Canadian Imperial Investment Pte Ltd v Pacific Century Regional Developments Limited [2000] SGHC 189

Case Number : Suit 1091/1999

Decision Date : 18 September 2000

Tribunal/Court : High Court

Coram : Lai Kew Chai J

Counsel Name(s) : Davinder Singh SC, Hri Kumar and Siraj Omar (Drew & Napier) for the plaintiffs; K Shanmugam SC, Edwin Tong and Prakash Pillai (Allen & Gledhill) for the defendants

Parties : Canadian Imperial Investment Pte Ltd — Pacific Century Regional Developments Limited

Contract – Contractual terms – Factual matrix – Whether evidence of factual matrix and mutual understanding of parties admissible in interpreting written contract

Contract – Contractual terms – Breach – Time of assessment of damages – Whether damages to be assessed at time of breach or date of judgment

: This is a trial of a claim for massive damages for an alleged breach of a `tag along` clause in a joint venture agreement.

Background

The plaintiffs claim substantial damages against the defendants for breach of a shareholders` agreement (`the agreement`) made between them on 31 January 1997.

By the agreement the plaintiffs entered into a joint venture agreement with the defendants. Under it, a joint venture company called Quinliven Pte Ltd (`Quinliven`) was incorporated with the purpose of participating in the development of a massive underground car-park in Shanghai, People`s Republic of China. The plaintiffs owned 25% of the shares in Quinliven. As for the defendants, until 3 August 1999, they owned the remaining 75%. The directors of Quinliven included directors from the plaintiffs and the defendants.

Clause 11(E) of the agreement is hotly contested. It provides:

> *11 Transfer of shares*
>
> *...*
>
> *(E) If PCRD receives from a third party an offer to acquire its shares (together with the related Shareholder`s loans) and such offer when accepted would result in PCRD holding less than 51 per cent of the issued capital of the Company, before accepting such an offer (the `first offer`) it shall forthwith inform OFPL of the terms and conditions of the first offer and it shall procure for OFPL an offer for an equivalent proportion of the Shares held by OFPL (together with the related Shareholder`s loans) on the same terms and conditions as those contained in the first offer so that after OFPL`s acceptance of the offer, the ratio of OFPL`s shareholding in the Company to PCRD`s shareholding in the Company shall always be 1:3.*

The other controversial term of the agreement is cl 11(A)(i). I will set it out later.

Sometime in 1997, the defendants and their parent company Pacific Century Group Holdings Ltd (`PCG`), embarked on a series of transactions which involved the transfer of all of their property within the People`s Republic of China including Hong Kong to Newco (`later named as PCCW Properties Ltd`), a company incorporated in the British Virgin Islands. This included a transfer of all of the defendants` shares in Quinliven to Newco. In return, the defendants and PCG received shares in Newco, the aggregate total being 100% of the shareholding in Newco. Thereafter, Tricom Holdings Ltd (`Tricom`), presently known as Pacific Century CyberWorks Ltd, acquired all of Newco`s shares from the defendants and PCG. In return, the defendants and PCG received shares and convertible bonds of Tricom. These various transactions (`the Tricom transaction`) were the result of an agreement made between the defendants, PCG, Tricom and Star Telecom International Holding Ltd. The Acquisition Agreement was dated 30 April 1999.

The consequences of these transactions were as follows:

(1) almost all of the defendants` assets and interests in the People`s Republic of China including Hong Kong are now held through Tricom;

(2) Tricom is a subsidiary of the defendants; and

(3) Quinliven remains a subsidiary of the defendants.

The flowchart below depicts the consequences:

The claims

The plaintiffs allege that the defendants have breached cl 11(E) of the agreement by failing to obtain from Tricom, an offer to purchase the plaintiffs` shares in Quinliven on the same terms and conditions as Tricom`s offer to acquire the defendants` shares in Newco (which included the shares in Quinliven). Subsequently, the price of Tricom`s shares rose and the plaintiffs were consequently deprived of the opportunity to benefit from the same by disposing of their shares in Tricom, as they would have sold their shares in Quinliven to Tricom in exchange for shares in Tricom.

In addition, the plaintiffs also claim the sum of US$1.025m, being the amount they had injected into Quinliven for the period from August 1999 to January 2000. This sum is made up of shareholder`s loans to Quinliven. The plaintiffs were obliged to extend these loans under the agreement.

The plaintiffs allege that if the defendants had in accordance with cl 11(E) obtained from Tricom an offer to acquire the plaintiffs` shares in Quinliven, then the plaintiffs would have transferred their shares in Tricom on 3 August 1999 being the date of the transfer of the defendants` shares in Quinliven (via Newco) to Tricom and consequently the plaintiffs would not have had to extend the loans after 3 August 1999.

The defence

The defendants, on the other hand, deny any breach of cl 11(E). They contend that a plain reading

of the agreement clearly show that cl 11(E) did not apply, as the transfer of the defendants` shares in Quinliven was carried out pursuant to cl 11(A)(i). They also argue that the Tricom transaction did not fall within the ambit of cl 11(E).

In addition, the defendants dispute the plaintiffs` calculation of the quantum of damages in the event the defendants are found to have breached cl 11(E).

As for the plaintiffs` second claim regarding the US$1.025m, the defendants were silent on this in the event they were held liable for having breached cl 11(E). They do not deny the plaintiffs` entitlement to a refund of US$1.025m.

The issues

The issues in this case are:

(1) whether, on or by 30 April 1999, the defendants had received an offer from a third party for their shares in Quinliven which, when accepted, would result in the defendants holding less than 51% of the issued share capital of Quinliven; and

(2) if the answer to (1) is `yes`, what damages are the plaintiffs entitled to.

An offer within cl 11(E)?

Both parties agree that the interpretation of cl 11(E) would entail a consideration of the background or factual matrix. The defendants, however, disagree with the plaintiffs as regards the evidence the latter sought to admit under the phrase `factual matrix`.

The legal basis for the admission of evidence of the `factual matrix` in the interpretation of written contracts is found in the House of Lords` decision in ***Investors Compensation Scheme Ltd v West Bromwich Building Society*** (`the ***ICC*** case`) [1998] 1 All ER 98. Lord Hoffman, whose judgment was adopted by three other Law Lords who together constituted the majority, set down the following principles of interpreting contractual documents:

> *(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*
>
> *(2) The background was famously referred to by Lord Wilberforce as the `matrix of fact`, but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*
>
> *(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification ...*

(4) The meaning which the document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see ***Mannai Investment Co Ltd v Eagle Star Life Assurance Ltd*** *[1997] 3 All ER 352[1997] 2 WLR 945.*

(5) The `rule` that words should be given their `natural and ordinary meaning` reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.

The plaintiffs seek to admit the evidence of Dr Steven Funk (`PW1`) a director of the plaintiffs, who was their representative in the discussion with Mr Patrick Cheung (`Cheung`) the defendants` representative, on the terms of the agreement and, in particular, how cl 11(E) came about. The plaintiffs argue that PW1`s evidence would greatly assist the court in the interpretation of cl 11(E) in its proper context. The plaintiffs contend that PW1`s evidence would reveal the mutual understanding of both parties as regards the intent of cl 11(E); the present cl 11(E) being the product of much discussion and negotiations between PW1 and Cheung.

The defendants, on the other hand, argue that PW1`s evidence of what Cheung had allegedly said is hearsay evidence and therefore inadmissible. Furthermore, PW1`s evidence on the intent of cl 11(E) was merely PW1`s subjective intention and hence irrelevant.

In applying the highly persuasive decision of the House of Lords in the ICC case to the present case and in particular principles (2) and (3), other than previous negotiations of the parties and PW1`s subjective intent of the rationale of cl 11(E), any evidence which `would have affected the way in which the language of the document would have been understood by a reasonable man` would thus be admissible as evidence. Accordingly, PW1`s oral and affidavit evidence of the mutual understanding which led to the insertion of cl 11(E) constitute admissible evidence. The remaining portions of PW1`s evidence regarding the negotiations of the parties are, using the same line of reasoning, inadmissible.

Therefore, the relevant portion of PW1`s evidence which formed part of the `factual matrix` of cl 11(E) include his evidence that Cheung, the defendants` representative, was agreeable to his idea of giving the plaintiffs `tag-along` rights such that in the event the defendants were to receive offers or be presented with opportunities in respect of the defendants` majority shareholding in Quinliven, the plaintiffs would have the right to the same benefit or opportunity proportionately. Accordingly, it was in fulfillment of this common intention that cl 11(E) was inserted into the agreement.

Furthermore, as the plaintiffs have pointed out, the defendants have failed to adduce evidence to contradict this aspect of PW1`s evidence. Significantly, the defendants failed to call Cheung as a witness to rebut PW1`s testimony on this point. Indeed, the defendants did not have any evidence to

challenge PW1`s evidence of the mutual understanding of the parties as regards the incorporation of cl 11(E) into the agreement.

As for the defendants` submissions on the intent of cl 11(E) these are:

(1) cl 11(E) was crafted to protect the plaintiffs, who were minority shareholders, from a situation where the defendants sell their interest in Quinliven to a third party, giving the plaintiffs no option but to continue the operations of Quinliven with the new partner. Clause 11 (E) therefore exists for the protection of the defendants and not to give the plaintiffs any economic benefits; and

(2) it does not make commercial sense for the defendants to allow the plaintiffs to participate in an economic opportunity which the latter did nothing to procure or contribute towards.

As regards the defendants` first submission above, the plaintiffs argue that cl 11(E) was not included to confer protection on the minority shareholders. The figure `51%` was a triggering event and not meant to refer to a situation where the defendants were to hold less than 51% of its shareholding in Quinliven and thereby lose their control over the operations of Quinliven.

The plaintiffs, by way of an illustration contained in paras 16-19 of its first set of written submissions, show that it was possible to trigger the operation of cl 11(E) with the defendants losing control over Quinliven when they sell some of their shares in Quinliven to a third party. At the same time the plaintiffs, after also disposing a corresponding portion of their shares in Quinliven, find themselves together with the defendants, holding a minority shareholding in Quinliven vis-Ã -vis that third party. In other words, cl 11(E) does not `protect` the plaintiffs from continuing operations with a new majority partner.

To further illustrate their point, in para 22 of its first set of written submissions, the plaintiffs show, by way of another example, that the operation of cl 11(E) could still be activated even in a situation where the defendants retain 50% of the shareholding in Quinliven after selling 25% to a third party and the defendants, together with the reduced shareholding of the plaintiffs in Quinliven, continue to hold more then 50% and thus retain control in Quinliven.

The two illustrations forcefully tell against the defendants` arguments that cl 11(E) was designed to protect the plaintiffs as a minority shareholder. On the contrary, the examples demonstrated and confirmed PW1`s testimony that cl 11(E) was crafted to enable the plaintiffs to participate in any economic benefit or opportunity opened to the defendants in the event the requirements of cl 11(E) were satisfied. Indeed, the admissions of Mr Peter Allen (`DW1`) during his cross-examination, that cl 11(E) has nothing to do with control and that 51% is an automatic trigger point unrelated to the question of the control, confirms this conclusion.

As for the defendants` second submission on the purpose of cl 11(E), they say that it would give rise to a peculiar result if the plaintiffs, whom the defendants contend had done nothing in relation to the whole series of transactions comprised in the Tricom transaction were to benefit from the fruits of the defendants` labour. I am of the view that such a contention cannot overturn the plain meaning of the clear words of cl 11(E) unless that interpretation makes no commercial sense at all. In the present case, there is PW1`s evidence as to the factual matrix of cl 11(E), which was specifically inserted into the agreement so that the plaintiffs could be afforded the same benefit or opportunity which the defendants would obtain in a situation where the requirements of cl 11(E) are satisfied.

No doubt at first glance, the plain meaning of cl 11(E) may be somewhat unorthodox to a lay person. However, when such a lay person is acquainted with the factual matrix of cl 11(E), the plain meaning

as identified manifests the common intention of the parties and therefore, should be given effect to. Furthermore, the plain meaning does not render cl 11(E) commercially unworkable nor lead to any unreasonable result.

Having regard to the mutual understanding of the parties with regards to cl 11(E), I am of the view that the following requirements have to be satisfied to trigger the operation of cl 11(E):

(1) the defendants must have received an offer for their shares together with related shareholder`s loans in Quinliven;

(2) the offer must come from a third party; and

(3) such an offer, when accepted, would result in the defendants holding less than 52% of the shares in Quinliven.

Offer for defendants` shares in Quinliven - meaning of `offer`

There is no dispute that Newco was merely a vehicle of convenience in the whole series of transactions comprised within the Tricom transaction where the eventual outcome was that Tricom became the legal owners of the defendants` shares in Quinliven. In return, for these shares and other property rights, the defendants obtained shares and convertible bonds in Tricom. The question is whether the defendants received an offer from Tricom.

The word `offer` is not defined in the agreement. In Sch 1 of the agreement which deals with pre-emption rights, the offer made by a third party has to be `a bona fide offer`. Although the phrase `bona fide` is absent from cl 11(E), I am of the view that it should also apply. Having in mind the intent of cl 11(E), if the offer were at less than the fair or real worth of the shares, then surely the plaintiffs would reject the offer as it would not benefit the plaintiffs. Indeed, it would seem that under cl 11(E), the plaintiffs would only consider accepting the offer where it was a bona fide offer, ie an offer for the shares at their fair or real worth, and this figure can be easily worked out by professionals.

In any case, whether the `offer` referred to in cl 11(E) has to be a bona fide offer, I am of the view that Tricom has indeed made such an offer to the defendants. In this regard, the defendants contend that Tricom has not made any offer for its shares in Quinliven as the transfer of shares was part of a restructuring exercise involving several companies such that there was no real change as the defendants, through Tricom, continue to exercise control (as the majority shareholder,) over the operations of Quinliven. Thus, the defendants submitted there was no actual offer made by Tricom to them.

I, however, agree with the plaintiffs` contention that the word `offer` cannot be construed literally; otherwise, this would allow the defendants to easily circumvent the operations of cl 11(E). The substance of the transactions between the defendants and Tricom is what counts rather than the form in which these transactions were carried out. In the present case, there was no dispute that the defendants and Tricom came to an agreement where there was a transfer of the defendants` shares in Quinliven to Tricom in return for shares and convertible bonds in Tricom. In other words, there must have been an actual or notional offer made by Tricom to acquire the defendants` shares. Furthermore, as the plaintiffs have pointed out, during DW1`s cross-examination, he conceded that the word `offer` need not be in the form of a document called `an offer`. DW1 also agreed with the plaintiffs that even if the transfer were the result of a shareholder`s approach as opposed to a third party offering to purchase shares from the shareholder, the requirement of `an offer` would have

been satisfied.

As for the defendants` contention that the offer must be `bona fide`, I accept the plaintiffs` submission that the expression simply meant that the transaction was negotiated at arm`s length. In this case, DW1 admitted that the Tricom transaction was a genuine arm`s length transaction with experts involved in assessing the value of the assets.

Shareholder`s loans

In the defendants` second set of written submissions, the defendants raised a new point that the `offer` must also be an offer to take over the shareholder`s loans (set out in cl 14). The defendants further say that in this case Tricom did not take over the shareholder`s loans and the defendants had continued to meet all demands for shareholder`s loans even after they transferred their shares to Tricom.

With regard to this contention, I accept the plaintiffs` reply. The starting point is cl 14, which requires shareholders to furnish loans (shareholder`s loans) to Quinliven. The agreement defines `Shareholders` to include :

> *any other person or persons holding any Shares who shall have executed a deed of ratification and accession pursuant to Clause 11B(i)*

Clause 11(B)(i) provides that:

> *It shall be a condition precedent to the right of any Shareholder to transfer any shares that the* ***transferor*** *(if not already bound by the provisions of this Agreement) executes in such forms as may be reasonably required by and agreed between the other Shareholder(s) a deed of ratification and accession under which the transferee shall agree to be bound by and shall be entitled to the benefit of this Agreement as if it were an original party hereto; ... [Emphasis added.]*

I further accept the plaintiffs` submission that the word `transferor` (in italics) should be read as `transferee`. The reasons for this interpretation will be dealt with subsequently.

In other words, any party who acquires shares in Quinliven from the defendants (or the plaintiffs) must execute a deed of ratification and accession (`the deed`). Thereafter, that party, being a `shareholder`, would be obliged to furnish loans to Quinliven pursuant to cl 14. Accordingly, it is unnecessary for that party to specifically make an offer as regards the defendants` obligation to furnish shareholder`s loans. Any offer by the party to acquire the defendants` shares must necessarily include the shareholder`s loans and this is a condition precedent to the transfer of the defendants` shares, which is evident from the opening words of cl 11(B). The court further accepts the plaintiffs` interpretation that the phrase `together with the related shareholder`s loans` in cl 11(E) has been placed in brackets for the avoidance of any doubt. In the present case Tricom`s offer to acquire the defendants` shares would necessarily entail an offer to acquire the defendants` obligation with regard to shareholder`s loans under cl 14.

As for the defendants` argument that they have to-date continued to fulfil their obligation to furnish

shareholder`s loans, this is simply because they failed to comply with the provisions of cl 11(B) in that they have not procured Tricom`s execution of the deed, which is a condition precedent to the transfer of their shares to Tricom. Therefore, it is not open to the defendants to rely on their own breach of the agreement to contend that the requirements of cl 11(E) have not been satisfied.

Clause 11(B): `transferor`

We now turn to the dispute surrounding the word `transferor` in cl 11(B)(i). The plaintiffs say that it is a typographical error and should be read as `transferee`. The defendants` contention is diametrically opposed. Both parties referred to earlier drafts of the agreement to support their respective position.

The court, however, is not minded to look at the earlier drafts as it is of the view that they constitute inadmissible evidence. There is no claim for any rectification of the agreement. As discussed in the preceding paragraphs of this judgment, principle 3 in the ***ICC*** case (see para 16 above) excludes previous negotiations of the parties save in an action for rectification, which is not the situation in the present case. Rather, one should look at the agreement as a whole and the operation of the various clauses vis-Ã -vis one another in order to determine whether the word `transferor` in cl 11(B)(i) is correct or meant to be `transferee`. The approach to this question, being a question relating to the interpretation of cl 11(B)(i), is identical to that employed in the construction of cl 11(E): one looks at the intent and the plain words of the provision itself.

The purpose of cl 11(B)(i) is evident from the provision itself. The deed is meant to bind the new shareholder to the terms of the agreement. A plain reading of the words in brackets envisages a situation where the `transferor` may not be bound by the agreement. Such a situation, however, will never arise under the scheme of transfer contemplated in the agreement. This is because the requirements under cl 11(B)(i) have to be satisfied before any transfer is made. Thus, before a shareholder transfers his shares, he will always be legally bound by the terms of the agreement. Accordingly, if the defendants` contention is correct, then the bracketed words are superfluous.

On the other hand, those same words do have a role to play if one were to read `transferor` as `transferee`. In the present case, Tricom, which is not already bound by the terms of the agreement, would be so bound upon execution of the deed. This ensures that as a new shareholder, Tricom has to comply with the terms and conditions of the agreement especially with regard to shareholder`s loans. This condition precedent - execution of the deed - is of particular importance in view of cl 19, which leaves the defendants free from its legal obligations under the agreement upon the transfer of all of its shares in Quinliven.

In relation to the inter-play between cll 11(A), 11(B), and 19, the defendants proffer two alternative interpretations. First, the defendants argue that cl 19 should be read subject to cll 11(A) and 11(B) as cl 19 is a general clause which deals with transfers of shares whereas the latter provisions are specific clauses. This submission, however, is not supported by the manner of incorporation of those clauses in the agreement itself. There is nothing, whether a clear reference or a subtle hint, to indicate that cl 19 is to be construed subject to cll 11(A) and 11(B). Furthermore, I am of the view that there is no necessity to construe cl 19 in this manner. Indeed, cl 19 as it stands, does not render the operation of the agreement commercially unworkable.

The defendants further submit that even if cl 19 were not to be read subject to cll 11(A), and 11(B), then on the facts of the present case, there was only a breach of cl 11(B)(i) being the defendants` failure to procure Tricom`s execution of the deed but, that did not mean that the defendants have

also breached cl 11(E) as well. This submission is certainly correct but the plaintiffs do not contend that a breach of cl 11(B)(i) would ipso facto amount to a breach of cl 11(E). Rather, the plaintiffs` submissions are to counter the defendants` argument that the transfer of the defendants` shares to Tricom did not mean that the defendants were released from their obligations under the agreement, which is contrary to the clear words of cl 19.

Coming back to cl 11(B)(i), I further agree with the plaintiffs` contention that the word `transferor` was actually meant to be `transferee` as such an interpretation would not render the words in brackets superfluous. For example, where a transfer is made to another shareholder, then obviously the latter is already originally bound by the terms of the agreement and, accordingly, the latter need not execute the deed.

Therefore, having regard to the reasons stated above, I am of the view that the word `transferor` in cl 11(B) should be read as `transferee`.

The offer must come from a third party - status of third party: when the offer is made

The plain words of cl 11(E) state that the time when one considers the status of the third party is at the time when the offer is made. In the present case, this would be the 30 April 1999, the date of the acquisition agreement. Tricom only became an `Associated Company` (as defined under the agreement) of the defendants on 3 August 1999 when the latter obtained shares and convertible bonds in Tricom.

The defendants place great emphasis on the final result of the Tricom transaction, viz that Tricom became a subsidiary of the defendants while Quinliven remained a subsidiary of the defendants. The defendants argue that the court should look at the substance of the whole transaction, namely, that Tricom would become the defendants` subsidiary and had assets injected in return for issuing shares to the defendants.

In the court`s view, however, the defendants` argument ignore the express words of cl 11(E), that is, to consider the offer at the time it was made and not the time when it was accepted. Clause 11(E) makes no mention that the third party making the offer must remain a third party at the time the offer is accepted. Accordingly, it cannot be disputed that as at the time the offer was made to acquire the defendants` shares, Tricom was in fact a third party.

I am impressed by the two illustrations given by the plaintiffs in order to refute the defendants` argument. In the first illustration, the plaintiffs raise the possibility of Tricom having the option of accepting payment in cash or issuing shares, or a combination of both, in exchange for the defendants` shares, and such an option being exercisable at a future date. The plaintiffs point out that in such a situation, one cannot say for certain whether Tricom would become an associated company until Tricom exercises its option and the sale is completed. Upon completion, Tricom may remain a third party or become an associated company. Assuming further, that Tricom remains a third party, then cl 11(E) would become operative, but would be too late then for the defendants to procure a similar offer for the plaintiffs. The plaintiffs, therefore, submit that the defendants` interpretation of cl 11(E) is artificial and not commercially viable. I agree.

In the second illustration, the plaintiffs point out that under the acquisition agreement, Tricom was required to furnish warranties to the defendants and a breach of the same would entitle the defendants to various remedies, including termination of the acquisition agreement and damages. Assuming that Tricom commits a breach and the defendants terminate the acquisition agreement, Tricom would no longer become an associated company of the defendants. When this takes place,

according to the defendants` interpretation, cl 11(E) is triggered. The plaintiffs, however, would be deprived of the right to damages against Tricom - which would constitute an economic benefit the plaintiffs ought to be entitled to under the agreement. If the defendants had procured a similar offer for the plaintiffs, the plaintiffs would have been entitled to sue Tricom for damages. Accordingly, the defendants` failure to procure the same meant that the plaintiffs would have to wait for the acquisition agreement to be terminated before requiring the defendants to comply with cl 11(E). Again, in such a scenario, the plaintiffs argue that the defendants` interpretation of cl 11(E) seem legally and commercially unreasonable. In agreeing, I apply what Lord Reid said in **Wickman Machine Tool Sales v L Schuler AG** [1974] AC 235 at 251:

> *The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that parties can have intended it and if they do intend it the more necessary it is that they shall make that intention abundantly clear.*

The court is of the view that the two illustrations are not manifestations of the plaintiffs` far-fetched and over-active imagination. They are commercially realistic scenarios. Accordingly, the defendants` interpretation of the time of considering the status of the `third party` in cl 11(E) cannot be correct. In the present case therefore, it is clear that Tricom was indeed a third party at the time the offer was made.

Such an offer, when accepted, would result in the defendants holding less than 51% of the shares in Quinliven

One of the defendants` arguments on this part of the case is that this third requirement of cl 11(E) was that the word `holding` should be read to refer to both direct and indirect holding. This is clear from DW1`s evidence during cross-examination where he said that the phrase `PCRD [the defendants] holding less than 51 % meant `PCRD [the defendants] or their holdings through their subsidiaries.`

The court, however, is of the view that it should apply the express words of cl 11(E), which makes no reference to the defendants holding shares in Quinliven through a subsidiary. First, the defendants` interpretation is a clear departure from the unequivocal language used in cl 11(E). Secondly, the defendants` argument fails because it is founded on the wrong premises. As discussed earlier, the intent of cl 11(E) was not to protect the plaintiffs as a minority shareholder but, rather, to allow the plaintiffs to ride on any benefit that the defendants may derive from a transfer of its shares in Quinliven. Thirdly, the authorities are clear that a departure from the plain words of a contractual agreement would only be permitted where it is necessary to give business efficacy to the agreement. It is, however, not the situation in the present case. The plain words of cl 11(E) do make business sense without the necessity of giving them a different meaning. Lastly, as the plaintiffs have pointed out, where the parties intended to refer to the defendants and their subsidiaries, there is specific mention of it. For example, cl 2B(A) and cl 7(B) specifically refer to `PCRD [the defendants] or its Associated Companies`. Such phraseology, however, is conspicuously absent in cl 11(E). I am therefore unable to accept the defendants` submission and would prefer to read the provision of cl 11(E) as it appears in the agreement.

`When accepted`

Another of the defendants` arguments under the third requirement of the clause revolves around the time at which the defendants` shareholding in Quinliven is to be taken into account. The defendants

point out that assuming the plaintiffs` argument to be correct in that Tricom had made an offer to the defendants on 30 April 1999, then the defendants have on the same day, accepted that offer. However, the transfer of the defendants` shares to Tricom via Newco only took place on 3 August 1999. Hence, the defendants submit that on 30 April 1999 when they accepted Tricom`s offer, their shareholding at 75% remained unchanged and accordingly, cl 11(E) was not triggered.

The plaintiffs, on the other hand, disagree with that interpretation. The plaintiffs argue that the question is whether the net result of the defendants accepting Tricom`s offer would be that the defendants` shareholding in Quinliven would fall below 51% and, not whether the defendants` shareholding would fall below 51% on the date of acceptance of the offer.

I agree and accept the plaintiffs` interpretation. If it were otherwise, cl 11(E) could easily be circumvented simply by making arrangements for the date of transfer of the defendants` shares to a third party on a date subsequent to the date of acceptance of that third party`s offer. In the court`s view, such an interpretation does not accord with business sense or common sense.

Therefore, the court is satisfied that the facts of the present case satisfy all three requirements of cl 11(E). Accordingly, cl 11(E) was triggered and the defendants, having failed to procure for the plaintiffs an offer based on the latter`s shareholding in Quinliven, on the same terms and conditions as that proffered by Tricom to the defendants, have breached cl 11(E) of the agreement.

Relationship between cll 11(A)(i) and 11(E)

One of the defendants` main defences was that the Tricom transaction was a cl 11(A)(i) transaction and, as such, fell outside the ambit of cl 11(E). Clause 11(A)(i) provides :

> *(A) Subject to the provisions hereof, no transfer of any Shares shall be made by the shareholders unless: the transferee is an Associated Company of the transferor, and the transferee shall remain as such Associated Company after the transfer and the obligations of the transferor under this Agreement shall remain unaffected by such transfer ...*

The defendants identify three pre-conditions, namely :

(1) the transferee [`Tricom`] is an associated company of the transferor [`the defendants`];

(2) Tricom shall remain as such associated company after the defendants have transferred its shares in Quinliven to Tricom; and

(3) the obligations of the defendants under the agreement shall remain unaffected by such a transfer.

The defendants reiterate their contention that the court ought to look at the substance of the Tricom transaction rather than the implementation of each individual transaction. They further urge the court to have regard to the intention of all the parties involved, which was to make Tricom a subsidiary of the defendants. Further, the acquisition agreement clearly stated that the transfer of the defendants` shares in Quinliven to Tricom was to take place after Tricom became the defendants` subsidiary. This was in fact carried out. Applying the definition of the term `Associated Company` in cl 1 of the agreement, which included `any subsidiary of [a] shareholder`, Tricom was

an associated company of the defendants and pre-condition (1) was satisfied.

The plaintiffs, however, submit that the time when the status of the transferee should be considered would be prior to the transfer of the shares, rather than the time the transfer was effected. Accordingly, the plaintiffs contend that Tricom was not an associated company of the defendants prior to the transfer and hence pre-condition (1) was not satisfied.

I accept the plaintiffs` submission as their interpretation accords with the plain reading of cl 11(A)(i), which clearly provides that not only was it a requirement that the transferee should be an associated company, but also, that this relationship between the transferor and transferee must subsists after the transfer. This is patently evident from the provision itself, that to satisfy pre-condition (1), the status of the transferee is to be determined prior to the transfer. On the present facts, it cannot be disputed that prior to the transfer of the defendants` shares in Quinliven to Tricom, Tricom was not an associated company of the defendants. Accordingly, pre-condition (1) was not satisfied.

There is no dispute that after the transfer, Tricom became and is still at present an associated company of the defendants.

The defendants contend that as Tricom is their subsidiary, their obligations through Tricom remained unaffected by the transfer of its shares to Tricom. The main obstacle to this contention, however, is cl 19(A) which reads:

> *This Agreement shall take effect from the date of this Agreement without limit in point of time and shall cease and determine upon the dissolution of the Company. If any Shareholder shall transfer the entirety of its shares, it shall be released from its obligations under this Agreement (except for its obligations under Clause 15) but if at that time there are two or more Shareholders bound by the provisions of this Agreement, this Agreement shall continue in full force and effect as between such continuing Shareholders until the dissolution of the Company.*

The defendants submit that cl 19 must be read subject to cl 11(A) for the latter to make commercial sense.

For the reasons stated in [para] 43 above, I do not accept the arguments. The court accepts the plaintiffs` submission that it should give effect to the express words of cl 19. Accordingly, reading cll 11 and 19 together, and having regard to the present case, it is clear that upon transfer of all of the defendants` shares in Quinliven to Tricom, the defendants were no longer bound by the terms of the agreement and hence, pre-condition (3) was also not satisfied.

The plaintiffs` motives

The defendants describe the plaintiffs` action as a `gold-digging` exercise; an act of opportunism. The plaintiffs dispute this allegation. First, the plaintiffs point out that as soon as PW1 became aware of the Tricom transaction, he attempted to obtain the defendants` confirmation of the same. Subsequently on 14 July 1999, PW1 wrote to the defendants informing the latter that the plaintiffs were willing to take up only two-thirds of what the plaintiffs would have been entitled to under cl 11(E).

Furthermore, as at 14 July 1999, the Tricom transaction had not been completed and the plaintiffs

could not be certain how Tricom`s share price would move upon completion. The plaintiffs therefore submit that the above showed it was not opportunistic. They did not wait for Tricom`s share price to surge before asserting their right under cl 11(E). Rather, the plaintiffs were seeking to obtain what they would have been entitled under cl 11(E) despite the uncertainty as regards Tricom`s share price.

The defendants also allege that the plaintiffs subsequently applied for an injunction to prevent them from transferring their Quinliven shares to Tricom in order to blackmail them into giving Tricom shares to the plaintiffs, as they could lose millions of dollars if the Tricom transaction was not completed. To substantiate this allegation, the defendants refer to PW1`s e-mail dated 19 June 1999. PW1 disagreed with this allegation during his cross-examination. PW1 referred to his e-mail of 27 July 1999 copied to Eric Kong (`PW2`) where he made it clear, in the penultimate paragraph, that even if the court were to grant an injunction, the plaintiffs did not intend to use it `to interfere or delay or disrupt` the Tricom transaction. This e-mail was sent on the same day to PCG (the defendants` parent company), and it was sent one day prior to the court hearing of the plaintiffs` application for the injunction.

Whatever might have been the plaintiffs` intention, it is in my view wholly irrelevant to the issues in dispute. As DW1 himself had stated during his cross-examination:

> *I think the best thing to do is to look at the contract [the agreement] and look at the relationship that existed between the parties and decide fairly what the situation is.*

The damages payable to plaintiffs

Having concluded that the defendants have breached cl 11(E), I next consider the issue of quantum of damages the plaintiffs are entitled to. The general principle is to put the plaintiffs, as far as it is possible, in the position as if the defendants had not breached the agreement. Accordingly, if the defendants had procured an offer for the plaintiffs on the same terms and conditions as those vis-Ã -vis itself and Tricom, then the plaintiffs would have had the option of transferring their 25% shareholding in Quinliven to Tricom, in exchange for shares and convertible bonds in Tricom.

I am satisfied that the plaintiffs, if presented with the offer, would have accepted the same as it was certainly an economic or commercial benefit. Not only would the plaintiffs receive liquid shares in Tricom, a publicly listed company, for their illiquid shares in a private company [Quinliven], Tricom was involved in what was perceived generally as a highly profitable project in Hong Kong (`Hong Kong Cyberport project`) and Tricom`s share price was expected to surge upwards upon public announcement of the Tricom transaction. In fact, this expectation came to fruition: Tricom`s share price climbed dramatically.

For the purpose of computing the number of Tricom shares the plaintiffs are entitled to, the plaintiffs rely on statistical information, which were furnished by the defendants either during pre-trial interrogatories or during the cross-examination of DW1 at the trial. These figures were tabulated in Annex A of the plaintiffs` first set of written submissions. The defendants have not disputed the same. Accordingly, I accept these figures as accurate and a basis for calculating the plaintiffs` entitlement. The table is reproduced below:

The plaintiffs` interest valued at HK $12m [by DW1]

Value to be accorded in the Acquisition	HK $12,000,000	
Proportion made up of shares (61%)	HK $7,320,000(61%) of 12,000,000	
Number of shares (at HK$0.31 per share) (1)	23,612,903 shares (approx) (7,320,000/0.31)	23,612,903
Proportion made up of bonds (39%)	HK$4,680,000(39% of 12,000,000)	
Number of shares (converted at HK $1.24 per share) (2)	3,774,194 shares(4,680,000/1.24)	3,774,194
Total No of Shares	27,387,097	

NB:	(1)		The price of HK$0.31 is stated as the conversion price at p 31 of the Tricom Listing Document.
	(2)		The price of HK$1.24 stated as the conversion price of the bonds as defined in cl 5.1 of the terms and conditions of the bond set out at p 39 of the acquisition agreement.

The next question is the price at which the shares are to be valued. This depends on the date upon which to assess the market value of the Tricom shares.

The general principle is stated in the highly persuasive decision of the House of Lords in **Johnson v Agnew** [1980] AC 367, 401 as follows :

> *The general principle for the assessment of damages is compensatory, ie that the innocent party is to be placed, as far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of the breach - a principle recognized and embodied in s 51 of the Sale of Goods Act 1893. But this is not an absolute rule: if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances.*

The defendants submit that the local position is as follows. In the case of **City Securities Pte Ltd v Associated Management Services Pte Ltd** [1996] 1 SLR 727 , the Court of Appeal followed a decision of the Privy Counsel and at p 733E stated:

> *In a contract for the sale of shares the measure of damages upon a breach by the purchaser is the difference between the contract price and the market price at the date of the breach, with an obligation on the part of the seller to mitigate the damages by getting the best price he can upon that date:* ***Akas Jamal v Moolla Dawood, Sons & Co*** *[1916] 1 AC 175, at p 179.*

The defendants therefore submit that applying the general principle to the present facts, the date would be the date of the defendants` breach, ie 30 April 1999. As at 30 April 1999, the market value of Tricom shares was HK$0.68 or US$0.09 per share. On this basis, the plaintiffs would be entitled to :

> *27,387,097 x US$0.09 [equals] US$2,464,838.73*

The plaintiffs on the other hand, stress that the House of Lords in ***Johnson v Agnew*** did acknowledge that the court had the discretion to fix another date according to what was appropriate in the light of the circumstances of each case bearing in mind that the purpose was to put the innocent party `so far as money can do, in the same position as if the contract had been performed`. The plaintiffs contend that in the present case, the price of Tricom shares has increased since 30 April 1999, the date of the defendants` breach and, it was because of this breach that the plaintiffs have been deprived of such a valuable asset. Accordingly, if damages were computed as at 30 April 1999, the plaintiffs would not be adequately compensated as the sum awarded would be insufficient to purchase the equivalent member of Tricom shares and convertible bonds from the market. The plaintiffs therefore urge that the date for assessment of damages should be some other date.

As for the cases referred to by the defendants, the plaintiffs point out that the two cases dealt with the breach of a contract for the sale of shares by the purchaser where the vendor could sell the shares to another purchaser to mitigate his damages. In the present case, however, the plaintiffs are unable to procure another offer from Tricom. Therefore, the damages should not be calculated as at the date of breach.

The plaintiffs further submit that there were four other dates which the court could consider. They are as follows:

(1) The highest value of Tricom shares between 3 August 1999 (date of transfer of defendants` shares to Tricom) and the date of judgment. If the defendants had complied with cl 11(E), the plaintiffs would have bought Tricom shares and be entitled to sell them between this period.

(2) The value of plaintiffs` shares as at the date of judgment. This would enable the plaintiffs to purchase the equivalent number of Tricom shares in the open market.

(3) The mean value between the price of shares on 30 April 1999 (the date of breach) and the highest price of the shares between 30 April 1999 and the date of judgment. The plaintiffs cited the local case of **Rodrigues v Robert Wee & Co** SLR 753 [1968] 2 MLJ 95 .

(4) The mean value between 30 April 1999 and the date of judgment.

My decision

Bearing in mind the general rule, the court is of the view that to assess damages as at the date of breach would not adequately compensate the plaintiffs for the reasons submitted by the plaintiffs. In my judgment the date of judgment would be a fair date. The other dates suggested by the plaintiffs presupposes that the plaintiffs would have sold the shares at the highest price during the relevant periods of time but this presumption or assumption is, in my view, too speculative and unreliable.

The plaintiffs also contend that they have made payments to Quinliven as shareholder`s loans pursuant to the agreement from August 1999 to January 2000. On 3 August 1999, the defendants transferred their Quinliven shares to Tricom. Accordingly, if the defendants had compiled with cl 11(E), then the plaintiffs would have similarly transferred their Quinliven shares on 3 August 1999 and would not have had to continue to extend shareholder`s loans. Hence, the plaintiffs submit that it has the right to recover these payments totalling US$1.025m as damages.

Conclusion

In conclusion, the court finds the defendants in breach of cl 11(E) of the agreement and awards the plaintiffs damages as follows:

(1) 27,387,097 x the market price of Tricom shares as at date of judgment; and

(2) US$1.025m.

The defendants are ordered to pay costs to the plaintiffs. Parties are directed to appear before me to settle the orders of court to give effect to this judgment.

Outcome:

Plaintiffs` claim allowed.