

Lee Siong Kee v Beng Tiong Trading, Import and Export (1988) Pte Ltd
[2000] SGHC 132

Case Number : Suit 1594/1999
Decision Date : 07 July 2000
Tribunal/Court : High Court
Coram : Lim Teong Qwee JC
Counsel Name(s) : Gregory Vijayendran and Julia Eng (Wong Partnership) for the plaintiff; Stanley Wong (Jing Quee & Chin Joo) for the defendant
Parties : Lee Siong Kee — Beng Tiong Trading, Import and Export (1988) Pte Ltd

JUDGMENT:

Grounds of Judgment

1. This is a claim by the plaintiff ("Mr Lee") for damages for breach of certain terms of an agreement in writing dated 10 August 1993 and also for wrongful repudiation of the agreement by reason of those breaches. There is an alternative claim for a *quantum meruit*. The claims are denied by the defendant ("Beng Tiong") which counterclaims a sum paid as an advance in pursuance of the agreement. At the conclusion of the trial I dismissed the claims and gave judgment for Beng Tiong on its counterclaim. Mr Lee has given notice of appeal and applied for directions with a view to expediting the appeal and I understand that directions have been given to dispense with compliance with the rule for grounds of judgment to be certified. These are nevertheless my written grounds.

2. The agreement dated 10 August 1993 ("agency agreement") recited that:

"(a) The estate of [Shaik Ahmad] (hereafter referred to as 'the Estate') is well possessed of and entitled to the lands and premises described in the Schedule hereto (hereinafter referred to as 'the Properties').

(b) [Mr Lee] has been in contact with the beneficiaries of the Estate of the deceased (which expression 'the beneficiaries' shall mean and include the beneficiaries identified in the Will of the abovenamed deceased and if not surviving at the date of this Agreement their heirs in title including their duly appointed legal personal representatives and/or duly appointed attorneys) and [Beng Tiong] expects to enter into Agreement for Sale of the Properties by the Estate upon the Estate's successful application in Originating Summons No 489 of 1993 for substitution of the trustees of the Estate of the abovenamed deceased.

(c) [Beng Tiong] wishes to seek the assistance of [Mr Lee] in working with the legal personal representatives of the Estate and [Mr Lee] has agreed so to do for the securing of [Beng Tiong's] purchase of the Properties on the terms hereinafter appearing."

3. The will identified the beneficiaries as "the persons or person who would at [the testator's] death have been entitled according to Mohamedan Law to [the testator's] estate and effects if [the testator] had died intestate". There were 14 beneficiaries at the date of the testator's death and they were his widow, 11 sons and two daughters. The testator Shaik Ahmad died on 15 July 1953 and probate of the will was granted to one of the four named executors leave being reserved to the others to prove the same but they have not done so. At the date of the agency agreement the Public Trustee was the trustee of the trusts of the will and all the properties were vested in him. The application by Originating Summons No 489 of 1993 was an application to appoint Syed Ali Redha Alsagoff ("Syed Ali") and Robert Ng Jer Leong ("Mr Ng") to be trustees in place of the Public Trustee. The expression "beneficiaries" as used in the agency agreement included the 14 immediate beneficiaries and the "heirs" and representatives of those immediate beneficiaries who had died. To avoid confusion I shall use the expression with the same meaning except where the context shows otherwise.

4. Clause 1.1 of the agency agreement provides:

"In pursuance of the said agreement and in consideration of the sum of Dollars Four Million Six Hundred and Forty Thousand (\$4,640,000.00) in the manner herein provided [Mr Lee] hereby agrees to work with and provide all necessary links and contacts with the legal personal representatives of the Estate in the manner herein provided and for the securing of the contract for sale of the Properties by the Estate to [Beng Tiong] for the sale price of Dollars Eight Million Two Hundred and Sixty Thousand (\$8,260,000.00)."

There were in fact no *legal personal representatives* as the properties were already vested in the Public Trustee upon the trusts of the will but I assume in favour of Mr Lee (without deciding the point which was not taken by Beng Tiong) that the expression included or meant the persons in whom the properties were vested. Beng Tiong was willing to pay \$12.9m for the properties but the estate or the trustees would only receive \$8.26m. Mr Lee would receive \$4.64m for his services.

5. The \$4.64m was to be paid as provided by cl 1.2:

"(a) immediately on the signing of [the agency agreement] the sum of \$250,000.00 ...;

(b) the balance of the agreed consideration \$4,390,000.00 less any advances made by [Beng Tiong] to [Mr Lee] under Clause 2.3 herein to be paid on completion as provided in Clause 2.4 herein."

6. Clauses 2.2, 2.3 and 2.4 provide:

"[Beng Tiong] undertakes:-

2.2 that [Beng Tiong], including [Beng Tiong's] agents and employees, shall not interact with any of the beneficiaries or the legal personal representatives of the Estate or the Solicitors of the Estate without first obtaining the prior consent of [Mr Lee];

2.3 if [Mr Lee] requests in writing (strictly for purpose of enabling [Mr Lee] to ensure the sale of the Properties to [Beng Tiong]) to make advances to [Mr Lee] up to the maximum limit of Dollars One Hundred and Fifty Thousand (\$150,000.00) within the period after 1st day of November 1993 and before 15th day of July 1994;

2.4 to instruct [Beng Tiong's] solicitors to pay by way of Cashier's Order the sum of \$4,390,000.00 LESS advances if any up the limit of \$150,000.00 that may have been made under Clause 2.3 above to [Mr Lee] on the day of completion of the sale of the Properties by the legal personal representatives of the Estate to [Beng Tiong] or the assigns of [Beng Tiong];"

7. Clause 3.8 provides:

"[Mr Lee] undertakes:-

3.8 to secure the Estate's execution to the Sale and Purchase Agreement for the sale of the Properties to [Beng Tiong] at the agreed sale price \$8,260,000.00 not later than the 15th day of July 1994 (hereinafter referred to as 'the deadline') failing which [the agency agreement] shall become null and void and [Mr Lee] shall refund within fourteen (14) days after the sale of the Properties to [Beng Tiong] is aborted all monies that have been paid by [Beng Tiong] to [Mr Lee] under the provisions of [the agency agreement];"

8. The statement of claim alleges the agency agreement and refers to these and other terms and also alleges that:

"It was an implied term of the [agency agreement] that [Beng Tiong] would pay to [Mr Lee] a reasonable sum for the work done by [Mr Lee] pursuant to the Agent's Work Term in the event of [Beng Tiong's] breach of the [agency agreement] ('the Reasonable Sum Term').

Particulars

The term is implied by law as it is necessary in order to give the [agency agreement] business efficacy."

The "Agent's Work Term" refers to the several provisions of cl 3 which describe in some detail the obligations of Mr Lee.

9. When the agency agreement was signed Beng Tiong paid \$250,000 to Mr Lee as an advance under cl 1.2 and subsequently a further sum of \$110,000 was paid as an advance under cl 2.3. By letters dated 3 November 1993 and 14 January 1994 Mr Lee requested an advance of another \$40,000 and if this is paid to him then the amount advanced under cl 2.3 would be \$150,000 which is the stipulated limit. It is alleged in the statement of claim that in breach of the term under cl 2.3 Beng Tiong failed, refused or otherwise neglected to effect payment of the balance of \$40,000.

10. Paragraph 8 of the statement of claim states:

"In breach of the Non-Interaction Term, [Beng Tiong] interacted with the Beneficiaries and the legal personal representatives of the Estate without first obtaining the prior consent of [Mr Lee]."

The "Non-Interaction Term" refers to the provisions of cl 2.2. The particulars given in the statement of claim allege (1) that Beng Tiong's managing director Ms Chiang had met some of the beneficiaries in or about November 1993 and that Ms Chiang had admitted to this to Mr Lee also in or about November 1993 and (2) that Beng Tiong had instituted proceedings in Suit No 1255 of 1996 against the beneficiaries "on the basis of a written agreement dated 12 August 1993 with the beneficiaries".

11. The "agreement" dated 12 August 1993 is a document signed by 12 of the beneficiaries expressing their consent to the sale of the properties by Syed Ali and Mr Ng to Beng Tiong for \$8.26m on the terms of a draft agreement annexed to it. It is not disputed that after it had been signed it was left with the Indonesian *Notaris* in whose presence it appears to have been signed.

12. The statement of claim goes on to allege that the breaches of the two terms constituted repudiatory breaches of the agency agreement and that Mr Lee "on 28 January 1995 accepted the aforesaid Repudiatory Breaches ... and elected to terminate" the agency agreement.

13. Finally it is alleged that:

"Further or in the alternative, at all material times after the [agency agreement], [Mr Lee] carried out various work and/or performed various services for [Beng Tiong] pursuant to the Agent's Works Term."

I assume in Mr Lee's favour that the "Agent's Works Term" refers to the provisions of cl 3 previously referred to as the "Agent's Work Term". Particulars of the work done are given. Mr Lee claims a reasonable sum for his work which he puts at \$2,900,571.40.

14. In its defence Beng Tiong admits the agency agreement and its terms. It denies the implied term alleged as regards the payment of a reasonable sum in the event of Beng Tiong's breach of the agency agreement and says that even if there was a breach of the agency agreement (which it denies) the agency agreement precluded payment of such sum.

15. Beng Tiong admits the request for the advance of \$40,000 by the letters dated 3 November 1993 and 14 January 1994 but alleges that on a true construction of cl 2.3 or "alternatively, that it is implied from clause 2.3 that [Mr Lee] must satisfy [Beng Tiong] that any advance of moneys sought under clause 2.3 must be strictly to ensure the sale of the properties to [Beng Tiong] before [it] is obliged to disburse the same". Beng Tiong's defence is that the condition had not been satisfied and it was not obliged to advance the \$40,000.

16. Beng Tiong admits to Ms Chiang having met some of the beneficiaries over a meal at an Indonesian restaurant in Singapore towards the end of 1993 but denies that it acted in breach of the agency agreement as alleged. It says in the alternative that even if there was a breach Mr Lee has suffered no damage or loss. It admits the proceedings in Suit No 1255 of 1996 but denies any breach of the agency agreement. Beng Tiong denies any repudiatory breach and says alternatively that Mr Lee has suffered no damage or loss.

17. In his defence to the counterclaim for the return of the advances made Mr Lee says that he was hindered and prevented from securing the estate's execution of the agreement for sale of the properties to Beng Tiong at the agreed price of \$8.26m by reason of the breaches alleged and Beng Tiong was not entitled to take advantage of its own "(repudiatory) breach(es) ... to rely on, or enforce, clause 3.8 of the [agency agreement]".

Repudiatory breach

18. I think it is convenient that I deal with this claim first. It is alleged in the statement of claim that by cl 3.8 of the agency agreement Mr Lee undertook to secure the execution by the estate of the agreement for sale of the properties to Beng Tiong not later than 15 July 1994 failing which the agency agreement was to become null and void. It is clear from the statement of claim that by that date Mr Lee had not secured the execution of the sale agreement by the estate.

19. It is established law that where a party has repudiated a contract by breach the aggrieved party has an election to accept the repudiation or to affirm the contract. See *Vitol SA v Norelf Ltd, The Santa Clara* [1996] AC 800 at p 810. The alleged breach by interacting with the beneficiaries took place in November 1993 and Mr Lee knew about it then. If this was a repudiatory breach then he was entitled to put an end to the agency agreement and at once treat himself as discharged from further performance. He must do so before the time for performance or further performance on his part expires.

20. Mr Lee requested an advance in November 1993 and again in January 1994. He did this with the knowledge that Beng Tiong had as he alleged interacted with the beneficiaries in repudiatory breach of the agency agreement. Far from accepting the alleged repudiation he was quite clearly affirming the agency agreement.

21. It is also alleged that by cl 2.3 Beng Tiong would make advances of up to \$150,000 within the period 1 November 1993 and 15 July 1994. The alleged repudiatory breach by not making the advance would have occurred at the latest when the period expired which is also the same time by which Mr Lee himself was to perform or complete performance of his part of the agency agreement. In these circumstances he should have accepted the repudiation then.

22. It is alleged in the particulars of the work carried out and services performed by Mr Lee pursuant to the agency agreement that he instituted legal proceedings against certain parties in Suit No 1550 of 1994. This action was commenced by writ issued on 22 September 1994 and judgment in default of appearance was entered against all but one of the defendants on 28 January 1995. By carrying out the work and performing the services pursuant to the agency agreement as alleged Mr Lee could not have accepted the alleged repudiation.

23. Although as pleaded time for performance on Mr Lee's part expired on 15 July 1994 it was nevertheless put to him under cross-examination that it was extended to 31 December 1994 and he agreed. There was no application to amend the pleadings but even if the pleadings are amended to allege this then quite clearly by carrying out the work and performing the services as alleged Mr Lee has affirmed the agency agreement.

24. In my judgment the statement of claim discloses no reasonable or probable cause of action in respect of the repudiatory breaches alleged whether the breaches are considered severally or cumulatively.

Advances

25. On 3 November 1993 Mr Lee wrote to Beng Tiong:

"This is the written request pursuant to clause 2.3 of the agreement between us dated 10th August 1993. In order to enable me to perform work and pay expenses to ensure the sale of the Properties referred to in the agreement to your Company, please pay to me the balance of the advances referred therein. As you have already advanced to me the sum of \$110,000, the balance of the advances which is the subject of this request is \$40,000."

It is not disputed that Beng Tiong had advanced \$110,000 and that there was a balance of \$40,000 to be advanced under cl 2.3. Beng Tiong did not respond to this request.

26. On 14 January 1994 Mr Lee wrote to Beng Tiong:

"I refer to my letter dated 3rd November 1993 and note that you have, to date, not responded to my request to pay to me the balance of the advance requested.

This letter is to request and demand that you comply with the provisions of clause 2.3 of our agreement dated 10th August 1993 and pay the balance of the advance stipulated in the agreement to me within a period of seven days from the date of this letter."

It is not disputed that no part of the \$40,000 requested was advanced in response to either of these letters or at all.

27. What cl 2.3 provides is an undertaking by Beng Tiong to make the advance "if [Mr Lee] requests in writing (strictly for purpose of enabling [Mr Lee] to ensure the sale of the Properties to [Beng Tiong])". The only condition for the advance is Mr Lee's written request. The defence is that Mr Lee must *satisfy* Beng Tiong as to the purpose *before* Beng Tiong was obliged to make any advance. That is quite simply not what cl 2.3 provides. Mr Lee has made a written request for the advance under cl 2.3. He specifically referred to this clause. He went on to say what the purpose was and the purpose was well within the terms of cl 2.3.

28. I see no reason to construe cl 2.3 in the way pleaded in Beng Tiong's defence. No mention is made anywhere in the agency agreement as to any requirement to satisfy Beng Tiong as to the purpose of the advance and to do so before it was obliged to make the advance. I see no reason to imply such a term. The agency agreement will not be unworkable without it. Such a term is contrary to the express provisions of cl 2.3.

29. In my judgment Beng Tiong failed, refused or otherwise neglected to effect payment of the balance of \$40,000 as an advance in breach of cl 2.3 of the agency agreement as alleged in the statement of claim.

Non-interaction

30. Mr Lee said in his affidavit:

"On or about November 1993, Ms Maggie Chiang, in the presence of Ms Patricia Lim and one Ricky

Chua, the Managing Director of Property Workshop Pte Ltd admitted to me in the offices of Property Workshop Pte Ltd that she had met with some of the beneficiaries on or about November 1993 together with Ms Patricia Lim and the Managing Director of Property Workshop."

He was not cross-examined on this but Ms Chiang said under cross-examination that she disagreed with this.

31. Ms Chiang said in her affidavit:

"I did meet a few of the alleged beneficiaries, including the one named Quresh. However, this was a purely social engagement and was arranged by [Mr Lee's] agent, Ms Patricia Lim. I had met the said person together with the other alleged beneficiaries in Indonesia through the arrangement of [Mr Lee] and had been invited to a meal with them. When some of the alleged beneficiaries were in Singapore towards the end of 1993, I returned the courtesy by inviting them to a meal at an Indonesian restaurant at Centrepont

During the meeting, Quresh openly told me, through a member of my staff I invited along as interpreter, that the beneficiaries or, at least, the majority, for whom he claimed to speak, had no intention of agreeing to sell the shophouses to [Beng Tiong]."

Under cross-examination she said she met Mr Quresh and another person whose name she did not know. She said she only met two of the beneficiaries and what she said in her affidavit about having met *some* of the beneficiaries was not correct.

32. Ms Chiang said:

"Q: When you met these two beneficiaries. Patricia Lim present?

A: Yes.

Q: Ricky Chua present?

A: Yes.

....

Q: You first obtained prior consent of plaintiff before meeting them?

A: No."

Neither Ms Lim nor Mr Chua was called to give any evidence.

33. "To interact" is to act reciprocally or to act on each other. Ms Chiang invited Mr Quresh and another beneficiary to a meal at a restaurant in a public place. She made no secret of it. Mr Chua and Ms Lim were present. Upon that occasion Mr Quresh told her that the beneficiaries or the majority had no intention of agreeing to sell the properties to Beng Tiong. I think Ms Chiang did act on Mr Quresh and the other beneficiary whom she invited to the restaurant. I think it was the occasion that prompted Mr Quresh to say what he did.

34. Ms Chiang went on to say under cross-examination:

"Q: Meeting with two beneficiaries. You subsequently informed plaintiff of this meeting?

A: No.

Q: AB-236. You received?

(Note: AB-236 is Mr Lee's letter of 3 November 1993 requesting the advance of \$40,000.)

A: Yes.

Q: After receiving what you did?

A: Contacted plaintiff.

Q: What you said to him?

A: I told him I already paid him \$110,000. However he did nothing and now he was asking another \$40,000. How I was to explain to my company.

Q: What he said in response?

A: Said he needed this money so that he could liaise with beneficiaries."

Ms Chiang had paid \$110,000. She had also paid \$250,000 when the agency agreement was signed. Until she received the request for another \$40,000 there is no evidence that she thought Mr Lee had done nothing. I think when Ms Chiang told him that she had by then met Mr Quresh in Singapore. She would have been influenced by what Mr Quresh had told her when she told Mr Lee that he had done nothing.

35. I think Ms Chiang did interact with Mr Quresh and I find accordingly. She did not obtain Mr Lee's prior consent to do so. In my judgment Beng Tiong has by its managing director as its agent or employee interacted with Mr Quresh and another beneficiary in breach of cl 2.2 of the agency agreement.

Damages

36. There is no allegation in the statement of claim that Mr Lee has suffered any loss or incurred any expense as a consequence of the breach of cl 2.2 or cl 2.3. However there is a claim for damages apart from a claim for damages for repudiatory breaches.

37. Mr Lee's primary obligation was to secure the execution by the estate of Shaik Ahmad of the agreement for the sale of the properties to Beng Tiong. See cl 3.8 of the agency agreement. Although cl 3.8 refers to the estate it is not disputed that the agreement would have to be signed by the persons in whom the properties were vested whether as legal personal representatives or as trustees. When the agency agreement was signed the properties were vested in the Public Trustee but it is clear that the intention of the parties as appears from the agency agreement was that the agreement for sale of the properties was to be signed by new trustees.

38. As recited in the agency agreement the agreement for the sale of the properties by the estate was to be signed "upon the Estate's successful application in Originating Summons No 489 of 1993 for substitution of the trustees of the Estate". As noted above that was an application to appoint Syed Ali and Mr Ng to be trustees in place of the Public Trustee. Unless these two new trustees were appointed in place of the Public Trustee there would be no agreement for sale of the properties to Beng Tiong to be secured by Mr Lee.

39. The proceedings in Originating Summons No 489 of 1993 have not been produced before me but Mr Lee said under cross-examination:

"Q: Lee (2). Para 42. By time you asked for \$40,000 true beneficiaries already turned hostile to whole deal?

A: Yes.

Q: True by then application OS 489 of 1993 to appoint new trustees unsuccessful? By time you first asked for \$40,000?

A: To best of my recollection, no. Believe application withdrawn between 3/11/93 and 14/1/94.

Q: True application withdrawn due to opposition by some beneficiaries?

A: True. By two beneficiaries who did not sign agreement."

The "agreement" which two of the beneficiaries did not sign is the document dated 12 August 1993 signed by 12 of the beneficiaries expressing their consent to the sale of the properties by the proposed new trustees to Beng Tiong. Mr Lee's evidence here is that the application was withdrawn between 3 November 1993 and 14 January 1994.

40. In his affidavit filed on 4 April 1995 in Suit No 1550 of 1994 he said:

"On or about September 1993, Quraisj [also spelt 'Quresh'] and four of the defendants: Harits, Abu Bakar, Ishak and Abdul Azis began taking various steps to cancel the appointment of the Attorneys, the proposed Trustees and withdraw Originating Summons No 489 of 1993. Quraisj also wrote a letter dated 14 August 1993 dismissing the appointment of [Mr Ng] and [Syed Ali]."

The evidence in this affidavit appears to be that in or about September 1993 Mr Quresh and four of the defendants had begun taking steps to withdraw the application.

41. In the same affidavit Mr Lee also said:

"On 3 August 1994, Quraisj on behalf of the defendants, instituted proceedings by way of Originating Summons No 745 of 1994 seeking inter alia to appoint the 6th, 7th, 8th and 10th defendants as proposed new trustees of the Will of the Testator in place of the Public Trustee"

There were 11 defendants in the action and all of them including the four proposed new trustees were 11 of the 12 beneficiaries who had signed the document dated 12 August 1993. Mr Quresh was one of the defendants.

42. In Originating Summons No 745 of 1994 Ms Animah bte A Gani said in her affidavit filed on 19 October 1994:

"The [Public Trustee] would agree to relinquish its duty as trustee of the Testator's estate only upon the following:-

a. Grant of Letters of Administration must be taken out for the estates of the deceased immediate beneficiaries of the Testator.

b. The duly appointed administrators of the estates of the deceased immediate beneficiaries of the Testator to obtain the consent of all the beneficiaries that they are in agreement to the appointment of new trustees for the estate of the Testator."

She pointed out in her affidavit that eight of the immediate beneficiaries had died and letters of administration had been granted in respect of the estates of only two of them but the grant had not been extracted and in respect of the estates of five no

application had been made for a grant of representation and in the case of the remaining one a limited grant had been made to Syed Ali as attorney but his appointment as attorney had been revoked.

43. I come back now to Originating Summons No 489 of 1993 for the appointment of Syed Ali and Mr Ng in place of the Public Trustee. By the time the agency agreement was signed the application was not going to be successful. It was not only opposed by the two beneficiaries who had not signed the document dated 12 August 1993. Eleven of those who had signed the document had supported the application to appoint four of themselves as trustees in place of the Public Trustee in Originating Summons No 745 of 1994.

44. There is no evidence that anything had been done to have legal personal representatives in place in respect of the eight deceased immediate beneficiaries of Shaikh Ahmad. There is no evidence that anything had been done to identify the ultimate beneficiaries upon the death of the eight deceased immediate beneficiaries. An inquiry may well be required to ascertain these later beneficiaries and there may well be minority interests. There is no evidence that anything had been done to satisfy the Public Trustee's conditions. If Originating Summons No 489 of 1993 was proceeded with the Public Trustee would have taken the same position.

45. On 14 August 1993 all the 11 beneficiaries who were the defendants in Suit No 1550 of 1994 wrote to the Public Trustee. They referred to documents signed by them and another beneficiary for the appointment of Syed Ali and Mr Ng as trustees and said:

"We hereby certify that all statements of PROXY / TRUSTEE APPOINTMENT, dated April 30, 1993 (the real date is February 8, 1993), therewith all the documents relating to such appointed, are CANCELLED and VOID; commencing from Saturday, August 14, 1993. We also herewith dismiss and revoke, commencing from August 14, 1993, all prior statements, one and others related to the aforesaid private trusteeship."

There were documents consenting to the appointment of Syed Ali and Mr Ng as trustees signed prior to 12 August 1993. Notwithstanding the difficulty with the language of the letter I think it is clear that all documents consenting to the appointment of Syed Ali and Mr Ng signed prior to 14 August 1993 were "cancelled" and "void".

46. The letter continued:

"After due consideration, eleven (11) of us, the heirs of the deceased, REQUEST that anything dealing with the estate of the deceased [SHAIK AHMAD], for the time being is still held by the PUBLIC TRUSTEE, NOT TO BE assigned to other people (private trustee), prior to our new, clear, and affirmed statement."

Copies of the letter appear to have been sent to this court and to several persons including Syed Ali and Mr Ng.

47. The application in Originating Summons No 489 of 1993 was opposed. The Public Trustee would have raised the same concerns as were raised in a similar application filed later. It was an application that was doomed to failure from the moment it was filed and certainly by 14 August 1993. It may or may not have been withdrawn only "between 3 November 1993 and 14 January 1994" as Mr Lee said under cross-examination but what is relevant is that the court has not appointed either Syed Ali or Mr Ng to be a trustee or trustees together with or without any other person and whether in Originating Summons No 489 of 1993 or in any other application. The failure occurred before the breaches of the agency agreement by Beng Tiong and not in consequence of any such breach.

48. The document dated 12 August 1993 has attached to it a draft agreement for sale of the properties. The draft agreement contains this term:

"The sale herein is conditional upon the Trustees having obtained approval from the High Court of the Republic of Singapore to the appointment of the Trustees as the legal personal representatives of

the Estate (hereinafter referred to as 'the said Order of Court').

PROVIDED ALWAYS that the Trustees shall do all in their means and powers to obtain the same and in the event that such approval are not obtained then this Agreement shall be null and void and of no effect and each party shall have no claim against the other. All monies paid to account of the sale herein shall be refunded to the Purchaser herein free from interest."

The "Trustees" are Syed Ali and Mr Ng. Even if the agreement for sale had been "secured" it would have failed as it was bound to and it would have been "null and void". There appears to be a confusion as the application to court is for the appointment of trustees and not legal personal representatives but the result would have been the same in any case. Neither Syed Ali nor Mr Ng would have acquired any right to sell the properties.

49. The sale would have to be sanctioned by the court if the sellers are selling as legal personal representatives of Shaikh Ahmad who died more than six years ago. If the sellers are selling as trustees upon trust for sale and one or more of the beneficiaries opposes the sale or is otherwise not competent to express his consent to it then an application to court would have to be made. In either case evidence of the value of the properties at the date of the hearing would have to be adduced and I cannot see that an order can be obtained either to sanction the sale or to empower the trustees to sell the properties to Beng Tiong for \$8.26m when Beng Tiong is willing to pay that price and another \$4.64m to Mr Lee to buy these properties.

50. In my judgment Mr Lee has not suffered any loss or incurred any expense in consequence of any of the breaches of the agency agreement by Beng Tiong or any loss or expense in respect of which he is entitled to damages.

Quantum meruit

51. Paragraph 12 of the statement of claim states:

"Alternatively to paragraphs 9 and 10 herein, notwithstanding the work done and services performed by [Mr Lee] pursuant to the Agent's Works Term as particularized in paragraph 11 herein, [Beng Tiong] [has] failed and refused to pay [Mr Lee] a reasonable sum or any sum at all. In the premises, [Beng Tiong] [is] in breach of the Reasonable Sum Term."

The "Reasonable Sum Term" is alleged in para 5. Paragraphs 9 and 10 contain allegations as to repudiatory breaches and their acceptance which have already been considered.

52. Counsel included in the bundle of authorities *Gold Coin Ltd v Tay Kim Wee* [1986] SLR 68. I heard no submissions on it but in that case the *quantum meruit* claim was contractual in nature. See at p 72. Lai Kew Chai J (delivering the judgment of the Court of Appeal) referred to *Way v Latilla* [1973] 3 All ER 759 and cited this passage from the speech of Lord Atkin at p 763:

"But, while there is, therefore, no concluded contract as to the remuneration, it is plain that there existed between the parties a contract of employment under which Mr Way was engaged to do work for Mr Latilla in circumstances which clearly indicated that the work was not to be gratuitous. Mr Way, therefore, is entitled to a reasonable remuneration on the implied contract to pay him quantum meruit."

The *quantum meruit* claim as pleaded is of a different nature. It is alleged to arise upon repudiatory breaches which have been accepted so that the agency agreement has been put at an end. See *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108. Lord Wright said at p 141:

"Such a claim is in the nature of a quasi-contractual claim. It is properly made in cases of contracts for

work and labour and the like, where the employer, who has got the benefit of part performance but before full completion has repudiated the contract (emphasis added), may be sued either for damages for breach or for restitution in respect of the value of the part performance which he has received."

The claim as pleaded is of this nature.

53. What Beng Tiong contracted to get under the agency agreement was an agreement for the purchase of the properties. It is plainly stated in para (b) of the recitals that Beng Tiong *expected* to enter into the agreement. Even if it has repudiated the agency agreement and the repudiation has been accepted it has not in the circumstances of this case got any benefit from any partial performance by Mr Lee. But as I have found Mr Lee affirmed the agency agreement and allowed time to expire without "securing" the agreement for sale and purchase of the properties.

54. Mr Lee has attempted to plead the claim as a contractual claim founded upon an implied term. I see no ground for implying such a term. The agency agreement is not unworkable without it. There is nothing in the agency agreement pointing to any obligation to pay Mr Lee anything other than the agreed fee for securing the agreement for sale and purchase of the properties. In my judgment there was no implied term as alleged and Beng Tiong was not in breach of any such term.

Counterclaim

55. The counterclaim is for the return of the money advanced. It is not in dispute that Mr Lee has received from Beng Tiong a total of \$360,000. Clause 3.8 clearly provides that Mr Lee was to secure the execution by the estate of the agreement for sale of the properties to Beng Tiong not later than 15 July 1994 failing which the agency agreement was to be null and void and he should refund to Beng Tiong all moneys paid to him under the agency agreement. It is alleged that time was extended to 31 December 1994.

56. Mr Lee's defence is that by reason of the breach of the terms as to advances and non-interaction he was "hindered and prevented" from securing the execution of the agreement by the estate for sale of the properties. I have found that the failure to secure the execution of the sale agreement was not caused by or consequent upon any such breach but by the failure of the application to appoint Syed Ali and Mr Ng as trustees in place of the Public Trustee and other circumstances before any such breach.

57. The defence also alleges that Beng Tiong cannot take advantage of its own repudiatory breaches. These are the same breaches of the terms as to advances and non-interaction but as characterised it appears that a distinct defence may have been intended. However I have found that the repudiation was not accepted and as noted above the breaches did not cause the failure to secure the execution of the sale agreement.

58. In my judgment the defence fails and Beng Tiong is entitled to recover the money it has advanced to Mr Lee.

59. For these reasons I dismissed Mr Lee's claim and gave judgment for Beng Tiong on its counterclaim.

Lim Teong Qwee

Judicial Commissioner

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