Sinojaya Sdn Bhd v Metal Component Engineering Pte Ltd & A Third Party [2002] SGHC 148

Case Number : Suit No 111 of 2002

Decision Date : 15 July 2002

Tribunal/Court : High Court

Coram : Woo Bih Li JC

Counsel Name(s) : Ong Ying Ping (Ong Tay & Partners) for the plaintiff; Joseph Liow (Straits Law Practice LLC) for the defendant

Parties : —

Evidence – Privilege – Without prejudice communications – Meeting discussing settlement of plaintiff's claim – No reference to communications being on without prejudice basis – Whether communications privileged

Evidence – Privilege – Without prejudice communications – Whether defendant waived privilege by circulating minutes of meeting to plaintiff and another party

application for summary judgment – Whether communications privileged – Whether meeting resulted in concluded agreement – Whether defendant had waived privilege

Facts

> The plaintiff ("Sinojaya") claimed the price of five machines sold and delivered to the defendant ("MCE"). MCE alleged that it was the agent for an undisclosed principal when it agreed to buy the machines from Sinojaya. Subsequently, MCE disclosed to Sinojaya that it was purchasing the machines as agent for the third party ("Hoyo"). MCE also alleged that Sinojaya then dealt directly with Hoyo, delivered the machines to Hoyo and issued quotations and invoices to Hoyo for two of the five machines. Hoyo also arranged to pay Sinojaya for the remaining machines by instalments. One instalment was paid but not others.
>
> On 31 January 2002, Sinojaya commenced this action naming MCE as the only defendant. On 22 February 2002, representatives of Sinojaya, MCE and Hoyo met to discuss Sinojaya's claim. After the meeting, MCE prepared and forwarded the minutes of the meeting to Sinojaya's representative as well as to Hoyo.
>
> Sinojaya subsequently applied for summary judgment. Sinojaya sought to refer to what was said at the meeting and, in particular, the minutes of the meeting in its affidavits. MCE took the position that the meeting of 22 February 2002 was on a without prejudice basis. Accordingly, MCE applied to strike out certain paragraphs in certain affidavits which referred to the meeting and the exhibit of a copy of the minutes.
>
> At first instance, MCE's application was dismissed on the ground that there was a concluded agreement. MCE appealed.

Held, allowing the appeal:

(1) The intention of the meeting of 22 February 2002 was genuinely to try and reach a settlement not only as between Sinojaya and MCE but involving Hoyo as well. MCE would not agree to pay Sinojaya

without securing an agreement from Hoyo to pay MCE in turn. The absence of any reference to the phrase "without prejudice" was therefore not fatal to MCE's position (See [30] – [31]).

(2) The fact that some parts of the minutes used the word "agrees" was not conclusive on whether there was a concluded agreement. The minutes were not drafted by solicitors. The opening words of the minutes stated, "This is the discussion ..." and not "agreement". The substance of the minutes showed quite clearly that there were two outstanding issues which were vital. First, MCE's solicitors were to send a payment schedule by 25 February 2002, and it was open to Sinojaya to reject it if it was not to Sinojaya's liking. Second, Hoyo had to agree to the terms recorded in the minutes by signing and returning a fresh sales agreement between MCE and Hoyo for three of the machines. If, as it turned out, Hoyo did not signify its agreement, the whole deal was off. In the circumstances, there was no concluded agreement on 22 February 2002 between Sinojaya and MCE (See [32] – [35], [37] – [38]).

(3) Sinojaya had not acted on the alleged agreement when their solicitors sent a fax dated 25 February 2002 to MCE's solicitors. This fax was to follow up on what had been discussed and had sought MCE's payment schedule for Sinojaya to consider. The fax also gave MCE the alternative of filing its Defence. MCE responded by filing the Defence. As the fax did not assert a concluded agreement, there was nothing for MCE to dispute at that time. Thus, although MCE's solicitors first alleged that the meeting was on a without prejudice basis only more than a month later by a fax dated 27 March 2002, there was no waiver by MCE of the without prejudice privilege (See [28], [43] – [44]).

(4) The circulation of the minutes to Hoyo did not put the minutes in the public domain just because Hoyo was not a party to the proceedings at that time. The absence of any specific restriction on the circulation of the minutes did not make it inequitable for MCE to argue that the minutes were inadmissible as evidence. Even documents which are admittedly subject to the without prejudice qualification may be circulated. The prohibition is not against circulation but against admission in a court, or tribunal, of law as evidence (See [45]).

(5) It was inequitable for Sinojaya to now try to rely on the minutes of the 22 February 2002 meeting to bolster its summary judgment application against MCE (See [47]).

[*Editorial Note*: The plaintiffs' appeal to the Court of Appeal vide CA 68/2002 was heard and dismissed by the Court of Appeal (Chao Hick Tin JA and Tan Lee Meng J) on 24 October 2002.]

Case(s) referred to

Tan Yeow Khoon v Tan Yeow Tat & Anor (No. 1)

[2000] 3 SLR 341 (distd)

Judgment

GROUNDS OF DECISION

Background

1. The Plaintiff Sinojaya Sdn Bhd ('Sinojaya') claimed the price of five power press machines sold and delivered to the Defendant Metal Component Engineering Pte Ltd ('MCE').

2. MCE alleged that it was the agent for an undisclosed principal when it agreed to buy the machines from Sinojaya. Subsequently, it disclosed to Sinojaya that it was purchasing the machines as agent for the Third Party, Hoyo Crosstec Sdn Bhd ('Hoyo'). MCE also alleged that Sinojaya then dealt directly with Hoyo and did the following:

(a) delivered the machines to Hoyo in Johor Bahru, Malaysia,

(b) issued quotations and invoices to Hoyo to enable Hoyo to obtain financing for two of the five machines.

Hoyo also arranged to pay Sinojaya for the remaining machines by instalments. One instalment was paid but not others.

3. On 31 January 2002, Sinojaya filed an action in the High Court of Singapore being Suit No 111 of 2002. MCE was the only party named as Defendant.

4. On 22 February 2002, representatives of Sino International Pte Ltd (a related company of Sinojaya), MCE and Hoyo met in the Hilton Hotel to discuss Sinojaya's claim. According to Sinojaya, the following persons attended the meeting:

(a)	Mr Charles Wong	}	
(b)	Mr Lim Kwee Beng	}	Sino International
(c)	Mr Chua Kheng Choon ('CKC')	}	
(d)	Mr Chua Han Min	}	MCE
(e)	Mr Ano	}	
(f)	Ms Grace Tan	}	Hoyo

5. After the meeting, CKC, the managing director of MCE, prepared and forwarded the minutes of the meeting to Charles Wong of Sino International, as well as to Hoyo.

6. Sinojaya subsequently applied for summary judgment. In various affidavits filed on its behalf, it sought to refer to what was said at the meeting and, in particular, the minutes of the meeting. Sinojaya asserted that the meeting resulted in a concluded agreement which MCE breached. The reference to the minutes was not to establish a fresh cause of action based on the alleged concluded agreement but to use them to assist Sinojaya to obtain summary judgment under the original cause of action i.e the sale of the machines.

7. MCE took the position that the meeting of 22 February 2002 was on a without prejudice basis and that there was no concluded agreement. Hence no reference should be made to it or the minutes thereof which were inadmissible as evidence. Accordingly, it applied to strike out certain paragraphs of certain deponents' affidavits which referred to the meeting and the exhibit of a copy of the minutes.

8. MCE's application was heard by the Deputy Registrar Mr Foo Chee Hock on 14 May 2002. He decided that there was a concluded agreement and so it was unnecessary to decide whether the meeting was held on a without prejudice basis in the first place. Accordingly, Mr Foo dismissed MCE's application.

9. MCE then appealed to the judge-in-chambers. The application for summary judgment was adjourned pending the outcome of the appeal. The appeal was heard by me on 13 June 2002. After hearing arguments, I concluded that the meeting was on a without prejudice basis and that there was no concluded agreement. Accordingly, I allowed the appeal. Sinojaya has appealed to the Court of Appeal.

The first affidavit of Wong Ping Leung

10. The first affidavit of Mr Wong Ping Leung, also known as Charles Wong, in support of Sinojaya's contentions, states inter alia:

> '6. This is especially so after the Defendants have actually admitted to the liability as recorded in the minutes prepared by their own managing director, Mr Chua Kheng Choon ("CKC") in relation to the settlement meeting held at Hilton Hotel on 22.02.02 (refer to paragraph 11 of LSM's affidavit).
>
> 7. I was present at this meeting with a colleague, Mr Lim Kwee Beng. The meeting was called by CKC and we were to attend the meeting as the representatives of the Plaintiffs. I believe that none of the parties informed their lawyers about this meeting even though the Plaintiffs have commenced proceedings and the Defendants have entered appearance. CKC had reassured us that everyone's concern is primarily to settle this matter and not to protract it any further. In fact CKC personally told me over the phone prior to the meeting that the Defendants would pay us our claim while they would look to Hoyo for payment.
>
> 8. At this meeting which lasted for about 2 hours, it was *definitely agreed* by parties that
>
> a. The Defendants would settle the Plaintiffs' claim herein and in fact will be giving their proposal for full payment thereof by 25/2/02.
>
> b. The Plaintiffs would not need to look to Hoyo Crosstec Sdn Bhd ("Hoyo") for payments and should in fact stop looking to them for settlement of this claim.
>
> c. That Hoyo and the Defendants will deal directly between themselves on how they wish to settle the payment thereof.
>
> 9. At all times, there was no mention that this agreement was subject to any conditions. In fact, I had thought that this was not a separate agreement but merely stating the fact of the relationships of the 3 parties; i.e. that the Defendants were liable to the Plaintiffs as contractual party and that the Defendants should be the one looking to Hoyo for their sub-sale of the machines to them.
>
> 10. I am also certain that at no times were there any mention that this meeting was to be made "Without Prejudice". No lawyers were involved in this meeting precisely because parties were keen and anxious to settle this matter once and for all. Neither I nor the Plaintiffs had informed Messr Ong Tay & Partners, the solicitors for the Plaintiffs about this meeting until 25/02/02 when we received the confirmed minutes from the Defendants. Messr Ong Tay & Partners then wrote to the Defendants' solicitors on the same day to record the settlement, a copy of this facsimile dated 25/02/02 is now exhibited as "CW-1".

11. The Plaintiffs were therefore shocked and baffled when they were informed by their solicitors on 27/2/02 that the Defendants had in fact filed their Defence on the same day and were even seeking security for costs.

12. I then called CKM and asked why they had once again reneged on their agreement and was informed that it was because Hoyo had not fulfilled their part of the bargain vis a vis the Defendants.'

11. I would add that paras 6 to 10 of that affidavit were some of the paras which MCE was objecting to.

The minutes of the meeting and other documentary evidence

12. The minutes of the 22 February 2002 meeting state:

> '**Meeting on 5X160T Sino Machines**
>
> This is the discussion on the settlement of payment, on the part of Hoyo Crosstec, on the 5x160T machines from Sinojaya.
>
> 1. Metal Component Engineering (MCE) agrees to assume all outstanding payment liability with SinoJaya (Sino). A legal letter stating payment schedule (within 6 months) will be sent to Sino by 25 February 2002.
>
> 2. HoyoCrosstec (Hoyo) have to sign a fresh sales agreement with MCE for the outstanding 3 machines (which Hoyo has not paid). These 3 machines are 2 from Sino, plus one more that MCE sold to Hoyo.
>
> 3. Sino agrees (by Mark Wang) to withdraw all outstanding invoices sent to Hoyo. From now no, Sino will deal directly with MCE, and MCE will deal with Hoyo. Sino shall send a letter stating that Sino shall not claim any more liability from Hoyo, apart from the S$35K supposed to be paid in February.
>
> 4. Hoyo has up to 12.00 noon of 25 February 2002 to (*sic*) signed and return the fresh sales agreement with MCE. Failing which, MCE will assume Hoyo disagrees with this arrangement and MCE shall proceed to take other actions against Hoyo.
>
> 5. MCE agrees to withdraw its legal action against Hoyo once the above sales agreement is signed and received by 12.00 noon 25 February 2002.
>
> 6. Sino agrees to withdraw court order against MCE once Sino received legal letter from MCE on the outstanding payment schedule.
>
> This minutes is sent to Hoyo's Ano-san, Grace-san, Sino's Mr Lau, Charles Wong, and Mark Wang.
>
> Minutes by: CHUA Kheng Choon.
>
> Date: 22 February 2002'

It was faxed to Charles Wong on 25 February 2002.

13. On the same day, Ong Tay & Partners, acting for Sinojaya sent a fax to Straits Law Practice LLC who were acting for MCE. The fax states:

'We have been instructed by our clients that a meeting was held on 22 Feb 2002 between your clients' representatives and ours and representatives from HoyoCrosstec.

We are instructed that parties have agreed inter alia to the following:

a) that (*sic)* you (*sic*) clients' admit liability to our clients' claim

b) that your clients will present a payment schedule for the full claim to be settled within 6 months from 22/2/02.

c) that our clients will withhold enforcement proceedings unless your clients default on any of the instalment payment

Please let us hear from you on your clients' proposal by close of office hour tomorrow, failing which, please let us have your clients' Defence within the next 48 hours.

In the meantime, we enclose herewith a copy of the PTC Notice for your information.'

14. There was no written fax or letter in immediate response. However, after Sinojaya applied for summary judgment, Straits Law Practice LLC wrote to Ong Tay & Partners on 27 March 2002. That letter states:

'**SUIT NO. 111 OF 2002Y**

CLAIM BY SINOJAYA SDN BHD

We refer to your client's two affidavits in support of the Order 14 application.

It is our view that your firm's letter of 30/10/01 and the minutes of the meeting as exhibited in "LSM-6" and circumstances surrounding the same are privileged on the grounds that these communications (*sic*) on a "without prejudice" basis. It is patent that these communications are protected from disclosure. In particular the meeting in February 2002 was for the purposes of achieving a tri-parte resolution of the disputes. Hoyo did not agree to our client's terms and as such there were no concluded agreement.

We require you to confirm that you will delete and strike out from the two (2) affidavits the objectionable contents. Please let us know within the next 5 days, failing which we shall make the necessary application to Court.'

Arguments for MCE

15. Mr Joseph Liow, Counsel for MCE, did not dispute that no one had specifically said prior to or at the meeting of 22 February 2002, that the meeting was on a without prejudice basis. The minutes of the meeting also did not contain this qualification.

16. However, he submitted that, 'A meeting does not have to be expressed as to be on a "without prejudice" basis in order for the matters discussed therein to be privileged from disclosure'.

17. Civil Procedure by Jeffrey Pinsler, 1994, states at p. 588 to 589:

'3. WITHOUT PREJUDICE COMMUNICATIONS

The rule, its rationale and scope

It is a well-established rule that statements made by opposing parties (or their solicitors) to each other, in the course of settlement negotiations on the express or implied understanding that they are not to be disclosed (that is, on 'without prejudice' terms), are privileged and may not be used at the trial unless both parties consent. The rationale of this principle is that such statements may be regarded as admissions by the party making them and used against him at the trial. The privilege, which is rooted in the public policy of keeping litigation to a minimum, protects the party against the disclosure of such statements, thereby encouraging him to settle the dispute without fear. In *Rush & Tompkins Ltd v Greater London Council & Anor*, Lord Griffiths, in the House of Lords, said:

> The 'without prejudice' rule is a rule governing the admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than to litigate them to the finish…. The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence.

In Singapore, the rule is given expression in the form of section 23 of the Evidence Act which provides:

> In civil cases no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.'

18. At p 590 to 591, the text continues:

'The English courts have developed a variety of rules which make up the framework of this privilege at common law. For instance, it is clear that operation of the privilege is not dependent on the use of the words 'without prejudice' in correspondence between the parties. The House of Lords in *Rush & Tompkins Ltd v Greater London Council & Anor* disapproved of a linguistic approach. Lord Griffiths, who delivered the judgment, expressed the following view:

> … the application of the rule is not dependent upon the use of the phrase 'without prejudice' and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission … I believe that the question has to be looked at more broadly and resolved by balancing two different public interests namely the public interest in promoting settlements and the public interest in full discovery between the parties to the litigation.

The consequence of this approach is that although the terminology 'without prejudice' is generally regarded as indicative of the intention to settle (and is often used in practice), it is not an absolute criterion.'

19. Mr Liow submitted that para 6 of Wong Ping Leung's first affidavit (cited above) demonstrated that the meeting of 22 February 2002 was to settle matters.

20. Mr Liow then submitted that there was no concluded agreement because the agreement was intended to be a tripartite one. The minutes envisaged that Hoyo would sign a fresh sales agreement with MCE for three machines failing which MCE would assume that Hoyo disagreed with the agreement. Hoyo did

not sign the fresh sales agreement.

21. Mr Liow further submitted that there was no concluded agreement even as between Sinojaya and Hoyo for another reason. Aside from the fact that Hoyo did not sign a fresh agreement with MCE, there was as yet no agreement between Sinojaya and MCE on the payment schedule. Sinojaya was surely not going to accept whatever MCE cared to propose as a payment schedule.

Arguments for Sinojaya

22. Mr Ong Ying Ping, Counsel for Sinojaya, stressed that no one had specifically said that the meeting was on a without prejudice basis and neither was this qualification stated in the minutes. However, he did not dispute the legal principle that the privilege from disclosure could apply even if such words were not used.

23. As regards the second main question i.e whether there was a concluded agreement, he submitted that it did not matter that Hoyo did not sign a fresh agreement with MCE as the suit was between Sinojaya and MCE. Hoyo had not formally entered the fray yet.

24. He also submitted that the minutes showed that an agreement had been reached. For example,

(a) Paragraph 1 of the minutes states that MCE 'agrees to assume all outstanding payment liability with Sinojaya ….' .

(b) Paragraph 6 states, 'Sino agrees to withdraw court order against MCE …', meaning actually to withdraw the suit as there was no court order.

[Emphasis added.]

25. There was no restriction on the use of the minutes and its circulation.

26. Mr Ong also relied on the case of *Tan Yeow Khoon v Tan Yeow Tat & Anor (No. 1)* [2000] 3 SLR 341 for the proposition that there can be a concluded agreement if all the terms are clear, leaving only the mechanics to be resolved. Also, the requirement of action by a third party would not necessarily mean that there was no concluded agreement.

27. As regards the absence of a payment schedule from MCE, Mr Ong suggested that this did not really matter so long as full payment was received within the six months envisaged under paragraph 1 of the minutes.

28. His third main point was that Sinojaya had acted on this agreement because his firm had sent the fax dated 25 February 2002, to which no response was received from MCE's solicitors until much later. The only response was the fax dated 27 March 2002, more than one month later, which alleged that the meeting was on a without prejudice basis. He submitted that by then it was too late for MCE to raise the privilege as MCE had waived the privilege. Also it was inequitable to allow MCE to raise the privilege after taking into account these factors as well as the fact that there was no restriction on the use of the minutes and its circulation. MCE could not pick and choose. By this, he meant that because MCE had allowed the minutes to be circulated to Hoyo, and as Hoyo was not a party in the proceedings at that time, the minutes had reached the public domain. MCE had acted thereon and could not raise the privilege now.

MCE's counter-argument

29. Mr Liow countered by pointing out that although there was no reply fax to Ong Tay & Partners' fax

dated 25 February 2002, it was not true that there was no response. That fax had sought MCE's payment schedule the next day or MCE's Defence to be filed within the following 48 hours. MCE's Defence was in fact filed, within the 48 hour deadline. It must have been clear then to Sinojaya that the payment schedule was not forthcoming. Also, MCE had assumed that the meeting was on a without prejudice basis until Sinojaya applied for summary judgment and the supporting affidavits were filed. Thereafter MCE's solicitors wrote, on 27 March 2002, to object to any disclosure of without prejudice communication.

My Decision

30. I was of the view that the intention of the meeting of 22 February 2002 was genuinely to try and reach a settlement not only as between Sinojaya and MCE only but involving Hoyo as well. That was why Hoyo's representatives also attended that meeting. Furthermore, in the circumstances, MCE would not agree to pay Sinojaya without knowing what its position vis--vis Hoyo was and securing an agreement from Hoyo to pay it (MCE) in turn.

31. The absence of any reference to the phrase 'without prejudice' was therefore not fatal to MCE's position.

32. As regards the second question i.e whether there was a concluded agreement, the fact that some parts of the minutes use the word 'agrees' was not conclusive. The minutes were not drafted by solicitors. Besides, the opening words of the minutes stated, 'This is the discussion …' and not 'agreement'.

33. More importantly, the substance of the minutes showed quite clearly that there were two outstanding issues which were vital.

34. First, MCE's solicitors were to send a payment schedule by 25 February 2002. I did not accept the suggestion that this was an inconsequential term. If a payment schedule had been forwarded and was not to Sinojaya's liking, I had no doubt in my mind that Sinojaya would have rejected it.

35. I was reinforced in this view from the fax dated 25 February 2002 from Ong Tay & Partners. Although it said that the parties had agreed on various terms, this should not be considered in isolation. What did the parties agree to? One of the terms was that a payment schedule was to be sent by MCE's solicitors. Indeed, the fax went on to refer to the payment schedule as MCE's 'proposal' thus indicating that it was open to Sinojaya to reject it if it was not to Sinojaya's liking. Unlike the minutes, the fax was drafted by solicitors.

36. I was of the view that the fax from Ong Tay & Partners detracted from, rather than supported, the contention that there was a concluded agreement.

37. Secondly, Hoyo had to agree to the terms recorded in the minutes by signing and returning a fresh sales agreement between MCE and Hoyo for three of the machines. As I have said, the purpose of the meeting was to achieve a tripartite agreement and not an agreement between Sinojaya and MCE only. This was reflected in the minutes. If, as turned out to be the case, Hoyo did not signify its agreement, the whole deal was off.

38. In the circumstances, I did not agree that there was a concluded agreement on 22 February 2002 between Sinojaya and MCE.

39. The case of *Tan Yeow Khoon* relied upon by Mr Ong was on different facts. There, the plaintiffs and defendants were all siblings. They were shareholders of three family-owned companies. The parties eventually met on two days to discuss their differences resulting in an agreement encapsulated in a letter

being sent by the first defendant's solicitors. The letter was cited, with emphasis added, by Justice M P H Rubin as follows:

'We refer to the above matters and to the meetings held on 17 November 1995 and 24 November 1995.

As arranged, we write to confirm that the parties, as a step towards achieving a comprehensive settlement of the disputes between them, have agreed to the following:

1 Tan Yeow Khoon shall act for himself and for Tan Yeow Lam as one party (Yeow Khoon).

2 Tan Yeow Tat shall act for himself and Tan Guek Tin as one party (Yeow Tat).

3 Yeow Tat shall sell his interest in the three companies (Companies):

a Soon Hock Container & Warehousing Pte Ltd;

b Soon Hock Transportation Pte Ltd;

c Cogent Container Services Pte Ltd.

4 Yeow Khoon shall buy Yeow Tat's interest in the Companies.

5 The purchase price of the interest in the Companies shall be based on the value of the companies as at 31 October 1995.

6 The value of the Companies shall be based on the audited book value but subject to the following:

(a) adjusted for market value of the immovable properties owned by the company;

(b) adjusted for payments made by the Companies other than for business purposes for the period 1 January 1990 to 31 October 1995;

(c) adjusted for transactions between the Companies and Wah Tien for the period 1 January 1990 to 30 October 1995;

(d) adjusted for transactions between the Companies and Hoon Nam for the period 1 January 1990 to 30 October 1995.

7 The valuation of the immovable properties shall be carried out as follows:

a Yeow Khoon shall appoint, at their own cost, Richard Ellis to undertake the valuation;

b Yeow Tat shall appoint, at their own cost, Knight Frank to undertake the valuation;

c The valuation of the immovable properties shall be arrived at by taking the average figure of the two valuations.

8 *The mechanism as to how the adjustments set out in paragraph 6(b), (c) and (d) are (sic) to be ascertained will be further discussed at the next meeting fixed for Thursday, 7 December 1995.*

9 Yeow Khoon shall pay Yeow Tat an amount equal to 25% value of the Companies. If the amount is below $2m, it shall be paid in one lump sum. If it exceeds $2m, the excess beyond $2m shall be payable in instalments to be agreed upon provided that the entire consideration is to be paid without a year from the date of the 1st payment.

10 Tan Guek Tin shall tender her resignation as a director and employee of the Companies upon the signing of the agreement and shall be entitled to six (6) months paid leave immediately. Tan Yeow Tat shall tender his resignation as a director and employee of the Companies upon the payment of the last instalment to him referred to in paragraph 9 hereof.

11 Yeow Khoon shall procure the unconditional release of Yeow Tat from all guarantees executed by them for the Companies.

12 Yeow Khoon confirms that they and the Companies shall have no further claims against Yeow Tat and Yeow Tat confirms that they shall have no further claims against Yeow Khoon and the Companies.

As agreed, please let us have copies of the leases of all the immovables properties owned by the companies and the floor plans of these properties on an urgent basis. As we have indicated, our clients require these documents to obtain a valuation of these properties.

[Emphasis added.]'

The letter was referred to as 'the letter agreement'.

40. Subsequently, there was a meeting on 7 December 1995 to work out the mechanism mentioned. A company secretary recorded the minutes of the meeting which minutes reflected the steps to be taken by various parties.

41. In these circumstances, Rubin J concluded that the letter agreement contained all the essential terms of a valid and binding agreement. What remained was the mechanism as to who should be the expert valuer to determine the adjustments to be made to the audited book value of the companies. He considered this to be a subsidiary aspect and not a point vital to the agreement. Apparently, the absence of an agreement on an instalment payment for the excess beyond $2m was not raised as an argument against the existence of a concluded agreement.

42. In the case before me, the payment schedule was, in my view, a vital part of the intended agreement. Secondly, it was a vital part of the intended agreement that Hoyo agree to be bound by it and it did not agree. Hoyo was not just a third party who would assist the parties to implement an agreement. It was supposed to be a party to the very agreement in dispute.

43. As regards the third main point raised by Mr Ong, I did not agree that Sinojaya had acted on the alleged agreement when Ong Tay & Partners sent their fax dated 25 February 2002 to Straits Law Practice LLC. This fax was to follow up on what had been discussed and had sought MCE's payment schedule for Sinojaya to consider. Furthermore, the fax gave MCE an alternative in its ultimatum: to forward the proposed payment schedule or file its Defence. As Mr Liow had submitted, MCE did respond, although not in the way that Sinojaya would have wanted. The Defence was filed. I did not see how Mr Wong Ping Leung could genuinely assert (in his first affidavit) that Sinojaya was shocked and baffled when it was informed that the Defence had been filed, given that this was an option given to MCE by Ong Tay & Partners.

44. I was also of the view that the fax of Ong Tay & Partners did not assert that there was a concluded agreement and it gave the contrary impression. There was nothing for MCE to dispute at that time. There was no waiver by MCE.

45. As for the circulation of the minutes, they were sent to Sinojaya and to Hoyo. I did not agree that they were in the public domain just because Hoyo was not a party to the proceedings at that time. In any event, the absence of any specific restriction on the circulation of the minutes did not make it inequitable for MCE to argue that the minutes were inadmissible as evidence. Even documents which are admittedly subject to the without prejudice qualification may be circulated. The prohibition is not against circulation but against admission in a court, or tribunal, of law as evidence.

46. MCE was not picking and choosing parts of the minutes it would use and parts which it would not.

47. In the circumstances, I was of the view that the shoe was on the other foot. It was inequitable for Sinojaya to now try and rely on the minutes of the 22 February 2002 meeting to bolster its summary judgment application against MCE.

Sgd:

WOO BIH LI

JUDICIAL COMMISSIONER