Chua Kim Leng (Cai Jinling) v Phillip Securities Pte Ltd
[2006] SGHC 221

Case Number : Suit 656/2005

Decision Date : 28 November 2006

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Cheah Kok Lim (Ang & Partners) for the plaintiff/respondent; Benjamin Sim and Tan Beng Swee (Shenton LLC) for the defendant/appellant

Parties : Chua Kim Leng (Cai Jinling) — Phillip Securities Pte Ltd

Contract – Contractual terms – Whether contract vague and ambiguous – Whether contract void for uncertainty

Contract – Intention to create legal relations – Whether email exchange between the parties reflected an intention to enter into legal relationship

28 November 2006

Andrew Ang J:

1 The plaintiff was employed as a dealing director with the defendant, a securities company which is a member of the Singapore Exchange Securities Trading Ltd ("SGX").

2 The plaintiff's claim against the defendant was for commission due to her, that being an agreed share of the fees earned by the defendant in respect of a share offer by Tiong Woon Corporation Holding Ltd ("TWC") underwritten by the defendant. Details of the arrangement between the parties are set out later herein.

3 Prior to her employment with the defendant, the plaintiff was a vice-president with OCBC Securities Pte Ltd ("OCBC Securities"), another securities company. The plaintiff was asked to join the defendant by a former colleague, one Lim Han Boon, who had himself moved from OCBC Securities and joined the defendant as a dealer in April 2004.

4 The plaintiff averred that it was an express term of her employment that the defendant would extend to her a loan of $160,000 ("the loan") to pay moneys owing from her to OCBC Securities. As evidenced by a promissory note dated 12 August 2004, the plaintiff obtained the said loan of $160,000 from the defendant's associate company, Phillip Credit Pte Ltd ("Phillip Credit"), presumably through arrangements made by the defendant as the plaintiff did not apply to Phillip Credit for such a loan.

5 According to the defendant, the plaintiff needed the loan as two of her customers at OCBC Securities had incurred contra or trading losses for which she had to indemnify OCBC Securities. The plaintiff claimed that the loan was to be set off from commission or moneys earned by her whilst working for the defendant. However, the defendant denied that there was any agreement for the loan to be paid from such commission or moneys earned by the plaintiff. Instead, the defendant alleged that the plaintiff promised and undertook to pay $5,000 per month as her two customers at OCBC Securities would pay her a combined sum of $5,000 per month.

6 That aside, as noted above (at [2]), the plaintiff claimed that she had entered into an agreement with the defendant to share the commission to be earned by the defendant in respect of a share offer by TWC which offer was underwritten by the defendant. The plaintiff's case was that the terms of the agreement were evidenced by an e-mail and the attachment thereto sent by the defendant's senior manager, one Melvin Yong Heng Yew ("Yong"), to the plaintiff on 4 January 2005 ("4 January e-mail") and another e-mail Yong sent her on 5 January 2005 ("5 January e-mail"). According to the plaintiff, those e-mails were the culmination of a series of e-mail exchanges between her and Yong as to the TWC deal since December 2004.

7 The plaintiff claimed that the defendant agreed, as evidenced by the terms of agreement set out in the 4 January e-mail attachment prepared by Yong, that:

(a) The plaintiff would be paid a commission for the introduction of the client, TWC, and for securing the offer of the shares.

(b) There would be offered, by way of a preferential *pro rata* placement, approximately 80 million shares in TWC valued at approximately $23.446m at 30 cents per share.

(c) One of the controlling shareholders of TWC, Ang Choo Kim and Sons, would take up $10m worth of shares amounting to 42.65% of the shares that were to be offered.

(d) The rest of the $13.446m worth of shares would be offered to existing shareholders and underwritten by the defendant.

(e) In the event the defendant was obliged to take up the unsubscribed portion, the plaintiff would place them out to third parties. If the plaintiff was unable to fully place out the unsubscribed portion, the plaintiff would indemnify the defendant for any losses suffered by the defendant in having to close out the open position.

(f) The fee that the defendant would earn from the preferential offer exercise would be 2.9% of the $23.446m (dollar value), amounting to $680,000.

(g) Of the fee referred to in (f), the plaintiff would be entitled to 63%, *ie*, $430,000 whilst the defendant would receive $250,000.

8 In or about February 2005, SGX informed TWC's lawyers that they should proceed with the offer of shares as a rights issue rather than as a preferential *pro rata* share offer. Thereafter followed various attempts by TWC to vary the structure of the offer so that it could still proceed with a placement. It is unnecessary to detail the various attempts and it suffices to say that in mid-March 2005, the SGX reiterated that the preferential offer to shareholders was essentially a rights issue and had to proceed as such. Accordingly, it was finally decided that the offer would proceed as a rights issue. The principal difference between a rights issue and the intended preferential *pro rata* offer to shareholders was that in a rights issue in accordance with SGX rules, shareholders could renounce their entitlement thereunder in favour of a third party.

9 On 18 April 2005, the defendant entered into an underwriting agreement with TWC in relation to the latter's rights issue. Under that rights issue exercise, 112,525,470 shares were to be offered by TWC to its shareholders at an issue price of 21 cents for each rights share on the basis of one rights share for every two existing shares. Ang Choo Kim & Sons who had an interest in 42.7% of the issued and paid up capital of TWC gave an irrevocable undertaking to take up all their entitlement under the rights issue. The defendant agreed to underwrite the remaining rights shares.

10 Under the underwriting agreement, commission was reduced to $520,000 from the $680,000 first proposed in January 2005 partly because it was agreed between the defendant and TWC that another financial institution, Hong Leong Finance Ltd, would be appointed manager of the rights issue in place of the defendant. The rights issue exercise was completed on 5 August 2005, all rights shares having been fully subscribed.

11 While the structure of the TWC share offer was evolving, changes were also taking place in the plaintiff's salary. Her initial salary was progressively reduced from $5,000 per month to $3,000 per month, to $1,000 per month and finally to $100 per month on 1 May 2005 which was less than two weeks after the underwriting agreement with TWC was signed on 18 April 2005. According to the defendant, this was because of the plaintiff's poor performance. The plaintiff, however, contended that after the TWC deal had been secured, the defendant wanted to get rid of the plaintiff as they had no further use for her.

12 The plaintiff's employment was terminated by the defendant on 27 June 2005 with immediate effect. The defendant's entitlement to do so was a matter of contention, but that is not material to the present case. The termination was followed by another notice by the defendant ceasing their sponsorship of the plaintiff as a trading representative.

13 According to the plaintiff, TWC was scheduled to pay the defendant the commission in the sum of $520,000 on 11 August 2005. On 12 August 2005, she received a message from Yong to attend a meeting at the defendant's premises. At the meeting on the same day, she was told she would be paid a sum of $177,847.76 and that the sum would be offset against the loan she had taken. (I should perhaps add that the actual sum offered was $10,000 more. That additional amount, as it later emerged from the evidence, represented a referral fee as to which there appeared to have been no agreement between the parties. Presumably, this was why the plaintiff left it out from her present claim.) At the meeting, Yong offered no explanation as to how the figure of $187,847.76 was arrived at. The plaintiff did not accept the figure as correct. On 15 August 2005, Yong telephoned her to say that the defendant's managing director, one Lim Wah Tong ("Lim"), wanted her to either accept the sum of $177,847.76 or otherwise state her stand.

14 On 18 August 2005, the plaintiff wrote to the defendant, asking for the sum of $177,847.76 to be offset against the loan but also asked to be paid the difference between that and the sum of $327,600 (that being 63% of the total commission of $520,000 earned by the defendant) to which the plaintiff claimed to be entitled. In the event, the defendant failed to pay any part of the $327,600 either towards offsetting the loan or directly to the plaintiff.

15 On 2 September 2005, the solicitors for Phillip Credit sent the plaintiff a letter of demand for repayment of the loan and interest. This was followed by a statutory demand for the loan and interest under the Bankruptcy Act (Cap 20, 2000 Rev Ed).

16 The plaintiff commenced this action on 16 September 2005 and on 27 September 2005 applied to set aside the statutory demand. She succeeded in doing so and Phillip Credit's appeal against the setting aside was dismissed by Belinda Ang J with costs.

17 The plaintiff did not deny that she was liable to repay the loan. She claimed, however, that in accordance with the agreement she had with the defendant, part of the commission she had earned from the TWC deal should be set off against the loan.

18 The plaintiff claimed that even after the moneys advanced by the defendant to her were set off, there would still be a balance of $153,160.58 (*ie*, $327,600 less $174,439.42, the latter sum being

the loan payable with interest computed at 9% as at 11 August 2004) due to the plaintiff from the defendant. The plaintiff claimed this sum in the proceedings before me. In the alternative, in the event that I found that the plaintiff was not entitled to set off the outstanding amounts due under the loan against the moneys due to her from the defendant, she claimed the full sum of $327,600 by way of commission from the defendant for introducing TWC as a client. Alternatively, the plaintiff claimed from the defendant commission in sum of $520,000 or such sum as the court deemed just or reasonable remuneration.

Sharing of commission

19 The principal question in this case was whether there was an agreement between the parties for the sharing of commission from the TWC share offer.

20 The defendant raised many issues but, from a perusal of the same, it would appear as if the issues originated from a pedantic invocation of rules, chapter by chapter from a contract textbook, than from a realistic appraisal of the case as a whole.

21 First, it was alleged that there was no intention to create legal relations between the parties.

22 It was common ground that the plaintiff's case rested upon the exchange of e-mails between her and her superior, Yong, on 4 and 5 January 2005 and in particular the attachment to Yong's 4 January e-mail amending the plaintiff's e-mail attachment of the same day. Material parts of the same are set out below:

> E-mail:
>
> From: Chua Kim Leng …
>
> Sent: 04 January 2005 15:41
>
> To: melvin@phillip.com.sg; jackkang@phillip.com.sg
>
> Subject: Proposed TWC Placement
>
> Dear Sirs,
>
> as spoken earlier, i have made the necessary changes to the 1st draft proposal and attached is the new proposal for the abovementioned exercise. It is very brief so please let me know if there is anything else i should add.
>
> hope to get approval for it soon so i can move forward with the deal.
>
> Thanks and best regards.
>
> Attachment:
>
> **Tiong Woon Corporation Pro Rata Placement 2004/2005**
>
> **Deal Structure:** Pro Rata placement (Preferential Offer) to All existing TWC shareholders. Controlling shareholder Ang Choo Kim and Sons (ACK) to subscribe for 100% of its 42.65% entitlement from preferential offer. Balance 57.35% to await for other shareholders' subscription. Phillip Securities to take up whatever amount not subscribed.

Proposal: Phillip Securities propose to do deal on board basis (ie consider done deal).

Deal Size: 23.446 million Singapore Dollars. ACK to take up 10 million in the exercise, leaving 13.446 million for other shareholders.

Offer Price: around 30 Singapore cents

Estimated Feed in Dollars: 680k Singapore Dollars

Estimated Fee in Percentage: 2.9%

TR Fee Sharing: 2.9%

Phillip Fee Sharing: 60%

E-mail:

From: Melvin Yong

To: Chua Kim Leng; Lim Wah Tong PSPL; Jack Kang

Sent: Tuesday, January 04, 205 4:28PM

Subject: Proposed TWC Placement

Deal approved as per attachment. Please note that this is only the financial terms. We still need to take care of the execution and documentation of the deal. Regards. Melvin.

Attachment:

Tiong Woon Corporation Pro Rata Placement 2004/2005

Deal Structure: Pro Rata placement (Preferential Offer) to All existing TWC shareholders.

(1) Controlling shareholder Ang Choo Kim and Sons (ACK) to subscribe for 100% of its 42.65% entitlement from preferential offer. Balance 57.35% to await for other shareholders' subscription.

(2) TR will source for placees in the event that Phillip has to take up unsubscribed portion.

(3) Phillip Securities to take up whatever amount that TR is not able to place out. In such an event, the TR will be responsible for any losses in closing out the open positions.

Proposal: Phillip Securities propose to do deal on bought basis (ie consider done deal).

Deal Size: 23.446 million Singapore Dollars. ACK to take up 10 million in the exercise, leaving 13.446 million for other shareholders.

Offer Price: around 30 Singapore cents

Estimated Feed in Dollars: 680k Singapore Dollars

Estimated Fee in Percentage: 2.9%

TR Fee Sharing: $430,000

Phillip Fee Sharing: $250,000

E-mail:

From: Chua Kim Leng …

Sent: 04 January 2005 16:31

To: Melvin Yong

Subject: Re: Proposed TWC Placement

btw boss, when do i get the commission payout after the deal is completed? The following month?

From: Melvin Yong

To: Chua Kim Leng

Sent: Wednesday, January 05, 2005 9.22AM

Subject: Proposed TWC Placement

Yes. We would pau [*sic*] out the following month. Regards. Melvin.

From: Chua Kim Leng …

Sent: 05 January 2005 14:23

To: Melvin Yong

Subject: Proposed TWC Placement

thanks boss.

23 A comparison of the two attachments will show, *inter alia*, that:

(a) The plaintiff had provided for a 60% share of the commission for herself while Yong amended it to a lump sum of $430,000 out of $680,000.

(b) Whereas the plaintiff was silent on her responsibility for any under-subscription, Yong had specifically spelt out:

(i) her responsibility for placing out shares in the event that the defendant was obliged to take up under-subscribed shares; and

(ii) her liability to indemnify the defendant if she failed to do so.

24 To suggest that such exchange did not show an intention to create legal relations is disingenuous. Clearly the e-mails exchanged were not "the sports of an idle hour, mere matters of pleasantry and badinage, never intended by the parties to have any serious effect whatever": per Lord Stowell in *Dalrymple v Dalrymple* (1811) 2 Hag Con 54 at 105. In matters of commerce, there is a rebuttable presumption that the parties intended to create legal relations. Absent any rebuttal the parties must be taken to have intended to enter into a contract.

25 The defendant next contended that the 4 and 5 January e-mails were vague, uncertain and incomplete. In support of this contention, the defendant raised a host of questions which, it alleged, ought to have been addressed failing which there could not be any agreement.

26 The issue of uncertainty is often raised in conjunction, and sometimes overlaps, with the issue of whether or not the parties intended to create legal relations. The requirement for certainty arises because unless a contract is certain, it would be incapable of enforcement. Looked at from this perspective, it becomes immediately obvious that the questions raised by the defendant do not need to be answered in order that the contract is enforceable. For example, it was said that the e-mails did not state what would happen if the fee payable by TWC was increased or reduced (or if an external corporate finance team was engaged). Further, it was said that the e-mail exchange did not say what the position would be if there was a change in the proposed deal structure or if the subscription price per share was not 30 cents or if the deal size was not as described.

27 I must say that if the defendant's contention was to be upheld, one could renege on almost any contract simply by raising questions and claiming that the contract was void for uncertainty. It is one thing to say that the contract could not apply because the circumstances had changed in a manner not contemplated by the parties. It is quite another to say that there was no contract at all because of uncertainty. In my view, the e-mails were not vague, uncertain or incomplete; even if the attachment to Yong's 4 January e-mail could have been drafted with more detail, there is sufficient content to constitute an enforceable contract.

28 The defendant next argued that the plaintiff had been informed of the defendant's request for a formal fee agreement between them to set out the terms clearly so as to avoid complications.

29 The defendant's manager in charge of Mergers and Acquisitions/Capital Markets, one Tan Meng Heng ("Tan"), gave evidence that as early as 14 October 2004, he informed the plaintiff by e-mail that his superior, one Francis Lee, wanted to document the fee arrangements between the plaintiff and the defendant to avoid future complications.

30 However, the plaintiff did not revert on the draft Memorandum of Agreement that was given to her by Tan at his office ("the draft Memorandum").

31 It was contended that the plaintiff knew that the evidence was damaging to her as it showed that she was informed of the defendant's requirement for a formal fee agreement and had not reverted to the defendant. In her evidence, she said that she had not been given a copy of the draft Memorandum. I made no finding on this question.

32 Even if the plaintiff did receive the draft Memorandum, this was overtaken by the e-mail exchanges between the plaintiff and Yong on 4 and 5 January 2005. It is to be noted that whereas the proposed fee in the draft Memorandum was lower, it was without indemnity by the plaintiff. The plaintiff was required to place out shares and if the plaintiff succeeded in doing so, the plaintiff would get a fee. However, if she did not, she attracted no liability. The plaintiff's obligations under the e-mail exchanges were clearly more onerous.

33 A further noteworthy point is that the draft Memorandum was equally brief in regard to the terms of agreement between the plaintiff and the defendant. That being so, how could the defendant complain that the e-mails of 4 and 5 January were vague or incomplete, or that they gave rise to complications which could have been avoided?

34 The defendant next contended that the 4 and 5 January e-mails were informal and subject to contract. For this proposition, it relied on the following words in Yong's 4 January e-mail:

> Deal approved as per attachment. Please not that this is only the financial terms. We still need to take care of the execution and documentation of the deal. Regards. Melvin.

35 It seemed to me much more likely that Yong was referring to the deal between the defendant and TWC when he referred to the need to "take care of the execution and documentation of the deal". Whilst of course the TWC deal was subsequently documented, there is no evidence that the defendant called for further documentation of the agreement between the plaintiff and itself after the exchange of the 4 and 5 January e-mails. Besides, under cross-examination, Yong admitted that he had reached an agreement with the plaintiff at a meeting with her on 3 or 4 January 2005 whereafter he prepared the attachment of 4 January 2005.

36 The defendant's final argument against there being an agreement between the parties was that there was no offer and acceptance. In short, the argument was that the plaintiff, by saying "thanks" in her 5 January e-mail, could not be said to have accepted the defendant's offer. In my view, the defendant was clutching at straws when it made such an assertion.

37 To my mind, the exchange of correspondence only served to show that the parties considered themselves bound by the agreement. If the shoe were on the other foot and the defendant was seeking an indemnity from the plaintiff for failure to find placees to take up an under-subscription, I have little doubt that the plaintiff could not escape liability by contending that she had merely said "thanks".

38 In conclusion, my finding is that there was an agreement between the parties for the sharing of the commission from the TWC share offer.

39 In the event that the court found that there was an agreement between the parties, the defendant next put up several added lines of argument.

40 First, it contended that the agreement between the parties was in respect of a preferential offer to shareholders on a placement basis and did not apply to a rights issue. Accordingly, it was contended that the defendant had not agreed that if the rights issue was not fully taken up by the shareholders, the underwritten portion was to be placed out to third parties by the plaintiff.

41 In support of this contention, the defendant pointed out that after TWC's decision to proceed with a renounceable rights issue cum placement, the plaintiff sought to clarify with Yong whether there would be any change to her commission sharing arrangement with the defendant. In her e-mail of 23 March 2005 ("23 March e-mail") to Yong, she had said:

> As for commission sharing with TR, kindly advise how much the TR will get in terms of sharing of underwriting n [*sic*] placement fee since TR is to source for placees as per the original plan.

The plaintiff explained, under cross-examination, that she had asked the question just to re-confirm. She went on to say that Yong had told her that the commission due to her would remain the same.

However, this was not in her affidavit of evidence-in-chief. On his part, Yong said, in his affidavit of evidence-in-chief, that sometime after 23 March 2005 he informed the plaintiff that as the structure of the fund-raising for TWC was still not confirmed, the defendant would talk about her fees later. I found that somewhat implausible. Given that the plaintiff had already introduced the TWC deal (*albeit* still evolving) she would not have accepted such a non-committal reply. Under cross-examination, Yong had confirmed that when the plaintiff sought the clarification (or, according to the plaintiff, re-confirmation), the plaintiff's obligations had not changed. If so, how could the defendant's obligations have ceased then?

42 In this context, it is noteworthy that Yong had conceded, under cross-examination, that as at January 2005 when he discussed the TWC deal structure, it was still early in the day. He had *expected* that the deal would see some changes thereafter. However, he added that he was concerned to see that the risk would be taken care of; if so, the defendant would pay the plaintiff the $430,000.

43 Yong accepted that as the details of the TWC deal were still being worked out in January 2005, it would not have been reasonable to expect the plaintiff to find investors to enter into agreements in January 2005. According to Yong, she had to fulfil this obligation only when the TWC deal was crystallised. Yet in spite of this, Yong agreed to the sharing of commission as set out in the attachment to his 4 January e-mail without qualification; as set out therein, the obligation of the plaintiff was to find placees only in the event the defendant was obliged to take up unsubscribed shares failing which the plaintiff would indemnify the defendant for any losses arising therefrom.

44 In further support of the defendant's contention that the agreement (the terms of which were spelt out in Yong's 4 January e-mail attachment) did not apply to the rights issue as eventually carried out, the defendant sought to suggest that the risks it assumed under a rights issue were greater than under the *pro rata* placement offer to shareholders. It is noteworthy that so far as the SGX was concerned, the preferential offer was essentially the same as a rights issue.

45 Yong went to some lengths in his affidavit of evidence-in-chief to elaborate upon the defendant's contention that the risks were different. I was not convinced for the following reasons:

(a) As to his averment that in a placement the defendant could carry out a book-building exercise to ensure that shares would be taken up by investors before deciding to proceed with the placement offer, the truth is that under the terms as set out in Yong's 4 January e-mail attachment, there was clear provision for the defendant to underwrite the placement offer, *ie*, to take up shares in the event of under-subscription. The defendant could not ask TWC not to proceed to issue shares just because there was insufficient interest among the shareholders in the issue. That is the whole purpose of an underwriting!

(b) As to his averment that the exposure of the defendant would run into millions of dollars for which the indemnity of the plaintiff was worthless, several points may be noted. Firstly, in view of the issue price having been reduced to 21 cents from 30 cents (reflecting a deep discount of 30 per cent) clearly the risk was somewhat exaggerated. Secondly, in contradiction to his affidavit of evidence-in-chief evidence suggesting that the agreement with the plaintiff could not have been so uncommercial bearing in mind the parlous state of the plaintiff's finances, Yong had stated under cross-examination that the plaintiff's liability was limited to only $300,000, that being what the defendant figured would be the extent of the risk. This contradiction was not explained.

(At risk of digressing, I must pause here to observe that the construction urged upon me by the

defendant was equally, if not more, uncommercial, *ie*, that the agreement the plaintiff would be paid a commission only if there proved to be unsubscribed shares. The contention put forth by the defendant was that it was a condition precedent of the agreement that before the plaintiff was entitled to a fee there had to be unsubscribed shares. In effect, the plaintiff would not be paid for assuming the risk of under-subscription until the risk materialised! This would be akin to having the benefit of insurance without paying a premium. For such a contention to be dressed up as a legal argument defies belief.)

46 In conclusion, in regard to the question whether the agreement as set out in Yong's e-mail attachment applied to the rights issue carried out by TWC, I find that it did.

47 The defendant next argued that in order for the plaintiff to share in the commission, she had to source for investors who would sign placement agreements before the issue of the shares. This requirement was, of course, not set out in the attachment to Yong's 4 January e-mail. Yong sought to explain it away by saying that the attachment did not accurately reflect the oral agreement he had with the plaintiff on 3 or 4 January 2005 and that by mistake he had omitted the requirement.

48 I did not believe his explanation for the following reasons:

(a) Such a requirement would have been inconsistent with the express term contained in the attachment requiring the plaintiff to source for placees in the event of the defendant having to take up unsubscribed shares. Clearly, as pointed out by the plaintiff, it would not have been possible to have placement agreements before the outcome of the offer to shareholders was known. Without knowing how many shares were unsubscribed, the plaintiff could not possibly have procured placement agreements. (I noted that, under cross-examination, perhaps in recognition of this difficulty, instead of referring to the requirement for "placement agreements" as he did in his affidavit of evidence-in-chief, Yong referred to just "letters of undertaking", those being arguably more generic. However, in my view, such a requirement was nevertheless inconsistent with the express term that the plaintiff's obligation was to source for placees in the event that the defendant had to take up unsubscribed shares.)

(b) If there was an inadvertent omission to stipulate the requirement, it was not explained why Yong failed to remedy such omission when he could have done so subsequently. One golden opportunity for him to make the correction was when the plaintiff sent him her 23 March e-mail (see above at [41]) seeking clarification (or confirmation) as to her share of commission. That e-mail was sent to both Yong and Lim and, very likely, they would have addressed their minds to the question. Yet, Yong made no attempt to remedy the alleged omission. Instead, as stated earlier, Yong confirmed under cross-examination that the plaintiff's obligation did not change. Although, in an attempt to explain this omission, Yong earlier claimed that he had completely forgotten about his 4 January e-mail until August 2005, when he received the plaintiff's letter of demand, when pressed he conceded that he would have recalled the same. To my mind, his failure to remedy the alleged omission cast grave doubts on his evidence as to the existence of the alleged further requirement.

49 The plaintiff's evidence was that it was only in June 2005, two months after the TWC deal had been finalised, that the defendant asked her to find sub-underwriters and that the defendant did so because in June 2005 TWC's share price fell to near the issue price of 21 cents per share. She further averred that although she was not legally obliged to, she had furnished the defendant with the names of potential investors.

50 The defendant, on the other hand, referred to certain documents prior to June 2005 as

suggesting, inferentially, that there was a term that the plaintiff would secure investors before the share issue. Firstly, the defendant pointed to an e-mail dated 14 October 2004 from one Daniel of TWC to the plaintiff in which Daniel said:

> We appreciate that you have approached several potential investors which have expressed their interest in our company.

In my view, that had little, if any, evidential value. The discussions were then at a very early stage when the proposal was to have a rights issue together with a placement to investors. In that context, to look for potential investors would have been quite understandable. By the time Yong's 4 January e-mail was sent, almost three months later, the structure of the deal had changed to a *pro rata* placement to shareholders.

51 Similarly, when the plaintiff in her e-mail of 2 December 2004 referred to having secured an institutional investor, it was in the context of a deal structure involving a preferential offering to shareholders and a placement to a selected institutional investor. Those e-mails could hardly be of assistance in determining whether a later agreement providing only for a preferential offer to shareholders included a requirement that the plaintiff secure investors before the issue.

52 The defendant next pointed to an e-mail dated 6 April 2005 from the plaintiff to the solicitors for the issue. In it, the plaintiff referred to TWC having helped procure interested parties as prospective placees. The defendant argued that this showed that the plaintiff was aware that the defendant was to execute placement agreements with the investors. What the defendant omitted to say was that the plaintiff envisaged that such agreements would be entered into only when the need arose. Hence, she had added within parentheses "(we however will discuss amongst ourselves when the need calls for it)". Nowhere in that e-mail did she suggest that such agreements would be entered into before the outcome of the offer to shareholders was known.

53 Perhaps the piece of evidence which came closest to suggesting that the parties contemplated agreements with investors being signed before the issue was the plaintiff's e-mail of 5 April 2005 in which she sent the names of certain investors to the defendant under the subject heading "Sub Underwriting (Private & Confidential)". It would be recalled that one of the defendant's difficulties was in explaining how a placement agreement could be signed before it was known how many shares were unsubscribed. A sub-underwriting agreement is different. Unlike a placement agreement where the defendant would be bound to place out and the placee would be bound to take up a specific number of shares, a sub-underwriting agreement would oblige the parties thereto to perform their part only if there was under-subscription.

54 Whilst I was inclined to believe that the plaintiff had given her e-mail that unfavourable subject heading, I did not think such an error on her part was decisive of the matter. The preponderance of the evidence being in her favour, I remained of the view that there was no agreement that she had to secure investors before the issue. In particular, I took into account the following:

(a) Firstly, as noted previously, the terms set out in Yong's 4 January e-mail attachment clearly did not include such a requirement.

(b) Secondly, it was inexplicable why the defendant would offer to pay her $177,847.76 if she was not entitled to a share of the commission. This employer, after all, did not seem to suffer from a predilection to generosity; witness its cutting of her pay from $5,000 all the way down to $100.

(c) Thirdly, if not for her entitlement to a share of the commission, it would be difficult to understand why the plaintiff would have stayed on despite the pay cuts.

(d) Fourthly, the internal memo of Tan showed as "due to Kim", both the amount of $177,847.76 referred to as "net underwriting commission" and a further $10,000 "referral fee". In other words, the plaintiff was recognised as being entitled to the same.

(e) Fifthly, when he was cross-examined, after some wavering and despite his stance in the affidavit of evidence-in-chief that the plaintiff was not entitled to any fee, Yong thought the plaintiff should still get the $187,000 odd earlier offered by the defendant which it subsequently withdrew.

(f) Sixthly, despite Yong's evidence that the plaintiff had failed to provide details of contact persons within the placees or to arrange for the defendant to meet with the placees, as requested by the defendant in mid-May 2005, there was not a single e-mail from the defendant evidencing such a request.

In the result, I held that the plaintiff was entitled to a 63% share of the $520,000 fee earned by the defendant, this percentage being the same as that which the earlier agreed share of $430,000 bore to the total fee of $680,000.

The loan

55 I accepted the plaintiff's contention that it was part of the plaintiff's terms of employment that the defendant arranged with Phillip Credit to extend the loan. Clause 6(b) of the Addendum to the plaintiff's letter of employment with the defendants provided: "Company extends a loan of S$160,000.00. The loan of S$160,000.00 will be repaid to us as per their current repayment schedule".

56 The plaintiff argued that there were two ways of paying this loan, *ie*, in accordance with a repayment schedule submitted by the borrower or through commissions earned whilst the plaintiff worked with the defendant. However, it appeared that the plaintiff had never given a repayment schedule to the defendant and neither did the defendants request for such a repayment schedule from the plaintiff. I accepted the plaintiff's testimony that it was agreed between the parties that the loan would be repaid through the commissions the plaintiff earned whilst working with the defendant.

57 I came to this decision particularly in the light of the fact that Phillip Credit was prepared to leave the issue of the method and timing of payment to the defendants alone. Indeed, according to the evidence of one Jack Kang, the plaintiff's immediate supervisor, Yong had the complete discretion to extend the repayment period beyond the loan period of six months or to recover the loan by way of deduction from commissions earned by the plaintiff whilst she worked with the defendant.

58 I was of the view therefore that the defendant was obliged to pay Phillip Credit the commission due to the plaintiff so that it carried into effect the agreement between the plaintiff and the defendant that repayment of the loan would be by way of setting off commission against the loan.

59 As regards the counterclaim, I understood that the contra losses incurred by the plaintiff's clients had since been paid. The plaintiff also accepted that she was liable for costs.

60 It was also disclosed, after I held in favour of the plaintiff, that the defendant had declined

an offer of settlement which was more favourable to the defendant than under the judgment.

61 In the result, I ordered as follows:

(a) Judgment for the plaintiff for the amount claimed of $327,600 of which the defendant is to pay $174,439.42 to Phillip Credit, on behalf of the plaintiff in repayment of the loan with interest.

(b) In respect of $153,160.58 (being the balance of the said $327,600 after repayment of the loan and interest), the defendant shall pay the plaintiff interest at 6% per annum from the date of the writ.

(c) As regards the loan owing to Phillip Credit, any further interest payable by the plaintiff thereon together with all legal costs (if any) payable to Phillip Credit in relation to DC Suit No 784/2006 shall be borne by the defendant by way of indemnity to the plaintiff.

(d) Costs to the plaintiff to be taxed, such costs to be on the standard basis down to the date the plaintiff's offer of settlement was made, *ie,* 17 July 2006, and thereafter on an indemnity basis.

(e) In respect of the counterclaim, legal costs to the defendant to be taxed unless agreed.