Chua Chian Ya v Music & Movements (S) Pte Ltd (formerly trading as M & M Music Publishing)
[2009] SGCA 54

Case Number	: CA 167/2008
Decision Date	: 06 November 2009
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Jonathan Yuen and Joana Teo (Samuel Seow Law Corporation) for the appellant; Kenneth Tan SC (Kenneth Tan Partnership), Lim Tat and Dew Wong (Aequitas Law LLP) for the respondent
Parties	: Chua Chian Ya — Music & Movements (S) Pte Ltd (formerly trading as M & M Music Publishing)

Contract – Breach

Contract – Illegality and public policy – Restraint of trade

6 November 2009 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 This is an appeal against the decision of the High Court judge ("the Judge") to dismiss Originating Summons No 937 of 2008 ("OS 937"), which was filed on 11 July 2008 (see *Chua Chian Ya v Music & Movements (S) Pte Ltd (formerly known as M & M Music Publishing)* [2009] SGHC 75 ("the GD")).

2 The appellant is local singer-songwriter, Ms Chua Chian Ya ("Chua"), more popularly known as Tanya Chua. The respondent is Music & Movements (S) Pte Ltd ("M&M"), a music publisher which previously published Chua's works. In OS 937, Chua sought a declaration that, *inter alia*, all rights in the songs composed by her during the period of her first agreement with M&M dated 18 September 2002 ("the Principal Agreement") as extended by a second agreement with M&M dated 25 May 2005 ("the Extension Agreement") had reverted to her (we shall hereafter refer to these songs as "the Compositions"). The application was dismissed with costs by the Judge on 9 October 2008.

Background

The relevant contracts

3 Chua initially entered into a contract with Ping Pong Music Publishing Singapore ("Ping Pong") dated 18 August 1999 that lasted three years. Both Ping Pong and M&M were run by one Lim Sek at the material time. After that initial agreement came to an end, Chua entered into the Principal Agreement with M&M on 18 September 2002, also for a period of three years, under which she agreed to compose songs exclusively for M&M. The rights in the Compositions were assigned to M&M. In consideration, Chua received an advance royalty payment of $20,000. M&M remained responsible for promoting Chua's works and for collecting royalties on Chua's behalf. The salient terms of the Principal Agreement were as follows:[note: 1]

3. GRANT OF RIGHTS

The Writer [*ie*, Chua] hereby irrevocably and absolutely assigns, conveys and grants to the Publisher [*ie*, M&M], its successors and assigns all rights and interests of every kind, nature and description in and to the Composition[s] created by the Writer during the term of this Agreement …

…

10 STATEMENT OF ACCOUNTS AND AUDITS

10.1 *A statement of all accounts shall be provided and delivered to the Writer by the Publisher* whether or not any royalties or fees are then due to the Writer, and all monies due thereunder pursuant to Paragraph 6 hereof [*viz*, the provision on royalties] shall be paid by the Publisher to the Writer, by bank order or in cheque, in Singapore Dollars.

10.2 The Writer or its representative shall have the right to inspect all books, records and other documents of the Publisher related to the Compositions, at the place of business of the Publisher, during usual business hours, and upon reasonable notice; all costs of such inspection shall be paid by the Writer; provided, however, that if more than ten (10%) percent of difference between the rendered statements by the Publisher and the result of [the] said inspection has occurred, all costs (except travelling and living costs) of such inspection shall be paid by the Publisher. These audit costs may never exceed an amount equal to the amount of underpayment.

…

12 SUSPENSION AND TERMINATION

In the event that the Publisher fails to account and make payment hereunder or fails to perform any obligations required hereunder and in the event that such failure is not cured within thirty (30) days after written notice has been served on the Publisher, or in the event that the Publisher becomes inactive, ceases doing music publishing business or … [goes] into compulsory liquidation or bankruptcy, then and in any such events the Writer, in addition to such other rights or remedies which it may have at law or otherwise under this agreement, may elect to cancel or terminate this agreement without prejudice to any rights or claims it may have, and then *all right[s] in and to the Composition[s] … shall revert to the Writer and the Publisher may not thereafter exercise any rights hereunder*.

[underlining and emphasis in bold in original; emphasis added in italics]

4 On 25 May 2005, Chua entered into the Extension Agreement with M&M, which extended the Principal Agreement until 17 March 2007. She was given $40,000 as an advance royalty payment. Of particular importance was the following term in the Extension Agreement:[note: 2]

6. The obligations of the Publisher [*ie*, M&M], namely to promote, publish and … commercially exploit ("to exploit") all Compositions … so as to generate royalties, revenue and income therefrom and to pay the same to the Writer [*ie*, Chua], shall survive 17 March 2007, and the Publisher shall undertake and shall continue to undertake to the Writer to expend all reasonable work and efforts to this end, and *shall not neglect and/or fail to exploit any part, portion, or particular Composition*. [emphasis added]

5 Pursuant to the Principal Agreement and the Extension Agreement, the Compositions were promoted throughout various countries, including Taiwan, the People's Republic of China ("China"), Malaysia and Singapore. Chua became famous in the region as a singer and songwriter as a result of her musical talents. Her record albums, by all accounts, sold well. At the time the dispute in the present proceedings arose in late 2006, Chua had written and recorded songs for nine albums. She had also won several musical awards both in Singapore and in Taiwan. M&M appointed an international music publishing house, Warner/Chappell ("W/C"), as the administrator to take charge of tabulating and collecting royalties arising from the use of the Compositions. The arrangement was that W/C would send statements of account on the royalties collected ("W/C's accounts") to M&M; M&M, in turn, would summarise W/C's accounts and send a summary of those accounts along with its copy of the accounts based on W/C's accounts to Chua every six months. According to counsel for M&M, Mr Kenneth Tan SC ("Mr Tan"), the accounts from M&M would contain a detailed breakdown of the royalty payments collected by it. Chua's counsel, Mr Jonathan Yuen ("Mr Yuen"), admitted that documents from M&M were sent to Chua, but argued that the correctness of the breakdown of the royalty payments could not be determined from the accounts.

The discrepancies in the accounts

6 The main facts as gleaned from the material correspondence between Chua and M&M's two representatives, Lim Sek and Jack Lim, which commenced in late 2006, are as follows (in this regard, we have considered only the correspondence that is directly relevant to the accounting discrepancies in issue in this appeal ("the Discrepancies"), *viz*, the discrepancies between W/C's accounts for the period from January to June 2006 (which accounts, according to Chua, were sent to her inadvertently) and M&M's summary). On 14 November 2006, Chua sent an e-mail to M&M and W/C to seek clarification of the Discrepancies. She pointed out that the figures for the royalties collected from China, Malaysia and Singapore as provided in M&M's summary did not tally with the figures given in W/C's accounts for the same period. She also asked about the "EZ Peer settlement",[note: 3] which was (purportedly) a sum that should have been paid to her without any deduction for commission by M&M. In the same e-mail, Chua stated that "[b]ased on inaccurate accounting, [she was] confirming the termination of the publishing agreement between M&M … and [herself], effective on 1st November 2006".[note: 4]

7 Following Chua's e-mail of 14 November 2006, Lim Sek responded on 25 November 2006 explaining that the Discrepancies could have arisen because of W/C's mistake in paying Chua royalties which were actually due to another singer. He then asked W/C to calculate the amount which had been paid to Chua by mistake. However, in her e-mail dated 4 December 2006, Chua disagreed with Lim Sek on the reason for the Discrepancies and asked, instead, for clarification of the statements which had been sent to her. Sometime on or around 26 December 2006, M&M sent *another* statement of account for the period from January to June 2006 to Chua.[note: 5] We should highlight at this point that, unfortunately, *only summaries of the statements of account could be found in the documents submitted to the court by both parties in their respective affidavits*. The complete statements of account (including, for example, the breakdown of the royalties from Chua's performances, the number of record albums sold, the details of the withholding tax deducted and so forth) were never provided to either this court or the Judge.

8 In an e-mail to Chua dated 30 December 2006, M&M's representative, Jack Lim, confirmed that the most recent statement of account sent by M&M was "[M&M's] final amendment",[note: 6] and informed Chua that she should disregard the prior statements. Chua replied by e-mail on the same day stating that Lim Sek had *not* given her good reasons for the Discrepancies, and reiterating that she wished to terminate her contract with M&M (see [6] above). Jack Lim then sent a summary of the

updated accounts listing the sum that had allegedly been overpaid to Chua. In March 2007, Lim Sek again sent an e-mail to Chua explaining that the Discrepancies had arisen because Chua's individual statements of account had been mixed with those of other songwriters.

9 Sometime in April 2007, Chua appointed her current lawyers to represent her. From that point onwards, M&M corresponded mainly with Chua's lawyers. In the course of such correspondence, M&M again provided several reasons for the Discrepancies. It was at this juncture that M&M explained that the Discrepancies could have arisen because of withholding tax deducted in Taiwan, where W/C was based. As we stated above (at [7]), the complete statements of account, including W/C's accounts, were never provided, and the only documentary evidence that we have on record consists of summaries of withholding tax deducted from the various territories where W/C was in charge of collecting royalties. This is, in fact, an important point in relation to a key issue in this appeal, *viz*, whether M&M had breached its contractual obligation to account to Chua (see further [12] and [32]–[35] below).

10 On 7 May 2008, Chua's lawyers gave written notice to M&M requiring it to provide "a proper and detailed account for the period between the first half of the year 2005 (i.e. from 1 January 2005) up to the second half of 2007 (i.e. to 31 December 2007)",[note: 7] but the request was not complied with within the 30-day period stipulated in cl 12 of the Principal Agreement. Lim Sek, in his affidavit filed on 22 August 2008,[note: 8] explained that the information sought by Chua had *already* been provided to her lawyers via Jack Lim's e-mails dated 28 September 2007[note: 9] and 3 April 2008[note: 10] (those e-mails concerned the issue of withholding tax and contained the account summaries which we alluded to at [9] above). Dissatisfied with the explanations given by Lim Sek, Chua filed OS 937 on 11 July 2008 for a declaration that, *inter alia*:

(a) the Principal Agreement, which was extended by the Extension Agreement, had come to an end and all rights in the Compositions had reverted to Chua absolutely; and

(b) in the alternative, all rights in the Compositions had reverted to Chua absolutely pursuant to cl 12 of the Principal Agreement.

It should also be noted that, sometime in August 2007, Chua's lawyers and accountants inspected the accounts at M&M's premises.

The decision of the Judge

11 The Judge dismissed OS 937. She held that cl 6 of the Extension Agreement (reproduced above at [4]) survived the termination of the parties' contractual relationship after 17 March 2007 because "there [was] nothing in the wording of cl 6 … that would give rise to absurdity and inconsistency if the words [therein] were interpreted in their grammatical and ordinary meaning" (see the GD at [48]). Based on the affidavit evidence before the court, the Judge accepted that Chua's complaints regarding errors in the accounts rendered by M&M were without merit because Chua had been overpaid and had even offered to repay the excess amount which she had received (see the GD at [43]).

The issues on appeal

12 Counsel for Chua, Mr Yuen, raised two issues before this court. First, it was argued that the rights in the Compositions reverted to Chua after 17 March 2007 (the date of expiry of the Extension Agreement) because the assignment of those rights did not survive the expiry of the Extension

Agreement. Second, he argued that, in any case, M&M's failure to account to Chua for the royalties collected entitled her to terminate the Extension Agreement pursuant to cl 12 of the Principal Agreement (reproduced above at [3]). We shall deal with each of these issues, which will be referred to as "the First Issue" and "the Second Issue" respectively, in turn.

The First Issue: Whether the rights in the Compositions reverted to Chua upon the expiry of the Extension Agreement

13 We note, at the outset, that the terms of the agreement between the parties were expressed clearly. In particular, cl 3 of the Principal Agreement clearly provided (as an *express* term of the contract) that the rights in the Compositions were "irrevocably and absolutely"[note: 11] assigned to M&M. Chua asserted that such an assignment clause – which effectively assigned the rights in the Compositions to M&M for the entire term of the copyright in those works – was no longer the practice in the music industry. In our view, this argument does not assist her as, even assuming that her assertion is correct, in the absence of undue influence, economic duress, misrepresentation or some other vitiating factor, the courts will uphold such contracts on the simple and self-evident basis that parties must honour the contracts which they have entered into. The corollary of this principle is that there are both good and bad bargains to be made, and the courts will uphold both. That is the nature of contractual obligations and, indeed, constitutes the reality as well as the lifeblood of the commercial world. The courts will only intervene in legally egregious circumstances – for example, where a vitiating factor is involved (*cf*, for example, cases involving the doctrine of undue influence, such as the Malaysian High Court decision of *Polygram Records Sdn Bhd v The Search* [1994] 3 MLJ 127, the English Court of Appeal decision of *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428 and the English High Court decision of *Elton John v Richard Leon James* [1991] FSR 397). Indeed, by their very nature, vitiating factors are exceptions to the general rule, which centres on upholding the sanctity of contract.

14 In the English High Court decision of *Panayiotou v Sony Music Entertainment (UK) Limited* [1994] EMLR 229 ("*Panayiotou*") (which concerned issues relating to restraint of trade as well as competition law, of which the former will be discussed below), Jonathan Parker J made the following observations, which are consistent with the approach outlined in the preceding paragraph (*id* at 374):

> I find difficulty in seeing how exclusivity of exploitation arising by reason of the outright sale and transfer of copyright can be classified as a restraint of trade at all. I agree with [counsel for the defendant] that *the sale and transfer of property rights is pre-eminently a matter of bargain. The proposition that there is some public policy interest in preventing an outright sale of a property right seems to me to be self-evidently unsustainable*. If there be any competition in this respect between freedom of trade and freedom of contract …, then in my judgment *freedom of contract should prevail*. [emphasis added]

Reference may also be made to George Wei, *The Law of Copyright in Singapore* (SNP Editions, 2nd Ed, 2000), where the learned author observes (at para 12.17):

> As a starting point, the copyright owner will be free to assign his copyright to whomsoever he chooses and under the terms and conditions that he is able to secure for himself. The fact that the assignor made a "bad bargain" and subsequently regrets [it] is no ground for upsetting the assignment; the principle of freedom of contract and the right of an owner of property to deal with his property as he thinks appropriate will apply unless some other principle of law [or] equity can be called into play. …

15 We should also state that we agree with the general approach of the Judge, who held that cl 6

of the Extension Agreement meant that M&M's rights in the Compositions survived the expiry of that particular agreement (see [11] above).

16 Another argument raised by Chua in relation to the First Issue was that, even if cl 6 of the Extension Agreement did indeed survive the expiry of that agreement, the effect of that clause was to impose "an unreasonable and inequitable restraint of trade against [Chua]".[note: 12] This point was not raised before the Judge in the court below, and the issue arises as to whether or not it can presently be raised on appeal (in accordance with the established principles stated by this court in *Panwah Steel Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2006] 4 SLR 571). In our view, however, this particular issue is rendered moot in the light of the fact that there is, in any event, no merit in Chua's argument apropos restraint of trade. Let us elaborate.

17 Broadly speaking, covenants in restraint of trade are *prima facie* unenforceable unless the contractual provisions are shown to be reasonable, taking into account the interests of both the parties concerned and the public. Specifically, the application of this doctrine to employment contracts is well established (see generally the decision of this court in *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR 663, where the doctrine was examined). This doctrine was applied to contracts between songwriters and music publishers in the seminal House of Lords decision of *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 WLR 1308 ("*Schroeder Music Publishing*"), a case which Chua relied upon heavily. However, it should be noted, at the outset, that that particular case involved an extremely one-sided contract. Indeed, the case involved such an extreme fact situation that it is often referred to by advocates of a broader (and distinct) doctrine of unconscionability, not least because of Lord Diplock's speech therein (even though such a doctrine has yet to take root in the Commonwealth in general and in Singapore in particular (see, for example, the High Court decision of *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR 117 at [72] and the decision of this court in *Sandar Aung v Parkway Hospitals Singapore Pte Ltd* [2007] 2 SLR 891 at [39]; although *cf* the Australian position as embodied in, for example, the leading High Court of Australia decision of *The Commercial Bank of Australia Limited v Amadio* (1983) 151 CLR 447)).

18 In *Schroeder Music Publishing*, the plaintiff, who was a 21-year-old unknown songwriter at the material time, entered into a (standard form) contract with the defendant music publisher that was extremely one-sided inasmuch as it favoured the music publisher and was almost totally unfavourable to the songwriter. The agreement was originally for five years, but its duration was *automatically extended* by another five years if the royalties received exceeded £5,000. Under the agreement, the songwriter assigned to the music publisher all rights in his existing works as well as in future works which he composed during the term of the agreement. The music publisher could *terminate the agreement at any time* with one month's notice and could assign the benefit of it to anybody. The songwriter was *liable to indemnify* the music publisher in respect of any claim mounted against his compositions; yet, there was *no obligation on the music publisher to promote or publish the songwriter's works*. In the event of the songwriter's breach of any of the terms of the agreement, the music publisher was entitled to withhold the payment of royalties to the songwriter, but no provision was made in the event of the music publisher's breach. The songwriter brought an action seeking, *inter alia*, a declaration that the agreement was contrary to public policy and void. The judge at first instance ruled in his favour, and his decision was affirmed by the English Court of Appeal.

19 On further appeal, Lord Reid, not surprisingly, held (*id* at 1313–1315):

> The public interest requires in the interests both of the public and of the individual that everyone should be free so far as practicable to earn a livelihood and to give to the public the fruits of his particular abilities. The main question to be considered is whether and how far the operation of

> the terms of this agreement is likely to conflict with this objective. The [songwriter] is bound to assign to the [music publisher] during a long period the fruits of his musical talent. But what [is] the [music publisher] bound to do with those fruits? Under the contract nothing. If [it does] use the songs which the [songwriter] composes [it] must pay in terms of the contract. But [it] need not do so. As has been said [it] may put [the songwriter's songs] in a drawer and leave them there.
>
> No doubt the expectation was that if the songs were of value they would be published to the advantage of both parties. But if for any reason the [music publisher] chose not to publish them the [songwriter] would get no remuneration and he could not do anything. Inevitably the [songwriter] must take the risk of misjudgment of the merits of his work by the [music publisher]. But that is not the only reason which might cause the [music publisher] not to publish. There is no evidence about this so we must do the best we can with common knowledge. It does not seem fanciful and it was not argued that it is fanciful to suppose that purely commercial consideration might cause a publisher to refrain from publishing and promoting promising material. He might think it likely to be more profitable to promote work by other composers with whom he had agreements and unwise or too expensive to try to publish and popularise the [songwriter's] work in addition. And there is always the possibility that less legitimate reasons might influence a decision not to publish the [songwriter's] work.
>
> …
>
> In the present case the [songwriter] assigned to the [music publisher] "the full copyright for the whole world" in every musical composition "composed created or conceived" by him alone or in collaboration with any other person during a period of five or it might be 10 years. He received no payment (apart from an initial £50) unless his work was published and the [music publisher] need not publish unless [it] chose to do so. And if [it] did not publish he [*ie*, the songwriter] had no right to terminate the agreement or to have copyrights re-assigned to him. I need not consider whether in any circumstances it would be possible to justify such a one-sided agreement. It is sufficient to say that such evidence as there is falls far short of justification. …

20 In the circumstances, the House of Lords unanimously held (affirming the decision of the lower courts) that the agreement between the songwriter and the music publisher was contrary to public policy and void. In our view, the rather extreme factual scenario in *Schroeder Music Publishing* rendered the case a rather easy one for the court: the contract concerned was extremely one-sided, and was *patently* unreasonable in being so wholly one-sided. The case law on the doctrine of restraint of trade has developed substantially since *Schroeder Music Publishing*, but we shall only highlight a few salient cases for present purposes (for a good overview, see generally *The Law of Copyright in Singapore* ([14] *supra*) at paras 12.20–12.30).

21 In *Panayiotou* ([14] *supra*), the artiste known as George Michael alleged that his exclusive music recording agreement with the record company, Sony Music Entertainment (UK) Limited ("Sony Music"), which formed part of a compromise agreement between the parties, was void or unenforceable as being an unreasonable restraint of trade. Parker J dismissed the claim on the basis that public policy precluded the artiste from alleging that part of a compromise agreement was in restraint of trade. Nonetheless, he proceeded to consider the agreement on the assumption that the doctrine of restraint of trade was applicable, and ultimately held that the terms of the agreement were justified (*id* at 380).

22 Interestingly, Parker J was of the view that (*id* at 316):

> [A] distinction must be drawn between the common law jurisdiction to declare a contract unenforceable as a restraint of trade (that being the jurisdiction which is invoked in this case) and the equitable jurisdiction to grant relief in certain circumstances against unfair and unconscionable bargains (a jurisdiction which is not invoked in this case).

The learned judge proceeded to observe thus (*id* at 316–317):

> Both jurisdictions are based on public policy, there being no other justification for the court intervening where contractual obligations have been assumed voluntarily. However, although both jurisdictions may be rooted in a single broad public policy, the position has now been reached on the authorities (as I read them) where differing public policy considerations – or differing aspects of a single broad public policy – apply to each jurisdiction.
>
> In the case of the equitable jurisdiction to [grant relief] against unfair and unconscionable bargains, the particular public policy consideration is that of preventing unfair advantage being taken of the weak and vulnerable. …
>
> …
>
> By contrast, in the case of the common law jurisdiction to declare a contract unenforceable as a restraint of trade, the particular public policy consideration is that of free trade. The test to be applied, where the contract is one which attracts the doctrine of restraint of trade, is a test of reasonableness: the court does not have to be satisfied that the defendant has behaved in a morally reprehensible way. …

23 Parker J nevertheless acknowledged – correctly, in our view – that there could, depending on the particular factual matrix, be an *overlap* between these two jurisdictions. In particular, the learned judge opined thus (*id* at 318):

> In certain cases the two jurisdictions may overlap. This will occur, for example, in the case of an unconscionable bargain where the unfair advantage obtained by the defendant takes the form of a restraint of trade imposed on the plaintiff.

24 We would respectfully endorse the approach taken by Parker J in *Panayiotou* as briefly outlined above. It is important, however, to emphasise that this does *not* entail the adoption of a broader doctrine of unconscionability – the legal status of which is still in a state of flux in the Commonwealth in general and in Singapore in particular (see above at [17]). In any event, it is unnecessary for the purposes of the present appeal to deal with the question of whether there is (or ought to be) a broader doctrine of unconscionability (although we note that there is local case law endorsing a narrower equitable jurisdiction proscribing specific (and improvident) bargains (see, for example, the High Court decisions of *Lim Geok Hian v Lim Guan Chin* [1994] 1 SLR 203 and *Pek Nam Kee v Peh Lam Kong* [1996] 1 SLR 75; and *cf* the (also) High Court decision of *Fong Whye Koon v Chan Ah Thong* [1996] 2 SLR 706, which demonstrates that the line between a broader doctrine of unconscionability and this (narrower) equitable jurisdiction might be blurred)). This is because the situation in *Panayiotou* was, in fact, precisely the situation which obtains in this appeal. Chua's case did not involve the broader doctrine of unconscionability, but focused instead on the court's common law jurisdiction to declare a contract unenforceable as a restraint of trade. Although Chua sought to invoke *Schroeder Music Publishing* ([17] *supra*) in aid of her case, she relied on that particular precedent from the perspective of the doctrine of restraint of trade *only*.

25 Some of the provisions of the agreement in issue in *Panayiotou* deserve brief mention. That

agreement was for a period of three years (initially), during which George Michael was obliged to produce "Master Recordings" for (in effect) two record albums. Sony Music had the option to buy a further five record albums, which meant that the contract between the parties could run to a maximum of 15 years. All Master Recordings produced by George Michael during the contractual period belonged to Sony Music and all copyright in them passed to Sony Music, albeit subject to limited release obligations in respect of certain Master Recordings. Parker J held that the agreement was justified in law. He noted that George Michael was an established musician and there was no inequality of bargaining power between the parties. The agreement being challenged was in fact the result of a renegotiation between the parties. Although the duration of the agreement *could* run to 15 years, it was effectively governed by the number of records that George Michael had agreed to sell, and could be shortened if he delivered his records more quickly. Parker J accepted that, in looking at the duration of the contract, he should take into consideration "a record company's need for successes to help pay for failures" (*id* at 367). Further, the commercial interests of a music publisher to sell as many record albums as possible were a legitimate interest to be considered. In this regard, Sony Music's commercial interests lay, in fact, in exploiting George Michael's recordings to the fullest. There was no reason to suspect that Sony Music would act against its commercial interests by (to paraphrase Lord Reid's words in *Schroeder Music Publishing* at 1313 (reproduced at [19] above)) keeping George Michael's recordings in the drawer, so to speak. Finally, as we have already emphasised above (at [14]), Parker J found that there was nothing inherently objectionable in Sony Music holding the copyright in George Michael's recordings for the full term of such copyright.

26 Apart from *Panayiotou*, reference may also be made to the English Court of Appeal decision of *Zang Tumb Tuum Records Limited v Johnson* [1993] EMLR 61 ("*Zang Tumb Tuum Records*"), where the court held a music recording contract between the pop group, "Frankie Goes to Hollywood", and its recording company to be *unenforceable* as being in restraint of trade. The court found that the provisions in the recording agreement as to the duration of the contract were grossly one-sided because the members of the group were bound, at the discretion of the recording company, for up to eight or nine years, but the recording company was itself free to terminate its obligations at any time by not exercising its options (although *cf Panayiotou* on a similar point). The court also found as being objectionable a clause providing that the recording company effectively had absolute discretion as to whether or not to release the group's record albums and that, even if any of those record albums were not released, the copyright therein would remain in the recording company.

27 More recently, the Hong Kong Court of First Instance in *Hummingbird Music Ltd v Dino Acconci* [2009] HKCU 105 ("*Hummingbird Music*") dismissed a claim that the management agreements between the pop group, Soler, and its manager were unenforceable under the doctrine of restraint of trade. The court found that the parties had parity of bargaining power, and that the management agreements, both of which were to last for three years, "were not for unduly long terms" (*id* at [128]). Significantly, even though the manager's ownership of copyright in the pop group's master recordings in perpetuity was challenged (*id* at [132]), the court held, citing *Panayiotou*, that the agreements "[were], as a package, fair overall and should be upheld" (*id* at [134]).

28 Returning to the facts of the present appeal, we should point out that what is being challenged here is not really an individual's freedom to make a living. Unlike the plaintiff artistes in the other restraint of trade cases discussed thus far in this judgment, Chua did not attack all the provisions in the Principal Agreement and the Extension Agreement, but, rather, chose to focus solely on cl 6 of the Extension Agreement (reproduced at [4] above). A distinction should be drawn between, on the one hand, restraints imposed on an artiste's ability to make a living (*ie*, by writing or performing music), which form the focus of the discussion in most of the cases on restraint of trade, and, on the other hand, restraints on the *sale* by an artiste of his or her proprietary interest in his or her musical compositions. Although Chua attempted to characterise cl 6 of the Extension Agreement as being an

unreasonable covenant in restraint of trade, she was (in reality) only challenging the *sale* of her intellectual property rights to M&M. That (as we have explained above at [13]–[14]) is a completely different proposition. We do not, in any event, view this particular provision as being in restraint of trade at all.

29 Further, the fact that the equitable doctrine of unconscionability was not relied upon as such in the present case does not mean that the relative bargaining power between the parties concerned was immaterial (a point which was also noted by Parker J in *Panayiotou* at 330–332). However, the situation in this appeal is rather different from that in *Schroeder Music Publishing* ([17] *supra*). In so far as the evidence on record shows, Chua's interests were much better protected than the interests of the plaintiff songwriter in *Schroeder Music Publishing*. As was the case in *Panayiotou*, the contract being challenged was not the first agreement between the parties but was, instead, the result of a renegotiation. There was no evidence on record to show whether Chua was legally advised at the material time, but the fact remains that she willingly entered into contracts with M&M. Chua was not a new and callow artiste when she entered into the Principal Agreement. That agreement was, in fact, the second contract which she signed with a music publishing company controlled by Lim Sek (the first such contract being that with Ping Pong dated 18 August 1999 (see [3] above)). By the time Chua entered into the Extension Agreement, she had been in the music industry for six years. It would be difficult to say that Chua was a fresh and naïve industry novice when she agreed to extend her contract with M&M in 2005.

30 Turning to the contractual provisions in the Principal Agreement and the Extension Agreement themselves, they are also readily distinguishable from the provisions in issue in *Schroeder Music Publishing*. Chua was paid her royalties in advance. The Principal Agreement and the Extension Agreement were for three years each without any provision for automatic extension (although each agreement contained an option for extension). Unlike the scenario in *Schroeder Music Publishing* and *Zang Tumb Tuum Records* ([26] *supra*), the right to extend the agreement between the artiste and the music publisher or recording company did not rest solely in the hands of the latter. Chua was also not bound for an inordinate amount of time. In this regard, it is interesting to note that the Hong Kong Court of First Instance in *Hummingbird Music* ([27] *supra*) upheld similar agreements, each of which had a duration of three years. Further, under cl 6 of the Extension Agreement, M&M was obliged to "expend all reasonable … efforts"[note: 13] to promote, publish and commercially exploit the Compositions. There was no evidence that M&M had failed to do so or that, in future, it would act *against* its commercial interests by *not* exploiting those works. Chua argued that an obligation requiring M&M to expend only reasonable efforts to (*inter alia*) promote the Compositions was insufficient to justify the restraint imposed on her. However, we note that, unlike the recording company in *Zang Tumb Tuum Records*, M&M did *not* possess an absolute and unfettered discretion as to whether or not to exploit the Compositions. The legal obligation imposed on the music publisher here was of a different nature: according to cl 6 of the Extension Agreement, M&M "shall not neglect and/or fail to exploit any part, portion, or particular Composition".[note: 14] Finally, cl 12 of the Principal Agreement (reproduced at [3] above) provided for the reversion to Chua of the rights in the Compositions in the event that M&M was (*inter alia*) no longer in the business of music publishing. The situation in the present case was clearly not one in which Chua was barred from recovering the rights in the Compositions should M&M cease to be in a position to carry out its obligations under cl 6 of the Extension Agreement. Thus, taken as a whole, the provisions in both the Principal Agreement and the Extension Agreement were reasonable in law.

31 We should add, at this juncture, the same caution advised by Parker J in *Panayiotou* at 381, *viz*:

> By the nature of the doctrine of restraint of trade … it is dangerous to attempt to extrapolate by reference to the decision in a particular case, or to apply a decision on one set of facts to cases with different facts.

In the present appeal, on the facts before us, we do not consider the contractual arrangement between Chua and M&M to be objectionable as being in restraint of trade. In the circumstances, therefore, Chua's arguments in relation to the First Issue must fail. However, that is not the end of the matter. If Chua can demonstrate *vis-à-vis* the Second Issue that there was a breach of cl 10 of the Principal Agreement, she would be entitled to terminate that agreement pursuant to cl 12 thereof and would, in turn, succeed in her appeal. It is therefore to that particular issue that our attention now turns.

The Second Issue: Whether M&M was in breach of its contractual obligation to account to Chua

32 The essence of Chua's case apropos the Second Issue turns really on this question: was M&M in breach of its contractual obligation to account to Chua for the royalties it had collected? If M&M were indeed in breach of this obligation, then it would not be open to M&M to argue that, as it had in fact allowed Chua's solicitors to inspect the accounts at its premises or as Chua had failed to ask that those accounts be audited, there was no breach on its part. If M&M were to attempt to mount such an argument, it would, with respect, be putting the proverbial cart before the horse. The legal obligation to account, as embodied in cl 10 of the Principal Agreement (reproduced at [3] above), was clearly set out, and, just as Chua must be held strictly to her contractual obligations, so must M&M with respect to its obligations. It thus becomes important to ascertain what *precisely* M&M had done to fulfil its obligation to account to Chua. In this respect, the only documentary evidence on record of M&M's actions consisted of the exhibits in the affidavits of Lim Sek and Chua. Although numerous *summaries* of the accounts relating to Chua could be found, what was on record consisted, essentially, of bare statements of the royalty payments received by jurisdiction and little else (see [7] and [9] above). In particular, there were no details as to how the royalty amounts were arrived at (for example, there were no details of the number of copies of albums sold and the price at which each copy was sold). Under these circumstances, it was impossible for Chua to raise any legitimate queries based on these summaries because there was nothing of substance which could be queried in the first instance.

33 M&M claimed that it had sent Chua the true and complete statements of account which explained the Discrepancies and which showed that Chua had actually been overpaid. However, although there was no dispute as to the *existence* of these documents, neither party actually adduced what would have constituted the true and complete statements of account. As such, the documents did not form part of the court's record (for ease of reference, we shall term these documents "the Unproduced Accounts"). We are, in turn, faced with a dearth of evidence as to how M&M had actually gone about fulfilling its contractual obligation to account to Chua. Mr Tan asserted that the very existence of the Unproduced Accounts must mean that M&M had fulfilled its obligation to account to Chua and pay her accordingly. Even though those accounts were not before this court, he argued, they had been presented to Chua in accordance with M&M's contractual obligations. In fact, as Mr Tan submitted before us, there was no other way in which Chua could have discerned the existence of any discrepancies in M&M's accounts except by going through the Unproduced Accounts. Mr Yuen, on the other hand, claimed that, although certain documents were given to Chua, those documents were essentially not comprehensible in themselves. It was contended that Chua did not even have sufficient information to understand what was missing, much less to understand the reason for the Discrepancies.

34 Contractual obligations must, consistent with the concept of sanctity of contract, be observed. We are of the view that, in the present case, M&M's obligation to account to Chua could not be met by the mere production of bare summaries of accounts without meaningful information on how the royalty amounts were arrived at (for example, information such as the breakdown of the number of copies of albums sold, the price at which each copy was sold and the income generated from Chua's performances).

35 Although the Unproduced Accounts might in fact have been in the possession of both parties and, further, might have shown that M&M had accounted to Chua and had paid her all the royalties due to her, without sight of those accounts, we have no way of determining the veracity of the claim by M&M that those accounts constituted statements of account produced in accordance with its obligation to account under cl 10 of the Principal Agreement. If the Unproduced Accounts were produced and if they in fact constituted true and complete statements of account, then it might not be open to Chua to argue that she did not understand the accounts. However, that was not the case here. Chua's lawyers had clearly given notice to M&M on 7 May 2008 to provide detailed accounts to explain the Discrepancies (see [10] above), but only *summaries* of accounts were provided by the latter. Hence, there was nothing to show that true and complete statements of account were in fact provided by M&M. There was, as far as the evidence on record shows, a clear breach of cl 10 of the Principal Agreement, which entitled Chua to terminate the agreement pursuant to cl 12 thereof and to recover the rights in the Compositions. Clause 12 of the Principal Agreement is, in fact, a clear example of an express termination clause which falls under "Situation 1" as outlined by this court in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR 413 at [91] (reference may also be made to the recent decisions of this court in *Sports Connection Pte Ltd v Deuter Sports GmbH* [2009] 3 SLR 883 at [51]–[56] and *Fu Yuan Foodstuff Manufacturer Pte Ltd v Methodist Welfare Services* [2009] 3 SLR 925 at [27]–[36]).

Conclusion

36 As Chua has succeeded on the Second Issue, the appeal is allowed with costs and the usual consequential orders.

[note: 1]See the Appellant's Core Bundle ("ACB") at vol 2, pp 23, 26 and 27.

[note: 2]*Id* at vol 2, p 34.

[note: 3]*Id* at vol 2, p 60.

[note: 4]*Id* at vol 2, p 61.

[note: 5]See the e-mail from Chua to Lim Sek dated 26 December 2006, in which the former referred to statements from M&M that she had "just received … today" (see ACB at vol 2, p 102).

[note: 6]*Id* at vol 2, p 101.

[note: 7]*Id* at vol 2, p 53.

[note: 8]See para 43 of Lim Sek's affidavit filed on 22 August 2008 (at Record of Appeal ("ROA") vol 3, p 119).

[note: 9]See ROA at vol 3, p 170.

[note: 10]See ACB at vol 2, p 49.

[note: 11]*Id* at vol 2, p 23.

[note: 12]See para 24(c) of the Appellant's Case.

[note: 13]See ACB at vol 2, p 34.

[note: 14]*Ibid*.

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