由此

HCCL 16/2006

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

COMMERCIAL ACTION NO. 16 OF 2006
(TRANSFERRED FROM HCA NO. 623 OF 2006)

BETWEEN

WANG RUIYUN Plaintiff

AND

GEM GLOBAL YIELD FUND LIMITED Defendant

Coram : Master de Souza in Court
Dates of Hearing : 28 April 2010
Date of Handing Down Judgment : 9 June 2010

J U D G M E N T

I. INTRODUCTION

1. The Defendant having failed to appear, judgment on liability was entered against it with damages to be assessed pursuant to the order of Stone J on 6 August 2009. The Registrar subsequently issued directions for the filing and serving of affidavits for the purpose of the assessment, ordering that they do stand as evidence in chief and may be read at the assessment hearing. In the event, the Defendant failed to participate any

further in the suit. The Plaintiff's 6th affirmation was read into evidence. The matters it deposed to remain wholly unchallenged, forming the factual basis for this decision.

II. THE EVIDENCE

2. The Plaintiff, a mainland investor and resident of the PRC, owned directly and indirectly through a holding company some 6.86% of the issued share capital of a Hong Kong listed company Bestway International Holdings Ltd ('Bestway') that traded in plastic products, principally PVC films. More specifically, he beneficially owned 107.4 M shares in Bestway and was also the beneficial owner of a BVI corporation, Victory Investment China Group Ltd which itself held 245.4 M shares in Bestway. He was the third largest shareholder in Bestway.

3. The Defendant, a company incorporated in the West Indies and a member of the Global Emerging Markets Group, had as part of its business invested in companies on the main board of the Hong Kong Stock Exchange if the investments represented substantial equity. The evidence disclosed that the Defendant professed interest in Bestway following Bestway's public announcement of its intention to acquire a 12% interest in a PRC corporation Cangzhou Chemical Industrial. Ltd, a joint stock company listed on the Shanghai Stock Exchange. It was against this background that the parties to the suit entered into lengthy and detailed negotiations for the sale of shares in Bestway by the Plaintiff to the Defendant.

4. As a prospective purchaser, the Defendant, a well-known investor, represented a substantial attraction for the Plaintiff. A sale of a

large number of shares to such an investor would have the advantage of significantly enhancing the value of the shares in the market. Were the Plaintiff to unload his shareholding in Bestway directly on the open market, a contrary effect would have been achieved. It would likely have resulted in a considerable diminution in the price of the shares with the public perceiving the exercise as share dumping.

5. In February 2006, the parties entered into 3 linked contracts, respectively named the Equity Line of Credit Agreement ('ELC Agreement'), the Cash Escrow Agreement ('Escrow Agreement') (both being dated 14 February 2006), and the Side Letter Agreement dated 27 February 2006 ('Side Letter Agreement').

6. The cumulative effect of these agreements summarized most succinctly in paragraph 7 of Stone J's judgment in the O.14 proceedings dated 6 March 2007 was as follows.

7. The Plaintiff was entitled to deliver to the Defendant a Draw Down Notice for a tranche of Bestway shares and on the same day deposit those shares into the Defendant's broker's CCASS account. Pursuant to a contractual formula, the Plaintiff's Draw Down Notice had to specify a 'floor price' below which he would not sell the shares to the Defendant, the actual price being ascertained by a formula within the ELC Agreement. On the business day following receipt of confirmation of the CCASS deposit, the Defendant was obliged to deposit into the Escrow Account held by an Escrow Agent an amount equal to 90% of the trading price for Bestway shares prior to the issue of the Draw Down Notice multiplied by the number of shares deposited into the Defendant's broker's CCASS account. The Defendant would then have 15 trading

days (or longer, if a contractual formula applied) to purchase for itself or by on-selling the same shares, subject to various conditions concerning the volume or prices at which Bestway shares have been trading during that period. At the end of the relevant period, the Defendant or the Escrow Agent had to account to the Plaintiff either for the sale proceeds from the sale of the shares to the Defendant or, if not required by the contractual terms to purchase the shares, for the return of the unsold shares, or a combination of both.

8. On the undisputed evidence, pursuant to Clause 2.1 and Schedule 2 of the ELC Agreement, the Plaintiff delivered to the Defendant on 17 February 2006 a signed Draw Down Notice requesting the Defendant to purchase 926 M shares with a Floor Price of HK$ 0.18 per share. The draw down amount was the number of shares representing the average trading volume of the 15 Trading Days immediately preceding the Draw Down Notice, namely 926 M shares. Clause 2.4(b) provided that the Defendant undertook not to sell any shares at a price below one and one ninth times the Floor Price, i.e. HK$ 0.20. The Floor Price stipulated the price below which the Plaintiff would not sell to the Defendant. The Pricing Period defined as the period of 15 consecutive Trading Days immediately following the Draw Down Notice would have been 20 February 2006 to 10 March 2006. None of the above being clearly defined in the contractual arrangement could have been the subject of controversy.

9. The terms of the initial Draw Down Notice were subsequently amended by the Side Letter Agreement at the request of the Defendant to permit the deposit into the Defendant's broker's account the initial number of shares in 3 tranches.

10. Pursuant to the ELC Agreement and the Side Letter Agreement, the Plaintiff deposited with the Defendant the 1st tranche of 312 M shares on 27 February 2006 and the 2nd tranche of a similar amount of shares on 6 March 2006. This 2nd tranche of shares was actually transferred on 7 March 2006 on account of the wrongful initial rejection by the Defendant. Transfer of the 3rd tranche of 320 M shares contemplated for 13 March 2006 did not materialize as it was rejected by the Defendant's broker, Merrill Lynch.

11. Under the Side Letter Agreement, the Pricing Period was also amended to a period between 28 February 2006 and 20 March 2006 inclusive. As is discernible in the totally ineffectual unsigned Closing Notice (about which more later) sent by the Defendant to the Plaintiff dated 21 March 2006 (see page 756 of Bundle D), the Knockout Days fell within this period.

12. The Side Letter Agreement obliged the Defendant, no later than the Business Day following receipt of confirmation of deposit of each of the above tranches, to deposit HK$ 69,076,800, HK$ 69,076,800 and HK$ 66,862,800 respectively into the Escrow Account.

13. The Defendant failed to make timely payment for the 1st tranche of shares. It was only on 1 March 2006 that it deposited funds into the Escrow Account. No deposit was made in respect of the 2nd or 3rd tranches. In respect of the 3rd tranche, the Defendant had refused to accept the deposit or to make any payment for it.

14. Pursuant to Clause 3 of the ECL Agreement, the Defendant was obliged to furnish to the Plaintiff a Closing Notice on or prior to the

Closing Date, namely the 16th Trading Day following the Draw Down Notice, stating the Purchase Price, the number of shares over and above the applicable initial deposit (if any) required to be further deposited by the Plaintiff, the applicable Unit Price, or the number of shares out of the initial deposit which shall be transferred and delivered back to the Plaintiff.

15. As is plain from the contractual documents, the issuance of a Closing Notice was a condition precedent to the Defendant returning shares placed by way of the initial deposit under the Draw Down Notice. The Purchase Price for the Closing Notice was defined as the sum of money which equaled the product of the Purchase Amount particularized in the Closing Notice (i.e. the initial deposit less the shares to be returned to the Plaintiff) and the applicable Unit Price: the ECL Agreement at Bundle D pages 574 and 578 (Clause 2.4(a)).

16. Quite aside from the Defendant's incontrovertible failure to take up and pay for the 2nd and 3rd tranches of shares and the late payment for the 1st tranche, the evidence further disclosed that the Defendant had on-sold shares below one and one ninth of the Floor Price and was dumping more than 20,800,000 shares each day in total disregard for the ECL Agreement. Flooding the market with shares in such a manner drove down the value of the shares of Bestway to the detriment of the Plaintiff. There can be no doubt that these are matters indicative of significant contractual breaches on the part of the Defendant.

17. It seems reasonably certain that by early March 2006 (if not before), the Defendant had taken the decision not to be further bound by its contractual obligations. Accordingly, on 21 March 2006, the

Defendant sent to the Plaintiff a draft Closing Notice previously referred to as being unsigned and invalid, stating its intention to return to the Plaintiff 407,933,333 shares.

18. To be valid and effective, a Closing Notice had to be issued, signed and delivered to the Plaintiff as it provided the only contractual mechanism for transfer back of shares by the Defendant to the Plaintiff. Further, the contract entered into required the Defendant to accept on deposit all the shares placed on initial deposit and to pay for them. In short, the shares had first to be accepted by the Defendant before any legitimate attempt could be made to return all or some of them by issuance of a Closing Notice. The Defendant having failed to comply with its contractual obligation as respect the return of shares was obliged to take up and pay for all the shares under the initial deposit.

19. On 22 March 2006, the Plaintiff obtained an ex parte Mareva injunction restraining the Defendant from dealing in the Bestway shares transferred to it and from withdrawing money from the Escrow Account. In breach of the injunction, the Defendant further sold some 3,963,333 of the Plaintiff's shares. Subsequently, the Defendant returned some 402,970,000 shares to the Plaintiff which was accepted in mitigation of his loss.

III. THE PLAINTIFF'S LOSS

20. Plainly, the Plaintiff has sustained considerable loss and damage consequent upon the Defendant's arbitrary disregard of its contractual obligations to take up and pay for shares according to the formula stipulated in the link contracts.

21. Featuring prominently in the assessment of the Plaintiff's loss and damage is the concept of Knockout Days as defined in the contractual documents. The term is defined thus:

> (a) On which 90% of the Closing Trade Price is less than the Floor Price stated in the Draw Down Notice last delivered by the Seller to the Purchaser, or
>
> (b) On which shares are not traded on the Main Board for the whole Trading Day; or
>
> (c) During which Trading has been suspended for more than one hour; or
>
> (d) In respect of which the Purchaser has made an election in accordance with Clause 2.4(a) that such Trading Day is a Knockout Day.

22. The Defendant alleged that there were 5 Knockout Days, namely days on which the Closing Trade price of Bestway shares was less than HK$ 0.20 per share. If the Defendant were right, its duty to compensate the Plaintiff would be significantly lessened.

23. As Mr. Hingorani, counsel for the Plaintiff rightly submitted, only paragraph (a) of the above definition was applicable in the circumstances. None of the remaining scenarios had occurred.

24. The blatant dumping of large numbers of shares on the market by the Defendant through Merrill Lynch drove down the daily closing price of the shares. As the actual price payable by the Defendant was determined by reference to the daily closing price in the 15 Trading

Days after the Draw Down Notice, the artificially low price engineered through dumping had the effect of reducing the Purchase Price payable by the Defendant.

25. The fall in value of the shares is plain for all to see. The shares were performing well in the period between 28 December 2005 and 1 March 2006 when the closing price stood at HK$ 0.20 a share and that was the lowest price for the period. The Table of Bestway Share Prices from November 2005 to November 2006 quoted by the Hong Kong Stock Exchange and exhibited as WRY-AH2 to the Plaintiff's 6th Affirmation ('the Share Table") charted the performance of the shares and demonstrated most convincingly the damaging effect of the Defendant's conduct on the shares.

26. There can be no quarrel that the Defendant had contracted to purchase 926 M shares. In its mandatory disclosures of interest pursuant to Cap. 571, it announced it became interested in that quantum of shares in Bestway. None of this was controversial.

27. Mr. Hingorani submitted that under the ELC Agreement, absent the condition precedent being satisfied, the Defendant was obliged to purchase 926 M shares at or above HK$ 0.20 per share. The Purchase Price payable would have been at least HK$ 166,680,000 being (926,000,000 x HK$ 0.20 per share x 90%).

28. He however contended that the period for calculating the Closing Trade Price should be the period before share dumping began. As the first breach occurred on 2 March 2006, he urged that the relevant period for ascertainment of the share value ought to be 9 February 2006 to

1 March 2006. With that I am in total agreement as a tortfeasor should not benefit from his wrongdoing.

29. The average Closing Trade Price for the relevant period was HK$ 0.2348 per share with reference to the Share Table in Bundle E, page 1330.

30. I would therefore assess damages as follows.

31. The Purchase Price payable by the Defendant would be 926 M shares x HK$ 0.2348 per share x 90%. This equates to HK$ 195,682,320. The damages payable would therefore be HK$ 195,682,320 less the amounts received by the Plaintiff from the Defendant (HK$ 40,503,237.28 + HK$ 930,412.16), less the amount received by the Plaintiff from the sale of shares not taken up (HK$ 25,897,379). The net damages payable by the Defendant would be HK$ 128,351,291.56. This is the amount that I assess to be paid by the Defendant to the Plaintiff. I so order.

32. There shall be interest at judgment rate on the judgment sum from the date of the writ until full satisfaction thereof.

33. As to costs, I also accede to counsel's submission that full indemnity costs are appropriate given the Defendant's callous and multiple breaches of its contractual obligations and the various spurious allegations in the original Defence and Counterclaim prior to the pleadings being substantially altered.

34. I order that the Defendant shall pay the Plaintiff's costs of the assessment including the costs reserved in respect thereof on full indemnity basis, taxed if not agreed. There shall be a certificate for counsel.

(B.L. de Souza)
Master of the High Court

Mr. Jeevan HINGORANI instructed by Alvan Liu & Partner for Plaintiff.

Defendant absent.