IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1995] SGHC 165

Suit 1413/1988

Between

City Securities Pte (in liquidation)

… Plaintiff

And

Associated Management Services Pte Ltd

… Defendant

GROUNDS OF DECISION

Financial and Securities Markets — Securities — Trading; Contract — Remedies — Damages

Version No 1: 29 Oct 2026 (23:45 hrs)

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City Securities Pte (in liquidation) v Associated Management Services Pte Ltd

[1995] SGHC 165

Suit 1413/1988
Warren Khoo L H J
12 July 1995

1 Cur Adv Vult

2 This is an appeal from an assistant registrar`s assessment of damages. The plaintiffs` claim is for a sum of $3,336,400 allegedly due under a debit note dated 24 January 1986 purportedly for 880,000 shares in Malayan Tin Printing Co Ltd (MTP) bought by the plaintiffs on the defendants behalf. It was alleged that the defendants failed to pay for the shares and take delivery.

3 The plaintiffs, who had gone into liquidation on 31 October 1986, issued a writ on 14 July 1988, claiming the amount just stated. After a long lapse, on an application for summary judgment, the plaintiffs obtained interlocutory judgment on 28 February 1994 for damages to be assessed, and costs fixed at $2,500. On 29 December 1994, the learned assistant registrar upon the assessment of damages awarded the plaintiffs damages in the sum of $2,254,265.36 with interest and a further sum of $198,829.54 representing loss of profit, also with interest. The appeal is against this decision.

4 The sum of $2,254,265.36 was arrived at as follows. The evidence produced by the plaintiffs shows that the plaintiffs contracted to buy one million MTP shares from Prima on or about 19 July 1985 at the price of $3.60 a share, delivery to be on 18 January 1986. In addition to this contract, there were two other contracts for the purchase of shares by the plaintiffs from Prima, one dated 19 July 1985 for 2.2 million Neptune Orient Lines shares at a total price of some $3m, and one dated 25 July 1985 for the purchase by the plaintiffs of 1.4 million Sigma shares for the price of some $3.323m.

5 The plaintiffs were not able to take delivery of any of these purchases, and extensions of time for delivery were agreed between them and Prima. In the end, the plaintiffs failed to take delivery of any of these purchases, and Prima took action in Suit No 3523 against the plaintiffs claiming a total sum of $7,616,151.55, of which $2,561,665.18 was attributed to the one million MTP shares, as follows:

> One million MTP shares (contract price less expenses) $ 3,560,300.00
>
> Add: Interest at 8.75% from 18 January to 21 April 1986 $ 79,375.18
>
> Deduct: Market price as at 21 April 1986($1.09 per share less expenses) $ 1,078,010.00
>
> $ 2,561,665.18

6 The sum of $2,254,265.36 claimed by the plaintiffs from the defendants and awarded by the learned assistant registrar is simply the proportionate amount attributed to the 880,000 (out of one million) MTP shares alleged to have been bought by the plaintiffs on the defendants` behalf.

7 **The nexus or lack of it**

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8 So the crucial question of fact in regard to the award of the sum of $2,254,265.36 is whether a nexus had been established between the sale of the 880,000 MTP shares from the plaintiffs to the defendants, and the sale of the one million MTP shares from Prima to the plaintiffs.

9 The chronology, as revealed by the documents, is, on the face of it, against the plaintiffs` contention as originally pleaded, that they had bought the shares on behalf of the defendants. The defendants` contract with the plaintiffs for the sale of the MTP shares, as noted earlier, was dated 24 January 1986. Delivery was expressly on a ready basis, meaning one week from the date of the contract. The plaintiffs` contract with Prima, on the other hand, was dated much earlier, 19 July 1985, although the delivery date was expressed to be 18 January 1986.

10 The evidence seeking to connect the two transactions, ie the sale from Prima to the plaintiffs and the sale from the plaintiffs to the defendants, was given by Mr Don Ho, one of the liquidators. He was, of course, not involved in the transactions at the time; he was appointed only in October 1986. None of the officers of the defendants who were involved in the transactions gave evidence. Mr Don Ho no doubt did his best, relying on the documents. On the crucial point regarding the nexus between the two transactions, he had first said in his affidavit affirmed on 27 June 1994 that the purchase by the plaintiffs of the 1 m MTP shares was to fulfil the plaintiffs` obligations to sell 880,000 MTP shares to the defendants. However, at the assessment hearing, he said, no doubt more consistently with the chronology, that the plaintiffs had first bought the MTP shares from Prima, and they subsequently sold 880,000 of those shares to the defendants.

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11 At the end of the inquiry, the circumstances in which the plaintiffs came to buy MTP shares from Prima and the circumstances in which they came to sell MTP shares to the defendants were far from clear and the nexus between the two transactions was tenuous at best. Defence counsel submitted that since the plaintiffs had not bought the shares on the open market on behalf of the defendants, they had not sustained any loss and damages should be assessed as nil. He said that the plaintiffs had dealt with Prima as principals but had dealt with the defendants as agents without disclosing to the defendants that they intended to use their own shares to fulfil their contract with the defendants. He also referred to s 52 of the Securities Industry Act (Cap 289), whereby dealers must make such disclosures. Plaintiffs` counsel, on the other hand, submitted that the plaintiffs were not acting as principals. He contended that it did not matter where the plaintiffs got their shares from to fulfil their contract with the defendants. He submitted that the loss should be the difference between the contract price ($3.75) between the plaintiffs and Prima and the market price in the week following the date of the debit note ($2.60). On 880,000 shares, that works out to something like $1.012m.

12 The learned assistant registrar was apparently in some difficulties at the end of the inquiry. After closing submissions, he took the somewhat unusual course of ordering Mr Cheah, witness for the defendants, to file a further affidavit stating (1) when the defendants suspected or became aware that the plaintiffs had not bought the shares as the defendants` agents and (2) whether the defendants had rescinded the contract for the purchase of the shares from the plaintiffs, and, if so, when they did so. Mr Cheah filed an affidavit. He was also then cross-examined on it. I think it is probably fair to say that it was largely on the evidence of Mr Cheah and the inferences which the learned assistant

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registrar drew from his evidence that the findings were made and the damages were awarded.

13 **The further evidence**

14 Mr Cheah in his affidavit attempted to deal with the queries implicit in the learned assistant registrar`s directions. He did not deal with the circumstances under which the plaintiffs had come to buy the MTP shares. He referred to a proposed takeover by MTP of a listed company Van der Horst (VDH). He said that the defendants were the biggest shareholder of VDH at the time. The plaintiffs were advisors and brokers to the defendants in respect of the takeover. The plaintiffs were also one of the underwriters of a rights issue of some 12.767 million shares by VDH. As a result, Cheah said the plaintiffs and defendants worked closely together. Following the completion of the VDH rights issue, there were discussions culminating in an agreement to effect the takeover by an exchange of shares.

15 The thrust of Mr Cheah`s evidence was that he did not suspect that the plaintiffs were actually buying the MTP shares as principals until July 1989. In response to the learned assistant registrar`s directions, he said in his affidavit that although the defendants had the right to rescind the contract because of the non-disclosure, the defendants had not in fact rescinded the contract. There were suggestions in Mr Cheah`s affidavit of some wrongdoings on the part of the plaintiffs in not making disclosures in the takeover offer documents of their dealings in the MTP shares.

16 On the invitation of the learned assistant registrar, the plaintiffs also filed an affidavit showing that the closing price of MTP shares for the week commencing 14 January 1986 was $2.60 throughout.

17 **The view below**

18 The learned assistant registrar dealt with the case by posing two questions: firstly, whether the plaintiffs had acted as principals or as agents in the sale of the MTP shares to the defendants; secondly, if the plaintiffs acted as principals, whether this had been made known to the defendants.

19 The learned assistant registrar rejected Cheah`s contention that he did not know that the plaintiffs were acting as principals until 14 July 1989. He noted that the number of shares involved was very large. He said it was unrealistic to expect such a large number of shares to be traded at one price on the same day. He also noted that the closing price of MTP shares on the open market as of 24 January 1986 (the date of the debit note) was $2.60, more than a dollar less than the price stated in the debit note. If Cheah had really placed an order for such a large number of shares, he would have found from newspapers the very next day that there had been no such purchase. The learned assistant registrar therefore found, on a balance of probabilities, that there had been a private agreement for the plaintiffs to sell the 880,000 MTP shares to the defendants. He found that the agreement must have been entered into at a time before the purported contract date shown in the debit note when the price was in the region of $3.75. He found that the defendants knew well all along that the plaintiffs were selling as principals.

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20 The learned assistant registrar said that although evidence of a conspiracy was, of course, hard to come by, it was not unlikely that the former directors of the plaintiffs and the defendants were acting together to circumvent the code on takeovers by using the plaintiffs to first buy MTP shares (thereby avoiding undue attention) with the intention that the plaintiffs would later transfer the shares to the defendants. He said that, in this way, the disclosure documents would not show that the defendants had dealt in MTP shares before 2 September 1985 when actually the plaintiffs had already bought MTP shares in July 1985 and were intending to transfer them to the defendants later.

21 The learned assistant registrar thus rejected the defence contention that the contract between the parties was for the plaintiffs to go on to the open market to buy the shares. He also rejected the defence contention that since the plaintiffs never did that, they were not entitled to any damages.

22 The learned assistant registrar held that the sum of $2,254,265.36 admitted by the plaintiffs to Prima in respect of 880,000 MTP shares was a loss which was a direct and foreseeable consequence of the defendants` breach of their contract with the plaintiffs. He found that the defendants knew that the plaintiffs had contracted to buy the shares from Prima to fulfil their obligation to the defendants. As stated above, he awarded that sum and also a sum of $198,829.54 for loss of profit.

23 **My views**

24 There is here a case where the plaintiffs, for reasons not explained, have said nothing at all about how they had come to buy the one million MTP shares. They have not said anything about the takeover of VDH or about their role in

the takeover. If the shares, or some of them, were for the defendants` account, they have not explained why they had bought one million shares when only 880,000 shares were required by the defendants. The plaintiffs` case, as put by the liquidator, is that the plaintiffs had first bought the shares and later found a buyer in the defendants. If that is the case, they have failed to demonstrate how they are entitled to charge the defendants for their own loss. On the other hand, if it is their case that they acted on the defendants` behalf, they have failed to explain why they should have bought shares in July 1985 when they did not contract to sell to the defendants until January 1986. They are singularly vague on the dates when the purchase and the sale took place. If the sale to the defendants was 24 January 1986, as shown in the debit note, they have also not explained why the defendants should have bought them at the price of $3.75 a share when the market price at that time was only $2.60.

25 So there were big gaps in the plaintiffs` case. The learned assistant registrar put forward the hypothesis that the two parties were probably acting together to circumvent the Code on Takeovers by using the plaintiffs to buy the shares with the intention of later transferring them to the defendants. However, hypotheses are no substitute for evidence on a question of fact. Furthermore, if the hypothesis is correct, then the question would arise whether the court should assist the plaintiffs in their claim, since there might then be a question whether the transaction was tainted with illegality.

26 Illegality or not, at the end of the day, what we have, simply, is a case where the plaintiffs have put forward a claim which they have made no credible effort to sustain. What little they have said in regard to the basis of their claim makes no sense. The defendants` evidence is of no help to the plaintiffs. The plaintiffs have simply failed to discharge the burden, which lies on them, of

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showing how their loss should be charged to the defendants. I think defence counsel is quite correct when he says that the damages ought to have been assessed as nil.

27 The assistant registrar also included a sum of $198,829.54 as loss of profit. I have only one comment to make on that. Firstly, the seller`s profit, if any, is normally included in the price he contracts to sell his goods. Where the buyer fails to pay for the goods and take delivery, and where there is an available market, the normal measure of damages is the difference between the contract price and the market or current price at the time when the goods ought to have been accepted. The seller cannot claim loss of profit in addition to the damages ascertained according to this normal measure of damages. Otherwise there would be double counting. The plaintiffs in fact did not claim loss of profit in addition to this normal measure of damages. The notes of proceedings show that all that they asked for was the difference between the contract price of $3.75 and the price ($2.60) prevailing in the week after the date of the debit note.

28 **Conclusion**

29 The defendants, therefore, succeed in this appeal. The damages should have been assessed as nil. The view which I have come to must lead to the conclusion that the plaintiffs should not have commenced the action in the first place. It would follow also that the defendants should have their costs of the entire action, including the costs of the O 14 proceedings and the costs of the assessment of damages, as well as the costs of this appeal. Any order for costs previously made against the defendants which is inconsistent with this should be set aside. I order accordingly.

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30 ***Defendants` appeal allowed.***

Warren Khoo L H J

Ng Kai Ming (PK Wong & Advani) for the plaintiffs
Ng Wing Cheong (Ng & Ng) for the defendants

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