

Chua Lam alias Chua Loo v Peh Kwee Tee
[2001] SGHC 55

Case Number : OS 1118/2000
Decision Date : 22 March 2001
Tribunal/Court : High Court
Coram : Lai Siu Chiu J
Counsel Name(s) : Hee Theng Fong with Doris Lee (Hee Theng Fong & Co) for the plaintiff; Suresh Nair with Christine M Chan (Allen & Gledhill) for the defendant
Parties : Chua Lam alias Chua Loo — Peh Kwee Tee

Civil Procedure Judgments and orders Consent order Interpretation of the terms Relevant principles

Facts

In settlement of a dispute between the parties, they obtained a consent order stating *inter alia* that (a) Chang (the plaintiff's wife) will absolutely transfer to the defendant all her rights title and interest in a golf resort and housing development venture (the "Batam project") including Chang's rights and or interest in 4,250 shares in the capital of the company known as PBGR Management and Marketing Pte Ltd ("PBGR") held in the name of Chang and her rights to the sum of \$997,192 which Boonoon Investments Limited ("Boonoon") owes to Chang; and (b) upon and in return for the transfer by Chang of her entire investment in the Batam project, the defendant undertook that he shall pay to Chang and/or her nominees the sum of S\$2,175,744.95 by 31 December 1999.

In the present proceedings, the plaintiff sought *inter alia* for a declaration that it was the defendant's obligation to prepare or procure the preparation of all the necessary transfer documents before the settlement date of 31 December 1999.

Held

:

(1) The court was mindful of two considerations: (a) the court should not rewrite the consent order; and (b) if the terms of the consent order are clear and unambiguous, they should be given their plain ordinary meaning without the aid of extrinsic evidence (see 14).

(2) The court held that there was no ambiguity in the terms of the consent order (see 16).

(3) The consent order was silent on whose obligation it was to prepare the documents Chang had to execute (see 17).

(4) The fact that the plaintiff encountered difficulties in obtaining the necessary information from PBGR or the defendant to enable Chang to effect transfer of the shares or, that the task of doing so had become more onerous than what the plaintiff, his counsel or Chang originally envisaged, did not mean that the responsibility should be foisted onto the defendant. Even if what the plaintiff said was true, that it would be easier for the defendant or he had the means, to obtain the requisite details to implement the consent order, that factor ipso facto does not place the burden on the defendant to prepare the documentation if he is not contractually obliged to do so (see 18).

(5) The court adopted a pragmatic approach to ensure that the terms of the consent order could be efficaciously implemented. The defendant was directed to convene a board meeting of PBGR and to

approve the waiver of pre-emption rights by Yeong, a shareholder of the company. The court further directed the defendant to furnish to Chang the last known address of Yeong (see 20).

(6) Chang was directed to: (i) execute the blank transfer form for the shares; (ii) write to Yeong at the latter's last known address (when furnished by the defendant) to request Yeong's consent to waive her pre-emption rights; and (iii) prepare and execute the deeds of assignment pertaining to divesting her interests the Batam project and the debt owed to her by Boonoon (see 20).

Cases referred to

A V Pound & Co v M W Hardy & Co

[1956] 1 AER 639 (refd)

Benjanin Developments Ltd v Robt Jones (Pacific) Ltd

[1994] 3 NZLR 189 (refd)

Citicorp Investment Bank v Wee Ah Kee

[1997] 2 SLR 759 (refd)

Pacific Century Regional Developments v Estate of Seow Khoon Seng

[1997] 3 SLR 761 (refd)

Reardon Smith Line Ltd v Hansen-Tangen

[1976] 1 WLR 989 (refd)

The Moorcock

(1889) 14 PD 64 (refd)

JUDGMENT

Grounds of Decision

The background

1. Chua Lam (the plaintiff) and Peh Kwee Tee (the defendant) were friends for almost 30 years (up to 1997); the plaintiff's wife is Chang Chaong Wen whom the defendant also knows. The plaintiff said he extended friendly loans (2) of S\$1.68m and HK\$2m to the defendant on 29 April 1987 and 12 January 1990 respectively. He (since 1992) and his lawyers requested repayment but were not paid. Instead, the defendant denied borrowing the monies and raised the defence of time-bar. Consequently, the plaintiff sued the defendant in Suit No. 1169 of 1997 (the Suit) in June 1997.

2. On 27 July 1998, when the Suit came up for trial, the parties came to a settlement and a consent order (the Consent Order) was recorded as follows:-

I. Chang Chaong Wen will absolutely transfer to Peh Kwee Tee all her rights title and interest in a golf resort and housing development venture on Batam Island, Indonesia, known as the PT Paradise Bay Golf Resort, Batam, Indonesia (the Batam project) including the following:-

(1) Chang Chaong Wen's rights and or interest in 4,250 shares in the capital of the company known as PBGR Management and Marketing Pte Ltd (PBGR) held in the name of Chang Chaong Wen;

(2) Chang Chaong Wen's rights to the sum of \$997,192 which Boonoon Investments Limited (Boonoon) owes to Chang Chaong Wen;

(3) Chang Chaong Wen's right to purchase 50 residential units in the Batam project;

(4) any rights that Chang Chaong Wen may have to individual golf memberships in the Batam project;

(5) all other rights and/or benefits which Chang Chaong Wen may have in the Batam project.

II. Upon and in return for the transfer by Chang Chaong Wen of her entire investment in the Batam project (as set out in paragraph 1 above), Peh Kwee Tee hereby undertakes that he shall pay to Chang Chaong Wen and/or her nominees the sum of S\$2,175,744.95 by 31 December 1999.

III. For the avoidance of doubt:-

(1) the transfer of Chang Chaong Wen's investment shall be contemporaneous with the payment made by Peh Kwee Tee; and

(2) Chang Chaong Wen shall do all necessary acts and things and to execute all necessary documents and transfers to effect the transfer to Peh Kwee Tee of her entire investment in the Batam project in order [that] the terms and conditions of this settlement may effectively be carried out.

IV. The above is in full and final settlement of the dispute between the parties and there shall be no further claims between the parties.

3. On 25 July 2000, the plaintiff commenced these proceedings (the OS) and prayed inter alia, for the following reliefs:-

(1) a declaration that upon the true construction of the Consent Order:-

(a) it is the defendant's obligation to prepare or procure the preparation of all the necessary transfer documents in respect of the transfer of all of Chang Chaong Wen's (Chang's) rights, title and interest in the Batam project for Chang's execution before the settlement date of 31 December 1999 and

(b) the transfer of Chang's entire investment in the Batam project is effected upon the delivery to the defendant of the aforementioned transfer documents duly executed by Chang.

4. The OS came up for hearing before me on 23 November 2000 whereupon I granted inter alia the following orders:-

1. the defendant shall (as a director of PBGR) convene a board meeting with Kanhatsu Hayashi (Hayashi) to approve the transfer of 4,250 shares (the shares) from Chang to the defendant or to his nominees, and to approve the waiver of pre-emption rights by Yeong Wai Kuen or by the Registrar of Supreme Court on behalf of Yeong Wai Kuen and to dispense with compliance with Articles 29 to 30 provided that Chang complies with the following directions:-

(i) execute the blank transfer of the shares;

(ii) write to Yeong Wai Kuen at her last known address which shall be furnished by the defendant to request for her consent to the waiver of her pre-emption rights under Article 28 of the Memorandum and Articles of Association of the company. In the event that Yeong Wai Kuen fails or neglects to respond to Chang's said letter within 14 days of the date of the letter, the Registrar of the Supreme Court is empowered to give written consent of waiver on Yeong Wai Kuen's behalf;

(iii) Chang executes an assignment to the defendant or his nominee as notified by the defendant's solicitors within 10 days from the date hereof of items 2 to 5 listed in the Consent Order;

2. completion of transfer of the shares together with all necessary documentation incidental thereto in exchange for cashier's order of S\$2,175,744.95 is extended to 31 March 2001;

3. In the event of default in compliance of directions herein by either party, the other party or both parties are at liberty to revise the Suit, in the alternative enforce the Consent Order.

The defendant has appealed against my decision (in Civil Appeal No. 172 of 2000).

The affidavits

5. Before I give the reasons for my decision, I need to refer to the affidavits filed by the parties, starting with the plaintiff's. In the affidavit which he filed in support of the OS, the plaintiff deposed that one month (1) before 31 December 1999 (the completion date), his solicitors had written to the defendant's solicitors to request for the drafts of the relevant transfer forms for Chang's execution. Three (3) weeks later, on 20 December 1999, the defendant's solicitors had requested clarification on what documents the plaintiff meant. Further correspondence from 28 December 1999 to 21 March 2000 between the parties came to nought. In short, there was disagreement on whose responsibility it was to prepare/procure the transfer documentation. The plaintiff

contended that as neither he nor Chang had any knowledge of the latter's supposed interest in the Batam project apart from what the defendant himself deposed to in his written testimony for the Suit and, the Suit itself had no connection whatsoever with Chang's alleged interest in the Batam project, it was for the defendant to prepare/procure the necessary documentation for Chang to divest and transfer to him, her interests in the project. The defendant not unexpectedly, took the opposite stand.

6. The plaintiff's solicitors did conduct a search in the Registry of Companies (ROC) to ascertain the particulars of the shareholders of PBGR. He alleged however that he/Chang were then given the run-around when they attempted to obtain from the defendant's solicitors and or PBGR information regarding:

- a. the addresses/contacts of the other two (2) shareholders in PBGR (Hayashi and Yeong Wai Kuen [Yeong]) and to obtain details of Chang's interests in the Batam project;

- b. the procedure for transferring the shares to the defendant.

Chang was obliged to contact her fellow shareholders because of Article 28 of the company which states:-

28. Shares shall be freely transferred by a member or other person entitled to transfer to any existing member selected by the transferor; but save as aforesaid and save as provided by Article 33 hereof, no share shall be transferred to a person who is not a member so long as any member or any person selected by the directors as one whom it is desirable in the interest of the company to admit to membership is willing to purchase the same at the fair value.

Hence, she sought the consent of Hayashi and Yeong for the transfer of the shares to the defendant, who was not an existing shareholder, as well as to waive their pre-emption rights. Hayashi gave his written consent by his letter dated 10 April 2000 to the plaintiff's solicitors; Yeong however, did not respond at all to the plaintiff's solicitors' letters seeking her consent.

7. Chang/the plaintiff also had to comply with Articles 29 and 30 of PBGR which state:-

29. Except where the transfer is made pursuant to Article 33 hereof the person proposing to transfer any shares (hereinafter called 'the proposing transferor') shall give notice in writing (hereinafter called 'the transfer notice') to the company that he desires to transfer the same. Such notice shall specify the sum he fixes as the fair value, and shall constitute the company his agents for the sale of the share to any member of the company or persons selected as aforesaid, at the price so fixed, or at the option of the purchaser, at the fair value to be fixed by the auditor in accordance with these articles....

30. If the company shall within three months after service of a sale notice find a member willing to purchase any share comprised therein (hereinafter described as a purchasing member) and shall give notice thereof to the retiring member, the retiring member shall be bound upon payment of the fair value to transfer the share to such purchasing member, who shall be bound to complete the purchase within seven days from the service of such last mentioned notice...

8. According to the plaintiff, his solicitors made no progress when they sought particulars from PBGR (by writing to Hayashi and the company's secretary) of Chang's rights to individual golf memberships as well as the relevant transfer procedures; Chang also had to obtain a replacement for the certificate for the shares as she was not in possession thereof. The plaintiff's solicitors were equally unsuccessful when they wrote to Boonoon (a Hong Kong company) to inquire as to the sum of \$997,192 which the defendant had alleged was owed to Chang according to the audited accounts of Boonoon, which he exhibited in his

affidavits filed for the Suit. Although Hayashi was/is a close business associate of the defendant (and would have been a witness for the defendant had trial of the Suit proceeded), the plaintiff alleged that the defendant was singularly unhelpful when the plaintiff's solicitors approached him for assistance to verify the information extracted from the ROC pertaining to the addresses of the company's shareholders. The plaintiff alleged that the defendant had control over the management of the Batam project despite which, he did not respond to the plaintiff's requests for information regarding details of Chang's rights, title and interest therein. The plaintiff complained that Hayashi was equally uncooperative because he was the defendant's friend. The plaintiff alleged that the defendant's conduct showed he did not want to comply with the terms of the Consent Order and effect the settlement.

9. The defendant quite naturally denied the plaintiff's many allegations. In his affidavit, he pointed out that the clear terms of the Consent Order (para 2 *supra*) put the onus on the plaintiff/Chang to obtain all the necessary approvals and documentation. He pointed out that the terms of the Consent Order were settled between the solicitors representing both parties; it was therefore wrong for the plaintiff to assert that neither he nor Chang had any knowledge of the latter's interests in the Batam project. If that was true, the plaintiff ought not to have agreed to the terms of the Consent Order. He could have but failed to, raise any objections concerning the draft order when the same was forwarded to his solicitors for approval, before the parties appeared in court to record the Consent Order.

10. The defendant affirmed that the agreement reflected in the Consent Order was not finalised on the completion date because neither the plaintiff nor Chang took any steps to procure/comply with, Chang's obligations set out under the Consent Order, until months after the completion date. Indeed, the plaintiff did nothing at all until the defendant's solicitors wrote to his solicitors on 3 March 2000 inquiring as to:-

(a) what steps the plaintiff/Chang had taken since the settlement was concluded, to communicate with the relevant companies regarding Chang's rights, title or interest in the Batam project;

(b) what legal advice the plaintiff/Chang may have sought in various jurisdictions in regard to (a) above and for copies of the same.

11. The defendant pointed out that the plaintiff had admitted he took no steps until after the plaintiff's solicitors' aforesaid letter dated 3 March 2000, this was some 1' years after the date of the Consent Order and well after the completion date. The defendant denied the plaintiff's assertion that there was an understanding between them as to how Chang was going to effect the transfer of the shares to him and as to who was to be responsible for preparing the transfer documentation. As to the plaintiff's methodology on the implementation of the Consent Order, the defendant stated such views were subjective and were never expressed to him by either the plaintiff or Chang.

12. The defendant also disagreed with the plaintiff's assertion that as one (1) of the two (2) directors of PBGR, the defendant had control of the company. Neither was it correct for the plaintiff to assert that the defendant was in a position to procure and direct that the relevant transfer forms and documents be prepared for Chang's execution.

13. In reply to the various allegations set out in the plaintiff's affidavit, the defendant had this to say:-

a. granted he had affirmed (in his affidavit for the Suit) that PT Paradise Bay Golf Resort and or PBGR would manage the Batam project but this did not eventually materialise. As it turned out, PBGR was used to market and sell golf memberships for the Batam project; he himself was never involved in the management of the Batam project whether in Batam or in Singapore;

b. he had been a director of PBGR since 27 June 1997 but only as a sleeping director whilst Hayashi had been a director since 15 March 1991;

c. Chang had to comply with the prescribed procedure set out in Articles 22 to 33 of the company's articles of association to effect the transfer of the shares to him. In this regard he understood that Hayashi and the company secretary of PBGR had written to the plaintiff's solicitors to remind them of the need for such compliance but, it was not done to-date and without such compliance, Chang could not effect transfer of the shares to him;

d. as for the debt owed by Boonoon to Chang, it had to be assigned to him under the applicable Hong Kong law but, the plaintiff/Chang did not produce evidence that they had satisfied the requirements under Hong Kong law or, of any applicable alternative procedure;

e. he did not know and was unable to assist Chang, in the transfer of her right to purchase 50 residential units in the Batam project to him;

Consequently, the defendant prayed for the OS to be dismissed since the plaintiff was in effect asking the court to go behind the terms of the Consent Order which, contrary to the stand taken by the plaintiff/his solicitors, were clear and unambiguous.

The decision

14. I had set out in para 4 above, the salient terms of the orders I made. In making those orders, I was mindful of two (2) considerations:-

a. I should not rewrite the terms of the Consent Order which had been agreed to by the parties who were separately represented at the material time and, who would have received the relevant independent legal advice;

b. if the terms of the Consent Order are clear and unambiguous, they should be given their plain ordinary meaning without the aid of extrinsic evidence.

15. Citing *Chitty on Contracts* (see 28 ed vol 1 p 604 para 12-043) and *A V Pound & Co v M W Hardy & Co* [1956] 1 AER 639, counsel for the plaintiff had submitted that the court should resolve any ambiguity by looking at the commercial purpose (of the Consent Order) and the factual matrix (see *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989 [infra]) against which it was made; in this regard the whole contract had to be considered. Neither the defendant nor I disagreed with that submission. Indeed, the Court of Appeal in *Pacific Century Regional Developments v Estate of Seow Khoo Seng* [1997] 3 SLR 761 (cited by counsel for the defendant) adopted that proposition of law. Counsel for the defendant had referred to two (2) other cases namely *Citicorp Investment Bank v Wee Ah Kee* [1997] 2 SLR 759 and *Benjanin Developments Ltd v Robt Jones (Pacific) Ltd* [1994] 3 NZLR 189 to resist the OS. Those cases do not detract from or add further to, the proposition of law set out in the *Pacific Century* case.

16. However, I am of the view that the terms of the Consent Order do not allow room for the application of the above principle of law, even though the learned assistant registrar had opined (on 19 January 2000 when the plaintiff applied 'for directions' to clarify the Consent Order) that cl III (2) was none too clear on what was required of Chang; I see no ambiguity in the terms spelt out in the Consent Order.

17. What I note is, under cl I of the Consent Order, Chang was obliged to transfer five (5) items to the defendant in exchange for the payment from him set out under cl II. Clause III (2) reinforced cl I by putting on Chang the responsibility *to execute all necessary documents and transfers to effect the transfer [to the defendant]*. However, the clause and indeed the entire Consent Order was silent on whose obligation it was to prepare the documents Chang had to execute; therein lies the dispute. Counsel

for the plaintiff had submitted that a term should also be implied into the Consent Order under 'the officious bystander' test propounded in *The Moorcock* (1889) 14 PD 64 by Bowen LJ (at p 68) so as to give business efficacy to the contract. As it could not have been intended at the time the Consent Order was agreed, that the plaintiff or Chang (whose shareholding amounted to only 4.25% of the paid-up capital in PBGR) would have to procure the waiver of pre-emption rights which the defendant was in a position to procure, it must necessarily be implied into the agreement between them that the defendant and not the plaintiff, had that duty. Counsel submitted that the same argument would apply to providing information of Chang's interests in the Batam project to enable her to transfer the same to the defendant.

18. As was said by the appellate court in *Pacific Century* (per Karthigesu JA at p 766), when construing a document:

...The court is required to ascertain the mutual intention of the parties as expressed in the words of the agreement. The law is concerned with the objective appearance, rather than with the actual fact, of agreement. It is not concerned with the actual intentions of the parties, rather it is the court's task to decide what each party was reasonably entitled to conclude from the conduct of the other. In *Reardon Smith Line v Hansen Tangen* [1976] 1 WLR 989 at p 996, Lord Wilberforce said:

When one speaks of the intention of the parties to the contract, one is speaking objectively -- the parties cannot themselves give direct evidence of what their intention was -- and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties.

Consequently, the fact that the plaintiff (as he complained) encountered difficulties in obtaining the necessary information from PBGR and or the defendant to enable Chang to effect transfer of the shares or, that the task of doing so had become more onerous than what the plaintiff, his counsel or Chang originally envisaged, does not mean that the responsibility should be foisted onto the defendant. Even if what the plaintiff said is true -- that it would be easier for the defendant or he had the means, to obtain the requisite details to implement the Consent Order, that factor ipso facto does not place the burden on the defendant to prepare the documentation if he is not contractually obliged to do so.

19. One other authority relied on by counsel for the defendant in his submissions was *The Interpretation of Contracts* by Kim Lewison (2 ed 1997) where the learned author stated (at para 1.05 p 8):

In attempting to reach a conclusion as to the presumed intention of the parties, the court will generally adopt an objective approach, that is to say that it will consider what would have been the intention of reasonable persons in the position of the actual parties to the contract.

He further relied on another extract from *Chitty on Contracts* (vol 1 at p 649 para 13-011) to say that the court may be willing to imply a term that the parties shall co-operate to ensure the performance of their bargain.

20. Applying the maxims and the guidelines culled from the cases referred to earlier, I adopted a pragmatic approach. I directed the defendant to convene a board meeting (with Hayashi) of PBGR because only he could do so, being a director of PBGR but not Chang, as a shareholder. Similarly, it was possible for the defendant as a director but not Chang as a shareholder, to approve the waiver of pre-emption rights by Yeong (or by the Registrar of the Supreme Court on her behalf). Hence, I also placed that responsibility on the defendant as well as the relatively easy duty of furnishing Chang with the last known address of Yeong (since the plaintiff claimed the same was not known to him). Chang on her part was directed to:

(i) execute the blank transfer form for the shares;

(ii) write to Yeong at the latter's last known address (when furnished by the defendant) to request Yeong's consent to waive her pre-emption rights under Article 28 of the company's memorandum and articles of association;

(iii) prepare and execute the deeds of assignment pertaining to divesting her interests the Batam project and the debt owed to her by Boonoon

as these acts were well within her and the plaintiff's, abilities to comply with without the need for assistance or co-operation from the defendant or for that matter, Hayashi or PBGR.

21. In making the above directions, I did not re-write the bargain the parties had entered into nor did I interpret the Consent Order to the advantage or disadvantage of any party. They were necessary from a practical viewpoint, to ensure that the terms of the Consent Order could be efficaciously implemented.

Lai Siu Chiu

Judge

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