Bidvest Australia Ltd *v* Deacons Singapore Ltd and another
[2010] SGHC 128

Case Number : Originating Summons No 667 of 2009

Decision Date : 27 April 2010

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Lee Kiat Seng, Daniel Chia and Shaun Lee (Wong & Leow LLC) for the plaintiff; Hri Kumar SC and Gary Low (Drew & Napier LLC) for the first defendant; Ang Cheng Hock SC, Tan Xeauwei and Sylvia Tee (Allen & Gledhill LLP) for the second defendant.

Parties : Bidvest Australia Ltd — Deacons Singapore Ltd and another

Contract

27 April 2010

Belinda Ang Saw Ean J:

Introduction

1 By this Originating Summons No. 667 of 2009 ("OS 667"), the plaintiff, Bidvest Australia Ltd ("Bidvest") sought, *inter alia*, a declaration that the first defendant, Deacons Singapore Ltd ("D1"), had wrongly paid out to Vestey Foods Group Limited ("Vestey") a sum of US$4,221,641.68 (the "Escrow Sum"), which D1 as stakeholder ("Escrow Agent") had held in escrow pursuant to an Escrow Letter dated 30 April 2007 (the "Escrow Agreement") signed by Bidvest, D1, and Vestey.

2 On 27 July 2009, Vestey was joined as a second defendant in OS 667. Thereafter, in an affidavit filed on 23 September 2009, Mr Phillip Crowley, who is the managing partner of D1, raised a counterclaim against Bidvest in OS 667 claiming that, in the event that D1 was adjudged liable by this court for the release of the Escrow Sum, by virtue of the Escrow Agreement, D1 would be exempted from liability towards Bidvest; alternatively, D1 would be entitled to an indemnity against Bidvest and Vestey pursuant to the Escrow Agreement.

3 In brief, the nub of the dispute was a legal opinion issued by a law firm in the People of Republic China ("PRC") (the "Chinese legal opinion") which D1 received and relied upon as the basis for the release of the Escrow Sum to Vestey. The first issue before this court was whether, on a proper construction of the Escrow Agreement, D1 was obliged to release the Escrow Sum to Vestey upon receipt of the Chinese legal opinion; and in the event D1 was adjudged to be in breach, the second issue was whether D1 could rely on the Escrow Agreement to exclude liability or to seek an indemnity from Bidvest and Vestey.

4 I agreed with Mr Hri Kumar SC representing D1 that on the proper construction of the Escrow Agreement, D1 was obliged to release the Escrow Sum to Vestey upon receipt of the Chinese legal opinion. In reaching that conclusion, it was therefore unnecessary to consider D1's counterclaim. Accordingly, OS 667 was dismissed with costs. In dismissing OS 667, I informed the parties that I was not making any ruling on whether Vestey had complied with its obligations in accordance with the contract underlying the Escrow Agreement, namely the Sale and Purchase Agreement between

Bidvest and Vestey dated 30 April 2007 ("the SPA").

5 Bidvest has since appealed against my decision, and I now publish my reasons for dismissing OS 667.

The SPA and the Escrow Agreement

6 Bidvest is an Australian corporation and part of a group of companies that specialise in the supply and distribution of food in Australia, South Africa, New Zealand, and Asia. Vestey is a company incorporated in England.

7 On 30 April 2007, Bidvest and Vestey (which was then known as Angliss International Limited) entered into the SPA whereby Bidvest, for the price of US$80m, agreed to purchase the shares and assets of several companies owned by Vestey, which included 80% of the total registered capital of Guangzhou Angliss Jin Pan Refrigerated Co Ltd ("Jin Pan"), a company incorporated in the PRC. D1 was the solicitor acting for Vestey in the transaction.

8 On 30 April 2007 and pursuant to cl 3.2 of the SPA ("SPA/3.2"), Bidvest, D1, and Vestey entered into the Escrow Agreement in the form of a letter addressed to D1. Under this Escrow Agreement, D1 was appointed the Escrow Agent to hold the total sum of US$7m (the "Escrow Funds") in a bank account on behalf of Bidvest and Vestey. The relevant section of SPA/3.2 is reproduced here with the sections relevant to OS 667 emphasised in bold. SPA/3.2 refers to cl 7.3 of the SPA ("SPA/7.3"), which in turn refers to cl 3.2A of the SPA ("SPA/3.2A"), both of which are also be set out below:

> 3.2 Form of payment: Payment of the Purchase Price shall be made as follows:
>
> (a) that part of the Purchase Price, being the amount of US$7 million in same day cleared funds and net of all bank charges and deductions (*PRC Escrow Funds*) shall be paid by telegraphic transfer to the Escrow Agent's Account No. 01-7-XXXXXX-X bearing account name "Deacons Singapore Limited – Trust A/C" and maintained with Standard Chartered Bank, Singapore Branch, 6 Battery Road Singapore 049909 SWIFT Code SCBLSGSG so as to enable the Escrow Agent to confirm receipt of the PRC Escrow Funds contemporaneously on Completion; and
>
> (b) the balance of the Purchase Price to [Vestey] by telegraphic transfer for same day value to [Vestey] at Account No. 01-7-XXXXXX-X bearing account name "Deacons Singapore Limited – Trust A/C" and maintained with Standard Chartered Bank, Singapore Branch, 6 Battery Road Singapore 049909 SWIFT Code SCBLSGSG contemporaneously with Completion,
>
> and [Bidvest] and [Vestey] shall, contemporaneously with the execution of this Agreement, sign the Escrow Agreement and shall procure that the Escrow Agent accepts the Escrow Agreement. ***Pursuant to the Escrow Agreement, the PRC Escrow Funds shall be disbursed to the Seller as follows*** :
>
> ***(c) in respect of the amount of US$4 million, as soon as any of the documents described in Clause 7.3(a)(i) to (iii) have been delivered to the Escrow Agent*** ;
>
> …

each of the obligations above and their related obligations in Clause 7.3 hereinafter referred to as an *Escrow Obligation*.

3.2A The parties hereto agree that, notwithstanding any other provision of this Agreement, the maximum aggregate Liability of [Vestey] for non-fulfillment of any Escrow Obligation within the time period specified in Clause 7.3 shall be limited to the relevant amounts assigned against that Escrow Obligation in Clause 3.2 and shall be deemed to have been fully and finally discharged if the relevant amount assigned against that Escrow Obligation in Clause 3.2 is paid out of the PRC Escrow Funds to [Bidvest]. In such event, [Bidvest] shall execute and deliver all documents and do all acts and things as [Vestey] may require in order to return any interest it may have in respect of Jin Pan (or any of its underlying assets) or any of the entities described above in respect of which the Escrow Obligation has not been fulfilled and, where it is the interest in Jin Pan or its underlying assets that is returned, the provisions of Clauses 6.1 to 6.5 shall not apply t o [Vestey] in connection with the carrying on by it through Jin Pan of the Business in Guangzhou.

…

7.3 PRC Post-Completion Transfer: ***[Vestey] shall use its reasonable endeavours to procure that*** :

(a) (at the cost of [Vestey], but subject always to approval by [Vestey] of the costs and expenses) approval from COFTEC for the transfer of the 80% equity interest in Jin Pan, a transfer of 80% of its underlying assets on terms reasonably acceptable to the parties hereto acting reasonably, or a transfer of 80% equity interest in a new entity that has acquired the underlying assets of Jin Pan (*Newco*) to [Bidvest] or its nominee, on terms reasonable acceptable to the parties hereto acting reasonably, has been obtained. ***[Vestey] shall be deemed to have fulfilled this obligation if any of the following documents have been obtained*** :

(i) business licence issued by SAIC in Guangzhou which reflects either the transfer of the 80% equity interest in Jin Pan held by [Vestey], or the transfer of 80% of the equity interest in Newco, to [Bidvest] or its nominee;

(ii) approval from COFTEC for transfer of not less than 80% of the underlying assets of Jin Pan or the transfer of 80% of the equity interest in Newco; or

(iii) a legal opinion from PRC counsel confirming that not less than 80% of the underlying assets of Jin Pan have been transferred by other means;

…

as soon as reasonably practicable after the Completion Date and in any case within 2 years from the Completion Date (or such later date as the parties hereto may agree). Pending fulfilment of the above obligations and without limiting the generality of Clause 7.1 and Clause 2.9 of Schedule 3, [Vestey] confirms that it shall act in accordance with reasonable instructions of [Bidvest] in relation to the operations of the Chinese Companies and, to the extent that the registered capital of any Chinese Company is not held, directly or indirectly, by [Bidvest], shall hold the interests in the Chinese Companies for the benefit of [Bidvest] subject always to Clause 3.2A. ***[Bidvest] agrees to provide all assistance, to sign all documents and do all acts and things (subject always to agreement on costs as expressly specified above) as [Vestey]***

may require in order for [Vestey] to fulfil its obligations under this Clause 7.3 . In carrying out reasonable efforts to satisfy its obligations in Clauses 7.3(b) and (c), [Vestey] agrees (subject to the remainder of this Clause) that it will follow the steps outlined as 1.1 to 1.3 and 2.1 to 2.3 on the PRC Checklist. The parties hereto agree that the purpose of the PRC Checklist is to find a means to achieve the outcomes set out in Clauses 7.3(b) and (c) and that the means to achieve the outcomes are not fixed. The parties hereto agree to reasonably consider any proposal to amend the PRC Checklist, including the steps referred to above, and any consent to a request to amend the PRC Checklist shall not be unreasonably withheld.

[emphasis added in bold]

9 Clause 5(a) of the Escrow Agreement ("EA/5(a)") listed the conditions and the corresponding amount of US$ 4m to be released from the Escrow Funds to Vestey in the event that any one of the three conditions was satisfied. Clause 5A of the Escrow Agreement ("EA/5A") provided that the conditions in EA/5 had to be satisfied within 24 months of the Completion Date and that D1 was obliged to return any unpaid portion of the Escrow Funds to Bidvest at the expiry of 24 months from the Completion Date. The Completion Date was defined as 8 May 2007 in the SPA, and accordingly the deadline for the fulfilment of any of the three conditions was 8 May 2009 (the "Deadline"). The relevant portions of EA/5 and EA/5A are set out below:

5. Subject to paragraphs 6 and 7, upon the occurrence of the events set out below, [D1] shall transfer the amounts described in respect of each of the events to [Vestey] and shall notify [Vestey] and [Bidvest] upon each transfer having occurred:

(a) in respect of the amount of US$4 million, as soon as any of the documents described below have been delivered to [D1] :

(i) a business licence issued by SAIC in Guangzhou which reflects either the transfer of the 80% equity interest in Jin Pan held by [Vestey], or the transfer of 80% of the equity interest in Newco, to [Bidvest] or its nominee;

(ii) approval from COFTEC for transfer of not less than 80% of the underlying assets of Jin Pan or the transfer of 80% of the equity interest in Newco; or

(iii) a legal opinion from PRC counsel confirming that not less than 80% of the underlying assets of Jin Pan have been transferred by other means;

…

5A. In the event that any of the matters referred to in clauses 5(a) to (d) (inclusive) are not satisfied ***within 24 months from Completion*** (or such other date as agreed by [Vestey] and [Bidvest] under the SPA), then in respect of those clauses for which such matters are not satisfied, [D1] shall pay the relevant amounts referred to in such clauses directly to the nominated bank account of [Bidvest].

[emphasis added]

10 The indemnity provision (cl 13) and the exemption clause (cl 14) of the Escrow Agreement which D1 relied upon in its counterclaim read as follows:

13. Each of [Vestey] and [Bidvest] jointly and severally agrees to indemnify you, your partners,

directors and employees (hereinafter, collectively referred to as *you*) from and against all damages, losses, liability (whether civil or criminal), costs, claims, charges, expenses (including legal expenses on a full indemnity basis), actions, judgements or demands whatsoever which any one or more of such persons may suffer, sustain or incur, or which may be made against any one or more of them, directly or indirectly, as a result of, or in connection with, any act or omission by any of such persons in connection with the matters described in this Letter or in discharge of any obligations set out in this Letter, unless any person requesting such indemnity has failed to act reasonably and in good faith.

14. We confirm that you shall have no obligations or duties to us other than those expressly described in this Letter. No amendment or variation of the terms of this Letter or any instructions given pursuant to the terms of this Letter shall be valid or effective without your prior written consent. We confirm that you shall not, in carrying out your obligations under this Letter, be in any way responsible or liable to us or any of our shareholders for any loss, costs, damages, expenses or inconvenience which may result from anything done or omitted to be done by you, unless you have failed to act reasonably and in good faith.

11 It was not disputed that the escrow mechanism embodied in SPA/7.3(a) and the corresponding EA/5(a) arose out of Bidvest's concerns regarding the legal status of Jin Pan, one of the companies which Bidvest wanted to acquire an interest in (see [7] above).

12 Jin Pan was incorporated as a Chinese joint venture company with 80% of its shares being held by Vestey and the remaining 20% of its shares held by a PRC company known as Guangzhou Hai Zhu District Jin Pan Cold Storage (the "Chinese JV Partner").

13 By the time a due diligence report was issued in April 2007 by Bidvest's solicitors, Baker & McKenzie ("B&M"), it became clear that the Chinese JV Partner had already been de-registered in 1999, and it was uncertain as to which PRC individual or entity had been designated the lawful successor to the Chinese JV Partner. As the articles of association of Jin Pan required unanimous approval of the board of directors for the assignment of assets or shares, both Bidvest and Vestey were concerned as to the legal ability of the Chinese JV Partner's nominees on the board of directors to vote or consent to any transfer of Jin Pan's assets to Bidvest.

14 In order to complete the sale and purchase transaction as well as to alleviate Bidvest's concerns regarding the transfer of Jin Pan's shares or assets, the escrow mechanism in SPA/7.3(a) was then put in place to give Vestey a period of 24 months to regularise the situation regarding Jin Pan.

Events leading up to the release of Escrow Sum and the filing of OS 667

15 Three days before the Deadline, on 5 May 2009, Bidvest received by fax a letter from D1 notifying Bidvest that D1 had received a legal opinion (the "Chinese legal opinion") according to the terms set forth in cl 5(a)(iii) of the Escrow Agreement ("EA/5(a)(iii)") (see [9] above) and consequently, D1 released the Escrow Sum to Vestey. The Escrow Sum comprised of US$4m plus accrued interest less bank charges.

16 The following day on 6 May 2009, B&M faxed a letter to D1 stating that it had been instructed that Bidvest had not received any transfer of Jin Pan's shares or assets in accordance with SPA/7.3(a). In the same letter, B&M also requested D1 to furnish a copy of the Chinese legal opinion and all the documents relating to the purported transfer that justified D1's release of the Escrow Sum.

17 D1's letter in reply of 7 May 2009 enclosed a copy of the Chinese legal opinion. The letter of 7 May 2009 was written by D1 in its capacity as the Escrow Agent. It was common ground that, at all material times, D1 was acting as Vestey's solicitor in the SPA. In that letter, D1 stated that it did not have any documents relating to the transfer and that Bidvest would have to contact Vestey for the documents. D1 made known that its obligation under the Escrow Agreement was simply to release part of the Escrow Funds upon receipt of the Chinese legal opinion. The Chinese legal opinion was issued by a PRC law firm known as Guangda Law Firm ("the Chinese law firm") on 4 May 2009 and the material parts are reproduced below:

> You have asked for our legal opinion in connection with ***certain assets transferred by [Jin Pan] to Ms. YANG Chao and Mr. ZHAO Yang*** (the "Assets") in the territory of the People's Republic of China ("PRC"), ***which assets are to be assigned shortly by operation of law to a PRC Company controlled by [Vestey]*** , being Guangzhou City Yangying Trading Co., Ltd..
>
> …
>
> 4 Opinion
>
> On the terms of this opinion read in its entirety ***, we confirm that not less than 80% of the underlying assets of Jin Pan have been transferred by other means*** .
>
> [emphasis added]

18 Dissatisfied with the explanation and seeing that the Chinese legal opinion reflected a transfer of Jin Pan's assets to two individuals (namely a Ms Yang and a Mr Zhao) and not Bidvest, B&M wrote to D1 on 11 May 2009 (three days after the Deadline) seeking clarification on how the Chinese legal opinion justified the release of the Escrow Sum. As the Deadline had already passed by then, B&M also requested D1 to return the Escrow Sum to Bidvest.

19 D1 wrote two letters to B&M on 14 May 2009. One letter was written by D1 in its capacity as Escrow Agent in which D1 reiterated that it was legally obliged pursuant to EA/5(a)(iii) to release the Escrow Sum upon receipt of the legal opinion from the Chinese law firm. D1 wrote the second letter in its capacity as Vestey's solicitor and in that letter, D1 stated that Bidvest had complied with its obligations under SPA/7.3 "by making available to [Bidvest] not less than 80% of the Jin Pan assets, and this was achieved within the [two] year period agreed." In the same letter, D1 explained that:

> In accordance with the underling [sic] intention of [SPA/7.3(a)], [Vestey] has found an alternative method of transferring to your clients not less than 80% of the underlying assets of Jin Pan. ***We are instructed that more than 80% of the underlying assets of Jin Pan have been transferred under a pre-incorporation contract to 2 individuals who are forming a PRC domestic company (Newco) for and on behalf of [Vestey]*** . These assets will be automatically transferred to Newco upon completion of its establishment. As a condition of the sale, Newco will lease the assets to Jin Pan for Jin Pan's continued use.
>
> We understand from PRC counsel that, ***under this arrangement, your client is able to acquire clean title to the assets in 2 alternative ways*** :
>
> > (a) A Bidvest entity may acquire the assets from Newco directly. Under the terms of the asset purchase agreement, Newco has the right to assign its rights under the agreement to a third party.

This acquisition may be achieved either through a PRC company owned or controlled by Bidvest, such as an existing wholly foreign owned enterprise (*WFOE*) or through establishing a new subsidiary to acquire the assets. We would suggest the former as we understand that generally no (or only simple) government approvals are required for this purpose.

(b) Bidvest may acquire the equity interest in Newco either through a subsidiary in the PRC or through a foreign company, thereby converting Newco into a WFOE.

Each of these transactions will require government approval, although we understand that the procedures for the former are generally simpler. ***Please therefore arrange for your client to nominate their preferred alternative, and to provide us with the full details of the relevant Bidvest entity. Please provide this information as soon as possible so that this aspect of the transaction can be completed*** .

…

[emphasis added]

20 B&M wrote again to D1 the following day on 15 May 2009 advising that the Chinese legal opinion did not satisfy the terms of the Escrow Agreement for a release of the Escrow Sum:

The legal opinion to which you refer in your letter does not satisfy the provisions of [EA/5(a)(iii)] as, amongst other reasons, the opinion does not opine on how at least 80% of the underlying assets of Jin Pan have been *transferred* to Bidvest or any nominee of Bidvest. It does not even opine on how those assets could be transferred to Bidvest at some point in the future (not that such an opinion would have satisfied [EA/5(a)(iii)] in any event).

…

[emphasis in original]

21 On the same day, D1 sent two letters in reply to B&M. In the first letter, D1 as Vestey's solicitor, denied breach by Vestey of its obligations under the SPA and countered that it was Bidvest who appeared to be in breach for refusing to comply with its obligations under SPA/7.3 and 7.5. In the second letter, D1 as Escrow Agent denied breaching the Escrow Agreement.

22 On 25 May 2009, D1 followed up on its 14 May 2009 letter to B&M by requesting once again for information from Bidvest to finalise the transfer of Jin Pan's assets. In that letter, D1 stated that Bidvest would be treated as being in breach of the SPA if Bidvest failed to provide the necessary information.

23 Four days later on 29 May 2009, D1 received a letter of demand from Wong & Leow LLC, requesting on behalf of Bidvest, payment of a sum equivalent to the Escrow Sum by 2 June 2009. D1 failed to do so and Bidvest commenced OS 667 against D1.

Events leading to issuance of the Chinese legal opinion

24 For completeness, I now come to the events leading to the issuance of the Chinese legal opinion. In his affidavit dated 4 September 2009, Mr Colin George Copland ("Mr Copland"), a director of Vestey, deposed that the Chinese legal opinion was obtained as part of the fulfilment of its obligations under the SPA to use reasonable endeavours to transfer its equity interest in or 80% of

the underlying assets of Jin Pan to Bidvest or its nominee.

25 I begin at the point in time after the Completion Date when Vestey's entire shareholding in a company, Angliss Hong Kong, was acquired by Bidvest. Thereafter, Bidvest had been managing Jin Pan to date through Angliss Hong Kong. Therefore, although Vestey continued to retain legal title to its equity interest in Jin Pan after completion, Bidvest had assumed effective control over Jin Pan's management and day-to-day operations. [note: 1] According to Mr Copland, one Mr Anthony Fok ("Mr Fok") was appointed as director of Angliss Hong Kong by Bidvest to oversee and manage Jin Pan's operations, and he was assisted by one Ms Cindy Ou Piao ("Ms Ou") who was the nominee director of the Chinese JV Partner and employee of Jin Pan since 1997.

26 Mr Bernard Benson ("Mr Benson"), the Chief Executive Officer of Bidvest, in his affidavit dated 30 June 2009 took a contrary position. He maintained that the senior management of Bidvest did not attempt to interfere or influence the day-to-day operations of Jin Pan [note: 2] so as to facilitate a neat and orderly withdrawal from the management and operations of Jin Pan in the event that ownership of Jin Pan or its assets could not be successfully transferred to Bidvest by the Deadline.

27 Sometime in June or July 2007, a dispute arose between Mr Fok or Ms Ou and the PRC solicitors, Wang Jing & Co ("Wang Jing"), who had been appointed by Vestey to explore ways to achieve a transfer pursuant to its obligations under the SPA. [note: 3] The dispute was over Wang Jing's fees which Mr Fok and/or Ms Ou objected to and that, in turn, led to Wang Jing suspending work on the matter. After Vestey found out about this dispute, Vestey settled Wang Jing's fees on or around 31 January 2008. [note: 4]

28 According to Mr Copland, Wang Jing had earlier identified a few alternative methods of procuring a transfer. One method was to obtain a court-approved sale of the minority shares of Jin Pan, [note: 5] a process which required a court-appointed assessment firm to first assess the value of the minority shares in Jin Pan. Wang Jing contacted Ms Ou on 23 April 2008 to request for Jin Pan's balance sheets and income statements for 2007 and the first quarter of 2008 so that the assessment could be done. [note: 6] As the assessment firm was given only up till the middle of May 2008 to complete its assessment, Mr Copland personally got involved in the urgent process of obtaining the required documents from Mr Fok and Bidvest.

29 After repeated requests, the documents were provided to Mr Copland on 10 June 2008 and forwarded to Wang Jing on 12 June 2008. However, this proved too late because the court-appointed assessment firm had ceased its cooperation and a new assessment firm had to be appointed by the court. While waiting for the new appointment, Vestey and Wang Jing also tried other ways to procure a transfer. [note: 7]

30 By the time a new assessment firm had been appointed, on or around 3 December 2008, [note: 8] Mr Copland realised that it might be difficult for any transfer pursuant to a court-approved sale to be completed before the Deadline. On 24 February 2009, Mr Copland wrote to Mr Benson of Bidvest to request an extension of the Deadline. [note: 9] That request was rejected by Bidvest.

31 It was in those circumstances, that Vestey was advised by its solicitors in the PRC that the transfer of 80% of Jin Pan's underlying assets to a local PRC entity would not require regulatory approval and could be achieved without obtaining consent of the owner of the minority shares. [note: 10] It was with this advice in mind that Vestey proceeded to take steps to incorporate a PRC

company called Guangzhou City Yangying Trading Co Ltd ("Yangying") which would first acquire 80% of the underlying assets of Jin Pan. After that, Vestey would transfer 100% of the shares of Yangying or transfer onward the 80% of the underlying assets to Bidvest or its nominee. [note: 11]

32 As Yangying was in the process of being incorporated, and with the Deadline fast approaching, 80.1% of Jin Pan's underlying assets were first transferred to Yangying's two shareholders, Ms Yang and Mr Zhao, on 4 May 2009, [note: 12] and upon that transfer the Chinese law firm issued the Chinese legal opinion (see [17] above).

33 In the meantime, both Ms Yang and Mr Zhao had earlier pre-signed a number of documents that would allow for the transfer of Yangying's shares or its assets. [note: 13] Yangying was incorporated on 19 May 2009 with Ms Yang and Mr Zhao as its shareholders. Vestey's solicitors in the PRC had advised that had the documents pre-signed by Ms Yang and Mr Zhao been completed and executed by Bidvest, the relevant assets or Yangying's shares would have been transferred to Bidvest or its nominee without any additional involvement on Vestey's part. [note: 14]

The issues raised by Bidvest

34 In written submissions, counsel for Bidvest, Mr Lee Kiat Seng ("Mr Lee"), submitted that the Chinese legal opinion did not satisfy EA/5(a)(iii) because it did not state or show a transfer of assets to Bidvest or its nominees. Mr Lee raised three arguments in advancing Bidvest's case.

35 First, the terms of the SPA (in so far as they were adopted in the Escrow Agreement) were incorporated in the Escrow Agreement by reference. Mr Lee did not rely substantially on this argument (the "incorporation issue").

36 Mr Lee's second argument related to the construction of the Escrow Agreement (the "construction issue"). Mr Lee argued that reading the Escrow Agreement together with the underlying SPA, the commercial purpose of the Escrow Agreement was to provide "security for Bidvest" and therefore the correct interpretation of EA/5(a)(iii) was that it required the Chinese legal opinion to evidence a transfer of Jin Pan's shares or assets *to Bidvest or its nominees* and not to any other unrelated person. In other words, Bidvest's case was that EA/5(a)(iii) must be given a reading that was identical to that of SPA/7(a)(iii) and that it did not make commercial sense that the escrow arrangement would allow for a transfer of Jin Pan's assets to parties who were unrelated to Bidvest. Mr Lee submitted that D1 as Vestey's solicitor was involved in the drafting of both the Escrow Agreement and the SPA, and was therefore well aware of the commercial purpose of both the agreements. As such, EA/5(a)(iii) required a transfer of Jin Pan's shares or assets to Bidvest or its nominees.

37 In his alternative argument, Mr Lee submitted that there ought to be an implied term that the condition in EA/5(a)(iii) could only be satisfied if there was a transfer to Bidvest or its nominees (the "implied term issue"). In making this argument, the same grounds that were relied upon in his arguments on the construction issue were used.

38 I now address in turn each of the issues raised by Bidvest.

Issue 1: The incorporation issue

39 Citing the High Court decision of *ABB Holdings Pte Ltd v Sher Hock Guan Charles* [2009] 4 SLR(R) 111, Mr Lee submitted that cl 2 of the Escrow Agreement ("EA/2") would somehow

entitle this court to look at the SPA by incorporation when deciding how to interpret the Escrow Agreement. EA/2 reads in its entirety as follows:

> 2. Capitalised terms used in this Letter shall bear the meaning ascribed to these terms in the SPA.

40 In my judgment, a simple reference to common definitions without more would not result in an incorporation of any particular express term of the SPA into the Escrow Agreement. Furthermore, Mr Lee did not mention the precise terms of the SPA that were to be incorporated into the Escrow Agreement. The incorporation issue was a non starter.

Issue 2: The construction issue

41 The Escrow Agreement and SPA are two separate and distinct contracts. Bidvest and Vestey are the only two parties to the SPA whereas the Escrow Agreement is a tripartite contract involving Bidvest, Vestey and D1 as stakeholder. The separate and distinct contractual relationship of a written stakeholder agreement is made clear in *Manzanilla Limited v Corton Property and Investments Limited* (unreported) 13 November 1996; Court of Appeal (Civil Division) Transcript No 1477 of 1996 ("*Manzanilla*"). In that case, a number of contracts of sale and purchase provided for a sum of money to be held by the appellant solicitors "as stakeholders as security for compliance by the Purchaser with its obligations hereunder." However, it also appears from Millett LJ's judgment that there was no separate written stakeholder agreement other than the sales contracts themselves. It is within this context that Millett LJ then set out the legal rights and obligations of a stakeholder as established by the authorities:

> ***Where a stakeholder is involved, there are normally two separate contracts to be considered*** . There is first the bilateral contract between the two principals which contemplates two possible alternative future events and by which the parties agree to pay a sum of money to a stakeholder to abide the happening of one or other of them. In the present case it consisted of a series of written contracts for the sale of land, and the relevant events were the failure of the contracts by the repudiatory breach of one party or the other. The second contract is the tripartite contract which results from the deposit of the money with the stakeholder on terms that he is to keep it until one or other of the relevant events happens and then pay it to one or other of the parties accordingly. ***The stakeholder is a party to the second contract but not the first. His rights and obligations are not normally expressly spelled out. They are implicit in the transaction itself, and must be discovered, not by implying terms, but by analysing the relationship of the parties which arises from the deposit of the money*** .
>
> [emphasis added in bold]

42 As there was no written stakeholder agreement that expressly provided for the rights and obligations of the appellant solicitors as stakeholder, Millett LJ relied on the construction of the underlying sales contracts in deciding whether the determining event for the deposit to be released had occurred:

> ***The identification of the determining event is a matter of the construction of the contract*** . I suppose that it is open to the parties to make the determining event not the happening of an actual event itself but the resolution by the Court or otherwise of any dispute as to whether it has happened. I doubt that this would be wise, but the Law Reports are full of cases about transactions far less wise than this. But there is no trace in the books of any such arrangement, which would put the Court in a very curious position. ***There is nothing in the terms of the sales***

contracts in the present case to lend support to such a term . The event upon which the deposits were to be paid to the Vendors is expressed to be the Purchaser's refusal or failure to complete. The corresponding event upon which they were to be repaid to the Purchaser is not expressly stated but is readily implied; it was the Vendor's failure or refusal to complete. There is nothing to postpone the stakeholder's liability in case of dispute until the resolution of the dispute.

[emphasis added in bold]

4 3 *Manzanilla* is distinguishable on the facts. In the present case, Bidvest and Vestey had expressly spelled out D1's stakeholder obligations in the Escrow Agreement. Mr Kumar, on behalf of D1, pointed out that the express terms of the Escrow Agreement provided that D1's obligations ought to be construed within the four walls of the Escrow Agreement and not together with the underlying SPA. In support of his contention, Mr Kumar referred me to *three* different provisions, cls 3, 4 and 14 of the Escrow Agreement. They read as follows:

3. Contemporaneously with our entry into the Transaction, [Bidvest] shall deposit the cash amount of US$7,000,000 (*Escrow Funds*), nett of all bank charges and other deductions, in the following bank account of Deacons Singapore Limited ***to be released in accordance with the provisions of this Letter*** :

…

4. By this Letter, we instruct you to hold the Escrow Funds in an interest-bearing bank account and ***to deal with those funds only as set out in this Letter*** . As soon as practicable after you have received the Escrow Funds, you shall send each of us a written confirmation of receipt of the sum.

[emphasis added]

…

1 4 . ***We confirm that you shall have no obligations or duties to us other than those expressly described in this Letter*** . No amendment or variation of the terms of this Letter or any instructions given pursuant to the terms of this Letter shall be valid of effective without your prior written consent…

[emphasis added]

I agreed with Mr Kumar that the statements in these three different clauses reinforced Mr Kumar's point that the statements clearly and unambiguously confined D1's stakeholder obligations to the Escrow Agreement alone. A proper starting point must be for this court to look at the express terms of the Escrow Agreement itself. D1's role as the solicitor for Vesty is separate and distinct from its role as Escrow Agent, and the knowledge of the SPA that D1 gained as Vestey's solicitor could not change its obligations under the Escrow Agreement, which was where Mr Lee's arguments were directed. I will elaborate on this point later.

44 A related point raised by Mr Kumar is that the parties' intention clearly came from a plain reading of the Escrow Agreement: the parties had intended for D1 to act as Escrow Agent simply in reliance of the documents it received. EA/5(a) required D1 to act *on the face of the documents it received* and there was accordingly no obligation on D1 to conduct any due diligence or investigation

into the veracity of those documents to ascertain whether the transfer had actually been effected (see EA/5(a) set out in full at [9] above):

> (a) in respect of the amount of US$4 million, ***as soon as any of the documents described below have been delivered to [D1]*** :
>
> [emphasis added]

45 Following from Mr Kumar's arguments, the correct interpretation of EA/5(a)(iii) is that the clause simply requires D1 to release the Escrow Sum once it received a Chinese legal opinion stating that it "confirmed that not less than 80% of the underlying assets of Jin Pan have been transferred by other means".

46 Although Mr Lee had argued that this court should look at the commercial context of the SPA to interpret the Escrow Agreement, crucially, in the course of argument, Mr Lee's stated that *it was because D1 was involved in the SPA* that one should look beyond the Escrow Agreement to the commercial context of the SPA. In the same breath, Mr Lee also accepted that if the appointed stakeholder was an independent person (and not the solicitor of one of the parties) who "only knows what his express mandate tells him" (*i.e.* the Escrow Agreement), then there would be no need to look to the SPA for the commercial context of the underlying transaction to help interpret the Escrow Agreement. To me, Mr Lee's comments certainly exposed the fallacy of the arguments canvassed before me in the form of the three issues identified above.

47 As stated, the fact that the Escrow Agent is also the solicitor of one of the parties is completely irrelevant as it made no difference. In reality, Bidvest was seeking to go beyond the express mandate in the Escrow Agreement only because of D1's knowledge of the SPA gained as Vestey's solicitor in the SPA. Crucially, the distinction that one must remember is that a stakeholder is a principal rather than agent for both parties. The fact that the stakeholder is the solicitor for one of the parties does not alter the nature of the stakeholder's obligations in the written stakeholder agreement. In *Hastingwood Ltd v Saunders Bearman Anselm (a firm)* [1991] Ch 114, one of the parties argued that the stakeholders who were solicitors for the other party ought to have held on to the deposit rather than pay it out when there was a dispute between the parties as to which of them was entitled to receive payment (at 124):

> Does it make any difference that the stakeholders in the present case were the solicitors for one of the parties, and indeed were directors of that party? Mr. Jackson submits that it does, and that it is not satisfactory that a solicitor who accepts a deposit as stakeholder should be able to take it upon himself to pay the deposit to his own client when the entitlement of his client to the deposit is disputed by the other party to the agreement. …

Mr Edward Nugee QC sitting as a deputy High Court judge went on to say that the court would *not* impose any additional obligations on the stakeholders on the basis that they were solicitors (at 126):

> … However, the obligation accepted by Mr. Saunders was an obligation to act as stakeholder until the later in time of the events specified in clause 2(a); and I agree with Mr. Tecks that ***the fact that a stakeholder is a solicitor does not alter the nature of the stakeholder's obligations*** … [emphasis added]

48 Similarly and as stated, in the present case, the mere fact that D1 was also the solicitor for one of the parties would not change the fact that D1 was a principal rather than agent for both parties. It is not unusual for parties to appoint the solicitor of one side to act as stakeholder and that

was what happened here. In fact, Bidvest agreed that D1 could continue to act as Vestey's solicitor despite being appointed stakeholder of the Escrow Funds.

49 For the reasons stated, Bidvest's claim must fail. I accepted that on a plain reading of the Escrow Agreement, D1 was entitled to act on the face of the documents it received and accordingly D1 had acted within the mandate prescribed in the Escrow Agreement in so relying upon the Chinese legal opinion to release the Escrow Sum to Vestey.

50 For completeness, I return to Bidvest's interpretation of EA/5(a)(iii), which was that D1 could only release the Escrow Sum upon receipt of a legal opinion that "evidenced a transfer of assets to Bidvest or its nominees and not to just anybody" [note: 15]. That interpretation did not find favour with me for the reasons discussed below.

51 The law of contractual interpretation was not disputed by the parties. Mr Lee submitted that the contextual approach to contractual interpretation as laid down and elaborated in two recent decisions – *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029, ("*Zurich Insurance*") and *Tiger Airways Pte Ltd v Swissport Singapore Pte Ltd* [2009] 4 SLR(R) 992, "*Tiger Airways*") – entitled this court to look at the SPA and the pre-contractual negotiations as relevant evidence for the purpose of interpreting the Escrow Agreement. In essence, Mr Lee's reliance on the SPA and the pre-contractual negotiations was for the purpose of establishing the commercial context within which EA/5(a)(iii) ought to be interpreted. Bidvest's case was that the Escrow Agreement was intended as "security for Bidvest" to secure Vestey's compliance in regularising the transfer of Jin Pan's assets to Bidvest or its nominee. According to Mr Lee, the Escrow Agreement would lose its purpose as "security for Bidvest" should EA/5(a)(iii) be interpreted without due consideration of the terms and the purpose of the underlying SPA.

52 To establish its case, Bidvest needed to do two things: (a) persuade this court that the SPA and the pre-contractual negotiations showed that the Escrow Agreement was intended to operate as security for the benefit of Bidvest to ensure Vestey's compliance under the SPA and, more importantly, (b) show that *D1's obligation pursuant to the Escrow Agreement was to ensure that Vestey had complied with the SPA and to verify that the documents D1 had received evidenced such compliance* before releasing the Escrow Sum to Vestey. This second matter would in effect increase the obligation of the Escrow Agent beyond the language of EA/5(a)(iii).

53 In my view, there was no basis for admitting the extrinsic evidence as argued for by Mr Lee. First, the three requirements that needed to be satisfied for extrinsic evidence to be admitted – the evidence must be relevant, reasonably available to the contracting parties, and relates to a clear and obvious context (*Zurich Insurance* at [125] and [128]-[129]) – were not met. As for the authorities cited by Mr Lee (*Zurich Insurance* and *Tiger Airways*), the extrinsic evidence sought to be admitted in both cases were held to be inadmissible on the ground that the evidence did not point to a clear and obvious context.

54 As I had already determined at [49] above, on a plain reading of the Escrow Agreement, D1's obligations were prescribed in the Escrow Agreement and not in the SPA. To advance its contextual argument, Bidvest must establish that the extrinsic evidence it wants to introduce is relevant, reasonably available to all contracting parties, and points to a clear and obvious context that will lead to a different interpretation of the Escrow Agreement. The context which Mr Lee has to establish on behalf of Bidvest is one that clearly and obviously shows that D1's obligation pursuant to the Escrow Agreement is to secure Vestey's compliance of the SPA (see [52] above). Within this context, the relevance of the SPA to the interpretation of the Escrow Agreement will become apparent. The question then is, whether the extrinsic evidence supports a finding for such a context.

55 Mr Lee tried to establish this context on the following premises: first, that the commercial purpose of the SPA was for the actual title of Jin Pan to pass from Vestey to Bidvest; second, that it was intended that the Escrow Agent must see that Vestey's obligations in fulfilment of the commercial purpose of the SPA was achieved before releasing the Escrow Funds.

56 Mr Lee argued that the SPA had intended for the *actual title of Jin Pan's assets to pass to Bidvest* within the 24 month period after the Completion Date and he referred to SPA/3.2, 3.2A and 7.3 for support. Mr Lee pointed to the words "to [Bidvest] or its nominee" in SPA/7.3(a) and submitted that those words must necessarily be imported into its sub-clause SPA/7.3(a)(iii). The relevant portion of SPA/7.3(a) is set out here:

> (a) … a transfer of 80% of its underlying assets on terms reasonably acceptable to the parties hereto acting reasonably, or a transfer of 80% equity interest in a new entity that has acquired the underlying assets of Jin Pan (*Newco*) ***to [Bidvest] or its nominee*** , on terms reasonably acceptable to the parties hereto acting reasonably, has been obtained. [Vestey] shall be deemed to have fulfilled this obligation if any of the following documents has been obtained. … [emphasis added]

In effect, Mr Lee was submitting that because of the words in SPA/7.3(a), it would follow that SPA/7.3(a)(iii), being a sub-clause of SPA/7.3(a), ought to be read to include the words in italics:

> (iii) a legal opinion from PRC counsel confirming that not less than 80% of the underlying assets of Jin Pan have been transferred by other means [***to [Bidvest*** **] *or its nominee***]; [note: 16]

57 It was further argued that because the third-level sub-clauses (*i*) to (*iii*) of SPA/7.3(a) were worded identically with (*i*) to (*iii*) of EA/5(a), both SPA/7.3(a)(iii) and EA/5(a)(iii) *ought to be interpreted in the same way*.

58 Although the third-level sub-clauses (*i*) to (*iii*) of SPA/7.3(a) were identical to (*i*) to (*iii*) of EA/5(a), the *second-level* sub-clause (*a*) of SPA/7.3 and sub-clause (*a*) of EA/5 were worded very differently (see [8] and [9] above). That suggested to me that the two agreements operated in two different contexts. Notably, SPA/7.3(a) went into considerable detail in describing *Vestey's* obligations regarding the transfer of Jin Pan's assets whereas EA/5(a) simply provided that *D1's* obligation was to release the sum of US$4m as soon as any of the documents described below have been delivered to it. A plain reading of EA/5(a) would be consistent with the parties' intention for D1 to determine the trigger event and to thereafter discharge its obligation as Escrow Agent with ease, certainty and speed upon the receipt of the specified documents. Ironically, to interpret EA/5(a)(iii) and SPA/7(a)(iii) identically as Bidvest had suggested would be tantamount to ignoring the verbal context directly surrounding those two sub-clauses.

59 I pause here to note that the remaining evidence that was adduced by Bidvest was merely used to establish that the commercial purpose of the SPA was for the transfer of Jin Pan's assets to Bidvest or its nominee.

60 For example, Mr Lee submitted that SPA/3.2A and 7.3 provided for an "unwinding mechanism" in the event that the transfers could not be effected and that feature underscored the fact that it was an actual transfer of the assets to Bidvest that was contemplated by the parties: [note: 17]

> … if the relevant amount assigned against that Escrow Obligation in Clause 3.2 is paid out of the PRC Escrow Funds to [Bidvest]. In such event, [Bidvest] shall execute and deliver all documents and do all acts and things as [Vestey] may require in order to return any interest it may have in

respect of Jin Pan (or any of its underlying assets) …

(SPA/3.2A is set out in full at [8] above).

61 In my view, Bidvest fell short of establishing a clear and obvious context showing that *D1's obligation* as Escrow Agent was to secure Vestey's compliance under the SPA. At any rate, the construction point was a facile argument that conflated the separate role of the Escrow Agent as a principal in a tripartite contract, and D1's role as Vestey's solicitor in the SPA which was a bilateral contract between Bidvest and Vestey. If anything, it is for Bidvest to take issue with Vestey on the Chinese legal opinion outside of OS 667.

62 On the related question of whether the pre-contractual negotiations were admissible as an interpretive aid, Vestey raised the existence of an entire agreement clause in objection to the admission of pre-contract discussions and documents. It seems to me that the existence of an entire agreement clause *per se* would generally be insufficient to prevent a court from adopting the contextual approach and considering extrinsic evidence, as the scope of the entire agreement clause itself could depend on the context relating to the particular agreement (see *Lee Chee Wei v Tan Peow Victor* [2007] 3 SLR 537 at [41]). That said, there was no need to dwell on the entire agreement clause argument. I was able to reach the conclusion that the pre-contractual negotiations were not relevant and would not point to any such clear and obvious context. In the recent High Court decision of *Goh Guan Chong v AspenTech, Inc* [2009] 3 SLR(R) 590 ("*AspenTech*") Andrew Ang J held that drafts of contracts were admissible if they passed the requirements set out in *Zurich Insurance*, but he also cautioned that such evidence may not always be helpful (at [58]):

> … This is not to say that such evidence will invariably be helpful. *Where the parties' respective positions are changing with each draft, there may be scant assistance obtainable by referring to the drafts, the paramount principle being to objectively discover the common intention of the parties …* [emphasis added]

Adopting Ang J's observations, Vestey's affidavit evidence which was unchallenged on the point was that the parties had gone through several drafts that reflected the parties' changing positions after negotiations and finally their bargained position. [note: 18] The drafts quite clearly failed to satisfy the *Zurich Insurance* requirements– the changing drafts and pre negotiations were not relevant to the Escrow Agreement nor did not they point to a clear and obvious context.

63 Similarly, the internal communications between Bidvest's lawyers and Bidvest's PRC lawyers were irrelevant to the present case in so far as they represented subjective declarations of intent that were not made available to the other contracting parties. However, Ang J explained in *AspenTech* that evidence of subjective declarations of intent may, in some cases, carry some weight (at [72]):

> This, however, does not mean that extrinsic evidence that was only available to one party is necessarily valueless. While such extrinsic evidence rightly cannot be used to conclusively reveal what the contracting parties' objective intention was, it may be used against the maker of statements therein to show the subjective intention of such party. In so doing, such evidence may reveal what the objective intention of the parties could not be. This will occur where the extrinsic evidence available to one party contradicts what that same party asserts was the objective intention of both parties.

64 With this, I refer to an internal email dated 25 April 2007 that was written by B&M's Mr Holland to a Ms Tracy Wut: [note: 19]

> Tracy,
>
> Part of the problem is that ***[D1] as escrow agent want absolute certainty whether an obligation is satisfied, and so want to tie everything back to a piece of paper*** . Is there a piece of paper flowing from the AIC registration that would serve this purpose? [emphasis added]

65 From this email, it would appear that Bidvest's solicitors were actually aware that D1 had intended for its own obligations as Escrow Agent to be tied to specified documents as that would allow it to act with ease, certainty and speed. Such an intention would have corroborated the meaning of EA/5(a) from a plain reading of the provision and was contrary to Bidvest's professed understanding of the Escrow Agreement as Mr Lee argued for at the hearing.

66 Accordingly, I concluded for the reason stated that the extrinsic evidence (the terms of the SPA, the pre-contractual negotiations, and the drafts of the SPA) was inadmissible. As Bidvest had failed to establish any other context for interpreting the Escrow Agreement, I accepted D1's interpretation of EA/5(a)(iii) as the correct interpretation, which was that EA/5(a)(iii) imposed an obligation on D1 to release the Escrow Sum to Vestey upon receipt of the Chinese legal opinion.

Issue 3: The implied term issue

67 In submissions, Mr Lee, using the same reasons above, argued that a term ought to be implied into the Escrow Agreement that EA/5(a)(iii) required D1 to receive a legal opinion that evidenced a transfer of assets to Bidvest or its nominees.

68 Going by Mr Lee's arguments, Bidvest was arguing for a term to be implied in *fact*, as opposed to a term implied by *law*. Since an examination of the particular factual matrix concerned is required in order to ascertain whether or not a term ought to be implied in fact (see *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927 at [41]), and seeing that Mr Lee was relying on the exact same grounds of argument as the construction issue, it was clearly inapt and unnecessary to imply any additional term into the Escrow Agreement.

Conclusion

69 For the reasons stated, I dismissed Bidvest's claim against D1. I ordered D1's costs of and incidental to OS 667 to be taxed on an indemnity basis and to be paid jointly and severally by Bidvest and Vestey in accordance with the Escrow Agreement. I further ordered Bidvest to pay Vestey's costs fixed at $5,000.

[note: 1] Colin Copland's affidavit dated 4 September 2009 at [60]-[61]

[note: 2] Bernard Benson's affidavit dated 30 September 2009 at [10]

[note: 3] Colin Copland's affidavit dated 4 September 2009 at [67]

[note: 4] Colin Copland's affidavit dated 4 September 2009 at [73]

[note: 5] Colin Copland's affidavit dated 4 September 2009 at [58]

[note: 6] Colin Copland’s affidavit dated 4 September 2009 at [76]

[note: 7] Colin Copland’s affidavit dated 4 September 2009 at [86]-[87]

[note: 8] Colin Copland’s affidavit dated 4 September 2009 at [88]

[note: 9] Colin Copland’s affidavit dated 4 September 2009 at [92]

[note: 10] Colin Copland’s affidavit dated 4 September 2009 at [96]

[note: 11] Colin Copland’ s affidavit dated 4 September 2009 at [97]

[note: 12] Colin Copland’ s affidavit dated 4 September 2009 at [101]

[note: 13] Colin Copland’s affidavit dated 4 September 2009 at [104]

[note: 14] Colin Copland’s affidavit dated 4 September 2009 at [105]

[note: 15] Plaintiff’s submissions filed 18 November 2009, p6 at [12]

[note: 16] Plaintiff’s submissions filed 18 November 2009 at page 24 para [49]

[note: 17] Plaintiff’s submissions filed 18 November 2009, p 23 at [46]

[note: 18] Colin Copland’s affidavit dated 4 September 2009 paras 42-44, 46 - 50

[note: 19] Affidavit of Bernard Benson filed 10 June 2009 Vol 2 at Tab BB-17 at p 459