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Singapore Court of Appeal holds sole director of company personally liable for costs

DB Trustees (Hong Kong) Ltd v Consult Asia Pte Ltd and another appeal
[2010] SGCA 21

The case of *DB Trustees (Hong Kong) Ltd v Consult Asia Pte Ltd* [2010] SGCA 21 proceeds from an earlier decision of the same name by the Singapore Court of Appeal (reported at [2009] SGCA 39) whereby DB Trustees (Hong Kong) Ltd (“**DB Trustees**”) were awarded costs, in two appeals and the proceedings below, on an indemnity basis against Consult Asia Pte Ltd (“**Consult Asia**”). In the present case, the Court of Appeal dealt with the issue of whether Ms Florence Koh Lee Kheng (“**Ms Koh**”) should be made personally liable for the costs of the appeals. Ms Koh was the only director of Consult Asia, and owned all but one of Consult Asia’s issued and paid up shares. She had also been solely responsible for Consult Asia’s participation in the appeals. It was held that Ms Koh should personally bear the costs of the appeals jointly and severally with Consult Asia.

Background

The litigation stems from the issue by Consult Asia of US\$32 million worth of senior secured notes (the “**Notes**”), in which DB Trustees acted as trustee of the security for the Note-holders. Consult Asia failed to redeem the Notes on 28 June 2008 and DB Trustees, after giving notice to Consult Asia, appointed receivers and managers (the “**Receivers**”) over the business and assets of Consult Asia. Ms Koh was not cooperative with the Receivers and denied them access to documents pertaining to the affairs and property of Consult Asia, thereby precipitating the start of proceedings by DB Trustees against Consult Asia. In the various proceedings that followed, Consult Asia managed to obtain an extension of time to redeem the Notes, but failed to do so.

Applicable principles

In deliberating whether an order of costs could be made against a non-party, the Court of Appeal reiterated the basic principle that costs are entirely at the discretion of the court. The Court of Appeal also held that there is no rule precluding the court from awarding costs in favour of or against a non-party.

After surveying the relevant case law, the court concluded that it was clear that the overarching rule with regard to ordering costs against a non-party in court proceedings is that it must, in the circumstances of the case, be just to do so. In assessing whether it would be just to do so, a variety of factors may be relevant. The court, however, highlighted two particular factors which ought to almost always be present to make it just to award costs against a non-party. First, there must be a close connection between the non-party and the proceedings. Secondly, the non-party must have caused the incurring of costs. Considerable weight would be placed on the presence of these two factors. The court added that this did not mean they were indispensable prerequisites

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that had to be met before a costs order against a non-party could be made. Nonetheless, in the case before the court, the two factors were present, as discussed below.

Ms Koh and Consult Asia

In terms of close connection and causation, Ms Koh was the only director of Consult Asia and was solely responsible for Consult Asia's participation in the appeals, as well as the underlying actions. The court observed that these proceedings, at their roots, stemmed from Consult Asia's and Ms Koh's unreasonable stance in not co-operating with the Receivers. In particular, it was noted that the commencement of certain actions by Consult Asia to discharge the Receivers occurred after Consult Asia had been given extensions of time to obtain refinancing and redeem the Notes, and had failed to do so. It would appear that the proceedings were employed by Consult Asia as a delaying contrivance to impede the sale of the security. The court noted that Ms Koh had dragged the matter on for more than a year without any plausible reasons for believing that Consult Asia could repay the Note-holders, and that this delay prejudiced the Note-holders' right to realise the security and recover monies due to them.

Ms Koh was, in essence, the only shareholder, holding all but one of the issued and paid up shares of Consult Asia. Therefore, the real and only beneficiary of any successful outcome of Consult Asia's litigation would be her. She alone stood to gain from the survival of Consult Asia and the preservation of its assets. In the prevailing circumstances, the court was of the view that the relationship between Ms Koh and the court proceedings was so close that it would not be unjust to make her liable for costs. She had directed Consult Asia's unreasonable conduct in the proceedings and stood to gain from any success that Consult Asia may have enjoyed, and this apparently without incurring a corresponding risk from any failure.

Furthermore, the court considered it relevant that Consult Asia appeared unable to satisfy the adverse costs orders made against it. Consult Asia's liabilities under the Notes were then in excess of S\$60 million whereas the properties held as security were valued at around S\$33 million. DB Trustees were hard-pressed to help the Note-holders recover from Consult Asia all that was owed to them under the Notes, let alone the costs of the proceedings.

Prior warning

In reaching its decision, the Court of Appeal also dealt with the question of whether a non-party must be informed or warned, prior to the conclusion of the proceedings, of any intention to seek an order for costs against him or her before such an order can be made. The court indicated that there cannot be an unbending proposition that a non-party must be given prior warning before an order for costs can be made against the non-party. What is essential is that the non-party must be accorded due process and his or her views adequately considered before such an order is made.

In the present case, Ms Koh had been allowed, through her counsel, to make submissions on costs to the court. Moreover, the court was satisfied that Ms Koh would have known that a submission that she should pay the costs of the appeals was always on the cards, and should have come as no surprise. In one of the previous underlying actions, there had been an application for Ms Koh to personally provide security for DB Trustees' costs, and in another underlying action, DB Trustees had applied to the judge for Ms Koh to be made to pay the costs.

Conclusion

In the circumstances, the Court of Appeal held that it was right and just to order that Ms Koh bear the costs of the appeals, which were awarded on an indemnity basis, jointly and severally with Consult Asia. This case serves as a warning to other single-director entities and highlights the pitfalls of adopting delaying tactics behind a corporate veil. Sole directors, who are also in essence, sole shareholders, should be wary of being saddled with personal liability for costs when using a company as a corporate fig leaf in the pursuit of unnecessary litigation.

If you would like to discuss the impact of this case on your business, please contact:

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