CHEN WEI HAU v DEREK CHEONG SHENG ZE & ANOR

CaseAnalysis

[2021] MLJU 909

Chen Wei Hau v Derek Cheong Sheng Ze & Anor [2021] MLJU 909

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

KHADIJAH IDRIS J

CIVIL SUIT NO WA-22NCC-698-12 OF 2019

17 March 2021

Parvinder Kaur *(Hakem Arabi & Assoc) for the plaintiff.*
Lock Ju Qi (Ben Chan) for the defendants.

Khadijah Idris J:

GROUNDS OF JUDGMENT

(ENCLOSURE 12)

Introduction

[1]Enclosure 12 was filed by the Defendants to strike out the action pursuant to Order 18 Rule 19 (1) (b) and / or (c) and / or (d) of the *Rules of Court* and / or the inherent jurisdiction of the court pursuant to Order 92 Rule 4 *Rules of Court 2012* ("RoC 2012").

[2]Having heard the parties' submission, this court dismissed Enclosure 12 with costs of RM 4,000.

[3]Aggrieved with the said decision, the Defendants appealed. Below are the grounds for the dismissal.

Parties

[4]The Plaintiff is an individual having his address for service at No. 30, Jalan Bukit Mewah 9/10, Taman Bukit Mewah, Kajang, 43000, Selangor Darul Ehsan.

[5]The 1st Defendant is an individual. He is a director of the 2nd Defendant company.

[6]The 2nd Defendant is a company limited by shares registered under the Companies Act 1965 on 13 July 1999. Its former name was known as “Rantau Seraya Construction Sdn Bhd”.

[7]The 2nd Defendant is the only authorised dealer in Malaysia of the Taiwanese beverage brand, officially recognised as Xing Fu Tang Taiwan which deals with Bubble Milk Tea (“Xing Fu Tang Business”).
Plaintiff’s pleaded case

[8]The Plaintiff contends that the business of the 2nd Defendant was co-founded by him. On 5th November 2018 the Plaintiff and the 1st Defendant had met with the principal of the Xing Fu Tang Business and thereafter the Plaintiff formulated the business plan of the 2nd Defendant. The 2nd Defendant (which was set up in 1999) was used for the 2nd Defendant’s business, as proposed by the 1st Defendant.

[9]Initially the 1st Defendant had proposed the investment of both the 1st Defendant and Plaintiff and the shareholding in the 2nd Defendant would be as follows –

Tan Bee Bee – 40% 1st Defendant – 30% Plaintiff – 30%

[10]It was also agreed between the Plaintiff and the 1st Defendant that once the 2nd Defendant’s business begins making money, the initial investment sum will be returned and that the Plaintiff will be made a director and shareholder of the 2nd Defendant upon which the Plaintiff will carried out various functions of a co-owner.

[11]Then around 1st January 2019 it was agreed between the Plaintiff and 1st Defendant that the shareholding ratio would be 75:25 whereby the 1st Defendant would own 75% of the shares by investing RM 750,000.00 whilst the Plaintiff would own 25% of the shares by investing RM 250,000.00.

[12]It was also agreed that a shareholders’ agreement will be signed.

[13]Based on the said agreement, around the 1st week of January 2019, the Plaintiff had invested RM 250,000.00 in the 2nd Defendant.

[14]For the management and operations of the 2nd Defendant company, business cards bearing the name of the 2nd Defendant with the names of the Plaintiff and the 1st Defendant having the same title designation ie “Executive Director and Co-owner” were printed. According to the Plaintiff the business card was designed by him.

[15]In reliance of the agreement (that the Plaintiff will be made director and shareholder of the 2nd Defendant

company) the Plaintiff had carried out various duties and responsibilities in the business of the 2nd Defendant, including taking charge of the social media accounts namely Facebook and Instagram and continuously updating the same with photographs of the outlet and products sold under the brand name Xing Fu Tang and attended opening ceremony of the Xing Fu Tang outlets. The Plaintiff was also interviewed by Oriental Daily in his capacity as the co-founder of the Business in Malaysia. The contents of this interview was sent to the 1st Defendant for verification before it was published on 1 April 2019.

[16]The Plaintiff consistently requested from the 1st Defendant for a shareholders' agreement to be signed. Although the 1st Defendant had agreed to this request, he has failed to execute a written shareholders' agreement, and only a template shareholders agreement was sent to the Plaintiff on 9 July 2019.

[17]Based on the agreement between the Plaintiff and the 1st Defendant, the investment sum of RM 250,000.00 was returned to the Plaintiff, in three (3) payments made on 26 June 2019, 23 July 2019 and 25 July 2019.

[18]On 2 August 2019, the Plaintiff came to know that he was barred from posting on the Xing Fu Tang Malaysia Facebook page, from accessing into the business email i.e. xingfutang.malaysia@gmail.com and barred access into the bank accounts of the business. When the Plaintiff confronted the 2nd Defendant on these issues, the 2nd Defendant proposed to purchase the Plaintiff's beneficial rights to the shares of the 2nd Defendant, which was yet to be transferred to the Plaintiff.

[19]On 3rd September 2019 the 1st Defendant published a statement on the official Xing Fu Tang Malaysia Facebook and Instagram page stating that the Plaintiff is no longer affiliated with Xing Fu Tang as General Manager (which the Plaintiff said he was never appointed as the General Manager and never receive any salary) and no longer authorised to represent the brand name in Malaysia and that only the 1st Defendant is the authorised representative of the said brand name.

[20]It is the Plaintiff's pleaded case that the Defendants removed him from the business due to his insistence requesting the 1st Defendant to come up with an offer price to purchase the beneficial interests in the 25% shares of the 2nd Defendant, which was supposed to be transferred to the Plaintiff.

[21]By reason of the non-performance of the 1st Defendant's obligations under the agreement between the Plaintiff and the 1st Defendant, the Plaintiff repudiated the agreement. Due to the non- performance, the Plaintiff claims he has suffered losses as detailed in paragraph 32 of the Statement of Claim.

[22]Consequently, vide this suit, the Plaintiff is claiming for the following –

(a) the value of shares of the 2nd Defendant as at December 2019 is to be assessed by an independent accountant;

(b) the 1st and / or the 2nd Defendant pays the Plaintiff 25% of the assessed share value within 7 days from the date of the accountant's report;

(c) the 1st and /or the 2nd Defendant pays the Plaintiff 25% of the net profits of sale from the commencement of business in March 2019 up to time of judgment; and

(d) damages for the embarrassment, distress, inconvenience and undue hardship caused to the Plaintiff for matters stated in paragraphs 27 and 28 of Enclosure 2.

Defendants' pleaded case

[23]The Defendants categorically denies the agreement as alleged by the Plaintiff.

[24]The total issued and paid up share capital of the 2nd Defendant was/is RM 250,000.00 divided into 250,000 ordinary shares of RM 1 each. The shareholders of the 2nd Defendant are Tan Bee Bee who holds 125,000 shares and Tan Yoong Wuang who equally holds 125,000 shares in the 2nd Defendant company.

[25]The 1st Defendant was appointed as a director of the 2nd Defendant on 17 December 2018. At all material times and until to-date, the 1st Defendant is just one of the directors of the 2nd Defendant and was never a shareholder of the 2nd Defendant.

[26]Prior to the appointment of 1st Defendant as one of the directors of 2nd Defendant, the 2nd Defendant had authorised the 1st Defendant to actively negotiate with the director of CEO International Co. Ltd, Taiwan ("CEO") for the purpose of securing a business opportunity from CEO in respect of the Xing Fu Tang Business.

[27]On 11 November 2018, the 1st Defendant had arranged a meeting with the director of CEO for the purpose of presenting a business plan formulated by the 1st Defendant in relation to the Xing Fu Tang Business.

[28]The Plaintiff had attended the said meeting but only for the purpose of assisting the 1st Defendant to present the said business plan to CEO. It was the Plaintiff who insisted to accompany the 1st Defendant to the said meeting as he was a fresh graduate back then and desired to learn about doing general businesses. Therefore, he had tagged along to assist and to learn from the 1st Defendant.

[29]After the said meeting and the active negotiations with CEO, on or about 31 December 2018 and 5 October 2019 the 1st Defendant, in his capacity as the director of the 2nd Defendant, entered into agreements with CEO whereby the 2nd Defendant was officially appointed as the territory master franchisee for the West and East Malaysia respectively ("Franchise Agreements") in respect the Xing Fu Tang Business.

[30]On or about December 2018, the Plaintiff approached the 1st Defendant and expressed his interest to gain more experience in doing general businesses after the trip in the said meeting with CEO. The Plaintiff applied for an

employment with the 2nd Defendant. As the 2nd Defendant was venturing into the Xing Fu Tang Business, the 2nd Defendant agreed to employ the Plaintiff with the job title "Manager" subject to his salary to be agreed upon and that the Plaintiff would be placed under the direct supervision of the 1st Defendant. The Plaintiff commenced his employment with the 2nd Defendant on 2 January 2019.

[31]During the period of the Plaintiff's employment with the 2nd Defendant as its manager, he had undergone several trainings and had assisted the Defendants in carrying out and promoting the Franchise Business, as follows, inter alia –

managing and updating the social media accounts namely Facebook and Instagram of the 2nd Defendant;

designing the marketing materials and visuals for social media accounts;

meetings with potential parties who were interested in obtaining sub-franchise of the Franchise Business;

providing supports to the sub-franchisees in setting up their outlets in accordance with the requirements imposed by CEO and the Franchise Agreements; and

assisting the 2nd Defendant in various opening ceremonies of its new outlets or stores.

[32]On 2 February 2019, as part of the Plaintiff's training process, by way of a board resolution, the 2nd Defendant had appointed the Plaintiff (in his capacity as the manager) as one of the 3 authorised personnel to operate its bank account maintained with the Public Bank Bhd. The signing condition to operate the said bank account was "*any 2 of the above authorised personnel*". The Plaintiff had duly acknowledged and signed as the "*Manager*" on the said board resolution.

[33]On or about January 2019, the Plaintiff had out of good faith, agreed to offer and paid a short-term loan of RM 250,000.00 to the 2nd Defendant.

[34]The said short-term loan was fully repaid by the 2nd Defendant to the Plaintiff between June to July 2019. At the request of the Plaintiff, the 2nd Defendant had agreed to pay the Plaintiff interest on the short- term loan at the rate of 5% per annum. The Plaintiff duly acknowledged receipt of the repayments in the Payment Voucher of the 2nd Defendant without any objection, as follows –

Date	Amount
30.05.2019	127,486.54
22.07.2019	126,041.67

24.07.2019 2,486.54

Total 256,014.75

[35]It had come to the knowledge of the 1st and 2nd Defendants that the Plaintiff had misrepresented his job position in the 2nd Defendant by distributing the alleged business name cards to the public without the 1st and 2nd Defendant's approval, consent and / or authority.

[36]Subsequently on 1 August 2019, the Plaintiff had effectively ceased his employment as manager of the 2nd Defendant without any resignation notice provided to the 2nd Defendant.

[37]Due to the alleged misconduct by the Plaintiff and cessation of his employment with the 2nd Defendant, the 2nd Defendant had on 3 September 2019 published in its Facebook and Instagram page concerning the cessation of the employment of the Plaintiff. However the 2nd Defendant had mistakenly stated the Plaintiff's job title was mistakenly stated as "General Manager", instead of "Manager".

[38]The 1st Defendant's solicitors vide letter dated 30 September 2019 had categorically denied the Plaintiff's allegations as contained in the Plaintiff's demand letter dated 24 September 2019.

The law

[39]It is trite law that the summary process under Order 18 rule 19 (1) of the *RoC 2012* can only be exercised in cases where the claim or defence is obviously unsustainable (*Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* *[1993] 3 MLJ 36*).

[40]On the issue whether the Plaintiff's OS is scandalous, frivolous or vexatious or an abuse of the process of the Court, reference is made to the case of *Thong & Anor v. Saw Beng Chong* *[2013] 2 MLJ 235*. In that case the court sets out the circumstances which would justify striking out under Order 18 rule 19 (1) (b) and (d) as follows –

> [15] Sub-paragraph(1)(b) deals with pleading which is 'scandalous, frivolous or vexatious'; while sub-para (1)(d) deals with 'an abuse of the process of the court'. In *Murray v Epsom Local Board* [1897] 1 Ch 35 *it was held by the court that,* ***'scandalous' generally refers to matters which improperly cause a derogatory light on someone, usually a party to an action, with respect to moral character or uses repulsive***
>
> ***...***
>
> ***The words 'frivolous or vexatious' generally refer to a groundless action of statement with no prospect of success, often raised to embarrass or annoy the other party to the action. In considering whether any proceedings were vexatious or frivolous, one is entitled to and ought to look at the whole history of the matter and it is not to be determined by whether the pleading discloses a cause of action or not*** (see *Attorney General of The Duchy of Lancaster v London & North Western*

Railway Co [1892] 3 Ch 274; and *Re Vernazza* [1959] 2 All ER 200). ***It was decided in the above case of Attorney General of The Duchy of Lancaster that 'frivolous or vexatious actions mean cases which are obviously frivolous or vexatious or obviously unsustainable'****.*

…

[18] Sub-para (d) of the rule deals with pleading which is 'an abuse of the process of the court'. In Castro v Murray (1875) LR 10 Exch 213, the phrase ***'abuse of the process of the court'*** *had been described generally to refer* ***to situations where the court's process is used for an unlawful object and not for the actual purpose intended to achieve justice.*** *It involves a process which is* ***contrary to good order established by usage.*** *In dealing with this sub-para (1)(d), again the judge is entitled to look at the affidavit evidence, on the same principle applicable to sub-para (1)(b) ie* ***striking out is not appropriate when there is conflicting evidence in the affidavits****. The judge must determine and decide the issue in question by consideration of the undisputed facts.*

(emphasis added)

Findings of the court

[41]The Plaintiff's claim against the Defendants appears to be breach of an agreement alleged to have been agreed between the Plaintiff and the 1st Defendant for the Plaintiff to be made a shareholder and director of the 2nd Defendant company.

[42]Taking into consideration the pleadings and affidavits evidence of both parties I am of the view this is not a suitable case to be disposed of summarily. The evidence adduced thus far clearly shows the parties' position are miles apart in relation to what transpired between them in so far as the purported agreement which concerns the 2nd Defendant. In particular, the crucial issue here is the purported oral agreement between the Plaintiff and the 1st Defendant in relation to the Plaintiff's participation in the 2nd Defendant's business – whether as a shareholder and director as alleged by the Plaintiff or merely providing loan to assist the 2nd Defendant's Business as alleged by the 1st Defendant.

[43]There are conflicting evidence which makes it unsafe for this court to make a finding at this juncture that the Plaintiff's case is obviously unsustainable.

[44]The conflicting evidence are discussed below.

[45]It is contended by the Plaintiff that he is the co-founder of the business carried out by the 2nd Defendant. To substantiate this, the Plaintiff produced a posting dated 30 October 2019 by the principal of the Business ie one Edison Chen who according to the Plaintiff has confirmed the Plaintiff's position as such. The posting which is in Mandarin has been translated and produced as Exhibit CWH-3 to enclosure 15. A perusal of the said posting appears to indicate the following –

(a) the posting appears to be issued by Xing Fu Tang Taiwan Headquarters and its founder Edison Chen;

(b) the posting appears to be the founder's unhappiness over the conduct of the Malaysian Master Franchisee (which appears to be the franchisee of the brand Xing Fu Tang in Malaysia) towards its business partner and other Malaysian sub-franchisees. It is also alleged that the Malaysian Master Franchisee has breached the terms of the contract between the Malaysian Master Franchisee and Xing Fu Tang Taiwan;

(c) the 1st Defendant, vide Instagram Post dated 31 October 2019 (produced as Exhibit DC-9 to enclosure 18) had categorically denied the postings. A perusal of Exhibit DC-9 shows the said posting was addressed to the Plaintiff's solicitor and it was in response to a letter dated 24 September 2019 issued by the Plaintiff's solicitor to the 1st Defendant. The contents of the posting appears to relate to the disputes between the Plaintiff and the Defendants which is now the subject matter of this instant action;

(d) although what is stated about the relationship between the Malaysian Master Franchisee and its business partner seems to bear a resemblance to the disputes between the Plaintiff and the Defendants in this case, but as correctly pointed out by the Defendants, there is nothing in the said posting that make specific reference to the names of the Defendants and the Plaintiff; and

(e) thus it would appear the said posting Exhibit CWH-3 does not substantiate the Plaintiff's claim.

[46]In respect of the alleged agreement reached between the Plaintiff and the 1st Defendant that the Plaintiff will invest RM 250,000.00 in the 2nd Defendant and therefore holds 25% of the shares in the 2nd Defendant, it is not disputed that the Plaintiff had in fact made a payment in the sum of RM 250,000.00 to the 2nd Defendant.

[47]However both parties are at loggerheads over the purpose of the said payment ie Plaintiff contends the payment was not a loan but an investment for him to be a shareholder and a director of the 2nd Defendant. Whereas it is argued by the 1st Defendant that the payment in the sum of RM 250,000.00 is a short term loan that the Plaintiff has graciously agreed to provide to the 2nd Defendant in return of an interest at the rate of 5%. Thus the principal amount and interest which makes a total of RM 256,014.75 was repaid to the Plaintiff.

[48]While the Plaintiff do not dispute the said sum was paid to him, he disputes that such payment was a repayment of a loan. Instead it is a return of the investment made by him as the 2nd Defendant has commenced business and generated income. This arrangement, according to the Plaintiff, was what has been agreed between the Plaintiff and the 1st Defendant.

[49]The Defendants produced voucher payments which according to them support their contention that the RM 250,000.00 was a loan. The voucher payments are Exhibit DC-4 to enclosure 13 –

(a) the first 1st payment voucher was dated 30 May 2019 for a total sum of RM 127,486.54. The following details appears on the said voucher –

(i) the voucher is addressed as "Pay to: Chen Wei Hau (951212-14-5679)";

(ii) the sum RM 125,000.00 is stated as "Being payment for refund earlier advance"; and

(iii) the sum RM2,486.54 is stated as "Being 1st repayment loan of RM125,000.00 @ 5% interest p.a".

(b) the second payment voucher was dated 22 July 2019 for a total sum of RM 126,041.67. The following details appears on the said voucher –

(i) the voucher is addressed as "Pay to: "Chen Wei Hau (951212-14-5679)";

(ii) the sum RM 125,000.00 is stated as "Being payment for refund earlier advance"; and

(iii) the sum RM1,041.67 is stated as "Being 2nd repayment loan of RM 125,000.00 @ 5% interest p.a (From 1st June 2019 – 31st July 2019 = 2 Month)".

(c) the third payment voucher was dated 24 July 2019 for a total sum of RM 2,486.54. The following details appears on the said voucher –

(i) the payment voucher is addressed as "Pay to: Chen Wei Hau (951212-14-5679)";

(ii) the sum of RM 2,486.54 is stated "Being 2nd repayment loan of RM 125,000.00 @ 5% interest p.a (From 7th January 2019 – 31st May 2019 = 4 Months & 24 Days)"; and

(iii) there is a caption "Note: Balance of the loan after 2nd repayment = RM 0.00".

[50]Whilst the said Exhibit DC-4 appears to support the Defendants' allegation that the RM 250,000.00 is a short-term loan and not as an investment by the Plaintiff as a shareholder and / or director, the business card of the 2nd Defendant (discussed below) which was printed and issued at the material time seems to say otherwise.

[51]The Plaintiff alleges, in reliance on the purported agreement reached between the Plaintiff and the 1st Defendant, he had participated in the operations and management of the 2nd Defendant the details of which is stated at paragraph 13 of the Statement of Claim. To facilitate such participation, the 2nd Defendant had printed and published the 2nd Defendant's business cards where on the said cards both the designation of both the Plaintiff and the 1st Defendant is stated as "Executive Director and Co-owner" of the 2nd Defendant. The said business card is produced as Exhibit CWH-7 to enclosure 15.

[52]The designation of the Plaintiff described on the 2nd Defendant's business card ie "Executive Director and Co-owner" in its ordinary and natural meaning seems to support the Plaintiff's case that it was intended by both the Plaintiff and the Defendants for him to be a shareholder and director of the 2nd Defendant.

[53]Besides that, the WhatsApp messages between the Plaintiff and the 1st Defendant at Exhibit CWH-10 to enclosure 15 appears to substantiate the Plaintiff's claim that the 1st Defendant intended to make the Plaintiff a shareholder when he answered the Plaintiff's question *"So I'm wont be the shareholder of this company?"* with *"you will be la…. I mean my 70% I will hold 40% and she hold 30%"*. This WhatsApp messages also indicates that the 1st Defendant appears to have a plan how the Plaintiff will be roped in as a shareholder of the 2nd Defendant. It also

indicates that the 1st Defendant appears to have some authority over the 2nd Defendant in deciding the Plaintiff's position as a shareholder of the 2nd Defendant. Further, the WhatsApp messages at Exhibit CW-11 to enclosure 15 appears to indicate there was a discussion and eventually a verbal consensus between the Plaintiff and the 1st Defendant that the Plaintiff will hold 25% shares in the 2nd Defendant company.

[54]It was contended by the Defendants that the Plaintiff was only employed as a manager of the 2nd Defendant (appointed on 2 January 2019) and to be placed under the direct supervision of the 1st Defendant. In his capacity as manager the Plaintiff was appointed as one of the 3 authorised personnel to operate its bank account maintained with the Public Bank Bhd. The Plaintiff denies he was appointed as manager. To support the denial, the Plaintiff pointed out there is no contract of employment between him and the 2nd Defendant appointing him as manager. It is further contended that if there is in fact misconduct on the part of the Plaintiff, show cause letter should have been issued against him by the 2nd Defendant ie as the employer. But there was none. This, coupled with the business card issue discussed above appears to support the Plaintiff's claim against the Defendants.

[55]However, there also appears to be facts which may negate the Plaintiff's contention that he was never appointed as manager of the 2nd Defendant. Exhibit DC-2 to enclosure 13 is the 2nd Defendant's "Dir Resolution in Writing on Subscription of Services (Cont'd)" where the Plaintiff was stated as one of the Authorised Personnel and whose designation was described as "Manager (Maker)". The Plaintiff's signature appears directly above the said designation, which was not denied by the Plaintiff in his affidavit.

[56]The 2nd Defendant's Directors' Resolution in Writing was dated 2 January 2019 and signed by Tan Bee Bee and the 1st Defendant as directors. Vide the said resolution it appears that the 2nd Defendant appointed the Plaintiff, being the manager of the 2nd Defendant, as one of the signatories of the current account maintained by the 2nd Defendant with Public Bank Berhad.

[57]It is apparent from the above that the facts of this case is highly contentious. There are contemporaneous evidence which seems to support the Plaintiff's claim against the Defendants. At the same time, in the context of the Defendants' defence against the Plaintiff, the Plaintiff's claim may appear to be weak but that is not a reason to strike out the Plaintiff's claim and deny the Plaintiff of his day in court (*Solai Realty Sdn Bhd v United Overseas Bank (Malaysia) Bhd* [2013] LNS 384). This court is also mindful that the court's power to dismiss an action summarily without permitting the Plaintiff to proceed to trial is a drastic power and therefore such power should be exercised with the utmost of caution (*Tractors Malaysia v Tio Chee Hing* [1975] 1 LNS 133; *[1975] 2 MLJ 1*).

[58]On the basis of the pleadings and the affidavits evidence as discussed in the foregoing, this court is not prepared to conclude, at this juncture, that the Plaintiff's claim is groundless or that it has no prospect of success. The issues raised in relation to the purported oral agreement between the Plaintiff and the 1st Defendant are issues which requires further investigation and it is this court's considered view that those issues can only be fairly and

justly adjudged by calling for viva voce evidence and not via averments made in conflicting affidavits which are not subject to verification.

[59]Lastly, it cannot be said the Plaintiff's action in commencing this action against the Defendants is an abuse of the process of the court as there is nothing to suggest that the Plaintiff's action is for an unlawful object or purpose. On the contrary, this action will determine the issues in dispute between the Plaintiff and the Defendants once and for all.

Conclusion

[60]In light of the aforesaid reasons, the Defendants' application to strike out the Plaintiff's claim was accordingly dismissed with costs.

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