IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1999] SGHC 164

Suit 1910/1998

Between

OCBC Wearnes & Walden Investments (Singapore) Limited
O'Connor's Properties Sdn Bhd (formerly trading as O'Connor's Engineering & Tading (Malaysia) Bhd)
SME Ventures Limited

… *Plaintiff*

And

Goh Shon Hai

… *Defendant*

And

Computer Measurement (S) Pte Ltd

… *Third Party*

GROUNDS OF DECISION

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OCBC Wearnes & Walden Investments (Singapore) Limited and Others v Goh Shon Hai (Computer Measurement (S) Pte Ltd, Third Party)

[1999] SGHC 164

Suit 1910/1998
Choo Han Teck JC
23 June 1999

JUDGMENT:

ORAL JUDGMENT

1. The parties have applied for the interpretation by the court of the meaning and application of the warranty contained in clause 13 of Schedule 3 to the Subscription Agreement dated 6 September 1994 executed by the plaintiffs, the defendant and the third party.

2. Clause 5(A) of the agreement sets out the following term (with the plaintiffs described as "the Investors", the defendant as "the Existing Shareholder" and the third party as "the Company"):

> "5. WARRANTIES AS TO THE GROUP COMPANIES (A) Warranties as to the Group Companies: The Existing Shareholder and the Company hereby jointly and severally warrant and undertake to and with the Investors and their respective successors in title (with the intent that the provisions of this Clause shall continue to have full force and effect notwithstanding completion) in the terms set out in Schedule 3 to this Agreement, subject only to:- (i) any exception fairly

> disclosed in the Disclosure Letter or expressly provided for under the terms of this Agreement; and (ii) any matter or thing hereafter done or omitted to be done at the request in writing or with the prior written approval of the Investors. In connection with the foregoing, the Existing Shareholder and the Company shall deliver the Disclosure Letter to the Investors not later than the date hereof, failing which the said qualifications shall have no effect. The said warranties and undertakings shall be separate and independent and save as expressly otherwise provided shall not be limited by reference to any other paragraphs of the said Schedule 3 to this Agreement or by anything in this Agreement." Clause 13 sets out the warranty in question as follows: "13. Book debts Save as disclosed in the Audited Accounts and/or the Unaudited Accounts, none of the book debts which are included in the Audited Accounts or which have subsequently arisen have been outstanding for more than six months from their due dates for payment and all such debts have realised or will realise in the normal course of collection their full value as included in the Audited Accounts or in the books of the relevant Group Company after taking into account the provision for bad and doubtful debts made in such Audited Accounts."

3. In interpreting a contract term, the basic approach is to gather the meaning from a literal reading of the term as it is worded. Sometimes, that may not be possible and thus the court may employ various principles of interpretation. One such principle is that if there is any ambiguity it would be resolved against the maker of the term. Another is that if a literal interpretation will lead to an absurd meaning then the court will depart from so doing and read it in the context of the agreement to see what reasonable meaning the parties must have intended. In any case, a term of a written contract must be read in the context of the entire agreement in order that the agreement may be given its full and useful effect. The parties would not be permitted to introduce oral evidence in an attempt to persuade the court that a special meaning or effect should be ascribed to the term.

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4. In my judgment, clause 13 is fairly straightforward. In this term, the company and the existing shareholder warrant that the book debts shown in the Audited and Unaudited accounts (other than the bad debts or doubtful debts stated in those accounts) have not arisen more than six months from their due dates for payment. In other words, they have not been outstanding for more than six months from due payment.

5. Secondly, the company and the existing shareholder warrant that the book debts in the Audited and Unaudited accounts (except those stated to be bad or doubtful debts) have been paid or will be paid in full without having to employ special means to collect them. What constitutes a special means (or in the language of the term itself, outside "the normal course of collection") is a question of fact which is not relevant presently. The issues before me concern the meaning of the two parts and whether they are independent of each other.

6. The warranty in clause 13 or any part of it will not apply if that warranty or part of it is excluded by a "fair disclosure" in the Disclosure Letter which has been defined under clause 1 of the agreement as follows:

> "Disclosure Letter means the disclosure letter in a form acceptable to the investors disclosing information constituting exceptions to the warranties set out in Schedule 3 to this Agreement, dated on or before the date of this Agreement, from the Existing Shareholder and the Company to the Investors and to be delivered to the Investors prior to the execution of this Agreement."

7. In the Disclosure Letter dated 1 September 1994 the defendant (Existing Shareholder) signed as the managing director on behalf of the Company (third party) making a number of disclosures. Under paragraph (H) it disclosed as follows:

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> "List of debts which are overdue for more than 6 months as at 30 June 1994. The list was enclosed."

8. From the foregoing, the question that arises is whether the debts described in the list are excluded from the warranty in clause 13. Insofar as they are overdue that part is clearly excluded. However, the plaintiffs contend that it does not exclude the warranty that the debts have been or will be collected in full. Their contention is that the two parts of clause 13 are independent of each other and are thus, in effect, two separate warranties.

9. Reverting to clause 13, it will be seen that the key lies in the phrase "and all such debts" (my emphasis). The question is whether the word "such" refers to all the debts or only those which are warranted to be less than six months old.

10. I will note in passing that in considering clause 13, counsel for the plaintiffs in his written submission dated 22 June 1999 appears to assume that the key word in the clause is the word "and" preceding the phrase "all such debts". With respect, as I have pointed out, the key word is not "and", but "such".

11. At first glance, one might easily have connected the words "such debts" to all the book debts in the accounts (except those provided as bad or doubtful debts). Clause 13 refers to "none of the book debts" in the accounts. In the context, although it is a clear reference to all the book debts it is, however, connected inextricably to the description "have been outstanding for more than six months". Thus, what the clause really means is that the company and the Existing Shareholder warrant that the debts in the accounts are not more than six months old and such debts can be collected in full. The word "such" must, therefore, describe the debts which they warrant to be less than six months old. If any debt is excluded from the warranty that it is less than six months old, then

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there is no warranty that it can be collected in full. The warranty in clause 13 as it is worded, and read together with clause 5 and the Disclosure Letter, means that unless a debt is excluded by disclosure in the Disclosure Letter, it is deemed and warranted to be less than six months old and would be collected in full.

12. I, therefore, disagree with the plaintiffs' interpretation in paragraph 17 of their counsel's submission, that "on a literal interpretation of the Warranty, the Defendant had warranted that all the book debts in the Audited and Unaudited Accounts would realise in the normal course of collection their full value".

13. The warranty as to the recovery of the debts is tied to the warranty that the debts are less than six months old. It should be noted that otherwise, the draftsman would simply state that the company and the existing shareholder warrants that:

(i) the debts are less than six months old; and

(ii) the debts can be collected in full.

If the plaintiffs are right in that all the debts are warranted to be recoverable in full, it would be of no importance to the investors whether the debts are six months old or six years old.

14. Mr Foo for the third party submitted that the Disclosure Letter "does not completely exclude the operation of the warranty given under clause 13 of schedule 3 i.e. that the Disclosure Letter does not go so far as to have the effect that the warranty given in relation to the recovery of debts, is completely excluded for debts which are listed in the Disclosure Letter." Counsel went on to state that the accounts identify three categories of debts, namely, book debts,

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bad debts and debts written off. He concluded by arguing that "to construe the Disclosure Letter as being a complete exclusion to clause 13 would mean that no warranty is given as to the recovery of the debts set out in the Disclosure Letter. It must then follow that these debts ought to have been reflected in the Audited Accounts as a provision or bad debts which have been written off".

15. For the reasons given above, I do not think this conclusion is correct. A debt which is more than six months old is not necessarily a bad debt or one that has been written off. It may or may not be collected in full. Similarly, a debt which is less than six months old may or may not be recoverable in full. Thus the warranty as it is worded becomes useful. The object is to give the investors the assurance that debts which are less than six months old can and will be collected. In order to be fair to all parties, the warranty of age will not apply to those debts expressly stated in the Disclosure Letter. Thus, any debt not disclosed will be deemed to be less than six months old and be recoverable in full. That must be the clear and reasonable intention of all parties to the agreement.

16. In passing I will also make the following observations as they are relevant to the application of clause 13. First, the warranty in clause 13 has been embodied in the contract as a term of the contract, but a breach of this term does not permit the investors to rescind the contract unless it was a breach discovered before the completion date. This is provided in clause 5(E).

17. Thus, in the absence of an express provision that the party in breach is to pay the investors all such debts as could not be collected under the warranty, the normal rule that a breach of contract only gives rise to a claim for damages will apply. Hence, if there are debts which were not disclosed in the Disclosure Letter, and have not been collected, the warranty in clause 13 would have been

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breached and the only issues remaining would be whether the defendant is entitled to claim a contribution from the third party, and the quantum of damages that would be payable, and, of course, the question of costs.

- Sgd -

Choo Han Teck

Judicial Commissioner

Choo Han Teck JC

Lawrence Quahe with Chang Man Phing and Yeo Yen Ping [Harry Elias Partnership] for the plaintiffs
Lai Swee Fung and Sim Lin Piah [Toh Tan & Partners] for the defendant
Foo Maw Shen and Keoy Soo Khim [Yeo Wee Kiong & Partners] for the third party

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