

Tan Koon Lek v Chua Swee Heng and Yeo Siew Luan
[2016] SGDC 67

Case Number : District Court Suit No. 3131 of 2012, District Court Appeal No. HC/DCA 27 and 28 of 2015

Decision Date : 24 March 2016

Tribunal/Court : District Court

Coram : Koh Juay Kherng

Counsel Name(s) : Mr. Derek Kang and Mr. Amogh Chakravarti (M/s Rodyk & Davidson LLP) for the Plaintiff; Mr. A.P. Thirimurthy (M/s Murthy & Co.) for the 2nd Defendants

Parties : Tan Koon Lek — Chua Swee Heng — Yeo Siew Luan

Contract - Whether there was agreement on terms of contract - Performance of Contract - Breach of contract - Oral evidence.

24 March 2016

District Judge Koh Juay Kherng:

INTRODUCTION

1 Interlocutory Judgment together with an Order for an account and inquiry to be taken was made in favour of the Plaintiff on 14th December 2015. Both the Plaintiff and the 2nd Defendant have appealed against my decision. I now set out the written grounds of my decision.

2 The Plaintiff's claim against the 2nd Defendant was for damages and an account of all sums due and owing to him under an oral agreement^[note: 1] ("**the Agreement**"). The alleged agreement was that the 2nd Defendant agreed to pay him 50% share of overriding commissions ("**the Commission**") generated by some financial advisers ("**the Advisers**") at Great Eastern Life ("GE Life"). The Advisers in question were formerly under the Plaintiff's charge and alleged to have been transferred by the Plaintiff to the 2nd Defendant or allowed to be retained by the 2nd Defendant in exchange for the agreed share of the Commission.

3 The claim against the 1st Defendant was amicably settled after CDR, terms of which were not disclosed to this Court.

Brief Facts

4 The Agreement was alleged to have been entered into at a meeting between the Plaintiff and 2nd Defendant sometime in November 2008. ^[note: 2]

5 The Plaintiff claimed that:

- (i) the Commission to be shared with him (50%) was in respect of all 8 Advisers named in an unsigned Deed^[note: 3]. He had transferred or permitted the Advisors to be retained in the 2nd Defendant's team;

(ii) the Agreement was to last as long as the 2nd Defendant was earning Commission generated by the transferred Advisers; and

(iii) the 2nd Defendant failed to pay him the *full 50%* of the Commission due to him under the Agreement.

6 The Plaintiff did not pursue the declaratory relief against the 2nd Defendant^[note: 4].

7 Initially, the Plaintiff alleged that there were additional terms ^[note: 5]of the Agreement including :

(i) That the Plaintiff's consent was necessary for the transfer of any of the Advisers out of the 2nd Defendant's team; and

(ii) That in the event of the Plaintiff's demise, the Commission payable to him by the 2nd Defendant would be paid to his wife.

8 However, in the Plaintiff's closing submissions, he abandoned his claim on the additional terms of the Agreement.

9 The 2nd Defendant's case was not entirely clear, to say the least. First, she argued that there was no agreement. Next, she admitted to the existence of the Agreement but argued that the payments were made to the Plaintiff on a goodwill basis. Further, she claimed that the terms of agreement were different from what was agreed with the Plaintiff^[note: 6].

10 The 2nd Defendant went on to argue that the terms of the Agreement were that she had agreed:

(i) to share commission with the Plaintiff only in respect of 3 of the 8 named Advisers for 2009 and for 7 of the named Advisers in 2010; ^[note: 7]and

(ii) that the Agreement was only to last for a period of 3 years or until such time that she is promoted to become a Director in GE Life^[note: 8] (whichever is earlier).

11 The Plaintiff contended that as there were no contemporaneous documents recording the terms of the oral Agreement, the truth lies to be determined by the credibility of the 2 parties and an objective assessment of the context in which the Agreement was entered into. The Plaintiff further argued that the context and content of the discussions of the November 2008 meeting can be inferred from the draft deeds^[note: 9]. He submitted that these documents support his version of the terms of the Agreement and that on a balance of probabilities, the 2nd Defendant's version cannot be preferred over. It is not disputed that only one of the draft Deeds^[note: 10] was given to the 2nd Defendant. The draft Deed in question was prepared by lawyers based only on the unilateral instructions of the Plaintiff.

12 The following facts are based on parties' pleadings and their respective positions taken at trial:

(a) The Plaintiff was a Director at GE Life for close to 30 years prior to his departure in December 2008.^[note: 11]

(b) The 2nd Defendant was a manager in the Plaintiff's team up to December 2008. Thereafter, she was placed in a team headed by another Director of GE Life by the name of Paul Taim, until her promotion to Director in or around January 2011.

(c) In 2007, the Plaintiff was diagnosed with glaucoma and went to Beijing to seek treatment. In the latter half of 2007 and 2008, the 1st Defendant and Paul Taim, took turns to act for the Plaintiff in his absence and the Plaintiff continued to earn commission from Advisers under his charge during this time.

(d) Typically, a Director at GE Life earns 35% to 45% on commissions generated by products sold by Advisers under his or her charge. Where there is a manager intermediate between a Director and Adviser, 10% to 20% of the Commission is shared with the manager.

13 From September 2008 onwards the Plaintiff had separate meetings with the 1st, 2nd Defendants and Paul Taim. They discussed about the transfer of the Advisers under his charge to the respective teams, *in consideration* for the Defendants and Paul Taim sharing with him part of the Commission generated by these Advisers. The discussions also covered "retention" of already transferred Advisers to the respective party^[note: 12].

14 The Plaintiff claimed that he had indicated to the 2nd Defendant that he wanted her to share with him Commission of all 8 Advisers transferred to or to be retained by her and for as long as they remained under her charge at GE Life.

15 The Plaintiff's version was that he would transfer 8 Advisers to the 1st Defendant's team and 27 Advisers to Paul Taim's team (including the 2nd Defendant). Of the 27 Advisers transferred to Paul Taim's team, 8 Advisers ^[note: 13]were to be transferred to or be retained by the 2nd Defendant in her team, under her direct care and charge as a manager within Paul Taim's team. It was not disputed that seven (7) out of the eight (8) Advisers were already transferred out of the Plaintiff's charge prior to the **November 2008** meeting.

16 The 8 Advisers in question were:^[note: 14]

- 1) Lewis Oh Chee Nam
- 2) Sabrina Chia Hwee Gaik;
- 3) Ho Tat Hong
- 4) Eddie Chung Hoi Ming;
- 5) Lee Teck Lim;
- 6) Carol Kong Kar Leng;
- 6) Judy Aw Wai Ling; and
- 7) Angie Kwek Ling Ling.

17 Lewis Oh and Eddie Chung (numbers 1) and 4)), were transferred to the 2nd Defendant's team in early 2006 when the 2nd Defendant was a manager in the Plaintiff's team. I was informed by parties that the 2006 transfers were carried out (with the consent of all involved) because of a Monetary of Singapore guideline then, that a Director cannot have more than 15 agents under his charge^[note: 15].

18 As for Sabrina Chia (number 2)), the 2nd Defendant claimed that since Sabrina was "recruited" by her in 1996/1997, she cannot to be treated as having been transferred to her by the Plaintiff for purposes of the Agreement. Surprisingly though, the 2nd Defendant did pay over commission generated by Sabrina. This is but one of the 2nd Defendant's inconsistent conduct compared to her argument.

19 The other Advisers, Lee Teck Lim, Carol Kong and Judy Aw were transferred by the Plaintiff to the 2nd Defendant's team in January 2008 (when the 2nd Defendant was a manager in the Plaintiff's team). Angie Kwek was recruited by Lee Teck Lim in April or May 2008. The 2nd Defendant took the position Angie Kwek should not be included as she was recruited by Lee Teck Lim and not the Plaintiff. Angie Kwek's commission was not shared with the Plaintiff.

20 In terms of timing, Ho Tat Hong (number 3) above), was transferred to the 2nd Defendant's team in December 2008 "after" the November 2008 meeting. Therefore, strictly speaking, only Ho Tat Hong can be considered as being "transferred" to the 2nd Defendant's team pursuant to the Agreement.

21 It was also not disputed that the sharing of Commission with the Plaintiff was on a 50%/50% basis. At the start of the trial, there was disagreement as to whether the commission to be shared was for *existing* or *new* policies generated by the Advisers. However, in the course of the hearing, the 2nd Defendant conceded that the sharing of commission covered both existing and new policies.

22 The Plaintiff's evidence was that shortly after November 2008, he instructed Paul Taim and the 1st Defendant to engage lawyers to reduce the oral agreements into written deeds. Suffice to say that none of the Deeds were executed by the 1st, 2nd Defendants and/or Paul Taim. For the 2nd Defendant, only the 1st draft Deed^[note: 16] (between the Plaintiff and the 2nd Defendant) was given to the 2nd Defendant.

23 Paul Taim's evidence was that he did not sign the Deed between him and the Plaintiff but was prepared to abide by the terms of the Deed.

24 Despite refusing to sign the Deed, the 2nd Defendant nevertheless began making monthly payments of the Commission to the Plaintiff from December 2008 onwards.

25 To show that he did not simply receive and did not contribute, the Plaintiff argued that his former secretary, Yeo Siew Poh, continued to be employed and lend support even after his departure from GE Life. He paid for her remuneration. The Plaintiff also claimed that he engaged and paid for the services of a trainer, one Ong Shun Min, to develop the skills of the Advisers.

26 There were also expenses paid by the Plaintiff for a goal-setting trip to Phuket for Paul Taim and the 2nd Defendant's team in January **2010**.

27 In January 2011, the 2nd Defendant was promoted to be a Director in GE Life and ceased making payments to the Plaintiff.

28 It was not disputed between the parties that to qualify for promotion to be a Director in GE Life, a Manager would need to fulfil 3 criteria:

- (i) generate 3 consecutive years of production of at least, \$200,000, \$200,000 and \$250,000;
- (ii) have at least 10 Advisers producing \$6,000 annually (which could be pro-rated depending on when the Adviser joined), and
- (iii) not to rely on the first 2 years of production of transferred Advisers for the purposes of satisfying promotion criteria. ^[note: 17]

29 The Plaintiff had argued that, but for the transferred Advisers from him to the 2nd Defendant, she could not have fulfilled the criteria for promotion to a Director. I rejected this argument as clearly, out of the 8 named Advisers, 7 of them were already under the 2nd Defendant's charge as of November 2008. Therefore, she could, *based* on GE Life's record, rely on the production of the Advisers already under her charge two years or more before November 2008.

Issues

30 The issues were:-

a) Was there an Agreement between the Plaintiff and the 2nd Defendant and if so, what were the terms agreed upon after of the November 2008 meeting?; and

b) Was the Agreement to last only for a period of 3 years or upon the 2nd Defendant's promotion to a Director of GE Life, whichever is earlier?

a) Was there an Agreement between the Plaintiff and the 2nd Defendant and if so, what were the terms agreed upon after of the November 2008 meeting?

31 By the 2nd Defendant's own admission at paragraphs 13 and 14 of her Defence^[note: 18], she admitted that there was an agreement to share commission with the Plaintiff. It was not disputed that the 2nd Defendant did not sign the Deed. However, her conduct after the November 2008 meeting was clear evidence that she acknowledged certain terms were agreed upon. Although the 2nd Defendant's oral evidence at trial was fraught with inconsistencies, her conduct and the Plaintiff's response, if any, were factors I took into consideration in arriving at my decision. Further, when there is a conflict of evidence, the court must test the evidence against the objective facts and the inherent probabilities. All things equal, more weight will be given to evidence of the existence of a fact than its non-existence^[note: 19]. Whose version was more credible? What did the 2nd Defendant do after the 28th November meeting?

32 Based on the 2nd Defendant's tabulation furnished to the Court on 20th August 2015 (by way of clarification), it was clear that she proceeded to share commission with the Plaintiff for 7 out of the 8 Advisors named in the 1st draft Deed given to her ^[note: 20]. This is consistent with the Plaintiff's assertion of an agreement, albeit only for 7 instead of 8.

33 The 7 Advisors whom the 2nd Defendant shared commission with the Plaintiff were:-

1) Lewis Ho Chee Nam;

2) Sabrina Chia;

3) Ho Tat Hong;

4) Eddie Chung Hoi Ming;

5) Lee Teck Lim (described as "Lee Teck Lim's Group" which included 6) and 7) below);

6) Carol Kong; and

7) Judy Aw.

Angie Kwek was not included as the 2nd Defendant took the position that Angie Kwek cannot be considered a "transferred Adviser" since she was recruited by Lee Teck Lim in April or May 2008.

34 What did the Plaintiff do or did not do for more than two years? According to him, he was in receipt of some payments from the 2nd Defendant. At no time did the Plaintiff protested against not receiving a share of the commission from "all" 8 advisors named in the unsigned Deed. The protest only came when the payments were discontinued.

35 The 2nd Defendant's evidence in Court was that she was unhappy with the terms set out in the draft Deed given to her. Yet, she did not inform the Plaintiff "directly" about her unhappiness at the material time or at all. Instead, she alleged that she communicated her unhappiness to Paul Taim. I found her explanation unacceptable. Even more puzzling, she then went ahead to share with the Plaintiff based on the agreed proportion. All that the 2nd Defendant needed to do was simply to communicate with the Plaintiff and state clearly what she was agreeable or not agreeable to. This she failed to do.

36 The 2nd Defendant had held back sharing the commission in respect of Lee Teck Lim. She first claimed that this was done with the Plaintiff's consent, which was denied by the Plaintiff. Next she tried to argue that she did so because Lee Teck Lim had requested her to do so. In my view, this is yet another instance of the 2nd Defendant's "unilateral" and inexplicable behaviour, to do as she pleases without having to communicate or sought consent to vary the Agreement. She had even gone so far as to make a bold and utterly illogical statement that she was not interested in the financial benefits of having the Advisors transferred to her by the Plaintiff. In my view, her inconsistent and contradictory evidence undermined her credibility.

37 As for her Counsel's written submission (via the clarification letter) on the breakaway benefit that Paul Taim will receive upon her promotion to Director which she argued the Plaintiff will also ultimately benefit, I rejected them as no evidence at all was presented on this at the trial.

38 On a balance, I found that the Agreement for sharing of the commission was for 7 and not all 8 of the Advisors named in the draft deed, based on the conduct of the Plaintiff and as well as that of the 2nd Defendant, post the November 2008 meeting.

b) Was the Agreement to last only for a period of 3 years or upon the 2nd Defendant's promotion to a Director of GE Life, whichever is earlier?

39 I observed that the number "3" was of particular significance to the parties. At paragraph 5 of the Defence, the 2nd Defendant stated that a Director is entitled to a share of commission "earned by the team of agents or his team of financial Advisors, for a period of 3 years maximum for new business generated ...". Clause 1 of the 1st unsigned Deed^[note: 21], which was drafted based on the Plaintiff's instructions, stated that the 2nd Defendant will not apply for promotion to be a Director within 3 years from the date of the Deed. Clause 2 of the amended unsigned Deed^[note: 22] (between the 1st Defendant and the Plaintiff) provided that the apportionment formula will be reviewed upon expiry of 3 years. The benefits payable to the Plaintiff by GE Life was over 3 years (although he chose to be paid a reduced lump sum payment up front).

40 I rejected the 2nd Defendant's argument that the Agreement was that she could seek promotion earlier than 3 years from date of the Agreement. If that was the case, she could apply to get promoted after one year or even earlier, from the time of Agreement. It was quite clear to me that the Plaintiff realised that he was not going to get his way with the 2nd Defendant, compared to Paul Taim and/or the 1st Defendant. The Plaintiff had no choice and accepted a *restricted* deal on the period of sharing when he realized that he did not have much time left before his departure from GE Life.

41 On balance, I accepted the Plaintiff's version that the Agreement was that the 2nd Defendant will not seek promotion for a period of 3 years from the Agreement. However, I also accepted the 2nd Defendant's submission that the sharing arrangement with the Plaintiff was only for a period of 3 years.

42 The fact that the Plaintiff had abandoned his assertions that his consent was required for the transfer of any of the Advisors out of the 2nd Defendant's team and that in the event of the his demise, the commission payable would have to be paid to his wife, supported of my view that the Plaintiff had accepted a *restricted* deal compared to the terms agreed with the 1st Defendant and or Paul Tiam.

Arguments on illegality, public policy and lack of consideration

43 For completeness, I dealt briefly with these three points. The 2nd Defendant raised the issue of illegality in her written submissions when this was not specifically pleaded. It was also not clear how illegality featured in this case. The 2nd Defendant failed to point to any authority to support her assertion. More importantly, I note that she herself had admitted to entering into such an agreement or arrangement with other Advisors at GE Life.

44 On the public policy point, the 2nd Defendant argued that it is "unhealthy and should not be encouraged". Whilst I agree with this argument, it was not shown or proven that such an agreement was against any public policy based on the facts of this case. The 2nd Defendant merely asserted that an *unlicensed* person like the Plaintiff should not be allowed to share in commission earned by duly *licensed* insurance agents. In fact, at paragraph 14 of her Defence, the 2nd Defendant herself took the position that GE Life does not object to such sharing of commission since it will be paid out of the 2nd Defendant's share

and that it was left to the parties to make or reach their own agreement. The 2nd Defendant also admitted to be participating in such arrangements since the earliest of time, way before 2008. The policy holder or consumer of GE Life's product does not end up paying more as a result such arrangements or agreements. GE Life, the company, did not suffer any loss.

45 Objections on invalidating contracts on grounds of public policy have generally been classified into five groups^[note: 23]:

- (1) objects of contracts which are illegal by common law or legislation;
- (2) objects injurious to good government either in the field of domestic or foreign affairs;
- (3) objects which interfere with the proper working of the machinery of justice;
- (4) objects injurious to marriage and morality; and
- (5) objects economically against the public interest.

46 In my view, the 2nd Defendant's argument did not fit into any one of the five categories.

47 As for the "consideration" point, I accepted the Plaintiff's argument that adequate consideration was provided by the Plaintiff when he procured the consent of the Advisers, and/or provided his own consent for the Advisers to remain with the 2nd Defendant upon their transfer to Paul Taim's team. Notwithstanding that Ho Tat Hong had requested to be transferred to the 2nd Defendant, the fact remained that the Plaintiff gave his consent and facilitated the said transfer. This act in itself would suffice to provide fresh consideration for the purposes of the Agreement.

48 In respect of the written submissions, I had informed Counsel for the 2nd Defendant when I delivered my oral grounds of decision, that his verbose written submission on matters that were either not specifically pleaded or irrelevant to the issues before this court, were most unnecessary and of no assistance.

CONCLUSION AND DECISION

49 As the 2nd Defendant stopped sharing the commission with the Plaintiff before the expiry of 3 years in January 2011, I found her to be in breach of the Agreement with the Plaintiff. Hence, I made the following orders:

- (1) There shall be interlocutory judgment in favour of the Plaintiff for the agreed share of the commission generated by the 7 advisors, namely, Lewis Ho Chee Nam, Sabrina Chia, Ho Tat Hong, Eddie Chung Hoi Ming, Lee Teck Lim, Carol Kong and Judy Aw (the last two being part of Lee Teck Lim 's group);
 - (2) An account and inquiry shall be taken and be made of all sums due and owing to the Plaintiff under the Agreement for the period of December 2008 to December 2011;
 - (3) Any sums found to be due and owing under (2) above, whether by way of underpayments or otherwise shall be paid by the 2nd Defendant to the Plaintiff within 14 days from the date of such account being finalized or ordered to be paid;
 - (4) Costs of the trial as well as the taking of account and inquiry together with interest are reserved to the Court after the taking of the account and inquiry; and
 - (5) Directions for the taking of account and inquiry shall be given, where necessary.
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[note: 1]BP Tab 1,page 11 paragraph (5)

[note: 2]BP Tab 1, page 3 statement of claim paragraphs 5 and 6.

[note: 3]PB pages 9 to 12

[note: 4]BP Tab 1 page 11 at prayer (4)

[note: 5]BP Tab 1, page 4 and 5

[note: 6]BP Tab 2 page 6 paragraphs 13 and 14; page 13 paragraph 29.

[note: 7]BP Tab 2 page 11 paragraph 26.

[note: 8]BP Tab 2 page 13 paragraph 29.

[note: 9]PB pages 1 to 50.

[note: 10]PB pages 9 to 12.

[note: 11]AEIC Tab 1 page 2, paragraph 7.

[note: 12]AEIC Tab 1 pages 5 to 9.

[note: 13]BP Tab 1 page 7 para 9(b).

[note: 14]PB page 11.

[note: 15]NE Day 2 Page 42, lines 25 to 32; and page 43, lines 12 to 15.

[note: 16]PB page 9 to 12.

[note: 17]NE 16th April 2015 pg. 27 of 130 lines 10 to 30.

[note: 18]BP Tab 2 page 6.

[note: 19]See Tab 2 page 14, Bundle of authorities of 2nd Defendant

[note: 20]See letter from 2nd Defendant's counsel dated 22 August 2015-marked "Clarification Letter".

[note: 21]PB page 9 clause 1.

[note: 22]PB page 34 clause 2.

[note: 23]See Chitty on Contracts Vol. 1 pg. [1092] 16-005

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