Chow Tat Ming Henry *v* Kea Kah Kim
[2015] SGHC 41

Case Number : Suit No 450 of 2013

Decision Date : 09 February 2015

Tribunal/Court : High Court

Coram : Edmund Leow JC

Counsel Name(s) : Alina Sim (Axis Law Corporation) for the plaintiff; Nazim Khan (Unilegal LLC)for the defendant.

Parties : Chow Tat Ming Henry — Kea Kah Kim

Contract

9 February 2015

Edmund Leow JC:

Introduction

1 In this suit, the Plaintiff alleged that there was an oral agreement ("the Agreement") between him and the Defendant under which the Plaintiff would purchase 2 million shares ("the Shares") in a Singapore-listed company known as DMX Technologies Group Limited ("DMX") with his own funds. According to the Plaintiff, the terms of the agreement were that if the Shares became profitable, both parties would share the profits equally, but if there was a loss, the Defendant would bear all the losses solely, and also compensate the Plaintiff for any interest incurred from having to borrow funds to finance the purchase.

2 The Shares were ultimately sold at a loss and the Plaintiff sued the Defendant for the sum of $776,865.28, which comprised $688,499.53 in losses from the sale of the Shares and $88,365.75 in interest and brokerage fees incurred.

3 After a two-day trial, I dismissed the Plaintiff's claim. As the Plaintiff has appealed, I now give my reasons.

Facts

Background

4 This case involves the same *dramatis personae* as Suit 320 of 2013 *Wan Lai Ting v Kea Kah Kim* ("S 320/2013"), wherein I dismissed a claim by the Plaintiff's wife against the Defendant. The parties agreed that evidence led in that case may be used in this case as well. These grounds should therefore be read in conjunction with my grounds for that case. For ease of reference, however, I will recap the background facts briefly.

5 The Defendant was, at the material time, the CEO of a Singapore-listed company known as ArianeCorp Pte Ltd ("ArianeCorp"). The Plaintiff owned 99.99% of the shares in a Hong Kong company known as Carriernet Corporation Ltd (HK) ("CNET").

6 On 14 August 2006, ArianeCorp entered into a sale and purchase agreement to acquire all the shares in CNET for an aggregate consideration of S$15.6m. This consideration was to be satisfied in full by the allotment and issue of 130,000,000 ArianeCorp shares ("the Consideration Shares") at S$0.12 each, credited as fully paid, to the following persons in the following manner:

(a) The Plaintiff – 84,500,000 shares.

(b) The Plaintiff's brother-in-law, Mah Cheung Wah – 17,500,000 shares.

(c) The Plaintiff's sister-in-law, Leung Man Ha – 15,000,000 shares.

(d) A financial consultant, Neo Hock Soon ("Neo") – 13,000,000 shares.

7 Under cl 6.2 of the sale and purchase agreement, the Plaintiff gave the following undertakings (which I will refer to as "the Moratorium"):

(a) not sell, realise, assign, pledge, transfer or otherwise dispose of (whether as principal or agent) any part of all of the Consideration Shares that were allotted to him for a period of one year from the completion date of the acquisition; and

(b) not to sell, realise, assign, pledge, transfer or otherwise dispose of (whether as principal or agent) more than 50% of his original shareholdings in the Consideration Shares, adjusted for any bonus issue or subdivision, in the second year following the completion date.

8 The Consideration Shares were duly allotted to the allottees on 12 March 2007. Chow was also appointed a director of ArianeCorp on 27 April 2007.

The Plaintiff's case

9 According to the Plaintiff, the Defendant approached him sometime in August 2007 asking for help with purchasing the Shares. The Defendant told the Plaintiff that the Shares were a good buy and that he had invested heavily in DMX. The Plaintiff replied that he was not interested and pointed out that he was unable to use his 84,500,000 shares in ArianeCorp as collateral to finance the purchase since they were subject to the Moratorium.

10 However, the Defendant persisted and noted that he did the Plaintiff a favour by acquiring CNET. He said that as the CEO of ArianeCorp, he had the authority to waive the Moratorium. He further promised to share any profits equally with the Defendant and bear all the losses incurred if the price of the Shares were to fall (including any interest and expenses incurred by the Plaintiff).

11 The Plaintiff therefore reluctantly agreed to the Defendant's proposal and purchased the Shares on 23 August 2007 for a total price of $1,120,000. The purchase was financed by a loan or a margin account provided his broker, Phillip Securities (HK) Limited ("Phillip Securities").

12 Shortly thereafter, as a result of the emerging subprime crisis, the price of the Shares started to decline. The Plaintiff frantically called the Defendant telling him that he had to sell the Shares, but the Defendant told him to hold. Multiple such telephone calls were made between October and December 2007. Finally, in early December 2007, the Plaintiff felt that he could not hold the Shares any longer and called the Defendant, who told him to start selling some of them. As a result, the Shares were sold in multiple tranches as follows:

S/N	Date sold	Number of shares sold	Price
1	6 December 2007	200,000	$72,000
2	7 December 2007	100,000	$38,500
3	17 January 2008	264,000	$58,539.88
4	20 January 2008	1,436,000	$262,460.59
Total		**2,000,000**	**$431,500.47**

13 The losses from the sale put the Plaintiff in financial difficulty, and it was only in 2011 that he managed to fully repay his debt (with interest) to Phillip Securities. He incurred a total of $82,974.40 in interest and $5,391.35 in brokerage fees.

The Defendant's case

14 The Defendant denied that there was any oral agreement between him and the Plaintiff regarding the purchase or sale of the Shares. He said that sometime in 2007, the Plaintiff asked him which stocks looked attractive for investment. He therefore suggested some stocks to the Plaintiff, with DMX being one of them. This was done in a social context with no intention to create legal relations.

15 The Defendant further submitted that the Agreement, even if it had been made, would have been void for uncertainty as there were no provisions for:

(a) the purchase price;

(b) the minimum time for holding;

(c) the maximum time for holding;

(d) any stop loss orders; and

(e) the price at which the shares have to be sold.

16 Finally, the Defendant contended that the Plaintiff had pledged his ArianeCorp shares as collateral to fund the purchase of the Shares. This was a violation of the Moratorium and constituted an illegality which rendered the Agreement unenforceable.

My decision

17 The Plaintiff's claim in this suit suffered from the same defects that his wife's claim in S 320/2013 did.

18 First of all, the Plaintiff's case was that a transaction worth millions of dollars was made purely by way of oral agreement. I found it hard to believe that an experienced businessman like him would adopt such a lackadaisical attitude towards documenting a transaction like that. Even if he did not wish to engage lawyers to draw up a formal contract, he had many opportunities to mention in writing the fact that the Agreement was made. In particular, the Defendant stepped down as CEO of ArianeCorp in February 2008 and handed the reins over to the Plaintiff. In late January 2008, the

parties exchanged email correspondence negotiating the terms of the Defendant's resignation. On 6 February 2008, the Defendant signed a letter of resignation which stated that he had no claims against ArianeCorp, and the Plaintiff signed the same letter on behalf of ArianeCorp stating that ArianeCorp had no claims against the Defendant. These events took place shortly after the Plaintiff made a loss from selling the Shares. If he truly believed that the Defendant was liable to compensate him for those losses, one would have expected him to at least advert to that fact in an email or document somewhere. Yet the Plaintiff could not point to any document where the Agreement was mentioned.

19 Indeed, the Plaintiff's own evidence was that he was forced to sell various properties to satisfy margin calls issued by Phillips Securities as a result of the DMX losses. Yet there is no evidence that he had asked the Defendant for repayment or financial assistance during that supposedly stressful period. As he admitted on the stand: [note: 1]

> Q: So you were under stress or pressure to come up with the money to pay the margin call?
>
> A: Yes, very much.
>
> Q: So it didn't occur to you that every month you are making margin calls, according to your story, you are making all these margin calls because of DMX shares, right, it didn't occur to you that you are going through all this stress, this is end January, when you are already negotiating, getting out, you are coming in as CEO and he is getting out, it never occurred to you, "Maybe I should just send an e-mail to Mr Kea, say, "Look, this is our agreement, and I have done this, and you owe me this amount of money"?
>
> A: No. I thought about it. *I never do it.*
>
> …
>
> Q: So in two successive months you got a call of 1 million each and you were able to come up with the money?
>
> A: That's why I keep selling the house. That's why some of the houses -- yes, I did come up with the money.
>
> [emphasis added]

I found it rather incredible that the Plaintiff would choose to sell properties to satisfy the margin calls instead of pressing the Defendant for repayment. This was not in my view how a normal person would react if there was truly an agreement between the parties that the Defendant would pay for any losses incurred.

20 Second, like his wife in S 320/2013, the Plaintiff also waited until the limitation period was almost up before taking any action on the alleged debt. He sent a letter of demand to the Defendant only on 11 April 2013 and commenced proceedings on 17 May 2013. This was more than five years after the Shares were sold at a loss and two years after he was said to have settled his debt with Phillips Securities. Notably, under cross-examination, the Plaintiff disagreed with counsel for the Defendant that he (the Plaintiff) did nothing for almost six years. He claimed that he had talked to the Defendant about the debt and had also asked Neo (who was a long-time mutual friend of both parties) to talk to him. [note: 2] Yet the Plaintiff failed to call Neo to give evidence on this point. This omission was particularly glaring since Neo had given evidence as an independent witness in S

320/2013 and there was no reason why he could not have been called as a witness to corroborate the Plaintiff's story in this regard.

21 Third, I agreed with the Defendant that the Agreement, as pleaded, was devoid of important details. There was no provision as to the date on which the Shares should be bought, or the price at which they should be bought. It was unclear who had the authority to decide when to sell the Shares and at what price in the event of a disagreement between the two parties. The time frame in which the Plaintiff had to pay the Defendant his share of the profits (if profits were made) and, conversely, the time frame in which the Defendant had to compensate the Plaintiff for his losses (if losses were incurred) were left unstated. Essentially, there appeared to be agreement only on the number of shares to be bought (2,000,000). In my view, such an agreement defied commercial sense and was too uncertain and incomplete to be enforceable.

22 Finally, although the Defendant might have thought that the Shares were a good investment, it seemed highly unlikely that he would have agreed to such an imbalanced transaction, whereby any profits would be shared equally, but any losses would be entirely borne by him. In most commercial agreements, the party who stood to gain from the upside would also be required to bear the downside risk. I found it very improbable that an experienced businessman like the Defendant would have agreed to share the upside equally but bear the downside entirely.

23 The Plaintiff's claim was therefore clearly unsustainable and it was unnecessary to delve into the illegalities alleged by the Defendant. Nonetheless, as a significant portion of the hearing was devoted to this issue, I will say a few words on it.

24 The Plaintiff initially pleaded in his Statement of Claim dated 17 May 2013 that the Shares were purchased using funds borrowed "by way of unsecured loan(s)". Subsequently, however, he amended his Statement of Claim on 21 July 2014 to state that the funds were borrowed by way of "loan(s) or a margin account". It emerged during the course of proceedings that the Plaintiff had deposited his 84,500,000 Consideration Shares in a margin account with Phillip Securities. Subsequently, on 18 June 2007, he obtained a margin loan of HK$7m from Phillip Securities. Under the client agreement with Phillip Securities, the Consideration Shares would automatically have been used as collateral for the loan.

25 The Plaintiff initially sought to deny that his account was a margin account, but this was clearly untenable given that the account statements he produced showed that the Consideration Shares were ascribed a "margin value" of $2,873,000 at a "margin ratio" of 0.40. When he was finally forced to admit in cross-examination that the Consideration Shares had been used as collateral for the loan, he said he did not understand the consequences of that, and thought that he was placing them in a "custodian account". But I found it hard to believe that a seasoned businessman like the Plaintiff would be unaware of how the stock markets worked and what a margin account was. In my view, therefore, there was sufficient basis to suspect that the Plaintiff had breached the Moratorium by using the Consideration Shares as collateral for a margin loan. Consequently, he might also have breached his duties under the Companies Act (Cap 50, 2006 Rev Ed) and the Securities and Futures Act (Cap 289, 2006 Rev Ed) to inform ArianeCorp and the securities exchange of a change in his shareholdings.

Conclusion

26 For the foregoing reasons, I dismissed the Plaintiff's claim with costs. I also referred the potential illegalities committed by the Plaintiff to the authorities for further investigation.

[note: 1] NE 12 September 2013, pp 52–53.

[note: 2] NE 12 September 2013, p 53.