IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 282

Suit No 226 of 2016
(Summons No 2494 of 2016)

Between

(1) FOREST FIBERS INC

(2) RGA HOLDINGS INTERNATIONAL INC

… *Plaintiffs*

And

(1) K K ASIA ENVIRONMENTAL PTE LTD

(2) LOH CHOON PHING ROBIN

(3) LOH YIN KUAN

… *Defendants*

GROUNDS OF DECISION

[Civil procedure] — [Injunctions]

Forest Fibers Inc and another
v
K K Asia Environmental Pte Ltd and others

[2016] SGHC 282

High Court — Suit No 226 of 2016 (Summons No 2494 of 2016)
Lai Siu Chiu SJ
3 June 2016

27 December 2016

Lai Siu Chiu SJ

Introduction

1 Forest Fibers Inc ("the first plaintiff") is a Canadian company while RGA Holdings International Inc ("the second plaintiff") is a Panamanian company. Both companies are in the business of buying, selling and/or recycling waste material and/or selling recycled products. The common director and shareholder of both plaintiffs is a Canadian national, Colubriale Domenico ("Domenico"), who is also the president of the second plaintiff.

2 KK Asia Environmental Pte Ltd ("the Company") is a Singaporean company which like the plaintiffs is in the business of buying and selling waste material and/or processing waste material into recycled products and/or selling recycled products. Loh Choon Phing Robin ("the second defendant") and Loh Yin Kuan ("the third defendant") are shareholders and directors of the

Company. The second and third defendants will be referred to collectively henceforth as "the defendants". The third defendant is the father of the second defendant. The Company owns a factory in Malaysia while the second and third defendants own the Company's sister company in Malaysia called KK Asia Malaysia situated at Ampang, Selangor. The second defendant together with his wife jointly own the property known as No 248 Carpmael Road, Singapore 429961 ("No 248") while the third defendant owned No 246 Carpmael Road, Singapore 429960 ("No 246") until it was sold on or about 1 April 2016. Henceforth, Nos 246 and 248 will be referred to collectively as "the Properties".

3 The second plaintiff applied in Summons No 2494 of 2016 ("the application") for an injunction against the defendants to restrain them from parting with, selling, charging or otherwise disposing of the Properties. In the alternative (under prayer 2), the second plaintiff applied for any sale proceeds of the Properties (net of sale expenses) to be held by their solicitors as stakeholders pending further orders. The second plaintiff sought a further order that the defendants provide the details of the buyers of No 246, namely, Tan Wee Kiat and Say Li Shan ("the purchasers"), and/or their solicitors.

4 I heard and dismissed the application. As the second plaintiff (with leave granted by the Court of Appeal on 15 September 2016) has appealed against my decision (in Civil Appeal No 140 of 2016), I now set out the reasons.

The facts

5 The genesis of Suit No 226 of 2016 ("the Suit") was a Purchasing Finance Agreement dated 22 April 2015 made between the first plaintiff and

KK Asia Malaysia. There was a further Purchasing Finance Agreement dated 8 May 2015 ("the PFA") made between the Company and the first plaintiff for the "[p]urchase part" and between KK Asia Malaysia and the first plaintiff's associate company, Forest Fibers Hong Kong Ltd ("FFHK"), for the "[s]elling part". Domenico deposed that under the PFA, the first plaintiff agreed to provide the Company with raw waste materials for the latter's processing. The Company would then account to the first plaintiff and/or FFHK for the finished product and/or the Company would deliver the finished product for sale to third party end-buyers on the instructions of the first plaintiff and/or FFHK. Subsequent to the signing of the PFA, the defendants informed Domenico that they were facing cash-flow problems. They requested Domenico to invest in the Company; Domenico agreed.

6 Using the second plaintiff as the investment vehicle, a share sale agreement dated 9 July 2015 ("the Share Sale Agreement") was executed with the defendants as the vendors. The second plaintiff agreed to purchase 50% of the shares in the Company from the defendants for US$200,000. Currently, the second plaintiff is a 50% shareholder in the Company while the defendants each hold 25% shares.

7 The salient clauses of the Share Sale Agreement relevant to the application are the following:

> 3.3 The [second plaintiff] shall have the option to sell the Sale Shares back to the [defendants] for [US$200,000] plus simple interest at 5% per annum in the event that the Company fails to generate net profits (before tax) of US$200,000.00 within a 10 months plus period, i.e. from the date of this Agreement to 31 May 2016. In such an event, the [defendants] shall pay the [US$200,000] plus simple interest at 5% per annum to [the second plaintiff] for the Sale Shares by 31 December 2016.

> 3.4 The [second plaintiff] undertakes to extend a loan of up to US$30,000.00 to the Company to finance its operations upon the request of the [defendants] to be made on or before 1 October 2015.
>
> 3.5 The [defendants] acknowledge that the Company is indebted to the [second plaintiff] for the sum of US$120,000.00 being a previous loan extended by the [second plaintiff] to the Company. The [defendants], jointly and severally, undertake that in the event that the Company fails to fully repay the said sum of US$120,000.00 plus simple interest at 5% per annum to the [second plaintiff] by 30 December 2016, they will pay 50% of the outstanding balance to the [second plaintiff] by 31 December 2016 and the balance 50% of the outstanding balance shall be absorbed and/or waived by the [second plaintiff].
>
> 3.6 The parties acknowledge that there is a rolling account of accounts payable by the Company to [the first plaintiff]. In the event that the Company is unable to pay such outstandings which are overdue, the [defendants] undertake to pay 50% of the said overdue outstandings and the [second plaintiff] undertakes to pay the balance 50% of the said overdue outstandings to [the first plaintiff].
>
> 3.7 In light of the aforesaid undertakings, the [defendants] further undertake not to sell their respective properties at 248 Carpmael Road, Singapore 429961 and 246 Carpmael Road, Singapore 429961.

8 Between 5 August 2015 and 15 September 2015, the first plaintiff claimed it disbursed US$59,488.38 to the Company and/or third parties at the Company's request as loans or advances:

Date	**Amount**	**Receiving Party**	**Purpose**
5 Aug 2015	US$11,461.56	The Company	Payment to subcontractor
13 Aug 2015	US$14,462.00	Genox Recycling Tech Co Ltd	Payment for equipment repair and spare parts

2 Sep 2015	US$19,913.83	Forte International (M) Sdn Bhd	Payment for the plaintiffs' office expenses, employees' wages, equipment and rental
8 Sep 2015	US$3,950.99	Luis Pernet Rojas	Payment for the plaintiffs' office expenses, equipment and employees' wages
15 Sep 2015	US$9,700.00	Teguh Jaya Polymer Sdn Bhd	Payment for handling and other charges incurred by the plaintiffs

9 Between 6 May 2015 and 15 July 2015, the second plaintiff claimed that at the request of the Company and/or the defendants, it disbursed US$149,578.05 to the Company as loans:

Date	**Amounts**
6 May 2015	US$37,487.00
7 May 2015	US$21,367.00
22 May 2015	US$60,724.05
15 July 2015	US$30,000.00

10 The plaintiffs alleged that it was an express or implied term of the various agreements between the parties that the various sums advanced or lent

by the plaintiffs were repayable on demand. On 19 January 2016, the first plaintiff demanded repayment of US$59,488.38 from the Company by 26 January 2016. The Company failed to repay the said sum or any amount by 26 January 2016.

11 Further, the plaintiffs alleged that there was a breach of cl 3.5 of the Share Sale Agreement in that the Company and the defendants failed to repay the second plaintiff the advances/loans totalling US$149,578.05.

12 The plaintiffs then discovered that in breach of cl 3.7 of the Share Sale Agreement, the third defendant had sold No 246 to the purchasers and disposed of the sale proceeds.

13 Separately, the first plaintiff had sued the Company in Suit No 1159 of 2015 ("the 2015 Suit") for its supply of waste materials totalling US$188,038.89 to the Company and for US$75,000 it had paid to the Company for waste materials which the Company failed to deliver.

14 On 24 December 2015, the first plaintiff obtained interlocutory judgment in default of appearance against the Company in the 2015 Suit ("the default judgment") under O 13 r 2 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the Rules of Court"). The Company applied to set aside the default judgment via Summons No 1522 of 2016. On 29 June 2016, with the consent of the first plaintiff, the default judgment was set aside and leave was granted to the Company to enter an appearance to the Writ of Summons.

15 Unbeknownst to the second plaintiff at the material time, the Company had on or about 26 August 2015 informed two of its Malaysian subcontractors, namely, Ever Classic Plastic Industries Sdn Bhd and Teguh Jaya Polymer Sdn

Bhd, that it would be closing its factory in Malaysia temporarily due to shortage of materials. To-date the factory remains closed.

16 On 1 September 2015, the third defendant informed the second plaintiff by email that he would no longer be putting money into the Company and would also be closing its Singapore office. The third defendant requested the second plaintiff to pay the monthly instalments owed by the Company to Standard Chartered Bank ("SCB") for the banking facilities provided by SCB. The sums due to SCB formed part of the Company's monthly expenses. The second plaintiff did not accede to the third defendant's request.

17 Domenico realised that the defendants were abandoning the Company due to its dire financial situation. Hence, in anticipation of the second plaintiff's clams against the Company/the defendants and mindful that the latter had other creditors, Domenico instructed his lawyers to, and they did, lodge caveats on the Properties ("the Caveats") on behalf of the second plaintiff.

18 On 24 February 2016, the Singapore Land Authority ("the SLA") notified the second plaintiff that the registered proprietors of Nos 246 and 248 (namely, the third and second defendants respectively) had applied to cancel the Caveats.

19 The action of the defendants prompted the plaintiffs to file the Suit on 9 March 2016. In the statement of claim, the plaintiffs claimed repayment of loans and advances made to the Company of US$59,488.38 and US$149,578.05. As against the defendants, the second plaintiff's claims were for:

(a) the sums of US$29,744.19 and US$74,789.02 being half of the loans and advances of US$59,488.38 and US$149,578.05 respectively made to the Company, pursuant to cl 3.6 of the Share Sale Agreement;

(b) in the alternative, specific performance of cl 3.6 of the Share Sale Agreement;

(c) a declaration of the validity of the charges on the Properties created under cl 3.7 of the Share Sale Agreement.

20 On 16 March 2016, the second plaintiff filed Summons No 1255 of 2016 ("Summons 1255") wherein it applied for the following orders:

(a) until the final determination of the action or until further order, the Caveats on the Properties be maintained;

(b) in the alternative, until the final determination of the action or until further order, the defendants be restrained from cancelling or seeking to cancel the Caveats; and

(c) in the further alternative, until the final determination of the action or until further order, the defendants' application in [18] to cancel the Caveats be suspended.

21 Summons 1255 was heard by Aedit Abdullah JC on 13 April 2016 and was dismissed. In essence, Abdullah JC held that cl 3.7 upon which the second plaintiff relied to maintain the Caveats did not amount to any caveatable interest in land.

22 On 23 May 2016, the second plaintiff filed the application. In the supporting affidavit filed by Domenico, he deposed that the Properties were

the only known assets of the defendants and if they were disposed of, the second plaintiff ran the risk that any judgment it obtained "would be toothless and devoid of substance" despite cl 3.7 of the Share Sale Agreement which undertaking the defendants had breached in any case. Domenico requested the court to preserve the status quo pending the determination of the Suit.

The second plaintiff's submissions

23 The second plaintiff submitted that the issue in the application differed from that in Summons 1255. Here, the second plaintiff was only requesting the court to uphold a negative covenant entered into by the defendants pending trial of the Suit. Their counsel pointed out that in selling No 246, the defendants had clearly breached the negative covenant. They should be compelled to keep their contractual promise.

24 As the third defendant had already sold No 246, the second plaintiff orally applied to court to amend the application to add a prayer which would give "practical effect" to prayer 2 as set out in [3] earlier (which amendment the court granted). The second plaintiff argued it was not asking for a reversal of the sale of No 246 but only that the defendants be prevented from enjoying the fruits of their breach of cl 3.7 of the Share Sale Agreement.

25 As there was a clear breach of a negative covenant, the second plaintiff submitted that Megarry J's decision in *Hampstead & Suburban Properties Ltd v Diomedous* [1969] Ch 248 ("*Hampstead's* case") was authority for the proposition that it was unnecessary to apply the "balance of convenience" test for injunctions propounded in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. Megarry J said in *Hampstead's* case (at 259):

> ... Where there is a plain and uncontested breach of a clear covenant not to do a particular thing, and the covenantor

> promptly begins to do what he has promised not to do, then in the absence of special circumstances it seems to me that the sooner he is compelled to keep his promise the better. … I see no reason for allowing a covenantor who stands in clear breach of an express prohibition to have a holiday from the enforcement of his obligations until the trial. …

26 Megarry J's decision was followed by Kan Ting Chiu J in *Rajaram v Ganesh (trading as Golden Harvest Trading Corp) and others* [1994] 3 SLR(R) 79 ("*Rajaram v Ganesh*") (at [26]-[27]). Kan J (at [28]) also quoted the following passage from Lord Cairns LC's judgment in *Richard Wheeler Doherty v James Clagston Allman and W C Dowden* (1878) 3 App Cas 709 ("*Doherty v Allman*") (at 720) which Megarry J had cited at in *Hampstead's* case (at 257):

> If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or of injury—it is the specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves.

27 The second plaintiff added that the injunction it sought was easily reversible, inexpensive to comply with and would not pre-empt the trial. The second plaintiff had conducted litigation searches on the defendants and ascertained therefrom that three creditors had commenced proceedings against the Company, one of which was SCB for banking facilities granted to the Company.

28 The second plaintiff submitted that damages would not be an adequate remedy as the defendants are in no position to pay any damages. Their primary

source of income was from their remuneration as directors and 25% shareholdings in the Company, both of which sources had ceased with the closure of the Company's factory and its stoppage of operations.

The defendants' submissions

29 The Company and the defendants were unrepresented at the hearing of the application, which was of considerable concern to the court. In fact, the court repeatedly advised the defendants to engage counsel for their defence as well as the Company's defence of the Suit (for which there was a pending application under O 14 of the Rules of Court by the plaintiffs), only to be told that the defendants lacked the financial resources to do so. The court was informed that various counsel the defendants had approached had quoted fees far beyond their means to pay.

30 Not surprisingly, the joint affidavit filed by the defendants on 30 May 2016 ("the defendants' affidavit") to oppose the application was far from satisfactory and hardly in compliance with O 41 of the Rules of Court.

31 In essence, the defendants' affidavit pointed to the fact that Summons 1255, which was an attempt to maintain the Caveats, had already been dismissed by Abdullah JC. The defendants' affidavit also seemed to have stated (not entirely clearly) that even prior to the events that gave rise to Summons 1255, there was an earlier (unsuccessful) attempt by the second plaintiff to lodge caveats against the Properties. The defendants also contended that the second plaintiff had no right to ask for information on the purchasers of No 246.

32 The defendants argued that the right given to the second plaintiff under cl 3.7 of the Share Sale Agreement was not equivalent to providing the latter

with the right to attach any outstanding amounts over the Properties. The defendants cited the Australian case of *Murphy v Wright* (1992) 5 BPR 11,734 ("*Murphy v Wright*") and the following passage from the judgment of Sheller JA of the Supreme Court of New South Wales where he said (at 11,742):

> … [T]he language of [the provision] is not the language of charge by the guarantors of their assets. It does not create a charge which is attached to assets. Nor do the guarantors promise to create a charge attached to assets. The appropriate language of charge by the guarantors is absent. All that is said is that the lender shall be entitled to attach debt due to any of the assets of the guarantor or guarantors. It is true that the agreement provides that in the event of default the lender may register a caveat against any property registered in the name of all or any of the guarantors until the moneys secured are repaid. It is argued on behalf of the appellants that from this flows an implication that the clause as a whole should be read as an agreement by the guarantors to charge such assets as the lender may identify in the event of default by the borrowers with payment of moneys due under the security. But this is to imply the grant by the guarantors of an interest in the nature of a charge over assets where the language of the clause provides for something else. The guarantors do not by cl 12 expressly charge their assets nor, in my opinion, can such a charge be implied from the terms of the clause or of the deed of guarantee. …

I will revisit *Murphy v Wright* at a later stage in these grounds.

33 The defendants contended that despite what was said in cl 3.5 of the Share Sale Agreement (see [7]), the Company did not receive the sum of US$120,000 as a loan from the second plaintiff. That sum was to reimburse the Company for costs and expenses incurred on the first plaintiff's behalf. The defendants listed out at para 18 of the defendants' affidavit those costs and expenses.

34 Moreover, the Share Sale Agreement was linked to the PFA (although I note that the defendants had only exhibited the 8 May 2015 amendment of the PFA) under which the first plaintiff had to but did not provide to the

Company, for 3 years, 1,500 tons of raw materials every month to the following:

(a) South America – 500 tons;

(b) Europe – 400 tons;

(c) United States – 300 tons; and

(d) the second defendant – 300 tons.

Further, the first plaintiff ceased supplying raw materials to the Company for processing soon after the Share Sale Agreement was signed. Without the processing work, the Company had no income whereby it could fulfil cl 3.3 and repay the second plaintiff's loan of US$200,000.

35 The defendants contended that the plaintiffs' breaches rendered the PFA and the Share Sale Agreement null and void.

36 The defendants disclosed that No 246 had been mortgaged to SCB to secure facilities of $1.3m extended to the Company. In this regard, I should point out that Domenico's supporting affidavit had exhibited a letter to the Company dated 25 January 2016 from lawyers Rajah & Tann demanding repayment of US$234,312.35 and S$822,936.17 to SCB within 14 days. The SCB facility was also secured by guarantees from each of the defendants.

37 At the hearing of the application, the third defendant informed the court that the proceeds of sale were insufficient to pay the Company's debt after the outstanding sums due to SCB were repaid together with the Company's other debts. The third defendant said there was no surplus left as he repaid loans totalling $330,000 taken from two relatives by marriage. The Company still owed $174,394.61 to its creditors.

38 As the rest of the defendants' affidavit largely related to their/the Company's allegations concerning the plaintiffs' alleged breaches of the agreements mentioned earlier, it serves no purpose to repeat them. Those complaints should more appropriately be dealt with in the counterclaim of the defendants and the Company against the plaintiffs. The court was informed that the Company's/the defendants' claim was for US$508,259.79 against the plaintiffs' claim of US$266,038.89 in the Suit.

The decision

39 Before I set out the grounds for my dismissal of the application, it would be useful to first review the cases cited earlier.

40 *Hampstead's* case concerned a licence granted by a landlord over leasehold premises ("the premises") to the defendant for use as a restaurant. The defendant covenanted *inter alia* not to permit music or musical instruments to be played within the premises in such a manner as to be audible to the extent of "causing a nuisance or annoyance" to neighbours including occupiers of the landlord's flats above the premises and, if any complaints were received by the landlord from the occupiers, forthwith to discontinue the playing at the landlord's request until such time as "effective soundproofing" was completed. The defendant assigned the lease and loud music was played resulting in complaints to the landlord from occupiers of the flats above the premises.

41 The landlord issued a writ and applied for an interlocutory injunctions to restrain the defendant from playing music and musical instruments so as to cause nuisance or annoyance to neighbours including the occupiers of the landlord's flats. The landlord adduced evidence that that occupiers of the flats

had been unable to sleep because of the music but the defendant adduced no evidence.

42 On the facts of the case, it was not surprising that Megarry J granted the interlocutory injunction and made the comments set out earlier at [25]. It is to be noted that *Hampstead's* case specifically dealt with negative covenants that were terms of a lease granted to the defendant tenant.

43 Next, I turn to *Rajaram v Ganesh.* The headnotes read as follows:

> The plaintiff requested the second defendant, Indian Bank, to issue a bank guarantee in favour of the first defendant, Ganesh. Under the guarantee, Indian Bank remitted US$2m to the third defendant bank, Oriental Bank of Commerce ("OBC") for Ganesh's benefit. The plaintiff alleged that he had agreed to arrange for the issuance of the bank guarantee on condition that Ganesh would not use it until he had arranged for US$2m to be paid to the plaintiff. However, Ganesh had breached this agreement by failing to pay the US$2m. The plaintiff further alleged that OBC knew of the agreement. He commenced this action, seeking a declaration that the guarantee had expired and was null and void, and for orders restraining the defendants from taking any action on the guarantee. He obtained *ex parte* an interim injunction restraining OBC from invoking, encashing or calling on the guarantee. OBC in turn applied to discharge the interim injunction. The plaintiff obtained summary judgment against Ganesh during the course of the hearing of OBC's application.

44 Kan J *inter alia* held:

(a) The balance of convenience test was not intended to be applied in every case. It did not apply where there was a clear breach or where there was no dispute on the facts.

(b) There were disputed facts in the case. Although OBC denied the allegations that the plaintiff made against it, the allegations against Ganesh were not disputed. Knowledge of Ganesh's breach was

sufficient against OBC, without it being involved in the underlying contract or having made any fraudulent misrepresentations.

(c) There was no cause in the circumstances to apply the balance of convenience test. There was no reason for not restraining OBC from paying Ganesh. OBC's application to discharge the injunction was therefore dismissed.

45 The above holdings (a) and (c) from *Rajaram v Ganesh* were what counsel for the second plaintiff relied on. Again as with *Hampstead's* case, Kan J's decision was specific to the facts of the case – Ganesh and OBC had clearly breached the terms of the guarantee issued by Rajaram and Rajaram had obtained summary judgment against Ganesh by the time OBC applied to discharge the interim injunction.

46 Kan J like Megarry J in *Hampstead's* case had relied on the passage from Lord Cairn LC's judgment in the House of Lords in *Doherty v Allman* set out earlier at [26]. Lord Cairns LC's words were uttered in the context of a case where what was in issue was a perpetual injunction and not an interlocutory injunction. Like *Hampstead's* case, the dispute concerned covenants on land as can be seen from its headnotes:

> Two leases were granted of pieces of land with some buildings on them, one granted in 1798 for 999 years, the other granted in 1824 for 988 years. There was no reservation of a power of re-entry for breach of covenant, nor was there any negative covenant obliging the lessee not to change the use of the premises. There was a power of re-entry, for rent in arrear and no sufficient distress on the premises. In each lease there was a covenant by the lessee that he, his executors, &c., will "during the term hereby granted preserve, uphold, support, maintain, and keep the said demised premises, and all improvements made and to be made thereon, in good and sufficient order, repair, and condition; and at the end or sooner determination of this demise, shall and will so leave

> and deliver up the same unto," the lessor, his heirs, &c. The premises had been used as corn stores for some years; and afterwards as artillery barracks, and dwellings for married soldiers. They had fallen into disrepair: it became necessary to repair them; the lessee thought it would be beneficial to convert the store buildings into dwelling-houses, which would much increase their value, and was proceeding to convert them accordingly, when the lessor filed a bill to restrain him, alleging waste:—
>
> Held, that this was not the case of enforcing a negative covenant where the words of contract were clear and indisputable; that the waste alleged was meliorating waste, and that, under the circumstances, the Court below had, in the due exercise of its discretion in such matters, properly refused to interfere by injunction.

47 The last case for consideration is *Murphy v Wright*. The facts were as follows:

> The respondent guaranteed a loan made by the appellant to the borrower. The deed of guarantee contained a term [cl 12] that on default by the borrower, the lender would be entitled to attach the debt to any real or personal property of the guarantor and to register a caveat against any property of which the guarantor was a registered proprietor. The borrower defaulted, and the lender lodged a caveat over the guarantor's Torrens title land.

48 Clause 12 of the guarantee in the case states:

> In the event of default by the Borrowers in payment of moneys due under the Security Documents or in performance or observance of any covenants therein then the Lender shall in addition to the rights set out herein or in the Security Documents be entitled to attach the debt due to any of the assets of the Guarantor or Guarantors whether such assets be real or personal and further the parties hereto agree that in the event of such default the Lender may register a caveat against any property registered in the name of any or all of the Guarantors until the Moneys Secured are repaid.

49 The majority decision in *Murphy v Wright* (Priestley and Handley JJA) held that cl 12 gave the lender an option to create an equitable charge and, in respect of the Torrens title land, the option was valid and was exercisable by

lodging a caveat. As stated at [32], the defendants had relied on a passage from the dissenting judgment of Shellar JA to say the language of cl 3.7 of the Share Sale Agreement was not the language of a charge.

50 I should point out that *Murphy v Wright* did not find favour with our Court of Appeal in *The Asiatic Enterprises (Pte) Ltd v United Overseas Bank Ltd* [1999] 3 SLR(R) 976 ("*The Asiatic Enterprises*"). There, the appellate court at [13] cited the passage from Sheller JA's dissenting judgment that the defendants relied on. The Court of Appeal held that cl 10 in the respondent bank's letter of offer of banking facilities to the appellant borrower did not provide a mechanism for creating or imposing a charge on immoveable property belonging to the appellant. The relevant extract from cl 10 reads:

> EVENTS OF DEFAULT
>
> On the occurrence of any of the following events of default (i) the Bank [the respondent] shall cease to be under any further commitment to you [the appellant] and all outstandings under the entire credit line ('the Outstandings') shall become due and payable immediately; (ii) the Bank shall, in addition to the rights set out herein, be entitled (as equitable chargee) to attach the Outstandings to any property of yours (whether real or personal) and to lodge a caveat against any real property that may now or hereafter be registered in your name whether singly or jointly …

51 This court has taken pains to set out the facts of the cases cited by the parties to show that unlike *Hampstead's* case and *Doherty v Allman*, the case at hand has nothing to do with negative or any covenants concerning immoveable property or leases. The Court of Appeal in *The Asiatic Enterprises* had also chosen not to follow *Murphy v Wright.* What the second plaintiff was attempting to do (wrongly) was to elevate a personal undertaking given by the defendants into a negative covenant pertaining to land.

52 The second plaintiff had attempted (unsuccessfully) to convert the defendants' personal undertakings to a caveatable interest in Summons 1255. In this regard, the following extract from [25] of *The Asiatic Enterprises* is illuminating:

> We have some difficulty in applying the decision of the majority in *Murphy* to the case at hand. We do not think that cl 10 gives to the respondent an option in the sense as an option is understood in a sale and purchase or lease of property or in the sense suggested by Handley JA. Construing cl 10 in plain and simple terms, we think that all that cl 10 gives to the respondent is a right or entitlement, upon default of the appellant, to do two things. … However, the mechanism for creating or imposing such a charge has not been specifically provided for in that clause. That being so, the respondent can only have available to it such mechanism as the law provides. … As regards movable property not in its possession or immovable property, whether such immovable property be "Torrens title land" or not, we do not see how the respondent could, by some unilateral action on its part, effect or impose a charge on it, or in the words of cl 10, "attach" the outstanding amount to the property as security.

53 It would also be useful at this juncture to look at s 115(1) of the Land Titles Act (Cap 157, 2004 Rev Ed) ("the LTA"); it states:

> **Caveats may be lodged**
>
> **115.**—(1) Any person claiming an interest in land (whether or not the land has been brought under the provisions of this Act), or any person otherwise authorised by this Act or any other written law to do so, may lodge with the Registrar a caveat in the approved form which shall include the following particulars:
>
> (*a*) the name of the caveator and the caveatee;
>
> (*b*) an address in Singapore at which notices may be served on the caveator and the caveatee;
>
> (*c*) nature of the interest claimed by the caveator;
>
> (*d*) the grounds in support of the claim;
>
> …

54 It is to be noted that s 115(1) of the LTA specifically refers to "an interest in land". What interest in land could the second plaintiff claim against the Properties as an unsecured creditor of the Company and/or the defendants by reason of the defendants' breach of personal undertakings? Moreover, its claim in the Suit was disputed and met by a larger counterclaim. It was little wonder that Abdullah JC dismissed Summons 1255.

55 The second plaintiff was aware from litigation searches it had conducted that the Company was indebted to SCB for substantial sums that were guaranteed by the defendants. If the third defendant had not sold No 246 as he did in order to meet SCB's demand by a certain deadline for repayment of outstanding loans owed by the Company, there was every likelihood that SCB could have and would have exercised its powers as mortgagees to foreclose on and sell No 246. In that scenario, the second plaintiff as a creditor would have had no priority of payment as its claim would rank *pari passu* with those of other unsecured/trade creditors.

56 At this stage of the proceedings, the court cannot determine that the defendants had deliberately breached their undertakings in cl 3.7 or that they were forced by circumstances to do so in order to stave off legal proceedings from SCB. It cannot be said that the defendants had deliberately breached a negative covenant merely by a breach of the undertaking in cl 3.7.

57 It bears noting that an injunction is an equitable relief that is not "standalone" but must attach to a recognisable claim at law. There was no basis for the second plaintiff as an ordinary trade creditor of the Company to restrain the defendants from parting with, selling, charging or otherwise disposing of the Properties after the Caveats were expunged from the registry of the SLA following the dismissal of Summons 1255. It had no "interest" in

the Properties to allow it to lodge a caveat under s 115(1) of the LTA. It only had a claim against the defendants for breach of their undertakings in cl 3.7 of the Share Sale Agreement.

58 Having failed in Summons 1255 to maintain the Caveats it had filed, it was clear to this court that the second plaintiff was seeking via the "backdoor" and by an interim injunction what was denied by Abdullah JC. If the second plaintiff had no basis to lodge the Caveats, it most certainly had no basis to apply for an injunction.

59 Consequently, the court disagreed with the contention of the second plaintiff that the prayer for an injunction was different from that in Summons 1255 and dismissed the application.

Lai Siu Chiu
Senior Judge

K Muralitherapany and Ng Lip Kai (Joseph Tan Jude Benny LLP)
for the second plaintiff;
the second and third defendants in person.