Teo Seng Kee Bob v Arianecorp Ltd
[2008] SGHC 81

Case Number : Suit 243/2007

Decision Date : 30 May 2008

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Ang Cheng Hock and Jacqueline Lee Siew Hui (Allen& Gledhill LLP) for the plaintiff; Jimmy Yap Tuck Kong and Wong Shyen Sook (Colin Ng & Partners LLP) for the defendant

Parties : Teo Seng Kee Bob — Arianecorp Ltd

Contract – Consideration – Variation of contract – Exception to rule that performance of existing obligations did not amount to valid consideration – Whether promisor obtaining factual or practical benefit from promisee's performance of existing contractual obligations – Part payment made to promisor used by promisor in its cash flow

Contract – Formation – Offer – Invitation to treat – Whether oral statements made during meeting amounting to offer or mere invitation to treat

30 May 2008 Judgment reserved.

Lai Siu Chiu J:

1 This was a claim by Bob Teo Seng Kee ("the plaintiff") against Arianecorp Limited ("the defendant") for specific performance of an agreement made in November 2006, wherein the defendant allegedly agreed to transfer 300,000 shares in a company called abKey Pte Ltd ("the Company") to the plaintiff for a consideration of $300,000 on certain terms.

2 The plaintiff is the managing-director as well as the major shareholder of the Company holding 1,650,000 shares. The defendant is a public company that was listed on the Stock Exchange of Singapore in September 1993 under its former name Vikay Industrial Ltd ("Vikay"). At the material time, the chief executive officer ("the CEO") of the defendant was one Kea Kah Kim ("Kea") while its chief operating officer was Ong Teck Guan ("OTG").

3 The Company which business is the manufacture of computer peripheral equipment, was incorporated on 29 March 2004 with the plaintiff and one Quek Seow Chim ("Quek") as the only directors and shareholders each holding one share of $1.00 par value. The plaintiff and Quek are related by marriage as their respective wives are sisters.

4 The plaintiff was the inventor and registered proprietor of the patents to a keyboard which he named the abKey keyboard ("the keyboard"). The keyboard was an improvement on the existing and conventional typewriter keyboard called the Qwerty keyboard ("the Qwerty"). Unlike the Qwerty, the layout of the keys of the keyboard were alphabetically arranged so that users would not have to memorise the layout of the Qwerty in order to learn to type. The keyboard enabled a user especially a novice typist, to type faster.

5 The plaintiff needed to raise capital for the Company from investors. Through an acquaintance Ron Lee Yee Mun ("Lee"), he was introduced to the defendant while on his own, the plaintiff approached an old classmate Ong Eng Kee ("Ong"). Eventually, on 21 May 2004, the plaintiff, the

defendant, Quek and Ong signed a shareholders' agreement ("the Shareholders' Agreement"). The defendant was issued 300,000 shares of par value $1.00 ("the defendant's shares") for its investment of $300,000 in the Company. Ong's investment of $150,000 (for which he was issued 150,000 shares) was held in the name of his company Ekong Investment Holdings Pte Ltd ("Ekong"). Quek's 150,000 shares were bought from the plaintiff's shareholding. The defendant and Ekong were entitled to have board representation for their investments. The defendant's original nominee to the Company's board was Then Chee Tat, its chief financial officer, whose successor OTG replaced him on the board. OTG was not/is not a director of the defendant. Ong was Ekong's nominee on the board. Although Lee was also a signatory to the Shareholders' Agreement, he was not issued any shares eventually as he had failed to procure The Economic Development Board to become a 20% shareholder.

6 On the same day that the Shareholders' Agreement was signed, the plaintiff licensed his rights under the patents to the Company under a licence agreement (the Licence Agreement") in consideration of which he was allotted 1,650,000 fully paid shares in the Company. Under the terms of the Licence Agreement, the rights to the patents reverted to the plaintiff in the event the Company was wound up.

7 Under cl 15.12.1 of the Shareholders' Agreement, the defendant was given the first right of refusal to manufacture the keyboard, which was the only product marketed by the Company. The Company did outsource the manufacture of the keyboard to the defendant on the basis that the defendant's prices were reasonable and competitive and it would be able to meet deadlines for quotations and deliverables.

8 The defendant and the Company signed an agreement on 1 July 2004 called a Management Service and Facilities Rental Agreement under which the defendant rented work-stations and office equipment at its premises to the Company at $1,000 per month and charged the Company a further $3,000 a month for the provision of professional (such as accounting) and administrative services.

9 The defendant in turn subcontracted the manufacture of the keyboard to a company called Racer Technology Pte Ltd ("Racer") which produced the first shipment of 2,000 sets of the keyboard in June 2005, instead of the original deadline of mid-December 2004. Customers who had placed orders complained of the delay and worse, there were quality problems with the keyboard they received, resulting in complaints from users. The defendant eventually terminated its contract-manufacturing arrangement with the Company in September 2005.

10 In an attempt to resolve the manufacturing deadlock, the plaintiff held an informal meeting of the Company's directors in March 2006. It was there agreed that Racer would be paid its outstanding invoices and Racer would then release the plastic moulds for the keyboard to the defendant. However, between the Company and the defendant there was another impasse. The Company could not/would not pay the defendant for the inventory (which the plaintiff claimed was overpriced and which purchase had not been approved by the Company) while the defendant would not release the inventory unless it received payment. The only way the Company could pay for the inventory was by way of letters of credit from its customers, which the defendant refused.

11 It had previously been agreed between the parties that the Company would pay the defendant 60% of tooling costs amounting to US$76,096.44 by 10 November 2004 followed by the remaining 40% amounting to US$48,315.20 within one year of 12 October 2004, by the Company purchasing 100,000 sets of the keyboard from the defendant, priced at US$0.483. If the Company was unable to purchase 100,000 sets of the keyboard within the stipulated deadline, it would have to pay the defendant in cash the balance amount owing. The Company only paid the defendant (on 28 October 2004) US$38,048.22 amounting to 30% instead of 60%, of the tooling costs.

12 In an attempt to break the impasse regarding the inventory withheld by the defendant, the plaintiff sent an email to Kea on 26 September 2006 copied to all the Company's directors, calling for a meeting of the board of directors on 5 October 2006 to discuss the Company's status and to resolve its problems. Kea responded stating he was not a director of the Company. (In another email sent on 27 September 2006 to OTG and Kea, the plaintiff had indicated that unless there was a change in circumstances, he would have no choice but to wind up the Company). As OTG did not turn up for the board meeting on 5 October 2006, the other directors *viz* the plaintiff, Ong and Quek decided to postpone the meeting for a week to 12 October 2006.

13 On 12 October 2006, the entire board met at the Pan Pacific Hotel ("the meeting"). Cindy Chang ('Cindy"), a staff member from the Company' auditors, was also present to record the minutes of the meeting which she did (see AB129-131). Cindy's minutes were consistent with the defendant's version (as given by OTG and Ong) of what transpired at the meeting, which was chaired by OTG.

14 The first part of the meeting related to OTG's request to the plaintiff for an update on the developments on the Company particularly on the plaintiff's efforts to raise new capital from fund managers. The discussion then turned to production problems, the quality of the keyboard and the difficulty of obtaining fresh funding if the Company did not have a product or stocks. The plaintiff handed out a list which detailed the Company's dispute with the defendant and his proposal to resolve the problems. OTG's reply to the list and proposal was that he could not respond as he was not wearing the defendant's hat but rather that of the Company's director. The directors then decided not to deliberate on the issues but to let the plaintiff raise them to the defendant directly. OTG commented that the plaintiff should negotiate with the defendant and Racer to agree on terms for the release of the inventory.

15 It was common ground that at some point of the discussion, the plaintiff offered to buy the defendant's shares as well as Ekong's shares. It was also not in dispute that the plaintiff produced blank offer letters ("the offer letter") he had earlier prepared and which he handed to OTG and Ong meant for the defendant and Ekong respectively. The offer letter reads:

> Agreement
>
> I_____(nric no.) acting on behalf of _____do hereby agree to sell all my/our stakeholding in abKey Pte Ltd comprising of _____shares or __% to _____This will take effect immediately upon my receipt from _____of a total of S$_____, being the full payment thereof. I also hereby undertake to resign from my abKey board of director's appointment, relinquishing all the attendant benefits and privileges thereof, with immediate effect.
>
> Signed this ____day of October 2006
>
> Witness_____
>
> Witness_____

16 The plaintiff then offered to buy the defendant's shares for $300,000 ("the purchase price") and similarly offered to buy Ekong's 150,000 shares from Ong for $150,000. Although both were surprised by the plaintiff's move, OTG and Ong indicated they would accept the plaintiff's offers. Ong there and then signed the offer letter ("Ekong's offer letter") filling in the blanks by naming Ekong as the seller of 150,000 shares at the price of $150,000 and naming the plaintiff as the buyer (see AB132). Ong's signature was witnessed by the plaintiff and Cindy.

17 The minutes recorded by Cindy contained the following last paragraph:

> It was then recorded that Mr Ong Eng Kee and Ariane Corporation had agreed to sell their entire stake in the Company to Mr Bob Teo &/or his nominees at par value for the shares held by these shareholders.

On 26 October 2006, Cindy had emailed to OTG, the plaintiff, Ong and Quek the minutes and had called for comments thereon. The plaintiff did not challenge the accuracy of the minutes. In fact, he replied to Cindy's email (at DB 1) the same night to thank her for "the very accurate and professional minutes".

18 OTG did not sign the offer letter meant for the defendant ("the defendant's offer letter") as he thought it required the signature of the defendant's CEO. Hence, he took the document back to the defendant's office. On the same day he notified Kea of the plaintiff's offer and that he (OTG) had accepted the plaintiff's offer to buy the defendant's shares at the purchase price. Kea informed OTG that it was not necessary for the defendant's board to approve the disposal of its shares in the Company and that OTG could sign the defendant's offer letter.

19 Consequently, OTG signed the defendant's offer letter on or about 25 October 2006 after which he telephoned the plaintiff to say the document could be collected from the defendant's office. The plaintiff indicated he would collect the same the following day.

20 On 26 October 2006, while OTG was away from the defendant's office, the plaintiff turned up at the defendant's office. However, he failed to collect the defendant's offer letter which OTG had left with Joyce Foo ("Joyce") of the defendant's accounts' department. Upon his return to the defendant's office that evening, OTG was told by Joyce that the plaintiff refused to collect the defendant's offer letter on the ground that the plaintiff wanted to discuss several issues with the defendant.

21 Surprised at the turn of events, OTG sent an email to the plaintiff that same evening (at AB 135) stating as follows:

> As I understood very clearly with the presence of the rest of the directors, you had agreed and offered to buy back the shares from Mr Ong and ArianeCorp at the same value that they invested in.
>
> As I understood from my staff, I also realized that you had now rescinded and retracted on your words and actions and you had refused to honour and take the offer letter back after we had signed it. Please acknowledge this asap. I hope that you understand this will constitute an appropriate action from us.

22 OTG received a reply from the plaintiff the same night at 7.40pm (copied to Ong and Quek) as follows:

> You were not in when I came over to AC and Joyce gave me our signed offer letter. I told her to hold on to it as there are several issues that need to be resolved between us.
>
> Rest assured that I have not retracted nor rescinded on my words or actions, something I consider most reprehensible in business.

23 What transpired thereafter was the bone of contention between the parties. Unfortunately, the

defendant's offer letter was not produced in court as the defendant was unable to locate it thereafter. Joyce left the defendant's employment in April 2007 and she could not recall where she had kept the document. Although it would have been preferable for the court to have had sight of the document, the defendant's omission to produce the document was not fatal to its case for the reason that: (a) the plaintiff never denied the existence of the defendant's offer letter and (b) Ekong's offer letter, which was a mirror image of the defendant's offer letter, was produced (see AB 132) to the court by Ong who was a witness.

The plaintiff's version of events

24 According to the plaintiff's written testimony, there was only an agreement reached "in principle" with OTG at the meeting, for him to buy the defendant's shares. The plaintiff asserted he did not have an opportunity then and it was also too premature for him, to state his conditions for the purchase of the defendant's shares. He preferred to raise the subject after OTG had spoken to Kea on the matter.

25 The plaintiff did not deny receiving OTG's email dated 26 October 2006 nor his reply thereto as set out in [21] and [22] above. However, the plaintiff alleged that in a telephone conversation he had with OTG on 1 November 2006, he had told OTG that he would be prepared to buy all the defendant's shares at par value only on condition that the defendant wrote off the Company's outstanding debts and released to the Company the inventory the defendant withheld (including keyboard materials for which the Company had made partial payment and stocks and materials) save for membranes. He claimed that OTG accepted his offer and agreed to write off the Company's debts, except that OTG did not agree to release the inventory.

26 On 2 November 2006, the plaintiff sent an email to OTG reiterating his telephone offer of the previous day. As the email is the gravamen of the plaintiff's claim, I shall set out its text in full (see AB 136):

> As we discussed on the phone, Wednesday, wherein you reiterated that you are prepared to write off all outstanding debts in return for my buying all of AC shares for par value of S$300K.
>
> As generous as it is, I am afraid even if I am to raise $300K, we'll not be able to survive starting from scratch given the long delay – in terms of time and funds needed. As you know, my main aim is to prevent closing down the Company so that the shareholders/creditors do not lose all their money.
>
> I am prepared to bear the risk and buy back your shares at par if, in addition to debt writeoff, AC also releases for our use, your inventory of stock and materials, except for the membranes and including the mold (sic), for which we had made partial payment.

27 OTG responded to the plaintiff the same morning (at AB 136) as follows:

> The release of inventory inclusive of the mould must be upon full settlement of $300,000 to ArianeCorp. I will speak to Mr Kea for his final approval.

OTG received an immediate response from the plaintiff that said:

> Let me know when you've heard from Mr Kea.

28 On 10 November 2006, OTG reverted to the plaintiff by email (copied to Kea) as follows:

I've discussed with Mr Kea. All items inclusive of mould will be released to you immediately once the $300,000 is deposited into our bank account.

29 It was the plaintiff's case (as pleaded in his statement of claim) but which the defendant denied, that there was a concluded agreement on 2 November 2006 or latest on 10 November 2006 whereby he would buy the defendant's shares in the Company at the purchase price, the defendant would release the inventory and treat the Company's debts as extinguished ("the November agreement").

The defendant's version of events

30 OTG not surprisingly denied the plaintiff's claim of the November agreement. OTG asserted that the oral contract concluded on 12 October 2006 was only for the plaintiff to buy the defendant's shares at the purchase price. There were no terms attached to the oral contract let alone the two conditions the plaintiff alleged in [29] above.

31 In his affidavit of evidence-in-chief ("AEIC"), OTG deposed that the defendant's offer letter was in the exact same terms as Ekong's offer letter that Ong had signed at the meeting, agreeing to sell Ekong's 150,000 shares to the plaintiff (or the plaintiff's nominees) at par value without qualification. Why should the defendant's shares be treated differently from Ekong's? He pointed out that it made no commercial sense for the defendant to have to suffer losses instead of making a gain on its investment and at the same time to have to cancel the debts owed by the Company as well as release its inventory.

32 OTG added that after he had signed the defendant's offer letter and contacted the plaintiff to collect the same, the plaintiff had made no mention of any conditions attaching to his offer to buy the defendant's shares, either in their telephone conversation on 25 October 2006 or, in his email reply to OTG on 26 October 2006. This was after the plaintiff had had sight of the defendant's (signed) offer letter albeit he refused to accept it.

33 OTG accused the plaintiff of unilaterally attempting to vary the oral contract *after* 12 October 2006, first on 26 October 2006 and subsequently on 2 November 2006. OTG pointed out that he had not agreed to the plaintiff's telephone request of 1 November 2006 in [25] above on the two conditions the plaintiff had imposed for his purchase of the defendant's shares. Consequently, it was absurd of the plaintiff to state in his email of 2 November 2006 at [26] that OTG had agreed. OTG added that in his email response in [27], he had unequivocally stated that he would speak to Kea for approval to release the inventory upon full settlement of the purchase price. If indeed there was the November agreement, the plaintiff would not have responded to say "Let me know when you have heard from Mr Kea".

34 OTG explained his email of 10 November 2006 in [28] as a gratuitous offer by him to release the inventory on condition that the defendant received full payment of the purchase price. He did not however offer to write-off the Company's debts.

Subsequent events

35 The events that took place after 10 November 2006 are not in dispute between the parties.

36 On 19 December 2006, the plaintiff handed at the defendant's office a personal cheque for $250,000. OTG attended to the plaintiff and inquired as to why the plaintiff was only making part-payment instead of the purchase price in full. The plaintiff replied that he did not have the resources

to pay the full amount. OTG informed the plaintiff he would need to speak to Kea on the plaintiff's request for part-payment. At the same time, he requested the plaintiff to pay $250,000 by a cashier's order instead of by cheque.

37 On the same day, OTG emailed Kea on the plaintiff's request for part-payment and inquired if Kea was prepared to agree. Kea's email reply on 20 December 2006 stated:

> I thought the agreement was for $300K.

which OTG understood to mean the plaintiff's request was rejected.

38 On 20 December 2006, the plaintiff went to the defendant's office to deliver a cashier's order for $250,000 which OTG accepted. OTG also procured the plaintiff's personal undertaking ("the personal undertaking") which stated:

> This is to certify that I, Teo Seng Kee NRIC no. 0005021J of 117 Edgefield Plains #04-328, Singapore 820117, do hereby undertake to pay ArianeCorp Ltd, a sum of S$50,000 in full by 31 March 2007, being the balance of full settlement for the transfer of shares of abKey to me, as stipulated in the Share Transfer Form, dated herein 20 December 2006.

In exchange for the cashier's order and the personal undertaking, OTG executed a share transfer form on the defendant's behalf and also signed a letter of resignation as director of the Company. Both documents were handed over to the plaintiff. The plaintiff scribbled on the share transfer form the words "S$250K payable now and 50K by 31.3.07". I should point out that the share transfer form produced in court (at AB 147) was one of two with the other copy being retained by the defendant, according to the plaintiff's evidence. The plaintiff explained that the defendant's share transfer form had stapled to it email correspondence but he was told by one Yvonne that the document, together with the attachments, had been lost. It was in the course of OTG's cross-examination that counsel for the defendant produced the defendant's copy of the share transfer form (marked as exhibit D-1) and sought to prove that the plaintiff's testimony was untrue because the document did not show staple marks at the top left hand corner such as to prove it had attachments previously.

39 OTG highlighted the omission from the personal undertaking (see AB 145/146) of any reference to release of the inventory or the writing-off of the Company's debts by the defendant.

40 OTG subsequently informed the plaintiff on 27 December 2006 that Kea preferred the balance of $50,000 to be paid once the defendant released all inventory items to the Company instead of waiting until 31 March 2007. The plaintiff agreed to the revised arrangement.

41 However, despite his many attempts and his email to OTG of 9 January 2006, the plaintiff claimed that for three weeks thereafter, he was unable to contact either OTG or Kea to obtain the release of the inventory to the Company even though he was prepared to pay the balance $50,000 and had a cashier's order for the amount ready for the exchange.

42 Consequently, the plaintiff sent a reminder on 19 January 2007 to the defendant as follows:

> Almost a month has transpired since our share transfer agreement and since you have received and cashed our cheque for S$250,000.
>
> You have yet to fulfil your obligations, as per the agreed terms of the share transfer agreement, namely that, in addition to writing off all abKey debts to ArianeCorp, you would release

immediately:

All inventory items – inclusive of the mould, stock and materials (except for the membranes).

(You have also yet to provide us the documents that are needed by our Secretary, which I had asked for time and again).

Although you had originally agreed to our paying the balance of $50,000 by 31March 07, as per the verbal agreement between Ong Teck Guan and me, I have conceded to pay ArianeCorp the balance of S$50,000 immediately upon your release of all inventory items…….

We expect the transfer to be effected, and documents and inventory materials to be completely handed over before 5pm 24 January 07. Otherwise, we have no choice but to assume that you have no interest in fulfilling the terms of the agreement.

43 The plaintiff then received the following response from OTG on 25 January 2007 (at AB 165):

I refer to your email of 19 January. If you will review our previous discussions on this matter, our agreement was that you would pay us S$300,000 for the release only of the moulds, stock and materials (except for the membranes). I did not accept your offer for S$300,000 payment to cover (a) release of the moulds, stock and materials (except for the membranes) (b) writeoff of the inventory (c) transfer to you of the shares.

I noted the payment to us of S$250,000. As per the original agreement, I am prepared to release the moulds, stock and materials (except for the membranes). However, transfer of shares will only be done after you have either paid the debts that is owed to AC or given satisfactory security for repayment of the debt.

As we have received numerous proposals and counter proposals from you that are always short of all outstanding to ArianeCorp; and having reviewed your case with management, we are prepared to listen to your new proposal.

David will represent ArianeCorp in resolving all outstanding issues. Please get in touch with him.

44 In his affidavit of evidence-in-chief ("AEIC"), OTG accused the plaintiff of exploiting the defendant's indulgence by splitting payment of the $300,000 into two tranches, hoping thereby to force the defendant to release the inventory in exchange for the balance payment of $50,000 and attempting to revive his proposed variation to the defendant's offer letter.

45 The plaintiff on his part alleged that OTG did a *volte face* by the email in [43] above on what had previously been agreed. In the event, the plaintiff did not pay the balance $50,000 by 31 March 2007 or at all. Instead, he commenced this suit on 17 April 2007. I should add that ten days after the commencement of this suit, the defendant sued the Company in Suit No. 269 of 2007 for sums in excess of US$200,00 for *inter alia* an outstanding short term loan, fees due under the Management Service and Facilities Rental Agreement in [8] above and the inventory. The claim for inventory (and cost of materials) alone was US$188,642.14 approximating $258,439.73 (at US$1.00 to $1.37).

The pleadings

46 In the statement of claim, the plaintiff repeated the facts set out in [15] to [28] above and alleged that he had, by the November agreement, a binding contract for him to purchase the

defendant's shares in consideration for which the defendant had agreed to release the Company's inventory as well as write-off its debts. The plaintiff asserted he was willing and able as of 24 January 2007 and thereafter, to perform his outstanding obligations under the November agreement and to pay the balance of $50,000. The plaintiff claimed declaratory relief as well as specific performance of the November agreement.

47 In its defence and counterclaim, the defendant denied the November agreement. The defendant contended that the oral contract had been reached much earlier (on 12 October 2006) as evidenced in the minutes of the meeting.

48 The defendant alleged that it was the plaintiff who was in breach of contract as he had failed to comply with the personal undertaking to pay the balance sum by 31 March 2007. The defendant contended that the plaintiff attempted to change the terms of the oral contract unilaterally.

49 The defendant counterclaimed for the balance outstanding of $50,000 and prayed for a declaration that the parties reached agreement on 12 October 2006 for the plaintiff to purchase the defendant's shares in the Company at the purchase price. The defendant also claimed specific performance of the oral contract.

The evidence

50 Apart from the plaintiff, Quek was the only other witness for the plaintiff's case while Ong testified for the defendant together with OTG and Kea. The two key witnesses were the plaintiff and OTG. I should add that neither the testimony of Quek nor of Kea was particularly helpful to the court. In Quek's case, a large portion of his AEIC comprised of what he was told by the plaintiff as he was generally not involved in the running of the Company's business. Neither did Quek have sight of either the defendant's or Ekong's offer letters (see para 40 of his AEIC) even though he attended the meeting. Similarly, Kea's testimony was essentially based on what was reported to him by OTG. I shall return to Ong's testimony later in the judgment.

51 Not surprisingly, one side criticised the testimony of the other party's main witness as unreliable. Accordingly, the plaintiff sought to prove that OTG was not a credible witness and conversely, the defendant submitted that no reliance should be placed on the plaintiff's testimony for the same reason.

The plaintiff's case

52 I start by reviewing the plaintiff's evidence. It was his contention (and pleaded case) that his agreement to buy the defendant's shares in principle at the meeting was borne out by OTG's evidence. Counsel for the plaintiff submitted that his client's offer letters to the defendant and Ekong only amounted to an invitation to treat at law.

53 The plaintiff asserted that the oral contract alleged by the defendant could not have been concluded on 12 October 2006 and he only offered to buy out the defendant at the meeting (but not at par value) because of the following evidence:

(a) the defendant's offer letter was blank, it was neither filled in nor signed as OTG himself indicated (albeit mistakenly) that he could not/would not sign until he obtained approval from the defendant's board;

(b) the plaintiff had raised at the meeting (and it was the very purpose for his calling the

meeting) the deadlock between the two companies over the issue of the inventory;

(c) at the meeting, OTG himself said he was wearing the hat of a director of the Company and not the defendant (although he did an about-turn in the witness stand at N/E 162). OTG therefore declined to discuss the list of issues raised by the plaintiff;

(d) unless the deadlock was then resolved, according to the plaintiff's testimony (at N/E 79) as well as that of Quek (at N/E 129-130), it made no sense for the plaintiff to buy the defendant's shares as the Company could not move forward but he would end up with a personal liability;

(e) no terms were discussed (including payment) on the purchase of the defendant's shares; and

(f) unless OTG reverted to the plaintiff to confirm the defendant's willingness to sell its shares, it would be premature to discuss any terms of sale.

54 The plaintiff pointed to OTG's subsequent conduct/events and the evidence adduced in court as reinforcing his case that no oral contract was concluded at the meeting:

(a) on 25 October 2006, the defendant's offer letter duly signed by OTG represented the defendant's firm offer to sell the defendant's shares to the plaintiff;

(b) unlike Ekong's offer letter, the plaintiff did not countersign the defendant's offer letter to indicate his acceptance of the defendant's offer;

(c) OTG did not reply to the plaintiff's email dated 26 October 2006 at [22] to say that an agreement to buy the defendant's shares had already been concluded at the meeting;

(d) if indeed there was a concluded contract as of 12 October 2006, OTG would not have offered to release (gratuitously he claimed) in his email at [27] the inventory in exchange for the purchase price;

(e) OTG conceded under cross-examination (at N/E 179) that before 10 November 2006, the defendant did not have an enforceable agreement with the plaintiff for the transfer of the defendant's shares, and

(f) Kea agreed (at N/E 245 and 249) that the purchase price was for both the defendant's shares and release of the inventory.

55 The plaintiff then submitted that the court should accept his testimony (and pleaded case) that the November agreement was the concluded contract based on the following evidence:

(a) OTG agreed during cross-examination (at N/E 169) that the defendant was willing to release the inventory which value was between $250,000 and $500,000 whereas the Company's outstanding debts were $100,000 to $150,000 as claimed in Suit No. 269 of 2007 (see [45] above);

(b) there was no reason for the defendant not to agree (in exchange for the purchase price) to extinguish the Company's debts which were of lesser value, if it was willing to release inventory worth $500,000;

(c) OTG did not deny he had a telephone conversation with the plaintiff on 1 November 2006 at

[25] nor what the plaintiff said to him;

(d) therefore OTG must have agreed in that conversation that the defendant would write off the Company's debts in exchange for the plaintiff's payment of the purchase price. Otherwise OTG's reply [27] to the plaintiff's email in [26] would have said there was no agreement for debt write-off;

(e) similarly, OTG's email of 10 November 2006 did not deny the plaintiff's email of 2 November 2006. His message merely reiterated that the defendant would release the inventory upon its receipt of $300,000.

56 Counsel for the defendant described as "lame" OTG's explanation (at N/E 169) that the defendant had decided to release the inventory to the Company because the inventory was of no value to the defendant. It was also untrue because the defendant had sued the Company for the value of the inventory in Suit No. 269 of 2007 (see [45] above).

57 Despite the agreement reflected in [54(f)] based on the defendant's own concession, counsel for the plaintiff complained that the defendant or more specifically OTG, attempted to vary the agreement yet again after the plaintiff had paid the defendant $250,000 by cashier's order on 20 December 2006. Counsel referred in particular to OTG's email to the plaintiff dated 25 January 2007 at [43] where the defendant adopted a "new position" that the $300,000 consideration was for release of the inventory and not for transfer of the defendant's shares or write-off of the Company's debts. Yet in court under cross-examination (at N/E 185 and 202) and again in re-examination (N/E 232-233), OTG had repeatedly said that the inventory would be released to the Company once the plaintiff paid the balance $50,000. OTG's evidence as well as the defendant's closing submissions (at para 114) contradicted para 21 of the defence which pleaded that the defendant's gratuitous offer to release the inventory was no longer valid as the plaintiff failed to tender full payment of the purchase price.

58 Other factors brought to the court's attention by counsel for the plaintiff were the following:

(a) OTG admitted he never told the plaintiff when the latter handed him the cashier's order for $250,000 that the same was unacceptable and that the defendant required full payment of the purchase price;

(b) the defendant reneged on its agreement to transfer the defendant's shares, release the inventory and write off the Company's debts;

(c) the plaintiff had always been willing, ready and able to pay the balance $50,000 since 9 January 2007;

(d) the minutes at [17] were incomplete as it was not stated that the plaintiff had handed offer letters to Ong and OTG nor was there mention that OTG said he needed to get board approval to sign the defendant's offer letter. Consequently, although the plaintiff agreed the minutes were accurate, they were incomplete and not conclusive of an oral contract having been concluded between the parties.

59 Counsel for the plaintiff drew a clear distinction between Ekong's offer letter and the defendant's offer letter. It was submitted that the plaintiff made the same invitation to treat to Ong for Ekong's shares but Ong reacted differently from OTG to the document. Ong did not have to consult or obtain the approval of, anyone else in order to accept the plaintiff's invitation to treat.

Hence, Ong could fill in all the blanks in Ekong's offer letter, sign it and return it to the plaintiff who accepted thereby Ekong's offer to sell its 150,000 shares for $150,000. Ekong and the defendant were two separate entities and neither Ong nor Ekong had issues with the plaintiff like the defendant over debts or inventory because Ekong and/or Ong had no involvement in the Company's business.

60 In the light of OTG's/the defendant's constantly shifting position which was also inconsistent with the email exchanges produced in court and which contradicted the defendant's pleaded case, the plaintiff's submissions urged the court not to accept the defendant's contention that there was an oral contract concluded on 12 October 2006. Instead, the plaintiff requested the court to accept that the parties' rights were governed by the November agreement.

61 The defendant's counsel not surprisingly was equally critical of the plaintiff's testimony as his opponent was of the evidence of OTG. First, it was pointed out that the plaintiff had conceded under cross-examination (at N/E 23) and when questioned by the court (at N/E 29) that he made the offer to buy out the defendant's shares as well as Ekong's shares on 12 October 2006. The plaintiff's witness Quek (PW2) had also confirmed that it was the plaintiff who made the offer to buy out the other two shareholders. If indeed the offer came from the defendant as the plaintiff contended, there was no reason for OTG to have been surprised by the plaintiff's move just as Quek was. Contrary to the plaintiff's pleaded case, the defendant argued that there was nothing on the evidence to suggest and/or show that the sale of the defendant's shares was subject to further negotiations between the parties.

62 The defendant relied on Ong's testimony to support its interpretation of the events that took place on 12 October 2006. Ong (DW3) had confirmed (at N/E 266) that the plaintiff offered to buy the shares of the defendant and Ekong and OTG was agreeable to the offer. Ekong similarly accepted the plaintiff's offer to buy its 150,000 shares. There was no reason to treat the defendant differently. The defendant described OTG's need to obtain Kea's signature or to obtain the defendant board's approval to the defendant's offer letter as a mere formality.

63 The defendant also placed reliance on the minutes of the meeting as well as on the plaintiff's conformation of the accuracy of the minutes at [17]. Consequently, the defendant argued, there was no evidence to support the plaintiff's case that only "in principle" agreement had been reached on 12 October 2006 for the purchase of the defendant's shares. The fact that the plaintiff praised Cindy in his email at [17] on receipt of the minutes from Cindy (see DB 1) spoke for itself. The plaintiff's excuse (at N/E 22) that he did not see a need to disclose his email to Cindy was not due to inadvertence. It was a deliberate act of concealment and the defendant invited the court to draw an adverse inference against the plaintiff for his non-disclosure.

64 The defendant pointed to the fact that the plaintiff's email of 26 October in [22] supported its case that there was already a concluded contract by that date. The defendant also placed reliance on the court's exchange with the plaintiff (at N/E 26-28) to show that it was unnecessary for the plaintiff to have countersigned the defendant's offer letter to indicate his acceptance of the defendant's shares.

65 The defendant argued that there could not have been a conclusion of the contract on 2 or 10 November 2006 because there was no unequivocal acceptance by the defendant of the plaintiff's proposals of adding two conditions to the transfer of the defendant's shares in the Company. OTG had also denied he had agreed to the conditions when he spoke to the plaintiff on 1 November 2006. The plaintiff's email of 2 November 2006 [26] did not mention that an agreement had been reached on 1 November 2006. It merely proposed the plaintiff's two conditions for buying the defendant's shares.

66 As for OTG's email of 10 November 2006 at [28], the defendant argued that it could not at law be construed as an acceptance of the plaintiff's counter- offer of 2 November 2006 as there was a material variation from the plaintiff's offer; nothing in OTG's email suggested there was a waiver of the Company's debts owed to the defendant. In any case, the plaintiff did not respond to OTG's email.

67 The defendant criticised the plaintiff's explanation that it would not have made commercial sense for him to buy the defendant's shares without resolving the two issues (of the inventory and the Company's debts) as an afterthought and an unsustainable attempt to justify his case. It was said that the plaintiff regretted entering into the oral contract without agreeing with the defendant on the release of the inventory and the debt write-offs. However, it was not the function of the courts to set aside a bad bargain (citing *Tai Joon Lan v Yun Ai Chin & Anor* [1993] 3 SLR 129). The plaintiff's closing submissions pointed out that this and the other cases cited by the defendant (*Bell & Anor v Lever Brothers Limited* [1932] AC 161; *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601) were cases in which written contracts were already in existence. Consequently, the courts were reluctant to imply any term into the written agreements that the parties had already concluded, just so as to overcome the hardships suffered by any one party from a bad bargain.

68 The defendant's closing submissions described the 59 year old plaintiff as no simpleton but as someone who had calculated his moves – first to get the defendant's shares at par value and when his offer to the defendant was accepted (as the defendant would want to recoup its investment), he then introduced the two conditions for his purchase of the defendant's shares.

69 The defendant's submission also sought to explain away some of the inconsistencies in OTG's evidence as well as in the defendant's case. Despite the concessions made in court by both OTG and Kea, the defendant maintained its position that the release of the inventory was a gratuitous offer made as a gesture of goodwill, provided the plaintiff paid the outstanding balance of $50,000.

70 As for the plaintiff's argument (put to OTG during cross-examination) that the defendant had benefited from the use of the $250,000 payment made by the plaintiff and yet he did not receive a single share from the defendant in return, the defendant sought to persuade the court (a submission that the plaintiff described as audacious and ludicrous) that the fault lay with the plaintiff! He failed to pay the balance $50,000.

71 The defendant further alleged that it had all along relied on the personal undertaking that the plaintiff would pay the balance due to the defendant by 31 March 2007. This submission totally ignored the evidence that OTG had informed the plaintiff on 27 December 2006 at [40] that Kea wanted the plaintiff to pay the balance as soon as possible and not wait until 31 March 2007 to do so. It further overlooked the plaintiff's email of 9 January 2006 in [41] above which stated he had a cashier's order for $50,000 ready to be exchanged for the defendant's share transfer form and release of the inventory.

72 The defendant claimed the plaintiff had misinterpreted the true intent of OTG's email dated 25 January 2006 set out in [43] above. Its counsel submitted the court should read the email in its entirety together with the last paragraph. The defendant's submission (para 118) explained that the defendant was extremely frustrated with the plaintiff's constantly changing positions *viz* the inclusion of additional conditions, his excuse of not having enough cash to pay one lump sum of $300,000. Hence the "new position" (in the defendant's words) set out in the email was a reaction on the part of OTG to the plaintiff's constant variation attempts and to his failure to pay the balance $50,000.

73 I should point that the plaintiff rejected the defendant's above explanation in its submissions on

the basis that there was no ambiguity in the email. I agree with the plaintiff's submission that it was crystal clear from OTG's email that he denied there was any agreement to transfer the defendant's shares.

The findings

74 While the plaintiff's failure to disclose his email to Cindy (DB 1) was inexcusable and his explanation for his omission was unconvincing, I had no other reasons to doubt the veracity of his evidence. On the whole, the plaintiff's testimony was satisfactory and the email he sent to Cindy cannot be considered to be fatal to his case. Counsel for the defendant made much of the fact that the court (at N/E 28) when questioning the plaintiff did not accept or understand some of his answers. I do not put too much store on that isolated incident either in my overall assessment of the plaintiff's case.

75 The same observations however cannot apply to OTG, who was considerably more articulate than the plaintiff and who was noted by the court to be prevaricating at one stage (at N/E 218) when he was questioned on the benefit to the defendant of having been paid $250,000 by the plaintiff. OTG's testimony was at times inconsistent with the defendant's pleaded case and at other times he contradicted himself. When it served his purpose to do so, he told the plaintiff at the meeting that he did not represent the defendant. In court however (see [53] above) because it served his purpose to say so (in order to support the defendant's case that an oral contract was concluded on 12 October 2006), he stated the opposite.

76 What was equally clear from the emails that he exchanged with the plaintiff was that OTG constantly shifted the goalpost in his negotiations with the plaintiff. That was unfair to the plaintiff whose sole purpose in wanting to buy over the defendant's shares was to try and make a success of the Company and his invention as well.

77 At this juncture, it would be appropriate to touch briefly on Ong's testimony before I go to my findings. Ong came across as a truthful and objective witness. It spoke well of him as a friend and as a person, that although Ong could have insisted on strict compliance with the terms of Ekong's offer letter, yet when the plaintiff approached him in November 2006 to reduce the agreed sale price of $150,000 (because the plaintiff had difficulty raising sufficient moneys to complete his purchase of Ekong's shares), Ong agreed and reduced the price by 50% to $75,000.

The issue

78 The only issue for the court's determination is, was an oral contract concluded on 12 October 2006 for the sale of the defendant's shares as the defendant contended or, was it concluded on 2 November 2006 or at the latest 10 November 2006 as the plaintiff maintained?

The decision

79 I am satisfied on the evidence, that the plaintiff's version of what happened at the meeting is correct, as corroborated by Ong. There was only an agreement in principle reached on 12 October 2006 that the plaintiff would buy the defendant's shares. It was at best an invitation to treat as the plaintiff submitted (see *Chitty on Contracts* 29th Ed 2004 Sweet & Maxwell Vol 1 p 25-126). OTG, who was the defendant's nominee on the Company's board did not complete the defendant's offer letter, sign and return it to the plaintiff to indicate acceptance of the plaintiff's offer because he thought (rightly or wrongly) that he was not in a position to do so. The defendant's argument that it should be treated no differently from Ekong was misconceived. Ekong had no outstanding issues to be

resolved and that was why Ong and the plaintiff concluded their agreement there and then.

80 I accept the plaintiff's explanation that unless and until he was certain that the defendant would accept his offer to buy out the defendant's shares, it served no purpose to discuss the terms of the sale and purchase further. I further accept the plaintiff's rationale (and Quek's) that unless there was a global settlement with the defendant on the twin issues of the inventory and the Company's debts, it made no commercial sense for the plaintiff to buy the defendant's shares either and incur a personal liability thereby. The keyboard was far from being a commercial success judging by its quality problems and the plaintiff was hard put to come up with the funds (eventually $375,000) to pay for the shares of the defendant and Ekong. It was vital therefore as Quek testified, that the Company was taken back by the plaintiff with a clean slate.

81 As the terms and conditions of sale were not even discussed, no oral contract was concluded on 12 October 2006 to sell the defendant's shares to the plaintiff. This is fundamental contract principles. I can do no worse than refer to a passage from *Cheshire, Fifoot & Furmston's Law of Contract – Second Singapore and Malaysian Edition 1998* at p 76 cited by the defendant that says:

> An offer, capable of being converted into an agreement by acceptance, must consist of a definite promise to be bound *provided that certain specified terms are accepted*...(emphasis added).

82 I move next to consider the plaintiff's case – was there the November agreement? Here again, one must consider the factual matrix. I accept the defendant's submission that the plaintiff's email of 2 November 2006 in [26] did not confirm he had reached an agreement with OTG a day earlier. The plaintiff merely reiterated his previous day's offer. It was the plaintiff's own evidence (at para 105 of his AEIC) that in their telephone conversation, OTG did not agree to release the inventory but only to forgive the Company's debts (see [25] above).

83 OTG's reply at [27] stated very clearly that in exchange for payment of $300,000, the inventory would be released. This was repeated in OTG's follow-up email on 10 November 2006 at [28]. The ambiguity that arose was, did the defendant mean the plaintiff would get the defendant's shares as well as the inventory if he paid the purchase price? Or did it mean (according to the plaintiff's version) that having *already agreed* with the plaintiff on 1 November 2006 to sell the defendant's shares and write-off the Company's debts in exchange for payment of the purchase price, OTG had agreed to the plaintiff's second condition to release the inventory?

84 The position was not made any clearer by OTG's contention in court at [34] that his offer of the inventory was made gratuitously on condition that the defendant received the full payment of $300,000 from the plaintiff. However, I note in this regard that the plaintiff was never told it was a gratuitous offer let alone that it required him to pay the purchase price in full, not even when he appeared at the defendant's office and handed OTG a cashier's order for $250,000 on 20 December 2006 (see [38]). It would have been reasonable to expect OTG to have rejected the part-payment there and then (as well as the plaintiff's request to pay the balance of $50,000 on 31 March 2007 as evidenced in the personal undertaking) but he did not. I had earlier alluded to the fact at [54] and [57] that in court, OTG and Kea abandoned the issue of the gratuitous offer and confirmed that the defendant would deliver the defendant's shares and release the inventory once the plaintiff paid the balance $50,000 still outstanding.

85 The next event that took place was OTG's *volte face* on 25 January 2007 at [43] when he adopted what he described in court as the "new position" (at N/E 195) viz that the defendant's agreement was only to release the inventory in exchange for the plaintiff's payment of the purchase price.

86 The defendant's change of heart was reprehensible to say the least. I agree with the plaintiff's submission that had he known that OTG would change his mind and that the plaintiff's payment of $300,000 would not (as he thought) secure him: (a) the defendant's shares; (b) the release of the inventory and (c) the write-off of the Company's debts, the plaintiff would not have paid $250,000 on 20 December 2006 and be willing to pay the balance of $50,000 on 9 January 2007.

87 To recapitulate, the plaintiff thought he had secured agreement from OTG on 1 November 2006 to the extinguishment of the Company's debts and transfer of the defendant's shares. The plaintiff also wanted release of the inventory which OTG did not agree to on 1 November 2006. However, on 2 and 10 November 2006, OTG's email reply (at [27] and [28]) to the plaintiff's email of 2 November 2006 (at [26]) suggested the defendant was also agreeable to this second request. In the context of the parties' negotiations, it was not unreasonable for the plaintiff to believe (which he did) that his payment of the purchase price had secured him all three items he wanted *viz* ownership of the defendant's shares, release of the inventory and a write-off of the Company's debts. Hence, he was prompted to and did pay $250,000 to the defendant by a cashier's order (as requested by OTG) on 20 December 2006 and he would have paid the balance of $50,000 on 9 January 2007 by another cashier's order had the defendant/OTG responded to his email message to release the inventory (see [41] above).

88 The defendant's pleadings (at para 18 of the defence) contended that there was no fresh consideration in any case for the plaintiff's request to vary the oral contract by releasing the inventory and the writing off of the debts. As counsel for the plaintiff rightly pointed out, that statement represents the old English law that performance of an existing contractual obligation by the promisee is not valid consideration for a new promise (see *Stilk v Myrick* (1809) 2 Camp 317).

89 However, the modern law on consideration has evolved and moved away from that old position. The modern approach (albeit much criticised by academics) is encapsulated in the judgment of LJ Glidewell in *Williams v Roffey Bros Ltd* [1990] 2 WLR 1153 ("*Williams'* case") who, after reviewing *Pao On v Lau Yiu Long* [1980] AC 614) said (at p 1165):

> …the present state of the law on this subject can be expressed in the following proposition: (i) if A has entered into a contract with B to do work for, or to supply goods or services to, B in return for payment by B, and (ii) at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain; and (iii) B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time and (iv) as a result of giving his promise, B obtains in practice a benefit, or obviates a disbenefit; and (v) B's promise is not given as a result of economic duress or fraud on the part of A, then (vi) the benefit to B is capable of being consideration for B's promise, so that the promise will be legally binding.

90 Our appellate court in *Sea-Land Service Inc v Cheong Fook Chee Vincent* [1994] 3 SLR 631 had distinguished *Williams'* case (at 634-635) as a limited exception to the English rule (that performance of existing obligations does not amount to valid consideration). For the exception to apply, the promisor must have obtained a factual or a practical benefit from the promisee's performance of his existing contractual obligations.

91 Did the defendant obtain a benefit for the limited exception in *Williams'* case to apply? The answer is yes. The defendant had the use of the plaintiff's $250,000 payment since 20 December 2006. Indeed, after being pressed by the plaintiff's counsel as well as the court for his answer (at N/E 217) on whether the defendant had had the benefit of the plaintiff's moneys, OTG finally admitted that the defendant used the plaintiff's $250,000 as part of its cash flow.

92 I should add that the modern approach in contract law requires very little to find the existence of consideration (per V K Rajah JC in *Chwee Kin Keong & Others v Digilandmall.com Pte Ltd* [2004] 2 SLR 594 at [139]).

93 I therefore declare that on 20 December 2006, there was a concluded contract wherein the defendant agreed to transfer the defendant's shares to the plaintiff, release to him the Company's inventory and extinguish the Company's debts in exchange for the plaintiff's payment of $300,000.

Conclusion

94 Consequently, there will be an order in terms of paras 20(b) and (d) of the plaintiff's (amended) statement of claim. The defendant is required to deliver up to the plaintiff: (a) a duly executed share transfer form; (b) the relevant share certificate(s) relating to the defendant's shares and (c) a board resolution approving the transfer of its shares to the plaintiff or to the plaintiff's nominee. In addition, the defendant shall release to the plaintiff the Company's inventory and write-off the Company's debts in the books of the defendant.

95 In exchange thereof, the plaintiff shall deliver a cashier's order for $50,000 to the defendant. The counterclaim is dismissed. The plaintiff shall have his costs on both the claim and the counterclaim.