Ong Cher Keong v Goh Chin Soon Ricky
[2001] SGHC 21

Case Number : Suit 302/1998

Decision Date : 03 February 2001

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Aloysius Leng and Vernon Voon (Abraham Low & Partners) for the plaintiff; Anthony Netto and Anand Thiagarajan (Netto & Netto) for the defendant

Parties : Ong Cher Keong — Goh Chin Soon Ricky

Civil Procedure – Judgments and orders – Setting aside judgment or order of court – Applicable principles for setting aside

: This suit has a long and complicated procedural history. The issue here concerns the nature and effect of certain court orders made in 1999.

Background

The original claim

The plaintiff, Mr Ong Cher Keong, commenced this action in March 1998. The amended statement of claim recited that the plaintiff and Mr Ricky Goh Chin Soon, the defendant, had entered into a written agreement (`the agreement`) in June 1995 whereby they had agreed to jointly develop certain land in Tong Huat Road, Singapore (`the property`). The plaintiff had a 30% share in the joint venture whilst the defendant held the remaining 70% interest. Subsequently, (i) the plaintiff paid the defendant an amount of $1,008,780 in respect of his share in the joint venture and (ii) the property was purchased by a joint venture company with the aid of a mortgage loan from the OCBC Bank.

Paragraph 6 of the statement of claim pleaded that some time in November 1996, the defendant informed the plaintiff that the property had been sold to Taiwanese parties for the sum of $45m but neither supporting documents on the sale nor statements of account on the expenses of the project were provided to the plaintiff. By para 7 the plaintiff averred that on 21 November 1996, he asked the defendant to account for the 30% share due him under the agreement upon the sale of the property and for the detailed breakdown of the figures for property tax, stamp duty, legal fees and bank interest for bank loan but none of these were provided to him.

Paragraphs 8 and 9 of the statement of claim are important. They read as follows:

> *8 On 12 December 1997, the defendant orally agreed to repay by instalments to the plaintiff his 30% share under the agreement upon the sale of the said properties in the sum of $4,386,365.69 which together with the plaintiff`s earlier payment of the $1,008,000 amounts to the sum of $5,394,965.69 as computed by the defendant without any supporting documents being provided for this computation.*
>
> *9 Wrongfully and in breach of the agreement, the defendant has failed to account to the plaintiff in the manner requested by the plaintiff.*

In para 10, the plaintiff said that he had computed his 30% share in the joint venture falling due upon sale of the property, subject to the taking of accounts, as being $5,475,923.52 based on a sale price of $45m. He set out his estimate of the receipts and expenses and also details of payments made to him by the defendant (totalling $3,700,000). By para 11, it was averred that despite the plaintiff`s requests, the defendant had failed to account to or pay the plaintiff the sum which he calculated to be due or such sum as was due to him as his 30% share under the agreement upon the sale of the property.

The plaintiff then went on to make five claims. The first (which was later referred to as prayer 1 of the statement of claim) was for `an account of all sums due from the defendant to the plaintiff being his 30% share under the agreement of 2 June 1995 upon the sale of the [property]`.

Summary judgment application

The defendant having entered an appearance to the action, the plaintiff applied for summary judgment. In response, the defendant filed an affidavit on 25 May 1998 in which he stated that the property had not been sold and so there were no profits for which he was obliged to account. He alleged the property remained in the ownership of the joint venture company. Further, some time towards the end of November 1996, he had reached a settlement of disputes with the plaintiff and agreed to pay the latter $2.7m. This sum had been paid by instalments and there were no further moneys due to the plaintiff.

The plaintiff`s application was heard on 29 May 1998. It was not disputed at the hearing that the property had not been sold to the Taiwanese parties, nor that it remained in the ownership of the joint venture company. The plaintiff contended that whether the property had been sold or not did not detract from the defendant`s fiduciary duty to the plaintiff to account for the management of the property. What the plaintiff sought was an account of the sums due from the defendant as his 30% share in the joint venture.

The assistant registrar, Ms Audrey Lim, found in favour of the plaintiff. The first order made by the assistant registrar was:

> *(1) An account be taken of all sums due from the defendant to the plaintiff being his 30% share under the agreement of 2 June 1995, of all expenses and deductions of the subject property as at 30 November 1996 per exh `OCK-2` in the plaintiff`s affidavit filed on 13 April 1998.*

Among the consequential orders made were the following:

> *(2) there be payment by the defendant to the plaintiff of all sums found to be due, if any, from the defendant to the plaintiff upon the taking of the account; and*
>
> *(3) the defendant pay the plaintiff interest on the amount found due to the plaintiff at the rate of 6% per annum from the date of the writ to the date of judgment.*

First taking of accounts

Surprisingly, the defendant did not appeal against the above orders. Instead, the parties proceeded with preparations for the taking of accounts pursuant to those orders. The accounts were taken by Assistant Registrar Eugene Teo on 1 October 1998. He found the sum of $3,222,650.83 to be due to the plaintiff from the defendant and gave judgment for the plaintiff for that sum and for four-fifths of the costs of the proceedings. The figure was arrived at on the basis that the property was worth $4.5m as at 30 November 1996.

In his grounds of decision, Assistant Registrar Teo noted the defendant`s assertion that there was nothing to account for since the first prayer of the statement of claim had asked for an account to be taken `upon the sale` of the property. He recorded that the plaintiff had sought to explain by way of his affidavit filed on 23 May 1998 that the figure of $45m was actually an agreed price for the property arrived at between the defendant and himself in November 1996 and that he was claiming an account of all sums due from the defendant based upon this price. Mr Teo pointed out that in order to get around the flaw in the case as stated in the amended statement of claim, the order made on the hearing of the summary judgment application was for an account to be taken of all sums due from the defendant to the plaintiff being the latter`s 30% share under the agreement, and of all expenses and deductions relating to the property as at 30 November 1996.

First order for accounts set aside

The defendant appealed from the above assessment. The appeal was heard by Lim Teong Qwee JC on 30 December 1998. The defendant renewed his arguments on the flaw in the plaintiff`s claim as pleaded. The appeal was allowed on this basis, ie the account could not be taken because the property had not been sold and the judgment of 1 October 1998 was set aside. The judge further ordered parties to attend before Assistant Registrar Audrey Lim to seek clarification of para 1 of the 29 May 1998 order.

The parties appeared before Assistant Registrar Audrey Lim on 14 January 1999 for clarification. The court made the following clarification:

> *Property - estimated selling price as reflected in OCK2 of $45m is only an estimate. Price is still subject to valuation and proof at accounting stage.*
>
> *[bull] Similarly other heads/items in OCK2 subject to proof.*
>
> *[bull] Date of account is at 30/11/96.*

Two months later, the parties appeared before Lim Teong Qwee JC for further directions. Counsel for the plaintiff informed the court of the clarification made by Assistant Registrar Lim on 14 January and asked for the matter to be referred back to Assistant Registrar Lim for further directions on the taking of accounts. The court then remitted the matter back to Assistant Registrar Lim for directions and further consideration or review.

The further hearing before Assistant Registrar Lim took place on 20 March 1999. Counsel for the defendant informed the assistant registrar that Lim JC had been concerned that the judgment given in May 1998 did not reflect the pleadings. Whilst para 8 of the statement of claim had recited that on 12 December 1997, the defendant orally agreed to repay by instalments to the plaintiff his 30% share under the agreement upon the sale of the property, para 9 had contained an allegation of breach of the agreement and had not mentioned anything to do with the sale of the property. Also prayer 1 had been for an account upon sale. Counsel further stated that Lim JC had suggested that the plaintiff set aside the judgment and amend the statement of claim or that the plaintiff ask Assistant Registrar Lim to review the order which was why the matter had been sent back to Assistant Registrar Lim. Counsel then suggested three alternative courses:

(a) that the plaintiff apply to set aside the order of 29 May 1998 and then amend his statement of claim;

(b) that the assistant registrar herself set aside the order; or

(c) that the assistant registrar amend the order so that it provided for the account to be given upon the actual sale of the property.

In response, counsel for the plaintiff pointed out that the order made by Assistant Registrar Lim on 29 May 1998 had not been appealed from.

The court then adjourned the matter to 5 April 1999 to give counsel time to take instructions from the plaintiff on the proposed courses. Assistant Registrar Lim further noted that she agreed with counsel for the defendant that one of the three courses of action suggested by him should be taken since what had been pleaded did not tally with what had been asked for in the claim.

Order made on 7 April 1999

At the next hearing before Assistant Registrar Lim, on 7 April 1999, counsel for the plaintiff informed the court that the plaintiff did not want to set aside the judgment of 29 May 1998. The plaintiff was agreeable to the court`s direction that the accounts be taken `upon sale of property`. Counsel for the defendant then tendered a document entitled `Directions sought by the defendant` which contained seven proposed directions. Having considered this document, the court adopted modified versions of the first two directions asked for and adjourned the other five for further hearing on 19 May 1999. The parties were informed that in the meantime they should work out a date for the sale of the property. The orders made by Assistant Registrar Lim were as follows:

> *1 An account be taken of all sums due, if any, from the defendant to the plaintiff being his 30% share upon the sale of the property under the joint venture agreement dated 2 June 1995.*
>
> *2 The plaintiff`s 30% of the net sales proceeds is to be computed on the basis of the actual sale figure*
>
> *(a) less costs and expenses incurred in connection with the sale of the property; (that is, the conveyancing and professional costs)*
>
> *(b) less other expenses and deductions as of 30 November 1996, and such expenses and deductions are as referred to in OCK2. The various items as set*

out in OCK2 are subject to proof before the accounting registrar.

It should be noted that the original directions 1 and 2 sought by the defendant read as follows:

> *1 An account be taken of all sums due, if any, from the defendant to the plaintiff upon the sale of the property under the joint venture agreement dated 2 June 1995.*
>
> *2 The plaintiff`s 30% of the net sale proceeds is to be computed on the basis of the actual sale figure*
>
> *a less costs and expenses incurred in connection with the sale of the property;*
>
> *b less other expenses and deductions as of 30 November 1996, and for this purpose the list of expenses and deductions set out in OCK-2 may be referred to by the accounting registrar as a guide but shall not preclude either parties (sic) from adducing additional evidence of the expenses and deductions.*

The parties were not able to reach any agreement on the sale of the property prior to their next appearance before Assistant Registrar Lim on 19 May 1999. Counsel for the plaintiff informed the court that his client preferred a sale by private treaty failing which the property was to be sold by public tender. He also stated that the plaintiff was disputing that the mortgage costs were attributable to the joint venture. Counsel for the defendant then suggested that unless both parties agreed to the sale of the property to a particular party and on agreed terms, the sale be by public auction. The court ordered that the parties were to attempt to sell the property by way of private treaty within eight weeks failing which the property was to be sold by public auction within eight weeks thereafter. AR Lim specifically noted: `NB: Question of whether mortgage is attributable to joint venture is reserved to be determined before assistant registrar taking the accounts.`

Sale of the property

The parties were not able to effect a sale in accordance with the above directions. Instead the property was taken over by receivers appointed by the mortgagees on 25 June 1999 in respect of the joint venture company. On 27 August 1999, Assistant Registrar Lim ordered that the directions for the taking of the accounts would be made upon completion of the sale of the property by the receivers. On 10 September 1999, the receivers entered into a contract to sell the property for $55m. Completion was scheduled for 10 November 1999 but did not take place on that date. No information was given to the plaintiff regarding completion, and on 28 December 1999, the plaintiff`s solicitors wrote to the defendant directly (his previous solicitors having discharged themselves) asking for confirmation of the completion of the sale. The defendant did not reply, but on 5 January 2000, the plaintiff received confirmation from the receivers themselves that they had been discharged. This indicated that the sale must have been completed. On 11 January 2000, therefore, the plaintiff wrote to the Registrar asking for the restoration of the hearing for directions for the taking of accounts.

Order made on 3 February 2000

On 27 January 2000, the Registrar sent a notice to the plaintiff`s solicitors and to the defendant directly as, at that time, the defendant had no solicitors on record. The parties were informed that they were required to attend before the assistant registrar, Ms Tan Wen Shan, in chambers on 3 February 2000 for a pre-trial conference pursuant to O 34(A) of the Rules of Court. On 31 January 2000, a company called Grandlink Group Pte Ltd, of which the defendant was a director, wrote to the Registry referring to its letter of 27 January 2000 to the defendant and asked for the pre-trial conference to be postponed as the defendant was then abroad. The letter also stated that the company`s office would be closed for the Chinese New Year holidays from 2 to 15 February 2000.

The pre-trial conference was not postponed. Grandlink Group Pte Ltd was informed that if the defendant failed to appear on the appointed date, the hearing would proceed in his absence. On 3 February 2000, the defendant was absent. The following orders were made by the court:

> *i that the defendant do file and serve an affidavit verifying account by 24 February 2000 showing:*
>
> *[bull] the price the property at Nos. 10 to 17 Tong Watt Road fetched at the receiver`s sale;*
>
> *[bull] costs and expenses incurred in connection with the sale of the property by the receivers;*
>
> *[bull] other expenses and deductions as of 30 November 1996, as referred to in OCK-2 in the plaintiff`s affidavit filed on 13 April 1998. The various items as set out in OCK-2 are subject to proof before the accounting Registrar.*
>
> *ii ...*
>
> *iii ...*
>
> *iv the plaintiff shall inform the Registry in writing after receipt of the defendant`s affidavit verifying account or after service of his affidavit of objections, if applicable, for a date to be fixed for the taking of accounts.*
>
> *v the taking of accounts (estimated for 1 day) shall include cross-examination of the defendant and the plaintiff upon their affidavits, and the plaintiff and defendant shall attend at the taking of accounts for the purposes of cross-examination.*
>
> *vi the decision of the accounting Registrar shall be by way of a judgment which will have the effect as a final disposing of the matter herein, subject to the right of appeal to a judge-in-chambers.*
>
> *vii the judgment shall bear interest at the rate of 6% per annum from the date of the writ to the date of judgment, and shall include costs to be paid by the defendant to the plaintiff, to be taxed unless otherwise agreed.*
>
> *viii ...*
>
> *ix ...*

x if the defendant fails to comply with the terms of today`s directions, the plaintiff shall be at liberty to file an affidavit verifying account by 9 March 2000 and shall write to the Registrar to restore the matter for hearing before the Registrar, and judgment will be entered for the sum stated in the affidavit, subject to verification before the accounting Registrar.

Second taking of accounts

The defendant did not comply with the above orders. On 25 February 2000, he appointed new solicitors to represent him in this matter. On 14 March, they filed an application seeking to set aside or rescind the orders made by Assistant Registrar Audrey Lim on 7 April 1999 and those made by Assistant Registrar Tan Wen Shan on 3 February 2000. Alternatively, the defendant wanted leave to appeal out of time against those orders. This application was fixed for hearing on 24 March immediately prior to the taking of the accounts. On that day, the application was dismissed and thereafter Assistant Registrar Tan Wen Shan proceeded with the taking of accounts and found that the final amount due to the plaintiff was $5,460,942.67.

The appeals

The defendant appealed against the refusal of the court to set aside the orders of court of 7 April 1999 and 3 February 2000. He wanted these decisions reversed and, in consequence, a setting aside of the accounts taken on 24 March 2000. It should be noted that a major cause of the defendant`s dissatisfaction with the accounts was in relation to the attribution of the mortgage of the property and interest thereon to the joint venture. His position was that whole of the mortgage should be attributed to the joint venture and interest should be calculated up to the date of the actual sale of the property.

The appeals came on for hearing before me. At the adjourned hearing on 2 May, I dismissed the appeal relating to the order of 7 April 1999 but allowed that in relation to the order of 3 February 2000. I set aside that order and the judgment on the accounts which had been made on 24 March 2000. I also made further directions for the taking of fresh accounts.

This was not the end of the matter. On 19 May, the parties appeared before me again at the request of the plaintiff who had asked for further arguments on both substantive and procedural grounds. The substantive grounds were not dealt with as I was informed that the defendant had become a bankrupt on 28 April 2000 and that as at 2 May 2000 had not had the sanction of the Official Assignee to proceed with his appeals. It was submitted that because of the supervening bankruptcy and the failure to follow bankruptcy procedures the defendant had not been competent to maintain his appeal at the hearing on 2 May. I found the plaintiff`s point on this to be well taken and therefore set aside the orders I had made on 2 May, thus reinstating the original position.

The bankruptcy order against the defendant was rescinded on 30 June. This made him able to proceed with his appeals. As I had agreed to hear further arguments from the plaintiff, the matter was fixed for hearing before me again. Three substantive hearings ensued. On 18 September 2000, I gave my decision which was substantially similar to that made previously except in relation to interest on the mortgage and interest on the amount to be found due.

Atkin`s Court Forms First, I refused to set aside the order of court of 7 April 1999. Secondly, however, I allowed the appeal against the order of 3 February 2000. I further ordered that new accounts be taken before me and that the arguments should include the issues of (1) how interest on the amount found to be due was to be calculated and (2) whether the mortgage was attributable to the joint venture and if so up to what date. In addition, I gave the following directions for the taking of accounts:

(1) the defendant do file and serve an affidavit verifying accounts by 9 October 2000 showing:

(i) the price that the property fetched at the receivers` sale;

(ii) costs and expenses incurred in connection with the sale by the receivers;

(iii) other expenses and deductions claimed as of two dates: (a) 30 November 1996 and (b) the date of sale, such expenses and deductions to be as referred to in exhibit OKD2 of plaintiff`s affidavit of 13 April 1998;

(2) the accounts and affidavit verifying accounts to be in the form contained in ;

(3) the plaintiff be at liberty to file and serve his affidavit stating his objection to the account and the reasons therefor within 21 days of service of the defendant`s affidavit;

(4) the plaintiff to inform Registry in writing after receipt of defendant`s affidavit verifying accounts or after service of plaintiff`s affidavit on objections (if applicable) for a date to be fixed for the taking of the accounts;

(5) taking of accounts (estimated one day) shall include cross-examination of plaintiff and defendant upon their affidavits; plaintiff and defendant shall attend taking of accounts for purposes of cross-examination;

(6) the decision of the accounting judge shall be by way of judgment which shall have the effect of a final disposal of the matter herein, subject to the right of appeal to the Court of Appeal;

(7) if the defendant fails to comply with the terms of today`s direction, the plaintiff shall be at liberty to file an affidavit verifying the accounts by 30 October 2000 and shall apply for a hearing date before me and at such hearing parties may attend but shall not be permitted to give evidence; and

(8) there be liberty to apply.

I also made orders on costs which are not relevant in the present connection.

The defendant then filed a notice of appeal in which he stated that he was appealing `against such part only of the [decision of 18 September 2000] as decides that new accounts be taken before Her Honour and that the appellant to file an affidavit verifying accounts and all other incidental orders relating to the taking of new accounts`. The defendant is not challenging my refusal to set aside the order of 7 April 1999. He now appears to accept the validity of that order. Instead, having achieved the setting aside of the orders made on 3 February and 24 March 2000, he is contending no further accounts can be taken in this action.

The defendant`s arguments at the first two hearings

At the first hearing in April 2000, the defendant argued that grave injustice had been done to him by the ex-parte order made on 3 February 2000. This was because Assistant Registrar Tan had made this order under the mistaken impression that Assistant Registrar Lim had, on 7 April 1999, directed the defendant to be liable to account to the plaintiff `Upon the sale of the property` and the defendant had consented to the same. Mr Netto, counsel for the defendant, submitted that the directions of 7 April 1999 could not constitute a `consent order` because they were never extracted and the terms and conditions of the consent were not properly set out and signed by both parties as required in law.

Mr Netto also contended that even if that order could be regarded as a formal consent order, it could not be substantiated in law because the defendant could not be sued to give an account `upon the sale of the property` before the property had even been sold. He argued that no cause of action could accrue before the property had been sold. Further, the plaintiff who had admitted in his affidavit of 24 July 1998 that the sale of the property was not relevant to his claim, could not be allowed to shift his position. By making the order of 3 February 2000, Assistant Registrar Tan had allowed the plaintiff to shift his position.

The defendant argued that there were ambiguities in the 7 April 1999 direction and these indicated that the order was not a consent order and, further, deprived the order of any binding effect on the defendant. The `ambiguities` referred to appear to be the contentions that the defendant could not possibly have agreed to bear all the interest on the mortgage loan after 30 November 1996 and that he could not possibly have agreed to the disallowance of other deductions relating to the maintenance of the land.

As an alternative argument, the defendant sought the court`s indulgence to invoke the `inherent jurisdiction of the court` pursuant to O 92 r 4 to rescind or set aside the order in question. The directions were given on mistaken facts and were based on a mistake of law and therefore had to be set aside in order to prevent injustice. In this respect the defendant relied on **Heng Joo See v Ho Pol Ling** [1993] 3 SLR 850 .

In submissions relating to the manner in which the accounts were taken, the defendant argued that even if he was bound to account because he consented to the compromise on 7 April 1999, fresh accounts should have been taken with all deductions as at the date of sale and the interest on the mortgage should have been left to the accounting registrar who should order that this interest must be borne by both parties proportionately until the sale of the property.

At the next hearing, on 2 May 2000, the defendant cited the case of **Huddersfield Banking Co, Ltd v Henry Lister & Son Ltd** [1895] 2 Ch 273 for the proposition that the court could set aside a consent order made on the basis of a mistake. Here the common mistake was that the defendant was liable to account based on the sale of the property even before the property was sold on 7 April 1999. The parties thought that the defendant was liable to give an account based on the sale of the property but that was premature because the property had not been sold. From the pleadings that were before the court then, the court had no jurisdiction to make the order which it had made. Mr Netto also referred to his earlier submission that even if the direction had been a perfect consent order, it should be set aside. He repeated his argument that this, however, had not been a consent order because all the terms and conditions had not been ascertained and clearly spelt out. The correspondence which passed between the parties subsequent to 7 April 1999 showed that there was no crystallised consent position. Therefore, the directions made had no binding effect.

Plaintiff`s arguments on restoration of appeal

When the appeal was restored after the defendant`s bankruptcy had been rescinded, the plaintiff made the following submissions in relation to the order of 7 April 1999. First, the submission was that this order was a `give and take arrangement` because :

(a) The plaintiff gave up his right of unconditional taking granted by the order of 29 May 1998 by agreeing to have the words `upon the sale of the property` included.

(b) In return, the plaintiff obtained the right to have the taking upon the sale of the property so as to determine the sale price amount, which was, to the knowledge of both the plaintiff and the defendant, the triggering event for the taking.

(c) The defendant gave up his right to apply to strike out the statement of claim.

(d) In return, he obtained the right to have a taking only upon the sale of the property by which time the sale price would be known.

Mr Leng, for the plaintiff, submitted that this arrangement was a compromise that the parties to it could not afterwards have set aside because upon attaining fuller information they thought they had made a bad bargain. He cited the following passage from the ***Huddersfield*** case (per Vaughan Williams J at p 228):

> *... if the arrangement come to was a compromise of doubtful rights and a give-and-take arrangement, parties to it could not afterwards have the compromise set aside because upon obtaining fuller information they thought they had made a bad bargain. But, having regard to the evidence, I am of the opinion that this arrangement was not a compromise or give-and-take arrangement of the sort I have referred to. The arrangement was not that one side should give way as to some of the machines and the other side as to the rest of them; and that being so, I have nothing further to dispose of before I deal with the question whether the machines were included in the mortgage.*

Mr Leng pointed out that the plaintiff had been given three options by Assistant Registrar Lim on 20 March 1999 and had chosen the third option which was that he would agree to an amendment of the order of 29 May 1998 in relation to when the account should be taken. Thereafter it was counsel for the defendant, who had drafted and submitted to the court directions for the further taking of the account. The actual directions made had closely mirrored those proposed by the defendant`s lawyers and therefore the defendant could not complain about them thereafter. Further, both parties had acted upon the compromise by trying to agree to terms of sale and appearing before the court again in this connection on two subsequent occasions.

The plaintiff further submitted that even if there had been a mistake, the defendant was bound by his own mistake because he had agreed to the account being taken `upon the sale of the property` and to these words modifying the previous order of court of 29 May 1998.

Hearing on 18 September 2000

Mr Netto tendered written submissions in which he first set out the facts. His account here was that on 7 April 1999, the pleadings before the court were based on the fact that the property was sold for $45m. On 29 May 1998, the plaintiff obtained judgment for an account to be taken but the defendant`s appeal against the account was allowed because the property had not been sold.

Assistant Registrar Lim had then made a clarification as follows: `Property - estimated selling price as reflected in OCK2 of $45m is only an estimate. Price is still subject to valuation and proof at accounting stage`.

Mr Netto went on to submit that from this clarification it was clear that at the taking of the account, parties should have proceeded to prove the value of the property as at 30 November 1996 by calling expert evidence on the value. Instead on 7 April 1999, the parties chose to try and compromise their rights by agreeing to take the accounts on a totally different basis as a result of which directions were given on that date and on 19 May 1999. The second set of directions came about because there was a dispute between the parties as the amount of mortgage interest to be deducted from the sale price.

Counsel then submitted that these two sets of directions were a total departure from the plaintiff`s pleaded case from the following reasons:

(a) no cause of action could properly accrue before the sale of property;

(b) the plaintiff`s original statement of claim and the order of 29 May were no longer relevant - the new cause of action came from the compromise agreement and only accrued upon the sale of the property.

The submission continued that the court had no jurisdiction to make those directions and that even if the court was not inclined to set aside the order of 7 April 1999, the plaintiff must issue a fresh writ or amend his statement of claim after his property was sold in order to give the court jurisdiction to rule on the terms and conditions of the compromise agreement. The defendant must also be given a chance to argue his version of the compromise agreement especially with regard to the mortgage interest and the interest on any judgment sum.

The defendant went on to submit that the court had no jurisdiction to make the order of 3 February 2000 enforcing the compromise agreement because:

(a) there were no pleadings and final judgment on the compromise agreement;

(b) all terms of a compromise agreement had not been dealt with and clearly spelt out.

The conclusion was that the plaintiff had to proceed to take out a writ based on the compromise agreement and obtain a judgment on the same.

It is clear that the defendant`s stand now is that on 7 April 1999 these proceedings came to an end. No further steps could be taken in them and the plaintiff was only entitled to take accounts to ascertain the amount due to him if he commenced a new action based on the directions of 7 April 1999. I believe that this stand will be the basis of the defendant`s appeal against the orders I made.

The decision

The basic principles which govern applications to set aside orders of court or judgments are concisely set out in paras 558, 559 and 560 of 36 ***Halsbury`s Laws of England*** (4th Ed). There are three situations in which an order may be set aside. The first situation is when the order has been obtained irregularly, that is, the person obtaining the order has not complied with the requirements of the Rules of Court in some aspect. In this situation, the person against whom the order is made is entitled to

have it set aside. The first situation did not apply in this case. The orders impugned here were regular orders.

The second situation is when a judgment has been obtained by fraud. Such a judgment may be impeached by means of an action which may be brought without leave. The fraud must relate to matters which prima facie would be a reason for setting the judgment aside if they were established by proof and the fraud must have been discovered after the judgment was passed. The orders here did not fall within this category. Whatever flaws there were in the plaintiff`s proceedings and the earlier orders made were well known to the defendant at all times. Further, the order of 7 April 1999 was based on proposals made by him.

The third situation is where an order or judgment has been obtained in default of the appearance of one of the parties to the suit. In such case, the person against whom the order has been made may apply for it to be set aside but the court has a discretion as to whether to allow the application. As a rule, the applicant must show by affidavit that he has a defence to the action on the merits. This third situation applied to the order of 3 February 2000 since the defendant was absent when it was made but did not apply to the order of 7 April 1999.

As the order of 7 April 1999 did not fall within any of the categories which I have mentioned, the defendant from the beginning faced an uphill task in his application to set it aside. I have set out the defendant`s arguments in some detail in [para ] 29 to 34 and 39 to 42 to show the twists and turns taken by the defendant in the course of the hearings. A major difficulty in the defendant`s path was, as he realised, the fact that the directions of 7 April 1999 had been substantially adopted from the draft which his own counsel had tendered to the court. Mr Netto therefore spent a lot of energy in arguing that these directions could not constitute a `consent order` because various technicalities pointed out by him had not been complied with. I found these arguments to be misplaced.

The defendant had been active in the action from the time the summary judgment application was filed. He had put in an affidavit in which he set out clearly the grounds on which he contended there were triable issues. Whilst he did not succeed in wholly defeating the application, his argument was recognised to the extent that the order made in relation to the taking of the account made no reference to the phrase `upon the sale of the property` which is what the plaintiff had originally asked for. The defendant had failed to appeal against this order. Instead, he participated in the taking of the accounts and renewed his arguments about the invalidity of the plaintiff`s claim in that forum. He then appealed against the accounts ordered. The appeal was successful and the matter was referred back to the assistant registrar for further directions.

By March 1999, it was clear that the case could not progress further on the basis of the order made on 29 May 1998. That was why the plaintiff was given three alternative courses of action. The plaintiff chose to have an amendment made to the manner of the taking of accounts. The defendant was aware of all this. He was not at that stage bound to accept that the plaintiff should be given these three courses. He could have filed an application himself for leave to appeal out of time against the order of court of 29 May 1998. That would have been one way out of the impasse that the parties found themselves in. He did not do that. More importantly, when the plaintiff indicated his choice of action, the defendant adopted the same by proposing to the court the directions it should make to give effect to the choice of the plaintiff. Whilst the court did not accept the totality of the wording proposed by the defendant, the order made substantially gave effect to what he wanted. In those circumstances, whether or not those various technicalities counsel referred to were complied with, was irrelevant. The defendant was in no position to ask the court to set aside what he had originally asked the court to put in place.

For the same reason, the case of ***Heng Joo See*** was not relevant. There, the court acting on its own motion had rescinded a decree nisi which had been granted contrary to the material facts. The court held that it could not remain idle when abuse of process by deception of the court took place in its face resulting in the removal of the very foundation on which the court had previously acted. The facts in that case were far removed from those here. Here, at all times, the varying contentions of the plaintiff and the defendant had been in dispute and before the court and it was the defendant who, being well aware of those facts, had suggested the form of the directions.

The defendant could have registered his protest to any directions being made at all if he considered that the course being adopted would be wrong and/or outside the jurisdiction of the court. He had legal advice at the time. Not only did he suggest the directions to be given but, thereafter, his counsel was correspondence with the plaintiff`s counsel in attempts to implement those directions by effecting the sale of the property. There were also two court attendances by the parties consequent upon the directions of 7 April 1999. In August 1999 when Assistant Registrar Lim ordered that directions for the taking of accounts would be given after the receivers had effected the sale, the defendant said nothing about the court being without jurisdiction to do so. Consequently, the plaintiff took various steps under the impression that there was no challenge to the validity of that order. By the time the defendant sought to set aside the order of 7 April, so much water had flowed under the bridge that the court could not, in equity, exercise any jurisdiction it had to do so.

By the time of the further arguments, the defendant had realised the futility of pursuing the setting aside of the 7 April 1999 order. Opportunistically, he changed his course to attacking the subsequent taking of accounts by adopting language used by the plaintiff in the plaintiff`s submissions. His new argument was that this order was a compromise and as such gave rise to a new cause of action. It had to be sued on separately. It could not be implemented.

I could not accept this submission. The April 1999 order did not give rise to any new cause of action. It could not because its purpose was to give effect to orders made in relation to the plaintiff`s original cause of action. This had been for an account. An order had been given for that account to be taken. The defendant`s position was that the account was being taken on the wrong basis because the property had not yet been sold and the right to take an account could not arise until after sale. The plaintiff had then agreed that the account should be taken after the sale. The defendant had accepted this agreement and had put forward directions to implement the taking of the account after the sale. The whole purpose of the order of 7 April 1999 was to provide a method for the parties to proceed in this action. The defendant recognised that. His then solicitors dealt thereafter with practical matters relating to the sale of the property. One of the reasons for selling the property was to enable the account to be taken. The fact that the sale was eventually effected by the mortgagees through the receivers appointed by them is irrelevant. Both parties had been working towards a sale before that.

Before September last year, the defendant did not question the second taking of accounts on the basis that it was an illegal step contrary to the effect of the order of 7 April 1999. Instead, when in March 2000 he finally tried to prevent the taking, he did so on the basis that the order of 7 April 1999 had no binding effect on him and that the order of 3 February 2000 had to be set aside because he was absent from the hearing and also had a good defence to the way in which the accounts had been taken. What he wanted was to put forward his own contentions as to the manner in which the accounts should be taken particularly in regard to the calculation of interest on the judgment and the attribution of the mortgage to the joint venture. Having so strenuously argued that the order of 7 April 1999 had no binding effect, it ill lies in the mouth of the defendant to now argue that its effect was to give rise to a new cause of action which the plaintiff had to sue on.

I upheld the validity of the order of 7 April 1999. Having done so I had to give effect to it by providing directions for the accounts it contemplated being taken. Since the defendant has not appealed against my decision on this order I fail to see that he has any basis for challenging the court`s jurisdiction to make the directions which were a natural and inevitable consequence of the order concerned. Finally, it should be noted that the draft directions put forward by the defendant`s counsel on 7 April 1999 themselves included directions as to the manner in which the accounts should be taken. The assistant registrar did not implement those directions at that time because she considered the directions should follow the sale. The defendant well knew what he wanted in April 1999. He cannot run away from it today because it has turned out to be less beneficial than he had earlier expected.

Outcome:

Appeals allowed in part.

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