Sundercan Ltd and another *v* Salzman Anthony David
[2010] SGHC 92

Case Number : Suit No 332 of 2009

Decision Date : 23 March 2010

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Andy Lem and Toh Wei Yi (Harry Elias Partnership) for the plaintiffs; Tan Kok Peng and Lye Hui Xian (Braddell Brothers LLP) for the defendant.

Parties : Sundercan Ltd and another — Salzman Anthony David

Contract – offer and acceptance

23 March 2010

Woo Bih Li J:

Introduction

1 The plaintiffs, Sundercan Ltd ("Sundercan") and Alain Mallart ("Mallart") are minority shareholders in a number of companies in which the defendant, Anthony David Salzman, is the majority shareholder. They claimed to have sold their minority shares to the defendant and other parties and sought an order of specific performance of each of the alleged agreements for the sale and purchase of the said shares.

Background

2 The defendant is a majority shareholder and director of V-Trac Holdings Limited ("VHL"), Engine Company No.1 ("ECN1") and V-Trac International Leasing Company ("VILC"). Sundercan and Mallart were minority shareholders in VHL and ECN1. In addition, Mallart was also a minority shareholder in VILC.

3 In the second half of 2008, the parties began negotiating the sale by the plaintiffs of their minority holdings in VHL, ECNI, and VILC to the defendant and other parties. The eventual proposed transactions were as follows:

(a) The defendant, together with ECN1, were to purchase Sundercan's shares in VHL and ECN1 ("Sundercan shares) for US$1,143,667.00; and

(b) The defendant, together with ECN1 and VILC, were to purchase Mallart's shares in VHL, ECN1 and VILC ("Mallart shares") for the sum of US$983,023.00.

4 During the negotiations, Sundercan and Mallart were represented by Codex Treuhand AG ("Codex") and Ms Francoise Macq ("Macq") respectively, while Ms Rachel Ho ("Rachel") acted on the defendant's behalf.

Defendant's Offer to Sundercan

5 On 7 October 2008, the defendant made an offer for Sundercan's shares when Rachel forwarded a number of documents to Codex for Sundercan to execute. These included the share purchase agreement ("Sundercan Agreement"), which had been executed by the defendant on behalf of himself and ECN1. Under the terms thereof, the defendant was to be responsible for payment of the purchase price.

6 Sundercan did not accept the offer immediately. Codex continued to negotiate the terms of the Sundercan Agreement with Rachel. Between 17 October 2008 and 22 October 2208, Codex sought clarification from Rachel in respect of some clauses in the Sundercan Agreement.

7 Under cl 1.1 of the Sundercan Agreement, the completion date would have been 1 November 2008. On that date, Sundercan was to deliver the duly executed transfer forms and written resignation of Stephane de Montauzan as director of VHL and the defendant would have been required to do two things:

(a) make the first instalment payment of 80% of the purchase price, *ie*, US$914,934.00 to Sundercan; and

(b) deliver a promissory note in favour of Sundercan for payment of the balance 20%, *ie*, US$228,733 no later than 30 April 2009.

8 On 22 October 2008, Rachel informed Codex as follows:

> …
>
> We are deeply worried by the global crisis and fear this may require a change to the payment schedule. We still hope we can proceed without any change, but we need a few more weeks before we can confirm.
>
> In the meantime, to be practical, you may sign and return the documents to us. If no change is needed to the payment schedule, we will initial your corrections and return an initialled original to you, and proceed. If a changed schedule is needed, we will inform you before we initial, so you can decide if the change is acceptable.

9 On 23 October 2008, Sundercan signed the Sundercan Agreement. All the relevant documents were forwarded to Rachel, who acknowledged receipt of the same via an email on 10 November 2008. It was Sundercan's case that it had accepted the defendant's offer to purchase the Sundercan shares on 23 October 2008 but the defendant asserted that he had withdrawn his offer to buy the shares in Rachel's email of 22 October 2008.

Defendant's offer to Mallart

10 As for Mallart's shares, the defendant offered to buy them when a number of documents, including the share purchase agreement ("Mallart Agreement"), were sent to Mallart sometime after 2 October 2008.

11 Mallart did not sign the Mallart Agreement immediately. Instead, between 16 and 22 October 2008, there were negotiations on the terms of the Mallart Agreement.

12 As with the Sundercan Agreement, the completion date under the Mallart Agreement would have been 1 November 2008. On completion, Mallart would have been required to deliver executed share transfer forms and his written resignation as director of VHL while the defendant was to do two things:

(a) make payment of 80% of the purchase price, *ie*, US$786,418.00; and

(b) deliver a promissory note in favour of Mallart for payment of the balance 20%, *ie*, US$195,505.10 no later than 30 April 2009.

13 On 22 October 2008, Rachel informed Macq via an email as follows:

> We are deeply worried by the global crisis and fear this may require a change to the payment schedule. We still hope we can proceed without any change, but we need a few more weeks before we can confirm.
>
> Also, I am very sorry but we simply cannot amend the promissory note.
>
> In the meantime, I would appreciate your confirmation that the text of the agreement and promissory note are acceptable. This way, we can go ahead immediately after we confirm the old schedule or in the worst case, agree with you on a new one.

14 On 23 October 2008, Macq emailed Rachel at 5.22pm stating that the Mallart Agreement had been signed and that Macq was ready to forward the relevant documents. Macq also asked to be advised if there was any change to the payment schedule.

15 In the meantime, there was apparently a telephone discussion between Rachel and Macq. The substance of that conversation was stated in an email from Rachel to the defendant at 23 October 2008 5.33 pm. It stated:

> ..
>
> Francoise confirmed on the phone today that though the promissory note is not ok, but they will accept it. She asked if they would still get the money on Nov 1st completion date according to agreement, Answer: NO
>
> They are upset about the news. Francoise says if the payment schedule is like changed from now 1st Nov to for example another date like 10 Nov is Ok. But if it is a material like payment 1 on this date, payment 2 on another date and many payments within a long period of like 20 months, then it is not ok.
>
> I told her I don't know until later. She wants us to confirm with her is the wait 1 week or 2 weeks or how many weeks. I said not sure. But we will get in touch again in 2 weeks time
>
> …

The defendant's email of 8 December 2008

16 On 8 December 2008, the defendant sent an email to Rachel stating that he was not able to buy their shares due to the economic crisis. In addition, he wrote that he proposed to review the situation at the end of every month, and planned to proceed at the very earliest moment. This email was forwarded by Rachel to Macq and Codex on 9 December 2008.

Demand for performance

17 In January 2009, the French solicitors of Sundercan and Mallart demanded payment from the defendant for the Sundercan and Mallart shares. The defendant replied through his solicitors that there were no binding contracts for the sale of the said shares. They added that even if the draft agreements were valid and binding, Sundercan and Mallart had not shown that they were ready, able and willing to complete the purported agreements on the completion date and were thus in repudiatory breach, in which case the repudiatory breach was accepted and the contracts terminated.

18 Sundercan and Mallart then instituted the present proceedings to obtain an order of specific performance of the Sundercan and Mallart Agreements against the defendant.

The issues

19 The issues canvassed by the parties were as follows:

(a) whether any contracts were formed on 23 October 2008 by the plaintiffs' purported acceptance of the offers set out in the draft sale agreements;

(b) if so, whether the plaintiffs were in repudiatory breach of such contracts;

(c) if the contracts for sale and purchase of the plaintiffs' shares were formed and not terminated, whether the plaintiffs were entitled to claim for the full price stated in the contracts; and

(d) whether specific performance of the contracts should be ordered.

Whether contracts were formed on 23 October 2008

20 For the formation of a contract, an offer must be accepted. Acceptance refers to a "final and unqualified expression of assent to the terms of an offer" (*Chitty on Contracts* (Sweet & Maxwell, 30th Ed, 2008) vol 1, at para 2-027).

21 In *Projection Pte Ltd v The Tai Ping Insurance Co Ltd* [2001] 1 SLR(R) 798, the Court of Appeal cited with approval at [16] the following words of Lord Denning MR in Port Sudan Cotton Co v Govindaswamy Chettiar & Sons [1977] 2 Lloyd's Rep 5 at 10:

> ... I do not much like the analysis in the text-books of inquiring whether there was an offer and acceptance, or a counter-offer, and so forth. I prefer to examine the whole of the documents in the case and decide from them whether the parties did reach an agreement upon all material terms in such circumstances that the proper inference is that they agreed to be bound by those terms from that time onwards.

22 The position was reiterated in *Midlink Development Pte Ltd v The Stansfield Group Pte Ltd* [2004] 4 SLR(R) 258 ("*Midlink*") by Rajah JC, who said at [48]:

> Acceptance in a contractual setting must be ascertained objectively. Acceptance can be signified orally, in writing or by conduct. When there is a history of negotiations and discussions, the court will look at the whole continuum of facts in concluding whether a contract exists.

23 When considering the history of the negotiations in the present case, both the email sent by Rachel on 22 October 2008 were crucial. In the email, the defendant made it clear that he was no longer willing to be bound by the payment schedule set out in the agreements because of the economic crisis. In my view, each email was a *qualification* to each offer such that it effectively suspended the original offer.

24 The plaintiffs submitted that the law is that there can be a valid and binding agreement even if not all the details of the terms of the agreement have been worked out between the parties. However, this is so only if the court finds that the parties have in fact concluded a contract and did not merely agree to contract in the future.

25 In my view, the payment schedule was an important term of both the Sundercan and Mallart Agreements and there was no mechanism for determining the payment schedule other than by future agreement between the parties. For instance, in regard to the Sundercan Agreement, Rachel stated on 22 October 2008 that if "a changed schedule is needed, we will inform you before we initial so that you can decide if the change is acceptable". Similarly, in regard to the Mallart Agreement, Rachel wrote "This way we can go ahead immediately after we confirm the old schedule or in the worst case, agree with you on a new one". This was akin to an agreement to negotiate which, as is clear from the decision of the House of Lords in *Walford v Miles* [1992] 2 AC 128, is unenforceable because it lacks the necessary certainty.

26 As for the plaintiffs' argument that the defendant's conduct subsequent to 23 October 2008 was consistent with the existence of a concluded contract, it is not entirely clear as to whether the courts can look at conduct subsequent to the time of the formation of the contract to determine whether a contract was concluded. The plaintiffs relied on two cases, namely *Econ Piling Pte Ltd v NCC International AB* [2008] SGHC 26 ("Econ Piling") and *Midlink* to support their proposition but the point was not argued there. The courts there appeared to have assumed that subsequent conduct could be considered to determine the existence of a contract. I would add that estoppel by convention is a different matter.

27 Furthermore, in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029, the Court of Appeal observed at [132(d)] as follows:

> … However, the principle of objectively ascertaining contractual intention(s) remains paramount. Thus, the extrinsic evidence must always go towards proof of what the parties, from an objective viewpoint, ultimately agreed upon. Further, where extrinsic evidence in the form of prior negotiations and subsequent conduct is concerned, … there should be no absolute or rigid prohibition against evidence of previous negotiations or subsequent conduct, although, in the normal case, such evidence is likely to be inadmissible for non-compliance with the requirements set out at [125] and [128-129] above. (We should add that the relevance of subsequent conduct remains a controversial and evolving topic that will require more extensive scrutiny by this court at a more appropriate juncture.)

While that was a case on the interpretation of the terms of a contract and not the determination of

the existence of a contract, it might equally apply to the latter.

28 Assuming that the court can consider conduct subsequent to the formation of the contract, the defendant's conduct after 23 October 2008 did not support the plaintiffs' assertion that such conduct unequivocally established a concluded contract.

29 Email had been exchanged between 24 October and 7 December 2008. While it is true that Rachel did not deny the existence of a contract, neither did she confirm it. The parties were still inquiring and discussing about the payment schedule. At best, the communication between the parties in that period showed that they were still keen to conclude a contract for the proposed transactions regarding the sale and purchase of the Sundercan and Mallart shares but not that the contract in question had been concluded.

30 In the case of Mallart, there was another factor that militated against the conclusion of a contract. Unlike the Sundercan Agreement, the executed Mallart Agreement was not returned to Rachel. Macq had held onto it pending the resolution of the payment schedule. To me, this suggested that Macq knew that there was no concluded contract yet.

31 The plaintiffs also argued that the defendant's acceptance of the resignations of Montauzan and Mallart, which would have been part of the completion obligations of Sundercan and Mallart, were consistent with a concluded contract. However, although the defendant appeared to have acted on the resignations, he nevertheless still acknowledged Sundercan and Mallart as shareholders of their respective shares in VHL. Hence, in a proposed rights issue of VHL in 9 October 2009, the shareholdings of Sundercan and of Mallart in VHL were still acknowledged and they were eligible for the rights issue although they in turn took the position that they had already sold their shares. For completeness, I mention that I was informed that the rights issue was withdrawn in any event.

32 I accepted that the defendant should not have acted on the resignations given his stance to deny the existence of a contract but I have made the appropriate consequential directions to have those persons reinstated as directors after I dismissed the plaintiffs' claims.

Other issues

33 As I decided that no contract was formed on 23 October 2008, I need not consider the defendant's assertion that if the Sundercan and Mallart Agreements had been concluded, the plaintiffs were in repudiatory breach as they were not ready and willing to complete on 1 November 2008 in accordance with the terms of the agreements.

34 Similarly, it was not necessary for me to consider whether the plaintiffs would have been entitled to claim specific performance.

35 There was also one other argument as to whether the plaintiffs' rights for the balance 20% would have been confined to the terms of the intended promissory notes but this also was academic in the circumstances.

Conclusion

36 For the reasons stated above, the plaintiffs' claims were dismissed with costs.