

Wan Lai Ting v Kea Kah Kim
[2015] SGHC 40

Case Number : Suit No 320 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 : Wan Lai Ting — Kea Kah Kim

Contract

9 February 2015

Edmund Leow JC:

Introduction

1 This case concerned a claim by the Plaintiff that the Defendant owed her S\$580,000 in respect of shares that she had purportedly lent him but which he had failed to return. After a full hearing, I found that the Plaintiff's claim was factually unsustainable and dismissed it. As she has appealed, I now give my reasons. I note in passing that the Plaintiff's husband, Henry Chow ("Chow"), had also commenced a separate suit against the Defendant, Suit 450 of 2013, based on facts that occurred around the same time. I heard that suit immediately after this one, and the parties agreed that I could refer to evidence from both suits when deciding each one.

Facts

Background

2 Carriernet Corporation Ltd (HK) ("CNET") was a Hong Kong company that the Plaintiff and Chow set up in 2001 as a family business. Chow owned 99.99% of the shares in CNET while his mother, Lau Man Hung ("Lau"), owned the other 0.01%.

3 On 14 August 2006, ArianeCorp Ltd ("ArianeCorp"), a Singapore-listed company, 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) Chow – 84,500,000 shares.
- (b) Chow's brother-in-law, Mah Cheung Wah ("Mah") – 17,500,000 shares.
- (c) Chow's sister-in-law, Leung Man Ha ("Leung") – 15,000,000 shares.
- (d) A financial consultant, Neo Hock Soon ("Neo"), who was responsible for brokering the deal

- 13,000,000 shares.

4 In granting in-principle approval for the listing and quotation of the Consideration Shares, the Singapore Exchange Securities Trading Limited ("SGX-ST") required Chow and the other allottees to execute statutory declarations stating (*inter alia*) that they would be the beneficial owners of the Consideration Shares following completion of the proposed acquisition. Statutory declarations to this effect were executed by Chow and Leung on 19 December 2006. In addition, under cl 6.2 of the sale and purchase agreement, Chow undertook not to sell or dispose of any of the Consideration Shares issued to him for a period of one year, and not to sell more than 50% of the Consideration Shares in the second year ("the Moratorium").

5 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.

6 At the material time, the Defendant was the CEO of ArianeCorp and held over 200,000,000 shares in it.

The Plaintiff's case

7 According to the Plaintiff, on 26 December 2006, Leung transferred the beneficial interest in her 15,000,000 shares ("the Disputed Shares") to the Plaintiff. This transfer was recorded in a document of the same date ("the 29 December 2006 Document") signed by Leung and witnessed by Lau. The Plaintiff was unable to produce the original of the 29 December 2006 Document and had only tendered a copy of it in these proceedings. This brief document stated as follows:

Ms. Leung Mun Ha

(HK ID: [...])

29th December 2006

ArianeCorp shares non-ownership declaration

I am Ms. Leung Mun Ha (HK ID: [...]) and is [*sic*] holding ArianeCorp shares of 15,000,000 shares (11.54%) on behalf of Ms. Wan Lai Ting (HK ID: [...]).

This consideration is driven from a family support basis and Ms. Wan Lai Ting has the full legal and operational rights to manage the shares.

(signed)

Leung Man Ha

Evidenced by: [Lau's signature appears here]

8 The Plaintiff's claim against the Defendant related to 10,800,000 of the Disputed Shares. According to Chow (who was the Plaintiff's witness), sometime in February 2007, after ArianeCorp's shareholders had approved the acquisition of CNET, the Defendant approached him asking to borrow 10,800,000 of the Plaintiff's shares. Although Chow initially declined the Defendant's request, the latter was persistent and Chow eventually agreed. The Defendant asked for the shares to be issued in the name of one Kelly Pang ("Pang") as his nominee. Consequently, when the Consideration Shares

were issued on 12 March 2007, 10,800,000 of the Disputed Shares were issued in Pang's name.

9 On 6 July 2007, the Defendant called Chow saying that he had sold the 10,800,000 shares for S\$0.10 each. The Defendant agreed to pay the Plaintiff the sum of S\$1,080,000 instead of returning the shares to her.

10 Subsequently, on 12 July 2007, the Defendant made part payment of S\$500,000 to the Plaintiff. However, despite repeated requests by the Plaintiff for payment of the remaining S\$580,000, the Defendant failed, refused or neglected to pay the remaining sum. The Plaintiff therefore commenced proceedings on 12 April 2013 claiming the sum of S\$580,000 from the Defendant.

The Defendant's case

11 In his defence, the Defendant denied borrowing shares from the Plaintiff. He further disputed the authenticity of the 29 December 2006 Document and alleged that the purported transfer of beneficial ownership in the shares to the Plaintiff was a sham.

12 The Defendant's case was as follows. Sometime in early 2007, Chow had asked him for help with procuring a Central Depository ("CDP") account to liquidate some shares. The Defendant then contacted a financial consultant, Mick Teoh ("Teoh"), who was Pang's husband. Teoh told the Defendant that he could provide Pang's CDP account (with Pang acting as Teoh's nominee) for a fee of 5% of the sale price of the liquidated shares, an arrangement which Chow agreed to. Consequently, Pang's CDP account was credited with 10,800,000 shares on 14 March 2007.

13 Later, in June 2007, Chow wanted to borrow S\$500,000 urgently and asked the Defendant whether he could borrow that sum using the 10,800,000 shares as collateral. The Defendant informed Teoh of Chow's request and Teoh agreed to loan the amount to Chow on the following terms: (a) Chow would pay 1% monthly interest on the loan; and (b) Teoh would return the 10,800,000 shares to Chow upon repayment of the loan. Chow agreed to those terms. Teoh passed the cash to the Defendant in end June 2007 who in turn handed it to the Plaintiff sometime in July 2007. Teoh proceeded to sell the 10,800,000 shares at S\$0.09 each on 21-22 June 2007, taking the calculated risk that he would later be able to purchase the shares back at a lower price if Chow repaid the loan and asked for the shares back.

14 The Defendant also submitted that Chow, acting in concert with the Plaintiff and Leung, had committed various illegalities. The Defendant argued that, assuming the Plaintiff had beneficial ownership of the Disputed Shares, Chow had a "deemed interest" in those shares as the Plaintiff's spouse pursuant to s 164(15) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Companies Act"). Under s 165(1) of the Companies Act, Chow as a director of ArianeCorp had a duty to disclose his deemed interest in the Disputed Shares. Further, the Plaintiff had also violated s 330 of the Securities and Futures Act (Cap 289, 2006 Rev Ed) ("the SFA") by authorizing and permitting Chow to furnish false information to the SGX-ST with intent to deceive. Consequently, the 29 December 2006 Document was void for illegality and the subsequent oral contracts that were allegedly made with the Defendant were tainted with illegality as well.

My decision

15 Despite the Defendant's lengthy submissions on illegality, I ultimately considered it unnecessary to decide that issue. This was because I found that the Plaintiff had failed to even prove that: (a) she was the beneficial owner of the Disputed Shares; and (b) the Defendant had borrowed 10,800,000 of the Disputed Shares from her.

Ownership of the Disputed Shares

16 The Plaintiff could not provide a convincing explanation for why the Disputed Shares were transferred to her. The Plaintiff's evidence was that Leung had "sold" the shares to her so that she (the Plaintiff) could raise funds to finance CNET's operational expenses. In return, the Plaintiff agreed to continue supporting her 78-year-old mother-in-law (Lau) financially, which she did by paying Lau the monthly sum of HK\$10,000. However, no reason was given as to why the Plaintiff would still need to finance CNET after it was acquired by Arianecorp. Further, the Disputed Shares were worth around S\$1.5m while the allowance that the Plaintiff said she gave Lau would have amounted to about S\$23,700 a year (using the exchange rate of 1 SGD = 5.068 HKD as of 29 December 2006). This would mean that the Plaintiff would have to pay Lau an allowance for *more than 63 years* before the price of the Disputed Shares would be repaid (even without accounting for interest). There was also evidence that the Plaintiff was already helping to look after Lau even before this purported transaction, and there was every reason to assume that she would have continued to do so in any case. So it appeared to me that the Plaintiff was essentially agreeing to do what she would have done anyway.

17 It was further noteworthy that the Plaintiff had earlier applied in Summons No 3480 of 2014 to admit two AEICs from Lau without Lau having to be cross-examined, claiming that Lau was too frail to travel to Singapore to attend court or even to give evidence via video link. I dismissed this interlocutory application as I considered the prejudicial effect of Lau's evidence to outweigh its probative value. But this application also suggested that the Plaintiff knew her evidence was weak and needed further corroboration from Lau. The flaws in her story might also indicate why she was not prepared to let Lau be cross-examined. On the whole, therefore, I found the Plaintiff's account utterly contrived and unbelievable.

18 In her closing submissions, the Plaintiff argued that it was irrelevant whether the consideration for the Disputed Shares were adequate, since it is trite that any benefit to the promisor or to a third party or any detriment suffered by the promisee would suffice as consideration in contract law. But this argument confused the issue of the *validity* of a contract with the issue of *proof*. The fact that the alleged consideration for a contract was illusory was a highly relevant factor in deciding whether such a contract existed or whether it was concocted as an afterthought to support a claim to ownership of assets. In my view, given the value of the Disputed Shares, it was very unlikely that it could have been transferred to the Plaintiff in exchange for her mere promise to financially support Lau (which was something that she had already been doing in any event).

19 But even if I accepted that Leung had attempted to transfer the beneficial interest in the Disputed Shares to the Plaintiff on 29 December 2006, the fact was that the Consideration Shares were only issued and allotted to the allottees on 12 March 2007. It is impossible for a settlor to create a trust over future property, *ie*, property that the settlor does not presently own: Robert Pearce, John Stevens & Warren Barr, *The Law of Trusts and Equitable Obligations* (Oxford University Press, 5th Ed, 2010) at p 192. Hence, the 29 December 2006 Document would not have been effective in transferring any beneficial interest in the Disputed Shares to the Plaintiff at that time, since those shares were not yet in existence then. And since the shares were subsequently issued and allotted to *Pang*, not Leung, Leung never acquired any interest in them and was in no position to transfer the beneficial interest in them to the Plaintiff. It was conceivable, based on the Plaintiff's version of events, that Leung might have had a right to receive the shares before they were actually allotted, and it was this right that she sold to the Plaintiff. However, I saw no need to consider this issue in detail as the Plaintiff's claim was not framed in this way, nor was the 29 December 2006 Document drafted in such a manner.

20 Thus, the Plaintiff's claim failed at the outset in that she failed to establish her beneficial ownership of the Disputed Shares.

Alleged oral agreements with the Defendant

21 Even assuming that the Plaintiff did acquire beneficial ownership of the Disputed Shares, I also found that she had failed to discharge her burden of proving that she had lent 10,800,000 of those shares to the Defendant.

22 First, the Plaintiff's case was that share loan agreement was made purely orally, and so was the subsequent agreement by the Defendant to repay the sum of S\$1,080,000 instead of returning the shares. But I found it incredible that there was no written contract or at least some correspondence to evidence a transaction of such a significant value. This was especially so given the fact that the Plaintiff and Chow were not related to the Defendant and had a purely business relationship.

23 Second, as mentioned earlier, the Plaintiff's stated reason for acquiring the Disputed Shares was to finance the operating expenses of CNET. But if this was true, then it made no sense why she would agree to lend a substantial portion of the Disputed Shares to the Plaintiff without receiving anything in return. Even more inexplicably, she waited for almost six years (a few months before the limitation period expired) before sending a letter of demand to the Defendant on 28 March 2013 for the repayment of the alleged debt of S\$580,000. Her only explanation for this lengthy delay was that she had heard that the Defendant was in financial trouble and wanted to give him time to recover financially, which I found hard to believe. In my view, even if the Plaintiff was really that considerate, she would at least have contacted him over the years to remind him of the outstanding debt and perhaps try to work out an instalment plan. Instead, she kept silent for almost six years and then sprung a lawsuit on him when the limitation period was almost up, which was not in my view how a normal person would act if the debt was genuine.

24 The only circumstantial evidence supporting the Plaintiff's claim was the payment of S\$500,000 that the Defendant made to her 12 June 2007, which the Defendant claimed was a loan from Teoh to Chow that he was merely passing on as an intermediary. The Plaintiff argued that it made no sense for Chow to borrow S\$500,000 from Teoh using the 10,800,000 shares as collateral when, according to the Defendant, those shares were placed in Pang's account for the purposes of liquidation anyway. Chow would have obtained a much larger sum if he had simply liquidated the shares at the prevailing price of S\$0.09. In my view, however, there were possible explanations for this. For example, Chow might have needed a short term loan urgently but did not want to sell the shares yet; alternatively, he might have been waiting for the share price to rise further. Moreover, the Defendant's version of events was corroborated by Teoh, whom he subpoenaed as a witness. Although counsel for the Plaintiff submitted that Teoh had concocted his evidence in an attempt to help the Defendant, I saw no reason why Teoh would commit perjury on the Defendant's behalf given that they were not particularly close. Further, if the Plaintiff's account was true, then Teoh would have nothing to lose by telling the truth and saying that Pang was acting as the Defendant's nominee. It made no sense for him to implicate himself in the dispute.

25 Ultimately, I considered that the burden of proof was on the Plaintiff to prove the alleged oral agreements, and I found that she had failed to do so even if I had disregarded the Defendant's version of events.

Conclusion

26 For the foregoing reasons, I dismissed the Plaintiff's claim with costs. Further, although I made

no finding on the Defendant's allegations of illegality, I found the factual circumstances to be rather suspicious. While it was reasonable for Neo to be allotted Consideration Shares for his role in brokering the deal, there was no apparent reason why Mah and Leung were allotted shares, since they were not shareholders of CNET. Although the Plaintiff claimed that they had all played a role in helping Chow to build up CNET over the years, she had difficulties explaining what they had actually done for CNET beyond running some routine errands occasionally. In my view, the circumstances raised a strong suspicion that they were simply holding the shares on Chow's behalf so that he could (a) dispose of those shares in breach of the Moratorium; and (b) avoid his duties of disclosure under the Companies Act and the SFA. This would explain why Leung was willing to give up her purported beneficial interest in the Disputed Shares to the Plaintiff for essentially no consideration – the shares were not hers to begin with.

27 Indeed, the overall impression I got during the trial was that Chow's family members (including the Plaintiff) were simply giving evidence under his directions. Chow was the Plaintiff's only witness who spoke with conviction; his family members gave hesitant answers and appeared not to know what was going on. The Plaintiff herself admitted under cross-examination that Chow dealt with most of the matters relating to the claim and she was merely following his instructions. Chow was also forced to admit in cross-examination that he was the person who drafted the 29 December 2006 Document, which gave rise to the suspicion that the Plaintiff's story was essentially concocted by Chow as a way of dealing with shares that in reality belonged to him. In his evidence, Chow claimed to be unaware of the securities regulatory and disclosure regime in Singapore. However, considering that Chow became CEO of ArianeCorp shortly after it acquired CNET, and later became CEO of another listed company in Singapore, it was difficult for me to take his claims of ignorance at face value.

28 Given these circumstances, I considered it necessary to refer the matter to the authorities for further investigation into possible regulatory offences.