NTA value of Nam Kee, as determined in accordance with clause 8.4.1, became $2,545,369.74 instead of $2,038,808.85 under the 16 May 2001 Completion Accounts.

25. Irving Tan sought to justify his revision of the Completion Accounts on the basis that the 16 May 2001 Completion Accounts was meant for discussion purposes only and in any event Ng Bee Bee had agreed at the 2 August 2001 meeting that PUI would pay the Retention Sum if the Plaintiffs could come up with Completion Accounts showing the NTA value as at least $2.5 million, when determined in accordance with clause 8.4.1.

26. I do not accept his first reason. His cover letter dated 16 May 2001 forwarding the Completion Accounts did not suggest that it was for discussion purposes only. Furthermore, if it was for discussion purposes only, there would not have been an admission of a breach of the NTA warranty. In my view, the suggestion that the 16 May 2001 Completion Accounts were for discussion purposes only was a desperate excuse to justify its revision.

27. As for the allegation about what Ng Bee Bee had said, I have already said that this was not pleaded as constituting a variation or an estoppel.

28. Therefore, the main issue is whether, under the terms of the SSA, the Property should be revalued for the Completion Accounts.

Should the Property be revalued?

29. Mr Beh relied on the terms of clause 6.2 which I have set out in para 8 above. He also submitted that PUI does not dispute that it is an accounting policy of Nam Kee to revalue its leasehold land and buildings from time to time.

30. On this point, Mr Beh was relying on Note 2.2 of Nam Kee's accounts for the year ended 31 March 2000 which states, inter alia:

> 'The building is subject to 24 years lease commencing February 1985. It was revalued by a professional valuers on 30 August 1997. The revalued leasehold land and building is subject to amortization for its remaining 12.5 years.'

However, in my view, this submission faced considerable difficulties.

31. First, paragraph 10(d) to (f) of the Reply and Defence to Counterclaim states:

> '(d) The Plaintiffs state that a Completion Account dated 16 May 2001 was furnished to the Defendants. The Completion Account showed a net tangible asset value of $2,723,263.74. [This was misleading as I have said in para 19 above.]
>
> (e) The Completion Account was subsequently revised which revised Completion Account, dated 8 August 2001, showed a net tangible asset value of $2,545,369.74, excluding the duly certified Completion Account Receivables, the Completion Liabilities and any amount owed to the Company by Pan-United Engineering Pte Ltd, in compliance with Clause 8.4.1 aforesaid.
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> (f) In both cases, the Completion Accounts were prepared on the basis of the same accounting principles as the Audited Accounts and the Nine-Months Audited Accounts and were duly audited by the said M/s Irving Tan & Co, Certified Public Accountants, in compliance with Clause 6.2 aforesaid and in consultation with the Defendants.'
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> [
>
> Emphasis added.]

32. I do not see how both the Completion Accounts prepared in May and in August 2001 could have been prepared on the same accounting principles as one relied on the 3 January 2001 valuation of the Property whereas the other (the 16 May 2001 one) did not.

33. It was also not pleaded specifically that the accounting principles of Nam Kee required revaluation of the Property. Neither was it pleaded that the revaluation was done every year. Indeed, looking at Note 2.2, there was only one revaluation between February 1985 and 30 August 1997.

34. Mr Beh sought to rely on the fact that, in cross-examination, Mr Cheong Sang Hoon, a Finance and Admin Manager of PUI, was shown Note 2.2 about revaluation and he agreed that Nam Kee had a policy of revaluing the Property 'from time to time'. Mr Cheong also agreed that Irving Tan was permitted to take into account any revaluation of the Property in the context of the Completion Accounts (NE 203). In my view, this evidence does not go as far as Mr Beh was submitting. If there had been a revaluation for the purpose of updating Nam Kee's accounts, Irving Tan would have been entitled to take that revaluation into account for the Completion Accounts. However, Mr Wong's 3 January 2001 valuation was not for the purpose of updating Nam Kee's accounts. Besides, even Irving Tan, who had been the statutory auditor of Nam Kee for some years, did not seek a revaluation of the Property or rely on Mr Wong's 3 January 2001 valuation when he was auditing the 16 May 2001 Completion Accounts.

35. On this point, paragraph 6 of Irving Tan's AEIC simply states that it was the accounting policy and practice of Nam Kee to re-value its immovable property but paragraph 6 stops short of stating that Nam Kee's accounting policy required revaluation to be done every year. Irving Tan must have realised this and that is why in paragraph 7 of his AEIC, he relies not so much on Nam Kee's accounting policy but on

the Statement of Accounting Standards ('SAS'). However, he could only say that under SAS 14, a property was required to be re-valued yearly if market conditions are volatile or between three to five years where the market is stable.

36. There was no specific plea by the Plaintiffs that the SAS would require revaluation of the Property. In any event, as the Property was last revalued on 30 August 1997, the next valuation could be in August 2002 in the absence of evidence of volatile market conditions.

37. It bears repeating that when Irving Tan was auditing the 16 May 2001 Completion Accounts, he did not seek a revaluation of the Property nor rely on Mr Wong's 3 January 2001 valuation even though it was Irving Tan's office who had asked that such a valuation be done for the purpose of stamping the transfer of shares from Lee Choo to Tiak Cheow. Neither did the Plaintiffs propose a revaluation for the purpose of the Completion Accounts. The idea of using Mr Wong's 3 January 2001 valuation came about only after it was admitted on behalf of the Plaintiffs that they had not met the NTA warranty.

38. As an aside, I would add that I notice that Note 2.2 of the accounts refers to a professional valuation on 30 August 1997 and Tiak Cheow said in paragraph 20 of his AEIC that 'All previous valuations of the company's land were undertaken by Wong Kum Sek & Co'. Yet Mr Wong's second AEIC exhibited two earlier valuation reports in 1990 and 1995 only and none in 1997. There was no evidence before me as to who had done the 30 August 1997 valuation.

39. Mr Beh also sought to rely on a press report dated 20 January 2001 based on a press release from the Pan-United group stating that 'The two wholly-owned subsidiaries of Pan-United Corporation arrived at the total purchase price of $10.5 million after considering NKA's earnings potential and the market value of its assets". He submitted that this demonstrated that PUI had made its purchase on the market value of the assets of Nam Kee and not the book value. However, there was no other evidence that PUI was thinking of or had obtained or relied on a revaluation of the Property for the purpose of the Completion Accounts when the SSA was signed or even as at 16 May 2001. Even Tiak Cheow and Irving Tan were not thinking of relying on Mr Wong's 3 January 2001 valuation up to 16 May 2001, even though each of them was aware that Mr Wong had done a recent valuation for the purpose of stamp duty.

40. Likewise, although PUI had accepted the figure of $2.5 million as the value of the Property for the purpose of stamping forms for the transfer of shares to it, this did not mean that PUI had agreed to adopt $2.5 million as the value of the Property for the purpose of the Completion Accounts. It appears to me that, whatever the reason, when the SSA was signed and when the 16 May 2001 Completion Accounts were being prepared, no one gave a thought to using the $2.5 million figure for the Completion Accounts, until August 2001.

41. Mr Beh then placed much reliance on the case of *Pacific Century Regional Developments Ltd v Estate of Seow Khoon Seng* [1997] 3 SLR 761. In that case, Pacific Century Regional Developments Ltd ('PCRD') agreed to acquire 3,510,000 shares from one Seow Khoon Seng, who had passed away, in a company called Pioneer Die Casting Co Ltd ('Pioneer Die Casting'). One of the objectives of the agreement was the listing of Pioneer Die Casting within three years from the date of the agreement. Under clause 6.3.1 of the agreement, the deceased would have the option of re-acquiring the shares if the objective of listing failed. The relevant provision required the valuation of the shares to be based on the NTA or PE of Pioneer Die Casting, whichever was the higher. Clause 6.3.2 of the agreement in that case provided:

> '(a) 'NTA' means the net tangible asset value of the company as at the end of the financial year immediately preceding the exercise date based on the audited financial statements of the company in accordance with generally accepted accounting principles and practices in Singapore as determined by the auditors of the company who shall decide as experts and not as arbitrators, and whose determination shall be final and conclusive.'
>
> [Emphasis added.]

42. The shares of Pioneer Die Casting were not listed. One Vincent Seow, representing the estate of the deceased, then wrote on 27 September 1995 to Mr Gerard Ee of Ernst & Young to obtain a valuation of the shares as at 31 December 1994 for the purpose of exercising 'appropriate options', meaning the option to re-acquire the shares from PCRD although there were various options available. Ernst & Young were the statutory auditors of Pioneer Die Casting. Mr Ee replied promptly on 28 September 1995. In his opinion, the NTA value as at 31 December 1994 was approximately $1.10 per share. However his reply had a specific qualification which stated:

> 'Kindly note that the fixed assets should be revalued for proper valuation. It includes leasehold land and building which was last revalued based on professional valuation on 24 November 1981.'

At that time, Mr Ee had not seen clause 6.3.2.

43. Vincent Seow was dissatisfied with this qualification as revaluation had not been stated in the agreement or in his letter to Ernst & Young. He then met with Mr Ee and brought his attention to clause 6.3.2 Mr Ee then issued another letter also dated 28 September 1995 but the qualification was removed. However, Mr Ee maintained that he had expressly said that the second letter was not to be used in conjunction with clause 6.3.2 of the agreement. On 10 November 1995, the estate's solicitors gave notice of election to re-acquire all the shares held by PCRD in Pioneer Die Casting at $1.10 per share.

44. On 15 November 1995, PCRD wrote in response to this notice as well as the 28 September 1995 letter from Mr Ee (which did not contain the qualification). PCRD stated that the valuation had failed to take into account the relevant market value of the real estate properties of Pioneer Die Casting and its subsidiaries. Also, they requested the PE figure to be determined. On 16 November 1995, PCRD's solicitors wrote to Ernst & Young to request a valuation based on the PE. On the same day, Mr Ee replied. The relevant part of his letter stated that the value given on the shares on 28 September 1995 took the values as stated in the audited balance sheet as at 31 December 1994. The value was given 'in response to a general enquiry from a director and is not by reference to any terms that may be set out in any option agreement'. On 21 November 1995, Mr Ee stressed the same point in another letter to PCRD's solicitors. In addition, he informed them that the valuation based on PE was four cents.

45. In the meantime, PCRD's President had sent Mr Ee a fax on 16 November 1995 asking for his determination of the NTA value with respect to clause 6.3.2. On 29 November 1995, Mr Ee replied to state that the NTA per share was $1.50. According to Mr Ee, this value had been arrived at by taking into account the revaluation of the leasehold land and buildings of the group as at 31 December 1994, based upon independent professional valuers' reports.

46. The trial judge did not think that there was room for further investigation or revaluation once the accounts of Pioneer Die Casting had been finalised. The Court of Appeal disagreed for three reasons.

47. First, clause 6.3.2 in that case provided for the NTA 'to be based on the audited financial statements of the company in accordance with generally accepted accounting principles and practices.' [Emphasis added.] The Court of Appeal was of the view that the second limb meant that the NTA would not be based solely on the audited financial statements, otherwise the second limb would be otiose. In addition, there were six affidavits from partners of well-known accounting firms all of whom stated that if they were appointed as an expert under clause 6.3.2, they would value the shares on the basis of revalued assets.

48. Secondly, clause 6.3.2 required the statutory auditors there to make a decision as 'experts and not as arbitrators'. If the NTA was to be based on the audited financial statements alone, appointing an expert to assess the NTA would seem unnecessary. On the other hand, only an auditor, as an expert, would be in a position to revalue the fixed assets and assess the NTA as a result.

49. Thirdly, the Court of Appeal was of the view that the agreement had to be looked at from a commercial perspective. Relying on the book Share Valuations by TA Hamilton Baynes, the Court of Appeal was of the view that basing the NTA purely on the audited financial statements would not reflect the correct worth of the shares. The last revaluation was on 24 November 1981, about 13 to 14 years earlier. No reasonable person would expect the shares to be based on figures last determined in 1981 and, again, the Court of Appeal relied on the six affidavits from partners of well-known accounting firms which I have already mentioned.

50. In the case before me, the SSA is silent about revaluation as was the case of the agreement in the *PCRD* case. However, many of the facts before me are somewhat different from those in the *PCRD* case.

51. First, clause 6.2 of the SSA does not have the second limb of clause 6.3.2 in the *PCRD* case.

52. Secondly, the statutory auditors of Nam Kee are not required to act as experts. On this point, I digress to say that the requirement of an auditor to decide as an expert and not as an arbitrator does not , by itself, necessarily mean that there must be revaluation. I do not consider

the judgment of the Court of Appeal in the *PCRD* case to mean that. The phrase 'to decide as experts and not as arbitrators' is often used to ensure that the auditors' decision is not appealable even though another phrase 'whose determination shall be final and conclusive' is used as well. In my view, the latter phrase is used merely to emphasize the point that the auditors' decision is not appealable.

53. Thirdly, while I accept that the SSA should be viewed from a commercial perspective, even though Irving Tan claimed he had been told by one of PUI's representatives that it was a friendly deal (NE 35), this is not a case where the last valuation was done 13 or 14 years ago but about three and a half years ago. More importantly, unlike the *PCRD* case, there was no evidence on the Plaintiffs' side from any other auditor that a revaluation of the Property should be done first before the accounts of Nam Kee were prepared as at the Completion Date. Indeed, it will be recalled that under clause 6.2 of the SSA, the statutory auditors are only required to audit the Completion Accounts. They are not required to determine the NTA value under clause 8.4.1. That is for the parties to ascertain from the Completion Accounts once they have been prepared and audited (up to the Completion Date).

54. Fourthly, unlike Gerard Ee in the *PCRD* case, the statutory auditor Irving Tan did not initially mention the need for a revaluation of the Property for the purpose of the Completion Accounts. I have already set out the circumstances as to how Irving Tan came to use the 3 January 2001 valuation of Mr Wong, after there was already an admission of a breach of the NTA warranty.

55. The evidence of PUI's expert witness Foong Daw Ching did not shed any further light on this point. In his report, he said only that upon receipt of Mr Wong's 3 January 2001 valuation report, Irving Tan should have sought the views of PUI. However, this comment appeared to apply to the revision of the Completion Accounts dated 8 August 2001. Mr Foong did not assert, one way or the other, whether there should be, in the first place, a revaluation under clause 6.2 of the SSA. Neither was he asked this question in cross-examination.

56. Mr Beh also submitted that PUI had recognised the need for revaluation because its solicitors Rajah & Tann wrote to Irving Tan on 6 December 2001 to ask him to take into account two valuation reports, one of which was from CB Richard Ellis Pte Ltd ('Richard Ellis'). The other was from DTZ Debenham Tie Leung (SEA) Pte Ltd, but I have disallowed a late application to adduce evidence from a representative of DTZ as the application should have been made earlier. It seems to me that while the letter from Rajah & Tann does appear to suggest that PUI was proceeding on the basis of a revaluation of the Property, it should not be read in isolation. Rajah & Tann had already on 17 September 2001 written to Leong Kwok Yan to object to any revaluation. Therefore their letter dated 6 December 2001 should be read to mean that, if a revaluation was necessary, PUI had obtained valuation from two other valuers.

57. In the particular circumstances, I am of the view that Clause 6.2 of the SSA does not require a revaluation of the Property and the Plaintiffs have breached the NTA warranty.

Secondary Question

58. A secondary question is whether there should be an adjustment nevertheless to the 16 May 2001 Completion Accounts. In cross-examination, Irving Tan said that the accountant in Nam Kee had applied depreciation for the two week period from 1 January to 15 January 2001. As the depreciation charge was on an annual basis, he would put back $11,977.55 i.e increase the NTA of Nam Kee by this sum. However, he did not explain why, in the first place, he had included the depreciation charge when he audited the 16 May 2001 Completion Accounts. It is not as though he was unaware of this depreciation charge at the material time. He could have rejected the depreciation charge then but he did not.

59. I am of the view that Irving Tan cannot try and revise or adjust the depreciation charge now. While the depreciation charge is usually applied on an annual basis, it should be pro-rated since the Completion Accounts were to be prepared as at 15 January 2001.

The correct value of the Property as at 15 January 2001

60. In the circumstances, it is not necessary for me to decide whether Mr Wong's 3 January 2001 valuation should be adopted to determine whether the NTA warranty has been breached. However, for completeness, I will deal with this point.

61. Mr Xavier raised a number of arguments to persuade me why I should not accept Mr Wong's 3 January 2001 valuation, if a revaluation should be done, and that I should instead adopt a valuation report dated 23 November 2001 by Richard Ellis which valued the

Property at $1.85 million. I will mention Mr Xavier's main arguments only.

62. First, Mr Wong's 3 January 2001 valuation was not for the purpose of the SSA but for stamp duty on the transfer of shares from Lee Choo to Tiak Chuan. Even Irving Tan had said, during cross-examination, that he did not actually ask to see a copy of Mr Wong's 3 January 2001 valuation before issuing the 16 May 2001 Completion Accounts because that valuation was for a share transfer (NE 44). I would add that although Irving Tan then said in re-examination that he had not thought about that valuation at the material time (NE 59), he did not explain why this was so if revaluation should have been done. The truth of the matter is that up to 16 May 2002 he did not think that a revaluation should be done.

63. Secondly, although Mr Wong's valuation was based on comparables, the comparable properties were not listed in Mr Wong's 3 January 2001 valuation. Mr Wong did not dispute that the had omitted the list of comparables in the valuation report but said that he had had them in mind when he did the valuation. In his first AEIC, he enclosed a list of comparables. However, some of the information in that list was inaccurate as to either the floor area or the price per square foot of a sale. Mr Wong then filed a second AEIC to include a list to replace the one he had exhibited to his first AEIC. In that list he corrected the earlier errors and included information on the period remaining of the leasehold comparables. However, there were again errors in his fresh list.

64. For example, as regards two of the comparables, the period remaining of their leases was incorrect because Mr Wong had calculated the remaining period from 15 January 2001 whereas he should have instead calculated it from the respective dates of sales/ transfers. Mr Xavier also submitted that item 3 of Mr Wong's list of comparables (which is 16 Benoi Sector) was of a property sold or transferred on 15 January 2001 i.e after Mr Wong's 3 January 2001 valuation. He could not have had this comparable in mind as at 3 January 2001 and he probably included it in his subsequent list to justify his valuation. To be fair, when Mr Wong sought to include his list of comparables, he referred to it as 'evidence of value' and he did not actually say that these were the comparables he had had in mind when he gave his 3 January 2001 report/valuation. In cross-examination, he said he included this property to show the trend of values (NE 78). In my view, he should have made it clear in his list that that property was sold/ transferred after the date of his valuation.

65. Thirdly, Mr Xavier submitted that although Mr Wong had inspected the Property again before his 3 January 2001 valuation, he had not measured the floor area of the buildings again. What Mr Wong had done was to adopt a figure of 4,449.2 square metres reflected in his earlier 1990 report of the Property. I would also mention that although Mr Wong used the word 'Built-in-area', what he meant was the floor area. The 4,449.2 square metres was the total floor area of two office buildings, two single-storey factory buildings and two single-storey guardhouses. Mr Wong explained that this figure was based on actual site measurements as opposed to measurements taken from plans.

66. On the other hand, Richard Ellis' measurements, as reflected in their report, were taken from plans. They came up with a figure of 3,694.80 square metres excluding a covered linkway between two production buildings and two guardhouses. However, Richard Ellis' witness Ms Sim Hwee Yan had, prior to giving evidence, done on-site measurements, and her measurements resulted in a floor area of 3,754.26 square metres. She also measured the covered linkway between two production buildings and the two guardhouses on site and if these were taken into account, the total would be 4,059.60 square metres, still less than Mr Wong's 4,449.2 square metres.

67. Unfortunately for the Plaintiffs, Mr Wong no longer had his working papers for the 1990 valuation. Furthermore, Richard Ellis' measurements from the plans and on-site measurements were not challenged during cross-examination.

68. To explain why his measurement of the floor area was 4,449.2 square metres, Mr Wong said that he had included the areas below the roof eaves as floor area. However, Ms Sim had, also prior to giving evidence, measured these areas to test his assertion. The areas below the eaves would have resulted in an additional 970.50 square metres, if the covered linkway was included, which would then make the total floor area 5,030.10 square metres (i.e 4,059.60 + 970.50 square metres). This was quite a lot more than Mr Wong's 4,449.20 square metres.

69. Mr Xavier also submitted that Mr Wong's 1990 report stated that the floor area of the larger of the two office buildings was 598 square metres, including the power station. The total floor area of both the office buildings was 918 square metres. This meant that the floor area of the smaller office building was 320 square metres (i.e 918 - 598 square metres). However, Ms Sim's measurements on site showed the floor area of the smaller office to be 324 square metres without taking into account the eaves area around this building. This figure of 324 square metres, without the eaves area, was already more than Mr Wong's 320 square metres. The eaves area, of the smaller office building, would be another 71.40 square metres (Exhibit D9).

70. Mr Xavier submitted that Mr Wong could not have included the eaves area in his measurement in 1990 of the floor area and that the explanation about the eaves area was just an excuse to justify Mr Wong's error of 4,449.2 square metres.

71. Mr Wong's reason for including the eaves area as floor area appeared to be that the eaves area was concreted and was used as part of the building. It could be used to store goods (NE 87). On the other hand, the evidence of Ms Sim was that floor areas given in comparables do not include the area below the eaves (NE 228). She was not challenged on this. I do not accept Mr Wong's reason as a good reason. The area below the eaves was almost as much exposed to weather as the area outside of the eaves. The fact that the floor of the eaves area was concreted was of minimal value as he himself accepted (NE 88).

72. However, Mr Beh submitted that on the authority of *Lim Bio Hiong Roger v City Developments* Ltd [2000] 1 SLR 289, the eaves area should be treated as part of the floor area for the purpose of valuation. In my view, that case did not assist Mr Beh because it did not concern the valuation of a property and also did not concern the eaves area. I accept Mr Xavier's submission that Mr Wong had used the eaves area as an attempt to justify the total floor area he had reported in 1990.

73. It also seems to me that Mr Wong had done his 3 January 2001 valuation rather casually. That is why he did not attach a list of comparables to that valuation. That is also why there were errors in the list of comparables he tendered eventually and errors again in his revised list. He must have known that his 3 January 2001 valuation was in respect of the transfer of two shares only and hence did not put in as much effort as he might otherwise have done had he been instructed to do a valuation for Nam Kee's accounts.

74. Although Mr Wong's 3 January 2001 valuation has the benefit of having been done before any dispute arose, Ms Sim said that Richard Ellis were told that their valuation was for the company's financial statement (NE 223). There was no suggestion that they knew that the valuation was required to resolve a dispute.

75. Ms Sim is a director of Richard Ellis although it was a licensed valuer of Richard Ellis, Claire Woo, who did the initial leg-work such as inspecting the Property, taking photographs, inspecting comparables, calculating floor area, and making adjustments in view of comparables. However Ms Sim said she did sit down with Claire Woo to discuss Ms Woo's proposed valuation before the report was finalised and Ms Sim did inspect the Property before she gave her evidence. Furthermore, as I have said, although Richard Ellis' valuation was based on measurements of floor area taken from plans, Ms Sim did go down to the site subsequently to take measurements of the floor areas and later, the eaves area, before she gave evidence.

76. Although Mr Beh submitted that working papers of Richard Ellis were not produced in evidence, he did not ask for them to be produced or, as I have said, challenge the accuracy of their measurements during cross-examination. Furthermore, I was quite impressed by Ms Sim's overall evidence which I find to be generally steady.

77. On balance, I am of the view that the valuation report by Richard Ellis is to be preferred subject to the qualification that Ms Sim's on-site measurements revealed a slightly larger floor area of 4,059.70 square metres (which includes the floor area of the covered linkway and two guardhouses) as compared to 3,964.80 square metres (which is based on plans and excludes the covered linkway and two guardhouses). The difference is 94.9 square metres, slightly more than 2%. In any event, Ms Sim had said that other valuers might differ between 5% to 10% from Richard Ellis' valuation and her own range of the value was $1.82 million to $1.9 million (NE 229 and 225). Using the higher end of her range i.e $1.9 million and adding 10% thereto would result in a figure of about $2.09 million which I will round up to $2.1 million.

78. Accordingly, if a revaluation of the Property should be done, I am of the view that the correct value thereof as at 15 January 2001 would be $2.1 million and the Completion Accounts should then be adjusted accordingly before clause 8.4.1 is applied.

Conclusion

79. As I have concluded that the SSA does not require a revaluation of the Property, the NTA value, as determined in accordance with clause 8.4.1, has resulted in a shortfall of $461,191.05. After setting off the shortfall against the Retention Sum, PUI still has to pay the Plaintiffs $38,808.95. I grant judgment to the Plaintiffs for $38,808.95 and interest thereon at 6% per annum from the date of Writ to the date of judgment. PUI's counterclaim is dismissed. The Plaintiffs have not succeeded substantially on their claim and I will hear the parties on costs.

Observation

80. I would add one observation. PUI had initially raised some other defences which were unmeritorious or irrelevant. These defences were dropped only during the trial. In my view, its attempt to rely on such defences does not reflect well on it.

Sgd:

WOO BIH LI

JUDICIAL COMMISSIONER

SINGAPORE