Wiseway Global Co Ltd *v* Qian Feng Group Ltd
[2015] SGHC 85

Case Number : Suit No 690 of 2014 (Registrar's Appeals Nos 41 and 49 of 2015)

Decision Date : 31 March 2015

Tribunal/Court : High Court

Coram : George Wei JC

Counsel Name(s) : Chen Xinping and Rich Seet (WongPartnership LLP) for the plaintiff; Ng Lip Chih and Jennifer Sia (NLC Law Asia LLC) for the defendant.

Parties : Wiseway Global Co Ltd — Qian Feng Group Ltd

Civil Procedure – Summary Judgment – Contract – Illegality – Estoppel

31 March 2015 Judgment reserved.

George Wei JC:

1 The proceedings before me arise from Wiseway Global Co. Ltd's ("the Plaintiff") application for summary judgment under Order 14 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the ROC") in Summons No 4487 of 2014 ("SUM 4487/2014"). On 30 January 2015, the learned assistant registrar ("the AR") granted Qian Feng Group Limited ("the Defendant") conditional leave to defend. The Defendant was ordered to put up security in the sum of HKD 29,789,087 by 4.00pm on 2 March 2015, failing which judgment would be given to the Plaintiff with interest and costs.

2 Both the Plaintiff and the Defendant filed an appeal against the AR's decision. In Registrar's Appeal No 41 of 2015, the Defendant appeals against the AR's decision to grant it *conditional* leave to defend, arguing that unconditional leave to defend should be granted instead. In Registrar's Appeal No 49 of 2015, the Plaintiff appeals against the AR's decision, arguing that the Defendant ought not to have been granted leave to defend.

3 Having heard the parties on 2 March 2015, I reserved judgment.

Brief factual background

4 The Plaintiff is a company incorporated in Hong Kong. The Defendant is a company incorporated in the British Virgin Islands. It is common ground that the parties signed a "Financing Agreement" dated 30 December 2012 ("the Financing Agreement"). The Financing Agreement was in Chinese and an English translation was placed before the court. The Plaintiff's case is that the Agreement constituted a loan extended by the Plaintiff to the Defendant for the purpose of business development; the Defence's position is that the Agreement was never intended to be an enforceable loan or, in the alternative, that it is tainted by illegality and therefore unenforceable.

5 I now set out a summary of the salient clauses in the Financing Agreement:

(a) The preamble to the Financing Agreement states that the Defendant invites financing from the Plaintiff for the "purposes of business development". Clause 1.2 states that the "purpose of the financing fund is for business acquisition and restructuring only."

(b) Clause 1.1 states that the Plaintiff will provide RMB$20m to the Defendant at an annual interest rate of 15% and that, on the execution of the agreement (*ie*, after it had been signed), all the financing capital will be deposited into the bank account designated for that purpose by the Defendant.

(c) Clause 1.3 provides that the maturity period of the loan is 12 months.

(d) Clause 2 sets out the details of a financing guarantee. It provides that the Defendant shall pledge its shares in "ASIAN FASHION HOLDINGS LIMITED" ("AFH") (the Defendant held 244,409,913 shares in AFH, which amounts to 44.54% of the total) to the Plaintiff as security for the loan. AFH is a company listed on the Singapore Stock Exchange.

(e) Clause 3.1 provides that the Defendant shall reimburse RMB$23m plus interest to the Plaintiff on the date of the expiration of the loan.

(f) Clause 7.1 states that Singapore law is the applicable law for any disputes arising out of agreement.

(g) Clause 7.2 provides that parties shall attempt to resolve the dispute on friendly terms. Failing which, on the 30th day from the date of dispute, any party is entitled to submit the matter to arbitration.

(h) Clause 8.1 provides that the exhibits to the agreement shall be regarded as an inseparable part of the agreement, and would supersede any other prior agreements or collateral agreements (whether written, oral, express, or implied), insofar as they pertain to the same subject matter.

(i) Clause 8.2 provides that "[a]ny modifications or changes to the agreement shall be made into amendment in writing and with the consent of both parties, indicated by their signatures" and further, that "a clear statement shall be made in the amendment to clarify that the amendment is based on the agreement."

6 I should add that personal guarantees for the return of the loan extended under the Financing Agreement were provided by two individuals, Liu Yanlong ("Liu"), and Wang Hui ("Wang"). These guarantees were provided in writing (in Chinese) and are both dated 31 December 2012. In the first "Letter of Undertaking", Liu and "Chang Guan Lou (Beijing) Club Management Co. Ltd.", a company owned by Liu, undertook to repay RMB$23m to the Plaintiff on the maturity date of the loan, and agreed to have "an unlimited joint liability with the [Defendant] in repaying the borrowed sum to the [Plaintiff]" (quoted from the English translation of the guarantees). In the second, Wang agreed to the same. The letters of undertaking do not contain any choice of law clauses.

7 It is undisputed that on 23 January 2013, HKD 24,618,663 was transferred by the Plaintiff to the Defendant. The plaintiff also placed the following two documents into evidence via affidavit.

8 The first is a document titled "Loan Supplementary to Financing Agreement and Remittance Instructions" dated 30 January 2013 ("Fund Transfer Confirmation"). The Fund Transfer Confirmation appears to have been signed by both the Plaintiff and the Defendant. In the Fund Transfer Confirmation, the following points appear to have been agreed.

(a) The parties agreed to convert the currency of the financing capital from RMB to HKD.

(b) The Defendant confirmed that it received HKD 24,618,663 from the Plaintiff pursuant to

the Financing Agreement; this money was transferred from the Plaintiff's HKSB account in Hong Kong to the Defendant's director, Lin Dao Qin's ("Lin"), Bank of China (Hong Kong) account.

(c) The Defendant agreed to make repayment of the principal sum (together with 15% annual interest) in HKD to the Plaintiff. Therefore, at the end of one year, HKD 28,311,462 shall be due to the Plaintiff from the Defendant.

9 The second is an agreement which appears to have been signed and executed by the parties on 1 March 2014 ("Supplemental Agreement"). The Supplemental Agreement amends the terms of the Financing Agreement in the following salient ways:

(a) First, cl 2 of the Financing Agreement is amended in that the original security (of 244,409,913 shares in AFH) was replaced with security of 58,800,490 shares in AFH held by Asia Brand Capital Pte Ltd.

(b) Second, cl 3.1 of the Financing Agreement is amended in that the deadline for the repayment of the loan monies is extended to 31 May 2014, on which date HKD 29,789,087 would fall due to be paid by the Defendant to the Plaintiff.

(c) Third, it was agreed that parties "irrevocably submit" any disputes to the non-exclusive jurisdiction of the courts of Singapore.

10 On the Supplemental Agreement, I note that Lin's signature does not appear at the position where the Defendant is supposed to have signed the document. Instead, it appears at the "Witnessed by" portion of the document. For this reason, the court sent a letter to both parties, asking for an explanation. In response, the Plaintiff submitted that the document was still validly signed because Lin's signature appears at the "Witnessed by" portion of the document. The Defendant simply stated that Lin does not *recall* signing the Supplemental Agreement and did not, even after the court's request for clarification, deny that the signature on the Supplemental Agreement is Lin's signature. Furthermore, in his affidavits, the Defendant's director, Lin, only deposes that he *does not recall* signing the Fund Transfer Confirmation or the Supplemental Agreement, [note: 1] but does not directly deny the validity of those documents or allege any fraud on the part of the Plaintiff in adducing these documents.

11 In light of the foregoing, I shall proceed on the basis that the Defendant did sign the Supplemental Agreement through Lin, and is accordingly bound by its terms.

12 To date, it is undisputed that the sum of HKD 29,789,087 has not been paid by the Defendant to the Plaintiff. On 6 June 2014, the Plaintiff's lawyers sent a letter of demand to the Defendant, demanding repayment of HKD 29,789,087 pursuant to the Financing Agreement, as amended by the Supplemental Agreement. Failing to get any response from the Defendant, the Plaintiff commenced Suit No 690 of 2014 on 26 June 2014. The Plaintiff then filed for summary judgment on 10 September 2014 (SUM 4487/2014).

Parties' submissions

13 The Plaintiff's *prima facie* case for judgment is, I believe, self-evident from my description of the facts and the documents above. It simply seeks the payment of a contractual debt. The crux of the dispute between the parties is whether the defences raised by the Defendant raise any triable issues that cast any reasonable doubt on the Plaintiff's claim to the debt.

14 I start by explaining the Defendant's position.

15 The Defendant claims that the Financing Agreement is not a straightforward loan agreement; instead, it had been entered into by the parties to disguise and further an illegal arrangement designed by the Plaintiff. The Defendant calls this the "Refund Arrangement". Under the Refund Arrangement, the parties agreed that monies would be transferred from the Plaintiff's Hong Kong bank account to the Defendant's Hong Kong bank account pursuant to the apparent loan agreement. The Defendant would then transfer the said monies via its Chinese bank accounts to the Plaintiff's nominees in China, who also hold Chinese bank accounts. The purpose of the Refund Arrangement was to circumvent the Chinese Government's foreign exchange controls. In return for its assistance, the Plaintiff agreed to pay the Defendant a fee, and also represented to the Defendant that it would not enforce the loan agreement against the Defendant.

16 In light of the foregoing, the Defendant raises two defences to the Plaintiff's claim:

(a) The first is one I shall term the "illegality defence". In essence, the Defendant argues that the Refund Arrangement is illegal because it was intended to, and did indeed, circumvent Chinese exchange control legislation. The said legislation mandates that all transfers from Hong Kong bank accounts into Chinese accounts be registered and screened by the Chinese authorities. The transfers effected by the Plaintiff from its Hong Kong account to its nominees in China – through the Defendant – pursuant to the Refund Arrangement (of which the Financing Agreement is an integral part) were not registered or screened as required. Thus, the Financing Agreement in unenforceable at common law because it was entered into for the furtherance of an illegal purpose.

(b) The second is one I shall term the "estoppel defence". The Defendant argues that the Plaintiff had represented to the Defendant that it would not enforce the Financing Agreement and that, in reliance on those representations, the Defendant agreed to enter into the Financing Agreement to its detriment. Therefore, the Defendant concludes, the Plaintiff is estopped from reneging on its representations by enforcing the Financing Agreement.

17 The Defendant has not been able to provide *any independent or supporting evidence* of the existence of the Refund Arrangement. However, it submits that there are features of the alleged Financing Agreement and the general circumstances which suggest that there is more to the Financing Agreement than the documents reveal. The Defendant raises the following points.

(a) First, the Plaintiff has failed to explain why a loan would be given to the Defendant for "business development" given that the Defendant is a British Virgin Island ("BVI") company with no business activities.

(b) Second, the Plaintiff has failed to explain why Liu Yanlong ("Liu"), a person associated with the Plaintiff and who has filed an affidavit in support of the Plaintiff's present suit, gave a personal guarantee for the repayment of the Defendant's loan.

(c) Third, the Plaintiff has failed to explain why it is not pursuing a remedy against the guarantors.

(d) Fourth, the Defendant argues that there is evidence of transfers totalling RMB$4m made by the Defendant to two individuals – Liu and one Mr Zhang Miao ("Zhang") – in February 2013. The Defendant claims that these individuals are the Plaintiff's nominees and that the transfers were made on the Plaintiff's instructions, pursuant to the Refund Arrangement.

18 The Plaintiff denies that this Refund Arrangement even exists. It submits that the existence of the whole Refund Arrangement has been called into serious doubt given the objective evidence before the court. In particular, the Plaintiff submits that the Refund Arrangement is inconsistent with contemporaneous documents (namely, the Fund Transfer Confirmation and the Supplemental Agreement), and does not make commercial sense. Critically, the Plaintiff submits that, *even assuming the Defendant's pleaded fact*s, its two defences cannot succeed at law. I shall discuss the Plaintiff's submissions in more detail as we go along.

Principles governing summary judgment

19 The general principles applicable in an O 14 application are well-established. Pursuant to O 14 r 3(1), the court has to decide whether there "is an issue or question in dispute which ought to be tried", or, absenting that, whether there "ought for some other reason to be a trial of that claim or part." After a plaintiff has shown that it has a *prima facie* case for judgment, a defendant may resist an O 14 application by showing that there is an issue or question in dispute which ought to be tried, in other words, by showing that there are reasonable grounds, or a fair probability, of a *bona fide* defence to the claim on the merits: *Habibullah Mohamed Yousuff v. Indian Bank* [1999] 2 SLR(R) 880 at [21].

20 As mentioned above, the key issue in this case is whether the Defendant has crossed the low threshold of raising a triable issue. It is well established that, where there are conflicts as to fact, summary judgment is ordinarily not granted: *Singapore Civil Procedure 2015* (G P Selvam gen ed) (Sweet & Maxwell, 2014) ("*Singapore Civil Procedure 2015*") at [14/4/5]. However, this does not mean that a defendant is immediately entitled to unconditional leave to defend as long as it disputes the facts claimed by the plaintiff in its affidavit. The following passage on the appropriateness of granting summary judgment where there is conflicting affidavit evidence from *Singapore Civil Procedure 2015* at [14/4/2], which cites *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400, is instructive:

> In the event of conflicting affidavit evidence, it is normally not appropriate for a judge to attempt to resolve such conflicts on affidavit: O.14 proceedings are not decided by weighing two affidavits… However, this does not mean that the judge is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however **equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be**. Instead, the judge will need to exercise his discretion so as to determine, in the first instance, whether the statements contained in the affidavits have **sufficient *prima facie* plausibility to merit further investigation** as to their truth… [emphasis added in bold]

Legal issues

21 In the present case, we have conflicting affidavit evidence. Moreover, the Plaintiff objects to the defences on the ground that they are not even *legally sustainable*, even assuming the facts pleaded by the Defendant.

22 The following issues therefore arise for determination:

> (a) Do the Defendant's pleaded facts relating to the Refund Arrangement have sufficient *prima facie* plausibility to merit further investigation? Or are they so equivocal, lacking in precision, inconsistent with undisputed contemporary documents, or inherently improbable such that further investigation is not merited?

(b) If the abovementioned factual threshold is crossed, on the Defendant's pleaded facts, is there a fair probability that the illegality and the estoppel defences can be made out *at law*?

(c) Leaving aside the merits of the defence, is there some other reason for a trial?

Issue 1: the plausibility of the Defendant's pleaded facts

23 As mentioned above at [17], the Defendant has been unable to offer *any independent or supporting* evidence of the Refund Arrangement. It relies mainly on the Plaintiff's omission to explain certain features of the facts as a basis for its conclusion that the court should infer there is something suspicious about the Financing Agreement.

24 The Plaintiff submits that the Defendant's defences are supported by nothing more than bare assertions. The Plaintiff avers that the RMB$4m transfers to Liu and Zhang have nothing to do with the Financing Agreement. In that connection, the Plaintiff denies knowing Zhang and points out that Liu has submitted an affidavit on the Plaintiff's behalf, denying that the "remittances" to him are related to the Financing Agreement.

25 The Plaintiff further submits that if the Refund Arrangement did exist, and if neither party intended that the Defendant should repay the loan monies to the Plaintiff, it would make no sense for either party to execute the Fund Transfer Confirmation and the Supplemental Agreement which, *inter alia*, confirm the Defendant's liability to repay and extend the latter's deadline for repayment.

26 Finally, the Plaintiff also submits that the Refund Arrangement is so inherently improbable because it does not make any commercial sense for the Plaintiff to enter into such an arrangement. In particular, the Plaintiff makes the following points:

(a) It is absurd that the Plaintiff would agree to an arrangement where it transfers RMB$20m to the Defendant but the Defendant only has to transfer RMB$4m to the Plaintiff's nominees.

(b) The Refund Arrangement is unnecessary because the Plaintiff can directly remit monies to its designated nominees in China. In fact, the Plaintiff has legally remitted monies from its HK bank accounts to the bank accounts in China around the same time the alleged remittances to Liu and Zhang were made, without any third party involvement.

(c) Even if the Plaintiff wanted to use a third party, it could have used its parent company, which was incorporated in China, instead of relying on the Defendant.

27 Having considered the documents and the submissions before me, I agree with the Plaintiff that the pleaded facts relating to the Refund Arrangement do not even have *prima facie* plausibility such as to merit investigation in a fuller trial. I have come to this view primarily because I cannot find *independent or supporting evidence* that lends support to the Defendant's account of events. The Defendant's case rests solely on the drawing of adverse inferences from several of the Plaintiff's failures to explain features of the Financing Agreement. However, all of the alleged omissions or failures are explicable and do not suggest that anything untoward had taken place.

28 On the stated purpose of the loan being the Defendant's "business development", I do not find that suspicious. It will be recalled that cl 1.2 of the Financing Agreement states that the "purpose of the financing fund is for business acquisition and restructuring only." No reason was offered as to why this was suspicious aside from the assertion that the Defendant was just a holding company which did not carry out business on its own. However, the Defendant has not provided any support for its

assertion that it carries out no business activities at all. And, even if that were true, without *any* evidence that the alleged lack of detail in the Financing Agreement was motivated by suspicious motives, I would be very hesitant to draw an adverse inference against a contracting party just because it failed to give more details about the purpose of a loan agreement it entered into.

29 Further, I do not find the fact that at least one of the guarantors (Liu) is related in some way to the Plaintiff suspicious on its own. Whilst it is not for the court to speculate, there can be a variety of innocent explanations. After all, both parties accept that Liu was the middleman who brought the Plaintiff and the Defendant (parties which previously had no dealings with each other) together. Without more from the Defendant, I cannot draw an adverse inference against the Plaintiff on this ground.

30 I turn now to the query raised by the Defendant as to why the Plaintiff is not pursuing a remedy against the guarantors. The fact that the Plaintiff has rights against the guarantors does not mean that it does not have rights against the Defendant. That much is plain and obvious. The fact that they have not, thus far, proceeded on the guarantees does not mean that they will not do so in the future. Unless the Defendant can offer more in terms of evidence, I am unable to draw any adverse inference against a party who is merely choosing one of the many remedies it has to recover a debt. There is nothing unusual about proceeding against the principal debtor, especially since, when the suit was commenced, the Plaintiff had reason to believe that the Defendant had substantial assets in Singapore (the 224,409,913 shares in AFH, which have since been sold). I note in passing, for the sake of completeness, that the Plaintiff's counsel raised the point that the Plaintiff may have thought that Chinese law requires them to sue the principal debtor first, even if the guarantee were a primary, rather than secondary, guarantee (in other words, it is not contingent on the principal debtor's non-payment). There is, however, no evidence of what Chinese law is on the point. In any case, there was no evidence before the court that this was why the Plaintiff had not yet taken proceedings against the guarantors. I therefore placed no weight on this aspect of the Plaintiff's submission.

31 As to the RMB$4m transfers made by the Defendant to the Plaintiff's alleged nominees, I find that the Defendant has failed to provide any evidence that such a transfer was made pursuant to the Refund Arrangement. Indeed, the Defendant's inability to explain or account for the arrangements pertaining to the remaining RMB$16m (the difference between the RMB$20m paid to the Defendant and the RMB$4m allegedly given to the Liu and Zhang), make it highly improbable that any Refund Arrangement really existed.

32 Most importantly, the Defendant's assertion that neither party ever intended for it to repay the loan is inconsistent with the contemporaneous documents, namely the Fund Transfer Confirmation and the Supplemental Agreement. Both of these documents affirm the Defendant's liability and intention to pay the loan monies and appear to be signed by the Defendant's director, Lin. Indeed, the Defendant's only response was that Lin does not remember signing the documents. I cannot, on the strength of this plea alone, go behind what appears to be Lin's signature on the face of the documents. Thus, I find that it is highly implausible that repayment by the Defendant was not intended.

33 I would note and repeat, at this juncture, that a litigant cannot expect to get leave to defend (conditional or unconditional) on the sole basis of bare assertions in its affidavit. While the Defendant may come up with a coherent version of events that is *logically* possible, a court, even at the summary judgment stage, needs more than that. Mere logical possibility is insufficient. There needs to be some evidence, direct or indirect, to support the defendant's bare assertions of what he claims are the true facts. Where a defendant's version of facts is entirely unsupported by independent or

supporting evidence, inconsistent with the documents before the court, and is in any case commercially implausible, I do not think that a court should hesitate to summarily determine the case in the plaintiff's favour. To my mind, this is such a case. Given the inherent improbability of the Defendant's version of facts, as well as its inconsistency with the contemporaneous documents, I find that there are no questions of fact that merit a fuller investigation at trial.

Issues 2 and 3: legal sustainability of the defence and other reasons for the grant of leave

34 Given my finding on issue 1, there is no need for me to examine if the Defendant's defences are legally sustainable (issue 2). However, for completeness, I will state my views briefly. Even if I were to assume that the Defendant's version of events is not entirely implausible, I still have serious doubts as to whether its defences can succeed in law.

35 For a start, the Defendant has not offered any evidence that the alleged Refund Arrangement is illegal. Chinese exchange control legislation requires that transfers made directly from HK bank accounts to Chinese accounts be registered and certified to be for "legitimate reasons". From the expert evidence on Chinese law presented by both parties, there is no suggestion that Chinese legislation has developed something akin to a sophisticated "anti-avoidance principle", which can catch and render illegal *indirect* transfers such as that allegedly present in this case. In my view, on the basis of the material before me, each of the individual sets of transactions which took place in this case – first, the transfers made from the Plaintiff to the Defendant within Hong Kong; second, the transfers from the Defendant to the "Plaintiff's nominees" within China – appear to be perfectly legal. While the Defendant exhibited an article on shadow banking in China which suggested that transactions similar to that described above may be illegal, none of the actual expert evidence gives me any reason to think that any of the transactions *in this case* are in fact illegal. Thus, even if I were to assume that the Refund Arrangement did exist, I do not think that any illegality is disclosed on the Defendant's pleaded facts.

36 On issue 3, the only "other reason" which the Defendant has proffered for the grant of leave relate to the need to investigate the potential illegality which exists in this case. However, given my finding that the facts do not support the Defendant's allegation that any legal impropriety exists, I do not need to consider this issue any further.

Conclusion

37 In conclusion, I grant the Plaintiff's appeal, and award it

(a) Judgment against the Defendant for the full judgment sum of HKD 29,789,087; and

(b) Contractual interest on HKD 24,618,663 at the rate of 15% per annum from 31 May 2014 up to and including the date on which this judgment is made.

38 I dismiss the Defendant's cross-appeal.

39 I also award the Plaintiff costs here and below. Costs are to be agreed between the parties, or taxed.

[note: 1] Lin's 2nd Affidavit, para 18