

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1992] SGHC 202

Suit No 1325 of 1987

Between

SAS International Hotels a/s

... Plaintiff

And

Amara Hotel Properties Pte
Ltd

... Defendant

GROUND OF DECISION

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

SAS International Hotels a/s v Amara Hotel Properties Pte Ltd

[1992] SGHC 202

Suit No 1325 of 1987
Judith Prakash JC
28 July 1992

1 Judgment:

2 Coram: Judith Prakash JC

3 Cur Adv Vult

4 JUDGMENT

5 THE EXIT AGREEMENT

6 This claim arises out of an agreement which the parties to this suit made to end their relationship and resolve all disputes between them once and for all. Ironically, the terms of the agreement (commonly referred to during the hearing as "the Exit Agreement") are now themselves the subject of disputes which this court has to settle. First, the background to the case. In 1979, the defendants' group of companies acquired a site from the Urban Redevelopment Authority on which they had to construct and operate a hotel and ancillary shopping centre. At that time, the defendants' group had property and construction businesses but no experience in running a hotel. Consequently in 1982, the

defendant company which was established by the group to own and operate the hotel, entered into a contract ("the management contract") with SAS Catering and Hotels, a consortium which agreed thereby to assist the defendants in the planning, designing and construction of a hotel and thereafter to operate such hotel on the defendants' behalf. The rights and obligations of SAS Catering and Hotels under this management contract were subsequently taken over by SAS International Hotels A/S, the plaintiffs herein.

7 For consistency, henceforth in this judgment I will adopt the nomenclature of the Exit Agreement and refer to the plaintiffs as "SIH" and to the defendants as "Amara".

8 The construction of the hotel duly commenced. In 1984, SIH assigned one of their employees, a Mr Kurt Ritter (PW1), as the pre-opening general manager of the hotel. Mr Ritter's responsibility was to work with Amara to ensure that the hotel met the requirements and standards of SIH. After two years on the job, Mr Ritter came to the conclusion that the hotel was not up to standard and that it would be very difficult for the co-operation between SIH and Amara to continue. He therefore convinced SIH that their involvement in the hotel's operations and management should terminate.

9 In early May 1986, Mr Ritter informed Amara that SIH wished to withdraw from the management contract. Amara was shocked by this as, although there had been disputes with SIH over expenditure, there had been no previous indication that SIH was considering a total withdrawal and the hotel was scheduled to open at the end of May 1986.

10 On 7 and 8 May 1986, SIH and Amara held prolonged negotiations on the terms on which the management contract would cease to operate. The result

was the Exit Agreement which was signed on 8 May 1986. The main purpose of the Exit Agreement as stated in recital (3) thereto was to enable the parties to terminate the management contract and to release each other from all liabilities, claims, demands, actions and proceedings arising in connection with the management contract or its termination. A secondary purpose of the document was to settle the basis on which SIH would provide interim assistance to Amara after the termination of the management contract.

11 Unfortunately a new set of problems arose in the operation of the Exit Agreement leading to this claim by SIH and a counterclaim by Amara.

12 THE FIRST DISPUTE: CLAUSE 3.1(i) While the Exit Agreement was being negotiated, Amara was aware that they would have great difficulty in opening and running the hotel without the services of certain key management personnel. Amara therefore asked SIH to allow two of their employees, Mr Ritter and one Mr Kuendig (PW2), to stay on at the hotel in the positions of general manager and resident manager respectively, for an interim period. SIH agreed to provide the services of the two men for a period of three months on the basis that their salaries and other benefits would be borne by Amara. Clauses 3.1(i) and 4.1(i) of the Exit Agreement were drafted to provide for this arrangement.

13 In the event, Amara was able to find replacement staff much sooner than expected. On 31 May 1986, Amara wrote to SIH stating that they had found a suitable general manager for the hotel whom they wished to appoint immediately. The letter continued "Therefore, we would be much obliged if transfer arrangements could be made for Messrs Kurt Ritter and Werner Kuendig in mid-June 1986" (AB31). SIH protested but Amara insisted that Mr

Ritter and Mr Kuendig were no longer required. They left the hotel on 15 June 1986 i.e. halfway through the three month period.

14 SIH's first claim under the Exit Agreement is for reimbursement of those portions of the salaries and other perquisites of the two men for the period 8 May 1986 till 7 August 1986 which have not been met by Amara. In response, Amara contends that they were entitled to terminate the services of these two gentlemen at any time they chose during the three month period and that therefore SIH's claim is misconceived.

15 The issue that arises therefore is whether on the true construction of clause 3.1(i) of the Exit Agreement, the services of Kurt Ritter and Werner Kuendig were provided for a fixed period of three months which could not be shortened by Amara at their option.

16 Clause 3.1(i) reads:

17 "3.1 Assistance to Amara

18 SIH hereby undertakes:-

19 (i) To provide the services of Mr Kurt Ritter and Mr Werner Kuendig as General Manager and Resident Manager respectively of the Hotel for a period of three (3) months from the date hereof against Amara meeting all payments and salaries and providing all perquisites and benefits under the contracts of employment between SIH and Messrs Kurt Eduard Ritter and Werner Kuendig annexed as Schedules B and C respectively, and in addition paying for the cost of repatriation of Messrs Kurt Eduard Ritter and Werner Kuendig and their

families (full fare economy) from Singapore to Oslo at the expiry of three (3) months from the date hereof or earlier termination hereof;"

20 Clause 4.1(i) is collateral to the above and by this clause Amara undertakes to:

21 "(i) pay all salaries and provide all benefits and perquisites provided for under the contracts of employment of Messrs Kurt Eduard Ritter and Werner Kuendig, annexed as Schedules B, and C and fulfil < Amara's > further obligations stated in clauses 3.1 hereof"

22 Amara rely on the words "at the expiry of three months from the date hereof or earlier termination hereof" (emphasis mine) which appear at the end of Clause 3.1(i) to support their contention that they could at any time terminate the provision by SIH of the services of the two men.

23 SIH on the other hand submits that the Exit Agreement has to be read as a whole to discern its object and the intention of the parties. A single phrase of the Exit Agreement cannot be looked at out of context. In this connection, I was referred to paragraph 820 of Chitty on Contracts (26th Edition) which states:

24 "Every contract is to be construed with reference to its object and the whole of its terms, and accordingly, the whole context must be considered in endeavouring to collect the intention of the parties, even though the immediate object of inquiry is the meaning of an isolated clause."

25 SIH pointed out that at the time the Exit Agreement was signed, Amara needed or thought they needed the assistance of SIH on an urgent basis to help them open the hotel and run it for the first few months. Although SIH were no

longer willing to be permanently involved in operating the hotel, the Exit Agreement indicates that they were willing to assist provided the terms of assistance were clearly defined and limited. This can be seen from the following provisions:

26 (1) clause 3.1(i) itself; (2) clause 3.1(ii) whereunder SIH undertook to render to Amara for a period of three months from the date thereof, and free of charge, such assistance as SIH in its absolute discretion deemed fit as being necessary in relation to the management of the hotel; (3) clause 3.3 which provided that upon the expiry of the three month period, SIH might, if so requested by Amara and at their absolute discretion, provide the services of the two gentlemen for such further period as SIH deemed fit; (4) clause 3.2 which was an extensive exemption clause relieving SIH from liability for any services rendered pursuant to clause 3.1 and indemnifying them against claims arising from such services.

27 Clause 3.1 of the Exit Agreement is not the only clause where a period of three months is referred to. This period appears again in clauses 3.3, 4.2 (which contains certain undertakings to be observed by Amara during the three month period) and clause 4.4. When the Exit Agreement as a whole is considered, it is apparent that three months was fixed by the parties as the length of the interregnum between the time when SIH was wholly responsible for the hotel's management and the time when these duties were fully taken over by SIH. It was an interval during which a smooth handover could be effected. In this context, it is not surprising that nowhere in the Exit Agreement is either party expressly given the right to shorten the interregnum. It would have been important to Amara at the time of signing that they could count on SIH and the services of the two men for the whole of the three months. Mr Teo Hock Chuan (DW1), a director of Amara, conceded (though somewhat reluctantly) that the

provision of the two men's services was a benefit which Amara derived from the Exit Agreement.

28 The only indication in the whole document that there is even a possibility of early termination is in the words "or early termination thereof" in clause 3.1(i) which Amara rely on. They contend that the only legal meaning to be drawn from these words is that Amara had a right of early termination, otherwise they are redundant. The interpretation given by Amara is not the only possible or even the most likely interpretation of the phrase. These words have to be read in their context. The context in which the words appear in the clause is in relation to the payment of repatriation expenses of the two men upon the expiry of their service. It is submitted by SIH that the words contemplate a factual situation where Amara might, albeit wrongfully, terminate their use of the two men prior to the expiry of the three months period. The insertion of the words here makes it clear that Amara's obligation to pay the repatriation expenses would arise not only when the agreed period expired but also when it is wrongfully shortened. I accept this submission. If the period for which the services were to be provided was to be subject to early termination by either side, it would have been expressly so stated. The inclusion of the four words in a part of the clause relating to repatriation rather than appointment cannot carry such a heavy weight as Amara contends.

29 To bolster their argument, Amara sought to rely on the provisions of clause 4.2 of Mr Ritter's employment contract with SIH and an identical clause in Mr Kuendig's contract. It is provided by each of these clauses that if, inter alia, Amara makes a request to SIH to remove the employee concerned from the hotel, SIH will discontinue such employee's service in the hotel and in such event the employee shall accept immediate repatriation to another SIH hotel. Counsel for Amara submitted that this provision clearly establishes Amara's

right of immediate termination. In my opinion, such a clause cannot assist Amara. It forms a necessary part of the contract between SIH and its employees so that the latter cannot resist a transfer if one is necessitated in the circumstances specified in the clause. However Amara's right to request SIH to make such transfer cannot reside in the employment contract between SIH and SIH's employee. It must emanate from the contractual arrangement between Amara and SIH itself. The Exit Agreement contains no such right. The deficiency in the Exit Agreement cannot be filled by reference to an independent contract between SIH and its employees.

30 In my judgment, on a true construction of the Exit Agreement, the services provided by SIH under clause 3.1(i) were to be provided for a fixed period of three months which could not be unilaterally shortened by either party.

31 Accordingly Amara's purported termination of SIH's services on 15 June 1986 was wrongful.

32 I have next to determine what damages can be recovered by SIH for this breach.

33 The submission made by SIH was that they were entitled to recover all the items particularised in paragraph 5 of the Statement of Claim as the perquisites and benefits payable under the respective contracts of employment between themselves and Messrs Ritter and Kuendig. I am unable to accept that submission in its entirety. SIH is entitled to be put in the place in which they would have been had Amara not breached the Exit Agreement. They are not entitled to recover what they have not expended nor what they would not have been liable to expend. In short, SIH cannot make a profit from Amara's breach.

34 Further, any amounts claimed by SIH which would have been payable as at 8 May 1986 are no longer claimable as a result of clause 1.2 of the Exit Agreement whereunder each of the parties thereto released the other from".....all liability, claims, actions, demands and other proceedings arising in respect of, under or in connection with the Amara Hotel Management Contract or its termination hereunder, and each of the parties here to undertakes not to commence any action against the others and to release and discharge the others from all claims, actions, demands and other proceedings in connection with the Amara Hotel Management Contract or the termination of the same save to the extent as the same is permitted hereunder."

35 With the above principles in mind, I turn to the various sums claimed by SIH in relation to the salaries and perquisites due to Messrs Ritter and Kuendig under their respective employment contracts.

36 A. The Kurt Ritter claim (i) Salary for period 15 June 1986 to August 1986 @ \$10,000 a month totalling \$17,307.50 I allow this in full. (ii) Housing for the same period @ \$5,000 a month totalling \$11,129 I allow this in full. (iii) Food allowance for one person for the same period @ \$50 a day totalling \$2,650 I disallow this claim on the basis that it is not provided for in Mr Ritter's employment contract. (iv) Laundry allowance for two persons for the same period @ \$200 per month totalling \$350 I disallow this claim on the basis that it is not provided for in Mr Ritter's employment contract. (v) Membership fees at Swiss Club and American Club for the period 1 June to 7 August 1986 totalling \$495 I disallow this on the basis that such fees are not provided for in the employment contract. The fact that prior to 8 May 1986, Amara paid these fees for Mr Ritter as an additional benefit does not entitle SIH to claim what they were not themselves legally obliged to pay on Mr Ritter's behalf. (vi) Vacation tickets for two persons for period 1 June 1985 to 1 June 1986 totalling

\$9,564 I allow this at \$2,391 being 25% of the amount claimed. I note that under his employment contract, Mr Ritter and his wife were entitled to one set of return air tickets for every 12 months service. SIH was providing Mr Ritter's services to Amara for three months only and therefore cannot claim more than one quarter of the vacation tickets' cost. Mr Ritter's service prior to 8 May 1986 cannot be taken into account in this connection as that claim would have been covered by clause 1.2 of the Exit Agreement. (vii) Expatriation freight for two persons at \$1,500 per person totalling \$3,000 I allow this in full as it is specifically provided for under clause 3.1(i). Mr Ritter's evidence was that in fact more than the sum claimed was expended on repatriation. (viii) Expatriation tickets for two persons totalling \$4,782 I allow this in full on the same basis as the expatriation freight claim. (ix) Car allowance for the same period @ \$2,500 a month totalling \$4,375 I disallow this claim. Mr Ritter's employment contract provided that one of the hotel cars would be at his disposal when needed. Mr Ritter's evidence was that he had the use of a car up to the end of June 1986 when he went on holiday. He did not ask Amara for the use of a hotel car in July or August 1986. No evidence was tendered to show that SIH provided him with a car at their own expense nor was there any evidence that they paid Mr Ritter himself a car allowance of \$2,500 a month between June and August 1986. Accordingly they have not suffered any loss under this head. (x) Driver for car for the same period @ \$900 a month totalling \$1,575 I disallow this claim. Mr Ritter's evidence was that he did not employ a driver at any time between 15 June and 7 August 1986. Secondly, the employment contract makes no mention of a driver. Accordingly SIH has no basis for this claim. (xi) Expense account of \$2,239 for the period April to June 1986 I allow this at \$514.90 being the expenses incurred in May 1986 as shown by the document AB33. The sum of \$1,623.80 incurred in April 1986 (as shown in document AB32) cannot be recovered as the claim therefor was released under clause 1.2 of the Exit

Agreement. (xii)Income taxes for the period 1985 to 1987 claimed at \$37,501.25 I disallow this claim. According to the document AB45 Mr Ritter's tax liability for the period 1 January 1986 to 15 June 1986 was \$6,791.25. Thus his tax liability for three months work in 1986 would proportionately be approximately \$3,400. Amara paid the tax authorities \$3,800 on Mr Ritter's account in July 1987 (AB329). Documents AB47 and AB50 showed that the tax payable by Mr Ritter for the years of assessment 1985, 1986 and 1987 was \$41,301.25 and thus the amount of \$37,501.25 claimed by SIH was ascertained by deducting therefrom Amara's payment of \$3,800. In my judgment, Amara cannot be made responsible for all of Mr Ritter's tax for the years 1985 to 1987. Their liability under the Exit Agreement was to pay Mr Ritter's perquisites during the three month period between 8 May and 7 August 1986 only. Tax on income earned before 8 May 1986 or after 7 August 1986 falls outside such liability. Those taxes must be borne by SIH. If SIH had a claim on Amara for those taxes pursuant to the provisions of the management contract, then such claim was released upon the signing of the Exit Agreement and cannot be reinstated. As the sum of \$3,800 paid by Amara to the tax authorities on Mr Ritter's behalf exceeds the amount of tax which would have accrued between 8 May and 7 August 1986, no further claim for tax can be made against them. (xiii)Deduction From the total of the above amounts, there must be deducted a sum of \$1,750 in accordance with paragraph 5 of the Statement of Claim. This sum represents SIH's agreed contribution to Mr Ritter's salary and perquisites since Mr Ritter also carried out regional work for SIH at the same time as he managed the hotel. B. The Werner Kuendig claim (i) Salary for the period 1 June 1986 to 7 August 1986 @ \$6,500 per month totalling \$14,500 I allow this in full. Whilst there was some suggestion during Mr Kuendig's cross-examination that his salary for June 1986 was held back on account of his income tax liability, Amara did not subsequently substantiate this by showing

proof of payment made to the income tax authorities on Mr Kuendig's behalf. (ii) Housing for the period 1 June 1986 to 7 August 1986 @ \$2,800 a month totalling \$6,232 I allow this at \$2,800 for the month of June 1986. According to Mr Kuendig's evidence, he left Singapore at the end of June with no intention of returning here. He went on holiday abroad whilst SIH tried to find him a new position within their organisation. Eventually he took up a post in Oslo on 15 August 1986. As Mr Kuendig was not in Singapore at all between 1 July and 7 August 1986 and no other housing was provided by SIH for him during that period since he was on holiday, SIH cannot claim a payment for his housing after 30 June 1986. No documentary evidence was tendered by SIH to establish that they paid the rent of Mr Kuendig's service apartment in Singapore during the period 1 July to 7 August 1986. (iii) Food allowance at \$50 per day for the period 15 June to 7 August 1986 totalling \$2,650 I disallow this claim as it is not provided for under Mr Kuendig's employment contract. (iv) Laundry allowance @ \$100 a month for the same period totalling \$175 I disallow this claim for the reason given in paragraph (iii). (v) Swiss Club membership fees of \$150 for period 1 June 1986 to 7 August 1986 I disallow this claim for the reason given in paragraph (iii). (vi) Vacation ticket for year 15 June 1985 to 15 June 1986 being a claim for \$4,782 I allow this at \$1,195.50 being 25% of the amount claimed for the reasons given in relation to Mr Ritter's vacation ticket claim. (vii) Expatriation freight cost of \$1,500 and expatriation ticket cost of \$2,391 I allow these items in full as being due under clause 3.1(i). (viii) Expense account for the period 1 May to 15 June 1986 claimed at \$778.51 I allow this in full.

37 In total the plaintiffs are entitled to recover the sum of \$59,039.41 in connection with this part of their claim. THE SECOND DISPUTE: CLAUSES 5.2 AND 5.3 AND SCHEDULES F AND G SIH also claims a sum of

Norwegian Kroner (Nkr) 803,588.39 as the balance of a sum of Nkr 1,024,754.86 which they state was payable under clauses 5.2 and 5.3 and Schedules F and G of the Exit Agreement.

38 By the said clauses 5.2 and 5.3, Amara undertook: "5.2 To pay to SIH in full settlement of the SIH's invoices relating to services and expenses rendered pursuant to Amara Hotel Management Contract, presently in dispute and submitted to arbitration, the sums listed in Schedule F heretoin accordance with the payment Schedule and terms herein. 5.3 To pay all outstanding sums owed to SIH and SAS Hotels as set forth in Schedule G hereto in accordance with the payment schedule and terms therein."

39 Schedule F to the Exit Agreement was simple. The first page thereof stated: "Total amount to be paid to SIH NOK 1,024,754.86 according to the attached reconciliation of accounts (page 1 and 2)". The pages 1 and 2 referred to are statements of account which are attached to Schedule F.

40 Schedule G is slightly more complicated. For ease of understanding the parties' positions, I set it out in full below:

41 "Schedule G The total amount payable to SIH according to Schedule F is: NOK 1,024,754.86. NOK 400,000 - should be paid before 31 October 1986. If the payment is made in due time the remaining part NOK 624,754.86 will not be claimed by SIH. Otherwise the whole amount (NOK 1,024,754.86) together with interest accrued at the rate of 8% per annum from the date of each invoice will be due to be paid by 01 November 1986."

42 The interpretation given by SIH to the foregoing clauses is, in essence, as follows:

43 (1) under clause 5.2, Amara undertook to pay to SIH in full settlement of various invoices the sum listed in Schedule F in accordance with the payment schedule; (2) the sum listed in Schedule F was Nkr 1,024,754.86; (3) under clause 5.3 Amara undertook to pay the sums set out in Schedule G in accordance with its terms; (4) Schedule G provided that although the total amount due was Nkr 1,024,754.86, if Amara paid Nkr 400,000 before 31 October 1986, the balance would be waived by SIH. But if no such payment was made, then on 1 November 1986 the whole amount of Nkr 1,024,754.86 would be payable by Amara.

44 The evidence adduced by SIH showed that on 31 October 1986 Amara had not paid SIH Nkr 400,000. Some negotiations had taken place between the parties as a result of which SIH had purchased a Volvo car from Amara and agreed that its price (S\$63,000) could be set off against that sum. Amara had also asked SIH to repurchase from them certain equipment that had been supplied to the hotel (in particular some 200 pieces of room safes) and similarly set off the cost thereof against the Nkr 400,000. SIH had not, however, agreed to this proposal by 31 October 1986. Amara contended in its defence that there had been a subsequent agreement between them and SIH for the date of 31 October 1986 to be extended to allow for further negotiation on the resale of the aforementioned equipment.

45 Having reviewed all the evidence, I find the following facts in relation to this part of the claim:

46 (1) on signing of the Exit Agreement, it was understood by both parties that the sum of Nkr 400,000 had to be paid in cash and not by way of a set-off or in kind; (2) subsequently there was a specific agreement between the parties that the price of the Volvo car would be set off against the said sum; (3) on 31

October 1986, Amara had not paid SIH the difference between the price of the car and the said sum; (4) there was no express agreement by both parties that the deadline of 31 October 1986 would be extended to any later date.

47 The submission of SIH is that in these circumstances, the sum of Nkr 803,588.39 (being Nkr 1,024,754.86 minus the price of the car) became payable on 1 November 1986. SIH now claims that sum and interest thereon at 8% per annum from 1 November 1986.

48 Amara's defence to this claim is three fold. It contends that:

49 (a) Schedule G was in fact a penalty provision as it provided for the payment of a larger sum on Amara's breaching the contract by failing to pay a smaller sum and, therefore, was unenforceable; (b) the sum of Nkr 400,000 had in fact been settled in full by 31 October 1986 through the set-off of the price of the car and various other amounts (as itemized in the counterclaim) which SIH owed Amara as of that date; and (c) there had been an express/implied agreement by SIH to an extension of the deadline of 31 October 1986 so no other amount fell due on 1 November 1986.

50 The second and third contentions set out above can be disposed of expeditiously. As regards contention (b), the obligation of Amara was to pay a certain sum. The payment contemplated by clause 5.3 was a cash payment. This is clear both from the wording of the clause and the evidence. During cross-examination, Mr Teo agreed that clause 5.3 contemplated a cash payment unless it was varied and that as at 8 May 1986 when he signed the Exit Agreement for Amara, it was not envisaged that payment under that clause would be made by way of set-off. Later in his evidence, Mr Teo also agreed that a set-off by Amara

would only operate if SIH agreed to it as well. Finally, he admitted that the Nkr 400,000 had not been fully paid by 31 October 1986.

51 With regard to contention (c), this is disposed of by the finding of fact I made earlier that the evidence showed that there had been no agreement for an extension of time.

52 The most substantial point raised by the defence in regard to this claim is, therefore, the contention that Schedule G imposed a penalty.

53 In support of this submission Amara relies on evidence (both oral and documentary) which indicated that many of the items set out in pages 1 and 2 attached to Schedule F making up the claimed amount of Nkr 1,024,754.86, were in fact items that Amara had not accepted and/or were for SIH's account. Amara contends that it was as a result of their strong objections to the full amount of the claim that SIH had agreed to a discount of approximately 60% so that a payment of Nkr 400,000 by 31 October 1986 would settle the whole claim.

54 Mr Ritter's testimony on the other hand was that he had agreed to the reduction at the request of the chairman of Amara who had said that Amara would have great difficulty meeting the full amount of the claim.

55 In my view the actual reason why SIH agreed that a payment of approximately 40% of their claim by a certain date would be accepted as a full payment of that claim, is not material for the purpose of deciding whether in law Schedule G is a penalty. This issue has to be determined by ascertaining the actual effect of the provisions under consideration and by applying the appropriate legal principles thereto and not by a consideration of why SIH agreed to give a discount.

56 SIH's submission on the penalty issue is as follows: (1) clause 5.2 imposes an obligation on Amara to pay the fixed sum mentioned in Schedule F; (2) Schedule G is not a provision providing for the payment of damages arising from the breach of a contractual obligation; (3) the law of penalties does not apply to a clause providing for the payment of money on a specified event which is not a breach of contract (see: *ECGD v Universal Oil Products Co* < 1983 > 2 All ER 205); (4) in clause 5.2 Amara agreed to pay SIH Nkr 1,024,754.86. A breach of this clause would have resulted in Amara being sued for that same amount, not for a greater sum. One of the tests for ascertaining whether a particular clause imposes a penalty is to see if it stipulates as payment for breach of contract a sum that is extravagant and unconscionable in amount compared with the greatest loss that could conceivably be proved to have followed from the breach (see: *Dunlop Pneumatic Tyre Co v New Garage and Motor Co Ltd* < 1915 > AC 79) and clause 5.2 does not fall within the parameters of that test; (5) clause 5.3 and Schedule G represented a concession to Amara. If Amara had complied with Schedule G, they would have been released from the balance due under Schedule F. This was a benefit granted to Amara rather than a penalty imposed on them.

57 In my view, the submissions made on behalf of SIH are well founded.

58 The law on penalties is succinctly stated in a passage from the judgment of Diplock LJ (as he then was) in the 1962 case of *Bernstein (Philip)(Successors) Ltd v Lydiate Textiles Ltd* (unreported but quoted at length in the *ECGD* case cited above). Diplock LJ said:

59 "In the ordinary way a penalty is a sum which, by the terms of a contract, a promisor agrees to pay to the promisee in the event of non-performance by the promisor of one or more of the obligations and which is in excess of the damage

caused by non-performance. When there is such a stipulation in a contract, then the question arises whether that provision is a genuine pre-estimate of the damages which will be sustained on a breach, in which case it is enforceable, or whether it is a penalty, in which case the court will grant relief against it and refuse to allow the promisee to recover more than the actual damage which he has sustained. It is apparent from what I have read of the clause that no case here arises of any breach by the defendants, the parties to the contract, of an obligation under their contract. They are being sued in respect of sums payable on an event defined in the contract, namely the default by the hirers in the payment of instalments under quite separate contracts of hire purchase which those hirers entered into with the plaintiffs. Gorman J in a careful and considered judgment referred to the cases, starting with *Re Apex Supply Co Ltd* < 1941 > 3 All ER 473, <1942> Ch 108, in which a distinction has been drawn by the courts between payment which by the terms of the contract a party undertakes to make on a specified event and payments which he undertakes to make on breach of a contract. Those cases, which I need not repeat, for they are set out in the judgment, in the view of Gorman J, and in my view rightly, draw a distinction between those two types of payment, and, to use the words I think < counsel for the second defendant > adopted from Hodson LJ in an earlier case, hold that the former type of payment does not fall within the penalty area. < Counsel for the second defendant > concedes that there is no case in which it has been held that a payment to be made on a specified event not being a breach by the promisor of his own contract is a penalty or can be treated by the courts in the same way as a penalty. The ordinary rule which the courts apply is that contracts should be enforced, *pacta sunt servanda*, unless they can be brought within that limited category of cases in which, for reasons of public policy, the court refused to give effect to the agreement of the parties. One limited class and well-known class is the class of penalty, but up till now it has been restricted

to cases where there is a prior agreement by the parties to the contract as to an amount to be paid by a party in breach to the other party in respect of that breach

60 What, in effect, the parties agreed here, and this was a dealer bargaining with a hire-purchase company, was that in certain events, namely a failure by a hirer to pay an instalment, the dealer should pay a sum specified in the contract and the finance company should assign its rights to the dealer. It may be that that was an improvident bargain. Whether it was depends on all the terms and not on an isolated clause. But one does not relieve against bargains merely because they are improvident when they are entered into between parties at arm's length, as these two were. In my view, the judgment of Gorman J was right. This was not a penalty and clearly, I think, did not fall within the penalty area. I, for my part, am not prepared to extend the law by relieving against an obligation in a contract entered into between two parties which does not fall within the well-defined limits in which the court has in the past shown itself willing to interfere." (Emphasis mine)

61 Here we have a case where two parties with equal bargaining power and dealing at arms length had a disagreement over the amount which one owed the other at that date. As often happens, the total liability was hotly disputed. As it was imperative due to the business conditions existing at the time of negotiation that a settlement be arrived at, the parties agreed on the compromise which Schedule G clearly represents. The total liability was admitted at the amount claimed but if a specified smaller sum was paid within a period of approximately six months, the balance of the larger sum would be forsworn by the claimant.

62 Before one can stigmatize Schedule G as imposing a penalty one would have to be convinced that it was a clause that imposed a contractual obligation, breach of which resulted in Amara having to pay a larger sum than it would

otherwise have been liable for. When clauses 5.2, 5.2 and Schedules F and G are considered together it appears obvious that this was not the case here. Amara's basic obligation is to pay the full amount of Nkr 1,024,754.86 but Schedule G reduces this liability on condition of payment of Nkr 400,000 being made by 31 October 1986. Amara therefore could have chosen to follow this method of settlement. When it did not do so, it was not in breach of a contractual obligation. Although the language of the Schedule was "NOK 400,000 should be paid" within the specified time, in the context of Schedule G, this language was not imposing a contractual obligation on Amara. Instead it was specifying the period within which payment of the lesser sum would be accepted as settlement of the whole claim.

63 To paraphrase a statement of Lord Roskill in the ECGD case, I am afraid I find it impossible to see how on this scenario there can be any room for the invocation of the law relating to penalty clauses.

64 As Mr Teo admitted, when he signed the Exit Agreement despite dissatisfaction with its terms, he did so having made a businessman's decision. As a businessman, he must now abide by the legal effect of the contract he concluded.

65 In the result Amara must pay the balance of Nkr 803,588.39 due under Schedule G.

66 Finally, there is an issue as to the rate of interest accruing on the said amount. In their Statement of Claim, SIH asked for interest at 8% per annum from 1 November 1986. Presumably this claim is based on that part of Schedule G which states:

67 "Otherwise the whole amount (NOK 1,024.754.86) together with interest accrued at the rate of 8% from the date of each invoice will be due to be paid by 01 November 1986".

68 As I read that wording however, it means that SIH could have claimed interest on the various amounts making up the Nkr 1,024,754.86 at 8% from the dates of the various invoices therefor up to 1 November 1986. They have not done so. Instead their claim is for interest at 8% from 1 November 1986. As this rate of interest has not been contractually agreed, the court is not bound by it. The court's discretion on the rate and period of interest for the sum of Nkr 803,588.39 therefore remains.

69 **SIH'S OTHER CLAIMS** In their Statement of Claim, SIH raised three other claims against Amara. These related to amounts allegedly due for air tickets, rental of computer terminals and advertising expenses. I need not deal with these claims however, as in their submissions SIH have, very sensibly, conceded that these claims are covered by the release in clause 1.2 of the Exit Agreement and therefore are no longer recoverable.

70 I now turn to Amara's counterclaim.

71 **THE COUNTERCLAIM: SIH'S INDEBTEDNESS TO AMARA** In the Schedule to paragraph 9 of their Defence and Counterclaim, Amara set out particulars of various amounts totalling \$70,765.56 (after amendment during the course of the trial) which they alleged were due to them from SIH. Detailed evidence was led from Mr Teo on how each of these amounts was arrived at.

72 SIH in their submissions contend that none of these amounts is recoverable for the following reasons:

73 1. all invoices prior to 8 May 1986 are the subject of the release and discharge of claims set out in clause 1.2 of the Exit Agreement and cannot be claimed; 2. those claims which are only journal and voucher entries without invoices to SIH since 8 May 1986 to date cannot be claimed; 3. some claims presented by Amara are actually claims of Teo Teck Huat (S) Pte Ltd and therefore cannot be recovered by Amara.

74 In my judgment, the first and third submissions made by SIH are valid. Any claims which arose prior to 8 May 1986 or which should have been brought by Teo Teck Huat (S) Pte Ltd cannot be pursued by Amara. The second submission however does not hold water. Even if invoices were not received by SIH, they have been aware of these claims since, at the latest, the filing of the counterclaim in November 1987 and have had full opportunity to investigate the claims and put up their reply thereto. Any failure by SIH to investigate cannot be held against Amara. I thus have to consider each of the amounts claimed separately to ascertain whether they are recoverable by Amara on the basis of the foregoing analysis.

75 (i) Refund of rental/PUB/TAS deposits in respect of Mr Ritter's flat claimed @ \$9,765 I allow this claim. I do not accept SIH's submission that this claim was known by 8 May 1986 and that the amount is covered by clause 1.2 of the Exit Agreement. The amounts which this claim represents are amounts which were refundable by third parties and were not payable directly by SIH. As Amara was not the named tenant in respect of Mr Ritter's apartment, the deposit holders did not refund these amounts to Amara when Mr Ritter eventually vacated his apartment in 1987. SIH having received money to which they were not entitled, must refund it to Amara. The amounts would not have formed a claim or liability of SIH falling within clause 1.2 on 8 May 1986 as at that date no monies had been refunded by, or become due for refund from, the

holders of the deposits. (ii) Direct expenses incurred by Mr Ritter for SIH - items (a) to (l) totalling \$10,757.18 I disallow this claim as all the amounts were incurred prior to 8 May 1986 and were covered by the release and discharge.

76 (iii) Direct expenses incurred by Mr Ritter for SIH - item (m) totalling \$6,856.90 This item comprises various overseas phone calls, telexes and courier services which are the subject of several invoices found in the second agreed bundle (AB2). These will be dealt with separately: (a) AB2 - 284: invoice for \$215.90. AB2 - 288: invoice for \$94.60. These invoices are for calls made by Mr Kuendig and Mr Ritter between 8 May and 15 June to various SIH offices and from the evidence it is clear that they were not made for the hotel's business. Accordingly, I allow the total claim of \$310.50. (b) AB2 - 290: invoice for \$122. AB2 - 293: invoice for \$6.30. These invoices represent expenses incurred by two gentlemen who were employees of SIH but there is no evidence that indicates these expenses should be borne by SIH. I disallow the claim. (c) AB2 - 295: invoice for \$5,998.10 representing telephone calls made by Mr Ritter between April and July 1986. These calls were made to various offices of SIH around the world. Bearing in mind Mr Ritter's regional role which would have required contact with both the head office and other hotels in asia, I allow this claim at \$3,051.84 being the amounts incurred in May, June and July. The April amount of \$2,946.36 was subject to the release and discharge. (d) AB2 - 319: invoice for \$420 representing courier charges in respect of packages sent to SIH's hotels outside Singapore in February, April, May and June 1986. I allow this at \$250.50 being charges incurred after 8 May 1986. (iii) Share of General Manager's regional expenses claimed at \$14,197.77 for period October 1986 to June 1986 I disallow this claim. Several of the invoices were raised by Teo Teck Huat (S) Pte Ltd rather than Amara. Secondly, all amounts incurred before 8 May 1986 would have been covered by the release and discharge. Thirdly, the

amount for the period 8 May to 15 June is covered by the deduction from SIH's claim in respect of Kurt Ritter's salary. (iv) Entrance fees and deposits for various clubs totalling \$5,467.50 I disallow this claim. First there is no evidence that these various fees are refundable. Secondly, Amara would have been aware of them by 8 May 1986. Thirdly, there is no evidence that Amara was required by SIH to provide these perks to Mr Ritter and Mr Kuendig and if they did so voluntarily, they cannot recover the cost thereof from SIH. (v) Bills no 51/86/TTHS and 52/85/TTHS totalling \$13,177.16 I disallow this claim. It represented invoices rendered by Teo Teck Huat (S) Pte Ltd in March 1986 and thus even if recoverable by Amara, which is doubtful, would be subject to the release and discharge. (vi) Items 8(a) and 8(b) of the Schedule totalling \$154.65 I disallow this claim as being covered by the release and discharge. (vii) Telecom charges for Mr Ritter's residence for August to November 1986 claimed at \$3,675.34 I allow this claim. Mr Ritter's own evidence was that SIH should pay for his residence telephone bills. (viii) Claim for \$930.30 in respect of guests referred to the hotel by SAS Airlines in October 1986 I disallow this claim as SIH cannot be liable for guests referred by third party. (ix) Telecom charges for Mr Ritter's residence for December 1986 to May 1987 claimed at \$6,447.26 I allow this claim in full for the reason given in (viii) above.

77 Thus the total amount due to Amara under their counterclaim is \$23,500.44.

78 CONCLUSION Accordingly, I make the following orders: (1) That judgment be entered for the plaintiffs for: (a) \$59,039.41 and interest thereon at the rate of 6% per annum from the date of the writ to date; (b) Nkr 803,588.39 and interest thereon at 6% per annum from the date of the writ to date. (c) costs of the claim. (2) That judgment be entered in respect of the counterclaim in favour of the defendants for: (a) \$23,500.44 and interest thereon at the rate of

6% per annum from the date of filing of the Defence and Counterclaim to date;
(b) half the costs of the counterclaim. (3) That the amount payable by the
defendants under Order (1)(a) above be the balance amount due after setting off
the amount payable by the plaintiffs under Order 2(a) above.

Judith Prakash JC

Aloysius Leng for the plaintiffs
G Raman for the defendants
