Lim Kian Kiong and Another v Tan Seng Teck and Another (Tan Say Lai and Others, Third Parties)
[2005] SGHC 104

Case Number : Suit 182/2003

Decision Date : 03 June 2005

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Sean Lim and Tan Aik How (Hin Tat Augustine and Partners) for the plaintiffs; Tan Hong Seng (Tan Lim and Wong) for the defendants; Kenny Yap (Allen and Gledhill) for the third parties

Parties : Lim Kian Kiong; Low Peck Lian — Tan Seng Teck; Tan Seng Eng — Tan Say Lai; Tan Sai Liang; Tan Koon Huat

Contract – Contractual terms – Construction of contractual term – Third parties agreeing to purchase plaintiffs' share in partnership with defendants – Defendants agreeing to purchase plaintiffs' share in event of failure to obtain approval from HDB for sale to third parties – Meaning of "approval"

Contract – Termination – Repudiation of contract – Third parties agreeing to purchase plaintiffs' share in partnership with defendants – Defendants agreeing to purchase plaintiffs' share in event of failure to obtain approval from HDB for sale to third parties – First defendant failing to sign supplementary agreement necessary to obtain HDB's approval – Plaintiffs commencing action against defendants – Defendants seeking indemnity from third parties – Whether actions of first defendant amounting to repudiation of contract – Whether third parties wrongfully rescinded contract – Whether third parties liable to indemnify defendants

3 June 2005

Woo Bih Li J:

Background

1 The plaintiffs Lim Kian Kiong and Low Peck Lian are a married couple. The defendants Tan Seng Teck and Tan Seng Eng are brothers. The plaintiffs and the defendants were partners of a business known as 815 Eating House ("the Partnership") with each partner apparently holding an equal stake in the Partnership. The Partnership was operating a coffee shop of the same name at Block 815 Jurong West Street 81 #01-210, Singapore 640815 ("the Premises"). The Premises were rented from the Housing and Development Board ("HDB"). The Partnership was also operating the refreshment area outside the coffee shop under a licence from HDB. This area was referred to as the Outdoor Refreshment Area ("ORA").

2 The plaintiffs and defendants had differences and decided to part company. The defendants would have bought over the plaintiffs' share in the partnership for $600,000 but did not have the funds to do so.[1] Consequently, they introduced one Tan Tong Pheng ("Tong Pheng") to buy over the plaintiffs' share at the same price.

3 The defendants and Tong Pheng were initially represented by Tan Kok Quan Partnership ("TKQP"). The plaintiffs were represented by Hin Tat & Partners ("HTP"). Eventually TKQP sent a fax on 30 August 2002 to HTP to state a final offer for the purchase of the plaintiffs' share in the Partnership. Paragraph 3 of the fax sets out the terms in 14 sub-paragraphs. I will refer to each sub-paragraph as a clause. The offer was accepted by HTP on the same day.

4 The material terms of the offer were:

(1) Mr Tan Tong Pheng proposes to purchase in the names of himself and/or nominees to be appointed by him at his discretion, your clients' 50% share in the Partnership at a consideration of $600,000.00 ("the Purchase Price"), subject to the approval of the HDB;

…

(4) Within one(1) week of obtaining the approval of the HDB for the sale of your clients' share of the Partnership to Mr Tan Tong Pheng and/or his nominees, Mr Tan Seng Eng and Mr Tan Seng Teck shall pay your clients the deposit of $141,500.00 less the sum of $50,600.00 representing their share of the profits of the Partnership for the months of April to August 2002 due and owing from your clients to them;

(5) Pending HDB's approval for the sale, all parties shall attend at the Premises on 31 August 2002 at 8.30am for the following purposes:-

(a) There shall be a joint inspection of the Premises;

…

(h) all parties to immediately adjourn to the HDB Hub to sign the necessary papers to apply for the changes in the Partnership, which have to be executed in person before a HDB officer;

(13) In the event that HDB does not approve the sale of your clients' share in the Partnership to Mr Tan Tong Pheng and/or his nominees:-

(a) …

(b) Mr Tan Seng Eng and Mr Tan Seng Teck shall purchase your clients' share of the partnership on the same terms set out herein …

As can be seen, the net amount payable by the defendants to the plaintiffs under cl 4 was $90,900.

5 In the meantime, the tenancy for the coffee shop and the licence for the ORA had expired on 31 May 2002. HDB had offered to renew the tenancy and the licence but the offer was not taken up, presumably, because the plaintiffs and the defendants had not resolved their differences. HDB eventually gave a final notice on 27 August 2002 for the tenancy and licence to be renewed by 31 August 2002.

6 After the agreement to purchase the plaintiffs' share in the Partnership had been reached, there was a joint inspection of the coffee shop in the morning of 31 August 2002. The joint inspection was attended by various parties including, *inter alia*, the plaintiffs, the defendants, Tong Pheng, his wife and three of Tong Pheng's children. After Tong Pheng was satisfied with the outcome of the joint inspection, he agreed to proceed with the purchase.

7 In the afternoon of 31 August 2002, the persons who attended the joint inspection met up again at an HDB Hub office at Toa Payoh ("the HDB Hub") to submit to HDB an application for a change of partners of the Partnership. For some reason, they were informed that they could not submit the application then. The plaintiffs, the defendants and Tong Pheng then signed a document

dated 31 August 2002 to the effect that by the end of the following week, the parties were to execute the necessary papers for the transfer of the plaintiffs' share to Tong Pheng's nominees whose names were set out in the document. The nominees were the three third parties in this action. At all material times thereafter, the third third party Tan Koon Huat, also known as Peter Tan ("Peter"), was the one who acted on behalf of the third parties and/or on the instructions of Tong Pheng who is his father. The other two third parties are Peter's sisters. Peter and his two sisters were the children of Tong Pheng who also attended the joint inspection mentioned above.

8 Although HDB's approval to the change in partners had not yet been secured, Peter and the first third party's husband, Tan Chee Kiak ("Chee Kiak"), began, on or about 15 September 2002, to operate the coffee shop with the defendants in shifts. Peter's two sisters were not involved in the operations.

9 Between about 3 September to 5 September 2002, the plaintiffs, the defendants and the third parties signed the requisite forms to substitute the third parties as the new partners of the Partnership in place of the plaintiffs. The forms were lodged with the then Registry of Companies and Businesses ("ROCB") on or about 6 September 2002. On or about 18 September 2002, TKQP submitted an application to HDB for the substitution of partners of the Partnership.

10 On or about 23 September 2002, 815 Kopitiam Pte Ltd ("the Company") was incorporated with the second defendant ("D2") and Peter as its directors and shareholders. The Company was supposed to take over the operation of the coffee shop business from the Partnership as Tong Pheng and the defendants had agreed to operate the business through a private limited company.

11 On or about 25 September 2002, the defendants and the third parties signed the requisite forms to terminate the business of the Partnership with effect from 23 December 2002. The forms were lodged with ROCB on 25 September 2002.

12 In the meantime, HDB's approval for the change of partners for the renewed tenancy had not been forthcoming due to an infringement of the terms of the licence for the ORA. After an exchange of correspondence between TKQP and HDB, HDB eventually wrote, by a letter to the Partnership dated 20 November 2002, to say that HDB had approved, subject to certain conditions, the application for the change of partners. The material condition for the purposes of the action was the execution of a supplemental agreement ("the SA") by all the partners, that is, the outgoing, incoming and remaining partners. The SA was in effect a novation agreement. The first appointment to sign the SA was fixed on 2 December 2002 at 11.30am. However, as the second plaintiff would be out of the country then, that appointment was changed to 11 December 2002 at 3.30pm.

13 On 10 December 2002, *ie*, one day before the appointed date to sign the SA, TKQP, acting for the defendants, wrote to HTP to say that the defendants would be unable to pay the $90,900 by the deadline as stipulated under the agreement. TKQP requested that the plaintiffs agree to let the defendants pay the $90,900 by way of monthly instalments of $3,000 and asked HTP to revert by 10.00am the next day.

14 HTP replied on 10 December 2002 stating the plaintiffs' rejection of the request to pay in instalments and stating that the plaintiffs were ready, willing and able to execute the necessary papers the next day.

15 At about 3.00pm of 11 December 2002, the third parties and Tong Pheng met up with the plaintiffs at the HDB Hub. D2 was also present as were Christina Choo from TKQP and a solicitor from HTP. The first defendant ("D1") was not present. According to Peter, as 3.30pm was approaching,

Tong Pheng asked D2 why D1 had not showed up. D2 said D1 was having a shower and would be late. After 3.30pm, Tong Pheng again asked D2 where D1 was and D2 said this time that D1 was sick.

16 On the advice of Ms Choo of TKQP, all the other partners, including the outgoing partners, signed the SA first. Before Peter left the HDB Hub, he asked Ms Choo why D1 had not turned up. Her response was that she had been told that D1 did not have the money to pay the plaintiffs.

17 Then, subsequently, but in the same afternoon of 11 December 2002, TKQP sent a fax to HTP. The fax was sent on behalf of the defendants and disputed the quantum of the deposit from which the $90,900 payment was derived.

18 On 12 December 2002, HTP replied to stress that the quantum of the deposit had been agreed and to point out that, on 10 December 2002, TKQP had said that the defendants would not be able to pay the $90,900 in accordance with the agreement reached. HTP also pointed out that D1 had failed to turn up for the appointment on 11 December 2002 to sign the SA and demanded a written confirmation by 4.00pm of 12 December 2002 that D1 would sign the SA by no later than 14 December 2002.

19 TKQP then sent a fax dated 14 December 2002 to HTP requesting that the $90,900 be paid in instalments but this time proposing a different payment plan from the one requested on 10 December 2002. This request was also rejected by HTP's fax dated 17 December 2002 which was sent at 12.43pm. In that fax, HTP required a written confirmation by 12 noon of 18 December 2002 that D1 would sign the SA by 2.00pm of 19 December 2002.

20 TKQP then sent a fax to the defendants and to Tong Pheng care of Peter, at 3.15pm of the same day, enclosing a copy of HTP's fax dated 17 December 2002. TKQP sought D1's instructions "latest by 10am, 18 December 2002 (Wednesday)".

21 According to Peter, he had checked with TKQP on 18 December 2002 who had informed him that as at 12 noon, there was no instruction from D1 in response to the latest deadline imposed by HTP. Peter then proceeded to instruct Allen & Gledhill ("A&G") to act for the third parties in the place of TKQP who had been acting for the defendants and Tong Pheng.

22 However, D1 must have given instructions to TKQP after 12.00pm because TKQP subsequently sent a fax that day at 1.21pm to HTP stating that D1 would sign the SA "next week". A copy of this fax was sent by TKQP to Tong Pheng care of Peter only at 3.06pm that day.

23 As events turned out, A&G had sent a fax the same day at 2.39pm to HTP and TKQP. The material part of A&G's fax stated:

> On 12 December 2002, M/s Hin Tat & Partners gave notice to Tan Seng Teck to provide written confirmation by 4pm on 12 December 2002 that he would attend at HDB Hub to sign the Supplemental Agreement. Tan Seng Teck however did not give any written confirmation that he would attend at HDB Hub to sign the Supplemental Agreement.
>
> On 17 December 2002, M/s Hin Tat & Partners gave further notice to Tan Seng Teck requiring him to furnish written confirmation by 12 noon today that he would attend at HDB Hub to sign the Supplemental Agreement. Again, Tan Seng Teck did not give any written confirmation that he would attend at HDB Hub to sign the Supplemental Agreement.
>
> At the present moment, the Supplemental Agreement has not been signed. Tan Seng Teck has

given no indication whatsoever that he intends to sign the Supplemental Agreement and the tentative allocation of the lease to our clients has lapsed.

In light of the above, it is clear that Tan Seng Teck is in repudiatory breach of contract. Our clients accept Tan Seng Teck's repudiatory breach of contract and hereby fully reserve all their rights and claims in relation to the matter including but not limited to their right to claim losses and damages, costs and expenses suffered and/or incurred as a result thereof.

24 As mentioned earlier, a copy of TKQP's fax to HTP stating that D1 would sign the SA "next week" was sent to Tong Pheng care of Peter but only at 3.06pm. It was not disputed that Peter did receive this fax. Peter's evidence was that as 18 December 2002 was a Wednesday, "next week" would mean the week commencing Monday, 23 December 2002. Peter's view was that this fax reinforced his belief that the defendants were no longer interested in the joint operation of the coffee shop as they knew very well that the Partnership would terminate with effect from 23 December 2002.

25 At 3.36pm of 18 December 2002, A&G sent another fax, this time to HDB to revoke the consent of the third parties to the SA.

26 At 4.50pm of the same day, TKQP sent a fax to HTP and to A&G to say that TKQP were no longer acting for the defendants.

27 According to D1, he went to the HDB Hub in the morning of the next day, *ie*, 19 December 2002 and signed the SA. It was obvious to me that he did so because he was aware of the fax from A&G on 18 December 2002 to HTP and TKQP accepting the alleged repudiatory breach of contract on his part. D1 was allowed to sign the SA on 19 December 2002 because, apparently, the HDB officer who attended to D1 was not aware, at that time, of A&G's fax to HDB the day before which revoked the third parties' consent to the SA. After D1 had signed the SA, D2 then went to see Tong Pheng at what has been referred to as Tong Pheng's petrol station. Peter and Tong Pheng were present when D2 arrived. He showed them an SA which appeared to have been signed by D1. Peter responded by saying that it was too late. The contract had been terminated and the third parties had revoked their consent to the SA. There was no change of this position subsequently even though the plaintiffs were prepared to carry on with the agreement after D2 had signed the SA.

28 On 26 December 2002, HDB wrote to HTP, to A&G and to the defendants. The substance of each letter was similar. Each letter referred to the third parties' revocation of consent to the SA and said that, in view of the revocation, HDB was not able to accept the SA for the substitution of partners in relation to the tenancy of the Premises.

29 In the meantime, Peter and Chee Kiak were still operating the coffee shop with the defendants in shifts (see [8] above). According to Peter, he and Chee Kiak were refused entry to the Premises on 1 January 2003 by the defendants. Thereafter A&G wrote to HTP about the handing over of the operations back to the plaintiffs. Soon after 1 January 2003, in the absence of a response for the plaintiffs about the handing over of the operations back to them, Peter and Chee Kiak relinquished whatever remaining control they had had of the operations.

30 No attempts were made by the plaintiffs to seek a renewal of the tenancy or the licence or to reinstate the Partnership which had been de-registered. Apparently, the plaintiffs did not want to have any more dealing with the defendants.

31 In the circumstances, the plaintiffs commenced action on 24 February 2003 against the

defendants for damages for breach of agreement and, alternatively, for specific performance by the defendants to purchase the plaintiffs' 50% share in the Partnership. The defendants in turn claimed a contribution or indemnity from the third parties.

32 On 4 July 2003, the plaintiffs' solicitors, who were then Hin Tat Augustine & Partners, wrote to HDB to seek HDB's clarification as to the status of its approval granted on 22 November 2002, in view of HDB's letter dated 26 December 2002 stating that it was not able to accept the SA for the substitution of the partners for the tenancy in question. After a reminder dated 18 July 2003, HDB replied on 25 July 2003 to state:

> [The approval granted on 22 November 2002] was contingent on the execution of the [SA]. As the three parties, Tan Say Lai, Tan Sai Liang and Tan Koon Huat have revoked their consent to the SA, there is no SA in existence. As such, the approval granted on 22 November 02 has been revoked.

33 It is appropriate to mention also that, eventually, by two agreements dated 29 August 2003, a fresh tenancy of the Premises and a fresh licence for the ORA were eventually granted by HDB to a new partnership by the name of Eating House 815 ("the New Partnership"). This name was slightly different from the name the Partnership had been operating under, *ie*, 815 Eating House. The partners of the New Partnership were initially the two defendants but the partners thereof at the time of the trial in the first half of 2005 were D2's son and daughter, D1 and D1's son.

The main issues

34 The main issues between the parties were:

(a) Whether HDB had approved the sale of the plaintiffs' share in the Partnership to Tong Pheng and/or the third parties;

(b) Whether D1's conduct, in failing to sign the SA on 11 December 2002 and failing to confirm by 12.00pm of 18 December 2002 that he would sign the SA by 5.00pm of 19 December 2002, constituted a repudiation of the agreement by the defendants which could be accepted by Tong Pheng and/or the third parties; and

(c) If the defendants were under any liability to the plaintiffs as a result of the revocation of the third parties' consent to the SA and there was no repudiation by the defendants, the extent to which the third parties were liable to contribute or to indemnify the defendants for their liability to the plaintiffs.

The court's findings and reasons

35 Mr Tan Hong Seng, counsel for the defendants, submitted that neither HDB's letter dated 26 December 2002 nor the one dated 25 July 2003 amounted to a non-approval from HDB under cl 13 of the agreement. Alternatively, since A&G had effectively terminated the SA in the afternoon of 18 December 2002, it was unnecessary for HDB to do anything to bring the SA to an end. Accordingly, neither of HDB's said letters, being superfluous, constituted a non-approval by HDB. He submitted that HDB's letter of 22 November 2002 constituted its approval and hence cl 13 did not apply.

36 Mr Tan also submitted that if there were any ambiguity in cl 13, then the ambiguity should be interpreted against the plaintiffs under the *contra proferentem* rule as it was HTP who had suggested

the inclusion of cl 13 as part of the terms of the agreement. Mr Tan argued that the reference to HDB's approval in cl 13 was ambiguous and could mean either HDB's in-principle approval of 22 November 2002 or its approval upon the execution of the SA by all the partners.

37 Another argument raised by Mr Tan was that HTP themselves had taken the position in their fax dated 28 November 2002, in response to TKQP's fax of the same date, that the HDB approval contemplated under the agreement did not mean unconditional approval. Secondly, in HTP's fax dated 18 December 2002 to A&G, HTP had taken the position that HDB had already granted its approval. On the other hand, I noted that TKQP had in their fax of 28 November 2002 (which HTP had replied to as stated above) taken the position that the HDB approval contemplated "must mean unconditional approval". After action was commenced, both the solicitors for the plaintiffs and the solicitors for the defendants were taking positions different from before.

38 I was of the view that prior arguments presented by solicitors did not *per se* bind their clients to the position advocated in those arguments. In any event, both the solicitors for the plaintiffs and the solicitors for the defendants had been taking positions in pre-action correspondence contrary to the positions taken during trial. So there was no point in trying to bind each of these two sides to the pre-action positions. I was also of the view that these ambulatory positions did not suggest ambiguity in cl 13 regarding HDB's non-approval. Rather, they demonstrated that the solicitors were simply taking whatever position they thought suited their clients' interest at the particular time.

39 I was of the view that cl 13 was not ambiguous and that it contemplated unconditional approval. For the purpose of cl 13, it was unrealistic to say that HDB had given its approval notwithstanding that a condition for its approval had not been complied with.

40 There was also a suggestion from the defendants' pleadings that cl 13 would not apply if the non-approval was not due to the fault of the defendants. I did not agree. In my view, in the absence of any default by the plaintiffs which caused the non-approval, cl 13 applied if the parties to the agreement did not obtain HDB's approval. That was so whether the non-approval was due to the default of the defendants or of the third parties and even where the non-approval was not due to any default at all.

41 Accordingly, as the third parties had revoked their consent to the SA before D1 signed it, there was in effect no approval from HDB and cl 13 kicked in.

42 Coming back to the question of the defendants buying the plaintiffs' share in the Partnership, developments had demonstrated that this was academic. In anticipation of the application for HDB's approval and under the impression that the plaintiffs had to first withdraw from the Partnership before the application to HDB was submitted, the parties had submitted the requisite forms to ROCB for the withdrawal of the plaintiffs and the inclusion of the third parties as partners. I have earlier alluded to this (see [9] above). I have also mentioned that after the forms for withdrawal and inclusion had been lodged, the defendants and the third parties signed the requisite forms to terminate the business of the Partnership with effect from 23 December 2003 since the intention was to operate the coffee shop under a private limited company (see [11] above). Pursuant to these steps, the business of the Partnership was terminated with effect from 23 December 2002. While it might be argued that the Partnership was still in existence even though it had ceased its business, the reality was that there was no point in compelling the defendants to buy the plaintiffs' share in the Partnership which would be valueless. Indeed, specific performance was claimed only as an alternative to damages. As regards damages, the plaintiffs were claiming $600,000 since the plaintiffs' share had become valueless. As for the defendants, their Amended Defence suggested that the plaintiffs were entitled to specific performance only and upon compliance with the procedure set out in the agreement.

However, in submission, the defendants' counsel Mr Tan took the opposite position and argued that damages would be an adequate remedy for the plaintiffs.

43 I was of the view that the defendants ought to pay the plaintiffs $600,000 as damages in addition to the $90,900. Indeed, the evidence for the defendants revealed that they did not dispute their liability to pay the $90,900. The only reason given by one of the defendants for their failure to pay the $90,900 was that they were awaiting the outcome of the trial.

44 However, Mr Tan submitted that as the agreement did not state that all liabilities of the defendants would be joint, each defendant should be responsible for his own actions. It was not clear what he meant by that. Did he mean that D2 should not be liable to pay any part of the $600,000 or D2 should be liable only for half of it? Neither permutation was taken specifically in the defendants' pleadings. *Chitty on Contracts* vol 1 (Sweet & Maxwell, 29th Ed, 2004), states at para 17.002, "Joint liability arises when two or more persons jointly promise to do the same thing". I was of the view that the defendants had promised to do the same thing under the agreement. Accordingly, in my view, the defendants were jointly liable to pay the two sums mentioned. As there was no argument by the plaintiffs that the defendants' liability should be joint and several, it was not necessary for me to decide whether their liability was several as well.

Whether D1's conduct constituted a repudiation by the defendants which could be accepted by Tong Pheng and/or his nominees

45 Although the defendants' claim against the third parties was for an indemnity and/or contribution "to the full extent of the Plaintiffs' claim", the claim by the defendants was actually only in respect of the $600,000 they might have had to pay the plaintiffs as the purchase price for their share or as damages. As I have mentioned, the defendants were not disputing their liability to pay the $90,900.

46 In view of my finding that HDB had not given its approval, the question whether D1's conduct amounted to a repudiation was academic as between the plaintiffs and the defendants. However, it was still relevant as between the defendants and the third parties.

47 Before I deal with the issue of the defendants' repudiation, I will deal first with some other points raised by Mr Kenny Yap, counsel for the third parties, against the defendants.

48 The defendants had assumed that because the purchase of the plaintiffs' share were to be in the name of Tong Pheng "and/or nominees to be appointed by him at his discretion", the third parties became parties to the agreement as soon as they were nominated by Tong Pheng. However, Mr Yap submitted that in law, a nomination could have at least two different consequences:

(a) a nomination which results in the nominee being a party to the contract (novation)

(b) a nomination which results in the benefit under the contract being conferred on the nominee without the nominee becoming a party to the contract.

49 Mr Yap submitted that on the facts before me, the second consequence was the applicable one. He relied on the following New Zealand and Australian cases:

(a) *Karangahape Road International Village Ltd v Holloway* [1989] 1 NZLR 83;

(b) *JR Stevens Holdings Pty Ltd v Von Begensey* 1992 NSW LEXIS 7155; and

(c) *Salter v Gilbertson* (2003) 6 VR 466.

Mr Yap also pointed out that cl 3 of the agreement provides for Tong Pheng to pay the purchase price. It did not refer to "and/or his nominees" as was the case for cl 1. That was true but I noted that besides cl 1, cl 4 referred to the obtaining of HDB's approval for the sale of the plaintiffs' share to Tong Pheng "and/or his nominees".

50 It seemed to me that the solicitors involved at the time the agreement was entered into had not addressed their minds to the distinction which Mr Yap had raised in submission. Hence the language of the clauses did not assist me much in determining whether to accept that the second consequence was the applicable one.

51 The distinction which Mr Yap drew to my attention was an interesting one as it is all too easy to assume that once a person is nominated, pursuant to a right of nomination, he becomes a party to the contract in the place of the party nominating him with all the consequences that follow from that change. The authorities Mr Yap cited demonstrate that this is not necessarily so.

52 In any event, the facts in the cases which Mr Yap relied on were different from those before me. Also, the case before me was not a straightforward sale and purchase agreement between two sides with the purchaser being given a right of nomination. This was not a case whereby the third parties would simply be obtaining the benefits of the plaintiffs' share. They would become the new partners with the defendants even though the operations were in fact undertaken by Peter and Chee Kiak on their side. Indeed, para 8(c) of the third parties' Amended Defence states that, "[o]n or about 1 September 2002, the Third Parties … commenced joint operations …". The third parties, and not Tong Pheng, signed the requisite forms for lodgment with ROCB to reflect their entry as the new partners. The third parties had to and did sign the SA with HDB. The subsequent revocation of consent to the SA was made on behalf of the third parties. HDB's consent, and the SA, were inextricably linked to the purchase of the plaintiffs' share in the Partnership.

53 In the circumstances, I was of the view that the third parties had become parties to the agreement of 30 August 2002 when they were nominated by Tong Pheng. Although there was no written consent by the third parties to the nomination, that consent could be inferred by conduct and, in the circumstances, I was of the view that such an inference should be made.

54 As an aside, I note that when A&G wrote to HTP and TKQP on 18 December 2002, A&G said they were acting for Tong Pheng and his nominees which they then named. A&G also said that "our clients" agreed to purchase 50% of the business. A&G then alleged in the same fax that D1 was in repudiatory breach of contract and that "our clients accept his repudiatory breach". As I have mentioned, the revocation of consent to the SA was made on behalf of the third parties.

55 However, Mr Yap raised another point, this time, on the contractual relationship between the parties. He submitted that even if the third parties had become parties to the agreement, they had no contract with the defendants. He submitted that the agreement of 30 August 2002 comprised two contracts. One was a contract between the plaintiffs and Tong Pheng and the other was a contract between the plaintiffs and defendants. He submitted that TKQP's fax of 30 August 2002 did not set out any obligation as between the defendants and Tong Pheng.

56 I did not agree that there were separate contracts. In my view, there was a tripartite contract although with different obligations as between different parties thereto. There were also common obligations. For example, cl 5(h) states:

(h) all parties to immediately adjourn to the HDB Hub to sign the necessary papers to apply for the changes in the Partnership, which have to be executed in person before a [*sic*] HDB officer;

57 I come now to the D1's conduct. It was undisputed that he did not turn up in the afternoon of 11 December 2002 at the HDB Hub to sign the SA. It was also clear from the letters that TKQP sent on behalf of the defendants on 10 and 11 December 2002, which I have mentioned (see [13] and [17] above), that the defendants were having difficulties paying the $90,900. That sum was to become due and payable one week after HDB's approval had been obtained. As mentioned, that approval was subject to all the partners signing the SA. D1's excuses that he had overlooked the appointment date and that he was ill that day were patently false. D1 was delaying the signing of the SA to play for time. However, the question was whether his delay up to 18 December 2002 constituted a repudiation which the third parties could accept.

58 I have already set out some of the developments between 12 and 18 December 2002 (see [18]–[26] above). HTP had sent two chasers to TKQP for D1 to sign the SA, one dated 12 December 2002 (see [18] above) and one dated 17 December 2002 (see [19] above). I would add that after D1 had failed to turn up on 11 December 2002, Tong Pheng and Peter then met the defendants at the office of TKQP on 12 December 2002. Peter then orally asked D1 to sign the SA immediately. Peter also claimed that subsequently, but prior to 18 December 2002, he had reminded D1 orally at various times to sign the SA. However, I noted that these other oral reminders were not mentioned in his Affidavit of Evidence-in-Chief. I did not accept his claim about these other oral reminders. It seemed to me that they were mentioned by Peter during the trial to bolster the argument that D1's conduct constituted a repudiation and not because the claim was true.

59 In any event, A&G's letter of 18 December 2002 to HTP and TKQP to accept D1's repudiation did not rely on Peter's oral request of 12 December 2002 to D1 to sign the SA immediately or on the other alleged oral reminders. A&G had instead relied on the written chasers from HTP dated 12 and 17 December 2002. The chasers and the deadlines stated therein were not from and were not imposed by the third parties but by the plaintiffs. Even if it were open to the third parties to act on such chasers, the fact was that the defendants were already operating the coffee shop with Peter and Chee Kiak. Although Peter said at the trial that he was unhappy with certain suggestions or steps taken by the defendants in the operations, there was no evidence that Peter had considered such suggestions or steps as constituting a repudiation. Indeed, such suggestions or steps were also not alluded to in A&G's fax of 18 December 2002 and I need say no more about them. There was also no evidence that as at 18 December 2002, Peter, or Tong Pheng, considered the omission to sign to be threatening the joint operations or that HDB was threatening to revoke its approval.

60 Furthermore, it was Peter's evidence that on 12 December 2002, at the meeting at TKQP's office between Peter, Tong Pheng and the defendants, D1 had said that he had not turned up on 11 December 2002 to sign the SA because the defendants could not pay the plaintiffs the $90,900. Peter subsequently proposed to Tong Pheng later that evening that Tong Pheng should buy part of the defendants' share in the Partnership so that the defendants would be able to pay the $90,900. Peter then spoke to Ms Choo of TKQP on 13 December 2002 to make an offer on behalf of Tong Pheng to buy a 10% share in the Partnership from D1 at the price of $120,000. The offer was rejected and on 14 December 2002, TKQP conveyed the rejection by fax to Tong Pheng care of Peter.

61 In the circumstances, I was of the view that although D1's continuing delay in signing the SA was reprehensible, it had not yet amounted to a repudiation. I was of the view that the third parties were trying to take unfair advantage of the situation to rescind their consent to the SA so as to put pressure on D1 to sell part of his share in the Partnership to Tong Pheng or his nominees. If the third

parties had genuinely considered D1's delay in signing the SA to be serious, Peter would have instructed A&G to first set a written deadline for D1 to sign. This was not done.

62 Accordingly, the third parties had acted wrongly in treating D1's conduct as a repudiation which they could accept.

63 As an aside, I would add that although Peter and Tong Pheng had refused to rescind the third parties' revocation even though D1 had eventually signed the SA, A&G did nevertheless write to HTP on 6 January 2003 to say that their clients were still prepared to consider acquiring the plaintiffs' share in the Partnership but the terms of acquisition would have to be re-negotiated between all parties including the defendants.

64 As the defendants eventually obtained the benefit of a fresh tenancy and a fresh licence from HDB for the Premises and the ORA, I was of the view that to order the third parties to indemnify the defendants for the $600,000 would result in an unwarranted windfall for the defendants. This could not be countenanced especially since D1's wilful default in signing the SA, when he should have done so, started the train of events that led to the action.

65 There was no evidence as to what damages the defendants would otherwise suffer as a consequence of the third parties' wrongful conduct. Accordingly, I was of the view that the third parties should pay $1,000, as nominal damages, to the defendants, provided the defendants pay the $600,000 to the plaintiffs.

66 In the circumstances, I made the following orders:

(a) The defendants were to pay the plaintiffs $90,900 and $600,000 forthwith. The liability of the defendants to the plaintiffs was joint.

(b) The third parties were to pay the defendants $1,000 as nominal damages. That payment was to be made within seven days of evidence being provided to the third parties or their solicitors that the plaintiffs have been paid $600,000 by the defendants. For the avoidance of doubt, interest on the $1,000 under the Rules of Court (Cap 322, R 5, 2004 Rev Ed) would accrue, if at all, from the eighth day of such evidence being provided. The liability of the third parties to the defendants for the $1,000 was joint.

67 On the question of interest to be paid to the plaintiffs, Mr Tan accepted that the defendants should be liable to pay interest at the rate of 6% per annum on the $90,900 but he suggested a lower rate of interest for the $600,000. I saw no reason why the rate of interest for the $600,000 should be lower just because the defendants disputed liability for it. Ultimately, they were liable for both sums. Accordingly, I ordered both the sums to be paid with interest at 6% per annum from the date of the writ to 28 April 2005 which was the eve of the date of my oral judgment. Interest from the date of oral judgment until payment would be at the rate prescribed by the Rules of Court, *ie*, at 6% per annum.

68 The defendants' liability to the plaintiffs for costs of the action was relatively straightforward. However, Mr Tan applied for an order that the third parties pay the costs of the plaintiffs directly and also pay the costs of the defendants. On the other hand, Mr Yap submitted that the defendants should pay the costs of the third parties or, alternatively, that there should be no order as to costs as between the defendants and third parties since the defendants had obtained an order for nominal damages only. Mr Yap relied on the *Singapore Civil Procedure 2003* (Sweet & Maxwell Asia, 2003) and *Singapore Court Practice 2003* (LexisNexis, 2003) by Jeffrey Pinsler both of which state essentially

the same point. I need cite only from the former which states at para 59/3/5:

> A plaintiff should not be regarded as successful if he only gets nominal damages. In such a case, the court should award costs to the defendant as if the latter had succeeded in his defence. This is to discourage frivolous suits from being filed (*Mahtani & Ors. v. Kiaw Aik Hang Lan Pte. Ltd.* [1995] 1 S.L.R. 168, which accepted the principle laid down in *Anglo-Cyprian Trade Agencies v. Paphos Wine Industries* [1951] 1 All E.R. 873, HC (England) and *Alltrans Express Ltd. v. C.V.A. Holdings Ltd* [1984] 1 All E.R. 685; [1984] 1 W.L.R. 394, CA (England). In the appropriate case, this rule may be disapplied.

69 Although I had granted the defendants nominal damages, the third parties had failed in the various points they had raised to resist a finding of liability. Also, as I have mentioned, their conduct was such as to take unfair advantage of the situation caused by D1. In the circumstances, I was of the view that the defendants and third parties should bear their own costs. Accordingly, I ordered the defendants to pay the plaintiffs the costs of the plaintiffs' action to be agreed or taxed. As for the costs between the defendants and the third parties, these parties were to bear their own costs.

Plaintiffs' claim allowed.
Defendants' claim against third parties allowed with nominal damages.

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[1]At p 63 of the Notes of Evidence of 10 March 2005