Kong Chee Chui and others *v* Soh Ghee Hong
[2014] SGHC 8

Case Number : Suit No 881 of 2011

Decision Date : 13 January 2014

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Mohamed Baiross (IRB Law LLP) (instructed) and Alice Tan-Goh Song Gek (A C Fergusson Law Corporation) for the plaintiffs; Roy Yeo (Sterling Law Corporation) (instructed) and Paul Yong Wei Kuen (Thames Law LLP) for the defendant.

Parties : Kong Chee Chui and others — Soh Ghee Hong

Contract – Misrepresentation – Fraudulent – Inducement

Tort – Misrepresentation – Fraud and deceit – Inducement

13 January 2014 Judgment Reserved.

Choo Han Teck J:

1 The defendant started a business venture in Indonesia together with at least one other person. He approached each of the seven plaintiffs at various points in time with a view to getting them involved in the business. Some of the plaintiffs are relatives of the defendant: the second and third plaintiffs are his cousins, the fourth plaintiff is his brother, and the seventh plaintiff is his uncle. The plaintiffs agreed to participate in the business. They say that they paid the defendant substantial sums of money over several years on the understanding that he would apply that money towards the business venture. They claim that their initial investments were induced by a number of statements made by the defendant which turned out not to be true. They also claim that he ultimately "pocketed or embezzled" at least part of the money "for his own use and benefit". They now seek a return of the money and/or an account of what he did with the money, including an account of any profit made.

2 According to the defendant, he started his Indonesian business venture in 2000 together with the fifth plaintiff and Ang Soon Huat, a relative of the fifth plaintiff. The plan was to acquire a plot of land in Bengkalis, Indonesia, clear it of trees, sell the timber from the felled trees, and develop an oil palm plantation on the cleared land. The fifth plaintiff, however, denies that he was involved in the business venture at that early stage. He says that he came on board only later, at the same time as the second to fourth plaintiffs. At the defendant's urging, they invested money periodically from May 2002 in return for shares in the business. The next individual to be sought out by the defendant was the first plaintiff. This overture was made in April 2006. He too agreed to contribute financially in return for shares in the business. Thereafter, in September of that year, the defendant represented to all seven plaintiffs that an opportunity had arisen to purchase logging rights in respect of a neighbouring piece of land. He invited them to invest further sums of money for that purpose, which they did. The plaintiffs say that by this point they had sunk a total of almost S$1.9 million into the business. Yet, the business did not appear to yield profit and they received no return on their investment. Instead, up to 2010, the defendant repeatedly sought more funds from the plaintiffs, telling them that this was necessary for "capital top-up" to meet operational costs and other expenses. The plaintiffs say that they handed over more than S$2 million, in addition to the initial

approximately S$1.9 million, pursuant to the defendant's requests for "capital top-up".

3 The fourth plaintiff has since arrived at a settlement with the defendant and discontinued his claim in this suit. The remaining plaintiffs advance the following causes of action: deceit or fraudulent misrepresentation (which mean the same thing), breach of trust, and unjust enrichment. It should be noted that they also pleaded "money had and received", but that is not a cause of action; its underlying basis is "embraced under the rubric of unjust enrichment": see the decision of the Court of Appeal in *Alwie Handoyo v Tjong Very Sumito and another and another appeal* [2013] 4 SLR 308 at [124]–[125]. In addition, they allege that the defendant orally agreed to return part of the money, which he had received from them, but failed to honour his undertaking in full.

4 The essence of actionable misrepresentation is a false statement of fact which induces the person to whom the statement was made into acting in a certain way. Usually, the person to whom the statement was made would have entered into a contract in reliance on that statement and seeks relief in respect of loss arising from that contract. Where fraudulent misrepresentation is alleged, the mental state of the person who made the statement is relevant. The elements of fraudulent misrepresentation had been reiterated by the Court of Appeal in *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 at [14] and I need not repeat them here. It is axiomatic that statements of fact must be distinguished from "statements as to future intention, predictions, statements of opinion or belief, sales puffs, exaggerations and statements of law", all of which cannot give rise to actionable misrepresentation: see *Deutsche Bank AG v Chang Tse Wen* [2013] 1 SLR 1310 at [93]. But statements of fact are often implied in statements expressing an intention to bring about a future state of affairs, predictions, opinions or beliefs, and counsel should be able to tease the former out from the latter. As for "sales puffs" or simply "puff", I do not think that this denotes some distinct legal category of statements which may never give rise to actionable misrepresentation. Rather, I see "puff" as no more than a loose label of convenience for statements which are, by their nature, generally treated with a degree of circumspection by reasonable persons to whom the statements are made. Such statements are put forward in the context of promotional pitches made by persons who obviously have some interest in the success of the pitch, and the statements are thus expected to contain hyperbole or understatement as may suit the person making them. Hence, if a statement is considered "puff", it may ordinarily be inferred that it did not operate as a "real and substantial" inducement in the mind of the person to whom it was made. However, whether an inference of that sort should be drawn depends on the facts of each individual case, and there may be circumstances which warrant a finding that some "puff" nonetheless operated as a real and substantial inducement, *eg*, where there exists between the parties a significant disparity in knowledge or a gulf in business acumen or sophistication.

5 The plaintiffs claim that their monetary contributions to the business from 2002 to 2006 were induced by fraudulent misrepresentations made by the defendant. From the statement of claim it appears that the plaintiffs allege three broad false statements. First, that they would enjoy a 500% return on their investment. Second, that the defendant would register them as shareholders in the business. Third, that the money which they paid in September 2006 would be applied towards purchasing the logging rights in respect of the neighbouring piece of land. It is apparent that these statements have the character of promises as opposed to representations of fact, in that they pertain to a future fact rather than an existing state of affairs. But the plaintiffs do not claim that those promises constituted terms of the contract such that the failure to fulfil those promises was a breach of contract. Instead they claim that these were misrepresentations; and not only that, but also that they were fraudulently made. Doubtless, the plaintiffs have reasons for doing so, foremost of which is to ensure that their claim is not time-barred.

6 For the plaintiffs' claim in fraudulent misrepresentation to succeed, statements of fact must be

extracted from the promises. First, that they would enjoy a 500% return on their investment. I am not convinced that a statement was made in those precise terms. The original statement of claim alleged that the defendant told the plaintiffs that the return "will be as high as 500%". The statement of claim was then amended so as to allege that the return "will be as high as 500% and/or alternatively would be 500%", and thereafter the plaintiffs' unanimous testimony was that the defendant said that the expected return would be 500%. This shift in the plaintiffs' position leads me to believe that if the 500% figure was mentioned by the defendant, it was expressed as a best-case scenario rather than a certainty. There is a substantial difference between saying that it would be the maximum expected return and saying that it would definitely be the return. Assuming that the defendant told the plaintiffs that the return would be as high as 500%, it was contended that this carried within it two implied statements of fact: that he honestly believed that the return could be so high, and that he was running a "thriving business". Whether I should find that one or both of these statements was implied depends very much on the context in which the defendant said that the return would be as high as 500%. It may have been said casually or tentatively or otherwise in a manner suggesting that it was not to be depended upon to any great extent — in other words it may have been "puff" — or it may have been said during a formal presentation backed up by meticulously-researched projections and models. The plaintiffs' evidence was bereft of detail, consisting of little more than bare assertions that this was what the defendant said. The seventh plaintiff testified that the defendant showed him some calculations in support of the 500% figure, but this was not elaborated on and I am not prepared to accept the testimony as true. In the absence of any evidence as to what the context was, I cannot find that, as a matter of fact, the defendant impliedly stated that he honestly believed that the plaintiffs could enjoy a return of up to 500% or that the business was thriving.

7 The second false representation the defendant is alleged to have made was that he would register the plaintiffs as shareholders of the business. The defendant acknowledged that he did not register the first, sixth and seventh plaintiffs as shareholders of PT Pan United, the Indonesian company that was incorporated in 2006 and served as the company for the business venture from its incorporation. Again, since this alleged representation is promissory in nature, an implied statement of fact must be teased out of it. I am willing to accept that there was an implied statement that the defendant genuinely intended to register those plaintiffs as shareholders at the time that he represented to them that he would do so. But the plaintiffs have not produced evidence to show that he did not have that intention at the time. Moreover, I am not persuaded that the first, sixth and seventh plaintiffs were induced by that statement of fact into contributing financially to the business. From the evidence, it seems clear that the understanding was that those plaintiffs would share in the profits of the business even if they were not registered as shareholders. Hence, even if the plaintiffs had known that the defendant's statement was a lie, I do not think that they would have, for that reason alone, refrained from participating in the business. It would have sufficed for them that, whatever the appearance of the register of shareholders might be, they would receive their due portion out of any profit made. The third and final alleged false representation was that the plaintiffs' contributions in September 2006 would be applied towards the acquisition of logging rights in respect of a neighbouring piece of land. This can be dismissed simply on the basis that there is no evidence that the money was not, in fact, applied towards that end. Therefore, the plaintiffs' claims in fraudulent misrepresentation failed.

8 Although the plaintiffs expended considerable energy on their claims in misrepresentation, their true grievance appears to be the opacity surrounding the defendant's handling of their investments in the business. I accept that whenever they contributed financially to the business they would hand the money over to the defendant and would trust him to apply the funds towards the business. I accept that the accounts and records of the affairs of the business were not kept with any thoroughness. Having invested in the business in anticipation of profit, it must be unacceptable for

the plaintiffs not to have enjoyed any return on their investment even after several years. Given these circumstances, it is understandable that the defendant's assertions that no profit had yet been made should sound to the plaintiffs like the prevarications of a dishonest man who had mismanaged, or even misappropriated for his own use, their investments in the business. However, the plaintiffs have adduced little or no concrete evidence of the defendant's misuse of that money. I am cognisant of the evidential difficulties which they face in this regard, given the paucity of information available to them. But the plaintiffs bear the burden of proving, on a balance of probabilities, that the defendant misused the money they entrusted to him, and in my view they have not discharged that burden. Since there is insufficient evidence for me to find that the defendant did not apply the plaintiffs' money towards the business, the plaintiffs' claims in breach of trust and unjust enrichment are dismissed. If, as participants in the business, they are dissatisfied with the limited extent to which the defendant has accounted to them and wish to compel him to divulge more concerning the business, they will have to find some way other than pleading causes of action that cannot be sustained on the evidence.

9 The plaintiffs also claim that, in May 2010, the defendant orally agreed to return a sum of S$3,305,119.35 to the plaintiffs. This was to be deposited in a United Overseas Bank ("UOB") account jointly held by the first, second and sixth plaintiffs. But so far the defendant has refunded only S$1,639,308.01, and the plaintiffs say that this leaves S$1,665,811.34 outstanding. From the evidence, it appears that in 2010, PT Pan United transferred approximately S$3.3 million to the defendant, and the defendant thereafter transferred about S$1.6 million to the UOB joint account. The defendant's case is that the difference between the amount he received from PT Pan United and the amount he sent onward to the plaintiffs was wholly attributable to what he called "entertainment expenses" that had to be met. He testified that this referred to commissions payable to Indonesian officials. In support of his case, the defendant adduced in evidence a resolution dated 6 October 2009 and signed by the shareholders of PT Pan United including the second to sixth plaintiffs. This resolution purportedly approved the payment of "entertainment expenses" of 82,000 Indonesian rupiah per cubic metre of logs. But the plaintiffs vigorously disputed the authenticity of this resolution, in that the second to sixth plaintiffs testified that what appeared to be their signatures on the resolution were in fact forgeries. Counsel for the plaintiffs submitted that since the defendant sought to rely on the resolution, he bore the burden of proving its authenticity. In my view, this was correct. Counsel then submitted that the defendant had not discharged this burden because he did not call a handwriting expert to attest to the genuineness of the signatures. I did not agree. Calling a handwriting expert is not the only means of proving the genuineness of signatures. It is a matter which can be tested by cross-examination of the relevant witnesses. Furthermore, the court can rely on its observation of the disputed signatures and how they compare to samples of genuine signatures. The assistance of a handwriting expert would almost always be helpful, and where documents are disputed, parties refrain from calling an expert at their own risk. However, it does not follow that the absence of expert testimony must mean that neither the genuineness of the signatures nor the authenticity of the documents has been proved.

10 In the present case, there were, in evidence, documents signed by the second to sixth plaintiffs. I have studied their signatures in each of those documents and compared them with the signatures on the disputed resolution, and am satisfied, on a balance of probabilities, that each of them did indeed sign the resolution of 6 October 2009. Therefore, I believe the defendant's claim that he used about half of the money which he received from PT Pan United to pay "entertainment expenses" which the plaintiffs agreed had to be paid, and subsequently transferred the balance to the plaintiffs' UOB joint account. I should add that even if I had found that the authenticity of the resolution was not proved, the evidence did not support a finding that the defendant had an obligation to pay S$1,665,811.34 to the plaintiffs. Hence, the plaintiffs' claim in this regard is dismissed.

11 Finally, the sixth plaintiff claimed S$166,458 from the defendant. This was said to be the amount due as repayment on a loan of S$148,623 extended by the sixth plaintiff to the defendant in February 2010. In evidence was a written loan agreement signed by the defendant and a voucher allegedly recording payment of the loan amount to the defendant. The defendant's case was that the money did not go to him but was instead deposited in the UOB account held jointly by the first, second and sixth plaintiffs. The sixth plaintiff's response was that it was the defendant who requested that the money be deposited in that account. On the strength of the documentary evidence, I am satisfied, on a balance of probabilities, that the sixth plaintiff did extend a loan to the defendant, whatever may be the means by which the transfer of funds was effected, and accordingly the defendant is obliged to pay the sixth plaintiff the principal amount of S$148,623 plus the "finance charge" of S$17,835 referred to in the written loan agreement. The defendant registered no objection to this "finance charge", and in the absence of any challenge to its validity I think that the sixth plaintiff can enforce it.

12 For the reasons above, the plaintiff's claims are dismissed, except for the sixth plaintiff's claim against the defendant for S$166,458, which is allowed.