Full Fledge Holdings Ltd v Wisanggeni Lauw
[2004] SGHC 141

Case Number : Suit 1341/2002

Decision Date : 30 June 2004

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Vinodh S Coomaraswamy and Chua Sui Tong (Shook Lin and Bok) for plaintiff; Tan Lee Cheng and Yeo Yen Ping (Harry Elias Partnership) for defendant

Parties : Full Fledge Holdings Ltd — Wisanggeni Lauw

Contract – Formation – Agreement not in writing – Dispute between parties concerning exact terms of agreement – Whether it was agreed that one party had an obligation to transfer shares.

30 June 2004 *Judgment reserved.*

Kan Ting Chiu J:

1 This case would not be necessary if the parties had put their agreements into writing or engaged lawyers to do it for them. They were involved in a substantial project to acquire a listed company by a reverse takeover, and to raise funds for the exercise. Most of their agreements and dealings were not recorded. When matters came to a head, they disagreed on the terms of the agreements they had between them and the actions they had taken.

2 The plaintiff, Full Fledge Holdings Ltd, is a company registered in Mauritius. Kang Hwi Wah ("Kang") is the sole beneficial owner of the plaintiff. In their dealings, the parties made little distinction between the plaintiff and Kang. Kang is a veteran in Singapore corporate circles and was in control of a listed company. However, he has little formal education, having received primary school education in the Chinese stream. His knowledge of the English language is limited, and he requires an employee to interpret and write English documents for him.

3 The defendant, Wisanggeni Lauw, is an Indonesian with business interests in Indonesia, Singapore, Hong Kong and China. He holds a Bachelor of Science degree from Syracuse University in New York, and had worked for about ten years in America before he returned to Indonesia. He controls an Indonesian company with a concession to a forest plantation in South Kalimantan which was to be developed into a pulp mill.

4 The defendant wanted to use a Singapore listed company to hold that business. His plan was to acquire a Singapore listed company through a reverse takeover, by injecting the business into it. In mid-2000, the defendant came to know Kang as someone who could assist him achieve his plan. They agreed that Kang would be rewarded for his assistance once the takeover was accomplished.

5 They did not record their agreement, and their recollection of the terms agreed upon were at variance. The parties took different positions on the terms of the agreement. The plaintiff's case is that the agreement was that:

(a) Kang was to assist the defendant to identify a suitable company to take over;

(b) Kang was to procure or arrange for the injection of funds "of about US$5.0 million" to facilitate the acquisition of the company; and

(c) upon the completion of the acquisition, the defendant was to transfer 57,630,000 new shares in the acquired company to Kang's sharebroker.

6 The defendant's case is that they had agreed that:

(a) Kang was to advance to the defendant US$10m to US$15m, with the first US$5m to be advanced within a few days, and the balance to be paid later; and

(b) the defendant would pay Kang 57,630,000 shares in the acquired company for the sum advanced.

7 After Poh Lian Holdings Ltd ("PLHL") was identified as a target for acquisition, there were some written records of the acquisition and the promised reward. The plaintiff sent the defendant a letter dated 25 September 2000:

ACQUISITION OF AN EQUITY STAKE IN POH LIAN HOLDINGS LTD,. SINGAPORE ("PLHL")

We refer to our discussions in respect of your proposed acquisition of an equity stake in PLHL.

For the purpose of your aforesaid acquisition, we have, at your request, to-date injected into your Indonesian timber projects with total cash value consideration of S$22 million.

As discussed and agreed, you will, upon your successful acquisition of an equity interest in PLHL, make forthwith the necessary arrangements to repay to me the aforesaid sum of S$22 million. To this effect and as agreed, you will upon the aforesaid acquisition, transfer 57,630,000 new PLHL shares to our share broker (name of our broking house and account number will be inform to you [*sic*] in writing in due course).

Unless the context requires otherwise, the expression "you" or "your" shall include your nominee/s as you may so choose to appoint.

For good order sake, kindly sign the duplicate copy of this letter to signify [your] agreement to the above.

…

8 This was followed by another letter from the plaintiff dated 3 October 2000:

ACQUISITION OF AN EQUITY STAKE IN POH LIAN HOLDINGS LTD,. SINGAPORE ("PLHL")

We refer to our discussions in respect of your proposed acquisition of an equity stake in PLHL.

For the purpose of your aforesaid acquisition, we have, at your request, to-date injected capital funds into your Indonesian Projects.

In consideration thereof, and as discussed and agreed, you will upon your successful acquisition of an equity interest in PLHL make forthwith the necessary arrangements to repay to us the aforesaid consideration. To this effect and as agreed, you will upon the aforesaid acquisition, transfer 57,630,000 new PLHL shares to our share broker. We shall inform you in writing the name of our share broking house and account number in due course.

Unless the context requires otherwise, the expression "you" or "your" shall include your nominee/s as you may so choose to appoint.

For good order sake, kindly sign the duplicate copy of this letter to signify your agreement to the above.

This letter supercedes our earlier letter of 25 September 2000.

…

Both letters were signed by Kang, and the defendant signed on the second letter to confirm his agreement.

9 Subsequent to these letters, the following developments took place:

(a) in or around December 2000, the defendant obtained loans totalling to $12m from:

(i) China Construction (South Pacific) Development Co Ltd;

(ii) a group represented by Douglas Ong; and

(iii) Lucas Ang Kadjaja.

Kang asserted that the three loans were arranged by him. The defendant only admitted to Kang's role in securing the third loan but maintained that Kang was acting in his personal capacity; and

(b) in or about April 2002, PLHL was acquired by a reverse takeover, and its name was changed to United Fiber System Ltd ("UFS").

10 On 28 June 2002, the defendant went to the Fullerton Hotel to sign some documents and to meet with Kang. At this meeting, Kang delivered to him the plaintiff's letter signed by Kang:

We refer to our letter of 3 October 2000 in which you confirm your agreement to transfer certain number of new Poh Lian Holding Ltd ("PLHL") shares to us at the designated accounts which we may so instruct you.

We now confirm our instruction that you are to transfer the following numbers of new Poh Lian Holdings Ltd shares to the Banks as listed below in favour of the respective accounts.

No. of new PLHL shares	**Transfer to (name of Banks)**	**PLHL shares as collateral in favour of**

a) 30,000,000 shares	Malayan Banking Berhad Raffles Place, Singapore	- Alps Investments Pte Ltd - Conic Heavy Equipment Pte Ltd - Victory Electronic Pte Ltd - Eurocar Pte Ltd
b) 10,625,000 shares	Bank of China North-Sub Branch Middle Road, Singapore	- Kang Hwi Wah

We understand that you will be arranging to execute the requisite documents to charge the aforesaid shares to the said Banks.

Upon your effecting the above Transfers and fulfilling all security documentation as required by the said Banks, we confirm that all *your obligations* under our 3 October 2000 letter are fulfilled. [emphasis added]

11 An employee of the plaintiff added to this letter the following in handwriting:

To: Full Fledge Holdings Ltd.

I, Wisanggeni, hereby irrevocably undertake to transfer 10,625,000 shares of PLHL to Bank of China, Singapore to secure the facilities granted by Bank of China to Mr Kang Hwi Wah. I also undertake the followings:

[cancelled]

b) to guarantee the minimum market value of PLHL shares at $0.17 cents ie. that the said shares with Bank of China shall have a market value of not less than $0.17 cents at the end of 12 months from today.

to which the defendant affixed his signature.

12 On the same day, 28 June, the defendant executed a memorandum of charge in favour of Malayan Banking Berhad of 30 million UFS shares, together with an undertaking to the bank to purchase the charged shares at 17 cents per share, and this charge was completed on 3 July.

13 Subsequently, the defendant applied to Singapore Exchange Securities Trading Ltd for approval to transfer UFS shares subject to a moratorium to Bank of China, but failed to obtain the approval.

14 The plaintiff had pressed the defendant, repeatedly, to transfer the shares to the Bank of China in its letters dated 3 September, 30 September, 4 October and 14 October 2002, and ended with a notice that it would take legal proceedings if the shares were not transferred.

15 The defendant did not reply directly to the demands, but on 10 September, his solicitors at that time, Hoh & Partners, sent a draft letter of release and discharge that the defendant wanted Kang to sign.[1]

16 On 11 September, Kang replied to that letter and asserted that the defendant was under an obligation to deliver to Bank of China shares free from moratorium, lien and charges.[2]

17 The solicitors responded on 17 September[3] that:

> We are instructed by Mr Wisanggeni that *his obligation* to you was only to deliver Moratorium shares free of any lien and all charges not non-moratorium shares. [emphasis added]

18 This is an admission to the existence of an obligation on the part of the defendant to deliver shares for charging, and ties in with the earlier request for the letter of release and discharge. The question whether moratorium and non-moratorium shares were to be delivered is not an issue at the present time as the moratorium imposed by the stock exchange authorities has lapsed, and is not raised as a part of the defence.

19 On 10 October, the solicitors again wrote to Kang[4] that they had been instructed by the defendant that he would be prepared to release and charge moratorium shares to Bank of China if Kang would execute the letter of release and discharge forwarded on 10 September, in order to safeguard the defendant from any possible legal claims.

20 When the impasse continued, the plaintiff also engaged solicitors to act for them. The solicitors, Hee Theng Fong & Co, wrote to the defendant on 29 October 2002, wherein they set out the background of the parties' dealings that "in consideration of our clients injecting capital funds into your Indonesian Projects, you will transfer to our clients [the shares]", and issued an ultimatum to the defendant to complete the transfer by 31 October. This was ignored, and the present action was filed on 7 November 2002 for the defendant to transfer 10,625,000 UFS shares to Bank of China for Kang's account.

21 Up to that time, neither the defendant nor his solicitors took the position that the plaintiff had failed to perform its obligations under the agreement that had been reached more than two years previously, in 2000.

22 In the statement of claim, it was pleaded that the defendant's obligations arose "[i]n consideration of the Plaintiffs' injection of capital funds into the Defendant's Indonesian Projects". This was amended on 24 February 2003 to "[i]n consideration of the Plaintiffs' efforts in introducing a public listed company to the Defendant and the Plaintiffs' procurement or arrangement of the sum of about US$5.0 million to be injected into the Defendant's Indonesian Projects".

23 There are questions over both versions of the agreement. Firstly, the plaintiff asserted that he had undertaken to find a company for the takeover. This was not reflected in the letters of 25 September and 3 October 2000, Hee Theng Fong & Co's letter of 29 October 2002 or the statement of claim. It only surfaced when the statement of claim was amended on 24 February 2003. If that was a term of the oral agreement, why was this not brought up from the start?

24 Secondly, with regard to the supply of funds to the defendant for the acquisition of the company, it was referred to as an injection of $22m in the letter of 25 September 2000, left unquantified in the letter of 29 October 2002 and the statement of claim, and fixed at US$5m in the

amended statement of claim. One would expect Kang to have had a clear understanding and recollection of currency and the amount to be raised.

25 The defendant's version was also flawed. In the defence, it was alleged that the plaintiff was to raise $22m. This was changed to US$10m to US$15m in the amended defence. As the defendant was relying on the plaintiff to raise funds for the takeover, one would expect the currency of the funds would be set, and that the amount to be raised be fixed and not variable by 50%, between US$10m and US$15m, and with the same reward.

26 The defendant and his solicitors did not inform the plaintiff and its solicitors that there was no obligation to be discharged by the defendant, as the plaintiff had not performed his part of the agreement. As this went to the root of the request and dispute, it would have been natural and reasonable to bring it up.

27 As I have noted at the outset, the confusion would have been avoided if the parties had put their agreement in writing. As it happened, the shifting stances and the inconsistencies are such that while I am satisfied that the parties have agreed that Kang would assist in the defendant's project to acquire a company, I am unable to accept either parties' version as to the exact terms agreed upon.

28 Fortunately, there is the letter of 28 June 2002. According to the plaintiff, the parties had agreed to vary their rights and obligations by reducing the number of shares to be transferred by the defendant and by specifying the manner in which the shares were to be transferred in two tranches.

29 The defendant's take on this letter was entirely different. He argued that he was not under any obligation under the letter because the plaintiff had not performed his obligations. The defence was that the transfer of the first tranche and the promise to transfer the second tranche were made outside of the terms of this letter, and were entirely separate *ex gratia* acts by the defendant to offer financial assistance to Kang or the plaintiff. The defendant explained that he signed on the letter because Kang told him that he needed it to show the banks that he had a right to the shares.

30 The defendant deposed in his affidavit of evidence-in-chief that:

> 34. At around that time [which is 7 June 2002 according to the preceding paragraph], Kang approached me to ask for my help. He explained that he and his companies had taken loans from banks. The bank loans were in default and the banks had demanded for additional security to avoid legal proceedings. He asked if I could help him by charging some of my UFS shares as additional security for the bank loans. I asked Kang how much was needed as a top-up, and he told me that he needed 40 million UFS shares. Kang said that 30 million UFS [shares] would have to be pledged to Maybank, and another 10 million UFS shares would be pledged to another bank. Kang only revealed the name of Maybank at that time, but not the name of the other bank.

31 In the defendant's opening statement, the point was repeated:

> The Plaintiffs are solely relying on their letter dated 28 June 2002 which purports to contain a written undertaking from the Defendant as regards the charging of the shares. However, the Defendant will rely on the contemporaneous documents to show that the credit support he gave to Kang is entirely ex-gratia and is not pursuant to any agreement or any alleged varied agreement as such as between the Plaintiff and the Defendant.

32 The pleaded defences were:

(a) the plaintiff had failed to advance the US$10m to US$15m and therefore there was no valuable consideration to support the agreement;[5]

(b) the agreement was repudiated by the plaintiff's breach, which was accepted by the defendant;[6]

(c) the agreement was discharged by mutual agreement;[7] and

(d) the defendant had agreed on an *ex gratia* basis, to charge the shares and was not under any obligation to do so.[8]

33 Underlying defences (a), (b) and (c) was an acceptance that there was a valid agreement at the outset.

34 Defence (a) is misconceived in law. A failure by one party to perform a contractual undertaking cannot support a defence that the contract is not supported by consideration. A promise to do something (*eg* provide funds) in exchange for a reward (*eg* the shares) constitutes the consideration to the agreement. In the proper circumstances, a failure by one party to perform may support a plea of repudiation and rescission.

35 Defence (b) was not supported by any evidence that the defendant had informed the plaintiff they had regarded it to be in breach of the agreement, and that they had accepted the repudiation and considered the agreement to be at an end.

36 Defence (c) was not supported by any evidence of a mutual agreement to discharge the agreement.

37 That leaves defence (d), that the agreement was an *ex gratia* promise which was not binding on the defendant. To evaluate the merit of this defence we have to look at the conduct of the plaintiff and the defendant. The plaintiff's position is that the defendant should have transferred the second tranche of shares to Bank of China after having discharged his obligation to charge the first tranche of shares to Malayan Banking Berhad.

38 The defence is that the defendant's transfer of the shares to Malayan Banking Berhad and promise to transfer the other shares to Bank of China were made *ex gratia*, and he was not obliged to keep the promise.

39 This is fundamentally different from defences (a), (b) and (c). By saying that his promise was made *ex gratia*, he was saying that there never was a contract, not that it had become unenforceable by the plaintiff's non-performance, or repudiation, or discharge.

40 If there was no binding obligation but only an *ex gratia* promise, why did the defendant's solicitors say in the letter of 17 September that they were instructed by him that "his obligation to you was only to deliver Moratorium shares …"? The word "obligation" was not used carelessly, but against the background of the defendant's demand that the plaintiff fulfil his undertaking. When Margaret Neo Kee Heng, the solicitor who wrote the letter, gave evidence, it was not suggested to her that the defendant did not give instructions for that letter to be written, or that the letter did not convey his instructions fully and accurately.

41 Equally significant was the fact that Ms Neo stated that the defendant had not informed her of any *ex gratia* arrangement he had with the plaintiff. The defendant did not explain why he did not

inform his solicitors that he had agreed to transfer the shares in response to the plaintiff's plea for assistance.

42 Furthermore, if the defendant's duty to deliver the shares was conditional upon the plaintiff's provision of the US$10m to US$15m, and the plaintiff had not done so, why did he not have that recorded in the letter of 28 June or his solicitors' letter of 17 September 2002?

43 In the same vein, why did the defendant ask for a letter of release and discharge from Kang in exchange for the memorandum of charge in favour of Bank of China if there was no obligation or liability to release or discharge? If the defendant's promise to execute the memorandum was made voluntarily on Kang's request, he could just have that recorded instead.

44 As the request for the favour was made by Kang around 7 June, and the documents for the charge to Malayan Banking Berhad were under preparation on 22 June[9] and were signed on 28 June at the meeting at Fullerton Hotel, it was wrong and unnecessary for the plaintiff to talk of "your obligations" and "our instructions" in the letter of 28 June. The defendant had no reason to confirm the instructions and obligations if they were not true. If he had wanted to help the plaintiff, he only needed to confirm that he would transfer the shares.

45 On this last point, the defendant's equivocation on whether he had acknowledged and confirmed the undertaking did not help his cause. On 19 February 2003, he deposed in an affidavit,[10] that when he signed on the letter of 28 June, it did not contain the handwritten undertaking. In his affidavit of evidence-in-chief affirmed on 13 October 2003, he softened his position and claimed that he did not remember seeing the handwritten words. At the trial, he took some time before admitting that he signed on the letter,[11] and he did not dispute the findings of document examiner, Lee Gek Kwee, that his signature was made over the handwriting. By the close of the case, there was no dispute that the defendant had added his signature after the handwritten undertaking was inserted.

46 The defendant is a well-educated and experienced businessman and from my observation, an intelligent person. It is inexplicable that he failed to raise the defences or inform his solicitors of them when the plaintiff made its demands on him. It was obvious that the plaintiff was taking the matter seriously, and there was no reason for him not to take it seriously too.

47 After reviewing the evidence, I find that the plaintiff had presented persuasive evidence that the defendant had undertaken to deliver the second tranche of shares to Bank of China.

48 On the other hand, I find that the defendant had failed to satisfy me on any of the defences he pleaded. The omission to state when the requests began, that he had only promised to help the plaintiff, his acquiescence to the contents of the letter of 28 June, and his admission in the letter of 17 September, undermined the credibility of his case.

49 I allow the plaintiff's claim and order the defendant to transfer the second tranche of 10,625,000 UFS shares to Bank of China for the account of Kang.

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[1]See PB 196-197

[2]See PB 198

[3]See PB 199

[4]See PB 230

[5]Amended Defence, paras 8 and 9

[6]Amended Defence, para 9

[7]Amended Defence, para 10

[8]Amended Defence, paras 15 and 16, see also defendant’s closing submissions paras 6.4 and 6.5

[9]See PB 318, para 12

[10]See DB 185

[11]Notes of Evidence, p 473