Irawan Darsono and Another v Ong Soon Kiat
[2002] SGHC 133

Case Number : Suit 464/2001

Decision Date : 26 June 2002

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Samuel Chacko, John Thomas and Adeline Toh (Colin Ng & Partners) for the plaintiffs; Francis Xavier and Mark Tan (Rajah & Tann) for the defendant

Parties : Irawan Darsono; Another — Ong Soon Kiat

Contract – Frustration – Defendant pleading guilty to offences under the Securities Industry Act (Cap 289) – Whether further performance of agreement impossible as such

Contract – Illegality and public policy – Plaintiff agreeing to buy shares of defendant's public listed company at certain price – Defendant requesting plaintiff to buy shares at higher price – Defendant agreeing to reimburse plaintiff for price difference and brokerage charges – Transactions an offence under s 97(1) Securities Industry Act (Cap 289) – Whether agreement enforceable – s 97(1) Securities Industry Act (Cap 289)

Damages – Measure of damages – Loss of opportunity – Relevant principles governing claims for such loss – Whether loss result of breach of contract

Judgment

GROUNDS OF DECISION

1. This is an account of an ambitious venture that ran into difficulties and criminal proceedings, ending in this civil action. It started when the first plaintiff Irawan Darsono ("Darsono") and the defendant Ong Soon Kiat met in July 1995. The defendant was the executive chairman and a substantial shareholder of Goldtron Ltd ("Goldtron") a company listed on the Singapore Stock Exchange.

2. Goldtron was engaged in the research and development of telecommunications equipment and security systems, and it aspired to expand its activities into Indonesia. Darsono is an Indonesian businessman with connections to people of influence in Indonesia. The defendant had hoped that Darsono could help Goldtron to gain access into Indonesia and Darsono was keen to take part in the venture.

3. In the same month, after several discussions, a deal was struck between them. This agreement which was not reduced into writing shall be referred to as the **July agreement**. Three terms of the agreement were not disputed, (a) that Darsono was to purchase 35m Goldtron shares at $1.10 a share, (b) that the defendant was to procure the shares for him, and (c) 15m shares were to be bought immediately. Darsono claimed that there was a fourth term that he was to be appointed managing director of Goldtron upon the purchase of the 15m shares. The defendant disputed this and said the agreement was that Darsono was to be made a director. It was agreed subsequently that Darsono would not dispose of the 15m shares within 12 months of their acquisition.

4. Following the agreement the defendant introduced Darsono to stockbrokers Ong & Co Pte Ltd ("Ong & Co") to assist him to acquire the shares. On 16 July the defendant instructed Darsono to buy 15m Goldtron shares at $1.23 per share. Darsono agreed to do that on the defendant's assurance that he would reimburse him the additional share price and brokerage expenses involved in buying the shares at $1.23 instead of $1.10. The purchase was carried out on the same day. This purchase shall be referred to as the **first transaction**. Subsequently the defendant made the promised reimbursement, which amounted

to $1,957,705.

5. In August, Darsono and the defendant agreed to vary the July agreement so that (a) Darsono's interests would be held by a company, Tracons Holdings Pte Ltd which was subsequently renamed Arhawishanto International Holdings Pte Ltd ("the second plaintiff"), (b) 30m Goldtron shares were to be purchased instead of 35m shares at $1.10 each, (c) the 15m shares Darsono had bought were to be transferred to the second plaintiff at $1.10 each, and (d) the remaining 15m shares were to be bought in 2 tranches of 10m and 5m shares. This agreement shall be referred to as the **August agreement**.

6. The holders of the one million issued shares in the second plaintiff are Darsono (60%), his wife Lin Huei Chen (10%), and two Indonesians, namely Hariyo Wibowo Harjojudanto ("Ari") (20%) and Ongki Purnomo Sumarno ("Ongki") who held the final 10%. Darsono claimed that he paid $300,000 for the shares held by Ari and Ongki because their involvement in the company would bring benefits to the venture.

7. On 21 September the defendant requested Darsono to transfer 10m of his Goldtron shares to the second plaintiff at $1.65. Darsono claimed that he complied with the defendant's request instead of transacting at $1.10 after the defendant promised to reimburse him the additional brokerage charges involved, but the defendant denied this. This transfer shall be referred to as the **second transaction**.

8. There was another transaction on 13 October when Darsono transferred his remaining 4.5m Goldtron shares to the second plaintiff at $1.56 per share. (He had sold 500,000 in the meantime to third parties in breach of his agreement to hold the shares for 12 months.) The price of $1.56 was fixed by the defendant. Darsono claimed that the defendant had also promised to reimburse him the additional brokerage expenses for this transaction but the defendant denied this. This transfer shall be referred to as the **third transaction**. (No additional share price payments were involved in the second and third transactions because Darsono regarded them as internal transfers between him and his company.) The first three transactions were handled by Ong & Co.

9. There was a **fourth transaction** which was done through Morgan Grenfell Asia & Partners Securities Pte Ltd ("Morgan Grenfell"). This took place on 17 October when the second plaintiff purchased 10m Goldtron shares at $1.55 at the request of the defendant. There was an agreement for the defendant to reimburse the second plaintiff the additional share price and brokerage charges. The plaintiffs claimed that $200,000 of that remained unpaid, and the defence was that the balance had been paid. All four transactions were done on the stock exchange.

10. The transactions came under investigation by the Commercial Affairs Division ("CAD"). The investigations led to the defendant being charged with five charges for offences under the Securities Industry Act. Four of the charges were for creating false appearances of the price of Goldtron shares in the four transactions in contravention of s 97(1) of the act. He pleaded guilty to all the charges on 5 March 1999.

11. The venture into Indonesia was not implemented because of differences between Darsono and the defendant and the criminal proceedings. Eventually the 24.5m shares were sold by the plaintiffs at a loss.

12. The plaintiffs filed these proceedings against the defendant. In this action

> (i) Darsono claimed reimbursement of the additional brokerage charges arising from the second and third transactions and the unpaid balance in respect of the additional share price and brokerage charges for the fourth transaction;

(ii) both plaintiffs claimed the loss incurred in the sale of the 24.5m Goldtron shares;

(iii) Darsono claimed the $300,000 he paid for the shares in the second plaintiff that were given to Ari and Ongki on the basis that it was a "wasted expense", and

(iv) Darsono claimed damages for the loss of opportunity to use the money spent on the Goldtron shares for other investment.

13. The plaintiffs relied on the defendant's convictions as evidence that he breached the agreements with Darsono. The defendant, on the other hand, asserted that the agreements relating to the four transactions were illegal and unenforceable contracts.

14. This issue of enforceability went to the foundation of the first claim. Counsel for the defendant asserted that the contracts were not enforceable because

> Where a contract is illegal as formed, or it is intended that it should be performed in a legally prohibited manner, the courts will not enforce the contract, or provide any remedies arising out of the contract. (*Chitty on Contracts* (28th Edn) para 17-007)

15. The plaintiffs' counsel's response was that the July and August agreements were *ex facie* lawful contracts. Counsel pointed out that there was no express term that the purchases or transfers of the shares were to be undertaken through a trade on the stock exchange and the parties were at liberty to undertake the transactions through whatever lawful means available. He was right that these two agreements did not refer to the manner in which the shares were to be purchased or transferred. They do not come within the proposition stated in the foregoing paragraph. However the promises of reimbursement were not made in these two agreements.

16. The claim for reimbursement arose from the promises made in connection to the four transactions. With regard to the four transactions, counsel for the plaintiffs submitted that "(e)ach of the four transactions could have been carried out at the stipulated prices lawfully, either by way of an off-market purchase or a shares placement letter." This submission was made on the premise that if transactions were not done on the stock exchange, they would not offend s 97(1) of the Securities Industry Act.

17. That submission did not stand up against the plaintiffs' own case. Darsono admitted that he knew Goldtron was a public listed company and that the sales of Goldtron shares would be traded in public. He appointed Ong & Co and Morgan Grenfell to act in the purchase of the Goldtron shares. He issued the instructions to the stockbrokers on each occasion without directing that the transactions were not to be put through on the stock exchange.

18. In these circumstances, can he say that he did not know that the transactions were to be carried out on the stock exchange when he knew that shares in public listed companies like Goldtron were traded on the stock exchange? There was nothing that could have led him to believe that these transactions were not to be traded on the stock exchange.

19. An indication of the state of his knowledge was offered in a letter written on his instructions. When he learnt of the CAD investigations, he instructed his solicitors Drew & Napier to write to the CAD to give his account of his involvement in the transactions. On 31 October Drew & Napier wrote to the CAD and set out

in detail his dealings with the defendant and the Goldtron shares. It is significant that in the explanation of his involvement in those transactions it was not stated that he did not know that they were to be carried out on the stock exchange.

20. Darsono knew that public listed Goldtron shares were transacted in the normal course on the stock exchange. There was no basis for him to suppose that the four transactions were done off-market or by share placement letters as his counsel suggested, and in any event it was not his evidence that he thought the deals were carried out that way. I find that Darsono and the defendant agreed and knew that the shares were to be transacted on the stock exchange.

21. These were therefore illegal contracts, and are unenforceable. This puts an end to claim (i) referred to in para 12. However, there are two questions of fact which I should deal with as they would be relevant if I am wrong in my conclusion that the agreements are unenforceable. The first question is whether the defendant had promised to reimburse to Darsono the additional brokerage charges in the second and third transactions. I accept Darsono's evidence that the defendant had agreed to pay them. Darsono and the defendant are experienced and rational businessmen. The defendant admitted that he had agreed that the additional brokerage charges for the first and fourth transactions arising from the inflated prices were to be borne by him. There was no reason for the additional brokerage charges payable for the second and third transactions to be treated differently, as they also arose from his requests to inflate the purchase prices.

22. The other issue is whether the defendant had only paid Darsono $4,299,985 for the fourth transaction, leaving a balance of $200,000 or whether he had made another payment of "about $200,000" on an unspecified date. In his supplemental affidavit of evidence-in-chief of 5 April 2002 he deposed that to the best of his recollection, the payment was made by a cash cheque. No evidence of such a cheque, much less the identity of the recipient of the proceeds, was produced. Under cross-examination, he conceded that he could have been wrong on the mode of payment without saying what the actual mode was. When he pleaded guilty to the criminal charges against him, he had agreed with para 88 of the Statement of Facts that $4,299,985 was paid to Darsono on the fourth transaction, and his mitigation plea referred para 88 without stating that another payment of about $200,000 was made. On the whole, I find the evidence on the further payment unsatisfactory and unacceptable.

23. If the agreements relating to the four transactions are enforceable, the defendant is liable to pay the additional brokerage charges on the second and third transactions and the balance of the reimbursement due for the fourth transaction.

24. I will now deal with the second claim for the loss suffered when the 24.5m Goldtron shares were sold. The plaintiffs pleaded that after making enquiries and obtaining advice on the CAD investigations in February 1996 Darsono learnt that the defendant may have acted illegally in the four transactions and had "rendered the further performance by the Plaintiffs of the [July and August] Agreements impossible and/or impracticable", and he "was left with no choice but to divest the second Plaintiff's interest in Goldtron at substantial losses."

25. It is to be noted that the alleged failure by the defendant to appoint Darsono as Goldtron's managing director was not pleaded as a cause for selling the shares. The statement of claim did not specify how the agreements became impossible or impracticable to perform and why Darsono was left with no choice but to sell the shares at a loss.

26. There was no evidence that supported those contentions. There was no order by the courts, the CAD, the stock exchange or any authority that prohibited the plaintiffs from proceeding with the agreements. There was also no explanation at all as to how he was compelled to sell the shares. The shares were disposed of over a period of 15 months between 11 March 1996 and 26 May 1997 by Ng Kok

Poh of Morgan Grenfell. The only instruction given was that all 24.5m shares were to be sold. Darsono left everything else to his discretion. He did not specify whether the shares were to be sold in a single or multiple transactions, or the time period over which they were to be sold. He did not monitor the trading prices of the Goldtron shares during that period, could not remember if Ng reported to him when he carried out the trades, and he did not ask Ng why the shares were sold over 15 months. There was nothing that reflected any compulsion or urgency to sell the shares. The shares were sold over 15 months, but it could have taken even longer as no time was set for that.

27. In the circumstances, I find that the plaintiffs had not established that the shares were sold because of the defendant's illegal activities rendered the further performance of the agreements impossible or impracticable and had left Darsono with no option but to divest the shares.

28. With regard to claim (iii) for the $300,000 in respect of the Tracons shares Darsono claimed to have given to Ari and Ongki, he did not provide any evidence that he paid for the shares and made a gift of them to Ari and Ongki. The defendant had put Darsono on strict proof of this claim and he has not discharged the onus on him.

29. There was another further difficulty with this claim. The $300,000 claimed was described as a wasted expense because the plaintiffs were precluded in law from continuing to perform the July and August agreements after being notified by the defendant that he was investigated by the CAD. However, as the plaintiffs were not prevented from continuing with the agreements, the $300,000 expenditure, assuming it was made, was not wasted. This claim therefore also fails on this ground.

30. The last claim was for "the loss of opportunity for the investment of monies which were used for the purchase of the aforesaid Goldtron shares for other investment opportunities." The starting point for such claims for lost opportunities is well stated in *Halsbury's Laws of England* (4th Edn Reissue) Vol 12(1) at para 962 that

> Where a breach of contract deprives the innocent party of the chance to receive a particular benefit, or to avoid a particular risk, damages may be awarded for the loss of that chance.

31. The loss of opportunity must be caused by a breach of a contract, not just by the contract itself. First there must be a breach, and second, the breach must cause the loss of the opportunity. Obviously Darsono cannot use his funds to pay for the Goldtron shares and put the same funds into other investments, and he can have no complaint over this. He would be in the same position whether the defendant breached the contracts or not. The plaintiffs have not identified the breach they were relying on. Even if the defendant had breached the contracts, that would not be a sufficient basis for Darsono to claim for the lost opportunity to use the funds for other investments unless the breach caused the loss of the opportunity. He can claim if the breach prevented him from making those other investments, e.g. if his share dividends were withheld or he was prevented from disposing the shares, and could not invest the dividends or sale proceeds, but that was not his case, and on his own case, he cannot claim. Claim (iv) is misconceived, and fails.

32. The plaintiffs' action is therefore dismissed with costs.

Sgd:

Kan Ting Chiu

Judge

Copyright © Government of Singapore.