Leads Engineering (S) Pte Ltd v Chin Choon Co (Pte) Ltd (personal representatives of the estate of Choo Kok Hoe, deceased, garnishee)
[2009] SGHC 53

Case Number : Suit 698/2006

Decision Date : 05 March 2009

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Liow Wang Wu Joseph (Straits Law Practice LLC) for the plaintiff; M N Swami (Swami & Partners) with Joethy Jeeva Arul for the Garnishee

Parties : Leads Engineering (S) Pte Ltd — Chin Choon Co (Pte) Ltd (personal representatives of the estate of Choo Kok Hoe, deceased, garnishee)

Civil Procedure

5 March 2009 Judgment reserved

Lai Siu Chiu J:

1 In this case, the court was tasked with determining whether the Estate of Choo Kok Hoe ("the garnishee") was indebted to a company Chin Choon Company (Pte) Ltd ("the defendant") so as to enable Leads Engineering (S) Pte Ltd ("the plaintiff") who was a judgment creditor of the defendant, to make absolute a garnishee order nisi that the plaintiff had obtained against the garnishee in the sum of $144,460.70.

2 The genesis of this suit was Originating Summons No. 1384 of 2006 ("the OS") wherein the plaintiff applied to court to enforce an arbitration award against the defendant in the sum of $144,460.70, pursuant to s 46 of the Arbitration Act (Cap 10, 2002 Rev Ed).

3 According to the plaintiff's statement of claim, the plaintiff was engaged by the defendant to construct 16 dwelling houses at Figaro Street, Singapore by an agreement dated 25 January 2000 ("the building contract"). The building contract imported terms from the Articles and Conditions of Building Contract (lump sum) of the Singapore Institute of Architects' ("SIA") including arbitration under clause 37(1).

4 Disputes arose between the parties during the performance of the building contract. By a Notice of Dispute, the plaintiff on or about 13 September 2000 referred the dispute to arbitration and an architect Goh Chong Chia ("Goh") was appointed the arbitrator.

5 In his award dated 9 March 2006 ("the Award"), Goh:

(a) ordered the defendant to pay the plaintiff $228,398.08;

(b) held that the defendant was not entitled to liquidated damages as the plaintiff was entitled to an extension of time to complete the construction works;

(c) held that the plaintiff was entitled to a sum of $34,979.43 being extra preliminaries incurred due to the prolonged contract period;

(d) ordered the plaintiff to pay the defendant a sum of $118,916.81 for defective works.

The net amount payable to the plaintiff after deducting $118,916.81 was therefore $144,460.70.

6 On 27 September 2006, the plaintiff obtained judgment in the OS against the defendant in the sum of $144,460.70 ("the judgment sum").

7 Choo Kok Hoe ("the deceased") was a developer who, by a letter dated 30 March 1998 ("the Agreement"), had appointed the defendant to be the main contractor to construct 20 housing units along Figaro Street ("the project"). In turn the defendant appointed the plaintiff as the subcontractor to construct the remaining 16 housing units in the project after it had completed construction of four units. The units constructed by the defendant comprised phase 1 of the project whilst those constructed by the plaintiff came within phase 2 of the project.

8 The deceased was a director as well as a shareholder of the defendant together with his sons. The defendant company was incorporated on 31 July 1970 and members of the deceased's family or relatives who were/are its shareholders (see 1AB 702-713) included the following:-

(a) The deceased – 1 share;

(b) Choo Eng Cheong (the deceased's son) – 70 shares;

(c) Choo Eng Seng (the deceased's son) – 70 shares;

(d) Choo Eng Tee (the deceased's nephew, son of Choo Kok Leong) – 200 shares;

(e) Choo Yeow Khim – 70 shares;

(f) Choo Ai Wah (daughter of the deceased) – 50 shares

9 The deceased was 83 years old when he appointed the defendant as the main contractor for the project. He passed away at the age of 93 on 3 April 2007. He was survived by his wife and eight children including Choo Eng Cheong ("CEC" who is also known as Paul Choo) and Choo Eng Seng ("CES") (collectively "the sons"). CEC and CES are the executors of the estate of the deceased for which the grant of probate was extracted on 18 February 2008.

10 Besides the defendant, the deceased and the sons were shareholders in two other family companies *viz* Choo Kok Hoe Realty Pte Ltd ("CKHR") which was incorporated on 11 October 1973 and Surrey Development Pte Ltd ("Surrey") which was incorporated on 12 April 1983 (see 3AB102-111).

11 By way of execution proceedings on the judgment sum, the plaintiff obtained (*exparte*) a garnishee order nisi against the garnishee on 12 July 2007. The garnishee was required to show cause on 26 July 2007 why the order nisi should not be made absolute.

12 Six weeks later (on 5 September 2007), the deceased's daughter Choo Ai Wah ("the petitioner") filed a petition in CWU No.109 of 2007 ("the winding-up petition") to wind up the defendant on the ground that the defendant owed her $83,546.50 under a statement of account dated 16 July 2007. The petitioner claimed the sum remained unpaid despite a demand made by her solicitors.

13 The petition was opposed by the plaintiff whose general manager/director Ng Peck Jin ("Ng") filed an affidavit giving the reasons therefore. The winding-up petition was eventually withdrawn on

16 January 2008 with leave of court and costs were awarded to the plaintiff against the petitioner.

14 In these proceedings, the garnishee disputed the plaintiff's claim by affidavits filed by the sons. Consequently, by an order of court dated 14 February 2008, the issue of whether there was any debt due and accruing in any amount from the garnishee to the defendant was ordered to be tried with the plaintiff being the plaintiff and the garnishee being the defendant in such proceedings. The affidavits filed by the sons and the two affidavits filed by the plaintiff's counsel Joseph Liow ("Liow") were ordered to stand as pleadings.

15 Prior to the hearing before this court, the plaintiff had administered Interrogatories to the garnishee which were answered by CEC on 12 June 2008. I shall return to the Interrogatories later.

The evidence

16 I begin my review of the evidence by referring to the parties' affidavits. In addition to the two affidavits of its solicitor Liow, Ng also filed an affidavit of evidence-in-chief on the plaintiff's behalf for the hearing.

17 For the plaintiff's claim, Liow (in his first affidavit filed on 12 July 2007) relied on the examination of CEC as a judgment debtor ("EJD") on 12 June 2007 (see [32] below) which adduced the following facts:-

(a) the defendant was the main contractor of the project;

(b) the developer was the deceased;

(c) the Agreement *inter alia* provided that the deceased would pay the defendant construction costs plus 2% commission. There was no fixed period for completion of the project by the defendant;

(d) the judgment sum was for part of the building works carried out on the project (including variations) after deducting omissions and defects;

(e) the garnishee should be indebted to the defendant in the judgment sum plus 2% commission amounting to $2.889.21;

(f) the defendant had not asked the garnishee to pay the judgment sum plus 2% commission.

18 In his affidavit, Ng deposed how the deceased had approached him in late 1999 to provide a quotation to carry out construction of the project. He was invited to submit a tender which the plaintiff did on or about 5 January 2000. Ng deposed that at the request of the deceased, the plaintiff reduced and revised its tender price to $7,794,816.74 ("the tender price"). The plaintiff then received a letter of award dated 21 January 2000 ("the letter of award") from the project's architect Atria Architects ("the architect") accepting the tender price on behalf of the defendant and not the deceased, a fact which Ng said he overlooked at the time.

19 When the plaintiff received the building contract subsequently for its signature, the name and signature of the employer were not typed or written in. The plaintiff's original performance bond dated 24 February 2000 furnished under the building contract was issued to the deceased (see 1AB1423) before it was amended to the defendant's name at the architect's request dated 3 July 2000.

20 Subsequently, the plaintiff received the Permit to Carry out Building works ("the Permit") dated

25 February 2000. It was issued by the Building and Construction Authority ("the BCA") to the deceased who was stated on the Permit as "the applicant" whilst the plaintiff was stated to be the "builder". A day later, the plaintiff received a second Permit also dated 25 February 2000 which was in the exact same terms as the earlier Permit, save that the defendant was stated to be a co-applicant with the deceased.

21 On 13 March 2000 the plaintiff conducted a search in the Land Titles register which search confirmed that the deceased was the owner of No 2-C, lots 2918 and 3061 Mukim 27, Figaro Street ("the land") on which the project stood.

22 On 11 July 2000, the plaintiff wrote to the architect to seek clarification on who was the plaintiff's employer. The architect's reply dated 20 July 2000 (at 1AB687-688) was not helpful – the architect said it was not involved in the tender exercise or in the negotiations between the plaintiff and CEC nor in the agreement reached between the parties. The architect added that if the plaintiff was not agreeable to the defendant being the contractual party, then the plaintiff should not have signed and accepted the letter of award. The architect requested the plaintiff to deal directly with CEC and/or the deceased on the issue. As far as it was concerned, the architect assumed the contracting parties were as per the letter of award. Attempts were also made by the plaintiff's solicitors to ascertain from the BCA why two Permits were issued; the BCA did not respond to the inquiries.

23 The plaintiff also wrote to the architect in June 2000 to inquire who had appointed the latter. The architect's fax dated 23 June 2000 (1AB186) said "we do not understand the contents of your letter". The plaintiff's solicitors' further letter dated 29 June 2000 (at 1AB187) inquiring whether the architect had been engaged by the defendant and was authorised by the defendant to issue the letter of award drew no response.

24 As it was not getting anywhere in its inquiries, the plaintiff decided not to pursue the issue of rectifying the building contract to reflect the correct contracting parties. Instead, it proceeded to perform the building contract until the dispute with the defendant arose, which resulted in the plaintiff giving the defendant a Notice of Dispute on 13 September 2000, leading to the arbitration and subsequently the award in [5].

25 In the arbitration proceedings, the plaintiff claimed the unpaid balance of its work as set out in its Final Account which was as follows:-

Final Account (as at 17 November 2001)

Proposed 16 units of Semi Detached Dwellings at Figaro Street

Contract Final Account

Original Contract Sum	$7,749,476.64
Less: Prime Costs and Provisional Sums	-$3,901,680.00
Original Contract Works	$3,847,796.64
Add	

Variation under Architect's Instructions	$403,033.17
Variation to be sanctioned by Architects	$77,188.83
Variations under Dayworks	$26,875.88
Loss and Expenses arising from prolonged Contract Period	$55.000

Add:

Nominated Sub-Contractor's Final Claims

a) Team Power	$695,212.00
b) Lam International	$33,000.00
c) Triebendesign	$87,602.00
d) Integrate Pte Ltd	$189,667.26
e) Romewall	$29,395.17
Add 0.5% Profit and 1% attendance (for items a to e)	$15,523.15

Add:

Nominated Supplier's Final Claim

a) CASA	$18,081.65
b) LTC Audie	$121,410.94
c) Hua Khien	$218,909.02
d) Nam Huat	$57,220.27
e) ATP	$96,000.00
Add 1% Profit (For items a to e)	$5,116.22

Final Contract Sum	$5,977,032.20

26 In addition to the judgment sum, the plaintiff claimed in the OS a further $158,467.17 ("the additional claim") on the basis that the arbitration only decided matters that were in dispute and not additional sums payable by the defendant once the Final Account was determined.

27 The parties referred the matter to mediation at the Singapore Mediation Centre and after three mediation sessions, it was agreed that the parties would appoint a neutral expert to resolve all disputes relating to the following:-

(a) to assess the value of all additions and omissions (variation claims);

(b) to assess the extension of time to be granted and any liquidated damages to be imposed;

(c) to assess the existence and value of any defects in the works.

Goh was appointed the expert/arbitrator as a consequence.

28 The defendant refused to pay the sums awarded by Goh resulting in the commencement of the OS by the plaintiff. The defendant also disputed the additional claim. Hence, on 27 September 2006, the plaintiff was only awarded judgment for $144,460.70. The OS was converted to a writ in the present action to determine the merits of the additional claim.

29 Before the plaintiff could apply to court for summary judgment on the additional claim, the defendant applied for a stay pending arbitration. The stay application was granted on 25 October 2006.

30 Consequently, the plaintiff commenced a second arbitration against the defendant by a Notice of Arbitration dated 3 July 2007 for the additional claim. The second arbitration proceedings have been held in abeyance pending the resolution of this suit.

31 The plaintiff initially sought to examine the garnishee in his capacity as a director of the defendant. The deceased refused to attend court prompting the plaintiff to apply for committal proceedings against him. Before the committal application could be heard on 13 April 2007 the deceased passed away (on 3 April 2007).

32 Consequently, the plaintiff applied to court for EJD against CEC as he is the managing-director of the defendant. It was in the course of his extensive examination by the plaintiff that CEC produced the Agreement in [7] above.

33 The main terms of the Agreement (see 3AB35) were as follows:-

(a) the defendant would provide project management services as well as be the contractor for the deceased;

(b) the project comprised of 2 units of 3 storey detached houses, 18 units of 3 storey semi-detached houses and a substation;

(c) the period of appointment was June 1997 to July 1999 and would be extended if there was any delay in the completion of the project;

(d) the deceased would reimburse the defendant for all progress payments made to its contractor;

(e) the deceased would reimburse the defendant for all the expenses and remuneration of its staff and consultants; and

(f) the deceased would pay the defendant a fee of 2% of the final construction cost.

34 CEC claimed that the debt owed by the deceased to the defendant had been paid. Pursuant to a court order obtained by the plaintiff, CEC produced cheques that purported to be payments made to the defendant by the deceased including the two invoices the defendant had rendered to the deceased dated 15 and 31 December 2003 in the sums of $234.917.64 and $11,741,405.93 respectively. CEC claimed that showed that the deceased settled his debt owed to the defendant and also those debts owed to Surrey and CKHR by the defendant (see [74] below).

35 Ng questioned the veracity of CEC's claims pointing out that the award by Goh was dated 9 March 2006 whereas the two tax invoices in [33] bore 2003 dates. He (and the plaintiff's counsel) asserted that the deceased (as a director of the defendant) was aware of the on-going arbitration proceedings between the plaintiff and the defendant. As such, the construction costs of the project could not be said to be finalised before 9 March 2006. Ng pointed out that if the defendant's actual indebtedness to the plaintiff was only known after 9 March 2006, the deceased could not possibly have made payment to the defendant prior to that date.

36 Consequently Ng argued that the garnishee was obliged to pay all construction costs incurred by the defendant. The deceased had not paid the defendant the judgment sum and the garnishee was therefore liable to pay the plaintiff.

37 Ng alleged that in the course of the arbitration proceedings, the deceased had admitted that he was the *alter ego* of the defendant. Apparently, Goh had raised the issue of whether the defendant was entitled to claim for damages for defects in the project when it was not the owner of the land. Counsel for the plaintiff had submitted to Goh that the defendant could not make such a claim unless (i) it had an interest in the project or; (ii) the owner under phase 2 had made a claim against the defendant for defects in the project.

38 In a letter to Goh dated 21 September 2004 (at 1AB 158-159), the plaintiff's solicitors informed the former that the plaintiff would not raise the issue of the defendant's lack of ownership of the land if the deceased would confirm that he was the sole controlling mind of the defendant and was for all intents and purposes the *alter ego* of the defendant. In their letter dated 28 September 2004 (at 1AB1156-1157) to Goh, the defendant's solicitors confirmed that the deceased and the defendant for all intents and purposes were the *alter ego* of one another. In their subsequent letter to Goh dated 7 October 2004 (at 1AB695-696) however, the defendant's solicitors withdrew the confirmation which was said to have been given on a "without prejudice" basis.

39 In their respective affidavits, CEC and CES maintained that no monies were due and payable to the plaintiff by the defendant either because the former had been paid or because of certain offsetting arrangements which are explained below.

40 At the EJD of CEC referred to at [32] above, CEC had produced:

(a) cheques issued and paid by the deceased to the defendant;

(b) directors' resolutions (of Surrey, CKHR and the defendant) that purportedly approved the following transactions:-

(i) the defendant's debt to Surrey in the sum of $5,414,108 as of 1 July 2005 was taken over by the deceased and offset against what the deceased owed the defendant under the Agreement;

(ii) the deceased took over $1,051,307.68 of the defendant's debt of $1,294,452.13 to CKHR as of 1 July 2005; the amount was offset against what the deceased owed the defendant under the Agreement leaving a balance of $243,144.45 still owing by the defendant to CKHR.

In short the sons contended, by the above debt swap arrangement, amounts totalling $6,451,307.68 owed by the deceased to the defendant had been setoff against monies owing by the defendant to Surrey and CHKR.

The evidence

41 The plaintiff's only witness was Ng (PW1) who was pitted against the garnishee's one witness CEC (GW1).

(i) The plaintiff's case

42 Ng testified (at N/E 18 on 4 September 2008) that when his managing-director Goh Kuang Chai signed the SIA Articles of Contract (at 1AB784) the particulars in the "employer" section had not yet been inserted. He claimed (although he was unsure) that the plaintiff signed a blank document which particulars were inserted after the company had signed. Even the tender price was inserted by the architect. Ng further alleged that there was a subtle shift in the correspondence. First, the plaintiff dealt with CKH, this developed to dealing with CEC and ended up with dealings with the defendant. The plaintiff's intention was only to deal with the owner of the project which was the deceased. The plaintiff regarded the defendant as only the main contractor not the developer, from whom it obtained the subcontract to complete phase 2 of the project.

43 During re-examination, counsel for the plaintiff had drawn Ng's attention to two different versions of the tender documents – in the version dated July 1998, the tender document bore the deceased's name while in the version dated March 2000, the tender document contained the defendant's name. Ng testified it was only when the plaintiff was about to start work on the project and it received two versions of the Permit (see 3AB86-87) that it realised the owner of the project was stated to be both the deceased and the defendant. However, it was unable to obtain clarification from BCA despite a reminder (see [22]), while the architect's response in [23] was that he did not understand the plaintiff's question.

44 It was noted that the plaintiff's letter dated 25 January 2000 (at 1AB777) accepting the letter of award was headed

Proposed erection of 16 units of 3 storey semi-detached dwelling houses on lots 2918 pt & 3061 MK27 at Figaro Street, Singapore (phase 2) for Mr Choo Kok Hoe.

The letter was carbon-copied to the defendant and three consultants involved in the project. That suggested (according to its counsel) that the plaintiff intended only to contract with the developer who was the deceased.

(ii) The garnishee's case

45 When he was cross-examined, CEC maintained that the garnishee owed no moneys to the defendant. He admitted that the deceased was one of the signatories to the defendant's cheques and the deceased had indeed signed cheques to pay the defendant for the project. The defendant's cheques required two signatures and CEC had asked the deceased to co-sign cheques issued to the plaintiff "for convenience" although earlier (NE 39 on 4 September 2008), CEC had claimed his father was old and he did not want to trouble the deceased on matters relating to the defendant. Further, the deceased also co-signed cheques issued by Surrey and CKHR. However, CEC claimed that by the time the dispute with the plaintiff went for mediation, the deceased was already "out of the picture" (NE 41 on 4 September 2008), his children having taken over the project. However it is noteworthy that every single cheque in the documents produced in court contained the signature of the deceased. This fact was not only true of cheques issued by the defendant but also of those issued by Surrey and CKHR. Indeed, the bankers for the defendant, Surrey and CKHR all confirmed that the deceased together with the sons were signatories of all three companies' bank accounts.

46 Questioned why there was only the one page Agreement (3AB35) between the defendant and the deceased for the project instead of the thick contract documents that the plaintiff signed with the defendant, CEC explained that the Agreement was in a simple layman's form, which answer was no explanation at all.

47 CEC agreed that the two invoices (at [34] shown in 3AB37-38) did not include the Award sum. Questioned whether Goh's award of $118,916.81(at [5(b)] to the defendant for defective works ("the defects award") benefited the deceased, CEC prevaricated. Despite being warned by the court and being reminded he was on oath, CEC maintained that the defects award did not benefit the deceased as the owner of the project "contractually". However he conceded ultimately that the defendant had not made any claim against the plaintiff for defective works, despite para 22 of his AEIC alleging the defendant had a claim of $1.8m for the same. Further, he agreed that the issue of defects had been dealt with by Goh in the arbitration proceedings.

48 When CEC's attention was drawn to the defendant's solicitors' letter in [38] which confirmed that the deceased was the *alter ego* of the defendant, he distanced himself from the same claiming that it was done for convenience to get the arbitration moving. He suggested that neither he nor the deceased gave the defendant's solicitors any instructions to give the confirmation requested by the plaintiff's solicitors. The concession was in any case withdrawn subsequently.

49 During cross-examination (at N/E 16 on 5 September 2008) of CEC counsel for the plaintiff alleged (which CEC denied) that the deceased controlled the defendant and the Agreement was a thin disguise to show that the deceased was separate from the defendant.

The submissions

(i) The garnishee's submissions

50 I will first refer to the garnishee's submissions as those were first filed followed by the plaintiff's submissions.

51 The garnishee maintained that it did not owe money to the defendant and denied that the deceased was the defendant's *alter ego*. Even if the deceased was the *alter ego* of the defendant, the garnishee argued that the issue of *alter ego* should not be used to make any claim against the deceased or his estate. It was pointed out that the deceased was only a minority shareholder of the

defendant holding 1 share.

52 The garnishee submitted that there was no principal and agent relationship between the deceased and the defendant for the project and no fixed sum was agreed between them for the project as the cost was unascertainable then. The deceased was not a party to the building contract between the defendant and the plaintiff. Being the project's main contractor, the defendant paid the plaintiff as and when the plaintiff submitted the architect's certificates of payment together with its invoices. The deceased made all payments that were due to the plaintiff as the subcontractor of the defendant. The payments were either made directly to the plaintiff or indirectly to Surrey and CKHR by way of setoffs as the defendant was their debtor. The three companies were independent of one another and there was no evidence that the deceased controlled the defendant or the other two companies. There was no reason to lift the corporate veil in this instance.

53 The garnishee submitted it was settled law that a garnishee order can only attach debts which the debtor himself is free to deal with at the time the garnishee order nisi was served. The garnishee cannot attach a debt that has been equitably assigned (citing *Holt v Heatherfield Trust Ltd v G and T Bridgewater Ltd* [1942] 2 KB 1.

54 In the alternative, the garnishee argued that there was an account stated and settled between the plaintiff and the deceased as of 1 July 2005. After such account stated, the debts that the deceased owed to the defendant were assigned to Surrey and CKHR.

55 If indeed the deceased dealt with the plaintiff personally which was denied, the plaintiff should institute fresh proceedings against the executors of the deceased's estate. To commence these garnishee proceedings in order to recover money from the defendant was improper.

(ii) The plaintiff's submissions

56 The plaintiff took issue with the one page Agreement pointing out that the document contained no fixed price for the defendant's works. It was drawn to the court's attention that when he was questioned at the EJD proceedings, CEC had explained that the defendant would subcontract the project and whatever amount in the subcontract payable by the defendant would be borne by the developer viz the deceased. The plaintiff argued that the Agreement was merely a device to hide the fact that the defendant was used to carry out the deceased's wishes.

57 Moreover, the Agreement expressly provided that the deceased would *inter alia* reimburse the defendant for all progress payments made to its contractors and pay the defendant a fee of 2% of all final construction costs. Therefore the plaintiff argued, the parties must have objectively intended that in consideration of the defendant's discharging such a responsibility, the deceased would be responsible for reimbursing the defendant all sums paid to the plaintiff.

58 Further, the garnishee's argument that it had paid the judgment sum by way of an account stated was not part of its pleaded case. In any event, there was no evidence to support CEC's testimony that the defendant had been paid by the deceased in full and final settlement of all its claim. There was also no evidence that the deceased, Surrey or CKHR chose to treat the sums that had been setoff as full and final settlement of the two tax invoices issued by the defendant in [34]. All that the two invoices showed was that the defendant made a final claim against the deceased by the second tax invoice dated 31 December 2003. It was also noteworthy that although the Agreement was signed on 30 March 1998 and the project was ongoing from 2000 until 2003, that the defendant only raised those two invoices to the deceased in December 2003 whilst the alleged debt swap arrangement between the defendant, Surrey and CKHR came about in July 2005.

59 Although CEC's AEIC alleged that the deceased had a claim for damages against the defendant for defects/delays in the completion of the project which may well amount to $1.8m, CEC admitted during cross-examination (at N/E 49 on 4 September 2008) that the deceased did not make such a claim against the defendant either in the arbitration proceedings or to date. Moreover (as the court pointed out to CEC at N/E 56 on 4 September 2008), the issue of defects had been subsumed in Goh's award of $118,916.81 to the defendant in [5(d)].

The Interrogatories

60 As I had indicated earlier at [15], I shall first refer to CEC's Answers to the plaintiff's Interrogatories before I make my findings. The Interrogatories and the Answers are as follows:

1. As at 14 June 2005, please state:-

(i) The amount the Garnishee owed to the Defendant

Answer: The Amount the Garnishee owed to the Defendant as at 14 June 2005 was $6,451,308.

(ii) How the Garnishee became indebted to the Defendant.

Answer: For the construction of the Deceased's Housing Development

2. To the Second Interrogatory, namely that:

(i) If any, the amount owed to or owing by the Garnishee to Surrey Development Pte Ltd.

Answer: As at 14 June 2005, Surrey Development Pte Ltd owed the Garnishee the sum of $496,471.45.

(ii) How the debt was incurred by the Garnishee or became owing to the Garnishee.

Answer: The sum was loaned by Garnishee to Surrey Development Pte Ltd.

61 The Answers to say the least were unsatisfactory and like the debts in [40] above, they were uncorroborated. I shall expand on my observations later.

The findings

62 The Agreement was quite unlike any building contract I have ever come across, be it between an employer and a main contractor or between a main contractor and a subcontractor or nominated subcontractor.

63 If indeed the Agreement was a genuine contract, one would reasonably have expected more than a one page document for a project for which the tender price (of the plaintiff as subcontractor) was $7,794,816.74. The Agreement should be contrasted with the thick tender documentation that the plaintiff was made to sign for construction of phase 2 of the project. One would further expect to see the final construction cost or value of the contract spelt out under item 3 so that the defendant could calculate its 2% fee. To prevent disputes from arising, one would also expect to see particulars of the names and costs of its staff and consultants as well as the type and amount of fees of government authorities that the deceased would have to reimburse the defendant. The fact that

none of such essential facts appeared in the Agreement gives rise to grave doubts on the genuineness of the document.

64 There is little doubt in my mind that the deceased decided to use the defendant as a middleman between himself and the plaintiff in order to protect himself from any legal liability to the plaintiff, who was the main contractor for the project. My view is reinforced by the fact that at the time the plaintiff was approached by the deceased to tender for the project, the plaintiff thought it was negotiating with the deceased. Hence, its original tender was addressed to the deceased, so too was its performance bond. My view that the defendant was nothing more than a middleman for the deceased is further reinforced by the fact that the deceased not the defendant, paid the plaintiff's progress claims after certification by the architect.

65 Next, I turn to the debt swap arrangement between the deceased, the defendant, Surrey and CKHR. In this connection, it would be necessary to first look at the three resolutions passed by the board of directors of the defendant. The first resolution passed on 14 June 2005 stated:

> Pursuant to the authority given by the Articles of Association of the Company it is hereby resolved that:
>
> Authority be given to the directors to hold an Extra-Ordinary General Meeting of the Company on 01 July, 2005 at 10.00 a.m. for the following matters:
>
> 1 To pass the directors' resolution relating to the offsetting of outstanding debt amount of S$5,400,000 due from Choo Kok Hoe against the credit amount of S$5,400,000 due to Surrey Development Pte Ltd.
>
> 2 To pass the Directors' resolution relating to the offsetting of outstanding debt amount of S$1,051,307.68 due from Choo Kok Hoe against the credit amount of S$1,051,307.68 due to Choo Kok Hoe Realty Pte Ltd.
>
> 3 To approve the above transactions.

66 The second resolution passed by the defendant's board of directors stated:

> RESOLVED THAT on this day 01 July 2005:
>
> a) the debt of amount S$5,400,000 due from Choo Kok Hoe And a credit amount of S$5,400,000 owing to M/s Surrey Development Pte Ltd be offset.
>
> b) that is M/s Surrey Development Pte Ltd agreed by their letter of even date, 01 July 2005, will take over the debt of Choo Kok Hoe of the amount S$5,400,000 by off-setting their credit amount of S$5,400,000 owed to them by our company, M/s Chin Choon Company (Pte) Limited, be and are hereby approved.

67 The third resolution of the defendant stated:

> RESOLVED THAT on this day 01 July 2005:
>
> a) the debt of amount S$1,051,307.68 due from Choo Kok Hoe And a credit amount of S$1,051,307.68 owing to M/s Choo Kok Hoe Realty Pte Ltd be off-set;
>
> b) that is, M/s Choo Kok Hoe Realty Pte Ltd, agreed by their letter of even date, 01 July 2005,

will take over the debt of Choo Kok Hoe, of the amount of S$1,051,307.68 by off-setting their credit amount of S$1,051,307.68 owed to them by our company, M/s Chin Choon Company (Pte) Limited, be and are hereby approved.

68 The three resolutions were signed by the deceased, the sons, Choo Yeow Khim and Choo Eng Tee, who is CEC's cousin.

69 In addition to the above resolutions, there were two letters that are relevant to the debt swap arrangement. Both letters dated 1 July 2005, one from Surrey and the other from CKHR, were addressed to the defendant and were in similar terms. The letters were headed "Agreement to offset our loan amount due from you with Mr Choo Kok Hoe's debt owing to you". Surrey's letter reads:

This is to confirm that we have agreed as follows:

a) that the outstanding loan amount of S$5,400,000 (Dollars Five Million Four Hundred Thousand only) due from your Company to our Company, be off-set by item (b);

b) the same amount of S$5,400,000, which is debt due from Mr Choo Kok Hoe to your Company, be transferred as his debt owing to our Company; and

c) these transfers to take effect as from 01 July 2005.

70 The letter from CKHR to the defendant reads as follows:

This is to confirm that we have agreed as follows:

a) that the outstanding loan amount of S$1,051,307.68 (Dollars One Million Fifty One Thousand Three Hundred and Seven and cents Sixty Eight only) due from your Company to our Company, be off-set by item (b);

b) the same amount of S$1,051,307.68 which is debt due from Mr Choo Kok Hoe to your Company, be transferred as his debt owing to our Company; and

c) these transfers to take effect as from 01 July 2005.

71 In its closing submissions (at para 41), the plaintiff (quite rightly) pointed out that the debt swap arrangement only benefited the deceased/the garnishee by insulating the latter from garnishee or other enforcement proceedings. Where the defendant was concerned, the debt swap arrangement was a neutral event. As for Surrey and CKHR, the arrangement meant that the deceased/the garnishee owed them money instead of the defendant. The question that arise is, was the debt swap arrangement a genuine transaction and/or did it make commercial sense? I would answer both questions in the negative for reasons which are elaborated on below.

72 It was CEC'S evidence that defendant owed Surrey and CKHR $5,414,108.00 and $1,294,452.13 respectively or $6,708,560.13 in total against which $6,451,307.68 was setoff (which debt was assumed by the deceased) leaving a balance of $257,252.45 still owing by the defendant. Against these figures, the defendant had rendered the two invoices in [34] to the deceased totalling $11,976,323.57. The deceased claimed to have advanced $12,228,832 to the defendant by 30 March 2004, resulting in an overpayment of $252,510.00.

73 The above figures are to be contrasted with the one page Agreement. There, no figures were

stated (notwithstanding that the tender price of the plaintiff was known) while CEC's explanation that it was because the construction costs were not known then was unconvincing. No evidence was adduced or documents presented to show how the debts to Surrey and CKHR were incurred by the defendant. The Answers CEC gave to the plaintiff's Interrogatories [60] threw no light on the matter either.

74 The garnishee did produce (in 2AB 215- 237) copies of cheques issued by Surrey, CKHR, the deceased and another entity (Chin Choon Company) to the defendant but the amounts did not add up to any of the figures stated in [72]. It is noteworthy that bank statements of the defendant produced by the garnishee (at 2AB137-158) for the period 29 April 2000 to 31 March 2004 showed the company was consistently overdrawn on its bank account. The audited accounts of the defendant disclosed by the garnishee (at 2AB104-120) for the year 2005 showed the company suffered losses for the years 2003 to 2005 and as of 2005, its accumulated losses totalled $1,802,427.

75 Clearly the defendant had no assets and undoubtedly survived on funding from the Choo family in particular from the deceased. It was the garnishee's case that as late as 30 March 2004, the deceased paid the defendant $1m. What was also clear from the evidence was that the deceased not the defendant, paid the plaintiff on its progress claims. That however does not mean the accounts were settled between them.

76 Although the deceased was only a minority shareholder holding one share in the defendant, that did not mean as CEC contended, that the deceased was not the alter ago or that he did not control the company or Surrey or CKHR. It is my view that the deceased did control all three companies. CEC had admitted that the family members did not pay for their shares in the defendant which were all given by the deceased (save possibly for shares of members of Choo Kok Leong's family). The same shareholders in the defendant held shares in Surrey and CKHR and it is more likely than not that their shares in the latter companies were also gifts from the deceased. I note that the deceased was 83 years of age when he signed the Agreement. Yet he signed and continued to sign, cheques for all three companies over the years until his demise in April 2007. The deceased's conduct reinforces my view that he was actively involved in the business activities of all three companies, despite his age.

77 In my view, the Agreement was nothing more than a device of convenience to shield the deceased from liability should a dispute arise with the plaintiff which turned out to be the case. When the petitioner failed to wind up the defendant (see [13]), members of the deceased's family came up with a new scheme to deny the plaintiff payment of the judgment sum. Hence, the charade of an alleged setoff arrangement between the three companies, involving the deceased. The fact that the deceased had the audacity to refuse to attend court on the plaintiff's application for EJD [30] speaks volumes of his character.

78 It would be appropriate at this juncture to make my observation on the garnishee's witness. I do not accept the testimony of CEC who did not impress me as a witness of truth. As stated earlier [47], he often prevaricated while in the witness box and was repeatedly admonished by the court for not answering the questions put to him by counsel for the plaintiff. Contrary to the submission of counsel for the garnishee, I found that Ng was a far more credible witness than CEC.

The law

79 Apart from the defence of setoff, the garnishee did not plead the defences of (i) account stated or (ii) that the plaintiff had received full and final settlement of its claim for the project. The defence of equitable assignment was also not pleaded.

80 The plaintiff had relied on *Gobind Lalwani v Basco Enterprise* [1999] 3 SLR 354 for the meaning of an "account stated". There Chao Hick Tin J adopted Lord Cave's definition in *Camillo Tank SS Co Ltd v Alexandra Engineering Works* (1921) 38 TLR 134 (at 143) and which was subsequently adopted by the Privy Council in *Siqueira v Noronha* [1934] 332 where Lord Atkin said (at 337):

> An "account stated" may only take the form of a mere acknowledgment of a debt, and in those circumstances, though it is quite true it amounts to a promise and the existence of a debt may be inferred, that can be rebutted, and it may very well turn out that there is no real debt at all, and in those circumstances there would be no consideration and no binding promise. But on the other hand, there is another form of account stated which is a very usual form as between merchants in business in which the account stated is an account which contains entries on both sides, and in which the parties who have stated the account between them have agreed that the items on one side should be set against the items upon the other side and the balance only should be paid; the items on the smaller side are set off and deemed to be paid by the items on the larger side, and there is a promise for good consideration to pay the balance arising from the fact that the items have been so set off and paid in the way described.

81 In our case we are concerned with the second category or what Blackburn J in *Laycock v Pickles* (1863) 4 B & S 497 called a "real account stated" or what is sometimes referred to as a "settled account". On the facts, I cannot see how the plea of "account stated' can be raised by the garnishee. As pointed out earlier [71], the deceased merely assumed the defendant's debts to Surrey and CKHR, he did not discharge the debts. Further, the two invoices of the defendant did not seem to feature in the account stated.

82 I need say very little on the issue of full and final settlement of accounts as that is a corollary to my observation above that there was insufficient evidence from the garnishee to satisfy the requirement of an account stated at law.

83 As for the plea of an equitable assignment briefly raised (para 30) in the garnishee's submissions, the case cited of *Holt v Heatherfield Trust Limited* (*supra* at [53]) would not assist the garnishee. In that case, there was a proper and absolute assignment by a judgment creditor of his judgement sum against the judgment debtor to the plaintiff in part payment of a debt the judgment creditor owed to the plaintiff. After the assignment but before notice thereof had been received by the judgment debtor, the defendant obtained a garnishee order nisi charging the judgment debt. The court held that the assignment even on the assumption that it was made without consideration, was a good equitable assignment and as the garnishee order only charged property with which the assignor could honestly deal, it did not charge the assigned debt which was the property of the assignee. Our facts are a far cry from those in *Holt v Heatherfield Trust Limited.*

Conclusion

84 In the light of my findings, I hold that the garnishee has failed to discharge the burden to prove the deceased did not owe any moneys to the defendant as at 12 July 2007 when the garnishee order nisi was made. Accordingly, I make absolute the garnishee order nisi dated 12 July 2007 and order the garnishee to pay the plaintiff the judgment sum with interest. Costs of these proceedings are awarded to the plaintiff.

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