Publicis Group SA v Chong Hon Kuan Ivan
[2003] SGHC 41

Case Number : OS 948/2002

Decision Date : 28 February 2003

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : Prakash Mulani and Parhana Moreta (J Koh & Co) for the plaintiffs; Chong Boon Leong, Ajinderpal Singh, and Louis Chan (Rajah & Tann) for the defendant

Parties : Publicis Group SA — Chong Hon Kuan Ivan

Civil Procedure – Whether proceedings begun by originating summons should continue as if they had been begun by writ – Rules of Court Order 28 rule 8(1).

1 In OS No 948 of 2002, the plaintiffs, Publicis Groupe SA ("Publicis"), a French public-listed advertising company, which entered into a Call and Put Option Agreement with the defendant, Mr Ivan Chong Hon Kuan ("Ivan"), the former managing director and chief executive of Publicis Eureka Pte Ltd with respect to the latter's shares in that company, sought to enforce the terms of the said contract. After hearing the arguments of counsel for both parties, I ordered that the proceedings continue as if the cause or matter had been begun by writ for reasons which are set out below.

Background

2 Ivan is the founding member of Eureka Advertising Pte Ltd ("Eureka"), a local advertising agency. Under his management, Eureka made profits between 1980 and 1996. Having established the company in the local market, Ivan sought to raise Eureka's profile in 1996 by entering into a joint venture with Publicis, a French company with an interest in the Asia-Pacific region. In December 1996, Publicis acquired 60% of the shares in Eureka, which was renamed Publicis Eureka Pte Ltd ("PEP"). The acquisition was on the assumption that Publicis and Ivan would work together to build PEP's business. As such, Ivan was appointed PEP's managing director and chief executive officer.

3 Publicis and Ivan also entered into a Call and Put Option Agreement, under which the former were granted an option to purchase the latter's 76,800 shares in PEP "at any time within sixty (60) Business Days after the termination of [his] employment with the Company by notice in writing to [him] for all the option shares". The price for the shares was to be fixed with reference to an agreed formula and it was to be calculated and certified by PEP's auditors.

4 Things did not turn out as expected. The working relationship between Publicis and Ivan deteriorated after the former incorporated a wholly owned subsidiary, FCA Communications, in Singapore and it worsened after Publicis acquired the interests of Saatchi & Saatchi, an international advertising agency, in September 2000. Ivan complained vociferously that Publicis diverted lucrative business from PEP to their other companies. On the other hand, Publicis, which denied diverting profits from PEP to FCA, contended that FCA sheltered PEP from operating losses.

5 On 6 November 2000, Ivan's solicitors, Rajah & Tann, asserted in a letter to Publicis' solicitors, J Koh & Co, that Publicis had acted in a manner prejudicial to Ivan's interest and added that he and two

other original shareholders were prepared to sell their shares (the "original shareholders' shares") in PEP to Publicis for not less than $6.4m.

6 Negotiations for the sale and purchase of the original shareholders' shares continued without a breakthrough for a while. To break the impasse, Publicis' chairman and chief executive officer, Mr Maurice Levy, informed Ivan on 15 May 2001 that his company was prepared to purchase the original shareholders' shares for $4.4m and pay for them on the basis of a time-table proposed by Ivan. On 21 May 2001, Ivan, who claimed to have accepted Maurice's offer, replied that he was glad that the parties had "finally come to an agreement".

7 The parties were supposed to sign legal documents with respect to the sale and purchase of the said shares. Unfortunately, these documents were not signed because of some disagreement between the parties. On 2 October 2001, Ivan informed Publicis that as the latter had reneged on the agreement to purchase his shares, he would commence legal proceedings. On 9 February 2002, Ivan's employment with PEP was terminated. On 11 June 2002, Publicis sought to exercise their right under the Call and Put Option Agreement to purchase Ivan's shares in PEP for only $2,267,904, the price calculated and certified by PEP's auditors, Ernst & Young. Ivan refused to transfer the shares in question to Publicis.

8 A number of suits were filed by Ivan as a result of the dispute between the parties. These include actions in relation to his claim for damages for wrongful termination of his contract of employment, his application for leave under section 216A of the Companies Act to commence an action on behalf of PEP against Publicis, and his allegation of oppression against minority shareholders. Ivan could not serve the requisite documents in his numerous suits on Publicis in Singapore as the latter refused to appoint local solicitors to accept service of the said documents. Having made it difficult for Ivan to serve the said documents in Singapore, Publicis then instructed J Koh & Co to file OS No 948 of 2002 on 9 July 2002 to enforce the terms of the Call and Put Option Agreement.

9 Frustrated at not being able to serve on Publicis in Singapore the requisite documents in connection with his suits, Ivan sought leave for substituted service of the said documents on J Koh & Co. He also attempted to have his suits consolidated with OS No 948 of 2002. Publicis opposed Ivan's applications, claiming that they had no intention to evade service and that service of the requisite documents in France was neither impossible nor impracticable. The Deputy Registrar, who heard Ivan's application on 22 August 2002, thought that the application for substituted service was premature. As such, the question of consolidation of the numerous actions in question did not arise.

Whether the dispute can be resolved on the basis of affidavit evidence

10 An originating summons may be a relatively simple and swift way of determining the rights and liabilities of the parties concerned. However, it is not an appropriate process where there is a dispute regarding essential facts which cannot be resolved on the basis of affidavits. Hence, Order 28 Rule 8(1) of the Rules of Court provides as follows:

> Where, in the case of a cause or matter begun by originating summons, it appears to the Court at any stage of the proceedings that the proceedings should for any

> reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that pleadings shall be delivered or that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.

11 Ivan's counsel contended that whether or not Publicis may rely on the Call and Put Option Agreement cannot be determined on the basis of affidavit evidence. He made the following points:

> (i) The Call and Put Option Agreement is no longer relevant as the shares in question had already been sold for a higher price in May 2001 when Ivan accepted Publicis' offer of 15 May 2001.
>
> (ii) It was not the intention of the parties that Publicis would have the right to purchase Ivan's shares under the terms of the Call and Put Option Agreement if his employment was, as he asserted, wrongfully terminated.
>
> (iii) Publicis should not be allowed to take advantage of the courts to enforce their claim in OS No 948 of 2002 when they have made things difficult for Ivan by refusing to appoint local solicitors to accept service of the requisite documents in his suits against them.
>
> (iv) The provisions in the audited accounts for the financial year 2001 are being disputed by Ivan and as the appointment of Ernst & Young as the company's auditor is an issue pending adjudication in OS No 347 of 2002, Publicis cannot rely on the calculations made by this firm of auditors for the purposes of the Call and Put Option Agreement,

Only the first three assertions will be considered in this judgment as they are sufficient to establish that the originating summons in question ought to be converted to a writ.

Whether there was a binding agreement in May 2001

12 If, as Ivan alleged, there was a binding agreement for the sale and purchase of Ivan's shares in May 2001, Publicis cannot rely on the terms of the Call and Put Option Agreement to purchase his shares. Publicis contended that whatever may have transpired between the parties in May 2001, there was no contract because the parties did not sign the requisite legal documents pertaining to, inter alia, the sale and purchase of Ivan's shares. Ivan disagreed and said that the parties' solicitors were merely required to document the terms already agreed upon.

13 At the outset, it is worth noting that in *Klerk-Elias Liza v KT Chan Clinic Pte Ltd* [1993] 2 SLR 417*,* 434, Karthigesu JA, who delivered the judgment of the Court of Appeal, aptly reiterated that "as a matter of principle, … an agreement to execute a formal agreement does not prevent there being a valid and concluded agreement in the meanwhile". In order to determine whether or not there was a contract in May 2001 for the sale and purchase of Ivan's shares, the following oft-cited words of Parker J in *Von Hatzfeldt-Wildenburg v Alexander* [1912] 1 CH 284, 288-289, should be borne in mind:

> It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract

between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case, there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored.

14 In his note of 15 May 2001 to Ivan, Maurice stated as follows:

> *In order to come to a final settlement*, I am making a huge step in your direction….
>
> 1 I have decided to pay the shareholders: you, Thomas Neo and Jimmy Chang, the amount of S$4.4 million that you have been requesting, although I have always found this amount to be out of proportion to the real value of your shares … .
>
> 3. I accept the timetable that you have asked for in your letter of March 14:
>
> S$1,700,000 – upon completion
>
> S$1,350,000 – 12 months after completion
>
> S$1,350,000 – 24 months after completion
>
> 4 You will serve a period of 24 months as non-executive Chairman, with the same remuneration and benefits as currently agreed. You have accepted a non-compete clause of 18 months starting on the day following the end of this two-year employment period.
>
> …. I hope you realize the effort I have made and that you will gladly confirm your agreement on the terms outlined above.

15 Ivan responded to Publicis' offer on 21 May 2001 in the following terms:

> Thank you for your letter.
>
> *Whilst I am glad that we have finally come to an agreement,* I would like you to know that this is not what I had in mind for our exit….
>
> I would also like to take this opportunity to assure you that I would continue to give of my best till the end of my contract.
>
> In the meantime, please let me know should our lawyers proceed to contact your solicitors for the purposes of preparing the necessary documentation.

16 On the same day, Ivan sent Maurice an e-mail captioned "Final Agreement". In it, he stated:

> Refer to my email this morning, I have instructed my lawyers to prepare the following:
>
> Share Transfer Form
>
> Instalment Payment Letter
>
> Service Agreement.

17 On 23 May 2001, Maurice replied to Ivan by e-mail. In his reply, which was also captioned "Final Agreement", he stated:

> I sincerely regret your decision to sell your shares. You know it was not my choice, but yours.
>
> I am asking Guillaume Levy-Lambert, who knows all the details of our negotiations, to follow up with the lawyers concerning the necessary contracts.
>
> I am counting on you to make sure the clients stay.

18 While Ivan claimed that a contract was concluded in May 2001 for the sale and purchase of his shares, Publicis pointed out that Maurice had, when making an offer of $3m for the shares in an earlier letter on 26 December 2000, stated as follows:

> It is not desirable, neither for you, nor for us, to have a public display of our differences, and therefore this offer is made only on the basis of an amicable settlement and *subject to further documentation*.
>
> [emphasis added]

19 Ivan's counsel countered that the offer contained in Maurice's letter of 26 December 2000, some five months before the 15 May 2001 offer, was not relevant as it was not accepted by Ivan. He pointed out that a series of proposals and counter-proposals flowed between the parties before Publicis made its offer of 15 May 2001, which did not contain the words "subject to further documentation".

20 When attempting to fathom the true intention of the parties in this case, all the relevant circumstances must be considered. In *Thomas Hussey v John Horne-Payne* (1879) 4 App Cas 311, 316, Cairns LC summarised the position as follows:

> [I]t is one of the first principles applicable to a case of the kind that … you must take into consideration the whole of the correspondence which has passed. You must not at one particular time draw a line and say, 'We will look at the letters up to this point and find in them a contract or not, but we will look at nothing beyond'. In order fairly to estimate what was arranged and agreed, if anything was agreed between the parties, you must look at the whole of that which took place and passed between them.

21 In the present case, it was not possible to decide whether Ivan's shares had already been sold to Publicis in May 2001 on the basis of affidavit evidence. One way of resolving the dispute was to adjourn the hearing of the originating summons in order that arrangements may be made for those who filed affidavits to be cross-examined (see, for instance, *Tan Yeow Khoon v Tan Yeow Tat* [2001] 3 SLR 341). Another option was to convert the originating summons to a writ. After considering all circumstances, including those which will be discussed below, I took the view that whether or not the Call and Put Option Agreement had been superseded by an agreement in May 2001 for the sale and purchase of Ivan's shares is a question that ought to be decided after a trial.

Whether the Call and Put Option Agreement applies if Ivan's employment contract was wrongly terminated

22 Ivan's assertion that Publicis cannot rely on the Call and Put Option Agreement because his employment contract was unlawfully terminated will next be considered. In essence, Ivan's counsel asserted that this is not an ordinary case of a majority shareholder buying out, after relationships have soured, the shares of a minority shareholder who has no legitimate expectation that he would not be required to sell his shares at a fair value in the event of breakdown of his relationship with the major shareholder. It was submitted that the joint venture arrangements and the terms of Ivan's employment contract aligned his fortunes with that of PEP in such a manner that it is inconceivable that Publicis could rely on the Call and Put Option Agreement if his employment contract was wrongfully terminated.

23 To fortify his argument, Ivan's counsel pointed out that his employment contract tied him to PEP for a long period of time and under the terms of the Call and Put Option Agreement, the longer he remained with PEP, the greater the multiplier for the determination of the value of his shares. Section 4.1 of the employment contract provided as follows:

> The term of employment of the Appointee … shall be for … five (5) years, commencing on 1 January 1997 and terminating on 31 December 2001 and provided the appointee has not committed any of the acts stated in section 4.2 (i) such term shall be renewed for an additional five (5) years … and (ii) the Appointee shall be entitled to renew this Agreement on a year to year basis from 1 January 2007 to 31 December 2011.

24 Section 4.2.1 of the contract, which refers to the limited circumstances under which Ivan's employment contract may be terminated provides as follows:

> The employment of the Appointee may be terminated at any time by the Company without notice or payment in lieu of notice or liability or compensation or damages …. upon the occurrence of any of the following:
>
> > [a] … the Appointee is guilty of gross negligence or wilful misconduct in connection with or affecting the business of the Company or the Group which results in a material adverse effect on the Company.

> [b] the Appointee has an interim receiving order made against him, becomes bankrupt ….
>
> [c] if the Appointee is convicted of any criminal offence involving dishonesty or fraud;
>
> [d] if the Appointee becomes prohibited by law for any offence involving fraud or dishonesty from holding the office of director in any company; or
>
> [e] if the Appointee resigns as a director of the Company otherwise than at the request of the Company.

25 Ivan's counsel asserted that as his dismissal had nothing to do with the circumstances referred to in section 4.2 of his employment contract, the validity of the termination of the employment contract ought to be determined by the courts before Publicis can rely on the Call and Put Option.

26 Publicis' counsel stressed that when considering Ivan's assertions, it should be noted that specific performance of an employment contract will not be ordered. However, what is relevant here is not specific performance of Ivan's contract but whether or not a wrongful termination of his contract can, in the light of the joint venture arrangements and the unusual terms of his employment contract, entitle Publicis to take advantage of the Call and Put Option Agreement. Whether Ivan's arguments are valid or not ought to be considered at a trial. They should not be dismissed on the basis of affidavit evidence.

Publicis' refusal to appoint local solicitors to deal with Ivan's claims

27 If there was any remaining doubt as to whether the originating summons in question ought to be converted to a writ, they were swiftly dispelled by Publicis' conduct in relation to the suits filed by Ivan with respect to the alleged wrongful termination of his contract of employment and sections 216A and 216 of the Companies Act. As has been mentioned, Publicis have not authorised J Koh & Co, their solicitors in this action, or any other person in Singapore to accept service of the relevant documents in Ivan's suits and when the originating summons presently being considered was heard, the requisite documents in Ivan's suits had still not been served in France on Publicis. Ivan's solicitors asserted as follows:

> [T]he real objective of [Publicis] in filing O/S 948 is to acquire [Ivan's] shares on the cheap without dealing with the substantive issues and liabilities brought about by [Ivan's] actions.
>
> This must be the logical conclusion in view of the fact that [Publicis] has refused to appoint solicitors to accept service of [Ivan's] actions on their behalf….
>
> [A]fter causing considerable delay by refusing to appoint solicitors to accept service on their behalf, [Publicis] has since instructed … J Koh & Co to file O/S on their behalf.

> The Court should not allow [Publicis] to pick and choose the issues for determination by the Singapore Court.

28 In *Drolia Mineral Industries Pte Ltd v National Resources Pte Ltd* [2002] 3 SLR 163, 175, Lee Sieu Kin JC, as he then was, rightly observed:

> To hold that a foreign plaintiff commencing an action in Singapore would be deemed to have submitted himself to the jurisdiction in respect of any counterclaim that may properly be made in that action reflects the justice of the situation. A foreigner who takes advantage of the legal system in Singapore to pursue his legal rights against a person amenable to the jurisdiction should … open himself to any claim the defendant might have against him so that as between them their rights and liabilities inter se may be squared off in one action rather than a multiplicity of actions in different jurisdictions. …. I do not see it as just that a foreign plaintiff is able to sue a resident here and take advantage of our legal system to pursue his rights … but the resident defendant is powerless to counterclaim against him.

29 Admittedly, Publicis' position is that they are not trying to evade service in France of the requisite documents in Ivan's suits. All the same, it is evident that they are making use of our courts to take over Ivan's shares while making it difficult for the latter to serve the documents in relation to his suits against them. Much time would be saved if OS No 948 of 2002 was converted to a writ so that Publicis' right to rely on the Call and Put Option Agreement to acquire Ivan's shares may be considered comprehensively at a trial together with issues such as the existence or non-existence of an agreement in May 2001 for the purchase of the said shares and the effect of an unlawful termination of Ivan's employment on the Call and Put Option Agreement. As such, I ordered that the proceedings in this case continue as if the cause or matter had been begun by writ.