Lee Chee Wei v Tan Hor Peow Victor and Others
[2006] SGHC 116

Case Number : Suit 488/2005

Decision Date : 12 July 2006

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Philip Fong, Jacelyn Chan, Peter Chean and Chang Man Phing (Harry Elias Partnership) for the plaintiff; Ng Lip Chih (Ng Lip Chih & Co) for the first defendant; Gregory Fong, Ho Thiam Huat and Fong Chee Yang (John Tay & Co) for the second defendant; Kelvin Lim (Kelvin Lim & Partners) for the third defendant; K Muralidharan Pillai, Harveen Singh and Jerome Robert (Rajah & Tann) for the fourth defendant

Parties : Lee Chee Wei — Tan Hor Peow Victor; Ong Ghim Choon; Yip Hwai Chong; Ang Tse Aun Damien

Contract – Illegality and public policy – Contract for sale of company's shares – Inacurracies in company's prospectus due to directors and shareholders holding greater interests than that disclosed – Whether contract tainted by illegality and incapable of enforcement by seller

Contract – Privity of contract – Contract for sale of shares – Undated contract between plaintiff as vendor and fourth defendant as agent for first, second and third defendants – Whether first, second and third defendants were parties to contract

Contract – Remedies – Specific performance – Contract for sale of shares in company undergoing public listing – Whether specific performance an appropriate remedy

Contract – Remedies – Damages – Plea for specific performance – Failure to plea assessment of damages should specific performance be refused – Whether court would order assessment of damages

12 July 2006 *Judgment reserved.*

Choo Han Teck J:

1 This action was commenced by the plaintiff against the four defendants for breach of a written contract ("the Contract") to buy all the plaintiff's 8,333,340 shares, constituting 2.5% of the issued shares in a company called Distribution Management Solutions Ltd ("DMS"). The plaintiff's allegation was that the undated contract was executed between 17 and 20 February 2005 by himself as vendor and the fourth defendant as agent for the purchasers, the first, second, and third defendants. The purchase price was $4.5m, of which, $750,000 was paid. The plaintiff claims specific performance and payment of the balance, or, alternatively, damages in lieu. The plaintiff alleged that the first, second, and third defendants ratified the Contract in March 2005. These three defendants denied that they were the purchasers and averred that the Contract was strictly between the plaintiff and the fourth defendant. The fourth defendant denied liability on three grounds. First, he alleged that the plaintiff failed to procure a directors' resolution from DMS approving the registration of the transfer of shares as required; secondly, the Contract was conditional upon the listing of DMS, which, in the event, did not take place; and thirdly, by the same token, the Contract was frustrated because the failure to list DMS was not caused by any fault on the part of the fourth defendant.

2 The plaintiff once owned three companies Super Mobile Pte Ltd, Mobile E Pte Ltd, and Sun Matrix Holdings Pte Ltd) that had distribution rights to the telecommunication products of Nokia Pte

Ltd, Singapore Telecommunications Ltd, and MobileOne Ltd. The plaintiff let his three companies become subsidiaries of DMS on the vague promise by the first defendant that when DMS was listed the plaintiff would stand to gain between $6m to $9m. The first defendant maintained that DMS bought those companies and paid $6m for them. That was never proved and I do not believe that any payment was made. The burden of proving that payment had been made is on the first defendant, and he could easily have done so, whereas, the plaintiff would have had to prove a negative. The first defendant was the chief executive officer ("CEO") of Accord Customer Care Solutions Ltd ("ACCS"). The second defendant was the CEO of DMS. Prior to that, he was a competitor and rival of the plaintiff, running his own group of companies in the same business of distributing and servicing telecommunication products. Like the plaintiff, he sold his companies to DMS. The third defendant was the chief financial controller of ACCS. The fourth defendant was the general manager of ACCS. He was neither academically well qualified nor wealthy although he was then earning $7,000 a month at ACCS. From 1994 to 1999 he was earning between $5,000 and $7,000. He was, however, a good and trusted friend of the first defendant, just like the third defendant. I believed that they were older and firmer friends to the first defendant than the second defendant was although during the material time, the second defendant appeared to be warming up a friendship with the first defendant.

3 DMS was a subsidiary of ACCS. Although the first defendant did not own any shares in DMS, he owned 50% of ACCS. His brother, who was not a party to these proceedings, held 3.3% of the shares in DMS and was its managing director. The second defendant held 3.22% of the shares and became the CEO of DMS after his own companies were taken over by DMS. In contrast, the plaintiff became, in his own words, an "executive officer" with no executive powers. The third defendant held 3.22% of the shares in DMS. It appeared that the listing of a company like DMS was part of the corporate expansion of ACCS itself. The problems and tension of rivalry and competition between the plaintiff and the second defendant before their companies became subsidiaries of DMS continued. It is not necessary to indulge in specific accounts because the two men had their own versions to each small story, but neither disputed their mutual dislike for each other, nor had they concealed it well during the trial. When the plaintiff was eventually transferred to another ACCS subsidiary called Network Management Solutions Pte Ltd but with no substantial work, he decided to leave the group. He told the first defendant that he wanted to sell his shares in DMS and leave. The first defendant told the plaintiff that he would help him find a buyer. The plaintiff referred to four meetings prior to the execution of the Contract, and two after, to prove that the Contract was executed by the fourth defendant as agent for the first, second, and third defendants. The first meeting was held on 12 January 2005 between the plaintiff and the first defendant at the latter's office. The first defendant told the plaintiff that he had found a buyer for the shares, and suggested that the second defendant could be one of them. Although a crucial issue in this action was whether there was only one buyer (fourth defendant) or three buyers, the confusion in using the word "buyer" (singular) in conjunction with the implied plurality of buyers in the same conversation, was in my view, a problem of grammar and not of fact. The second meeting was held on 17 January 2005, also at the first defendant's office. The second and third defendants were also present at this meeting. At this meeting, the first defendant proposed the price of $4.5m, which the plaintiff accepted. He also told the plaintiff that he would be using a proxy to buy the shares. The third meeting was held on 27 January 2005 which was initially between the plaintiff and the third defendant to work out the details of the sale of the shares. The two were unable to agree and the plaintiff went to see the first defendant. Subsequently, the first defendant asked the third defendant to join in. At this meeting, an initial payment of $750,000 was agreed. The third defendant also agreed to have the agreement in writing. It was a matter of dispute whether the third defendant said that the first, second, and third defendants would not be able to sign a written agreement themselves because they were either directors or shareholders of DMS. The fourth meeting was held on 8 February 2005, which the plaintiff and all four defendants attended, with the fourth defendant attending for the first time and introduced as the person who would be executing the Contract. Again, the dispute here was whether

it was made clear that the fourth defendant was signing as the true and only purchaser. The initial payment of $750,000 was also paid to the plaintiff at this meeting. The money came from a cheque from Invest Asia Holdings Ltd ("Invest Asia"), an offshore company used by the first defendant for various purposes. The cheque was prepared by the financial controller of ACCS, Kuan Chow King. She was not able to give evidence in court as her whereabouts were not known.

4 On 21 February 2005, Nokia Pte Ltd announced that it had terminated ACCS's contract with it, and it also became known that the Commercial Affairs Department of the Singapore Police Force was investigating ACCS and its officers in a case of fraud. On 1 March 2005 the plaintiff met the first defendant to ask about the completion of the Contract. The first defendant told him that he had no money to pay. On 14 March 2005, the plaintiff once again spoke to the first defendant, and this time, the second defendant was also with them. The defendants demurred and nothing was done. As it transpired, they had lost any incentive to complete the purchase given the other problems the first, third, and fourth defendants were facing at that time.

5 The plaintiff adduced the taped recordings and transcripts of his meetings with the defendants in evidence. The parties spoke ungrammatical English, mixed with Chinese dialect. Parts of the recordings were not clear. But the recordings were relevant to the extent that in spite of ambiguities in various parts of the record, they indicated that the first defendant and the third defendant were the principal parties interested in the purchase of the plaintiff's shares. The second defendant appeared to sufficiently indicate that he too was very much on the side of the first and third defendants, but not sufficiently, as a co-buyer. He might just be like the fourth defendant – a loyal assistant to the first and third defendants. In negotiations of this nature, I think that it would only be reasonable that parts of what were said might not have expressed the true intention of the speakers as they baited and snared each other towards their personal goals. Eventually, the real intentions might become clearer as other evidence add their weight to the story. It is, therefore, prudent not to give individual statements too much credibility, and look, instead, for a broader, more coherent account after comparing all that was said with all that was done. To this end, I made no assumption that the plaintiff was the only honest and upright party in the proceedings, but he alone gave an account which the evidence supported, and at least, his motivation and intention seemed to me the only sincere and genuine one. The fourth defendant's belief that he was making a good investment did not convince me that that young man with a young family and no money to raise the $750,000 advance payment, would have executed a contract of this magnitude.

6 The evidence led me to find, without much difficulty, that the fourth defendant was not the buyer he purported to be. He had hitherto shown neither inclination nor means to make such a purchase. The first and third defendants seemed to me to have both. They were also connected to Invest Asia – and I am not here concerned with their other activities that were the subject of other proceedings, but the connection with Kuan Chow King and the $750,000 paid from Invest Asia's accounts which the third defendant maintained was his bonus money that he had willingly loaned to the first defendant to pay the plaintiff. There was no corroborative evidence of such a loan. Furthermore, if the fourth defendant was the purchaser, the defendants had not satisfied me as to why they would use money from Invest Asia to make payment on the fourth defendant's behalf. If this money had come from the third defendant and Invest Asia as an advance payment to the plaintiff as the defendants alleged, and, as it appeared, secured by a side loan agreement between the plaintiff and the fourth defendant, there was no documentation that showed how the third defendant and Invest Asia had protected themselves against the plaintiff or the fourth defendant. The first, third, and fourth defendants were witnesses whose testimonies were such that I would have liked to find independent corroboration. I found none. I am of the view that the four defendants acted together to assist the first and third defendants buy over the plaintiff's shares. It is quite possible that the second defendant might also have been a co-buyer, but reviewing the evidence, I am not

able to say whether he was probably more a buyer than just a henchman for the first and third defendants. The Contract was prepared by the solicitors engaged by one Jenny Lim on the instructions of the third defendant. Neither the plaintiff nor the fourth defendant had anything to do with it except to sign it. I am of the view that the plaintiff reasonably apprehended that he was dealing with the first and third defendants as members of a consortium comprising them to buy his shares. Although the second defendant was probably not one of the members in the consortium, he had given reasonable grounds to lead the plaintiff to draw that conclusion.

7 Having claimed that he entered into the Contract in his own behalf, the fourth defendant relied on defences of interpretation of the Contract terms. First he said that the Contract was unenforceable because the plaintiff did not obtain the directors' resolution of approval. He pointed out that under cl 4.5(c), he was entitled to rescind the Contract. However, that was only one of three options open to the purchaser under cl 4.5 of the Contract. Sub-clauses (a) and (b) gave the purchaser a right to defer insistence on performance. Since the fourth defendant did not appear at completion there was no evidence that he had elected sub-clause (c). In respect of his defence that the Contract was subject to DMS's successful listing, the short answer of the plaintiff, which I accept, was that that was not stated in the Contract. On the contrary, the Contract envisaged completion even if there was no listing. In cl 4.1, it specifically stipulated that the completion shall take place on listing, or, if there was no listing by 30 April 2005, then on that date itself. On that basis, the defence of frustration failed *in limine*.

8 The first defendant also relied on the defence of illegality. His counsel, Mr Ng Lip Chih, submitted that the prospectus of DMS for the listing exercise would have become inaccurate if the plaintiff's case was true, namely, that some directors and shareholders of DMS would be holding greater interests in the company than was disclosed. Consequently, he argued, the plaintiff would be tainted with the illegality and be unable to enforce the Contract. I am of the view that the plaintiff was utterly uninvolved in the listing exercise, just as he was utterly uninvolved in the affairs of DMS, which was the reason why he wanted out in the first place. He was only anxious to get back what he was promised when he gave up his own companies to DMS – $6m to $9m, or as much as he could get to start afresh. He was also not concerned with who executed the Contract as he knew he was dealing with the first, second (erroneously, perhaps), and third defendants, and only required the written document for comfort and security. The defendants were the ones who did not wish to disclose the identities of the true buyers. If the plaintiff had committed any breach of the listing regulations by virtue of his participation in the sale of his shares to the persons who had the duty to disclose the proper information in the prospectus, that would not, and I should point out, on the facts of this case only, have rendered him a party to the illegality such as to prevent him from enforcing his contract of sale to the first and third defendants.

9 The plaintiff prayed for an order for specific performance or, alternatively, for damages in lieu of specific performance. Generally, specific performance would not be granted except in cases in which the subject matter is unique or has an intrinsic value that cannot be adequately compensated by damages. Land is the most common of such subject matter. Shares in a private company might be another. In this case, the subject matter was a block of shares of a company that was at the material time in the process of a public listing. It is a strong argument that even if such shares were deemed to be unique or had intrinsic value as such, that would only be a perspective from the point of view of the purchaser. The vendor's interest in the contract of sale was strictly monetary. What he wanted was payment of the purchase price. Viewed from this perspective, specific performance did not appear to be an appropriate remedy. The duty to mitigate one's loss is inherently incompatible with a claim for specific performance, because one cannot ask for performance when he was at the same time under a duty to minimise his loss by buying from or selling to an alternative source. Might this have led Justice Oliver Wendell Holmes Jr to say, "The duty to keep a contract at common law

means a prediction that you must pay damages if you do not keep it – and nothing else"? See: *The Path of the Law* (Applewood Books, Reprint Ed, 1996) at p 11. In the usual case, the plaintiff would have to try and sell his shares elsewhere to meet the legal obligation of mitigating his loss. The plaintiff could have found it difficult to sell his shares in the present case, but he had not led evidence of any such difficulty, or that he had made any effort to re-sell his shares. Damages would have been an adequate remedy in this case, and as such, the defendants ought not to be compelled to take delivery of shares they no longer desired. The facts of this case did not seem to me sufficiently compelling for me to hold that the contractual promises ought to be honoured specifically by performance. I would, therefore, not make an order for specific performance.

10 The plaintiff, however, had not adduced any evidence as to what the damages ought to be. Counsel for the defendants, not surprisingly, objected to Mr Philip Fong's late request for an order for damages to be assessed by the registrar in the event that the court found the defendants or any of them liable. This request was made at the hearing of the replies to the closing submissions of the respective counsel. Counsel for the defendants accepted that there were no rules prohibiting this court from exercising its discretion in making an order for damages to be assessed, but they submitted that the court ought not to do so. Defence counsel submitted a number of cases starting with *Coenen v Payne* [1974] 1 WLR 984, which upheld the principle that generally, issues of liability and damages ought to be tried together by the same judge. The sensibleness of this rule is obvious. However, there are cases in which the issues of liability and damages could more sensibly be bifurcated and tried separately. Counsel referred to some cases that exemplify instances where bifurcated trials were ordered. Where a full trial might be lengthy and complicated, it may be proficient to have it tried in parts. In addition to spending time in each part to concentrate on a specific bulk of the issues, it might also save time and costs if the resolution of the first part renders the second unnecessary (or even just shortening it). There may be some savings in costs but that is balanced against those instances in which the second part has to go on necessitating a refresher. I agree with counsel for the defendants that the present situation was entirely different, and the plaintiff ought reasonably have anticipated that damages would have to be quantified should his prayer for specific performance fail.

11 The amended statement of claim prayed for an order for specific performance together with interests, and "damages in lieu or in addition to specific performance". The crucial words "to be assessed" were not pleaded and no application was made at any time to make the necessary amendment. I do not think that I can agree with Mr Philip Fong that if an order for specific performance was not granted, "it must follow that the court ought to exercise its discretion to order that damages be assessed." To make an order for damages to be assessed at this stage required the pleadings to be amended. I might have allowed the amendment but for the fact that counsel did not make any application to amend the plaintiff's claims for relief. It would, in my view, be going too far for the court to prod him along in such circumstances because it may appear that the court would have lost its neutrality in doing so. Neither did counsel ask for leave to adduce evidence of the damages before me. Counsel for the defendants jointly submitted that the plaintiff had clearly elected to ask for specific performance and was not concerned to take steps to preserve his position. He was cross-examined on the lack of proof of the market value of his shares. He conceded that he was not calling any expert evidence as to the value of his shares. The plaintiff had been fully alerted but, notwithstanding that and the reminder in the closing submissions of the defendant's counsel, no attempt was made to rectify the omission. Counsel for the plaintiff only made an attempt to justify an order for the assessment of damages after the closing submissions had been made, when, during the oral replies of the respective counsel, I enquired if I could make such an order. Counsel for the defendants also correctly anticipated that one of the factors to be considered in deciding whether or not to allow time for the assessment of damages is the question of prejudice to the defendants. In this regard, it was submitted that a separate enquiry into damages now would incur time and costs

needlessly. To a large extent this factor could be mitigated by an order of costs, but the third defendant is presently in prison and that would make it more difficult and inconvenient for him to prepare his case. I would exercise any discretionary factor in this regard against the plaintiff. In my opinion, the plaintiff had elected not to adduce evidence in respect of damages, and that being the case, I would not now make an order for damages to be assessed, or that the plaintiff be given leave to adduce fresh evidence in respect of damages. It is far too late.

12 If neither specific performance nor an order for the assessment of damages was given, it followed that the plaintiff was obliged to return the $750,000. He would be entitled to retain the money only if the contract provided that it was paid as a non-refundable deposit or that the plaintiff had performed his part of the bargain. He might have been ready and willing to do so, but the fact was that he did not hand over the executed transfer forms to the defendants. On the longstop completion date (30 April 2005) he was to hand over the transfer documents duly executed but did not do so on account of the fourth defendant not appearing. I noted that cl 4.3 of the Contract provided that: "No Party shall be obliged to perform any of its obligations under cl 4.2 unless (simultaneously with such performance) the other Party performs all its obligations under that Clause." This meant that the plaintiff was not obliged to execute the transfer documents and could not be said to be himself in breach on account of not performing his part, but it could not mean that he was entitled to keep any money already paid unless the Contract expressly or clearly indicated that that money was not required to be returned in the event of a breach.

13 For the above reasons, the plaintiff's claim for specific performance or payment of the balance purchase price is disallowed, but nominal damages of $300 is awarded to him as against the first, third, and fourth defendants for breach of contract. The counterclaim for payment of $750,000 is allowed with half costs. The claim against the second defendant is dismissed with costs. However, given the evidence that the second defendant had facilitated the negotiations of the Contract, and the manner in which the first, third, and fourth defendants ran their defence, I would order that the costs payable by the plaintiff to the second defendant be paid by the first, third, and fourth defendants. All costs are to be taxed, if not agreed.