

Tang Kay Heng Alan v Purwadi
[2003] SGHC 312

Case Number : Suit 1435/2002/D
Decision Date : 23 December 2003
Tribunal/Court : High Court
Coram : Kan Ting Chiu J
Counsel Name(s) : Tan Hong Seng (Tan Lim & Wong) for plaintiff; Leonard Hazra and Chan Hoe (David Lim & Partners) for defendant
Parties : Tang Kay Heng Alan — Purwadi

Contract – Formation – Purported commission sharing agreement between parties – Whether binding contract entered between parties.

Contract – Formation – Whether plaintiff sued the right party.

1. The plaintiff sued the defendant for his share of commission in a deal he claimed he helped to put through as broker.
2. The deal involved 42.1% of the shares of a Chinese company which operates a toll road in China. The shares were held by Spring Sun International Ltd ("SSI"), a wholly-owned subsidiary of Spring Sun Highway Ltd ("SSH"). The transaction was carried out by SSH selling all the shares of SSI, thus indirectly, the 42.1% shares of the Chinese company. The purchaser was IPCO International Ltd ("IPCO"), a Singapore listed company. The defendant was a director and the chairman of IPCO.
3. At the close of the plaintiff's case, counsel for the defendant submitted that there was no case for the defendant to answer, and accepted that if the submission was made and failed, the defendant cannot enter his defence. After hearing submissions from both counsel, I dismissed the claim. The plaintiff appeals against my decision.

The plaintiff's case

4. SSI and SSH were under the control of Chng Heng Tiu ("Chng"), an old and good friend of the plaintiff. Chng had asked the plaintiff to look for a buyer for the 42.1% shares.
5. The plaintiff worked on the assignment and introduced Chng to the defendant. The negotiations were carried out between Chng, the defendant, Ong Chee Hong ("Ong") and the plaintiff.
6. Chng agreed on behalf of SSH to pay the plaintiff US\$7.5m for his services. It was also agreed that commissions of US\$15m and US\$7.5m were to be paid to the defendant and Ong respectively.
7. The plaintiff, the defendant and Ong decided to use a company as the vehicle for receiving their commissions. The plaintiff found a shelf company for the purpose, Lotos Investments Ltd ("Lotos") a British Virgin Islands company. While only Ong was registered as the director and shareholder of the company, it was their company.
8. Arrangements were then made for SSH to issue a letter to Lotos dated 1 July 1999 wherein SSH confirmed the appointment of Lotos as its broker in selling "our wholly owned subsidiary M/s Spring Sun International Ltd and/or our 42.1% interests in [the Chinese company] including

shareholder's advances and accrued interest" and agreed to pay Lotos or its nominees the commission of US\$30m.

9. The plaintiff, the defendant and Ong took steps to record the sharing of the US\$30m. A Commission Sharing Agreement was made on 30 December 1999 between them. This was typed on SSH's letter of 1 July 1999 and it reads

Commission Sharing Agreement

1. Tang Kay Heng's group of companies US\$7.5 million __ [signature]
2. Thew Ah Ba's group of companies US\$7.5 million ____ [signature]
3. Purwadi's group of companies US\$15.00 million ____ [signature]

Dated
30th December
1999

(Ong's name does not appear in the agreement. Instead one Thew Ah Ba is named. The plaintiff did not know who he is, and did not offer any explanation for the absence of Ong's name.)

10. By a letter from Lotos to SSH dated 8 July 2000, it was confirmed that the US\$30m was to be deducted from the price the defendant was to pay to SSH for the purchase of SSI shares by the defendant, and that payment was to be made to Lotos' receiving party Acostar Holding Ltd ("Acostar"). The defendant also undertook to deduct the US\$30m and pay it to Acostar *on demand*. (The sale of the SSI shares was arranged so that IPCO was to pay SSH for all the shares of SSI with IPCO shares, and that the defendant would purchase the IPCO shares from SSH.)

11. The plaintiff did not receive his commission, and sues the defendant for

1. the sum of US\$7,500,000.00 pursuant to the "Commission Sharing Agreement" evidenced in writing on 30 December 1999 or damages in breach of the same;
2. alternatively US\$7,500,000.00 as monies had and received to the use of the Plaintiff;
3. alternatively an account of all monies or value received and payment of the sum found due;
4. alternatively damages.

The pleaded defence

12. Although the defendant elected not to make his defence, it is nevertheless necessary to consider his pleaded defence to establish those elements of the plaintiff's claim which are admitted, which the plaintiff does not have to prove, and those which are disputed, and have to be proved.

13. The defendant denied that

- (i) the plaintiff was SSH's appointed broker;

- (ii) the plaintiff introduced Chng to him;
- (iii) there was any agreement for the payment of commission to him, the plaintiff and Ong;
and
- (iv) he signed the Commission Sharing Agreement.

14. The defendant admitted that he "agreed with Chng/SSH and Ong as the sole beneficial owner of Lotos and that the Defendant will deduct and pay to Lotos the amount of US\$30 million from the amount payable by the Defendant to SSH for the purchase of the new IPCO shares from SSH".

Examination of the plaintiff's case

The plaintiff's right to a commission

15. The plaintiff did not call Chng, Ong or anyone else to corroborate his appointment as broker and his entitlement to a commission.

16. To the contrary, he admitted to executing a statutory declaration on 20 December 2000 in which he deposed that

I did not at any time introduce nor was I responsible for procuring or securing the sale of Spring Sun International Ltd to Ipco International Limited. For the avoidance of doubt, I was not involved in, whether by myself, by my nominee companies or otherwise, any sale of Spring Sun International Ltd whether in whole or in part to Ipco International Limited or to any other party.

17. Then he made matters worse for himself when he tried to reconcile that with his claim. He deposed in his affidavit of evidence-in-chief^[1] that his statutory declaration is not incorrect because Chng's instructions were to get a buyer for the 42.1% shares in the Chinese company (as contrasted to the shares of SSI), without regard to the terms of SSH's letter of appointment of 1 July 1999. In his sophistry, he did not address the fact that IPCO did not purchase SSI's 42.1% stake in the Chinese company, it bought 100% of the SSI shares from SSH. If he wants to maintain the distinction he was making, he should also accept that he had not complied with Chng's instructions and he should not be entitled to any commission.

18. In any event, he moved from that line under cross-examination when he agreed with the defendant's counsel that the statutory declaration was entirely inconsistent with his evidence.^[2] On his own case, he lied twice on the same issue, when he made the statutory declaration, and when he tried to explain it away.

The commission sharing agreement

19. The plaintiff's case is that his document sets out the division of the US\$30m commission between himself, the defendant and Ong.

20. The agreement, on its face, does not reflect that. Ong was not named as a party or a recipient. Instead the mysterious Thew Ah Ba signed. Ong was to receive nothing as the payment was to be made to Thew's group of companies.

21. Furthermore, the agreement does not even say that the plaintiff is to receive a share of the commission. It refers to "Tang Kay Heng's group of companies". The group of companies is not

identified in the agreement, and the plaintiff did not offer any explanation at the trial. No attempt was made to show that "Tang Kay Heng's group of companies" is synonymous with Tang Kay Heng. The onus was on him to show that he was the intended recipient.

The plaintiff's right to sue the defendant

22. The plaintiff's case is that he, the defendant and Ong had acquired Lotos and arranged with SSH that the commission was to be paid to Lotos. Lotos was then to parcel out the commission to them. As so explained, Lotos was the collection agent for the three of them.

23. In his statement of claim the plaintiff also alleged that "(t)he Plaintiff also constituted the Defendant his agent to make arrangements with SSH for Lotos to receive his commission of US\$7.5 million from SSH and to account to the Plaintiff for the same."^[3] Having pleaded that, he only deposed in his affidavit of evidence-in-chief "I ... left it to the Defendant and Ong to arrange how my commission would be paid by SSH to Lotos", without saying that he wanted the defendant to be his agent for that purpose, or that the defendant agreed to be his agent.

24. In order to make payment Lotos must receive the commission. However the plaintiff acknowledged that by the letter of 8 July 2000, Lotos had confirmed that the US\$30m was to be paid by the defendant to Acostar. When Lotos agreed that the commission was to be paid to Acostar, it ceased to be the receiving party.

25. The defendant's liability was to pay Acostar on demand. There was no assertion that the payment was due. There was no allegation or evidence that Acostar had demanded payment of the US\$30m.

26. The plaintiff did not take into account the implications and consequences of the changes in the arrangements for the payment of the US\$30m. He just took the position that he was suing the defendant because the defendant had undertaken to pay the US\$30m to Lotos.^[4] This was contrary to Lotos' confirmation, and the defendant's undertaking of 8 July 2000 that the US\$30m was to be paid to Acostar.

The defendant's submissions

27. Counsel for the defendant submitted that there was no case to answer on the grounds that (i) accepting the plaintiff's evidence at face value, no case was been established in law, and (ii) the evidence led from the plaintiff was so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged.

My findings

28. There were fundamental defects in the plaintiff's case. The commission sharing agreement on which he based his claim does not give him to any share of the commission.

29. His own case is that Lotos was the collection vehicle for him, the defendant and Ong. Consequently Lotos should sue for the commission if it is not paid. However, by the letter of 8 July 2000 the payment was to be made to Acostar on demand. If the US\$30m was not received upon demand, Acostar should sue the defendant for it. The plaintiff has no basis to sue the defendant for his alleged share of the US\$30m.

30. The foregoing conclusions are arrived at on the acceptance of the plaintiff's evidence at face

value. When the evidence was considered, I found it to be very unsatisfactory. When his claim as broker and his entitlement to the commission was disputed he produced no documents to substantiate that, and did not call any one from SSH to corroborate his claim. He wanted the court to take him at his word, even when he admitted that he had executed a statutory declaration that contradicted the very basis of his claim. He pleaded that the defendant was his agent for collecting the commission, but lead no evidence on that, not even from himself. He was as difficult to understand as to believe.

31. The plaintiff's case was seriously flawed in law and on the facts, and was not supported by any credible evidence. He had failed to make out his claim on a balance of probabilities. For these reasons his claim was dismissed with costs without the defence being heard.

[\[1\]](#) at para 33

[\[2\]](#) Notes of Evidence page 38

[\[3\]](#) Amended Statement of Claim para 9

[\[4\]](#) Notes of Evidence pages 30, 31, Amended Statement of Claim para 14

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