Uncharted Business Pte Ltd v Asiasoft Online Pte Ltd
[2009] SGHC 188

Case Number : Suit 42/2008

Decision Date : 21 August 2009

Tribunal/Court : High Court

Coram : Lee Seiu Kin J

Counsel Name(s) : Lionel Tan I Kwok and Lye Yi Xiang (Rajah & Tann LLP) for the plaintiff; Cheong Yuen Hee (Y H Cheong) and Yeh Siang Hui (J S Yeh & Co) for the defendant

Parties : Uncharted Business Pte Ltd — Asiasoft Online Pte Ltd

Contract

21 August 2009

Lee Seiu Kin J:

1 This suit turned on whether the defendant's letter of 26 April 2006 ("the Termination Letter"), which gave notice of termination of the appointment of the plaintiff as exclusive e-Pin distributor for three years of all the defendant's licensed products and services with effect from 1 July 2006, entitled the plaintiff to damages against the defendant under a contract between the parties entitled "Memorandum of Understanding" dated 26 August 2005 ("the MOU").

2 The plaintiff is a Singapore company in the business of management and consultancy services and the development of e-commerce applications. The people behind the plaintiff are its business advisor, Kang Yong Wah ("Addison") and one of its directors, Liew Chee Yuan ("Stanley"). The defendant is a Singapore company in the business of internet gaming. It is a wholly owned subsidiary of Asiasoft International Co Ltd ("AI"), a company incorporated in Thailand. The directors of the defendant are Tan Tgow Lim ("Sherman") and Pramoth Sudjitporn ("Pramoth").

3 The background to the matter goes back to 2003, when Addison and Stanley were working in a company called SG Web Pte Ltd ("SG Web"). Addison said that he and Stanley incorporated the plaintiff company to pursue businesses outside of the core business of SG Web. They discussed with Sherman the possibility of leveraging on AI, which was a much larger company, to pursue the online computer game business in Singapore. In September 2003 Addison prepared a business plan and Sherman approved it. They decided to use the defendant (which was a shell company controlled by AI and called BM Media Pte Ltd until its name was changed in May 2004) as the vehicle for this. The intention was that Addison and Stanley would eventually be issued shares in the defendant.

4 Addison identified a Korean game called Gunbound as one that would be popular in Singapore. The Korean owner agreed to grant distribution rights in Singapore for Gunbound to AI. Addison and Sherman agreed that the plaintiff and defendant would share the net revenue in the following manner: 60% would go to the plaintiff and 40% to the defendant. In return, the plaintiff would undertake to distribute and promote Gunbound in Singapore while the defendant procured the rights to Gunbound through its parent, AI. The game was launched in June 2004 and it secured net revenue of some $275,000 in the period from June 2004 to August 2005. The plaintiff, which did not have substantial staff of its own, had an arrangement with SG Web under which the work for Gunbound would be carried out by the employees of SG Web.

5 After the launch of Gunbound, Sherman and Addison agreed to promote another computer game, called Maplestory. They also negotiated on the terms for this project. This started in November

2004, and an agreement was reached in December 2004. Under this agreement the plaintiff and defendant would split the net revenue with 40% of it going to the plaintiff and 60% to the defendant, on the following terms:

(a) The plaintiff would, *inter alia*:

(i) develop a computer billing system for Maplestory;

(ii) develop a "Passport System" for users to register, log-in, manage their accounts and play the game;

(iii) design and develop a website for Maplestory;

(iv) finance the business operating expenses; and

(v) provide computer, event and office equipment.

(b) The defendant would, *inter alia*:

(i) secure Maplestory licensing rights in Singapore and Malaysia; and

(ii) acquire computer servers and network equipment to host and operate Maplestory.

6 In April 2005, Maplestory was released for preliminary testing (in the jargon, called "beta testing"). Feedback was obtained and modifications made to the game, website and other applications. A media event was held on 23 June 2005 to drum up publicity for the official launch on 26 June 2005.

7 Two months after Maplestory was launched, in August 2005, Sherman proposed to Addison to make some changes to the arrangement between the defendant and plaintiff. They discussed the matter over several weeks and the outcome was the MOU, which was executed on 26 August 2005 by Sherman on behalf of the defendant and by Stanley on behalf of the plaintiff. The operative provisions of the MOU are as follows:

Scope of MOU

This MOU is intended to outline the express intention of AsiaSoft and Uncharted Business to enter into a business arrangement and co-operation involving the (i) e-Pin Distribution of AsiaSoft's products and services, (ii) Gunbound Operations (iii) Purchase of Assets and (iv) the details of initial operation fee of Maplestory.

The parties agree to do the following:

e-[Pin] Distribution

- AsiaSoft shall appoint Uncharted Business as the exclusive e-Pin distributor of AsiaSoft for all AsiaSoft's licensed products and services.

- Uncharted Business shall resell and distribute the e-Pin of AsiaSoft's licensed products and services through payment modes, including but not limited to, (i) Online e-Payment, (ii) Singpost's SAM Machine Kiosk and (iii) Mobile Services Provider.

- Except for the Online e-Payment mode of payment, Uncharted Business shall not distribute e-Pin AsiaSoft's products and services to territories of Malaysiaunless otherwise reviewed and agreed by the parties.

- The distributor cost shall be fixed at 30% off the suggested retail price for all AsiaSoft's licensed games.

- The initial term of the appointment shall be for a period of 36 months from 1st September 2005 and expiring on 31st August 2008, with the first option to renew a further term of 36 months at revised terms and conditions, where appropriate.

Gunbound Operations

- With effect from 1st September 2005, Uncharted Business shall cease to be the authorized business operator of AsiaSoft's licensed game – Gunbound.

Purchase of Assets

- AsiaSoft to purchase the fixed assets (with reference to Annex A) from Uncharted Business for a consideration of SGD10,000.00.

- AsiaSoft to purchase the web applications developments (with reference to Annex B) from Uncharted Business for a consideration of SGD180,000.00.

Initial Operation Fee for MapleStory

- AsiaSoft to pay Uncharted Business a fixed fee of SGD110,000.00 for the operation of MapleStory during the period from 1st April 2005 to 31st July 2005.

The payment arrangement of the total consideration of SGD300,000.00 by AsiaSoft to Uncharted Business shall be on a monthly basis at 8% of Net Revenue (before Royalty Fee) of MapleStory for 12 months from 1st September 2005 to 31st August 2006. The monthly payment is due and payable not later than thirty (30) days after the end of each calendar month. At the end of 31st August 2006, based on 8% of Net Revenue (before Royalty Fee) of MapleStory, the total accumulative amount is calculated. If the amount is more than SGD300,000.00, the excess amount shall be treated as sales commissions and is payable to Uncharted Business. If the amount is less than SGD300,000.00, the deficit amount shall be treated as a discount to the total consideration.

8 The parties disagreed as to the exact circumstances behind the MOU. However they agreed that the MOU was a binding contract between them. At the same time, another memorandum of understanding was entered into between the defendant and SG Web, pursuant to which the defendant purchased certain fixed assets from SG Web for the sum of $50,000 and paid $70,000 to SG Web to take over the employment of its employees. The defendant had only one employee and with this other memorandum of understanding the defendant acquired the entire staff of SG Web and its equipment. They continued operating from the same premises. This was essentially a paper transfer as there was no change in the working arrangements. From October 2005 to May 2006, the defendant paid SG Web $120,000 in three instalments. Addison and Stanley became employees of the defendant, with Addison appointed the chief executive officer (CEO) and Stanley the chief financial officer (CFO).

9 Under Addison and Stanley, the defendant promoted Maplestory which grew popular and eventually turned out to be a commercial success. Then, from early 2006, a series of events took place, the exact details of which are in dispute. Those events culminated in the defendant's Termination Letter to the plaintiff dated 26 April 2006. That letter simply stated as follows:

> We hereby, give written notice of our decision to terminate your appointment as our exclusive e-Pin distributor for all AsiaSoft's licensed products and services. The termination shall take effect from 1st July 2006.

10 The plaintiff's position was that the defendant had no right unilaterally to terminate its appointment as "exclusive e-Pin distributor for all AsiaSoft's licensed products and services", which appointment was made under the MOU, as there was no provision in the MOU for such termination. The defendant's position was that the plaintiff had agreed to the termination, and therefore it was made by mutual agreement. The plaintiff's response was that it had never agreed to the termination. The entire suit turned on whether there was such an agreement.

11 According to the defendant, even at the time the MOU was entered into, it was their mutual understanding that the defendant was entitled to terminate the MOU once the accumulated sum of the monthly 8% of net revenue payable to the plaintiff reached $300,000. The defendant alleged that the reason behind the MOU was for the plaintiff to obtain a total payment of $300,000 as it was not certain at the outset that Maplestory would do well. However, by 31 August 2006, the plaintiff had received a total of about $769,000 from the 8% share of net revenue, and another $292,000 in commission from the 30% commission from the e-Pin distributorship. The defendant's position was that based on the understanding between them, since the $300,000 had been reached, it was entitled to terminate the MOU at any time. However, the defendant's motives for the termination arose out of the fact that plans were being made by Asiasoft Corporation Company Limited ("Asiasoft Corporation"), which was the parent company of AI, the defendant's parent company, to be listed on the stock exchange of Thailand. The problem was that Stanley, the CFO of the defendant, was a director of the plaintiff while Stanley's wife was a director and 50% shareholder of the plaintiff. This meant that the MOU, under which the plaintiff was appointed the exclusive e-Pin distributor for the defendant, would be regarded as a related-party transaction. In addition, Addison was not only the CEO of the defendant, but also the *de facto* director of the plaintiff. The defendant wanted to remove these conflicts of interest. Addison agreed that this was a problem, although he denied that he had agreed to the solution put forward by the defendant, *ie* termination of the MOU.

12 The discussions over this issue, which took place from February 2006 onwards, were accompanied by exchanges of email which provided some illumination on the intentions of the parties. I reproduce the salient ones below:

(a) 10 February – Sherman to Addison and Stanley:

As I have spoken to you guys before, that after this consolidation, I will need all the current arrangement of business transaction with Uncharted to be transfer back to Asiasoft Online. I appreciate the time and contribution make here together with Uncharted. However, due to the requirement of our future plans, we have to put the interest of Asiasoft first.

It is my responsibility here to ensure that all business and management matters of the groups come in good form without doubt and suspicous [sic] from all investment insitutions [sic] and shareholders.

Stanley, kindly make the arrangement and have the account transfer to Asiasoft Online before the end of this month and have it take effect beginning of March. Please make new contract understand Asiasoft name. Thank you.

(b) 11 February – Addison to Sherman, in reply to (a):

As part of our deal, Uncharted Business was promised for this exclusivity in order for the transfer. To recall, it told us many painful meeting to reach such agreement. At this juncture, you may be facing certain difficulties which I have no access. Nevertheless, I can agree with you to the below mention. But we have to negotiate first since it affect our agreement greatly. Also, it is impossible for the contract to be transfer with immediate effect.

(c) 11 February – Sherman to Addision, in reply to (b):

Thanks Addison. We have to adapt to changes for the good of the company. If the transfer is impossible, then we will terminate the mode of this business arrangement. We can't accept those practice anymore. I regret that this may have create some uneasiness for you but ethics and confident is what Asiasoft want. Everyone have to respect that. Please understand. We will talk in Taipei if u have any question.

(d) 16 February – Stanley to Sherman, in reply to (a):

I do agree that we have to make arrangement to best possible eliminate any form of doubt and suspicious that might arise from investment insitutions [sic] and shareholders. It is to protect the interest of AsiaSoft as a group entity viewing a decision to go public.

As AsiaSoft business is the publication and operation of online gaming content, appointment of a third party distributor to handle our A-Cash distribution is a normal sound business practice. The main concern here is that Uncharted Business is related to Addison and me in some ways. Thus, I would suggest to re-assign the e-pin distribution rights to a company that is not "linked" to Addison and me, nor of relatives to us. This will ensure the continuation of what has been agreed pre-merging and also eliminate the main concern of public mis-perception.

13 In mid-February 2006, Sherman travelled to Taipei with Addison to attend a computer game exhibition. But there was no discussion between them on this matter. The next event was an email by Sherman to Stanley and Addison on 2 March 2006 in which Sherman said:

Has the transfer of biz from Uncharted goes to Asiasoft yet? I need this to be resolve immediately without further delay. Let me know by Monday.

There were some oral exchanges between Sherman, Addison and Stanley around that period. Then in April 2006, in Addison's words, "Sherman instructed Stanley to prepare a formal termination letter to reflect the termination of [the plaintiff's] exclusive distributorship of the e-Pins". Stanley complied and on 26 April 2006, Sherman signed the Termination Letter handed to him by Stanley. The contents of that letter are set out in [9] above. It evoked no written reply from the plaintiff. Addison and Stanley continued to work in the defendant, respectively as CEO and CFO. They worked hard at promoting Maplestory and met with considerable success. Almost exactly a year after the Termination Letter was issued, Addison resigned as CEO of the defendant on 23 April 2007 by tender of a letter. One day later, on 24 April 2007 Stanley resigned as CFO of the defendant; he sent his resignation notice by email. Their letter and email were expressed in amicable terms. The defendant's replies were also in amicable terms. About eight months later, on 12 December 2007, the plaintiff's solicitors wrote to the defendant a letter of demand in respect of the claim in this suit.

14 The defendant's position was that the evidence clearly showed that Addison and Stanley had agreed to the Termination Letter. Although the two of them had argued against it, in the end they were persuaded by Sherman's reasoning. Indeed, Stanley had drafted the Termination Letter as Sherman had requested and the plaintiff had accepted it without any protest at all. Further both Addison and Stanley had continued to work as CEO and CFO of the defendant for almost a year after that, and they had continued to put in tremendous efforts during that period to further the defendant's commercial interests. And they had both resigned on good terms. The defendant alleged that the true reason for the claim that came from out of the blue in December 2007 was because Addison and Stanley had wanted to take advantage of the fact that Asiasoft Corporation was in the midst of being listed on the stock exchange of Thailand.

15 Addison and Sherman said in their evidence that the reason they had not protested at the time was because they thought that they could not persuade Sherman to change his mind and they decided to hold their hands until an opportune moment came. They said that they were aware at the time that they had six years to bring up a claim for breach of contract.

16 There was no dispute that Addison and Stanley did not make any protest regarding the Termination Letter. Indeed, their evidence was that they had in fact cooperated thereafter and had carried on with their duties as CEO and CFO and had done a good job. Addison said the following in his AEIC at para 93:

> … I told him that the intended termination was wrongful and that [the plaintiff] could seek damages arising out of the wrongful termination. Sherman responded by stating that [the plaintiff] was free to take any action. Hearing this, I then felt that there was no point discussing the matter further with him. As I had already expressed to him that [the plaintiff] had the right to sue and he had acknowledged it, I decided to leave the matter as it was for the time being.

17 I found this position to be not only inconsistent with his behaviour pre-termination, but especially so post-termination. For someone who had reserved his rights in that manner, and was poised to make a claim against the defendant, Addison certainly did not manifest any such intention when he tendered his resignation letter to Sherman on 23 April 2007 in which he stated:

> I hereby tender my resignation with effect from today.
>
> Thank you for the opportunities in AsiaSoft Online Pte Ltd. I believe my duties have been accomplished and the company has grown. May the company rise to greater heights in future.

Stanley's email tendering his resignation, which expressed similarly warm sentiments about the

defendant, went as follows:

> I am writing to you today to officially tender my resignation from AsiaSoft Online Pte Ltd. This was a difficult decision, as working for AsiaSoft has been a positive experience and one for which I am thankful. I have acquired a great deal of knowledge and experience here, and have appreciated the opportunity to work for you. I have benefited from all your personal and professional advice over the years. This final decision was reached only after thorough consideration.
>
> Thank you again for everything.

18 Even allowing for some latitude in such letters, the message conveyed in them was incongruent with the scenario painted by Addison and Stanley that Addison had reserved the plaintiff's right to sue the defendant for breach of contract. It was more consistent with the defendant's position that they had agreed to the termination at the time, bearing in mind that Addison and Stanley had worked hard for the defendant for a full year after the termination and that was why the resignation letter and email were expressed in such warm terms.

19 Indeed Addison and Stanley were asked about this in cross-examination and I found their explanations to be somewhat awkward and not to have the ring of truth. I disbelieved them and found on the evidence before me that they made no such reservation. I found for a fact that the plaintiff, represented by Addison and Stanley, had agreed to the termination. From the email communication between the parties, it was clear that Sherman was determined to push through the termination although Stanley and Addison had argued that they could work out some arrangement under which they could still enjoy the benefits of the MOU. However the evidence at trial of the oral communications at the time showed that Addison and Stanley had communicated to Sherman their agreement to the termination, even if it was reluctantly given. This was supported by contemporaneous events, such as the fact that Stanley had drafted the Termination Letter, and that both Addison and Stanley continued to work as CEO and CFO of the defendant for another year after that. Indeed, from their letter and email to Sherman tendering their resignations, Addison and Stanley both left on a good note and expressed to Sherman their good wishes for the defendant's future. Finally, there was evidence to support the defendant's contention that the subsequent claim by the plaintiff was an afterthought some 20 months after the termination and eight months after they resigned in April 2007. I was therefore not persuaded by the testimony of Addison and Stanley that they had, at the time of termination in April 2006, made the decision to sue the defendant at a later stage.

20 In coming to my decision, I had considered the evidence of Lau Sya Chung ("Lau"), a witness called by the plaintiff. He gave evidence that, in March, May and July 2006, he met Addison who complained to him about Sherman's unlawful termination and said that he had decided not to pursue a claim for the time being as he had six years to do so. In his affidavit evidence-in-chief, he was able to give a detailed recollection of events that took place two years before he was asked to give evidence on it. When asked in cross-examination if he had asked Addison how the latter knew he had six years to sue the defendant, Lau replied that Addison told him that it was stipulated in the contract. He was asked twice if he was sure of this. Both times he confidently replied that he was. When re-examined, he changed his evidence and said that he had assumed, from what Addison told him, that it was stipulated in the contract. Based on this and the manner in which he had given his evidence in chief, I placed little weight on Lau's evidence.

21 On the issue of mutual consent to terminate an agreement, *Chitty on Contracts* (Sweet & Maxwell, 30th Ed 2008) vol 1 at paras 22-025–22-026 states:

> **22-025 Rescission by agreement**. Where a contract is executory on both sides, that is to say where neither party has performed the whole of his obligations under it, it may be rescinded by mutual agreement, express or implied … The consideration for the discharge … is found in the abandonment by each party of his right to performance … It depends upon the consent of both parties, to be gathered from their words or conduct and not upon the intimation by one of them that he does not intend to be bound by the agreement.
>
> **22-026 Effect of rescission**. A contract which is rescinded by agreement is completely discharged and cannot be revived.

There was no doubt that neither party had performed the whole of its obligations under the MOU.

22 For the reasons given above, I dismissed the plaintiff's case with costs, which I ordered to be taxed if the parties cannot come to agreement on the quantum.

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