Rafiq Jumabhoy v Scotts Investments (Singapore) Pte Ltd (in compulsory liquidation) [2003] SGHC 119

Case Number : OS 499/2003

Decision Date : 20 May 2003

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Tan Bar Tien (B T Tan & Co) for the plaintiff; Rajiv Nair (Shook Lin & Bok) for the defendants; Chua Beng Chye (Shook Lin & Bok) for the defendants

Parties : Rafiq Jumabhoy — Scotts Investments (Singapore) Pte Ltd (in compulsory liquidation)

Insolvency Law – Winding up – - Commencement of proceedings against company in compulsory liquidation – Whether leave to commence and continue action can be granted retrospectively – s 262(3) Companies Act (Cap 50, 1994 Rev Ed)

1 This Originating Summons ("OS") was an application by Rafiq Jumabhoy ("RJ") for leave to commence and continue with his claim, made by way of counterclaim, in Suit No 736 of 2002 which suit ("the Suit") had been commenced by Scotts Investments (Singapore) Pte Ltd (in compulsory liquidation) ("SIS").

2 The Suit was commenced on 25 June 2002. By then, SIS was already in compulsory liquidation, having been wound up on 1 September 2000. RJ was the third defendant therein. RJ's Defence and Counterclaim was filed on 25 November 2002. On 10 February 2003, SIS filed a Summons for Direction and on 14 February 2003, directions were given. On 21 February 2003, RJ's solicitors then filed an application for summary judgment on his counterclaim. It was fixed for hearing on 28 March 2003. However, SIS' Counsel then took the point that RJ had not obtained leave of court to commence and continue with his counterclaim as required under s 262(3) of the Companies Act (Cap 50). Accordingly, RJ had to apply for such leave and his application for summary judgment was adjourned pending the outcome of his application for leave.

3 Accordingly, RJ's application for leave was made by way of the present OS. In its original form, the OS had sought leave to commence and continue the existing counterclaim i.e with retrospective effect. However, RJ then applied and I allowed him leave to amend his OS to include an alternative prayer for leave to commence a fresh action in the event the court would not grant the leave retrospectively.

Hearing on 21 April 2003

4 The hearing of the OS was heard on the same day as the application to amend it i.e 21 April 2003. At that hearing, I was informed by Counsel for RJ and for SIS that SIS would be withdrawing its claim leaving RJ's counterclaim to be dealt with.

5 As regards RJ's application for leave, there were two issues:

(a) should RJ be granted leave to commence his claim at all,

(b) if so, did the court have jurisdiction to grant leave retrospectively or, to use a latin phrase, *nunc pro tunc.*

6 Mr Rajiv Nair, Counsel for SIS, submitted that leave should not be granted at all. He submitted that RJ should instead go through the liquidation process which was a summary process, relying on *Re The East Kent Shipping Company (Limited)* 18 LT 748 and *The Hull 308* [1991] SLR 304 which cited *Re Exchange Securities & Commodities Ltd & others* [1983] BCLC 186.

7 On the second issue, he relied on *In Re National Employers Mutual General Insurance Association Ltd* [1995] 1 BCLC 232 ("NEMGIA") which is authority for the proposition that the court has no jurisdiction to grant leave retrospectively even if the court was minded to grant leave. That was a decision of Rattee J on s 130(2) of the English Insolvency Act 1986 which, for present purposes, is in *pari materia* with our s 262(3). In reaching that decision, Rattee J followed an earlier decision of Milmo J in *Wilson v Banner Scaffolding Ltd,* The Times 22 June 1982.

8 Counsel for RJ, Mr Tan Bar Tien, submitted that, as regards the first issue, the liquidators of SIS would dispute RJ's claim anyway and were in fact prepared to deal with his claim in the usual process of litigation until the liquidators themselves decided not to pursue SIS' claim.

9 Mr Tan also submitted that RJ was not trying to escalate costs and that was why RJ was applying for summary judgment on the issue of liability first. I should mention at this point that RJ was claiming remuneration for work done by him pursuant to three board resolutions of SIS between 27 July 1996 and 18 June 1997 and an indemnity for legal costs he had incurred pursuant to two written indemnities from SIS between 30 June and 9 October 1997.

10 As regards the second issue, Mr Tan did not raise any concern about limitation defences should I have decided that I had no jurisdiction to grant leave retrospectively. There was no elaboration before me by Mr Tan or Mr Nair as to whether part of the claim by RJ might become time-barred, depending on whether the work or legal costs had been undertaken or incurred more than six years before an order made prospectively. Mr Tan appeared minded to accept the proposition that the court had no jurisdiction to grant leave retrospectively.

11 However, I reserved judgment to consider the far-reaching consequences of such a proposition.

Further research and decision

12 Subsequently, I directed the solicitors for each party to do further research on this point. Eventually, they reverted with, inter alia, the case of *In re Saunders (A Bankrupt)* [1997] CH 60. This was a decision by Lindsay J in which the learned judge declined to follow the two earlier decisions of Milmo and Rattee JJ when he (Lindsay J) was considering s 285(3) Insolvency Act 1986 on bankruptcy, a provision which he considered similar to s 130(2) of the same Act. However, I noted that Lindsay J had granted leave to appeal and in *Bristol & West Building Society v Trustee of the property of Back and another (bankrupts)* [1998] BCLC 485, the court also referred to the decision of Lindsay J being under appeal. Upon my further inquiry, the solicitors for each party informed me that they were unable to locate any written judgment of the appellate court. Neither did they inform me of the outcome of the appeal, if any. Accordingly, I assumed that no appeal had been proceeded with.

13 After considering all the authorities cited to me, I decided to grant leave to RJ to commence and continue with his counterclaim i.e leave was granted retrospectively.

My reasons

14 As regards the first issue, I did not find the case of *Re The East Kent Shipping Company (Limited)* to be of much help. There the claim of the plaintiff was on bills of exchange and was not disputed. It was in such circumstances that the Vice-Chancellor said that, "any creditor who brings an action against a company where an order or a resolution has been made or passed to wind up that company takes a most unnecessary step, and is guilty of incurring costs most uselessly. If one creditor may do so, a hundred might; …."

15 In *The Hull 308*, L P Thean J, delivering the judgment of the Court of Appeal, said, at p 311:

Counsel for the interveners very helpfully referred us to the case of *Re Exchange Securities & Commodities Ltd & Ors* [1983] BCLC 186. In that case, there were ten applications, all by the same nine applicants, relating to ten companies in liquidation. The applicants in respect of each of the companies applied for leave under s 231 of the Companies Act 1948 to commence action against that company. The applicants were all investors in the companies and sought leave to sue the companies with a view to establishing the existence of trust interests on the ground that they were not creditors but beneficiaries under trusts. All the applications were refused by Mervyn Davies J. The learned judge after reviewing the claims and the authorities concluded thus, at pp 195-196:

> I must now decide the question put to me. I have tried to take account of all considerations urged upon me on both sides. My decision is that the companies are not to be at liberty to commence the proposed proceeding. My reason for this is that I must do what is right and fair in the circumstances: see the *Aro* case [1980] CH 196 at p 208. It seems right and fair to me, in the circumstances of this case, not to allow the action. The approach should be, I think, that leave should be refused under s 231 if the action proposed raises issues which can be conveniently decided in the course of the winding up. It seems plain to me that the issues which would be discussed in the proposed Chancery action can perfectly well be decided in the ordinary course of the liquidation. Now that the liquidator is aware of the trust claims and moreover, has by his counsel undertaken to put before the court in a neutral fashion the issue whether or not the various classes of investors have trust interests, it seems to me quite unnecessary to allow a separate action to decide these issues. I add that there seems to me positive benefit in having the issues decided in the liquidation because the procedure should be quicker and less expensive than writ or originating summons proceedings.
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> The general approach I have mentioned gives way in special circumstances: see, for example, the *Redman* case and compare the *Aro* case. I see no special circumstances here. The considerations urged on the plaintiffs' behalf do not, singly or taken together, seem to me to make it right or fair to allow the action.

For the reasons we have given, this appeal must fail, and we dismissed it with costs.

16 However, the main reason why the Court of Appeal in *The Hull 308* was not inclined to grant leave to commence action under s 262(3) was because the plaintiffs were seeking leave to commence and carry on with an action in rem which had been commenced after the commencement of winding up and after provisional liquidators had been appointed. If leave was granted, "it would confer upon the plaintiffs a security on an asset of the defendants which the plaintiffs otherwise did not have and could not have" (see p 310 at E to I).

17 I was of the view that Thean J's citation of *Exchange Securities* was not intended to be a general rule discouraging the exercise of the jurisdiction and discretion under s 262(3) in favour of a plaintiff. It all depends on the particular circumstances of each application.

18 Indeed, it was important to bear in mind the facts and arguments in *Exchange Securities* which led Mervyn Davies J to say what he did. In that case, there were ten applications for leave by nine applicants. As Mervyn Davies J observed at p 195 d:

> Counsel for the respondents (Mr Heslop) explained in some detail how he saw the liquidator proceeding if untrammelled by any investor's action. Section 246(3) enables a liquidator to apply to the court for directions. The provisional liquidator, said Mr Heslop, would be making use of that sub-section to determine which trust interests, if any, subsist. There would be respondents to the summons initiating the application. The respondents to the summons would

be representatives of the various classes of investors and a representative of the general creditors. In that way, the liquidator's neutrality would be preserved. In contrast to that, in the proposed action it was suggested that the liquidator would necessarily be in an adversarial position.

Advantages in relying on the ordinary liquidation machinery in this way were, he said, (a) that all proceedings would be in one court, (b) that the liquidator could see that all competing claimants were found and (c) that the laborious working out of a Chancery writ action would be avoided.

19 In the application before me, there was only one claimant against SIS. There was no suggestion by SIS' Counsel that SIS' liquidators would be taking a neutral position. Indeed, the liquidators were resisting RJ's claim. More importantly, there was no elaboration as to how the procedure in liquidation would be quicker and less expensive, especially since the counterclaim of RJ had already gone some way in the Suit. If I had decided not to grant leave, RJ would have filed his proof of debt which the liquidators would have rejected and a fresh action would have had to be filed which would have repeated all the steps already taken vis-à-vis RJ's counterclaim. That would have been more time-consuming and incur more costs unnecessarily.

20 In the circumstances, I was minded to grant leave, subject to the second issue.

21 As regards the second issue, s 262(3) of the Companies Act states:

(3) When a winding up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except -

(a) by leave of the Court; and

(b) in accordance with such terms as the Court imposes.

22 At first reading, the words "no action or proceeding shall be …" appear imperative and mandatory and suggest that leave cannot be granted retrospectively.

23 In the *Wilson* case, Milmo J was reported to have said, "The prohibition against issue without leave of the court imposed by section 231 of the Companies Act 1948 was absolute and unqualified". Section 231 of the Companies Act 1948 was the forebear of s 130(2) of the Insolvency Act 1986.

24 In *NEMGIA*, Rattee J said at p 234 i to 235 a:

… I should follow Milmo J's decision unless I am satisfied that it was plainly wrong. I am not so satisfied. It seems to me that, with great respect to Milmo J, his decision represented the natural construction of the words of, in his case s 231 of the Companies Act 1948, and in the present case of s 130(2) of the Insolvency Act 1986. Each of those provisions provide in the clearest possible terms that no action shall be commenced against a company in liquidation without the leave of the court. That is, in my judgment, as Milmo J held it was, a provision constituting an absolute bar upon the commencement of an action against a company in liquidation without first obtaining the leave of the court.

25 Before I elaborate on the decision of Lindsay J in *Re Saunders*, I should set out s 285(3) and s 130(2) of the Insolvency Act 1986. As I have said, the provision applicable before Lindsay J was s 285(3) but he considered that to be similar to s 130(2).

26 Section 285(3) of the 1986 Act states:

After the making of a bankruptcy order no person who is a creditor of the bankrupt in respect of

a debt provable in the bankruptcy shall -

(a) …, or

(b) before the discharge of the bankrupt, commence any action or other legal proceedings against the bankrupt except with the leave of the court and on such terms as the court may impose. This is subject to sections 346 (enforcement procedures) and 347 (limited right to distress).

27 Section 130(2) of the same Act states:

When a winding up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company or its property, except by leave of the court and subject to such terms as the court may impose.

28 As I have said, s 130(2) is, for present purposes, in *pari materia* with our s 262(3) Companies Act.

29 In *Re Saunders*, a number of plaintiffs had commenced actions against a solicitor Saunders, and also against another solicitor, without learning of Saunder's bankruptcy and then sought leave under s 285(3) of the 1986 Act to do so. The plaintiffs' Counsel raised five heads of argument to persuade Lindsay J that he could and should grant leave retrospectively and, hence, not follow the decisions of Milmo and Rattee JJ.

30 First, they referred to English cases on the forbears of s 130(2).

31 Secondly, they referred to other English cases on different Acts where leave is apparently required before proceedings may be commenced.

32 Thirdly, they referred to difficulties or anomalies if a strict literal construction was applied.

33 Fourthly, they cited Commonwealth cases from Australia, New Zealand, Canada and India.

34 Fifthly, they raised arguments of injustices and inconveniences if retrospective leave cannot be given.

35 Lindsay J noted that, apparently, none of the cases cited for the first, second and fourth heads of argument were cited to Milmo and Rattee JJ.

36 After a comprehensive review of all the heads of argument, Lindsay J concluded that he could and did grant retrospective leave. It is unnecessary for me to quote extensively from the judgment of Lindsay J. Suffice it for me to say that I found his reasoning highly persuasive. However, I had the following additional reasons.

37 Although no local cases were cited to me with respect to the second issue, it turned out that in *The Hull 308*, which SIS' Counsel had cited for the first issue, the Court of Appeal had proceeded on the assumption that it had jurisdiction to grant leave retrospectively although its decision was not to grant leave at all for the reason I have stated.

38 As regards Commonwealth cases, the solicitors for SIS drew my attention, after further research was done, to a decision by the High Court of Australia in *Emanuele & another v Australian Securities Commission & others* 144 ALR 359. This decision was given on 5 June 1997 after the 1996 decision of Lindsay J and thus could not have been cited to him. The case of *Emanuele* also involved the question whether leave could be granted retrospectively. However, I do not propose going into the details of the facts and legislation there as they are different from those before me. Nevertheless, the case is still useful as an illustration of a situation where the High Court of

Australian, albeit by a majority of three to two, took the view that leave of court could be granted retrospectively in the face of emphatic language in provisions which appeared to make the obtaining of prior leave mandatory. I would add that although Gaudron J was one of the dissenting judges, he too was inclined to the view that leave could be granted retrospectively in the context of the legislation there, but not after a certain event had taken place i.e a winding up order had been made (see p 375 line 42 to p 378 line 29 of the report). Under the legislation in that case, certain parties who wanted to apply to the court for a company to be wound up in insolvency were required to obtain leave of court before the application for winding up was made.

39 As regards the argument of injustice and inconvenience, I was also of the view that while a plaintiff can be expected to make a winding up search before commencing action against a company, his search may not divulge the existence of the winding up order if he has mis-spelt the full name of the company.

40 Moreover, even if the plaintiff has done his search and then commences action, how often will he be expected to repeat his search in the course of the litigation? After all, it may well be that there is no trace of a winding up order or even a winding up petition against the defendant company at the time just before the action is filed, but, after the action is filed, a winding up petition is filed and a winding up order is then made.

41 As for the advertisement of a winding up petition in the Gazette and in the press, there are times when the advertisements are placed some time after the petition is filed due perhaps to negotiations between the debtor company and the petitioning creditor. What happens to the steps taken by the plaintiff between the date of the filing of the petition and the advertisements?

42 I was also mindful of the situation where a plaintiff might have been encouraged (or misled, as Lindsay J said at p 77 at F) into commencing or carrying on with his litigation as appeared to be the case before me. Here, both sides knew SIS was in liquidation. The liquidators must also be more familiar with the requirement under s 262(3). Yet no objection was raised by the liquidators, at the material time, to RJ's counterclaim having been commenced without leave and, indeed, the liquidators were content for this state of affairs to continue until they decided to withdraw SIS' claim. I do not say that they were under a duty to tell RJ that he was required to obtain leave, but, assuming RJ's claim had been pursued to a full trial with oral evidence and submissions and that RJ then obtained judgment, could the liquidators be heard to say that the judgment was a nullity since he had not obtained leave and the court had no jurisdiction to grant leave retrospectively? In the absence of clear words in the legislation requiring such a conclusion, I was of the view that such a conclusion could not be right.

43 As regards an argument that to allow a plaintiff retrospective leave might deprive liquidators, and hence other unsecured creditors, of limitation defences, the counter-argument was that to deny the jurisdiction to grant retrospective leave would be to leave the plaintiff, who had otherwise commenced his action in time, without a remedy. Indeed it was precisely the limitation defences that were of concern to Lindsay J (see p 65 at E and p 75 at G).

44 In any event, the question about limitation defences brought to the forefront the purpose of s 262(3).

45 In *Re Saunders*, Lindsay J said, at p 78H to 79C:

> In *Carr v. British International Helicopters Ltd.* [1994] I.C.R. 18, Lord Coulsfield gave the judgment in the Edinburgh Employment Appeal Tribunal which is, of course, a United Kingdom court. *Wilson's* case had been cited but not Rattee J's case. A plaintiff there wished to complain to an industrial tribunal that he had been unfairly selected for redundancy by the administrators. The leave that he should have obtained before commencing his proceedings was thus under section

11(3)(d) of the Insolvency Act 1986 but the language there used is much the same as in sections 103(2) and 285(3). The argument for nullity was correspondingly similar. In a passage the reasoning of which applies as much to bankruptcy as it did to section 11(3)(d), Lord Coulsfield said, at p.30:

> "In our view, the purposes of the insolvency legislation can quite well be served without requiring that a summons served, or an application made, without prior consent should be considered to be a nullity or incompetent. The purpose of the legislation is, in general terms, to prevent the liquidator's or administrator's task being made more difficult by a scramble among creditors to raise actions, obtain decrees or attach assets. We cannot, however, see that there is any reason why it should be necessary for the provision of such protection to treat any proceedings which may, for one reason or another, be commenced without consent as null and, therefore, incapable of proceeding further."

46 In *NEMGIA*, Rattee J said, at p 235:

> As Milmo J in *Wilson v Banner Scaffolding Ltd* (1982) Times, 22 June also pointed out, that provision was intended by the legislature to protect the interests of the creditors of a company in liquidation by preventing the company being subjected to actions once it has gone into liquidation without the court first considering whether such an action ought to be allowed.

47 While I accepted that s 262(3) was intended to protect the interests of the creditors of a company in liquidation, I did not, with respect, accept that that would necessarily mean that there should be no jurisdiction to grant leave retrospectively.

48 In my view, the purpose of s 262(3) is, as Lord Coulsfield alluded to in *Carr*, to prevent the liquidators from being distracted and the assets of the company in liquidation being expended to respond to unnecessary actions. After all, if a writ with a full statement of claim is filed and served, the plaintiff will have to claim his costs of the same. In addition, liquidators' own costs in having to consider the same, and perhaps, consulting solicitors especially in the context of a dead-line regarding entry of appearance and filing of a defence may also escalate.

49 Consequently, I did not think that the purpose of s 262(3) was to allow liquidators, and hence other unsecured creditors, an unexpected windfall which would arise if the court does not have jurisdiction to grant retrospective leave and a plaintiff cannot file a fresh action because of limitation defences.

50 I end by saying that I was aware that a decision that the court has such a jurisdiction might tempt potential plaintiffs and their solicitors to be lax about making winding up searches and seeking the court's leave promptly. I would only say that if such be their attitude, then they act at their own risk. As is obvious, the existence of the jurisdiction does not necessarily mean that the jurisdiction will be exercised in favour of all applicants. It is still for applicants to persuade the court why such leave should be granted, especially if retrospectively. The mere fact that time and costs have already been incurred will not necessarily be sufficient always to persuade the court to grant leave retrospectively.

Plaintiff's application allowed.