

Poh Lian Development Pte Ltd v Hok Mee Property Pte Ltd and others
[2010] SGHC 247

Case Number : Suit No 365 of 2005
Decision Date : 25 August 2010
Tribunal/Court : High Court
Coram : Lee Seiu Kin J
Counsel Name(s) : Tan Lee Cheng and Tricia Tay (Rajah & Tann LLP) for the plaintiff; Christopher Chong and Kelvin Teo (MPillay) for the first and fourth defendants; Julian Lim and Eric Chew (Asia Ascent Law Corporation) for the second defendant; Simon Yuen (Legal Clinic LLC) for the third defendant.
Parties : Poh Lian Development Pte Ltd — Hok Mee Property Pte Ltd and others

Contract

25 August 2010

Lee Seiu Kin J:

Introduction

1 On 1 July 2009 I delivered my written judgment (“the Judgment”) in this Suit with an order for parties to make submissions on the question of costs. However, due to the complexities of this case, which was completed only after 42 hearing days and in which there are four defendants and a total of five counterclaims, I gave liberty to the parties to apply for clarifications of my orders in the Judgment. In the event, the parties appeared before me on the question of costs and also for clarifications as well as further arguments to correct certain errors in the Judgment. This occupied another three days, at the end of which I found it necessary to issue this Addendum to the Judgment.

2 In this Addendum, I adopt the same nomenclature used in the Judgment. The Addendum will state the relevant parts of the Judgment that are modified or altered, with the reasons for them wherever applicable. In the event of any conflict between this Addendum and the Judgment, this Addendum is to take precedence over the Judgment. There have been submissions made by various parties on various points that I have considered but rejected. Some of those submissions are not reflected in this Addendum; I did not consider this necessary in view of the fact that I maintained those parts of my original decision, the reasons for which have been given in the Judgment.

Typographical errors

3 There were two typographical errors in the Judgment: at [18], the words “provisional costs items” in the second sentence should read “prime costs items” and at [68], the words “Hok Mee” in the last sentence should read “Hok Chung”. Those paragraphs in the Judgment should be read accordingly.

Overpayments to Hok Chung

4 In [31] of the Judgment I had found that Hok Chung had been overpaid the sum of \$3,394,400

and ordered Hok Mee to refund this amount to the Partnership. At [40] of the Judgment I also made Hok Chung liable to refund this amount to the Partnership. I had arrived at the sum of \$5,091,600 as the total of the PC Rate items paid to Hok Chung and based on my finding that the actual cost was only one-third of this amount, I had found that Hok Chung had been overpaid by two-thirds of that amount, viz \$3,394,400. However in computing this I had not taken into consideration the following matters:

(a) An item called "Granite Niche Cover to Modules \$1,462,880" had been omitted from the works and the item had been considered in AGA's Qualified Final Account. Therefore this item should be excluded from the computation of the total PC Rate items.

(b) There was a change to granolithic finishes (in lieu of granite finish) to the floor of the Annex Block which resulted in an omission of \$1,078,206.40. As Hok Chung was similarly not paid for this, it should also be excluded from the total PC Rate items.

(c) Hok Chung was entitled to 15% profit for attendance for works carried out and this works out to be \$127,525.68.

In the premises, the total overpayment to Hok Chung would be two-thirds of (\$5,091,600-\$1,462,880-\$1,078,206.40) with a deduction for profit for attendance of \$127,525.68, which results in the sum of \$1,572,816.72.

5 Therefore, the order in [31] of the Judgment should be for Hok Mee to refund to the Partnership the sum of \$1,572,816.72 and in [40] of the Judgment, for Hok Chung to refund \$1,572,816.72 to the Partnership.

Loans to PLD directors

6 At [35] of the Judgment, I had found that PLD and Hok Mee had to account to the Partnership for the \$800,000 advanced to four directors of PLD out of the proceeds of sale of the niches. There I had held that they should be liable in the ratio of their respective shares of the profits. However I agree with counsel for Hok Mee that the apportionment should be equal on the ground that it did not concern any sharing of profit as no profit was eventually made by the Partnership. Therefore my order in [35] of the Judgment is to be amended accordingly, and PLD is liable for \$400,000.00 and Hok Mee also for \$400,000.00.

Commission to the Temple

7 In [36] of the Judgment, I had found that the Temple was entitled to outstanding commission of \$1m from the Partnership. As the commission was to be paid from the gross proceeds of sale, this debt is to rank ahead of all other payments due from the Partnership. Hok Mee submitted that this debt should rank *pari passu* with the loans and advances made by PLD, Hok Mee and Hok Chung. I do not agree with this on the ground that the latter were loans made by the partners whereas the commission to the Temple was an expense. As for the outstanding management fee due to Hok Mee, I was of the view that that should rank *pari passu* with the said loans and advances in view of Hok Mee's conduct.

Overpayment to Hok Chung

8 In [39] of the Judgment, I had ordered Hok Chung to refund \$2,005,856.03 to the Partnership being the amount overpaid to it. However I had not taken into consideration the fact that there

should not have been an omission of \$50,000 (which was made by the Architects) for the minor sewer works construction. Taking that into account, the refund should be reduced by that sum to \$1,955,856.03. I therefore order this reduced amount to be refunded by Hok Chung to the Partnership instead. Hok Chung had made further submissions on other reasons for reducing this sum further, all of which I rejected.

Corporate veil

9 In [44] of the Judgment, I had held that the corporate veil should be lifted against Kek in respect of Hok Mee and Hok Chung. I had found in [39] and [40] of the Judgment (as amended in this Addendum) that the relevant losses were the sums of \$1,955,856.03 and \$1,572,816.72 due from Hok Chung. Consistent with my finding in [44] of the Judgment, I order that Kek be personally liable to the Partnership for these amounts, totalling \$3,528,672.75.

Kickback from AGA

10 In [50] of the Judgment I had ordered Hok Mee to refund the kickback received from AGA of a sum amounting to \$1,108,406.49. This sum is incorrect and the correct amount is \$358,400.

\$400,000 advance to the Temple

11 In [55] of the Judgment, I had held that the Temple was not liable to refund to the Partnership the sum of \$400,000. This money was advanced to the Temple at the time when the agreement between the Partners was for the Temple to be entitled to a 25% profit share in return for bearing the marketing costs. The explicit agreement in relation to the \$400,000 when it was advanced by the Partnership to the Temple was that this would be set off against the share of profit that the Temple would in due course receive. However in [36] of the Judgment, I had found that this profit sharing agreement was subsequently altered by the partners. Under the new agreement, which was not in writing but evidenced by minutes of meetings, the Temple would be entitled to a 15% commission on the sale of the niches, payable upon collection of sale price. Indeed, consequent to this finding, I made a finding that the Temple was entitled to a further sum of \$1,000,000 by way of that 15% commission. There was no evidence of any explicit agreement as to how the \$400,000 was to be dealt with upon this change of the agreement. However I find that it would be a necessary implication from the altered agreement that the Temple would have to repay the \$400,000 as, under the new agreement, it was to bear the marketing costs. Therefore I find the Temple liable to refund this \$400,000 to the Partnership.

Priorities

12 In [76] of the Judgment, I had ordered the remaining amounts in the Partnership Account, after the Temple has been fully paid the sum of \$281,200 pursuant to [74] of the Judgment and such expenses as may be assessed by the Registrar pursuant to [75] of the Judgment, to be distributed as follows: 36.235% to PLD, 52% to Hok Mee and 11.765% to the Temple. However I had not taken into account the outstanding debts owed by the Partnership to PLD, Hok Mee as well as Hok Chung. The parties are agreed that PLD had advanced a total of \$13,300,000 to the Partnership, Hok Mee had advanced a total of \$5,730,000 and Hok Chung a total of \$286,000. Therefore the order in [76] of the Judgment is to include such payments before any distribution to the Partners. In the event that there is insufficient funds to repay these three creditors in full, they rank *pari passu* as the Joint Venture Agreements do not provide for any priority of payment.

Consolidated account

13 The following tables summarise the outcome of the above modifications to the Judgment.

A: Outstanding Management Fees Due to Hok Mee

Main Contract Construction Costs

Payments to Hok Chung based on AGA Certificates \$ 25,170,842.48

Less

a. Overpayment due to P.C. Rate items \$ (1,572,816.72)

b. Overpayment due to over-certification \$ (1,955,856.03)

\$ 21,642,169.73

Total Construction Costs

Preliminary Works \$ 1,200,000.00

Piling Works \$ 865,878.30

Main Contract Works \$ 21,642,169.73

\$ 23,708,048.03

Outstanding Management Fees due to Hok Mee

30% of total construction costs (30% of \$ 7,112,414.41
\$23,708,048.03)

Less

a. Part payment \$ (4,621,625)

b. Kickback from AGA \$ (358,400)

\$ 2,132,389.41

B: Monies Due to the Partnership

(1) Overpayment to Hok Chung due to PC Rate \$ 1,572,816.72
items

(2) Overpayment to Hok Chung due to over- \$ 1,955,856.03
certification by AGA (excluding P.C. rate items)

(3) \$800,000 loans to former PLH Directors

(a) 50% to be refunded by PLD \$ 400,000

(b) 50% to be refunded by Hok Mee \$ 400,000

\$ 4,328,672.75

Hok Mee and Hok Chung are jointly and severally liable for the sum of \$1,572,816.72 in (1). Hok Chung is liable for the sum of \$1,955,856.03 in (2). PLD is liable for the sum of \$400,000 in (3)(a). Hok Mee is liable for the sum of \$400,000 in (3)(b). As the corporate veil is lifted in respect of Hok Mee and Hok Chung, Kek is personally liable to the partnership for \$3,928,672.75 comprising the \$1,572,816.72 in (1), \$1,955,856.03 in (2) and \$400,000 in (3)(b).

C:	Monies Due From the Partnership		
(1)	Loan/Advance from PLD	\$	13,300,000
(2)	Loan/Advance from Hok Mee	\$	5,730,000
(3)	Loan/Advance from Hok Chung	\$	286,000
(4)	Outstanding Management Fees due to Hok Mee	\$	2,132,389.41
	Total Debt	\$	21,448,389.41

As the total moneys that would be available in the Partnership Account as a result of the present action is \$4,328,672.75 and the total debt owed by the Partnership is \$21,448,389.41, it follows that each creditor is entitled to recover a rateable proportion for every dollar owed by the Partnership. The respective sum due to each creditor is as follows:

(1)	Loan/Advancement from PLD	\$	2,684,180.45
(2)	Loan/Advancement from Hok Mee	\$	1,156,417.60
(3)	Loan/Advancement from Hok Chung	\$	57,719.97
(4)	Outstanding Management Fees due to Hok Mee	\$	430,354.73
	Total	\$	4,328,672.75

The computation of the net positions is as follows:

- (a) PLD is entitled to set off \$400,000 from the sums due from the Partnership and accordingly is entitled to recover \$2,284,180.45 (rounded to \$2,284,180) from the Partnership.
- (b) Kek/Hok Mee/Hok Chung owed the Partnership a total sum of \$3,928,672.25 but are entitled to be paid a total sum of \$1,644,492.30 (\$1,156,417.60 + \$57,719.97 + \$430,354.73). They are therefore liable to pay the partnership \$2,284,179.95 (rounded to \$2,284,180).

D: Monies due to and from the Temple

Commissions due to the Temple	\$	1,000,000
Less		
(1) Commissions/rebates to NOP withheld by the Temple	\$	(722,600)
(2) Advance to the Temple for marketing expenses	\$	(400,000)
(3) Assessed damages in respect of running operating costs to be incurred by the Temple	\$	(122,600)

In the event that the assessed damages do not exceed \$122,600, the Temple shall have to pay the net figure to the Partnership.

Orders

14 Kek, Hok Mee and Hok Chung are liable to pay, on the basis of joint and several liability, the sum of \$2,284,180 to the Partnership. As PLD is entitled to this sum from the Partnership, it follows that Kek, Hok Mee and Hok Chung ought to pay the sum of \$2,284,180 to PLD and I so order.

15 In the event that the damages assessed pursuant to the order in [64] of the Judgment is less than \$122,600, the Temple shall pay such difference to the Partnership. Parties are at liberty to apply for further orders in relation to any difference between the assessed damages and the sum of \$122,600.

16 In [72] of the Judgment, I had ordered the Temple to pay \$54,000 to PLD being money had and received. The Temple had subsequently paid this sum to its solicitors as stakeholders and I order it to be paid over to PLD forthwith.

Costs

17 On the question of costs, I note that the plaintiff, PLD, had succeeded in the bulk of the claims against Hok Mee, Kek and Hok Chung which included breach of fiduciary duty and the corporate veil was pierced. In my view, bearing in mind that there was a considerable degree of overlap, the issue of the partnership dispute took up about two-thirds of the trial and the issue of overpayments to Hok Chung took up about one-third. I therefore order Hok Mee and Kek to pay PLD's costs on the standard basis. I also order Hok Chung to be jointly and severally liable for one-third of PLD's costs, in view of the reduced role of Hok Chung in the suit. I further order Hok Mee and Kek to pay two-thirds of the costs of the Temple on the standard basis. All costs are to be taxed unless agreed.

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