M & A SECURITIES SDN BHD (Company No: 15017-H) v NG CHI KWONG [2011] MLJU 437

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

MAH WENG KWAI, JC

SUIT NO D-22NCC-560-2010

18 March 2011

Dhinesh Bhaskaran (Denise Tan with him) (Messrs Shearn Delamor & ***Co***),

D Paramalingam (Messrs ***Krish Maniam*** & ***Co***)

MAH WENG KWAI, JC

JUDGMENT

1. By consent of parties Suit Nos D-22NCC-560-2010, D-22NCC-561-2010, D-22NCC-562-2010, D-22NCC-563-2010, D-22NCC-564-2010, D-22NCC-565-2010, D-22NCC-566-2010, D-22NCC-567-2010 and D-22NCC-568-2010 were heard one immediately after another.

2. There was no application made under Order 4 of the Rules of the High Court 1980 for a consolidation of the cases.

3. Counsel D. Bhaskaran and Denise Tan acted for the Plaintiff in all 9 suits and Counsel D. Paramalingam acted for all the 9 Defendants.

4. At the commencement of the trial, Counsel for the Plaintiff informed the Court that he would be calling as his first witness Chong Wai Mun (PW1), Manager of Bursa Malaysia Depository Sdn Bhd in Suit No D-22NCC-560-2010. And that in order to avoid calling PW1 repeatedly in all the other suits, his evidence would be referred to and adopted as evidence oh behalf of the Plaintiff in the other 8 Suits. Counsel for the Defendant agreed to this arrangement.

5. In Suit No. D-22NCC-560-2010, Counsel for the Plaintiff called Chan Kim Hing

(PW2), Executive Director and Head of Operations of the Plaintiff as his next witness. The written witness statement of PW2 was erroneously marked as PW1S when it should have been marked as PW2S.

6. Chan Kim Hing (PW2) was called as the only witness, as PW1, in the other 8 Suits respectively. In those cases the written witness statement of Chan Kim Hing was correctly marked as PW1S throughout.

7. It was also agreed between parties that Counsel for the Defendant would cross-examine Chan Kim Hing (PW2) extensively in Suit No. D-22NCC-560-2010 only and that he would not repeat his detailed cross- examination in the subsequent suits save for specific issues pertaining to them.

8. Save for the Defendant in Suit No. D-22NCC-560-2010 who elected not to be present at the trial to give evidence on his own behalf, all the other 8 Defendants gave their evidence respectively.

9. The Plaintiff's Case

9.1 The Plaintiff is a stock-broking firm and at all material times was a Participating Organisation of Bursa Malaysia Securities Bhd (Bursa Malaysia).

9.2 The Defendant was at all material times a client of the Plaintiff having opened 2 trading accounts namely, an Individual Trading Account and a Margin Account on 5/3/07 and 6/6/07 respectively.

9.3 On 6/6/07, the Plaintiff and Defendant entered into a written Margin Trading Facility Agreement wherein the Defendant agreed inter alia, to pay to the Plaintiff all sums due and owing from time to time arising from share transactions carried out on the Defendant's accounts, together with interest at the rate of 13% per annum.

9.4 The Commissioned Dealer's Representative (CDR) or Remiscier, acting for the Defendant in the 2 accounts was one Pneh Tee Eong (Pneh).

9.5 Due to the contra loses sustained by the Defendant in the Individual Trading Account, the Plaintiff by letters dated 12/7/07 and 16/8/07 demanded payment and warned the Defendant that if he failed to settle his losses, the Plaintiff would submit his name as a defaulter to Bursa Malaysia.

9.6 By letter dated 30/8/07, due to the Defendant's non payment he was reported by the Plaintiff to Bursa Malaysia to be posted as a defaulter.

9.7 Due to the Defendant's failure to pay the sums claimed, the Plaintiff force sold the Defendant's shares on the Accounts. As at 30/4/09, the Defendant still owed the Plaintiff the sum of RM 1,084,147.14 together with interest thereon under the Individual Trading Account and the sum of RM619,700.26 together with interest thereon under the Margin Account.

9.8 As the Defendant chose hot to attend Court and to testify, the Plaintiff contended that its claim stood unrebutted and that the Defendant's Counter-Claim was not proven.

10. The Defendant's Case

10.1 The Defendant admitted opening a Trading Account as well as a Margin Account with the Plaintiff but denied the Plaintiffs claim wholly and relied on the following defences, namely:-

(a) Pneh, the CDR/Remiscier was appointed and authorised by the Plaintiff to conduct all transactions on the 2 Accounts and that Pneh had acted wrongfully in collusion with the Plaintiff.

(b) the margin limit of the 2 Accounts was increased by the Plaintiff without the knowledge and consent of the Defendant so that Pneh and the Plaintiff could increase their trading activities in the Asia EP share counter in early 2007.

(c) when the Defendant found out about the unauthorised transactions he lodged a complaint with Bursa Malaysia and that after due investigations Bursa Malaysia found Pneh had acted in violation of Rule 404.3 (1)(a) & (b) and Rule 404.1(2) & (3) of the Rules of Bursa Securities "for engaging in manipulative trading activities in Asia EP shares". Pneh was reprimanded by Bursa Malaysia and fined RM100,000.00 and was struck off the Register with immediate effect.

(d) on 24/6/09, the Plaintiff was in turn reprimanded and fined RM200.000.00 for failing to exercise strict supervision over the business activities at its Kuala Lumpur branch office and the trading business of Pneh.

(e) that the Plaintiff by not challenging the findings of Bursa Malaysia had admitted the same and that the Plaintiff is therefore estopped from making this claim.

(f) The Defendant in his Counter-Claim claimed for general damages in the sum of RM10,000,000 and exemplary damages on the grounds that:-

(a) the Plaintiff had acted mala fide in commencing this suit.

(b) the Defendant had been harassed persistently by the Plaintiff on the contra losses.

(c) the Defendant had been subjected to "embarrassment, contempt and ridicule" by posting the Defendant as a defaulter with Bursa Malaysia.

11. Decision Of The Court

Upon considering the evidence of PW1 and PW2 in support of the Plaintiffs case, the written and oral submissions of Counsel for Plaintiff and Defendant and in the absence of any evidence adduced in the defence case, the Court held that the Plaintiff had proven its claim on a balance of probabilities and that the Defendant had failed to prove his Counter-Claim. Accordingly, Judgment as prayed in terms of the Amended Statement of Claim was

entered for the Plaintiff and the Counter-Claim was dismissed with costs. Costs of the Claim and Counter-Claim in the sum of RM 15,000.00 was granted to the Plaintiff.

12. Reasons For The Decision

12.1 After trial, the Court arrived at the following findings of fact:-

(a) that the Defendant was a client of the Plaintiff having admitted that he had opened the Trading and Margin Accounts with the Plaintiff (in early 2007and not in 2005 as wrongly pleaded in the Defence). The Defendant signed the Individual Trading Account Application Form on 2/3/07 (Bundle D1 pages 25 to 32) and the Margin Account Application Form on 30/5/07 (Bundle D1 pages 35 to 41).

(b) the Defendant was bound by the Terms and Conditions of the 2 Accounts and knew he had to pay for his contra losses together with interest and late penalty charges.

(c) that Pneh was the CDR / Remiscier handling the 2 Accounts for the Defendant.

(d) the Defendant, through Pneh, conducted the following trades on his 2 Accounts:-

(i) trades on the Individual Trading Account from 5/3/07 to 20/7/07 (Bundle D1 pages 305 to 312, Bundle D2 pages 421 to 587).

(ii) trades on the Margin Account from 6/6/07 to 16/7/07 (Bundle D1 pages 313 to 318, Bundle D2 pages 595 to 606).

(e) the Defendant suffered contra losses in the 2 Accounts and the Plaintiff demanded for payment, By Letters of Demand dated 20/2/08 and 23/12/08 the Plaintiff demanded for payment but the Defendant did not respond to the letters or pay for the losses. Importantly, the Defendant did not protest his indebtedness if indeed the share transactions were carried out by Pneh without his knowledge and authority.

(f) due to the Defendant's failure to meet the demand, the Plaintiff force sold the Defendant's shares on the 2 Accounts and claimed for the balance sum of RM823,805.63 in respect of the Individual Trading Account and the sum of RM445,148.05 in respect of the Margin Account (Bundle D2 pages 411 to 419 and Bundle D1 page 286 respectively). The Defendant did not dispute the Plaintiffs claim until the Writ of Summons and Statement of Claim were filed.

(g) The Defendant was at all material times fully aware of the share transactions carried out on his 2 Accounts as he had authorised them. The Defendant was at all times notified of the trades by the Plaintiff through namely:-

(i) Notification through Contract Notes, Monthly Statements, Set-off Statements and letters.At the end of each trading day, the Plaintiffs back office system would generate by computer and print the clients' Purchases and/or Sales

Contract Notes, which would then be posted to the client on the following day. At the end of each month, the Plaintiff would generate and print the client's Monthly Statements, setting out in detail the client's total purchases and sales of shares for the month.The Contract Notes, Contra or Set-off Statements and Monthly Statements were sent to the client by ordinary post at the address given by the Defendant in the Application Forms signed by the Defendant. Letters were also sent by the Plaintiff to the Defendant informing him of the changes in his trading limits and in the applicable interest rates. The Defendant never responded to these letters of notification.There was no challenge by the Defendant to state that he never received the Statements, Contract Notes and letters on the ground that they were sent to a wrong address.The Defendant cannot now therefore deny that he had never received the said documents from the Plaintiff. The Plaintiff by posting the said documents to the Defendant at his given address was strictly adhering to the instructions of the Defendant given in his Application Forms.

(ii) Notification by Bursa Malaysia Depository Sdn Bhd (formerly known as Malaysian Central Depository Sdn Bhd).Besides receiving the said documents directly from the Plaintiff, the Defendant was also notified of the trades conducted on his Individual Trading Account and Day Contra Trading Account through Statements of Accounts sent to him by Bursa Malaysia. This was confirmed by Chan Kim Hing (PW2) in Question and Answer No. 16 of his Witness Statement.The Defendant had opened a Central Depository System account with Bursa Malaysia as was the compulsory requirement to deposit or withdraw shares purchased or sold on his 2 Accounts. The Defendant had given the same address to Bursa Malaysia as his correspondence / postal address. There is no evidence of any complaint made by the Defendant to Bursa Malaysia on any unauthorised transactions carried out by Pneh on his 2 Accounts.

(h) significantly, it is important to note that the Defendant never once complained in writing to Pneh, the Plaintiff, Bursa Malaysia or Bank Negara that Pneh had conducted unauthorised transactions on his 2 Accounts. No police report was ever lodged by the Defendant against Pneh or the Plaintiff.

(i) the first time the Defendant denied the trades was when the Defence and Counter-Claim were filed in June 2010, some 3 years after the impugned transactions.

(j) all the transactions carried out by Pneh were clearly authorized and consented to by the Defendant.

13. Issues Of Law

13.1 Issue 1 - Whether Pneh as CDR / Remiscier. was an agent of the Plaintiff or Defendant.

A CDR / Remiscier is in law an agent for his client when conducting trades on his client's account and not an agent of the stock broking firm. This proposition of law has been decided in several cases such as in the Singapore High Court decision of *RHB - Cathay Securities Pte Ltd v Ibrahim Khan & Other Actions* [1999] 3 SLR 464 where it was held "that a remiscier or dealer's representative is acting as an agent of the client to input such trades for him into the electronic share trading system of the SES".

In the unreported case of Mayban Securities Sdn Bhd v Lim Hong Chon (Kuala Lumpgr High Court Appeal No R3-11-60-04) Mohamad Ariff J held that "while a remiscier is not a general agent of the broking house, he te by custom regarded as an independent contractor vis-a-vis the broking house and acts as an agent of the client".

In the field of insurance law too, it was held in the Singapore Court of Appeal case of *National Employers Mutual General Insurance Association Ltd v Globe Trawlers Pte Ltd* [1991] 2 MLJ 92 that the general rule is that a broker who completes the proposal form is not acting as an agent for the insurer but for the insured.

In the present case, Pneh was expressly and voluntarily chosen by the Defendant to be his remiscier to handle his 2 Accounts when he nominated Pneh and filled in his name in the 2 Applicant Forms. Pneh in turn had signed the Application forms as the Defendant's introducer.

As explained by witness Chong Wai Mun (PW1), Pneh was not an employee of the Plaintiff as a salaried Dealer's Representative but a Commissioned Dealer's Representative (CDR). Pneh received commissions on trades transacted from the Defendant as agent of the Defendant.

The Defendant as principal will therefore be liable for all contra losses arising from the share transactions carried out by Pneh as his agent, regardless of whether he had authorised the same or not.

13.2 **Issue 2 - Whether the Defendant can rely on the penalty imposed bv Bursa Malaysia to avoid liability**

The Plaintiff was no doubt reprimanded and fined by Bursa Malaysia for failing to exercise proper supervision over the trades conducted by Pneh on the

Defendant's 2 Accounts. While the Plaintiff may have been careless or negligent in the supervision of the trading conduct of Pneh, this alone will not excuse or absolve the Defendant from liability for the losses. This is because the Defendant is liable as the principal for all trades conducted by his agent Pneh, including unauthorised transactions if any.

Although the Plaintiff is deemed to have accepted the findings of Bursa Malaysia as the Plaintiff did not challenge the findings by way of an appeal or judicial review and is therefore estopped from denying the same but this does not necessarily mean that the Plaintiff is also estopped from pursuing this claim as contended by Counsel for the Defendant.

In the face of the claim by the Plaintiff, the Defendant should have commenced third party proceedings against Pneh.

This was not done and no explanation was proferred to the Court as to why no attempts were made to make Pneh accountable.

13.3 **Issue 3 - Whether the Defendant can deny receipt of the contract documents and letters.**

All contract documents sent by the Plaintiff, Monthly Statements sent by Bursa Malaysia and Letters of Demand sent by the Plaintiff's solicitors were sent to the Defendant's given address.

No evidence has been adduced to show that the said documents were not sent to the Defendant. Accordingly, the Defendant is estopped from denying the receipt of the relevant notifications by post and is deemed in law to have received them.

In the Court of Appeal case of *Malayan Banking Bhd v Lim Poh Ho & Anor* [1997] 1 MLJ 662, Mahadev Shankar JCA at page 667 held that the "persistent failure to respond to the demand letters must be held to be an admission that the amounts claimed were in fact due and owing".

13.4 **Issue 4 - Whether the Statements of Accounts and Contract Notes are admissible**

The Statements of Accounts and Contract Notes were computer generated and printed. According to Section 90A of the Evidence Act 1950, computer

generated documents are admissible in evidence. Section 90A (1) and (2) of the Evidence Act provides:-

(2) For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used."

In the present case, the Certificate under Section 90A was signed by one Ng Ah Chye, the Electronic Data Processing Manager of the Plaintiff. This Certificate confirms that the Statements of Accounts and Contract Notes were produced by the Plaintiff's computers in the course of their ordinary use and that the computers were in good working order and were operating properly at the time.

In the Court of Appeal case of *Gnanasegaran a/I Pararajasingam v Public Prosecuter* [1997] 3 MLJ 1, Shaik Daud JCA held "that Section 90A(1) of the Evidence Act allowed the production of such computer-generated documents or statements if there is evidence, firstly, that they were produced by a computer. Secondly, it is necessary also to prove that the computer is in the course Of its ordinary use". P G Segaran's case was cited with approval in the recent Federal Court case of *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613.

13.5 **Issue 5 - Effect of Defendant Electing 'No Case to Answer'.**

The Defendant did not attend trial and hence did not give evidence on his own behalf. By electing 'no case to answer' the Defendant had chosen not to adduce evidence to challenge the Plaintiff's case.

Unless the Plaintiffs evidence is inherently unreliable or incredible, the evidence adduced by the Plaintiff must be accepted by the Court to be true.

In the Court of Appeal case of *Pradeep Kumar a/I Om Prakash Sharma v Abdullah Sani bin Hashim* [2009] 2 MLJ 685 at page 702, Suriyadi Halim JCA held that "the election to submit no case to answer meant that the Court had to accept the truth of the respondent's evidence was just a reiteration of the law. Unless rebutted the respondent's evidence stood unchallenged and unrebutted".

Further in the recent Court of Appeal case of *Yoong Sze Fatt v Pengkalen Securities Sdn Bhd* [2010] 1 CLJ 484, Low Hop Bing JCA held at page 491 that:"In our judgment, it is trite law that once a defendant in civil proceedings makes a submission of no case to answer and elects not to call evidence, then all the evidence led by the plaintiff must be assumed to be correct: per Gopal Sri Ram, JCA in Jaafar bin Shaari, supra, citing Wasakah Singh, supra. This principle has found similar expression in a number of judgments handed down in the motherland of common law. These cases include *Alexander v. Rayson* [1936] 1 KN 169; *Boyce v. Wyatt Engineering* [2001] EWCA Civ. 692; *Milier (t/a Waterloo Plant) v. Cawley* [2002] EWCA Civ. 1100; and *Benham Limited v. Kythirra Investments Ltd* [2003] EWCA Civ 1794."

In the present case, the Court was satisfied that the oral and documentary evidence adduced at trial cannot be said to be inherently unreliable. On the contrary, the Court found the Plaintiff's evidence to be cogent and correct. The Defendant did not even challenge the quantum and computation of the Plaintiff's claim at trial.

13.6 **Issue 6 - Failure bv either party.to call Pneh as a witness -whether adverse inference under S.114 (a) of the Evidence Act 1950 ought to be invoked and if so against which party**

As held earlier, Pneh was the agent of the Defendant and as the Defendant claimed that Pneh had carried out unauthorized transactions on his 2 Accounts, it will be incumbent upon the Defendant to call Pneh as his witness. This the Defendant did not do and of course no explanation was given to the Court to account for this omission. I am of the view that this is a proper case for the Court to invoke the adverse inference under Section 114 (g) against the Defendant.

On the scope and applicability of Section 114 (g) of the Evidence Act, I need only refer to the words of Mohamed Azmi SJC in the case of *Munusamy v Public Prosecutor* [1987] CLJ (Rep) 221 where at page 223 His Lordship held:-

> "It is essential to appreciate the scope of Section 114 (g) of the Evidence Act lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non production of not just any witness but an important and material witness to the case".

There appears to be a withholding or suppression of evidence by the Defendant in failing to call Pneh who was an important and material witness to the case.

13.7 **The Defendant's Counter-Claim - whether there are any merits**

13.7.1. The Defendant's Counter-Claim for general and exemplary damages appears to be founded on defamation on the ground that the Plaintiff had caused the Defendant to be posted as a defaulter by Bursa Malaysia.

13.7.22The Court found as of fact and law that there are no merits in the Counter-Claim for the following reasons:-

(i) the Plaintiff was required by Rule 403.1 of the Rules of Bursa Securities to report a defaulting client to Bursa Malaysia;

(ii) the Defendant was a defaulting client;

(iii) the Plaintiffs action is protected by qualified privilege and/or justification;

(iv) in any event the actual posting of the Defendant as a defaulter was made by Bursa Malaysia and not by the Plaintiff;

(v) as the Plaintiff's claim has been allowed, the Defendant was properly and lawfully posted as a defaulter;

(vi) as the Defendant did not testify, no evidence was led to prove the Defendant's claim for damages of RM 10,000,000 or any part thereof.

13.7.3Counsel for the Plaintiff submitted that the Defence and Counter-Claim in all 9 suits are very suspicious as they are identical and that all 9 Defendants had retained the same solicitors to act for them in these proceedings. I am of the view that nothing much turns on this allegation as there was no evidence adduced to prove common intention on the part of all 9 Defendants to take advantage of the Plaintiff or that they had acted to the detriment of the Plaintiff.

14. In the result the Plaintiff's Claim was allowed and the Counter-Claim was dismissed with costs.
