IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1996] SGHC 286

Suit 433/1996

Between

Essen System Builders (S) Pte Ltd
Another

… *Plaintiff*

And

Chew Boon Hee

… *Defendant*

GROUNDS OF DECISION

Contract — Illegality and public policy — Restraint of trade

Version No 1: 29 Oct 2026 (23:45 hrs)

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Essen System Builders (S) Pte Ltd and Another v Chew Boon Hee

[1996] SGHC 286

Suit 433/1996
Goh Joon Seng J
11 December 1996

1 The first plaintiff is a company incorporated in Singapore in 1983 with the initial object of trading in electrical appliances. Later it switched its activities to supply design and installation of roofing systems. At the material time it had a paid up capital of $300,000 divided into 300,000 shares of $1 each par value. The defendant, a roofing expert, was the sole shareholder save for one share held by his wife Yeo Puay Soon as his nominee.

2 By 1990, the first plaintiff had established a reputation in roofing. With increased business it needed increased banking facilities. But its bankers were reluctant to increase the facilities. It became necessary for the first plaintiff to obtain additional capital injection to finance its business activities. This fact was known to an executive of Banque Indosuez one Goh Chung Meng (Goh). Goh then introduced Kho Choon Keng (Kho), a substantial shareholder of the Lian Huat Group of companies as a potential investor who was prepared to inject the additional capital required. As Lian Huat Group`s main business interests were in property development, the defendant was advised by Goh that with Kho`s

participation as a shareholder, the first plaintiff could tap the synergy between the first plaintiff and the Lian Huat Group.

3 After a series of meetings and the signing of a memorandum of understanding, the sale and purchase agreement (the s & p agreement) dated 15 July 1991 was entered into by the defendant and Yeo Puay Soon of the one part and Kho on behalf of the second plaintiff of the other part. By the s & p agreement the second plaintiff agreed to purchase from the defendant and Yeo Puay Soon 180,000 shares being 60% of the issued share capital of the first plaintiff at $3.10 per share. This was arrived on the basis of $1.67 for the nett tangible asset value and a premium of $1.43 for the goodwill. The total paid for the 180,000 shares was $558,000 of which $257,400 was for the goodwill. In investing through the second plaintiff, Kho expected a return based on the minimum after tax profits of the first plaintiff of $1,330,000 for the three years 1991 to 1993. To secure such a return for the second plaintiff, by the terms of the s & p agreement, the defendant was to furnish a bank guarantee to make up any shortfall in the minimum after tax profits to a limit of $288,000. In this way the second plaintiff would recover its payment for the goodwill either from the profits of the ensuing three years or from the bank guarantee.

4 It was further agreed that the second plaintiff would apply and pay for an additional allotment of 240,000 shares and the defendant would apply and pay for an additional allotment of 160,000 shares all at par value of $1 per share.

5 Shortly after the signing of the s & p agreement, the defendant met with Kho and Goh at the ANA Hotel at the request of Goh. The defendant was told by Goh that to implement the scheme, there ought to be two further agreements namely, a shareholders and a service agreement to be entered into on completion of the sale of shares under the s & p agreement. Goh then produced and obtained

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the defendant`s signature to an agreement (the basics agreement) containing the basic terms intended to be incorporated in the two further agreements. This is clear from the preamble to the basics agreement which read:

> *It is hereby agreed between Kengfu Industries (S) Pte (KI) and Chew Boon Hee (CBH) that in addition to all terms and conditions contained in the Agreement dated 15 July 1991, the followings shall be the basics of the Shareholders Agreement and Service Agreement to be executed on Completion of Sale.*

6 The relevant clauses of the basics agreement were cll 3 and 10(C) the provisions of which read:

> 3 [The defendant`s] terms [sic] of appointment as Managing Director will be three (3) years. However, his appointment could be terminated within [sic] one (1) month`s notice if the followings are detected:
>
> A Violation of laws and regulations.
>
> B Misconducting [first plaintiff] and its subsidiaries.
>
> C Breach of Shareholders Agreement and Service Agreement.
>
> D Ill health, disability, disabled or death.
>
> E …
>
> 10 [Defendant] also undertakes that:
>
> A …
>
> B …
>
> C he will not work or be involved in all competitive trade and/or competitors for the first five years after he leaves [first plaintiff] and its subsidiaries.

7 The sale of shares under the s & p agreement was completed on 11 September 1991. On completion the defendant received $558,000 from the second plaintiff for the 180,000 shares. From this sum the defendant paid into the first plaintiff`s account $160,000 for the additional allotment of 160,000 shares. He also placed a sum of $288,000 with Hongkong & Shanghai Banking

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Corporation Ltd (HSBC) on deposit as security for the issue of the bank guarantee for the same amount in favour of the second plaintiff. On the same day the shareholders agreement between the second plaintiff and the defendant and the service agreement between the first plaintiff and the defendant were also entered into. The relevant clauses of the service agreement were cll 2, 9 and 10 set out below.

> 2 The Appointee, being on the date of this Agreement already in the employment of the Company, hereby irrevocably undertakes to the Company to continue to work for the Company for a period of three (3) years from the date hereof (the Bonded Period) as its Group Managing Director …
>
> 9(A) This Agreement shall be subject to termination by the Company by not less than one month`s notice in the event that the Appointee:
>
> (i) is incapacitated by reason of ill-health or accident from performing his duties hereunder and shall have been so incapacitated for a total period of 30 consecutive days or more; and
>
> (ii) shall have committed any serious misconduct or breach of his obligations hereunder and such breach not having be [sic] remedied within 60 days after written notice thereof has been served by the Company on the Appointee or shall have been guilty of conduct tending to bring himself or the Company into disrepute (including conviction of any criminal offences other than traffic offences) or shall have committed an act of bankruptcy or compounded with his creditors generally.
>
> 9(B) …
>
> 9(C) If the Appointee shall cease to be an employee of the Company (except for the provisions of Clause 10 below which shall continue notwithstanding the termination of the employment of the Appointee) this Agreement shall thereby automatically determine but if such cessation shall be caused by any act or omission of either party without the consent, concurrence or complicity of the other such act or omission shall be deemed to be a breach of this Agreement and determination hereunder shall be without prejudice to any claim for damages in respect of such breach.

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> 10(A) In this Clause the following expressions bear the following meanings, namely:
>
> `the Business` means the business(es) carried on by the Company and its subsidiaries at the date of termination (Termination Date) of the employment for any reason of the Appointee by the Company; and `the Territory` means Singapore.
>
> 10(B) The Appointee agrees with and undertakes to the Company that he will not during a period of five (5) years from the Termination Date within the Territory:
>
> (i) be directly or indirectly engaged or concerned in the conduct of any business competing with the Business;
>
> (ii) carry on for his own account either alone or in partnership (or be concerned as a director in any company engaged in) any business competing with the Business;
>
> (iii) assist any person, firm or company with technical advice in relation to any business competing with the Business; or
>
> (iv) otherwise be interested, directly or indirectly, in any business competing with the Business.
>
> 10(C) While the restrictions aforesaid are considered by the parties to be reasonable in all the circumstances it is agreed that if any one or more of such restrictions shall either taken by itself or themselves together be adjudged to go beyond what is reasonable in all the circumstances for the protection of the Company`s legitimate interest but would be adjudged reasonable if any particular restriction or restrictions were deleted or if any part of [sic] parts of the wording thereof were deleted, restricted or limited in a particular manner then the restrictions shall apply with such deletions, restrictions or limitations, as the case may be.

8 The last day of the defendant`s three-year term as group managing director under the service agreement was 10 September 1994. On 18 August 1994, Kho wrote to the defendant informing him that his appointment would not be renewed. It later transpired that the profits of the first plaintiff fell short of the minimum after tax profits of $1,330,000 for the three years 1991 to 1993 to the extent that the second plaintiff was entitled to and it did make a demand under the bank guarantee for the full amount of $288,000. HSBC complied with the demand and reimbursed itself from the sum of $288,000 deposited with it as

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security. Thus for its payment of $257,400 for the goodwill, the second plaintiff recovered $288,000.

9 In the meantime due to management differences, the relationship between Kho and the defendant had deteriorated. On 29 August 1994, the defendant commenced winding-up proceedings in Companies Winding-Up Petition No 211 of 1994 to wind up the first plaintiff on just and equitable grounds under the provisions of the Companies Act. At the end of the hearing, the court found that the defendant had made out a case for winding up the first plaintiff. It however adjourned the matter to allow the parties to arrive at a settlement whereby the second plaintiff would buy over the defendant`s shares in the first plaintiff. Eventually the defendant sold his 40% interest in the first plaintiff amounting to 280,000 shares at $1.21 per share. The sale was completed on 6 June 1995.

10 On 2 October 1995, the defendant became a director of Econ-ers Pte Ltd. On 2 December 1995, he became the managing director. As Econ-ers Pte Ltd were also in the roofing business, the first plaintiff on 7 March 1996 commenced these proceedings for inter alia an injunction to restrain the defendant from being engaged in the business of Econ-ers Pte Ltd for five years from 11 September 1994. The claim was grounded on cl 10(B) of the service agreement.

11 On 5 June 1996, the writ and the statement of claim were amended adding the second plaintiff as a party and bringing in cl 10(C) of the basics agreement. The plaintiffs then added the alternative claim for a similar injunction for five years from 6 June 1995 (when the defendant ceased to be a shareholder of the first plaintiff on the transfer of his 280,000 shares to the second plaintiff). The matter came before me for hearing. I dismissed the

plaintiffs` claim with costs. The plaintiffs have appealed to the Court of Appeal. I now give my reasons.

12 The basics agreement was an agreement between the second plaintiff and the defendant to enter into two further agreements being the shareholders agreement and the service agreement in addition to the s & p agreement. This is clear from the preamble itself. This intention was also confirmed by Kho. In his affidavit of evidence-in-chief this was what he stated:

> *At or about the time the share sale agreement was entered into, the 2nd plaintiff entered into a separate agreement with the defendant setting out the basic terms of the shareholders agreement and service agreement which were to be executed upon completion of the sale (basic agreement).*

13 Then in re-examination he said:

> Q: The terms of the basics agreement would be incorporated in the other agreements.
>
> A: I think it should be.

14 In my view therefore cl 10(C) of the basics agreement had no application, the same with the rest of the provisions of the basics agreement were intended to be incorporated in the shareholders agreement and the service agreement. More specifically the provisions of cl 10(C) of the basics agreement were intended to be and were incorporated in cl 10(B) of the service agreement though not in identical terms. Accordingly, upon the signing of the shareholders agreement and the service agreement, the basics agreement had become spent.

15 On the service agreement, by cl 2, the defendant`s term of appointment as the group managing director was for three years commencing 11 September 1991. By cl 9(A), notwithstanding cl 2, the defendant`s employment was subject

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to `termination`, that is earlier termination, by the first plaintiff if he should inter alia commit any serious misconduct or breach of his obligations thereunder or by his conduct he had brought himself or the first plaintiff into disrepute. By cl 10(B) the defendant agreed that he would not `during a period of five (5) years from the Termination Date` within Singapore be directly or indirectly engaged in any business in competition with the first plaintiff. `Termination Date` was defined in cl 10(A) as `the date of termination ... of the employment for any reason of the [defendant] by the [first plaintiff]`. The defendant served his full term of three years as the group managing director. He did not cease to be the group managing director because of earlier termination of his service by the first plaintiff. The defendant whose livelihood depended mainly on his roofing skill would not have agreed to any clause restraining him from engaging in the trade he knew best for five years as a condition of his employment for only three years unless his services were terminated for reasons set out in cl 9(A). As the defendant`s services under the service agreement were not so terminated but came to an end on the expiry of the term of three years, the provisions of cl 10(B) were never triggered into operation and there was no `termination date` from which the five years would commence to run.

16 Additionally it is my view that cll 10(C) of the basics agreement and 10(B) of the service agreement were unreasonable restraints of trade and therefore void and unenforceable. The law on restraint of trade is succinctly stated in ***Cheshire, Fifoot & Furmston`s Law of Contract*** (Singapore and Malaysia Ed) by Andrew Phang Boon Leong (1994 Ed) p 587:

> *A contract in restraint of trade is one by which a party restricts his future liberty to carry on his trade, business or profession in such manner and with such persons as he chooses. A contract of this class is prima facie void but it becomes binding upon proof that the restriction is justifiable in the circumstances as being reasonable from the point of view of the parties themselves and also of the community.*

> *Such has long been the legal effect of two familiar types of contract. First, one by which an employee agrees that after leaving his present employment he will not compete against his employer, either by setting up business on his own account or by entering the service of a rival trader. Secondly, an agreement by the vendor of the goodwill of a business not to carry on a similar business in competition with the purchaser.*

17 Of the two types of restraint of trade contract, the courts are more liberal in upholding restraints of trade imposed on the vendor of the goodwill or business. See ***Gledhow Autoparts Ltd v Delaney*** [1965] 3 All ER 288 at p 291 where Sellers LJ said:

> *... an employer is not entitled by a covenant taken from his employee to protect himself after the employment has ceased against his former servant`s competition, although a purchaser of goodwill is entitled to protect himself against such competition on the part of the vendor.*

18 Although cl 10(B) is contained in the service agreement, the restraint was clearly designed to protect the goodwill attached to the 180,000 shares purchased by the second plaintiff from the defendant under the s & p agreement. But the goodwill was purchased for no real consideration or alternatively for inadequate consideration in that the second plaintiff was entitled to have recourse to the bank guarantee for $288,000. It thus recovered more than what it paid for the goodwill when the after tax profits of the first plaintiff fell short of the minimum after tax profits stipulated in the s & p agreement.

19 In determining the reasonableness of the restraint of trade, adequacy of consideration has to be taken into account. See ***Thorsten Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co Ltd*** [1894] AC 535 at p 565 where Lord Macnaghten said:

> *... It was laid down in* ***Mitchel v Reynolds*** *1 P Wms 181 that the court was to see that the restriction was made upon a good and adequate consideration, so as to be a proper and useful contract. But in time it was found that the parties themselves*

> *were better judges of that matter than the court, and it was held to be sufficient if there was a legal consideration of value; though of course the quantum of consideration may enter into the question of the reasonableness of the contract. ...*

20 I was therefore of the view that the second plaintiff paid no real consideration for the goodwill. Whatever consideration there was was so inadequate as to make the stipulated restraints unreasonable. Accordingly I dismissed the plaintiff`s claim.

21 ***Plaintiff`s claim dismissed.***

Goh Joon Seng J

Francis Xavier (Allen & Gledhill) for the plaintiffs
Chong Boon Leong (Rajah & Tann) for the defendant

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