NGAN & NGAN HOLDINGS SDN BHD & ANOR v. CENTRAL MERCANTILE CORPORATION (M) SDN BHD [2010] 3 CLJ 818
COURT OF APPEAL, PUTRAJAYA
HELILIAH MOHD YUSOF JCA, KN SEGARA JCA, RAMLY ALI JCA
[CIVIL APPEAL NO: W-02-85-2007]
7 OCTOBER 2009

For the appellants Lim Kian Leong (Tony Ng TT, Keith Kwan & Rachel Tan Pak Theen with him); M/s Mohd Zain & Co

For the respondent - Lambert Rasa-Ratnam (Sean Yeow Huang-Meng & R Himahlini with him); M/s Lee Hishammuddin Allen & Gledhill

JUDGMENT

Ramly Ali JCA:

[1] The plaintiff (respondent in the present appeal), a company incorporated in Malaysia with its registered address at 9th Floor, Wisma Central, Jalan Ampang, 50450 Kuala Lumpur filed the present action inter alia for an order that the defendants do deliver vacant possession of a property known as the 10th Floor, Wisma Central, Jalan Ampang, 50450 Kuala Lumpur held under Strata Title Grant No. 10015, Lot No. 150, Section 58, Bandar Kuala Lumpur, Daerah Wilayah Persekutuan; pay the sum of RM754,074.30 being arrears in rent, service charges, utilities charges and other expenses as at 31.8.1998; and further pay rent and service charges in the sum of RM17,404.20 per month and RM2,847.96 per month respectively from 1 September 1998 until delivery of vacant possession to the plaintiff, together with interest thereon.

[2] The defendants on the other hand counter claimed for:

(a) an order that the plaintiff do forthwith and in any event within 14 days of the date of the order transfer the ownership of the said property from the plaintiff to the 2nd defendant;

(b) further or in the alternative, an order that the plaintiff transfer ownership of a property of the same value of the said property to the 2nd defendant;

(c) further or in the alternative an order that the plaintiff pay compensation to the 2nd defendant equivalent to the value of the said property; and

(d) further or in the alternative, an order that the plaintiff pay to the defendants the sum of RM254,699.75 being the expenses incurred by the defendants in reliance of an agreement by the plaintiff to give the said property to the 2nd defendant.

[3] The 2nd defendant averred that at all material times he is the beneficial owner of the said property by virtue of an agreement between him and Samanda Holdings Berhad (now known as

WTK Holdings Berhad) which has majority control over the plaintiff whereby it was agreed, inter alia, that the said property was given to the 2nd defendant as gratuity for his long service in Samanda Holdings Berhad (WTK Holdings Berhad).

[4] The agreed facts filed by both parties are reproduced as follow:

(a) the plaintiff and the 1st defendant are a company incorporated in Malaysia. The 2nd defendant is a shareholder and director of the 1st defendant;

(b) the 2nd defendant was a director of Samanda Holdings Bhd from 22 August 1973 until his retirement on 30 June 1995. (Samanda Holdings Bhd changed its name of WTK Holdings Bhd (WTK) on 29 August 1997);

(c) the total emoluments received by the 2nd defendant as a director of WTK from 1 January 1992 to 30 June 1995 was RM420,000;

(d) WTK Holdings Bhd is a shareholder of the plaintiff (respondent in this appeal);

(e) the plaintiff is the registered proprietor of the said property;

(f) the said property has a total area of 7,911 square feet. Pakatan Juruharta, a registered valuer, in a report dated 8 July 1996 valued the said property at RM2,215,000;

(g) on 18 September 1995, the board of directors of WTK:

(i) approved in principle the payment of gratuity to the 2nd defendant, subject to approval by the shareholders in general meeting; and

(ii) authorised Dato' Joseph Chong and/or Mr. Lum Weng Loy to formulate a suitable ex-gratia payment, bearing in mind the 2nd defendant's 17 years of service in the group and report back to the board of directors of WTK in due course;

(h) by a letter dated 20 September 1995 from Lum Weng Loy, the 2nd defendant was informed that the board of directors of WTK had decided in principle to give the said property to 2nd defendant as gratuity;

(i) neither the plaintiff nor WTK in general meetings have approved of the giving of the said property to the 2nd defendant as gratuity;

(j) the defendants have occupied the said property since 1 April 1995 and are still occupying it;

(k) in 1996, the 1st defendant spent a total RM254,699.75 renovating the said property;

(l) General Aluminium Works (M) Sdn Bhd rented apart of the said property from the 1st defendant from March 1996 until March 1997;

(m) the plaintiff has not executed the relevant documents to transfer the said property to the 2nd defendant.

[5] Both the parties have agreed that the issue of liability in the present action be determined pursuant to O. 14A of the Rules of the High Court 1980 (RHC 1980) based on the agreed facts and agreed documents.
[6] The statement of agreed issues on liability for determination pursuant to O. 14A RHC 1980 as agreed and formulated by the plaintiff and the defendants are as follows:

(a) whether the agreement in principle to give the property known as the 10th Floor, Wisma Central, Jalan Ampang, 50450 Kuala Lumpur held under Strata Title Grant No. 10015, Lot No. 150, Section 58, Bandar Kuala Lumpur, Daerah Wilayah Persekutuan, to the 2nd defendant by way of gratuity for his past services, is valid and enforceable by the 2nd defendant.

(b) In the event the question is answered in the affirmative, it is agreed that this court should:

(i) dismiss the plaintiff's claim against the defendants with costs; and

(ii) grant an order in terms of prayers (1) and (6) of the defendant's amended counter claim (ie, to transfer ownership of the said property to the 2nd defendant and costs).

(c) In the event the question is answered in the negative, it is agreed that this court should:

(i) grant an order in terms of prayers (a) and (e) of the plaintiff's statement of claim (ie, to deliver vacant possession of the said property to the plaintiff and costs);

(ii) order the registrar to assess the damages payable by the defendants to the plaintiff for the use of the property from 1 April 1995 until the date vacant possession of the property is delivered to the plaintiff; and

(iii) dismiss the defendants' amended counter claim with costs.

[7] The defendants contended that WTK at all material times being the majority shareholder of the plaintiff company was in de facto control and absolute management of the plaintiff company and therefore being in a position to enter into contract for and on behalf of the plaintiff company. The defendants argued that the plaintiff and WTK are bound to act in accordance with the agreement with the 2nd defendant (as contained in the letter dated 20 September 1995 from Lum Weng Loy to the 2nd defendant) and to carry out the relevant shareholders meeting and to obtain the relevant shareholders approval in order to execute the transfer of the said property to the 2nd defendant as stipulated in the said agreement.

[8] On 18 January 2007, the learned High Court judge allowed the plaintiff's claim with costs under O. 14A of RHC 1980 and dismissed the defendants' counter claim with costs. Hence the present appeal before this court.

[9] In establishing their counter claim the defendants relied on the strength of two documents

namely - Samanda Holdings Berhad, minutes of board meeting held on 18 September 1995 (p. 118 of the appeal records); and a letter dated 20 September 1995 (p. 119 of the appeal records) signed by Lum Weng Loy (who was the Executive Director of WTK) using his personal letterhead "Lum Weng Loy, Westmont Group of Companies, Level 25, Wisma Goldhill, 67 Jalan Raja Chulan, Kuala Lumpur."
[10] The relevant part of the said minutes of meeting is found in para 7.6 which reads:

7.6 Gratuity Payment to Former Director

The Board approved in principle the payment of gratuity to Mr Ngan Ching Wen in appreciation for his long service and invaluable contribution to the Company. However, pursuant to the Companies Act 1965, such payment whether in cash or in kind is subject to approval by the shareholders in General Meeting. Dato' Joseph Chong Chek Ah and/or Mr Lum Weng Loy were duly authorised to formulate a suitable ex-gratia payment, bearing in mind Mr Ngan's 17 years of service in the Group and report back, to the Board in due course.

[11] Subsequent to the said board meeting held on 18 September 1995, the said Lum Weng Loy wrote a letter dated 20 September 1995 to the 2nd defendant informing him of the decision of the Board to following effect:

Divestment Of Assets

I refer to your letter of 15 September 1995 addressed to YB Dato' Joseph Chong and wish to advise that the contents were discussed during Samanda Holdings Berhad's board meeting held on 18 September 1995. Please be informed that after due deliberation taking into account among others your past invaluable services to the Group, the Board has unanimously decided in principal on the following:

(i) CPI - For divestment based on original cost of investment ie, RM6.046 million.
(ii) Shanghai Samanda - For divestment based on original cash contribution ie, RM3.122 million.

(iii) 10th Floor,

Wisma Central
- to be distributed as gratuity

(iv) Motor vehicle

WCN 3788
- For divestment based on current book value ie, RM82,000

I look forward to hearing from you for my further action.

Yours sincerely,

sgd

Lum Weng Loy

[12] It must be noted, that in both the documents the decision in question is "decision in principle" and as clearly stated in the Minutes of the Meeting, "pursuant to the Companies Act 1965, such payment whether in cash or in kind is subject to approval by the shareholders in General meeting." The minutes only mentioned about "the payment of gratuity" to the 2nd defendant in general term. The board had not decided whether the payment of the gratuity was to be in cash or in kind. There is no mention at all about the said property in the minutes. The board only authorised Dato' Joseph Chong Chek Ah and/or Mr. Lim Weng Loy to formulate a suitable ex-gratia payment to the 2nd defendant and to report back to the board in due course. Whatever formulation by Dato' Joseph Chong Chek Ah and/or Mr. Lim Weng Loy in this matter must be reported back to the board in due course and after that whatever decision must be subject to approval by the shareholders in General Meeting.

[13] When the letter dated 20 September 1995 was written by Lim Weng Long to the 2nd defendant there is no indication at all to show that the matter has been 'reported back to the board'. Also, there is no indication to show that the matter has been approved by the shareholders in General Meeting. The letter merely informed the 2nd defendant that the decision was made by the board "in principle" only. It must also be noted that the said Lum Weng Loy did not sign the letter "for and on behalf" of WTK nor the plaintiff company. It appears the said Lum Weng Loy had exceeded his authority or mandate given by the board of WTK in writing the said letter to the 2nd defendant. Thus, the said letter does not bind the board of WTK and ultimately has no bearing at all on the plaintiff company.

[14] In the circumstance of the case, the plaintiff as the registered owner of the said property is not a party to the transaction. There is no privity of contract between the plaintiff and the defendants. Therefore whatever agreement or contract to dispose of the plaintiff's assets or property to another person, without the approval of the plaintiff will not bind the plaintiff and therefore unenforceable against the plaintiff. A contract binds only the parties to it (see: Kepong Prospecting Ltd. & Ors. v. Schmidt [1967] 1 LNS 67 (Privy Council)).

[15] The basis of the defendants' case rests solely on Lum Weng Loy's letter dated 20 September 1995 to the 2nd defendant. This letter was written on his personal letter head. This letter cannot in any way be attributed to the plaintiff company. There is nothing in the letter to indicate that Lum Weng Loy was acting as an agent or "for and on behalf" of the plaintiff company.

[16] Even assuming the alleged agreement or contract was made by the Board of WTK, the position will still be the same ie, it does not bind the plaintiff. The board of directors of a holding company (holding majority shares in a subsidiary company) is not in a position to dispose of the asset or property of the subsidiary company without the approval of the subsidiary company in general meeting as required under the relevant provisions of the company law, for a simple reason that both the holding and the subsidiary companies are actually separate legal entities. Disposal of asset or property belonging to a company can only be carried out by the company itself based on the relevant provisions of the company law. The holding company, being

shareholder of the subsidiary company has no authority to do so, unless with the approval of the subsidiary company.

[17] The defendants contended that by virtue of the controlling stake of WTK in the plaintiff company in terms of management and majority of its shareholdings, WTK was at all material times and is in de facto control of the plaintiff company, therefore being in a position to contract for and on behalf of the plaintiff. They cited the decision of the Federal Court in Sunrise Sdn. Bhd. v. First Profile (M) Sdn Bhd & Anor [1997] 1 CLJ 529 to support the proposition.

[18] The court finds that the decision in Sunrise Sdn Bhd is distinguishable and cannot be applied to the facts of the present case. In that case, the subsidiary in question was wholly owned by the holding company ie, the whole of the 100% shares in the subsidiary were owned by the holding company. There was no other shareholder involved. While in the present case the plaintiff company is not a wholly owned subsidiary of the holding company (WTK). WTK owned only 85% of the plaintiff's shares while the other 15% were owned by third parties. The interest of the other shareholders, although minority must also be considered and protected by the law.

[19] The plaintiff company is the registered proprietor of the said property. Although WTK is a shareholder of the plaintiff company, this does not give WTK the right to deal with the property of the plaintiff company, let alone to give the plaintiff's property away. The plaintiff as a company duly incorporated under the Companies Act 1965, is a separate legal entity from its shareholders. (See: Salomon v. Salomon & Co. Ltd [1897] AC 22; ATA Management Consultants Sdn Bhd v. Makmuran Sdn Bhd [2004] 3 CLJ 53; and Abdul Aziz Atan & Ors v. Ladang Rengo Malay Estate Sdn Bhd [1985] 1 CLJ 255; [1985] CLJ (Rep) 370).

[20] Being separate legal entities, one cannot be held liable for the wrong of the other. (see: Hong Kong Vegetable Oil Co. Ltd v. Malin Sirinaga Wicker & Ors [1977] 1 LNS 35).

[21] It is trite law that no person can give a better title than he had - memo dat quod non habet. Therefore, WTK, not being the registered proprietor of the property was never in a position to give the property as a gift or gratuity to the 2nd defendant. (see: Supreme Court decision in M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 14).

[22] The present transaction is not an everyday commercial arrangement entered into between the parties. It is a transaction involving a decision in principle of the board of directors of a holding company to give property belonging to a subsidiary to its former employee/director inconsideration of his retirement. In that scenario, the provisions of s. 137 of the Companies Act 1965 must be complied with.

[23]Section 137(1)(a) provides that "it shall not be lawful for a company to make to any director any payment by way of compensation for loss of office as an officer of that company or of a subsidiary of that company or as consideration for or in connection with his retirement from any such office unless particulars with respect to the proposed payment (including the amount thereof) have been disclosed to the members of the company and the proposal has been approved by the company in general meeting and when such payment has been unlawfully made the

amount received by the director shall be deemed to have been received by him in trust for the company".
[24] Such restriction shall not apply to transactions or payments as provided under s. 137(5), namely:

(a) any payment under an agreement entered into before the commencement of the relevant repealed written laws;

(b) any payment under an agreement, particulars whereof have been disclosed to and approved by special resolution of the company;

(c) any bona fide payment by way of damages for breach of contract;

(d) any bona fide payment by way of pension or lump sum payment in respect of past services, including any superannuation or retiring allowance, superannuation, gratuity or similar payment, where the value or amount of the pension or payment (except so far as it is attributable to contribution made by the director) does not exceed the total emoluments of the director in the three years immediately preceding his retirement or death; or

(e) any payment to a director pursuant to an agreement made between the company and him before he became a director of the company as the consideration or part of the consideration for the director agreeing to serve the company as a director.

[25] In the present case, it is not disputed that at the material time, the 2nd defendant was a director of WTK (holding company) as well a director of the plaintiff company (subsidiary company). The 2nd defendant retired as a director of WTK on 30 June 1965. Under s. 137(7), 'director' includes a person who has at any time been a director of the company or a corporation deemed to be related to the company under s. 6 of the same Act. It is also not in dispute that the proposed 'gift' has not been approved by the plaintiff company as well as WTK in their respective general meetings. Even if the said property has been transferred to the 2nd defendant, he shall be deemed to have received it in trust for the plaintiff company.

[26] There is no indication at all to show that the said transaction comes under any of the exception under s. 137(5)(a-e) as listed above.

[27] The value of the property in question at the material time was RM2.215 million, while the total emoluments of the 2nd defendant as a director in the three (3) years immediately proceeding has retirement was only RM420,000. This is not in dispute. Clearly the value of the said property for exceeds the total emoluments for the three (3) years period. Thus exception (d) under s. 137(5) is not applicable.

[28] Even though s. 137(1) talks about "payment", this court is of the view that such "payment" shall include property or asset which has monetary value, given to a director as consideration for or in connection with his retirement from such office.

[29] The defendants relied on the High Court decision in RHB Capital Bhd v. Tan Sri Dato'

Abdul Rashid bin Haji Mohamed Hussain [2006] 2 CLJ 91 to support their contention that s. 137 of the Companies Act 1965 does not apply on the facts of the present case. The defendants submitted that the agreement in the present case was not made with the object of compensating the 2nd defendant for loss of his office as a director of WTK or as consideration for his retirement therefrom but was a gratuity in appreciation for his long service and invaluable contribution to the company for the past 17 years of service to WTK.

[30] In that case (RHB Capital Bhd) the learned judge ruled that "in view of the foregoing facts, pleadings, evidence (both oral and documentary) and the authorities cited, it is this court's view that the RM20m payment to the defendant was a legitimate payment under the terms of his service contract as part of remuneration package."

[31] What is pertinent to note here is that the payment of RM20m made in that case (RHB Capital Bhd) was based on the terms of a service contract dated 5 August 1999 entered into between the RHB Securities Sdn Bhd (RHS) and the defendant which governs the defendant's employment as the Executive Chairman of RHS.

[32] Clause 15(c) of the said contract of service provides that the contract may be terminated at any time by the defendant upon giving of at least six months notice to RHS. In such event, RHS shall make payment to the defendant of an aggregate amount of the sum of RM1,000,000 for each year of service to be calculated commencing from 1983, up to and including the year in which such termination occurs and such other additional payments as may be determined by the board of director of RHS and agreed to by the defendant.

[33] Clause 15(d) thereto provides that in the event that the defendant ceases to hold the position of Executive Chairman and Chief Executive Officer of the Group (which is defined in the RHS contract to mean the plaintiff, its subsidiaries and the companies in which the plaintiff has an interest in the equity share capital thereof, and includes such companies as may at the time of the RHS contract or at anytime thereafter subsists), RHS shall pay compensation to the defendant in the amount equal to the payment payable to the defendant pursuant to cl. 15(c) of the RHS contract.

[34] Clause 15(f) provides that any payment under the RHS contract shall be made within 30 days of the applicable termination of employment of the defendant.

[35] Clearly, the payment to the defendant in the above case (RHB Capital Bhd) was made pursuant to an agreement or contract between the company, RHS and the defendant before he became a director of the company as the consideration or part of the consideration for the defendant agreeing to serve as a director of the company. Thus, it clearly falls under the provisions of s. 137(5)(e) of the Companies Act 1965 and the restriction under s. 137(1) is not applicable. However, in the present case, no such contract ever exist between the parties. Therefore s. 137(1) of the Companies Act 1965 is applicable.

[36] Thus, the 2nd defendant cannot claim he is the beneficial owner of the said property. The plaintiff has always been and is the true legal as well as beneficial owner of the said property. Thus the 2nd defendant's counter claim against the plaintiff must fail.

[37] The 2nd defendant's counter claim against the plaintiff is based on the same Minutes of Meeting of the Board of WTK dated 18 September 1995, which specifically mentioned as "Gratuity Payment to Former Director". Paragraph 7.6 of the Minutes states that "The Board approved in principle the payment of gratuity to Mr. Ngan Ching Wen (the 2nd defendant) in appreciation for his long service and invaluable contribution to the company." This gratuity is not based on any prior agreement or contract between the parties. Gratuity of this nature is more likely to be in form of a "gift" from a company to its former director. There may be an intention to that effect, but it was an unfulfilled intention as the relevant requirements under the Companies Act 1965 as elucidated above have not been complied with.

[38] Where a gift rests merely in promise, whether written or oral, or in an unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor or those claiming under it, to complete or perfect it. If a gift is to be valid, the donor must have done everything which, according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do (see: Halsbury's Laws of England, 4th edn reissue, vol. 20 p. 42, para 63; and Omega Securities Sdn Bhd v. Yeo Lee Hoe [2003] 1 CLJ 276).

[39] An incomplete gift can be revoked at any time; there is a power to draw back so long as the gift is incomplete, (see: Standing v. Bowring [1885] 32 Ch D 282 at p. 290 (A). In re Fry [1946] Ch. 312; [1946] 2 All ER 106 it was held that the intended gift was incomplete and therefore inoperative in that the donor had not done anything required of him in order to divest himself of the legal right and equitable title of the shares in question. That decision was followed by the Singapore Court of Appeal in re Lee Phee Soo, Deed. [1960] 1 LNS 108; [1960] 26 MLJ 234 (CA).

[40] Applying the above principles to the facts of the present case, it is clear, that the proposed 'gratuity' to be given to the 2nd defendant (in the form of the said property) is an incomplete and imperfect gift. The court will not compel the plaintiff or the intending donor (WTK) to complete and perfect it. The 2nd defendant, as the donee of the proposed gift has no right over the property (the subject matter of the gift), and thus cannot claim any interest on it.

Conclusion

[41] Based on the above considerations this court unanimously holds that on the balance of probabilities the plaintiff (respondent) has established its claim against the defendants (appellants) in the main claim, while the defendants (appellants) on the other hand have failed to establish their counter-claim against the plaintiff (respondent). Therefore the present appeal by the defendants is dismissed with costs. The decision of the learned High Court judge is hereby affirmed. Costs of RM20,000 be paid by the defendants (appellants) to the plaintiff (respondent). Deposit to the plaintiff (respondent) towards account of costs.