Wisanggeni Lauw v Full Fledge Holdings Ltd and Another Appeal
[2005] SGCA 21

Case Number : CA 63/2004, 95/2004

Decision Date : 11 April 2005

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Lai Siu Chiu J; Yong Pung How CJ

Counsel Name(s) : C R Rajah SC (Tan Rajah and Cheah) with Tan Lee Cheng and Kenneth Leong (Harry Elias Partnership) for the appellant in CA 63/2004 and the respondent in CA 95/2004; Vinodh Coomaraswamy SC and Kenneth Choo (Shook Lin and Bok) for the respondent in CA 63/2004 and the appellant in CA 95/2004

Parties : Wisanggeni Lauw — Full Fledge Holdings Ltd

Contract – Breach – Appellant wished to acquire Singapore-listed company and sought respondent's help – Respondent to introduce a suitable company for acquisition and to inject a sum of money towards appellant's business plan – Agreement that appellant was to transfer shares in acquired company in exchange for respondent's efforts – Appellant failed to effect transfer of some of the shares – Trial judge ordered appellant to effect transfer – Whether there was indeed an agreement between the parties – Whether the transfer of shares was an ex gratia arrangement between the parties

Civil Procedure – Judgments and orders – Appellant to guarantee minimum market value for some of the shares for a period of one year – Respondent requested for order that appellant be held to the guarantee – Trial judge refused to make the order – Whether appellant ought to be held to the guarantee

Damages – Assessment – Respondent requested for damages to be assessed – Trial judge refused the request – Whether an order for damages to be assessed ought to have been granted

11 April 2005 *Judgment reserved.*

Chao Hick Tin JA (delivering the judgment of the court):

1 This was an action brought by the plaintiff ("Full Fledge") against the defendant ("Lauw") to compel Lauw to transfer 10,625,000 shares in a company ("the 10.6m shares") pursuant to an agreement between them which was partly oral and partly in writing. Lauw denied that there was any such agreement, and alleged, in the alternative, that if there was such an agreement, Full Fledge was in breach thereof, entitling Lauw to repudiate it. The trial judge ruled in favour of Full Fledge (see [2004] SGHC 141) but he refused, in a supplemental judgment (see [2004] SGHC 209), to grant Full Fledge's prayers for certain consequential reliefs. Both Lauw and Full Fledge have appealed.

2 Lauw's appeal in Civil Appeal No 63 of 2004 ("CA 63/2004") relates to the court's finding that he was in breach of the agreement in failing to transfer the 10.6m shares. Full Fledge's appeal in Civil Appeal No 95 of 2004 ("CA 95/2004") concerns the court's refusal to grant him an order for assessment of damages arising from the breach. We heard oral arguments on 23 February 2005 and reserved judgment.

The background

3 We will now set out the facts which gave rise to the dispute in question. Lauw, an Indonesian national, was educated in an American university and had, after graduation, worked there for some ten years. He now has business interests in Indonesia, Singapore and China. Full Fledge, a

Mauritius company, belongs to one Mr Kang Hwi Wah ("Kang"), a known personality in the corporate world in Singapore who was previously associated with the public-listed company called Amcol.

4 Lauw controlled an Indonesian company with a concession to a forest plantation in South Kalimantan which he hoped to develop into a pulp mill. His plan was to acquire a Singapore-listed company and then inject the pulp mill business into it. It was in mid-2000 that Lauw came to know Kang and sought the latter's help in materialising that business plan. Kang was agreeable to help on the understanding that he would be rewarded. At the time, the understanding was not set out in a formal document. However, subsequently, there were some letters emanating from Kang to Lauw, upon which Full Fledge relied to show the scope of the agreement. As these letters are important, they will be set out *in extenso*.

5 Sometime in September 2000, Kang identified Poh Lian Holding Ltd ("PLHL") as a possible target to implement Lauw's business plan. On 25 September 2002, Kang, writing on behalf of Full Fledge, sent a letter to Lauw ("the first letter") in these terms:

> **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 …
>
> …
>
> For good order sake, kindly sign the duplicate copy of this letter to signify you [*sic*] agreement to the above.
>
> …

6 Although in the last paragraph of the letter a confirmation was requested, Lauw did not sign the duplicate nor return it to Full Fledge. In the light of this, it would be fair to infer that what was set out therein did not correctly reflect the position or intention of the parties. Therefore, eight days later on 3 October 2000, Kang, on behalf of Full Fledge, again wrote a similar letter to Lauw ("the second letter") but with some material changes:

> **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.

…

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

This letter supersedes our earlier letter of 25 September 2000.

7 It would be noted that the second letter expressly stated that it superseded the first letter. A material difference between the two letters was that in the second letter, no reference was made to the injection by Full Fledge of $22m into the timber project. Instead, it merely stated in general terms that Full Fledge had "injected capital funds into [Lauw's] Indonesian Projects", without identifying any specific amount. Lauw signed the second letter signifying his agreement.

8 In December 2000, Lauw obtained loans totalling $12m from the following sources:

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

(b) a group represented by one Mr Douglas Ong; and

(c) one Mr Lucas Ang Kadjaja.

There was a dispute as to whether all these loans were arranged by Kang. Lauw admitted that Kang made arrangements in respect of the loan from Lucas Ang Kadjaja. However, there was evidence that Kang did assist in obtaining funds from the other two sources.

9 In April 2002, Lauw successfully acquired PLHL by a reverse takeover and shortly thereafter, changed its name to United Fiber System Ltd ("UFS"). We shall hereinafter refer to "PLHL" as "UFS".

10 On 28 June 2002, as arranged, Kang met up with Lauw at the Fullerton Hotel and handed to the latter a letter of the same date ("the third letter"), the contents of which read:

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 Ltd	– Alps Investments Pte – Conic Heavy Equipment Pte Ltd – Victory Electronic

Pte Ltd

– Eurocar Pte Ltd

b) 10,625,000 shares Bank of China – Kang Hwi Wah
North-Sub Branch
Middle Road,
Singapore

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 [the second letter] are fulfilled.

[emphasis added]

11 At the bottom of the third letter were the following words, written by an employee of Full Fledge:

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 wordings]

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

Against these written words, Lauw appended his signature. During various stages of the proceedings, Lauw denied that it was his signature. He also asserted that when he signed the letter, the written words were not there. However, when confronted with expert evidence, he had no choice but to admit to the handwritten undertaking.

12 It is quite clear that by the third letter, together with the additional words in writing therein, the parties had agreed to modify the rewards to be given to Full Fledge: instead of the transfer of 57,630,000 UFS shares ("the 57.6m shares") to Full Fledge, there would only be a transfer of 40,625,000 shares ("the 40.6m shares), with a guarantee that, firstly, the 10.6m shares were to be transferred to Bank of China ("BOC") for the account of Kang, and, secondly, that their market value by the end of a 12-month period would not be less than 17 cents per share. Kang also alleged that the reduced number of UFS shares would be non-moratorium shares.

13 On the same day, and obviously in fulfilment of what he undertook to do as reflected in the third letter, Lauw executed a memorandum of charge in favour of Malaysian Banking Berhad ("Maybank") in respect of 30,000,000 UFS shares ("the 30m shares"), together with an undertaking to Maybank to purchase the charged shares at 17 cents per share. We should, at this juncture, mention that even though in the third letter it was not stated that Lauw would guarantee the market price of the 30m shares, such a guarantee was in fact given by Lauw to Maybank. Eventually, when the 30m

shares were sold and there was a shortfall of about $1.1m, Maybank obtained a judgment against Lauw who satisfied the same.

14 Soon thereafter, Lauw applied to the Singapore Exchange ("SGX") for approval to transfer 10.6m shares to BOC as required by the third letter. However, the SGX did not grant the approval sought on the apparent ground that the shares were subject to a moratorium. On 3 and 30 September 2002 and 4 and 14 October 2002, Full Fledge repeatedly pressed Lauw to effect the transfer of the 10.6m shares to BOC and insisted that they should not be moratorium shares.

15 It is germane to note that on 10 September 2002, Lauw's then solicitors, M/s Hoh & Partners, sent a draft letter of release and discharge ("LOR") to be executed by Kang. Kang replied the next day, stating that the 10.6m shares to be transferred to BOC should be freed from moratorium, lien and charges. On 17 September 2002, the solicitors for Lauw replied, asserting that Lauw's obligation was "only to deliver Moratorium shares free of any lien and all charges not non-moratorium shares". On 10 October 2002, Lauw's solicitors reiterated that he would be prepared to charge the moratorium shares to BOC if Kang would execute the LOR. In all these correspondences, there was no assertion that Lauw was under no contractual obligation to transfer the 10.6m shares to Full Fledge. The impasse continued and on 7 November 2002, Full Fledge instituted the present action to compel Lauw to fulfil his part of the bargain.

The pleadings

16 In the Statement of Claim, it was originally pleaded that Lauw's obligation arose "[i]n consideration of [Full Fledge's] injection of capital funds into [Lauw's] Indonesian Projects" following what was set out in the second letter. However, on 24 February 2003, it was amended to be "[i]n consideration of [Full Fledge's] efforts in introducing a public listed company to [Lauw] and [Full Fledge's] procurement or arrangement of the sum of about US$5.0 million to be injected into [Lauw's] Indonesian Projects". This was the basis of Full Fledge's claim when the action came on for trial before Kan Ting Chiu J.

17 In his defence, Lauw initially alleged that Full Fledge, through Kang, was to have raised US$22m for the project by way of loans, to be repaid by the issue of the 57.6m shares. The amount was subsequently changed to various sums in the range of US$10m to US$15m, with US$5m to be paid in early October 2000 and the balance by November/December 2000. At the trial, Lauw again altered his position and said that Full Fledge was to advance US$22m for the project. Lauw asserted that, because Full Fledge had failed to fulfil its part of the bargain by injecting the required capital into the project, there was a failure of consideration or, in the alternative, there was repudiation of the agreement on the part of Full Fledge which was accepted by Lauw or, in the further alternative, the agreement was discharged by mutual consent. Lauw stated that the charging of the 30m shares in favour of Maybank on 28 June 2002 was really done as a personal favour to Kang and not pursuant to any contractual obligation. So was the proposed charging of the 10.6m shares to BOC.

18 Lauw also averred in his defence that UFS was not introduced to him by Full Fledge, or more specifically, Kang.

The decision below

19 The trial judge rejected Lauw's defences of failure of consideration, repudiation and discharge by mutual agreement. He found that the facts could not sustain those defences. There was no intimation from Lauw that the agreement had come to an end because of repudiatory breach on the part of Full Fledge, or that the agreement was discharged by mutual consent. Neither could the

undisputed facts substantiate the defence that Lauw's charging of the 30m shares to Maybank was an *ex gratia* act.

20 We noted that the trial judge found difficulties with some aspects of the cases of both parties. Full Fledge's version did not match the written documents that passed between the parties, *ie*, there was no mention of the introduction of a listed company for takeover by Lauw. The judge, moreover, wondered why the correct version of the understanding reached between the parties was not set out in the Statement of Claim from the very beginning. Similarly, with regard to Lauw's assertion, if it were true that Lauw's obligation was contingent upon Full Fledge fulfilling its part of the bargain, namely, injecting a certain amount of capital into the project, why did Lauw not identify the correct amount from the outset, instead of repeatedly changing the amount he alleged Full Fledge was to inject into the project? Neither Lauw, nor his solicitors, made the point in the correspondence that Lauw could not transfer the 10.6m shares to Full Fledge because the latter had not performed its part of the bargain. Equally germane was the fact that Lauw never informed his solicitor, Ms Neo, that the charging of the 40.6m shares was pursuant to an *ex gratia* arrangement.

21 Nevertheless, the judge had no difficulty in finding that as of 28 June 2002, the parties had varied the original agreement as reflected in the second letter. Instead, the parties had agreed that, following Kang's assistance to Lauw in acquiring a Singapore-listed company into which Lauw had injected his pulp mill business, Lauw would undertake to deliver both the 30m shares and the 10m shares to Maybank and BOC respectively, and that he would also guarantee the share price at 17 cents per share for a period of one year.

22 Accordingly, the trial judge ordered Lauw to transfer the 10.6m shares to BOC for the account of Kang as he had contractually bound himself to do.

The contentions of Lauw

23 Lauw's main argument in this appeal is that Full Fledge had not proved the terms of the agreement between the parties, and thus its claim, as it had constantly shifted the basis of its claim. He highlighted the fact that the initial claim in the Statement of Claim was based on the understanding that Full Fledge was "to inject capital funds" into the project, and that was changed to "to procure or arrange for the injection of capital funds", as set out in the Amended Statement of Claim as follows:

> In consideration of [Full Fledge's] efforts in introducing a public listed company to [Lauw] and [Full Fledge's] procurement or arrangement of the sum of about US$5.0 million to be injected into [Lauw's] Indonesian Projects. …

24 In the light of these shifting positions, Lauw argued that the court should not have found that Full Fledge had established its case, bearing in mind that the trial judge also said at [27] of his judgment that he was "unable to accept either parties' version as to the exact terms agreed upon".

25 Next, Lauw contended that the trial judge had also erred in holding that the defence of "no consideration" was without merit. Lauw's counsel, while recognising that a promise could constitute consideration, said that what Lauw was contending was that as Full Fledge had failed to inject the agreed capital into the project, Lauw was not required to fulfil what he had agreed to do. In the words of counsel, "as no funds were provided, no reward was due".

26 Counsel also challenged the trial judge's conclusion that because Lauw asserted that his promise was *ex gratia*, that amounted to saying that there was never a contract. Counsel argued

that the position which Lauw was trying to advance was that because Full Fledge never fulfilled its obligation of injecting capital into the project, as spelt out in the first and/or second letters, Lauw was not obliged to carry out his part of the bargain under the agreement as reflected in those letters, and that what he had agreed to carry out under the third letter was outside the agreement and was purely *ex gratia*.

Our analysis

27 The trial judge was clearly conscious of the shifts in position made by Full Fledge. We have indicated this at [20] above. This can be seen from [23] and [24] of his judgment, where the judge observed:

> 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?
>
> 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.

28 It seems to us clear that Kan J delivered his judgment on the basis that the third letter represented the revised terms of the agreement of the parties. As pleaded in the Amended Statement of Claim, the consideration which was provided by Full Fledge was the introduction of UFS to Lauw by Kang and the arrangement for the injection of US$5m into the project.

29 At one stage, Lauw sought to argue that there was no agreement at all between the parties. However, in the face of the third letter, the actual transfer of the 30m shares to Maybank and the attempted transfer of the 10.6m shares to BOC, Lauw had no real choice but to allege, as his counsel did before us, that while there was an agreement between the parties, the transfer of the 57.6m shares would only be effected to Full Fledge upon the latter making a capital injection into the project, and as Full Fledge never injected any capital into the project, Lauw's obligation to transfer the 57.6m shares did not arise.

30 As we see it, the key issue which we have to address is whether the transfer of the 30m shares and the attempted transfer of the 10.6m shares were *ex gratia* acts, and not acts to discharge a contractual obligation. If they were *ex gratia* acts, why was there a need for Lauw to signify his consent to what was written on the third letter? Why did the letter further state that upon effecting the transfers, all of Lauw's "obligations under [the second letter] are fulfilled"? Why did it even refer to the second letter? To meet these queries, Lauw claimed that he signed the third letter in order to enable Kang to produce it to his bankers to show that he owned a total of about 40m UFS shares.

31 However, there are a number of problems to this assertion. First, Lauw never told his solicitor, Ms Neo, that what he had undertaken to do was purely *ex gratia*. Thus, upon being pressed by Full Fledge in early September 2002 to transfer the 10.6m shares, Lauw's solicitors, in a letter of 10 September 2002, requested Kang to execute the LOR. If there was no obligation, why was it necessary for Kang to execute the LOR? Equally significant to note is that in a letter of 17 September

2002, the solicitors for Lauw stated:

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

In another letter of 10 October 2002, Lauw's solicitors only reiterated that the parties' agreement was for Lauw to pledge moratorium shares, not non-moratorium shares. Nothing was said about the transfer of shares being wholly *ex gratia*. Second, if the transfer of the 40.6m shares was *ex gratia*, why did Lauw give a guarantee that the UFS share price would be maintained at 17 cents or above for a period of one year? Third, no evidence was adduced to show why Lauw should do Kang such a great favour in respect of the 40.6m shares with a total value of close to $7m.

32 In our opinion, the foregoing clearly shows up the falsity of Lauw's claim that the transfer of the 30m shares to Maybank was an act done as a favour to Kang, and not out of obligation. Neither could we accept that the transfer of the 10.6m shares, which Lauw was required to make in accordance with the terms of the third letter, was an *ex gratia* act done out of friendship and kindness.

33 The present appeal relates essentially to a finding of fact. Having carefully considered the documents and the evidence adduced, not only do we think that it is not shown that the trial judge's finding was wrong, but, in our judgment, it is a finding which we ourselves would have come to. In the light of the third letter and the subsequent objective facts, including the correspondence of his solicitors, Lauw's claim that there was no agreement, or that what he did was purely *ex gratia*, defies credibility.

Full Fledge's appeal

34 Pursuant to Kan J's main judgment, Lauw was required to transfer the 10.6m shares to Full Fledge or, as directed, to its nominee bank. In the Statement of Claim, Full Fledge asked for:

> (a) …
>
> (b) [Lauw's] guarantee that the 10,625,000 UFS shares to be transferred to Bank of China shall have a market value of not less than S$0.17 per share at the end of 12 months from 28th June 2002;
>
> (c) Further and/or alternative to (a) and (b) above, damages to be assessed.
>
> …

35 The trial judge refused Full Fledge's request that reliefs be granted on these two prayers. On prayer (b), he felt that any further relief was wholly unnecessary, as Lauw's obligation to guarantee the price of the shares at 17 cents per share at the end of the 12-month period, *ie*, 28 June 2003, was clearly spelt out and there was no dispute about it. With regard to prayer (c), the judge held that as no evidence was adduced at the trial that as of 28 June 2003, the market price of UFS shares was less than $0.17 per share, and as no claim was made on account thereof, there was no basis to make any order that damages be assessed. In this connection, we note that counsel for Full Fledge sought to amend or clarify prayer (c) to read "[Full Fledge] shall be entitled to damages against [Lauw] to be assessed once the damage has been crystallised". The judge found difficulty with this amended prayer in two respects. First, it was unclear what "crystallisation" of damages referred to, and second, when the crystallisation was to take place.

36 In the light of the trial judge's finding in the action, which we have affirmed, it is clear that Lauw was in breach of contract when he failed to transfer the 10.6m shares to BOC for the account of Kang. For that breach, Lauw would be liable to pay damages in respect of losses suffered by Full Fledge. Looking at the record of proceedings, while it was not so expressly stated, what the court and the parties were then focusing on was the substantive question of liability. We are unable to see why Full Fledge should be denied its just reliefs. Accordingly, we would direct that there be an order for assessment of damages.

37 A more difficult question relates to prayer (b). Due to the failure of Lauw in transferring the 10.6m shares to BOC, no sale of the 10.6m shares could have been effected then by BOC. The deadline of 28 June 2003 had long passed. However, we do not think Lauw should benefit by his default. There is no logic or reason why Lauw should be relieved of his undertaking on account of his own breach. The guarantee was to safeguard the interest of Full Fledge and we can see no grounds why Full Fledge should be deprived of this safeguard. In our opinion, it would only be fair if Lauw be required to give a similar guarantee for a similar length of time effective from the date of this judgment. Accordingly, we would declare that Lauw shall provide a guarantee that the share price of the UFS shares would not fall below 17 cents per share at the expiry of the period of one year from the date of this judgment.

38 Fortuitously, the current market price of each UFS share, as appears from the media, well exceeds the guaranteed price of 17 cents per share. The guarantee given by Lauw as to the price of the UFS shares could well be rendered academic. If the current price is maintained, it could even mean that no loss is suffered by Full Fledge, rendering an assessment as to damages wholly unnecessary.

Judgment

39 In the result, the appeal of Lauw in CA 63/2004 is dismissed with costs. The security for costs, together with any accrued interest, shall be released to Full Fledge to account of the latter's costs.

40 The appeal of Full Fledge in CA 95/2004 is allowed with costs. The security for costs, together with any accrued interest, shall be refunded to Full Fledge.

Appeal in CA 63/2004 dismissed. Appeal in CA 95/2004 allowed.