

Ong Leong Chuan v Ong Heng Chuan and Others
[2002] SGHC 126

Case Number : OS 1944/1999, SIC 600451/2002
Decision Date : 13 June 2002
Tribunal/Court : High Court
Coram : Belinda Ang Saw Ean JC
Counsel Name(s) : Plaintiff in person; Ranvir Kumar Singh (Kumar & Loh) for the first and second defendants; Andy Chiok and Ong Lee Woei (Michael Khoo & Partners) for the third defendant
Parties : Ong Leong Chuan — Ong Heng Chuan

Civil Procedure – Costs – Principles – Costs following the event – Whether circumstances justifying departure from normal rule – Whether fixing of costs fair and reasonable

Companies – Oppression – Commencement of proceedings under s 216 Companies Act (Cap 50, 1994 Ed) by plaintiff – Parties arriving at compromise agreement – Scheduling of terms of agreement to a Tomlin Order – Application by plaintiff to enforce compromise agreement – Whether to grant application – s 216 Companies Act (Cap 50, 1994 Ed)

Judgment

GROUND OF DECISION

1. The Plaintiff, Ong Leong Chuan, and the first three Defendants, Ong Heng Chuan, Ong Teck Chuan and Ong Boon Chuan are brothers.
2. On 16 December 1999, the Plaintiff as shareholder of the Tong Guan Food Products Pte Ltd, the 4th Defendant, commenced proceedings under s 216 Companies Act (Cap 50). Subsequently, an amicable resolution of the proceedings was reached and the terms of the compromise agreement were scheduled to a Tomlin Order ("the Compromise Agreement").
3. Unfortunately, the differences amongst the brothers did not end with the compromise settlement. The present dispute, which is one of many, is over the terms of the Compromise Agreement.
4. On 21 March 2002, the Plaintiff, acting in person, filed an application by way of summons-in-chambers entered no.6000451 of 2002 to enforce the Compromise Agreement.
5. On 2 May 2002, I granted leave to the Plaintiff to amend the date of the Tomlin Order to read as 26 July 2000 instead of 17 July 2000. Insofar as the other prayers were concerned, I dismissed the Plaintiff's application with costs fixed at \$800.00 to the 3rd Defendant, Ong Boon Chuan ("Boon Chuan"). I now set out the grounds of my decision.
6. The Plaintiff's appeal is against the dismissal of prayers 2 to 6 of his application and costs.

Prayers 2 and 3 of the application

7. Prayer 2 of the Plaintiff's application was for an order to compel the 3rd Defendant, Boon Chuan, to observe Clause 8 of the Compromise Agreement and to transfer 380,000 shares in the 4th Defendant to the Plaintiff as he had made part payment in the sum of \$190,000 for those shares in accordance with the terms of Clause 7.

8. Clauses 7 and 8 read as follows:

"7. The plaintiff shall purchase from the 3rd defendant, and the 3rd defendant shall transfer, 380,000 shares in Tong Guan which had been allotted to the plaintiff pursuant to the October 1999 Rights Issue but which had not been subscribed for by him, for a total consideration of \$380,000 to be paid to the 3rd defendant as follows:

a. as to \$190,000 within 8 weeks of this order; and

b. as to the balance of \$190,000 on the completion of the sale of all his shares in the company to the 1st to 3rd defendants or any of them as they may so decide. This payment shall be set-off against the sale proceeds of the plaintiff's shares.

Provided that if the plaintiff shall default in the

payment of the sum of \$190,000 to the 3rd defendant within the prescribed period of 8 weeks from the date of this Order, the plaintiff shall be deemed to have declined to purchase the said 380,000 shares from the 3rd defendant, and he shall have no claim whatsoever on the said shares. The sale of all his shares to the defendants or such of them pursuant to clause 1 shall accordingly be less the 380,000 shares.

8. On receipt from the plaintiff of the sum of \$190,000 the 3rd defendant shall transfer the 380,000 shares to the plaintiff who shall thereupon execute a transfer of those shares in escrow and deliver the transfer form(s) and the share certificate(s) to his solicitors M/s Hee Theng Fong & Co., to be held by the said solicitors as stakeholders pending

completion of the
sale and
purchase. The
transfer forms
shall be prepared
by the company
secretary of Tong
Guan."

9. Clause 7(a) does not stipulate the mode of payment. Payment could be made in any commercially acceptable form.

10. The effect of a stipulation as to time depends on the true construction of Clause 7. The proviso to Clause 7 deals with the consequence of a default in payment. If there is non-payment by the appropriate time specified, the Plaintiff is treated as having declined to purchase the 380,000 shares.

11. If part payment for those 380,000 shares were made in accordance with Clause 7(a), then the provisions of Clause 8 would come into play.

12. At the material time, M/s Hee Theng Fong & Co represented the Plaintiff. It is evident from the firm's letter of 5 October 2002 that the due date for payment of \$190,000 pursuant to Clause 7(a) was undeniably 20 September 2000: see exhibit marked "OBC-26" to affidavit of Boon Chuan filed on 18 March 2002 in Originating Summons no. 100 of 2002. At the hearing, the Plaintiff argued for the date of the Tomlin Order to be 27 July 2000 so that the last day for payment would fall on 21 September 2000. I agreed with Counsel for Boon Chuan, Mr. Andy Chiok, that the last day for payment under Clause 7(a) was 20 September 2000. I should mention that in Skeletal Arguments prepared in support of the Plaintiff's request on 8 May 2002 for further arguments, he conceded that the last day for payment of \$190,000 was 20 September 2000.

13. Relevant to the computation of time in Clause 7(a), is naturally the date of the Tomlin Order which I decided was 26 July 2000. The Plaintiff is not appealing against this part of the order.

14. On 20 September 2000, M/s Hee Theng Fong & Co tendered a cheque no. 341525 drawn on United Overseas Bank Limited ("UOB") in favour of Boon Chuan for \$190,000 in purported performance of Clause 7(a). M/s Michael Khoo & Partners received the cheque after office hours. The cheque was presented for payment the next working day. The cheque was dishonoured and Boon Chuan learned about that on 27 September or thereabouts. On 29 September, M/s Michael Khoo & Partners gave notice of dishonour to M/s Hee Theng Fong & Co.

15. It transpired that the next day, after the cheque was tendered on 20 September 2000, the Plaintiff deposited into Boon Chuan's bank account \$190,000 in cash. The Plaintiff did that because he was not allowed to operate his UOB account as it was subject to a mareva injunction order dated 9 February 2000 made in Suit no. 1632 of 1999: see 8 of 4th affidavit of Boon Chuan filed on 18 March 2002 in Originating Summons no. 100 of 2002.

16. Mr. Chiok submitted that the cash payment was unknown to M/s Michael Khoo & Partners and Boon Chuan. They learned about it from M/s Hee Theng Fong & Co's letter dated 30 September. Mr. Chiok argued that given the dishonoured cheque and circumstances of the cash payment, the Plaintiff never intended to pay for the shares when the cheque was tendered on 20 September. He must have known that it would not be cleared.

17. It was unnecessary for me to find that the Plaintiff knew that the cheque would be dishonoured; had represented and induced the 3rd Defendant to believe that the cheque would be honoured when it was given and accepted on 20 September. On legal principles, the Plaintiff's purported payment by cheque was bad. In law, when the UOB cheque was offered for payment on 20 September, it amounted to a conditional payment of the amount of the cheque. Since the UOB cheque was not met on presentation, it did not constitute payment as required before time expired on 20 September. With the dishonour, payment was void ab initio. See **Tan Chong Keng v Vincent Lim Bak Keng** [1986] 2 MLJ 327 at 328; **Marreco & Others v Richardson** (1908) 2 KB 584 at 593; **DPP v Turner** (1974) AC 357 at 367-368.

18. The cash payment on 21 September 2000 was one day late. It was deposited in Boon Chuan's bank account outside the period of eight weeks specified in Clause 7(a).

19. The exchanges of correspondence showed that Boon Chuan never accepted the cash payment on 21 September. In fact through his lawyers, he returned the money, which the Plaintiff steadfastly refused to accept. As the matter stands, Boon Chuan's cheque for \$190,000 in favour of the Plaintiff is with M/s Hee Theng Fong pending resolution of this issue: see exhibit "BC-15" to 6th affidavit of Boon Chuan filed herein on 6 May 2002.

20. In the absence of timely payment, by virtue of the proviso to Clause 7, the Plaintiff is deemed to have decided not to purchase the 380,000 shares. Consequently, Boon Chuan was under no obligation to sell the 380,000 shares to the Plaintiff nor was he required to observe the provisions of Clause 8. I therefore dismissed prayers 2 and 3 of the application.

Prayers 4 and 5 of the application

21. By these two prayers, the Plaintiff sought to enforce the provisions of Clause 10.

22. Clause 10 reads as follows:

"10. Upon delivery of the share transfers and share certificates to the plaintiff's solicitors pursuant to clause 5, the defendants shall, subject to the consent of the financial institutions concerned, procure the plaintiff to be discharged from all guarantees signed by him and financial obligations

undertaken by him
in connection with
facilities granted
to Tong Guan and
its subsidiaries
wherein monies
utilised from such
facilities were
duly authorised
and used for the
business of Tong
Guan and its
subsidiaries ("the
said monies"). The
defendants

(except the 3rd
defendant) shall
procure Tong
Guan and its
subsidiaries to
indemnify the
plaintiff in respect
of any claim that
may be made in
respect of the
said monies. "

23. In a related application, summons-in-chambers entered no. 600081 of 2002, which came up for hearing on 5 April 2002, I ordered the share certificates and duly signed blank share transfer forms envisaged in Clause 5 be held by M/s Kumar & Loh as stakeholders in place of M/s Hee Theng Fong who had ceased to act for the Plaintiff.

24. Both Mr. Kumar, Counsel representing 1st and 2nd Defendants, and Mr. Chiok contended that the events giving rise to the operation of Clause 10 had not arisen in that the Plaintiff had not yet fully complied with Clause 5 as varied.

25. Mr. Kumar informed the court that M/s Kumar & Loh as stakeholders had not received from the Plaintiff all the share certificates and duly signed blank share transfer forms. Mr. Kumar's position was that certificates for 380,000 shares remained outstanding whereas by Mr. Chiok's reckoning, the certificates should be for 180,000 shares.

26. For the purpose of this application, I was satisfied that so long as there were outstanding share certificates and duly signed blank share transfer forms to be handed over to the stakeholders, the application was pre-mature. There was no need for me to deal with Boon Chuan's challenge to the Plaintiff's statutory declaration on missing certificates representing 300,000 shares or the actual number of share certificates still to be handed over to the stakeholders. I accordingly dismissed prayers 4 and 5.

Prayer 6 of the application

27. By Clause 11, the shares are to be valued by M/s Ernst & Young. The parties were required to

sign an appointment letter. Failing the appointment of M/s Ernst & Young, under Clause 11 the court would appoint an independent valuer.

28. The Plaintiff in prayer 6 of his application wanted an order appointing an independent valuer because the 1st to 3rd Defendants had not signed the appointment letter.

29. Mr. Kumar informed the court that the Plaintiff had just signed the appointment letter and that he would be meeting the 1st and 2nd Defendants to collect their signatures. Thereafter, the appointment letter would be handed over to Mr. Chiok for Boon Chuan's signature. In the circumstances, there was no disagreement as such to trigger the operation of Clause 11.

30. I dismissed prayer 6 of the application as it was made pre-maturely.

31. Only Mr. Chiok pressed for costs. Since there was no particular circumstance warranting a departure from the normal order that the unsuccessful party pays the costs, I awarded Boon Chuan costs fixed at \$800. The amount of costs fixed at \$800 was more than fair and reasonable for an application, which was argued for over an hour.

Sgd:

BELINDA ANG SAW EAN

JUDICIAL COMMISSIONER

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