Chin Tuck Seng v VPC Alliance (PJ) Sdn Bhd [2016] MLJU 544

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

YEOH WEE SIAM J

CIVIL APPEAL NO. WA-12BNCvC-18-02/2016

26 August 2016

Ramdhari JBS (P Kuppusamy & Co) for the complainant.
Teh Hong Jet (Tan Kim Siong & Teh Hong) Jet for the respondent.

Yeoh Wee Siam J:

JUDGMENT APPEAL

[1]This is an appeal by the Appellant / Defendant ("Defendant") against the decision of the learned Sessions Court Judge ("Sessions Court" or "Judge") dated 27.1.2016, given after full trial, in allowing the claim of the Respondent / Plaintiff ("Plaintiff") with costs according to scale, and dismissing the Defendant's Counterclaim with costs according to scale.

SALIENT FACTS

[2]The Defendant was appointed by the Plaintiff as Valuation Executive via a Contract of employment effective from 4.1.2010 for 3 years with a salary of RM2,000.00 per month ("1st Contract").

[3]Subsequently, the Defendant was promoted to the position of Property Management / Valuation / Estate Agency / Property Consultancy and the 1st Contract was extended for another 3 years from 1.8.2012 ("2nd Contract"). The Defendant's monthly salary was increased from RM2,000.00 to RM4,000.00.

[4]On 14.5.2014, both the Defendant and the Plaintiff agreed to enter into another Contract of employment dated 14.5.2014 for a period of 6 years with effect from 1.10.2014 ("3rd Contract"). The Defendant's remuneration package was RM4,300.00 which comprised a basic salary of RM3,900.00 per month, and a fixed allowance of RM400.00.

[5]On 16.5.4014, the Defendant also signed a Letter of Undertaking dated 16.5.2014 ("1st LOU") giving his undertaking to the Plaintiff that he undertook to serve the Plaintiff for a minimum of 6 years with effect from 1.10.2014. In consideration thereof, the Plaintiff has to endorse the Defendant's Test of Professional Competence ("TPC") logbook and assignment ("logbook"), together with a payment of RM3,000.00.

[6]On 6.11.2014, the Defendant signed a letter of amendment to the 1st LOU and the Contract of employment ("2nd LOU"). Vide the letter of amendment dated 6.11.2014, the Defendant agreed that his undertaking to serve the

Plaintiff for a minimum of 6 years shall be amended to commence from 1.4.2015, instead of 1.10.2014. It was also agreed between the Defendant and the Plaintiff that this amendment to the Contract of employment and the 1st LOU shall not invalidate these 2 agreements but shall serve as replacement / additional terms.

[7]After the Defendant had passed his TPC interview at the end of 2014, he requested the Managing Director of the Plaintiff, Loh Soong Park (SP1), to reconsider changing some of the terms of his 3rd Contract. SP1 agreed to reconsider the matter..

[8]Thereafter, there were negotiations, discussions and meetings between the Defendant, SP-1 as well as Loh Soong Ky, the Head of Business and Marketing of the Plaintiff (SP2) on 6.2.2015, 9.2.2015, 25.2.2015 and 2.3.2015 pertaining to the request by the Defendant to reconsider some of the terms and conditions of his employment contract. After many negotiations, the Plaintiff agreed to revise the Defendant's salary to RM7,000.00 per month and an allowance of RM250.00, as well as his fixed term contractual period of 6 years to be reduced to 5 years. On 25.2.2015, the Defendant informed both SP1 and SP2 that he was agreeable to the revised salary and terms. The Defendant also agreed that profit sharing together with other registered valuers be given but this term would not be stated in the Contract.

[9]On 2.3.2015, the Plaintiff prepared the documents pertaining to the agreed revised terms and conditions of the Defendant's employment for the Defendant to sign. However, the Defendant told both SP1 and SP2 that he did not want to sign the documents saying that he had changed his mind. He then said that he wanted a salary of RM8,000.00, with a fixed term contractual period of 3 years and a written commitment of profit sharing. SP1 requested Defendant to rethink the matter.

[10]On 4.3.2015, both SP1 and SP2 had another discussion with the Defendant. During this meeting, the Defendant said that he wanted a salary increment of RM5,000.00 from his present salary, a contractual bonus of 6 months' salary, a fixed term contractual period of 3 years with a fixed notice of termination of service. SP1 did not agree and he told the Defendant that the Plaintiff would offer a salary of RM8,000.00, a fixed term contractual period of 4 years and a minimum contractual bonus of 2 months as well as profit sharing where the term pertaining to profit sharing would not be stated in the Contract of employment. On 5.3.3015, the Defendant informed SP1 that he refused to accept the new terms offered by the Plaintiff.

[11]Vide a letter dated 4.3.2015, the Defendant informed SP1 that despite reminders on 12.1.2015 and 2.3.2015, SP1 had failed to provide the Defendant with the letter of satisfaction together with the certified true copies of his identity card, birth certificate and degree ("the documents") (Rekod Rayuan / RR pg 143).

[12]Vide a letter dated 11.3.2015, the Plaintiff informed the Defendant that it was reviewing his request to have the documents verified and certified as well as to provide a letter of satisfactory employment ("LS"). In this letter, the Plaintiff disputed the Defendant's contention that despite several reminders on 12.1.2015 and 2.3.2015, the Plaintiff failed to provide him with the documents. The Plaintiff further stated that there were some recent discussions with the Defendant on the reconsideration of some of the terms and conditions of the Defendant's Contract and those discussions were not regarding the Defendant's reminders to the Plaintiff to provide certification of true copy of the documents or the LS. Lastly, in the said letter, the Plaintiff asked the Defendant for clarification to enable the Plaintiff to arrive at its decision to accede to the Defendant's request (RR pg 144).

[13]By a letter dated 12.3.2015, the Defendant informed the Plaintiff, inter-alia, that he would seek clarification from the Board of Valuers, Appraisers and Estate Agency ("the Board") and referred the Plaintiff's letter dated 11.3.2015

to the Board in a separate letter (RR pg 145).

[14]On 24.3.2015 at about 8.48 am, the Defendant texted the Plaintiff via Melissa Ooi stating that he was on emergency leave and that he had a personal matter to settle. The Defendant did not turn up for work on 24.3.3015.

[15]On 25.3.2015, the Defendant reported back for work with the Plaintiff, and handed an application form for emergency leave (RR pg 149).

[16]By a letter dated 27.3.2015, the Plaintiff requested the Defendant to clarify and explain his leave on 24.3.2015 without prior notice, and whether it could be considered as an emergency leave or was it justifiable for the Management to consider the merits of his application for emergency leave. This letter was handed to the Defendant on 30.3.2015 (RR pg 152).

[17]The Defendant did not turn up for work on 31.3.2015. However, at about 8.45 am that day, Queenie Wong Siew Kuen (SP4) received the Defendant's letter dated 30.3.2015 giving the reason for his emergency leave, and asking the Plaintiff to clarify that his new employment contract only commences on 1.4.2015 (RR pg 153).

[18]On 1.4.2015, the Defendant gave his letter dated 31.3.2015 to the Plaintiff alleging that he has been constructively dismissed by the Plaintiff with effect from 31.3.2015 (RR pg 154-157).

[19]By a letter dated 7.4.2015, the Plaintiff denied and refuted the Defendant's alleged claim for constructive dismissal which was totally misconceived and without basis. By the same letter, the Plaintiff also stated that the Defendant had breached his Contract of employment dated 14.5.2014 and the 2 LOUs dated 16.5.2014 and 6.11.2014. As such, the Defendant was required to pay the Plaintiff his basic salary multiplied by the balance of the contractual period not served pursuant to Clause 5 of his Contract of employment dated 14.5.2014 and the 2 LOUs dated 16.5.2014 and 6.11.2014. The Plaintiff also reserved its right to take appropriate legal action against the Defendant to recover all monies due to the Plaintiff (Bundle B1 pg 158-162).

[20]The Defendant replied to the Plaintiff by his letter dated 16.4.2015 (RR pg 163-165).

[21]The Plaintiff then instructed its Solicitors to issue a letter of demand dated 28.4.2015 to the Defendant to demand a sum of RM288,000.00 being the basic salary of RM4,000.00 per month multiplied by the balance contractual period of 72 months as the Defendant has breached the Contract of employment dated 14.5.2014 and the 2 LOUs dated 16.5.2014 ad 6.11.2014 (RR pg 166-167).

THE PLAINTIFF'S CLAIM

[22]The Plaintiff's claim against the Defendant is for breach of the 3rd Contract together with the 2 LOUs (paragraph 8 of the Statement of Claim / SOC in RR pg 11).

[23]In consequence of such breach, the Plaintiff claims from the Defendant the sum of RM288,000.00, interest thereon at 5% per annum from 6.5.2015 to the date of full realization, and costs (paragraph 12 of SOC in RR pg 12).

DEFENDANT'S COUNTERCLAIM

[24]The Defendant made a Counterclaim against the Plaintiff for breach of the 1st, 2nd, 3rd and/or 4th Contracts and the 2 LOUs, and/or for forcing, intimidating, threatening the Defendant, and using undue influence, commercial pressure, and fear of losing the job on the Defendant, and/or imposing terms and conditions which are unfair and unreasonable in the Contracts of employment (cumulatively to be referred to as "coercion" or "duress").

[25]The Defendant pleads that as a result of constructive dismissal by the Plaintiff, the Defendant counterclaims from the Plaintiff the following:

(a) reinstatement to his job;

(b) the sum of RM288,000.00; and/or

(c) the sum of RM100,000.00 as damages; and/or

(d) loss of salary of RM4,000.00 a month commencing 31.3.2015 until the date of Hearing and the final Order of the Court;

(e) the Plaintiff signing and certifying the documents and the LS as required in A & B (rule 17) of the Board;

(f) exemplary and/or aggravated damages;

(g) interest at 5% on the sum ordered by the Court;

(h) costs.

(Defendant's Counterclaim in RR pg 21-23).

HIGH COURT'S DECISION ON THE DEFENDANT'S APPEAL

[26]On 27.7.2016, after hearing both parties I dismissed the Defendant's Appeal and affirmed the decision of the Sessions Court. I ordered the Defendant to pay costs of RM3,000.00 to the Plaintiff, subject to payment of the allocatur fee of 4% of the costs.

GROUNDS FOR HIGH COURT'S DECISION Issues before the Judge

[27]The Judge considered the following 4 issues:

(i) Whether there was constructive dismissal by the Plaintiff through the Defendant's letter dated 31.3.2015 (Note: the Judge erroneously referred to the Defendant's letter dated 30.3.2015 when it should be dated 31.3.2015 as in RR pg 154-157);

(ii) Whether the Plaintiff had breached the Contract by coercion and duress of the Defendant;

(iii) Whether the Defendant had breached the Contract by not going to work which gives the Plaintiff the right to get the monthly salary of the Defendant as provided in the Defendant's Contract of employment; and

(iv) Whether the terms of the Defendant's Contract of employment are one-sided, in favour of the Plaintiff but against the Defendant, which renders it to be void and unenforceable.

Regarding issues (i) and (ii)

[28]The Judge rightly applied the "contract test" to determine whether the Defendant has been constructively dismissed. Guided by the authorities in *Wong Chee Hong V. Cathay Organisation* [1988] 1 MLJ 92, *Western Excavating (EEC) Ltd V. Sharp* [1978] 2 WLR 344, and *Bayer (M) Sdn Bhd V. Anwar Abd Rahim* [1996] 2 CLJ 49, the Judge considered the issue whether there was constructive dismissal according to the test:

"… if the employer is guilty of such breach as affects the foundation of the contract or if the employer has evinced or shown an intention not to be bound by it any longer..".

[29]The Judge rightly held that the burden of proof is on the Defendant to prove constructive dismissal according to the following conditions (before the burden shifts to the Plaintiff):

1. "There must be a breach of contract by the employer;
2. The breach must be sufficiently important to justify the employee resigning;
3. The employee must leave in response to the breach and not for any other unconnected reasons;
4. He must not occasion any undue delay in terminating the contract, otherwise he will be deemed to have waived the breach and agreed to vary the contract.".

[30]The crux of the Defendant's case is based on his letter dated 31.3.2015 claiming constructive dismissal. The Judge evaluated the evidence of SP1 and SP3, and despite all the detailed allegations of coercion and duress made by the Defendant against the Plaintiff, the Judge made a finding that there was no such coercion and duress. Instead, the Judge found that the Defendant, being an educated person, understood all the terms of the Contract and voluntarily signed the 3rd Contract with the 2 LOUs. In fact, the Defendant also initialled every page of the 3rd Contract. According to the Judge, there was consideration for the Contract namely, that the Plaintiff gave its undertaking to confirm the TPC Logbook to enable the Defendant to register with the Board and a payment of RM3,000.00 to the Defendant, and the Defendant had agreed to continue working for the Plaintiff for 6 more years commencing from 1.10.2014, and this was later amended to 1.4.2015 through the 2nd LOU or Amendment dated 6.11.2014.

[31]Thus, the issue of the Plaintiff "dominating the will" of the Defendant, and using its position to an unfair advantage over the Defendant does not arise. Therefore, contrary to what the Defendant submits, the Judge did not err when she did not apply the provisions regarding undue influence in s.16(1), (2)(a) and (3)(a) of the Contracts Act 1950 read with s.20 of the same Act.

[32]As for the Defendant's subsequent complaint that the Plaintiff failed to prepare the LS and to certify the documents, the Judge did not err to find that these 2 responsibilities or acts ("2 acts" or "requirements") are based on the Plaintiff's discretion, but they do not form part of the terms of the Defendant's Contract of employment. Thus, the Plaintiff cannot be said to have breached the Contract if it fails to fulfill the requests of the Defendant in regard to the 2 acts.

[33]Since the Judge could not find any evidence that the Plaintiff, as employer, had breached the terms of employment in a fundamental manner, the Judge is therefore right in holding that there is no constructive dismissal of the Defendant by the Plaintiff.

[34]In fact, from a perusal of the totality of the evidence adduced, it is clear that at all times, the Plaintiff was willing to continue with the 3rd Contract and the 2 LOUs. Even though the Defendant alleges that there is a 4th Contract, the evidence shows that the intended 4th Contract was never executed (see RR pg 136-141). As submitted by the Plaintiff, the Defendant after much cross-examination admitted that the so-called 4th Contract is actually the 2nd LOU dated 6.11.2014. It is also to be noted that in her Judgment, the Judge did not make any finding on a 4th Contract

being executed. Be that as it may, the important thing to note is that even before the Plaintiff could decide on the Defendant's revised terms for the 3rd Contract upon request made by the Defendant, and after negotiations by both parties, the Defendant went ahead to abandon his job and did not turn up for work from 31.3.2015 onwards.

[35]The Defendant contends that on 30.3.2015, SP1 informed him that if he wanted the photocopies of the documents to be certified and the LS from the Plaintiff company, the Defendant would have to sign a new Contract of employment on a 6 year basis effective on 1.6.2015 and SP1 added a transfer clause. SP1 then went on to say that if the Defendant refused to sign the new Contract, he would be dismissed from the employment of the Plaintiff company and would not be eligible to be a Registered Valuer and a Registered Estate Agent. The Defendant was shocked and shaken, and pleaded with SP1 to let him have the new Contract for a day to understand it. SP1 immediately pulled the Contract away from the Defendant's hand and said that he would make sure that the Defendant would not be a Registered Valuer and Registered Estate Agent.

[36]However, SP1 denied meeting the Defendant on 30.3.2015. SP1's evidence was supported by his Personal Assistant's testimony i.e. Queenie Wong Siew Kuen (SP4). In addition, 2 other Plaintiff's witnesses i.e. Loh Soong Ky (SP2) and Loo Boon Wei (SP5) also testified that the Defendant did not meet SP1 on 30.3.2015. It is noted that the Judge made a finding that there was no such meeting on 30.3.2015. Therefore, the credibility of the Defendant is questionable. It appears to be that the Defendant is not a truthful or reliable witness.

[37]Another crucial point that was highlighted by learned Counsel for the Plaintiff is that on 24.3.2015, the Defendant had already known that the Board could waive the requirements that he requested from the Plaintiff and/or SP1. The Defendant was informed by one Mahaletchumi from the Board that the Board could waive such requirements for his registration as a Registered Valuer and Registered Estate Agent (Bundle B-2 pg 12, and RR pg 186). This can also be seen from the Defendant's following evidence during cross-examination on 20.11.2015:

> "Q. Would you agree with me that on 30.03.2015 you already knew that the Board of Valuer could waive the requirement you requested from the company or the MD. Look at your letter yesterday. Your letter dated 2nd April. You went for the interview on 24th March. So on 30th you already knew the Board can waive this requirement. Would you agree with me?
>
> A. Yes.".

[38]However, the Defendant intentionally did not disclose such fact to the Plaintiff, that the Board had informed him that the requirements that the Plaintiff provides the Defendant with the LS and the certified true copies of document could be waived, even until the day that the Defendant left his employment with the Plaintiff.

[39]Since the Defendant knew during the meeting with the Board on 24.3.2015, that the Board could waive the requirements from the Plaintiff, it is highly probable, as submitted by the Plaintiff, that the Defendant decided to breach his 3rd Contract of employment with the Plaintiff. In order to avoid his liability to pay the sum of RM288,000.00 as compensation to the Plaintiff, the Defendant then staged or concocted the story about the meeting on 30.3.2015, and wrote to the Plaintiff about the fictitious meeting on 30.3.2015 in his letter claiming constructive dismissal.

[40]As pointed out by learned Counsel for the Plaintiff, all this time, the Plaintiff was still waiting for any decision /

clarification by the Board pertaining to the said requirements (Bundle B1 pg 55-58 and RR pg 144-147).

Regarding issue (iii)

[41]By the fact that the Defendant walked out on his job and breached his 3rd Contract of employment, read together with the 2 LOUs, it means that the following Clause 5 of the Contract dated 14.5.2014 would apply automatically:

> "In the event that you fail to serve the company for the minimum period specified herein, you shall pay the company your basic salary (current at any time) multiplied by the balance of the contractual period not served plus return all bonuses paid to you, unless the company has waived the requirement for you to serve the minimum period required." (Bundle B1 pg 17-26).

[42]The same clause is also provided in the LOU dated 16.5.2014.

[43]The Judge considered Clause 5 and further went on to examine Clause 7 of the same Contract which states as follows:

> "Notwithstanding anything contained herein, the company may waive the requirement for you to serve the minimum period specified on its own motion / unilaterally or at your request on such terms and conditions as the company may at its absolute discretion decide.".

[44]The Judge observed that the Defendant ought to have exercised his right under Clause 7 to make an application to the Plaintiff to be released from the minimum period of service even though the approval thereof is subject to the Plaintiff's discretion. However, the Defendant did not adduce any evidence before the Sessions Court that he had made such application to the Plaintiff under Clause 7.

[45]In view of the Defendant's failure to exercise his right given under Clause 7, it follows that the Defendant is caught by Clause 5 due to his failure to fulfill the minimum term of his employment.

[46]The Defendant submits that Clause 5 cannot be invoked to impose the penalty on the Defendant. Instead, it is trite law that damages must be proved before assessment can be made (see *Bhai Panna Singh V. Bhai Arjun Singh* AIR 1929 PC 179; *Selva Kumar a/l Murugiah V. Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817 at pg 829; and *Reliance Shipping & Travel Agencies V. Low Ban Siong* [1996] 2 MLJ 543 at pg 547). With respect, while I agree that damages must be proved, in the present case, it must be noted that Clause 5 is an express provision to the effect that in the event that the Defendant fails to serve the Plaintiff company then the Defendant shall pay the company his basic salary multiplied by the balance of the contractual period not served by the Defendant plus return all bonuses paid to the Defendant. Based on the evidence adduced, the Plaintiff has calculated such sum to be RM288,000.00 being the Defendant's basic salary of RM4,000.00 per month multiplied by the balance contractual period of 72 months. Therefore, the Judge has rightly awarded the sum claimed to the Plaintiff.

[47]The Defendant had agreed to Clause 5 when he executed the 3rd Contract and the 2 LOUs. It is therefore now too late in the day for the Defendant, as an afterthought, to contend that Clause 5 is void in equity for being unconscionable.

Regarding issue (iv)

[48]The Judge is of the opinion that even though the Defendant alleges that the terms of the Contract of employment are one-sided, the Defendant has the choice to decide not to execute further Contracts. However, the Defendant chose to sign the Contract. This means that the Defendant had voluntarily decided to be bound by the terms of such Contract that he signed. In view of that, the issue of one-sidedness of the Contract does not arise.

[49]I agree with the position taken by the Judge. Since the Defendant voluntarily executed the Contract, such Contract is therefore valid and enforceable.

[50]The Defendant submits that s.28 of the Contracts Act 1950 is applicable when he entered into a minimum period of employment under the Contract. The said s.28 provides as follows:

> "Every agreement by which everyone is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void."

[51]The Judge is not wrong to find that s.28 of the Contracts Act 1950 does not apply in this case considering that at the time when the Defendant executed the 3rd Contract and the 2 LOUs, the Defendant was still working for the Plaintiff. Apart from that, I do not think that by the Plaintiff's requirement that the Defendant serves for a fixed contractual term of 6 years, which the Defendant had agreed to by executing the 3rd Contract and the 2 LOUs, it tantamounts to a "contract in restraint of trade". A fixed term contract of employment is nothing new; it is commonly used in both the private and public sectors. It serves the purpose of giving certainty to the employer and the employee on the duration of employment. A classical case of restraint of trade would be where the employer imposes a term in the contract of employment that after the contract period, the employee would not be allowed to work for another employer in a similar profession, trade or business. However, in this case, there is no such prohibition imposed by the Plaintiff on the Defendant. The Plaintiff merely contracted with the Defendant that he serves for 6 years. The Plaintiff did not prohibit the Defendant from being employed with another employer after the term of 6 years. Thus, the Defendant's contention that the Contract with the Plaintiff violates s.28 of the Contracts Act 1950 does not hold water.

DECISION

[52]On the whole, I do not find that the Judge had erred in her findings of fact or application of the law. I am satisfied that there was sufficient judicial appreciation of the evidence and the law by the Judge. As such, there is no good reason for this appellate Court to intervene and interfere with the decision of the Sessions Court.

Order accordingly.

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