IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1998] SGCA 30

CA 221/1997

Between

Sansin Investment Pte Ltd

… *Appellant*

And

MCST Plan No 1917

… *Respondent*

GROUNDS OF DECISION

Land — Strata titles — Common property

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Sansin Investment Pte Ltd v MCST Plan No 1917

[1998] SGCA 30

CA 221/1997
Goh Joon Seng J; Karthigesu JA; L P Thean JA
14 May 1998

Judgment:

GOH JOON SENG J

Cur Adv Vult

(delivering the judgment of the court): This appeal is against the decision of Christopher Lau JC who held that the fees (the signage fees) paid by John Hancock Life Assurance Co Ltd (John Hancock) to the appellants for the naming and signage rights to the building named `John Hancock Tower` (the Building) were `income derived` from the `common property` of the Building under s 10(1)(c) of the Buildings and Common Property (Maintenance and Management) Act (Cap 30) (the Act). The appellants were accordingly ordered to give an account of all the signage fees received by them for the naming and signage rights and pay same over to the respondents.

2. **The background**

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The appellants and its related company, Century Tower Investment Pte Ltd, were the developers of the Building. The respondents are the management corporation of the Building constituted under the Land Titles (Strata) Act (Cap 158, 1988 Ed) (the Strata Act).

3.The Building consists of 18 floors of office and 7 floors of car park space.

4.By an agreement for lease (the lease agreement) dated 25 November 1992 the appellants and Century Investment Pte Ltd agreed to grant and John Hancock (then known as British Life Assurance Co Pte Ltd) agreed to accept a lease of three floors of office space within the Building, then known as `Century Tower 21`. On the same day, the parties entered into an agreement called the `Naming, Option and First Refusal Agreement` (the Agreement). The Agreement was to be read together with the lease agreement and the lease. Subsequently, Century Tower Investment Pte Ltd assigned their interests in the Building to the appellants and went into voluntary liquidation.

5.In substance, under the Agreement, the Building was to be renamed `John Hancock Tower` subject to the approval of the Advisory Committee on Street, Building and Estate Names. The appellants were to apply for the approval. On such approval being obtained, signages of the name `John Hancock Tower` would be erected `at the exterior and other parts of the Building in such manner as the [appellants] considers acceptable`. The costs would be borne by John Hancock. If such approval was not obtained by 15 October 1992, John Hancock would have the right to rescind the lease agreement. In consideration for the naming and signage rights, John Hancock agreed to pay the appellants the signage fees fixed at $180,000 yearly.

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6.To deal with the issues raised in these proceedings, it is necessary to set out the relevant clauses of the Agreement.

> 1.1 Forthwith upon the execution of this Naming, Option and First Refusal Agreement and the Agreement for Lease the landlord shall at the landlord`s cost and expense apply to the relevant government authority for the Building to be renamed `John Hancock Tower`.
>
> 1.2 In the event that the application is approved, appropriate signage depicting the name `John Hancock Tower` at the exterior and other parts of the Building in such manner as the landlord considers acceptable in accordance with prevailing practice and as the law permits but otherwise in consultation with the tenant shall be installed by the landlord but the tenant shall bear all costs in respect thereof.
>
> 1.3 Such signage installed shall be maintained at all times by the landlord but at the cost of the tenant who shall indemnify and save harmless the landlord from any prosecution, action or other claim, loss and damage which may be made against or suffered by the landlord as the result of or otherwise arising from the installation or presence of such signage.
>
> 1.4 When the management corporation (as defined in the Agreement for Lease) comes into existence, the right of the tenant to have the Building named John Hancock Tower and to maintain the aforesaid signage shall be subject to the absolute discretion of the management corporation.
>
> 1.5 However, so long as the landlord by reason of being the registered subsidiary proprietor of any of the strata title units in the Building has any vote in the matter the landlord shall exercise its vote as members of the management corporation in favour of permitting the tenant to continue to have the Building named John Hancock Tower and to maintain the aforesaid signage. In the event that the management corporation shall require the payment of any fee or money as a condition of the management corporation permitting the retention of the name John Hancock Tower and the signage, the landlord shall pay or offer to pay to the management corporation such fee or money provided always that the landlord shall not at any time be required to pay out any more money than it has received from the tenant under cl 2 hereunder. If despite the landlord so exercising its vote and or offering to pay any such fee or money to the management corporation, the management corporation decides to change the name of the Building and to require the tenant to remove the aforesaid signage the tenant shall have no

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> claim for any compensation whatsoever against the landlord. The landlord shall be under no obligation to the tenant to be or to remain a registered subsidiary proprietor of any of the strata title units in the Building.
>
> 1.6 The obligation of the landlord under cl 1.5 hereof shall cease when the tenant is no longer the tenant of the landlord in respect of the demised premises paying the rent and the tenant`s contribution under the lease to the landlord unless the landlord and the tenant agree to continue the arrangement that the landlord shall exercise its vote as aforesaid in consideration of the tenant continuing to pay the naming right fee mentioned in cl 2.1 hereof.
>
> 2.1 In consideration of the landlord agreeing to doing the things mentioned in cll 1.1, 1.2, 1.3 or 1.5 hereof the tenant shall pay to the landlord each year the sum of Singapore dollars one hundred and eighty thousand ($180,000) or pro-rated for part thereof so long as the name of the Building is maintained as John Hancock Tower (or such variation(s) thereof as requested or initiated by the tenant) and the aforesaid signage is not discontinued by the management corporation.
>
> 4 In the event that the application made pursuant to cl 1.2 hereof is not approved by 15 October 1992, the tenant shall have the right to rescind the Agreement for Lease notwithstanding anything to the contrary contained in the Agreement for Lease.

7.In December 1992 the appellants sold two of the strata units.

8.On 31 December 1992 temporary occupation permit for the Building was issued.

9.On or about 15 March 1993 another strata unit was sold.

10.Following approval being obtained to name the Building `John Hancock Tower`, the signages were erected by 5 July 1993 on the roof and the external walls of the Building which are common property as defined by s 3 of the Strata Act.

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11.On 21 August 1995, the respondents were constituted pursuant to s 33 of the Strata Act.

12.On 22 February 1996, the appellants and John Hancock entered into a supplemental deed (the supplemental deed). This was in anticipation that with further sales of the strata units in the Building the total share value of the unsold strata units would be reduced with each sale. The supplemental deed provided for a variation of the amount of the signage fees to be paid by John Hancock in such event. Instead of a flat amount of $180,000 the revised signage fees are calculated according to the formula of $180,000 x (current share value/total share value) for so long as the Building is named `John Hancock Tower` and the signages continue.

13.Between 23 August and 10 September 1996, the managing agent, Colliers Jardine, acting on the instructions of the Protem Committee of the respondents, wrote several times to the appellants for information on the signage fees received by them. They received no satisfactory reply.

14.On 12 September 1996, the respondents held their first annual general meeting.

15.On 28 October 1996, Drew & Napier, acting for the respondents, demanded of the appellants a full account and payment of the signage fees. The appellants did not accede to the demand.

16. **The proceedings in the High Court**

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On 27 January 1997, the respondents commenced proceedings in OS 127/97 (the OS) seeking the following orders: 1. An order that the appellants hand over copies of all documents relating to the Agreement and the supplemental deed.

2. An order that the appellants give a full account of the signage fees paid to them.

3. An order that the appellants pay over to the respondents the signage fees not earlier accounted for.

17.When the OS came up for hearing in the court below, prayer 1 had already been complied with. On the remaining prayers, the learned judge held that the signage fees were income derived from the common property of the Building and fell within s 10(1)(c) of the Act. Consequently, he made the orders applied for. In so holding, the learned judge stated:

> 8 How should one consider the term `derived` in the context of this claim? Mr Yeap [for appellants, as defendants in the court below] advocated a narrow interpretation which is that the moneys received from John Hancock are derived solely from the defendants` own voting rights as subsidiary proprietors and not that they are derived from the defendants` granting any rights over common property. On such an interpretation, as I understood his argument, the moneys paid would fall outside the scope of s 10(1)(c) of the Act.
>
> 9 Mr Yeap`s interpretation, at first blush, is an attractive argument. However I think it tells only half the story. It is an argument, with great respect to Mr Yeap, of form over substance; the voting rights would be valueless to John Hancock if the signages could not have been put on the common property of the Building.
>
> 10 The Act`s raison d`tre is to provide for the proper maintenance and management of a building and its common property. It is the policy of the Act that strata title buildings be upkept and paid for out of a maintenance fund contributed to by the building`s strata title owners, maintained initially by the

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> developer, and subsequently on the management corporation`s establishment, by the management corporation of the building. That this is the policy of the Act is underlined by s 9, s 10 and particularly s 10(6) of the Act which makes a breach of s 10 an offence.
>
> 11 The natural consequence of Mr Yeap`s argument is that it would enable `voting rights` to cloak what is otherwise income derived from common property as income not so derived. That would effectively evade the intended ambit of the legislation. Taking a common sense approach, I do not think the scope of the Act is to be limited in the way submitted by Mr Yeap.

18. **The appeal**

It is principally against that part of the judgment of Christopher Lau JC that this appeal is directed. The appellants raise seven grounds. But all these can be subsumed under one main ground, namely that the signage fees are not income derived from the `common property` of the Building and therefore does not fall within the ambit of s 10(1)(c) of the Act.

19.Section 10(1)(c) reads:

> *A developer shall pay into the maintenance fund*
>
> (a)
>
> (b)
>
> (c) all income derived from the common property of the development.

20.By s 2 of the Act `maintenance fund` means `the maintenance fund for a development established by a developer pursuant to section 9`.

21.Under s 9 of the Act, the developer shall from the date when a temporary occupation permit is issued establish a maintenance fund for the development to be used principally for the maintenance of the `common property` of the development.

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22.Under s 2 of the Act `common property` in relation to any building comprised in any strata title plan shall have the meaning assigned to it in the Strata Act.

23.Section 3(b) of the Strata Act states that `"common property" in relation to any subdivided building which is comprised in any plan approved by the relevant authority other than a plan bearing the title of "condominium" means so much of the land for the time being not comprised in any lot shown in a strata title plan`. Subsection (c) describes what common property includes. It includes roofs and external walls.

24.There is no dispute that the signage fees are `income` for the appellants. The issue is whether it is derived from the common property of the Building. The signages are fixed to the roof and the exterior wall and thus on the common property of the Building. Does this mean that the signage fees are derived from the common property and thus fall within s 10(1)(c) of the Act. The answer lies in the source of the signage fees.

25.The word `derived` was discussed by the Court of Appeal of New Zealand in ***Commissioner of Inland Revenue (NZ) v NV Philips Gloeilampenfabrieken*** 10 ATD 435. In that case the respondent, a foreign company incorporated and domiciled in Holland, carried on the business of manufacturing electric lamps and other equipment, and exported some of its products to New Zealand. A company in New Zealand imported goods from the Dutch company on terms that the New Zealand company should pay for the same in English sterling currency in Holland within three months of the close of the month in which the goods were invoiced and despatched to New Zealand. There was no provision for payment of interest on any unpaid balances of purchase money if the period of credit was exceeded. In July, 1948, the New

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Zealand company owed the Dutch company a sum of 80,000 (sterling) for goods supplied, in respect of which the agreed period of credit had been exceeded. The New Zealand company was unable to discharge the debt and it requested its creditor to extend the time for payment. The Dutch company agreed to convert the debt into a loan which was evidenced by an agreement executed by or on behalf of the parties which provided, inter alia, that the loan should bear interest at 3% and should be repaid to the Dutch company in pounds sterling in the Netherlands after five years in ten equal yearly instalments. After the agreement had been executed, the Dutch company sent to the New Zealand company a cheque for 80,000 drawn by the Dutch company on the Midland Bank in London and made payable to the order of the New Zealand company. Upon receipt of the cheque, the New Zealand company endorsed it payable to the Dutch company and returned it to the company in payment of its debt for 80,000 for goods supplied. It also sent to the Dutch company a receipt for the loan of 80,000 and made appropriate entries in its books. The question was whether the Dutch company was liable to income tax and social security charge in respect of interest under the New Zealand Land and Income Tax Act 1923, ss 84(2) and 87(j). This depended on whether the interest was derived from any source in New Zealand. Barrow-clough CJ held that it was not, and hence the Dutch company was not liable for tax and social security charge for the interest. The Court of Appeal affirmed the decision of Barrow-Clough CJ.

26.In affirming the decision of Barrow-Clough CJ, Gresson J stated at pp 439-440:

> *The answer which I should expect the `practical man` to make to a question what was the source of the money which was received by Philips-Holland would be the loan it made which means in effect the lending of the money - the transaction it is I think unreal and incompatible with a practical approach to regard the obligation as the source. It is what produced the obligation that is important It appears to me that in interpreting s 87, proper*

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> *regard must be paid to the word `derived`: it should not be read as `received`. The word `derived` means more than received; it connotes the source or origin rather than the fund or place from which the income was taken To be a `source` of the income within the meaning of the subsection, it is necessary I think to look to the originating cause. It is not sufficient to ascertain the fund out of which the income was in fact paid, which is no more than the reservoir from which it was drawn. It is not whence it was paid but why it was paid that is the determining factor. The emphasis is not upon the receipt but upon the derivation of the income.*

North J in concurring with Gresson J stated at p 443:

> *The way the matter must be approached is now well settled, namely, `source means not a legal concept, but something which a practical man would regard as a real source of income`; `the ascertaining of the actual source is a practical hard matter of fact (in* ***Liquidator, Rhodesia Metals Ltd (in liquidation) v Commissioner of Taxes*** *[1940] AC 774, p 789 and in* ***Studebaker Corp of Australasia Ltd v Commissioner of Taxation (NSW)*** *[1921] 29 CLR 225, p 233; R & McG 165).*

27.In the South African case of **Commissioner for Inland Revenue v Lever Brothers & Unilever Ltd** [1946] 14 SATC 1, Watermeyer CJ elaborated on the meaning of the word `source` at p 8 of the judgment:

> *The word `source` has several possible meanings. In this section it is used figuratively, and when so used in relation to the receipt of money one possible meaning is the originating cause of the receipt of the money, another possible meaning is the quarter from which it is received. A series of decisions of this court and of the Judicial Committee of the Privy Council upon our Income Tax Acts and upon similar Acts elsewhere have dealt with the meaning of the word `source` and the inference, which, I think, should be drawn from those decisions is that the source of receipts, received as income, is not the quarter whence they come, but the originating cause of their being received as income and that this originating cause is the work which the taxpayer does to earn them, the quid pro quo which he gives in return for which he receives them.*

28.In **Nathan v Federal Commissioner of Taxation** [1918] 25 CLR 183, the appellant there was a shareholder of a company incorporated and with its management and control in England. The company carried on business in

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Australia. The High Court of Australia held that dividends paid to the appellant in England from profits made in Australia by the company was `derived` from a source in Australia. Isaacs J in delivering the judgment of the court stated at p 189:

> *Is the `source` of the appellant`s dividends `within Australia`? We must look further into the Act. This cardinal fact presents itself at the threshold: when the legislature divides all income into income derived from (1) `* ***personal exertion****` and (2) `* ***property****` it uses language which indicates that it regards these two expressions to represent the two general `sources` of income. Particular sources - such as earnings, &c - fall within the general source denominated `personal exertion`, and all other particular sources fall within the general source denoted `property`. That the legislature itself regards these two expressions as representing the general `sources` dealt with by the Act is demonstrated by the proviso to sub-s 2 of s 18, a proviso added by the November Act. That proviso says that `if the income from either source does not amount to the sum to be deducted from that source, the balance of the sum to be deducted may be deducted from the income from the other source.` The `personal exertion` source is exhaustively defined, and embraces various species of income the result of personal exertion - or labour - in Australia. The `property` source by parity of reasoning is intended to be some means of production in Australia not included in personal exertion - something which represents, so to speak, the capital fund which produces the income.*
>
> *The legislature in using the word `source` meant, not a legal concept, but something which a practical man would regard as a real source of income. Legal concepts must, of course, enter into the question when we have to consider to whom a given source belongs. But the ascertainment of the actual source of a given income is a practical, hard matter of fact.*

29. ***Nathan*** `s case was followed in **Chandos Pte Ltd v Comptroller of Income Tax** [1987] 1 MLJ 670 [1987] SLR 287 . There, a company incorporated in Singapore, agreed to give a loan to Delacom Investments Pty Ltd (Delacom), a company incorporated in Australia but registered in Singapore as a foreign company. Both were customers of Bank Nationale de Paris (BNP), Singapore. The loan agreement was signed in Johore and the cheque for the loan handed over in Johore. But the cheque was drawn on BNP Singapore. Upon

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presentation, the amount thereof was debited against the account of Chandos with BNP and credited to the account of Delacom with BNP. The issue there was whether the interest on the loan was `derived` from Singapore under the Income Tax Act (Cap 134). In holding that it was, LP Thean J (as he then was) stated at p 673:

> *The only question in this appeal is whether the interest on the loan to Delacom was derived from Singapore and this question turns on a finding of the source of the interest, as the word `derived` connotes a source.*

Then at p 676 the learned judge stated:

> *Mr Ang submitted that the interest on the loan to Delacom was not derived from Singapore. The loan, he said, was made in Johore Bahru when the cheque drawn by Chandos was handed over to Delacom, and when Chandos drew a cheque it transferred its right to obtain credit to Delacom I am unable to accept this argument. Such a finding of the source of the interest is much too superficial and also artificial; it looks only at the formal or symbolic side of the transaction and ignores other salient facts surrounding it. In finding the source of interest in this case I echo the oft-quoted dictum of Isaac J in* ***Nathan v Federal Commissioner of Taxation*** *[1918] 25 CLR 183 that source is not a legal concept but something which a practical man would regard as a real source of income, and the ascertaining of the actual source is a practical hard matter of fact.*

30.Reverting now to the signage fees, they are, in our view, payments for the right or licence granted to John Hancock to name the Building initially as John Hancock Tower and thereafter the right to ensure to their best ability that the name of the Building is not changed by the respondents by binding the appellants to exercise all their votes in favour of retaining the name. The attachment of the signages to various parts of the common property of the Building is not the quid pro quo for the signage fees. No doubt the signages are fixed to the common property and the right to name the Building `John Hancock Tower` will be of little value if John Hancock does not have the right to put up the signages. The two rights are intertwined and have to go together. But the

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signage right is incidental to the naming right. It is `parasitic` on the naming right. Without the naming right, the signage right will not come into existence.

31.Applying the test of what `a practical man would regard as a real source of income, and [that] the ascertaining of the actual source of income is a practical hard matter of fact`, the signage fees come not from the fact that the signages are fixed to the common property of the Building but from the naming right conferred in the first place. The real source of income is the naming right and this right arises not from the common property but from the power of the developer to confer such a right. Following the New Zealand and South African cases quoted above, the cause or the reason why the income arose was because of the grant of the naming right. This is evident from the Agreement itself. In cl 2.1, John Hancock is to pay $180,000 or pro-rated per annum:

> *so long as the name of the Building is maintained as John Hancock Tower (or such variation(s)) thereof as requested or initiated by the tenant) and the aforesaid signage is not discontinued by the management corporation.*

It is also clear in cll 1.5 and 1.6 of the Agreement that John Hancock has to continue to pay the fee so long as the appellants exercise their votes as members of the management corporation in favour of permitting John Hancock to have the Building named `John Hancock Tower` and to maintain the signages. The consideration provided by the appellants has nothing to do with making use of the common property in any way. The consideration is to exercise its voting right in favour of John Hancock. Once the respondents are constituted, the naming and signage rights lie in them, not the appellants. The right which the appellants have is in their vote at the management corporation. What John Hancock is paying for, in this sense, is that vote which the appellants possess.

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32.The signage fees could be income derived from common property if rent was charged for the space occupied by the signages. This is not the case here. In our view, the supplemental deed providing for a pro-rated annual fee to be paid depending on the proportion of shares the appellants hold reinforces the fact that the source of the income is the naming right and the right to demand that the appellants exercise their vote in a certain way, not the putting up of the signages on the common property. After the constitution of the respondents, the appellants lost their absolute power to grant the naming or signage rights. This is anticipated in cll 1.4 and 1.5 of the Agreement. From that moment onwards, what John Hancock is paying for is merely the votes the appellants held to influence the outcome of the naming and signage rights.

33.For the reasons given above, we allow the appeal and dismiss the OS with costs here and below. The deposit as security for costs is to be refunded to appellants` solicitors.

Goh Joon Seng J
Karthigesu JA
L P Thean JA

Andre Yeap and Andrew Yeo (Allen & Gledhill) for the appellants
Jimmy Yim SC and Adrian Tan (Drew & Napier) for the respondents

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