Lim Quee Choo v Tan Jin Sin and Others
[2008] SGHC 133

Case Number : Suit 401/2007

Decision Date : 15 August 2008

Tribunal/Court : High Court

Coram : Chan Seng Onn J

Counsel Name(s) : Johnny Cheo Chai Beng (Cheo Yeoh & Associates LLC) for the plaintiff; Chelva R Rajah SC (Counsel) and Suppiah Thanaveloo (Thanga & Co) for the defendants; Seethapathy s/o Mannapuri Padmanabham (S Nabham) for the 3rd defendant

Parties : Lim Quee Choo — Tan Jin Sin; Lim Lee Chin; Dauphin Offshore Engineering & Trading Pte Ltd

Contract

15 August 2008

Chan Seng Onn J:

Introduction

1 This action arose out of an order of court made on 22 May 2007 by Lee Seiu Kin J. on hearing an application in OS 2188 of 2006/C ("OS") by Tan Jin Sin and Lim Lee Chin (the 1st and 2nd plaintiffs in the OS) in which Lim Quee Choo (the 1st defendant in the said OS) was ordered to pursue its counterclaim as if the matter had been commenced by writ of summons. In this OS, Dauphin Offshore Engineering & Trading Pte Ltd ("Dauphin") was the 2nd defendant.

2 As ordered, this suit no 401/2007/S was commenced by Lim Quee Choo as the plaintiff. The others, namely, Tan Jin Sin, Lim Lee Chin and Dauphin were respectively named the 1st, 2nd and 3rd defendants in this action.

3 Counsel for the plaintiff and the 1st and 2nd defendants informed me at the commencement of the trial that they would not be calling any witnesses. The parties agreed to rely entirely on an agreed statement of facts and argue only on the construction of two documents, namely, the "AGREEMENT MADE THIS 24TH DAY OF FEBRUARY 2005" ("agreement") and the "UNDERTAKING" ("undertaking") also of the same date.

4 In the form that the action now took, the plaintiff's claim was entirely against the 1st and 2nd defendants. The plaintiff no longer had any substantive claim against the 3rd defendant. If so, the plaintiff should not have added Dauphin as the 3rd defendant since the dispute no longer concerned Dauphin, and this had to be reflected in the final order for costs.

5 For convenience, I now set out below the three important documents, namely, the agreed statement of facts, the agreement and the undertaking.

Agreed statement of facts

AGREED STATEMENT OF FACTS

The Parties

1.1 The plaintiff and Wong Peng Luan are the co-administrators of the Estate of Jit Meng Deceased (collectively "the Administrators").

1.2 Tan Wah Leng ("Tan") and her husband Thian Kim Hoe ("Thian") were directors in the 3rd Defendants and together were the registered owners of a total of 8.5 million shares out of a total issued and paid up capital of 10 million shares in the 3rd Defendants.

1.3 The 1st defendant ("TJS") is the brother of Tan and the 2nd defendant ("LLC") is the wife of TJS. TJS and LLC are the registered owners of a total of 1 million and 500,000 shares respectively in the 3rd Defendants.

1.4 The lawyers representing the Plaintiff and the Administrators at that time were Messrs David Rasif & Partners ("DRP"). Messrs Rajah & Tann acted for Tan and Thian.

Circumstances leading to the Documents of 24th February 2005

2. The Administrators have obtained Judgment in Suit 232 against Tan and Thian and pursuant thereto commenced execution proceedings to seize the 8.5 million shares in the 3rd Defendants registered in the names of Tan and Thian by way of Writs of Seizure and Sale No 58 and 61/2004 ("the Writs").

3. The Sheriff had seized the 8.5 million shares and the next step in the execution proceedings under the Writs was for an advertisement to be published in the newspapers to elicit offers from the public for the 8.5 million shares.

4. The Documents that were signed on 24th February 2005 are as follows:-

(a) An Agreement signed by the Administrators, Tan and Thian as well as TJS and LLC ("the Agreement");

See page 1 to 3 of Agreed Bundle of Documents ("ABD")

(b) An Undertaking signed by TJS and LLC in favour of the Plaintiff ("the Undertaking");

(Page 4 of ABD)

(c) 2 Share Transfer Forms signed by TJS and LLC respectively in favour of the plaintiff, one for 1 million shares and the other for 500,000 shares;

(page 5 and 6 of ABD)

(d) Waiver of Pre-Emptive Rights signed by Tan and Thian;

(page 7 of ABD)

5. The 3rd Defendants were not party to the Documents.

6. DRP wrote to the sheriff to proceed with the advertisement of the sale of the 8.5 million shares by the letters of 05.04.2005, 06.04.2005, 08.04.2005 and 12.04.2005.

(page 12, 15, 18 and 23 of ABD)

7. Further DRP corresponded with M/s Rajah & Tann and the exchange of correspondence is as follows:-

(a) 17.03.2005 – from DRP to M/s Rajah & Tann *(page 8 of ABD);*

(b) 24.03.2005 – from DRP to M/s Rajah & Tann *(page 9 of ABD);*

(c) 30.03.2005 – from DRP to M/s Rajah & Tann *(page 10 of ABD);*

(d) 05.04.2005 – from DRP to M/s Rajah & Tann *(page 11 of ABD);*

(e) 06.04.2005 – from M/s Rajah & Tann to DRP *(page 13 of ABD);*

(f) 06.04.2005 – from DRP to M/s Rajah & Tann *(page 14 of ABD);*

(g) 07.04.2005 – from DRP to M/s Rajah & Tann *(page 16 of ABD);*

(h) 08.04.2005 – from DRP to M/s Rajah & Tann *(page 17 of ABD).*

8. On 11 April 2005, The Sheriff wrote to Singapore Press Holdings Pte Ltd enclosing the notice for sale and invitation to the public to bid for the shares to be published in the newspapers.

(page 19 to 21 of ABD)

9. On 11 April 2005, another creditor of the 3rd Defendants, Trios Corporation (S) Pte Ltd ("Trios") presented a winding up petition against the 3rd Defendants as well as bankruptcy proceedings against Tan and Thian. M/s Pillai and Pillai who were acting for Trios wrote to the Sheriff on 11 April 2005.

(page 22 of ABD)

10. The Sheriff wrote to DRP on 12 April 2005 that the advertisement would only be made after the conclusion of these proceedings commenced by Trios. No advertisement was ever published in the newspapers.

(page 24 of ABD)

11. Tan and Thian did not satisfy the Judgment on 19 April 2005 or at any time. Bankruptcy orders were made against them on 23 September 2005.

Agreement dated 24 February 2005

AGREEMENT MADE THIS 24TH DAY OF FEBRUARY 2005

Between

LIM QUEE CHOO / WONG PENG LUAN ("the Plaintiffs") on the first part.

And

TAN WAH LENG / THIAN KIM HOE ("the Defendants") on the second part.

And

TAN JIN SIN / LIM LEE CHIN ("the Third Parties") on the third part.

WHEREAS

A. The Plaintiffs have obtained Judgment against the Defendants in Suit No 232 of 2004/X in the High Court of Singapore.

B. The Plaintiffs have commenced enforcement action in Writ of Seizure and Sale Nos. 58 and 61/2004/R in respect of 8,500,000 shares in Dauphin Offshore Engineering & Trading Pte Ltd held by the Defendants.

C. The Plaintiffs are prepared, at the Defendants' request, to withhold enforcement in Writ of Seizure and Sale Nos 58 and 61/2004/R in accordance with the terms and conditions in this Agreement.

IN CONSIDERATION OF THE MUTUAL COVENANTS HEREIN, IT IS HEREBY AGREED THAT:

1. Subject to clause 2 below, the Plaintiffs shall withhold further enforcement action in Writ of Seizure and Sale Nos. 58 and 61/2004/R and shall not take steps to advertise in any way the sale of the 8,500,000 shares in Dauphin Offshore Engineering & Trading Pte Ltd held by the Defendants.

2. The Defendants shall fully satisfy the Plaintiffs' Judgment in Suit No 232 of 2004/X by 19 April 2005, failing which the Plaintiffs may continue with their enforcement action in Writ of Seizure and Sale Nos. 58 and 61/2004/R.

3. The Third Parties hereby irrevocably agree to transfer all their 1,500,000 shares in Dauphin Offshore Engineering & Trading Pte Ltd to Lim Quee Choo for consideration of S$1.00 in the event the Defendants shall fail to comply with Clause 2 above and fully satisfy the Plaintiffs' said Judgment. Pursuant to this Clause 3, the Third Parties shall forthwith execute transfer forms in favour of Lim Quee Choo.

4. The Defendants shall also pay the sum of S$15,200.00 being costs awarded by the Courts so far, that remain unpaid on or before 24 March 2005. The Defendants shall also make an interim payment of S$25,000.00 by 2 March 2005.

5. This Agreement is confidential and all parties hereby undertake, in good faith, to maintain the strictest confidence.

Signed, Sealed and Delivered)
by THIAN KIM HOE) signed by Thian Kim Hoe

Signed, Sealed and Delivered)
by TAN WAH LENG) signed by Tan Wah Leng

Signed, Sealed and Delivered)
by LIM QUEE CHOO) signed by Lim Quee Choo

Signed, Sealed and Delivered)
by WONG PENG LUAN) signed by Wong Peng Luan

Signed, Sealed and Delivered)
by TAN JIN SIN) signed by Tan Jin Sin

Signed, Sealed and Delivered)
by LIM LEE CHIN) signed by Lim Lee Chin

Witness: Raymond Ong (Advocate & Solicitor)

Witness: David Tan Hock Boon (Advocate & Solicitor)

Undertaking

To: LIM QUEE CHOO

UNDERTAKING

[1] We, TAN JIN SIN and LIM LEE CHIN hereby irrevocably undertake and acknowledge that we agree to transfer all our 1,500,000 shares in Dauphin Offshore Engineering & Trading Pte Ltd to Lim Quee Choo or nominee for a total nominal consideration of S$1.00 in the event Tan Wah Leng / Thian Kim Hoe shall fail to abide by the Agreement dated 24 February 2005 between Lim Quee Choo / Wong Peng Luan on the first part and Tan Wah Leng / Thian Kim Hoe on the second part and us collectively on the third part.

[2] This is in consideration of Lim Quee Choo / Wong Peng Luan forbearing to proceed with the execution proceedings as set out in the said Agreement.

[3] Pursuant to this Undertaking, we enclose herewith our signed transfer forms in your favour.

[4] We also undertake to sign all documents, pass all resolutions and do all things necessary to effect the transfers.

Dated this 24th day of February 2005.

Signed: (Tan Jin Sin) Witness: Raymond Ong (Advocate & Solicitor)

(Lim Lee Chin)

We, Tan Jin Sin and Lim Lee Chin acknowledge receipt of S$2/-

Signed: (Tan Jin Sin)/(Lim Lee Chin)

[Numbering of the paragraphs in the above undertaking are mine.]

The Salient Facts

6 The largely undisputed material facts were as follows:

(a) On 23 March 2004, the plaintiff and Wong Peng Luan ("Wong"), as co-administrators of the estate of Koh Jit Meng, commenced proceedings in Suit No. 232/2004/X against Tan Wah Leng ("Tan") (who owned 3.5 million shares in Dauphin) and Thian Kim Hoe ("Thian") (who owned 5 million shares in Dauphin). The co-administrators obtained **judgment** against Tan and Thian (the "judgment debtors") **for the sum of $3,381,656 and $12,000 costs** ("judgment debt"). The co-administrators then sought to execute on this judgment. They seized 8.5 million Dauphin shares held by the judgment debtors by way of two writs of seizure and sale Nos. 58 and 61 of 2004 ("WSS").

(b) At the request of the judgment debtors, the co-administrators agreed, *inter alia*, to give some "breathing space" up to 19 April 2005 for the judgment debtors to fully satisfy the judgment debt.

(c) Accordingly on 24 February 2005, an agreement by way of a deed was signed by the co-administrators, the judgment debtors and the defendants. Subject to the judgment debtors satisfying the judgment debt in full by 19 April 2005, the co-administrators "**shall withhold further enforcement action in the Writ of Seizure and Sale Nos. 58 and 61/2004R and shall not take steps to advertise in any way the sale of the 8,500,000 shares...**." For convenience, this shall be referred to as "the prohibition" in clause 1 of the agreement. In the event of the judgment debtors' failure to fully satisfy the judgment debt by the due date, the 1st and 2nd defendants (**hereinafter referred to as "the defendants"**) agreed to transfer 1.5 million of their Dauphin shares to the plaintiff for a nominal consideration of $1 and the co-administrators would thereafter be entitled to continue with their enforcement action in the WSS.

(d) On the same day that the agreement was signed, an undertaking was also separately executed by the defendants in favour of the plaintiff, in which the defendants undertook to transfer 1.5 million of their Dauphin shares to the plaintiff for a nominal consideration of $1 should the judgment debtors **"fail to abide by the Agreement dated 24 February 2005.**" The undertaking was in consideration of the co-administrators **"forbearing to proceed with the execution proceedings as set out in the said Agreement."** The defendants also acknowledged in writing their receipt of $2. Whether this $2 was further consideration for their undertaking to the plaintiff would be discussed later.

(e) Pursuant to clause 3 of the agreement and pursuant to paragraph 3 of the undertaking, two share transfer forms were executed in favour of the plaintiff on the same day, one for the transfer of 1 million Dauphin shares signed by the 1st defendant, and the other for the transfer of 500,000 Dauphin shares signed by the 2nd defendant. The consideration for each of the transfers was stated as the nominal sum of $1.

(f) For a nominal consideration of $1, both judgment debtors also signed waivers of their pre-emptive rights in respect of the transfer of the 1.5 million Dauphin shares held by the defendants; and they confirmed that they did not wish to purchase these shares and would not oppose the transfer of these shares to the plaintiff.

(g) The signing of the waiver of pre-emption rights by the judgment debtors, the execution of the transfer forms and the further undertaking by the defendants to sign all documents, pass all resolutions and do all things necessary to effect the transfers (see paragraph 4 of the undertaking), indicated to me that the transfers were intended to be effected **immediately** once the obligation arose (under either the agreement or the undertaking or both) for the defendants to transfer a total of 1.5 million Dauphin shares to the plaintiff for $1.

(h) The first interim payment of **$25,000 due by 2 March 2005 under clause 4** of the agreement was duly paid by the judgment debtors to the then solicitors for the co-administrators, M/s David Rasif & Partners ("DRP"), on 17 February 2005.

(i) **Under clause 4** of the agreement, the second payment of **$15,200 for the costs** awarded by the courts was to be paid **on or before 24 March 2005**.

(j) Despite repeated reminders from DRP on 17 March 2005, 24 March 2005, 30 March 2005 and 5 April 2005 to the solicitors for the judgment debtors, M/s Rajah & Tan ("RT"), no payment (or part payment) of $15,200 was forthcoming, except mere promises to pay. The last letter in this series of letters from DRP to RT on 5 April 2005 stated that:

> "In the event we do not receive the sum of $15,200 by 2.00 p.m. today, our clients' strict instructions are to inform the Sheriff to proceed with the sale of the shares owned by your clients immediately."

When the judgment debtors failed to pay by 2.00 p.m., DRP wrote to instruct the sheriff to proceed with the advertisement for the sale of the shares immediately.

(k) However, on the following day, 6 April 2005, RT on behalf of the judgment debtors proposed partial payment comprising a part payment of $5,000 by 7 April 2005 and another part payment of $5,000 by 8 April 2005, leaving unaddressed the outstanding balance of $5,200.

[**My finding**: Bearing in mind that the second payment of $15,200 was already overdue by 2 weeks, this written reply (to offer a payment of only $10,000) clearly constituted a written repudiation by the judgment debtors of their obligation to pay the **full sum** of $15,200 as agreed under clause 4 of the agreement.]

(l) On 6 April 2005, DRP replied agreeing with the proposed partial payment but stated that the judgment debtors were in breach of the terms of the "settlement." DRP reiterated that in the event the judgment debtors failed to pay as promised by 8 April 2005, the co-administrators would proceed with the advertisement for the sale of the shares immediately. In the meantime, DRP informed the sheriff to hold his hand.

(m) 7 April 2005 came and went without any payment of the first $5,000 as promised. A reminder was sent to RT.

(n) 8 April 2005 came and went again without any payment of the second $5,000 as promised.

[**My finding**: In my view, the offer of two partial payments by the judgment debtors was clearly a ruse to mislead the co-administrators to believe that some part payment towards the long overdue second payment of $15,200 would be forthcoming so as to keep their hopes of payment alive. I could imagine the frustration felt by the co-administrators with the games played by the judgment debtors at this time when no payment was received.]

(o) DRP then wrote to the sheriff on 8 April 2005 to proceed with the advertisement of the WSS. On the same day, DRP also wrote to RT, notifying them that the sheriff had been instructed to proceed with the advertisement for the sale of the 8.5 million shares seized.

(p) On 11 April 2005, the sheriff wrote to Singapore Press Holdings Pte Ltd ("SPH") to publish the "Sheriff's Notice of Sale" for WSS No 58 and 61 of 2004R on 13 April 2005.

(q) However on 11 April 2005, a creditor of Dauphin, Trios Corp (S) Pte Ltd, presented a winding up petition against Dauphin and commenced bankruptcy proceedings against the defendants.

(r) On the 12 April 2005, DRP instructed the sheriff to proceed with the advertisement unless there was an order of court to stay such an action. The sheriff replied to DRP that the advertisement would be made only after the conclusion of the hearing of the company winding up petition to avoid any complications which might arise if the advertisement for the sale was taken out before the petition was heard.

(s) As a result of the winding up petition and the bankruptcy proceedings, the sheriff did not proceed with the advertisement and no advertisement was actually published in the newspapers.

(t) When the date came for payment of the judgment debt of **$$3,381,656 and $12,000 costs due on 19 April 2005 under clause 2** of the agreement, **the judgment debtors paid nothing** to the co-administrators and that judgment debt (less the interim payment of $25,000) together with the usual interest thereon remained unsatisfied even up to the date of my decision. The second payment of $15,200 for other costs due earlier on 24 March 2005 also remained unpaid.

No breach of the prohibition in clause 1 of the agreement

7 The plaintiff maintained that on the facts, there was no breach of clause 1 of the agreement. The plaintiff accepted that clause 1 prohibited him from taking any steps to advertise in any way the sale of the 8.5 million shares to further its enforcement action in the WSS. But it did not apply to other modes of execution such as bankruptcy or garnishee proceedings. Notwithstanding its "sweeping" language, the plaintiff contended, and I agreed that in determining the natural meaning of the prohibition, the applicable test must be how it would be understood by a reasonable person, in the position of the addressee of the document at the time when the agreement was made and having the knowledge reasonably available to the parties. Accordingly, I accepted that the following words in the prohibition bore the following meanings:

(a) "in any way"	This was readily understood to refer to the mode of advertisement *i.e.* newspaper or in any other medium. The phrase "in any way" clearly referred to the word "advertise".

(b) "shall not take steps to advertise"	Read as a whole and in the context of the agreement, this phrase should mean "shall not publish" any advertisement. I did not think it was meant to cover mere "preparatory steps" or "attempts to publish" if the end result remained that there was no publication or advertisement effected at all in the newspapers or in other medium. I would not adopt a pure literal interpretation but a purposive interpretation having regard to the agreement as a whole and the intended purpose of clause 1 as far as the parties were concerned. If the prohibition was meant to cover "any preparatory step" e.g. getting the artwork ready, drafting the words to be used in the advertisement, giving instructions to the sheriff and sending the finalised version of the advertisement to the newspapers in anticipation of publication on a date in the future, then the prohibition ought to make that clear. A reasonable person interpreting clause 1 would not have expected clause 1 to be breached if only mere preparations were made but no advertisement was actually published. In other words, to a reasonable person in the position of the addressee, the normal understanding would be that so long as the addressee did not in fact publish any advertisement, no breach of clause 1 would have occurred and it would have been irrelevant whatever preparatory steps might have been taken with a view to publication. For instance, if preparations for advertisement were made in well advance so that there would be no delay whatsoever in having the publication immediately on the following day, 20 April 2005, should there be no payment of the judgment debt on 19 April 2005, would it therefore mean that there was already a breach of clause 1 of the prohibition simply because preparatory steps towards publication had in fact been taken? I did not think so. It would be stretching the intended purpose of those words if it was meant to cover a situation where even a single preparatory step would be sufficient to constitute a breach of the prohibition (and also a repudiatory breach of the agreement) when in reality, no publication or advertisement had in fact taken place. I therefore agreed with the plaintiff's submission that the co-administrators were not prohibited from merely taking preparatory steps **towards** advertising the WSS if no advertisement was in fact published; and that simply writing to the sheriff to proceed to advertise did not, *per se*, constitute taking steps to advertise the sale of the 8.5 million shares nor did it constitute further enforcement action under the WSS, so long as the advertisement did not appear in the newspapers.

8 It was not disputed that no advertisement of the WSS was published. No enforcement action was in fact carried out under the WSS apart from the mere preparatory steps to advertise. There was no discernable loss which could be established from those mere preparatory steps to advertise. I could therefore see no prejudice to the judgment debtors and the defendants. All that the defendants could really complain of was the fact that letters of 5, 6 and 8 April 2005 had been sent to the sheriff and the sheriff had written to SPH on 11 April 2005 instructing them to publish the advertisement on 13 April 2005, which instruction was eventually withdrawn by the sheriff on 12 April 2005 despite a

further letter on the same day from DRP instructing the sheriff to proceed with the advertisement unless the sheriff was served with an order of court to stay such action. Taken as a whole, these facts in my view were insufficient to constitute a breach of clause 1 of the agreement as no concrete step to further the enforcement action of the WSS by way of an actual advertisement of the WSS had materialized in any way. The mischief sought to be prevented by the prohibition in the agreement was to keep confidential the sale of the 8.5 million shares that had been seized by the sheriff. But where no publication had taken place, the purpose or intention behind the prohibition had not been violated.

9 Accordingly, this case could simply be decided on this point alone and the defendants would be obliged under the agreement to transfer the 1.5 million Dauphin shares to the plaintiff for $1 since the judgment debt had remained unsatisfied till date.

10 In case I was wrong on my interpretation, and if there was indeed a breach of the prohibition, I would now proceed to deal with the alternative case of the plaintiff **on the assumption that (in fact and in law) a breach of clause 1 by the co-administrators had occurred on the agreed facts**.

Alternative case if there was a breach of the prohibition

Whether the forbearance to advertise and enforce the WSS was a condition precedent?

11 The defendants submitted that the plaintiff's obligation to them was to allow the judgment debtors until 19 April 2005 to fully satisfy the judgment debt and to withhold enforcement action and not take steps to advertise the WSS until then. The defendants contended that it was the plaintiff's only and central obligation. It embodied the very heart of the arrangement, which was for the defendants to transfer their 1.5 million Dauphin shares to the plaintiff for $1 only if the judgment was not fully satisfied by 19 April 2005. Being the plaintiff's core obligation, the defendants argued that it was clearly a condition. The plaintiff breached it because on 5, 8 and 12 April 2005, three separate letters were sent by the plaintiff through DRP to instruct the sheriff to proceed with the enforcement of the WSS and to advertise the sale of the 8.5 million Dauphin shares. As such, the defendants contended that they were thereby released from their obligation to transfer their 1.5 million shares. It appeared to me that the defendants' defence was premised on some reasoning based on the concept of a condition precedent blended with the concept of a total failure of the consideration of forbearance.

12 It is trite law that a condition precedent to the **formation** of a contract must be distinguished from a condition precedent to the **performance of an obligation** under the contract. In the latter, the contract has already come into being, but the obligation to perform has been postponed until the fulfilment of certain specified conditions. Whereas in the case of a condition precedent to the formation of a contract, there is no contract in existence until after the specified condition has been fulfilled.

13 In the submissions, the parties did not make clear to me which kind of condition precedent they were relying on. As such, I would first analyse the factual situation on the assumption that they meant to utilise both types of condition precedents in their arguments.

14 In this judgment, "clauses" referred to those in the agreement and "paragraphs" referred to those in the undertaking.

15 The following four questions had to be answered:

(a) Whether or not clause 1 read with clause 2 was a condition precedent to the **formation of the agreement**?

(b) Whether or not paragraph 2 read with clauses 1 and 2 constituted a condition precedent to the**formation of the unilateral contract of undertaking**?

(c) Whether or not clause 1 read with clause 2 was a condition precedent to the **performance of the obligation stipulated under clause 3** for the transfer of the 1.5 million shares?

(d) Whether or not paragraph 2 read with clauses 1 and 2 constituted a condition precedent to the **performance of the undertaking stipulated in paragraph 1** for the transfer of the 1.5 million shares?

My finding on the 1st and 2nd questions

16 In my judgment, if clause 1 read with clause 2 (and read further with paragraph 2 in the case of the undertaking) was a condition precedent to the **formation** of both the agreement and the undertaking, then all the parties had to wait until the 19 April 2005 before they could tell if the agreement and undertaking had both come into existence. Until after the 19 April 2005, no one would be able to tell if the condition precedent would have been fully satisfied *i.e.* the co-administrators had factually refrained from taking any steps to enforce and advertise the WSS for the entire period ending on 19 April 2005. It would have meant that the judgment debtors could with impunity refuse to abide by clause 4 to pay $25,000 by 2 March 2005 and to pay $15,200 by 24 March 2005, as these were obligations maturing **well before** the 19 April 2005. It made no sense to me to have obligations set out in the agreement and undertaking that would have matured **even before** it would be known whether or not the condition precedent was satisfied in order for the agreement and undertaking to come into existence.

17 If the defendants were correct, then any preparatory steps taken by the co-administrators to advertise before 19 April 2005 would constitute a failure of the condition precedent and no agreement or undertaking could factually come into existence. No obligation could ever arise on the part of the defendants to transfer their 1.5 million shares either under the agreement or the undertaking, even if it subsequently transpired that there was in fact no payment of the judgment debt by the judgment debtors either by 19 April 2005 or in this case, no payment at all.

18 In other words, any non-fulfilment of the condition precedent in clause 1 and 2 (and read further with paragraph 2) had completely prevented the "birth" of the obligation of the defendants to transfer their 1.5 million shares to the plaintiff, be it under the agreement or the undertaking.

19 Under these circumstances, the ancillary question would be whether the other obligations of the judgment debtors spelt out in the agreement *i.e.* all the following three separate and independent payment obligations of the judgment debtors, namely to pay:

(a) the interim payment of $25,000 due on 2 March 2005;

(b) the costs of $15,200 due on 24 March 2005; and

(c) the judgment debt of $3,381,656 and $12,000 costs due on 19 April 2005,

would *per se* be automatically and retrospectively discharged simply because of the slightest non-

fulfilment of the condition precedent to the formation of the agreement and the undertaking.

20 To construe clauses 1 and 2, and paragraph 2 as condition precedents to the **formation** of the agreement and undertaking (as was apparently advocated by the defendants), it would, for the reasons given above, be a rather fanciful construction of the two documents, not borne out by any clear words. I believed that such a fanciful construction could not have been in the reasonable contemplation of the parties dealing with each other at arm's length or on a commercial basis. Nor could it be intended by them. It would also have given a huge windfall to the judgment debtors in that any minimal non-compliance with clauses 1 and 2 (including paragraph 2), for instance by taking just one small preparatory step towards advertising the WSS (without an actual advertisement eventually published in the newspaper), would in itself be sufficient to release the judgment debtors entirely from the judgment debt and all other sums payable, and the WSS would become totally unenforceable thereafter. Furthermore, the defendants, who were substantively the "guarantors" for the payments by the judgment debtors (under clause 3 and paragraph 1) would also enjoy a windfall, and escape from their irrevocable undertaking to transfer 1.5 million of their Dauphin shares to the plaintiff in the event of a non-performance of any one of the above three payment obligations by the judgment debtors.

21 I therefore rejected the construction that clauses 1 and 2, and paragraph 2 were conditions precedent to the formation of the agreement and the undertaking as that would not accord with the intentions of the contracting parties and would not accord with commercial sense.

My finding on the 3rd and 4th questions

22 On the wordings in clause 3, I could only find one condition precedent to the performance of the defendants' obligation to transfer 1.5 million of their shares *viz* the condition precedent that there was a failure by the judgment debtors to fully satisfy the judgment debt by 19 April 2005. But was there a second condition precedent to be further satisfied?

23 Hence, the 3rd and 4th questions focussed on whether or not clauses 1 and 2 were to be construed as an **additional** condition precedent to the performance of the defendants' obligation in the agreement to transfer the shares which was over and above that expressly set out under clause 3. In my judgment, no such additional condition precedent existed. I could not find any words that would indicate to me that the parties had intended a second conjunctive condition precedent in addition to the required precedent event of a failure by the judgment debtors to satisfy the judgment debt by 19 April 2005.

24 Similarly, neither could the forbearance to enforce the WSS and advertise the sale of the 8.5 million shares under clauses 1 and 2 read together with paragraph 2 create an additional conjunctive condition precedent for the performance of the defendants' obligation stipulated under paragraph 1 of the undertaking to transfer the 1.5 million shares upon the event of a failure by the judgment debtors **to abide by all the terms in the agreement**.

25 The fact that the co-administrators' promise to forbear was described as the "consideration" for the undertaking on the part of the defendants to transfer the 1.5 million shares did not make paragraph 2 of the undertaking a condition precedent to the performance of the undertaking. There had to be clear words in the undertaking to make the "forbearance" a further pre-event to be fulfilled before the defendants could be liable for their performance of their obligation in paragraph 1 in the undertaking. But there was none.

26 I noted that the plaintiff had given $2 to the defendants for the undertaking, the receipt of

which was acknowledged by them. Although the purpose for the payment of $2 was silent in the undertaking, I found that this was given to the defendants as nominal consideration in support of the undertaking. This form of nominal consideration to ensure the validity and binding nature of the contractual undertakings would be good consideration in law. That the consideration flowing from the promisee might have been insufficient in value in comparison with the benefit that the promisee might receive was irrelevant as it is trite law that the validity of the undertaking to the promisee does not depend on the adequacy of the promisee's consideration but on the fact that the promisee has provided consideration for the undertaking given by the promisor.

27 Since the "forbearance" to proceed with execution in paragraph 2 was stated as a "consideration" for the undertaking, its nature was no different in my view from the $2 consideration, both of which went more to the issue whether or not the undertaking was in fact supported by any valuable consideration for it to be valid and binding on the defendants.

28 With the $2 consideration given, there was really no further need to consider if there was forbearance from the co-administrators up to the point of the fulfillment of the condition precedent in paragraph 1 for the transfer of the shares (although on the facts the co-administrators had dutifully given full forbearance as consideration for the undertaking at least up to the date of the failure by the judgment debtors to pay the $15,200 by the due date of 25 March 2005, whereupon the condition precedent in paragraph 1 was satisfied). I would reiterate my opinion that the $2 was itself adequate and good consideration to ensure that the plaintiff had in his hand a valid and enforceable undertaking from the said defendants.

29 As an aside, there would also be no need to consider whether there was a failure of the "consideration" of forbearance for the defendants' irrevocable agreement in clause 3 to transfer their shares upon the event of the stipulated payment default because the **agreement was by way of deed**. Being by deed, no further consideration need be given to the defendants to ensure the enforceability of their unilateral promise in the agreement by the defendants to transfer their 1.5 million shares to the plaintiff should the event of non-satisfaction of the judgment debt arise.

30 In paragraph 1 of the undertaking, the defendants irrevocably undertook to transfer their 1.5 million Dauphin shares for $1 to the plaintiff if the judgment debtors "**shall fail to abide by the Agreement".** This was the only condition precedent stated in the undertaking. A failure to "**abide by the agreement**" could not be limited to a breach only of clause 2, as the defendants would like to contend. It must certainly include a breach of clause 4. On my construction of the undertaking, a breach of clause 4 clearly came within the scope of those words in bold and underlined above.

31 In my judgment, the ambit of the condition precedent for the performance of the defendants' obligation (to transfer their 1.5 million Dauphin shares for $1) embedded in paragraph 1 of the undertaking was very different from that embedded within clause 3 of the agreement. The condition precedent in paragraph 1 was much wider in scope because it had 3 separate, different and identifiable triggering events:

(a) A default by the judgment debtors to pay an interim $25,000 by 2 March 2005 in breach of clause 4 of the agreement;

(b) A default by the judgment debtors to pay $15,200 costs by 25 March 2005 in breach of clause 4 of the agreement; or

(c) A default by the judgment debtors to pay the judgment debt of $3,381,656 and $12,000 costs by 19 April 2005 in breach of clause 2 of the agreement.

32 Any one of the above events, if triggered, would in my view amount to a clear failure by the judgment debtors to "abide by the agreement" as stipulated in paragraph 1 of the undertaking. The defendants basically tried to persuade me that the only relevant trigger was the default in (c), and the defaults in (a) and (b) could simply be disregarded and discarded. I was not able to agree as that would have required me to completely ignore the existence and the plain meaning of the words "**shall fail to abide by the Agreement**" in paragraph 1 of the undertaking.

33 On the facts, it was not disputed that the defaults in (b) and (c) had occurred. It was pertinent to note that the undertaking to transfer was not triggered once, but twice. In the premises, it was not tenable for the defendants to adopt the position that even after two consecutive serious failures of the judgment debtors to abide by the agreement, the defendants remained not liable to fulfill their undertaking in paragraph 1.

34 Unlike the sole triggering event embedded in clause 3 of the agreement (namely (c) above), any one of the above 3 triggering events would in my judgment be sufficient in themselves to satisfy the condition precedent for the undertaking to transfer the said 1.5 million shares. I did not agree that upon the satisfaction of the condition precedent in triggering event (b), the undertaking to transfer was not immediate but had to be deferred to 19 April 2005 just to see if the last trigger (c) was activated. Obviously, that obligation to transfer had accrued and crystallised on the date of the triggering event, and the defendants were immediately obliged to take all necessary steps to effect the transfer of the 1.5 million shares to the plaintiff. I could not accept the defendants' suggestion that the undertaking had no effect until after 19 April 2005 as the earlier triggers were ineffective in crystallising the undertaking to transfer, and that the judgment debtors could simply disregard their payment obligations in (a) and (b) with impunity, whilst the plaintiff had to remain obligated to forbear until 19 April 2005, otherwise he would lose all the benefits he would have had under both the agreement and the undertaking.

35 In any event, the triggering condition precedent event (c) for both the undertaking and the agreement to transfer the 1.5 million shares was subsequently also activated in fact.

36 Since the potential defaults in (a) and (b) above were not "protected" in the agreement, the plaintiff clearly considered it necessary to extract a separate undertaking **going beyond what was in the agreement**. The undertaking was in essence a further guarantee provided by the defendants for the performance not only of clause 2 but also of clause 4 of the agreement by the judgment debtors. Accordingly, any default by the judgment debtors in (a), (b) or (c) was meant to trigger the undertaking by the defendants to transfer the 1.5 million shares to the plaintiff.

37 Such a construction made sense to me as the agreement did not appear to have any real sanction or incentive for the defendants (as the effective "guarantors" for payment by the judgment debtors) to deter or persuade the judgment debtors from breaching their first two obligations under (a) and (b), apart from the fact that such a repudiatory act of non-payment under (a) or (b) might allow the co-administrators to accept the repudiatory breach and regard themselves relieved from their obligation under clause 1 to refrain from enforcement and advertisement of the WSS. Since the agreement in so far as the defendants were concerned applied only to a default in (c) but not of (a) and (b), that to me was the very reason why the plaintiff needed a further undertaking from the defendants to cover the eventuality of a default by the judgment debtors in respect of any non-payment under either (a) or (b), which would then enable the plaintiff to immediately enforce the transfer of the shares against the defendants.

38 If the undertaking was meant to do exactly the same thing as the agreement (which was what I gathered would be the substantive effect of the defendants' submissions), there would have been

no need for the undertaking. An undertaking, providing for exactly the same obligations on the part of the defendants as those in the agreement and on exactly the same condition precedent as that in the agreement for the transfer, would have been unnecessary. The undertaking would be a superfluous document for which the $2 consideration paid by the plaintiff for the defendants' promise to transfer the shares would have been for nothing as everything would have been covered by the agreement already. That in my view was not an outcome the parties had set out to achieve or would have intended.

39 Although it was axiomatic that both the agreement and the undertaking ought to be construed together in such a manner as to be consistent with each other and in accordance with the intended commercial purpose behind the agreement and the undertaking, nevertheless in my view the undertaking stood alone and apart from the agreement in terms of the respective legal obligations of the various parties. They must not be conflated as if they were one and the same. In fact, the undertaking was wider in scope than the agreement in so far as the obligation of the defendants to transfer their shares to the plaintiff was concerned. In comparison with clause 3 of the agreement, paragraph 1 of the undertaking was premised upon certain wider condition precedents to performance primarily because of the different construction of the said clause and paragraph.

40 Once an earlier triggering event had occurred, there was no necessity in the undertaking as worded for the plaintiff to wait until the rest of the triggers had been triggered before enforcing the defendants' obligation to transfer the shares. Accordingly, once any earlier obligation under clause 4 was breached, the undertaking would immediately be triggered and the obligation to transfer would accrue. On the facts of this case, the plaintiff was entitled to immediately enforce the undertaking against the said defendants upon the satisfaction of the condition precedent through non-payment under (b). There was no need to wait for (c) to be triggered. The triggering of (c) merely reinforced the right of the plaintiff to enforce the undertaking. The same right also arose from the agreement upon the trigger in (c) being activated by the judgment debtors upon their default in paying the judgment debt owed.

41 Further on the undisputed facts, the defendants had no basis to complain that the plaintiff had not granted full forbearance up to 24 March 2005, the date of the first triggering event (b). The plaintiff in fact continued to grant full forbearance until 5 April 2005, which was the date the plaintiff first wrote to the sheriff. This was 11 days **after** the first triggering event (b). In total, the period of forbearance by the plaintiff lasted 7 weeks (between the date of signing the agreement and the undertaking on 24 February 2005 and the date the letter was sent to the sheriff on 5 April 2005). By any standard, this would be sufficient and valuable consideration of forbearance from enforcement coming from the co-administrators. The judgment debtors (and in a sense the defendants) had obtained the full benefit of forbearance from enforcement in the strictest sense (*i.e.* preparatory steps to advertise were yet to be taken). The judgment debtors had what they had bargained for, until they themselves decided to default first on payment in (b), and followed next by their payment default in (c), and they thereby committed a repudiatory breach of the agreement by their own actions.

42 Under these particular circumstances, it made no sense that after the triggering event (b) caused by the judgment debtors, the plaintiff remained obliged to continue with their forbearance until it was past event (c), in order to maintain sufficient forbearance as "consideration" to support the previous triggering event (b) which *per se* had already crystallised the defendants' obligation in the undertaking to transfer the shares.

43 Although the plaintiff might have been in breach of the forbearance in clause 1 read with clause 2 in the agreement **subsequent** to the date of the triggering event (b), nevertheless the

triggering event (b) took place first and had already crystallised the obligation undertaken by the defendants to immediately transfer their 1.5 million shares to the plaintiff, which was well before the date of the plaintiff's alleged breach of its non-forbearance obligation under clauses 1 and 2 of the agreement. The alleged breach by the plaintiff of non-forbearance, which took place **after** the triggering event of default, would accordingly be irrelevant in my view. The alleged non-forbearance, a subsequent event, should not be allowed to undo what had been crystallised earlier in the undertaking by the triggering event (b). For this second reason, the plaintiff's action must succeed even if one were to be generous to construe the co-administrators' subsequent action of instructing the sheriff to proceed with the advertisement of the WSS (which took place before 19 April 2005) was indeed a factual breach of the forbearance obligation in clause 1 read with clause 2 of the agreement.

44 If clauses 1 and 2 or if paragraph 2 were to be regarded as a condition precedent for the 1.5 million share transfer obligation as contended by the defendants, then I could not find any express words either in the agreement or the undertaking that would allow such a construction. To elevate clauses 1 and 2 in the agreement or paragraph 2 of the undertaking to a condition precedent (of whatever form) to the transfer of shares by the defendants, when they clearly could not be construed as such, would amount to the court introducing new terms and re-writing the bargain for the parties. In my judgment, clauses 1 and 2 or paragraph 2 could not be characterised as a condition precedent (of whatever form) when construing the agreement or the undertaking either alone or in conjunction with each other.

45 In my view, clause 1 read with clause 2 was merely a contractual term in the agreement and nothing more, and the consequences of a breach of the term should be examined on its own merits. A breach of clause 1 read with clause 2 should not alter the character of those two terms and turn them into "condition precedents" to obtain a totally different set of consequences, just so that it would suit the purpose of defendants.

Existence of an implied term?

46 Having failed on the express term argument that clauses 1 and 2 of the agreement and paragraph 2 of the undertaking were not condition precedents to the transfer obligation, the defendants appeared to be relying on the argument that (a) in the circumstances under which the agreement and the undertaking were made; and (b) in the light of their purpose and the fact that there was only one sole obligation on the part of the co-administrators which laid at the heart of the agreement and the undertaking, a term ought to be implied that the share transfer obligation would have to be further subject to the co-administrators' forbearance not to enforce the WSS and the forbearance not to take steps to advertise the sale of the seized shares for the whole period from 24 February 2005 to 19 April 2005, regardless of any breach by the judgment debtors of their earlier payment obligations under clause 4 of the agreement.

47 In my judgment, the implied term argument would fail for the following reasons:

(a) The court ought not to imply such a term unless it was necessary, equitable and reasonable under the circumstances to do so. (*See Chitty on Contracts 29th Ed, 2004, Vol 1 at 13-009.)*

(b) The implied term was not necessary as the agreement and the undertaking worked perfectly well without it. The defendants had obtained a legal right to a "breathing space" before the co-administrators were entitled to continue with the enforcement proceedings. This legal right was never taken away. On the facts, the alleged step towards advertising the WSS in a

purported breach of clauses 1 and 2 was not an action taken by the co-administrators without cause. It was in fact precipitated by and was an obvious consequence of the judgment debtors' own repudiatory breach of clause 4 of the agreement. The co-administrators had in fact given full forbearance (and therefore good consideration), because they had taken no steps (preparatory or otherwise) to advertise the WSS **until after** the judgment debtors defaulted on their payment of $15,200 due on 25 March 2005 in breach of clause 4 of the agreement and **until after** the co-administrators had been sent on a wild goose chase by the judgment debtors and **until after** the judgment debtors had been notified that if they failed to comply, the advertisement would proceed. When no payment came, that repudiatory breach was accepted by the co-administrators who then proceeded on 8 April 2005 to inform the sheriff to advertise the WSS. I did not think it would now lie in the mouth of the defendants to argue that there was a total failure of consideration or insufficient consideration provided for the undertaking, which then completely discharged the obligations of the defendants to transfer their shares as per their undertaking. It was worth noting again that the judgment debtors subsequently also defaulted in payment of the full judgment sum, thereby triggering the same undertaking a second time.

(c) Such an implied term would be manifestly unreasonable as a breach by the plaintiff or the co-administrators would disentitle them from proceeding with the enforcement of the WSS to recover the very substantial debts owed of some $3.5 million, and it would also have given the judgment debtors a windfall. Further, the defendants would also obtain a windfall and escape from their promise to transfer over to the plaintiff their 1.5 million shares for the failure by the judgment debtors to abide by the agreement, be it clause 2 or clause 4. Were the defendants to be correct on the existence of such an implied term, then the co-administrators would have given up their right to enforce the WSS for the 8.5 million shares should they take any preparatory steps to enforce before 19 April 2005. It made no commercial sense for the co-administrators to give up their claim to recover the judgment debt by the immediate sale of the 8.5 million Dauphin shares in return for the agreement and undertaking by the defendants to transfer a much smaller quantity of shares *i.e.* the 1.5 million Dauphin shares.

48 At the most charitable construction of the multipartite agreement as a whole, I could only imply that the obligation on the part of the co-administrators to forbear from enforcement and advertisement in clause 1 was intertwined with the obligations of the judgment debtors and the defendants in the sense that any breach of clause 1 by the co-administrators **without cause** would give rise to the right of the judgment debtors to refuse payment of the judgment debt in clause 2 (which refusal did take place), and therefore, that triggering event or the satisfaction of the condition precedent for the defendants' obligation in clause 3 to transfer their 1.5 million shares in Dauphin was occasioned by the default of the plaintiff and his co-administrator (and not by the judgment debtors). Accordingly under such circumstances, the plaintiff ought not to be allowed to benefit from the defendants' obligation to transfer the shares arising from a triggering event that could be traced back to the plaintiff's own default. However, on a closer analysis of the facts, the default under the agreement was **never precipitated** by the plaintiff or his co-administrator. The default was first initiated by the judgment debtors by their repudiatory refusal to abide by clause 4 of the agreement to pay the plaintiff the sum of $15,200 by the stipulated due date of 24 March 2005. This in my view was sufficient to excuse the plaintiff from a strict adherence to its own obligation under clause 1 to refrain from taking any preparatory steps to advertise before 19 April 2005. As such, these steps taken to advertise were in fact a response to the initiating default of the judgment debtors not to pay the $15,200 in breach of clause 4 of the agreement.

49 Hence, even on the most charitable construction of the multipartite agreement with the implied term included, I did not think that the defendants could be relieved of their obligation to transfer their shares when the failure to pay on the $15,200 costs by the judgment debtors was not occasioned by

any defaulting act of the plaintiff.

50 From the evidence now available, it was obvious to me that the judgment debtors never intended at all to pay the $15,200 nor the judgment debt, whether by their respective due dates or otherwise. If the parties at the time they signed the agreement and the undertaking were to be asked what would they have intended should these postulated facts happen, I would think it likely that the parties would have simply said that the plaintiff would of course be entitled to the transfer of the 1.5 million Dauphin shares to them under both the agreement and the undertaking.

Were the preparatory steps to advertise a repudiatory breach of the agreement or the undertaking?

51 I would now examine the seriousness of the breach of clause 1 read with clause 2 of the agreement by the co-administrators.

52 Having regard to the nature of clauses 1 and 2 which were primarily for the benefit of the judgment debtors, it did not mean that any breach of clause 1 (however minor) would automatically terminate the agreement and discharge the judgment debtors' from further performance of the agreement. Whether or not the agreement could be terminated by the judgment debtors would first depend on the nature of clause 1 read with clause 2, and the seriousness of the breach.

53 Consequently, the factual question before me was whether the breach by the plaintiff in taking steps on 5, 8 and 12 April 2005 to advertise the sale of the 8.5 million Dauphin shares was so serious a breach as to entitle the judgment debtors to repudiate the agreement, when no actual publication of the advertisement had in fact taken place? If indeed it was so serious as to be repudiatory in nature, then the next obvious question was whether the repudiatory breach had in fact been accepted by the judgment debtors (or for that matter the defendants who were the other parties to the agreement). The judgment debtors never terminated the agreement before 19 April 2005. It would now be too late for the judgment debtors (or for that matter for the defendants) to allege that termination of the agreement had taken place. Now that the judgment debtors had not satisfied the judgment debt on its due date and with the obligations under the agreement remaining alive for all parties, the defendants would be bound to comply with clause 3 to transfer the shares immediately.

54 The defendants essentially contended that the steps taken on 5, 8 and 12 April 2005 in breach of clause 1 had to be regarded as repudiatory because this was the only fundamental condition in the contractual relationship between the defendants and the plaintiff.

55 I disagreed. On the agreed facts, the breach of clause 1 by the co-administrators was clearly non-material and technical in nature because no advertisement was in fact published. The preparatory steps and attempts to publish were futile. In the end, nothing came out of what the co-administrators had tried to do. Neither the defendants nor the judgment debtors suffered any real damage or any appreciable loss. I found that the breach of clause 1 by the co-administrators was not repudiatory in nature. Therefore, neither the defendants nor the judgment debtors were legally entitled to terminate the agreement and disavow the defendants' obligation to transfer the shares. The non-repudiatory breach at the most would allow the wronged parties to claim damages or seek an injunction to restrain the co-administrators from actually advertising the WSS in substantive breach of clause 1. Since the agreement (and the payment obligations therein) remained alive, the obligation of the defendants to transfer the shares in clause 3 was accordingly triggered on 19 April 2005 when no payment was received on the judgment debt.

56 In my view, it would be wrong for the defendants to characterise the technical breach as a

"total failure of consideration" when in fact there was never any publication of the advertisement for the sale of the 8.5 million shares as part the enforcement of the WSS.

57 In any event, the defendants did not appear to have run their arguments on the basis that the agreement or the undertaking had been lawfully terminated as a result of the default of the co-administrators. In fact, the defendants contended that they were unaware of the breach by the plaintiff and co-administrator, and the defendants were therefore in no position to accept the alleged repudiatory breach. Since there was no termination, the agreement would have remained alive and continued in existence for the benefit of all parties. (*See Chitty on Contracts 29th Ed, 2004, Vol 1 at 24-011).* The defendants' obligation to transfer the shares therefore arose the moment the judgment debtors failed to satisfy the judgment debt on 19 April 2005. The triggering event for the transfer had taken place. Once it was triggered, it would essentially end the continuing right of the judgment debtors (including the defendants) to accept the breach and terminate either the agreement or the undertaking thereafter. (*See Chitty on Contracts 29th Ed, 2004, Vol 1 at pg 1367)*.

Conclusion

58 Accordingly for the reasons given, I found that the plaintiff was entitled to enforce the undertaking given on 24 February 2005. I ordered the 1st and 2nd defendants to transfer their 1.5 million Dauphin shares to the plaintiff for a consideration of $1.00 and to pass all resolutions and do all things necessary to effect the registration of the transfer of the said shares to the plaintiff within 2 weeks.

59 The costs of this action were ordered to be taxed or agreed and paid by the defendants to the plaintiff.

60 The plaintiff was ordered to pay the costs of the 3rd defendant to be taxed or agreed.

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