Cheah Geok Tuan (alias Seah Geok Tuan) and Another v Lie Khin Sin and Another [2005] SGHC 210

Case Number : Suit 213/2005

Decision Date : 11 November 2005

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Bernard Doray and Foo Soon Yien (Bernard Rada and Lee Law Corporation) for the plaintiffs; Loo Ngan Chor and Yeo Lih Wei (Lee and Lee) for the defendants

Parties : Cheah Geok Tuan (alias Seah Geok Tuan); Ng Siok Lay — Lie Khin Sin; Lie Turng Phung Ken

Credit and Security – Money and moneylenders – Loans of money – Agreement for sale of shares with buyback option – Vendor paying stamp duties – Dividends and bonus shares issued during option period transferred to vendor – Whether agreement amounting to loan under guise of sale and purchase of shares

11 November 2005 *Judgment reserved.*

Choo Han Teck J:

1 When is an elephant a bird? The principal issue in this case concerned the nature of a disputed contract: Was it an investment agreement or a loan? The contract was given a descriptive name – "Purchase of 154,103 Asia General Holdings Ltd shares with Buy Back Option". But the plaintiffs claimed that it was in substance a loan agreement. It is important to set out the contract in full because of the nature and importance of the issue in dispute. The agreement was written out as follows:

> May 11, 2001
>
> To: Mdm NG SIOK LAY
> 107 MARSHALL ROAD
> SINGAPORE
>
> RE: PURCHASE OF 154,103 ASIA GENERAL HOLDINGS
> LIMITED SHARES WITH BUY BACK OPTION.
>
> Kindly confirm by signing below that you have agreed to transfer the subject shares at terms and condition set out below:-
>
> 1. CONSIDERATION: S$255,000. However, for stamp duty purposes, the sum will be stated as S$693,463.50 on the Transfer Form.
>
> 2. All STAMP DUTIES RELATING TO THIS TRANSACTION SHALL BE BORNED [*sic*] BY YOU.
>
> 3. ALL THE DIVIDEND AND BONUS ISSUES IF ANY DURING THE OPTION PERIODS SHALL BE TRANSFERRED OR PAID (NET OF COST) TO YOU ACCORDINGLY SOONESS [*sic*].
>
> 4. OPTION TO BUY BACK: DATE OF EXERCISED [*sic*] – AUGUST 15, 2001

CONSIDERATION PAYABLE: S$297,750.00

5. FURTHER 3 MONTHS EXTENTION [*sic*] OF OPTION TO BUY BACK (UP TO NOV. 15) FOR CONSIDERATION PAYABLE TO ME OF S$45,000.00

6. AND FURTHER 3 MONTHS EXTENTION [*sic*] OF OPTION TO BUY BACK PERIOD WITH SAME TERMS AS POINT 5 ABOVE.

Yours truly,

_____Sgd_____

LIE TURNG PHUNG KEN

AGREE:_____Sgd_____ WITNESS:_____Sgd_____

NG SIOK LAY ONG KHIAM POH

2 The agreement was ostensibly a signed contract between the second plaintiff and the second defendant. The second plaintiff is the wife of the first plaintiff and the second defendant is the son of the first defendant. It was obvious from the evidence that the two contracting parties were not the real parties to the transaction that actually took place. The second plaintiff was a necessary party because the subject matter of the transaction was shares in Asia General Holdings Ltd and the second plaintiff was the registered owner of the shares. The second defendant became a party because his father decided that he (the second defendant) should sign the contract as a trustee. The defendants' evidence at trial was that the second defendant signed as trustee for one Darma Tanuwidjaya ("Darma"), allegedly, his uncle.

3 The contract, as it appeared on the written agreement, was straightforward. The contract title stated that it was a purchase of 154,103 shares in Asia General Holdings Ltd. The purchase price, described as the "consideration" was $255,000. The contract was signed on 11 May 2001 and stipulated a date for the vendor to buy back the shares at $297,750, namely, on 15 August 2001. The buyback or redemption sum of $297,750 was calculated after a deduction of 5% from each of the $15,000 instalments (that came to $2,250). The agreement also gave the "vendor" a three months' extension to repurchase the shares, provided that she pays another $45,000 (which works out to $15,000 a month). Finally, another three months' extension for the repurchase would be granted on the payment of yet another sum of $45,000.

4 The plaintiffs' case was that the document was only the security arrangement for a loan of $300,000, of which $45,000 was deducted upfront as interest for the first three months of June, July and August at $15,000 a month. However, the plaintiff received a cheque for only $250,000 because the first defendant had used $5,000 for payment of stamp fees. The stamp fees came up to $1,387 so a separate cheque for $3,613 being the balance was subsequently given to the first plaintiff. The three remaining terms were also relevant. Firstly, the agreement provided that the stamp duties payable for the transfer would be paid by the vendor. Conventionally, however, the obligation of

paying the stamp duty in a sale of shares transaction is the obligation of the purchaser. Secondly, it was provided that the consideration would be stated as $693,463.50 for the purposes of stamp duty. The plaintiffs say that the defendants found this to be necessary because the loan amount was much lower than the real value of the shares, and therefore, the appearance of legitimacy for the transaction that the defendants wanted, namely, a properly stamped contract, might be frustrated by a rejection from the stamp office. In any case, the plaintiffs say that they did not know that the defendants had inscribed the figure $693,463.50 until after the event. Thirdly, it provided that all dividends and bonus issues during the interim would be transferred to the vendor. This was also contrary to conventional practice. In a conventional sale of shares with a buyback option, dividends and bonus issues belong to the purchaser. He could, of course, sell the bonus issues to the vendor as part of the buyback option. But in the present case, the transfer of bonus issues back to the vendor was subject only to cost.

5 The contract was witnessed by Ong Khiam Poh who is also known as Peter Ong. In this regard, a typewritten telefax dated 9 May 2001 sent by the first defendant to Peter Ong is relevant. The telefax stated:

> SPOKEN TO DARMA & WILL DO THE DEAL WITH SOME MODIFICATION ON TERM PROPOSED BY YOU & SUBJECT TO TAKE A LOOK AT THE CO'S AUDITED ACCOUNT.
>
> INSTEAD OF TWO MONTH INTEREST PRE-DEDUCTED FROM THE ADVANCE, WILL DEDUCT THE WHOLE THREE MONTH [*sic*] IE. $45,000. HOWEVER, 3 MONTHS INTEREST (15%) ON THE $15,000 WILL ALSO BE DEDUCTED FROM THE REPAYMENT IE. INSTEAD OF REPAYING $300,000, WILL REPAY $297,750 ($15,000 x 15%) AT THE END OF THIRD MONTH, MATURING DATE.
>
> BORROWER WILL PAY $45,000 FOR THE EXTENTION OF 3 MONTHS OPTION TO BUYBACK THE SHARES IF REQUIRED.
>
> IF NEED FURTHER CLARIFICATION, PL CALL.

In reply, Peter Ong wrote in his own hand the words: "Dear Mr K.S. Lie, Mr William Seah [the first plaintiff] accepts your proposal, confirm." and sent it back to the first defendant. The first plaintiff and Peter Ong testified in court that this telefax contained the terms of the loan that Peter Ong, a mutual friend, brokered between the first plaintiff and the first defendant. The language of this telefax was the language of a loan. It referred to the deduction of the three months' interest, and more importantly, referred to the "borrower". Although it also referred to an extension of time for a "buyback", the issue before me was whether the contract was a loan agreement made to appear like a sale and buyback agreement. Hence, it was not unexpected to see features of a sale and buyback document. The more important question was whether there were features of a loan. It was not disputed that the contract was made pursuant to this telefax of 9 May 2001.

6 It will now be appropriate to examine the oral evidence of the respective parties. The first plaintiff's evidence was as follows. Sometime in March 2001 he asked Peter Ong to help him raise $300,000 for his business. He handed Peter Ong a copy of the annual report of the Asia General Holdings Ltd for the year 1999 and a copy of a share certificate in that company for 154,103 shares in the name of the second plaintiff. He also gave Peter Ong a copy of a certificate of stamp duty indicating that on 22 March 2000 the second plaintiff had sold 25,000 shares in the Asia General Holdings Ltd for $175,000 or $7.00 a share. Peter Ong then told the first plaintiff that he had given these documents to the first defendant who was prepared to consider giving a loan to him. Peter Ong then arranged a meeting in which the first plaintiff, the first defendant and himself met at the Orchard Hotel. The first plaintiff told the first defendant at this meeting that he had 30,000 shares to sell at

$8 a share. The first defendant said that he was not interested in buying the shares.

7 About two months later, in May 2001, the first plaintiff told Peter Ong to ask if the first defendant would consider lending him $300,000 instead at a fair interest rate and with two months' interest deducted upfront. Peter Ong telephoned the first plaintiff on 9 May 2001 and told him about the terms that the first defendant wanted. The first plaintiff accepted the terms although at that time he had not been told that he had to bear the cost of transfer of the shares now that the shares had to be formally transferred by the second plaintiff.

8 On 11 May 2001, the first plaintiff met the first defendant and Peter Ong at the first plaintiff's office. The first defendant arrived with various documents including two unsigned letters dated 11 May 2001 by the second defendant to the second plaintiff, and a letter of acknowledgement dated May 2001 from the second plaintiff addressed to the second defendant. The first plaintiff asked the first defendant not to register the transfer of the shares so as to avoid incurring unnecessary expenses, but the first defendant insisted on effecting the transfer. The first plaintiff then obtained the signatures from his wife, the second plaintiff, and gave them together with the share certificate No B8355 for 154,103 shares in Asia General Holdings Ltd to the first defendant on 15 May 2001. The first defendant produced a letter dated 14 May 2001 addressed to the second defendant and asked that the first plaintiff sign it. It was a letter acknowledging that the first plaintiff had received the sum of $438,463.50 on behalf of the second plaintiff. The first plaintiff subsequently realised that this amount added to the sum of $255,000 paid to the second plaintiff amounted to the figure of $693,463.50 which was the consideration stated in the transfer form.

9 The first plaintiff paid a total of six months' interest at $15,000 a month, and then stopped paying altogether after he had unsuccessfully tried through letters of 10 December 2001 and 5 February 2002 to get the interest rate reduced. The first plaintiff spoke to Peter Ong in August 2004 and asked him to persuade the first defendant to reduce the interest rate so that the first plaintiff could repay the loan and redeem his wife's shares. After "many rounds of discussions and meetings" Peter Ong told him that the first defendant would transfer the shares back for $450,000 in a buyback transaction. The first plaintiff told Peter Ong that he would accept that offer, and a lunch meeting was thus arranged for 6 September 2004 at a restaurant in Suntec City. At that meeting, the first defendant brought along a friend called Kenny Lim, who was also known to Peter Ong. The first plaintiff told the first defendant that he wanted the transaction to be concluded through lawyers. The first defendant agreed and told the first plaintiff that his lawyers were Tan Chye Kwee & Co. On the same day the first plaintiff's solicitors wrote to Tan Chye Kwee & Co but received a reply stating that they (Tan Chye Kwee & Co) had no instructions to act for the first defendant. The first plaintiff was subsequently told by Peter Ong that the first defendant had come to know of a letter from the Asia General Holdings Ltd to its shareholders that there were interested parties willing to pay $12 per share and that he was not willing to sell the shares back to the plaintiff for $450,000. Consequently, the plaintiffs brought this action against the defendants.

10 The second plaintiff testified that she had inherited the shares in Asia General Holdings Ltd but she agreed to let her husband use them as security for a loan to be taken for his business. Apart from the fact that she had to sign the various documents referred to, she was not involved in the transaction at all.

11 The defendants' version of the transaction was as follows. The first defendant testified that he was a real estate businessman and the father of the second defendant. He was asked by Peter Ong in February or March 2001 if he was interested in purchasing some shares in an unlisted public company. The first defendant said that he was not interested but Peter Ong was "quite persistent" so he agreed. He met the first plaintiff and Peter Ong at the Copthorne Orchid Hotel where he was

shown a certificate of stamp duty of a previous sale of the shares in the company in question, that is, Asia General Holdings Ltd. The first plaintiff also showed the company accounts to the first defendant but the latter was "not impressed". The first defendant testified that in late April or early May, which was about two months after his meeting with Peter Ong and the first plaintiff, Peter Ong approached him again and said that the first plaintiff needed cash urgently, and suggested various alternatives to the first defendant, including a loan to be given to the first plaintiff using the latter's shares as security. The first defendant was still not interested.

12 The first defendant testified that after that second effort, Peter Ong approached him again. This time the first defendant wondered if it was Peter Ong himself who needed the money. He told the latter that if he were indeed the true borrower he would be more inclined to help. Although the actual words the first defendant deposed in his affidavit at para 7 were "I asked Peter if it was really himself who had found a good business opportunity – perhaps something pertaining to the timber industry – in which case I would be more amenable to helping him," he had stated that a loan was one of the alternatives suggested by Peter Ong. However, his evidence continued abruptly with a further suggestion by Peter Ong that the first defendant ask his cousin Darma. At this point the first defendant thought that Peter Ong must have a "substantial interest in the deal" and he told Peter Ong that he would check with Darma but warned him that the "costs of funds in Indonesia were higher than that of Singapore".

13 A few days after that, Peter Ong reverted with a proposal from the first plaintiff to sell 150,000 shares at $270,000 with an option to buy them back at $300,000 after two months, and, just in case the first plaintiff was unable to re-purchase the shares in two months, a further three months' extension of the option. In the circumstances, the first plaintiff would be "willing to pay S$15,000 for each additional monthly extension". The first defendant conceded that Peter Ong actually used terms such as "an advance of S$270,000" and "interest of S$15,000". According to the first defendant, he then discussed the proposal with Darma but he (Darma) doubted that the first plaintiff would have the means to re-purchase the shares; in which event, he (Darma) would be left with "illiquid shares". Darma therefore asked that the price for the shares be lowered to $255,000, but left the details to be sorted out by the first defendant. The first defendant claimed that Darma trusted him because they grew up together.

14 The first defendant then despatched the telefax dated 9 May 2001 (set out at [5] above). He testified:

> To accommodate Darma's request for a lower selling price ie S$255,000, I suggested that the buy-back option be extended to three months instead. However, to be fair to [the first plaintiff] and to compensate him for the loss of interest on having S$15,000 less cash over three months, I proposed that S$2,250 (5% per month of S$15,000) be deducted from [the first plaintiff's] buy-back price.

The first defendant confirmed Peter Ong's evidence that he (Peter Ong) sent back an acceptance of the terms by the first plaintiff, and also sent the company's annual reports. The first defendant testified that he told Darma that given the first plaintiff's urgent need for funds it would not be convenient to transfer the shares to his (Darma's) name. The first defendant testified that as he was in the midst of divorce proceedings, it would not be convenient to use his name either, so he suggested that the shares be transferred to the second defendant. He testified, however, that it was the first plaintiff's idea to have the contract documents reflect the sum of $693,463.50 as the selling price, a point disputed by the first plaintiff.

15 The first plaintiff did not exercise the buyback option and nothing happened (other than his

having paid $90,000 on what he said were interest payments) until 6 September 2004 when he tried to recover his wife's shares from the defendants. When the defendants refused to return the shares the plaintiffs commenced the present action. In the light of the narrative just set out, I now proceed to consider the key issue: Was the contract document of 11 May 2001 a contract for the sale and purchase of shares as it declared in its title or was it a contract for a loan? Another way of looking at the true issue for determination is to ask whether the written agreement of 11 May 2001 was indeed the contract between the parties, which would be the defendants' case, or whether it was merely a document designed and intended to conceal the true agreement, which would be the plaintiffs' case.

16 If the agreement of 11 May 2001 was examined on its own without any extraneous evidence one would say that it was probably a passable contract for the sale of shares with a buyback option. However, the plaintiffs' case was not based on that contract, but on an oral contract for a loan. Their case was that the written agreement of 11 May 2001 was a device by the first defendant to disguise the loan agreement, which was the true agreement between the parties. In that regard, having considered the testimonies of all the material witnesses, I accept the plaintiffs' version as the more probable one. Apart from my acceptance of the plaintiffs and Peter Ong's evidence, the two other main factors that inclined me to this view were, first, the written agreement itself, though worded to reflect a sale of shares agreement, contained features that were alien to a conventional sale of shares (with buyback option) agreement. Conventionally, stamp duties are payable by the purchaser. It is a convention that could be departed from by an express agreement, but no reason was given to explain the departure from the norm in this case. Another unusual feature is that the defendant-purchaser agreed to transfer all dividends and bonus issues back to the plaintiff-seller should she exercise her buyback option. Ordinarily, dividends and bonus issues belong to the registered owner. In this case, the second defendant was the registered owner and remains so until the shares are transferred back. There was no explanation for this unusual term. Finally, the consideration for the buyback is conventionally a fixed sum or a stated formula for calculating the value at the time of the exercise of the option. In this case, the consideration was fixed at $297,750 which included interest at $15,000 a month. And that is consistent with the cost of extending the option period fixed at $45,000 for three months, renewable for a further three months at the same cost. It was the plaintiffs' case that the loan agreement was made subject to payment of $15,000 interest per month on the principal sum of the loan of $300,000 after deducting $45,000 and the stamp fees.

17 The second major factor that inclined me towards accepting the plaintiffs' case was that all the other ancillary and supporting evidence, such as the documents other than the 11 May 2001 agreement itself, and the testimonies of the witnesses, were preponderantly more credible when examined against the plaintiffs' case than when examined against the defendants' version. The second most important document in this case was the telefax of 9 May 2001 that the first defendant sent to Peter Ong. The express reference to "interest" payments and to the "borrower" indicated very much the context in which the deal or transaction was being struck through Peter Ong. The latter testified in court, and was unshaken under cross-examinations that it was indeed a loan transaction which he helped to broker between the first defendant and first plaintiff. I accept the first plaintiff's evidence as well as that of Peter Ong that the sum of $693,463.50 written as the consideration on the transfer form was written by the first plaintiff on the instructions of the first defendant.

18 The use of Darma as the provider of funds whether as a loan or for investment purposes was an unusual connection. The burden was on the defendants to explain what Darma's role was but it was an explanation that was much weaker in comparison to the case put forward by the plaintiff. It was clear to me that the first defendant was the key person from the defendants' side. Darma, like the second defendant, was only a supporting figure. The defendants' case was that Darma was the true owner of the funds and he had invested them through the first defendant. But as it transpired,

the shares were purchased and transferred into the name of the second defendant. In any event, I accept the evidence that the first plaintiff did not meet Darma before the loan transaction. On the contrary, the first plaintiff asked Peter Ong to liaise with the first defendant, not only prior to the transaction, but also subsequently, when he tried to get the interest payments reduced. There was no evidence to support the proposition that the second defendant was holding the shares in trust for Darma.

19 If, as the defendants say, Darma was the beneficial owner of the shares, he gave no indication that he had any interest in recovering them or proving that they were his apart from than the oral evidence of the father and son defendants. There was absolutely no evidence (other than his testimony in court, affirming his affidavit of evidence-in-chief) that Darma was in any way connected to the transaction. Even the banker's cheque for $250,000 seemed to have came from an unknown account.

20 On 21 October 2004, Peter Ong signed a statutory declaration on behalf of the first plaintiff in which he declared that he arranged the meeting between the first plaintiff and the first defendant because the first plaintiff asked for his help in finding someone who would lend him $300,000. Peter Ong knew the first defendant to be just that person. It was equally important that Peter Ong's statutory declaration supported the first plaintiff's evidence that he met the first defendant in September 2004 over lunch and during which they agreed that the loan be discharged upon the payment of $450,000. Peter Ong declared that the first defendant subsequently reneged on that agreement. Counsel for the first defendant submitted that Peter Ong's evidence was unreliable because he had signed a note on 21 December 2004 acknowledging that the transaction that he had brokered between the first plaintiff and the first defendant was a sale of shares transaction. After listening to Peter Ong in court, I have little hesitation in accepting his rejection of that note and counsel's suggestion. His affidavit of evidence-in-chief was consistent with the contents of his statutory declaration; both these documents were sworn statements unlike the statement he signed for the first defendant, which was prepared for him by the first defendant, and, having heard the first defendant and Peter Ong's testimonies, I find that the note of 21 December 2004 read more like the first defendant's message than that of Peter Ong.

21 The contractual document in this case was entitled "a purchase of shares with a buyback option". However, the terms and structure were inconsistent with a contract of that nature. They were, in my view, more consistent with the nature of a loan contract. The terms in the written agreement were also more consistent with the testimonies of the plaintiffs and Peter Ong. The defendants' story of how the shares were to be purchased and held in a trust is difficult to believe. It will be recalled that according to them, Darma was the real purchaser and beneficiary, but he had to rely on the first defendant whom he trusted because he (Darma) was an Indonesian and was contracting in Singapore. And yes, the shares were purchased and registered not in the name of the first defendant but his son, the second defendant. There was no evidence that the latter held the shares in trust for Darma.

22 The meeting at Suntec City on 6 September 2004 was a post-contract event and, strictly, had no direct bearing on the nature of the contract. However, the events relating to and arising from that meeting corroborated the evidence of the state of mind of the parties concerned. In respect of this episode, I am of the view that the plaintiffs' version, as supported by Peter Ong, is more credible than the defendant's version, as supported by Kenny Lim. The first defendant tried to portray that it was the first plaintiff who was anxious to meet but his short message to Peter Ong's mobile phone revealed that he was the anxious party. I am of the view that the first plaintiff had genuinely concluded a second agreement with the first defendant at that lunch to redeem his shares for a lump sum of $450,000 and that the first defendant reneged on that agreement after he realised that the

shares were worth much more, and that technically, on paper, he appeared to have a strong case against the first plaintiff's claim based on a loan.

23 On the evidence, I am of the view that the original transaction was, in fact, a loan transaction. An elephant is a bird when it has feathers and can fly. I would permit the first defendant to charge interest on the loan at the rate of 20% per annum as permitted by s 23(5) of the Moneylenders Act (Cap 188, 1985 Rev Ed). Consequently, I will allow the plaintiffs' claim and order that the defendants deliver up the share certificates in question to the second plaintiff upon payment of $298,597.13 by the plaintiffs. Costs are to follow the event, to be taxed if not agreed.