Ng Sing King and Others v PSA International Pte Ltd and Others
[2003] SGHC 59

Case Number : OS 1022/2002

Decision Date : 18 March 2003

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : Andre Maniam and Melvin Chan (Wong Partnership) for Plaintiffs; K Shanmugam SC and Valerie Tan (Allen & Gledhill) for First and Third Defendants; Thio Shen Yi, Collin Seah and Karen Teo (TSMP Law Corporation) for Second and Fourth Defendants

Parties : Ng Sing King; Lim Koon Hock; Hong Jen Cien; Wong Ban Kwang; Ng Siew King; Lo Lain; P-Serv Pte Ltd — PSA International Pte Ltd; P & O Australia Ports Pty Ltd; PSA Corporation Limited; P & O Ports Ltd; Elogicity International Pte Ltd

Civil Procedure – Striking out – Whether parties to remain on record where no remedy available against them – Rules of Court (Cap 322, R 5, 1997 Rev Ed) O 18 r 19

1 These two appeals were lodged by the Third Defendant (RA 337 of 2002) and the Fourth Defendant (RA 335 of 2002) against the decision of the Senior Assistant Registrar Toh Han Li who dismissed the said Defendants' applications to remove themselves as parties to the action and to strike out all references to them in the Originating Summons pursuant to Order 18 rule 19 of the Rules of Court or under the inherent jurisdiction of the Court. The Senior Assistant Registrar also ordered them to pay costs of $2,000 each to the Plaintiffs. The Fifth Defendant was not involved in these applications and was therefore unrepresented at the hearing of these appeals.

2 In September 2002, the parties attended before Woo Bih Li JC and directions were given by the judge for the filing of affidavits by the Defendants. On 1 November 2002, the judge ordered the filing of pleadings and of further affidavits. Pursuant to these directions, the Plaintiffs filed their Statement of Claim on 15 November 2002 and the Defendants filed their respective Defences subsequently. The Fourth Defendant took out the application below (for striking out) on 28 October 2002. The Third Defendant took out its application on 22 November 2002.

The statement of the claim

3 The Fifth Defendant is a company incorporated in Singapore. It is engaged in the business of providing cargo 'track and trace' solutions for the shipping logistics industry. Until 10 January 2001, it was known as P-Serv Technologies Pte Ltd.

4 The Plaintiffs and the First and the Second Defendants are the registered shareholders of the Fifth Defendant. The Plaintiffs hold collectively 34.02% of the shares while the First Defendant holds 32.8% and the Second Defendant holds 33.18%.

5 The First Defendant is a wholly owned subsidiary of the Third Defendant. The Second Defendant is 99% owned by the Fourth Defendant and 1% owned by P & O Australia Ltd, the holding company of the Fourth Defendant.

6 The Fifth Defendant has nine directors. The First, Second and Third Plaintiffs are presently directors of the Fifth Defendant. The First Plaintiff is also the Chairman of the Board of Directors of the Fifth Defendant. The other six directors of the Fifth Defendant comprise three representatives from the First and the Third Defendants and three representatives of the Second and the Fourth Defendants.

7 The Fifth Defendant was founded in 1992. In 1997/1998, it developed the eSeal, a wireless security device affixed onto cargo containers which informs the user whether the containers have been tampered with. From 1998, the Fifth Defendant focused its business on providing global 'track and trace' solutions to cargo owners and shippers.

8 The company began looking for investors in its technology. The Third and the Fourth Defendants indicated their interest and entered into negotiations with the Plaintiffs and the Fifth Defendant. The Third Defendant's representatives informed the First and the Second Plaintiffs that its internal practices required such investments to be held by its investment holding subsidiary, the First Defendant, and that the nomination of the First Defendant as a shareholder in the Fifth Defendant would not make any difference in substance to the Third Defendant's support of the Fifth Defendant. The difference would be in name only. It was also represented that the Third Defendant would lend its full resources and influence to the Fifth Defendant. Similarly, in various discussions with the Fourth Defendant's representatives, it was orally represented that the Fifth Defendant would receive the full support and resources of the Fourth Defendant and the P & O Group although the shares were held in the name of its subsidiary, the Second Defendant.

9 On 29 September 2000, the Plaintiffs entered into a Shareholders' Agreement and a Subscription Agreement with the First and the Second Defendants. Subsequent to that date, the Plaintiffs continued to deal with the same representatives from the Third and the Fourth Defendants.

10 The crucial paragraph in the Statement of Claim reads:

"19. In the circumstances, the Plaintiffs had at all times considered the Third and Fourth Defendants to be the shareholders in the Fifth Defendants as a matter of substance, notwithstanding that the registered shareholders were the First and Second Defendants. In most of their discussions and correspondence, all parties had simply referred to the First and Third Defendants as 'PSA' and the Second and Fourth Defendants as 'P & O' without distinguishing between the specific entities involved. PSA and P & O were also collectively referred to as the 'Strategic Shareholders' whereas the First to Seventh Plaintiffs were collectively referred to as the 'PNA Shareholders'. All further references in this Statement of Claim to 'PSA' shall be a collective reference to the First and Third Defendants whereas all references to 'P & O' shall be a collective reference to the Second and Fourth Defendants."

11 Following from the said paragraph 19, the Statement of Claim proceeds to detail the allegations that the affairs of the Fifth Defendant have been conducted and/or the powers of the directors have been exercised in a manner oppressive to the Plaintiffs and/or in disregard of the Plaintiffs' interest as members and shareholders of the Company. It also avers that acts of the Fifth Defendant have been done or are threatened and/or that resolutions of the members or shareholders have been passed which unfairly discriminate against and/or are otherwise prejudicial to the Plaintiffs. In particular, the Plaintiffs complain that:

(1) PSA and P & O were involved in matters that were in competition with the Fifth Defendant's business;

(2) PSA and P & O planned to collaborate with competitors of the Fifth Defendant to the exclusion of the Plaintiffs and to engage in activities that were contrary to the Fifth Defendant's interests;

(3) PSA and P & O sought to usurp the role of the Fifth Defendant's management and

consequently to conduct the affairs of the Fifth Defendant in complete disregard of the rights of the Plaintiffs; and

(4) PSA and P & O sought to diminish the value of the Fifth Defendant and ultimately to abandon it in order to facilitate their own pursuit of a similar business with other third parties to the exclusion of the Plaintiffs and thereby causing damage to the Plaintiffs' interests.

12 The Statement of Claim concludes:

"41. The Plaintiffs therefore seek relief to bring to an end and to remedy the matters complained of above.

And the Plaintiffs claim against the Defendants for the following relief:

(1) The First to Fourth Defendants, or any one of them, purchase all the Plaintiffs' shares in the Fifth Defendants at a fair value, taking into account the effect of the oppressive and unfairly prejudicial conduct of the First to Fourth Defendants, and without any discount arising from the fact that the Plaintiffs' shareholding in the Fifth Defendants is a minority shareholding in a private company;

(2) An independent accountant be appointed to determine the fair value of the Plaintiffs' shares in the Fifth Defendants as aforesaid;

(3) The sale and purchase of the Plaintiffs' shares in the Fifth Defendants be completed within thirty (30) days of the determination of the fair value of the Plaintiffs' shares in the Fifth Defendants pursuant to prayer 2 hereof;

(4) Further and alternatively, damages;

(5) Alternatively, the Fifth Defendants be wound up under the provisions of the Companies Act (Chapter 50), with such directions thereto as the Court may think fit;

(6) Costs of these proceedings be paid by the First to Fourth Defendants or any one of them; and

(7) Such further or other relief as this Honourable Court may deem fit."

The third defendant's arguments

13 The Third Defendant proceeded with its appeal on the assumption that the facts set out in the Plaintiffs' Statement of Claim were true. It was the parent company of the First Defendant but did not hold any shares in the Fifth Defendant. While there were officers employed by both the First and the Third Defendants, it did not follow that the Third Defendant was therefore a shareholder of the Fifth Defendant. The Third Defendant did not seek at this stage to question the jurisdiction of the Court to entertain a claim against non-shareholders in an action under section 216 Companies Act as there were cases indicating that the Court could.

14 However, it submitted that joining it as a party in the circumstances here was frivolous and vexatious. The only relief sought against the Third Defendant was a buy-out of the Plaintiffs' shares in the Fifth Defendant. There was no averment that the First Defendant would not be able to make the buy-out if the case was proved. The First Defendant was a company with a paid up capital of $600 million and it had invested some S$14 million in the Fifth Defendant. The claim against the Third

Defendant was made therefore essentially to embarrass it and to obtain discovery. On 22 July 2002, the solicitors acting for the First and the Third Defendants wrote to the Plaintiffs' solicitors to state the position of the said Defendants thus ('the Company' in the letter refers to the Fifth Defendant):

"Your clients' allegations of oppression and unfair conduct by our clients are without basis, and are denied. We note your clients have not set out any details of such alleged conduct in your letter. We add that your clients' allegations against PSA Corporation Ltd, which is not a shareholder in the Company, are baseless, and misconceived. Please do not include PSA Corporation Ltd in any further correspondence or proceedings.

Our clients remain amenable to considering and exploring sensible, commercial ways in which shareholders may realise the value of their shareholding in the Company. However, your clients' proposal to sell their shareholding to our clients, on the basis that the Company is valued at S$50 million, is unworkable. The true or fair value of the Company is not S$50 million. Accordingly, our clients do not agree with your clients' proposal. Our clients are prepared to purchase, on a pro-rata basis to their shareholding, your clients' shareholding at a fair value, determined by an independent expert. Alternatively, if parties cannot agree to a sensible solution, it may be preferable to proceed to a winding up of the Company, and the distribution of the assets pursuant to a liquidation.

Please let us have your clients' position on this. In the meantime, all our clients' rights are expressly reserved."

15 What the First and the Third Defendants got in response to their solicitors' letter of 22 July 2002 was this Originating Summons filed on 24 July 2002.

The fourth defendant's arguments

16 The Fourth Defendant also proceeded on the basis that a non-shareholder could, in appropriate cases, be joined in an action under section 216 Companies Act. However, those cases where such joinder was allowed involved exceptional circumstances which did not feature here.

17 The Second Defendant has a paid up capital of more than A$315 million. There was no allegation by the Plaintiffs that the Second Defendant would not be able to buy out their shareholding of approximately one-third of the Fifth Defendant even if it were valued at S$50 million. The Second Defendant was not a mere financial device. It was a genuine company which had invested some S$14 million in the Fifth Defendant. The Second and the Fourth Defendants were distinct legal entities incorporated in Australia and there were no exceptional circumstances justifying a lifting of the corporate veil. In fact, the Second Defendant was incorporated 11 years before the incorporation of the Fourth Defendant.

18 The many agreements between the parties were drafted with legal advice and they did not state that the Fourth Defendant was a party thereto in any way. In the agreement dated 29 September 2000 made among the parties, while the general definition of 'affiliated corporation' in clause 1.01 included a holding company of the parties, the 'Protection of Name and Non-competition' provision in clause 15, which prohibited competition with the Fifth Defendant by the shareholders' affiliated companies, excluded the holding companies of the First and the Second Defendants. The Fourth Defendant would not be affected by a winding up of the Fifth Defendant in any event.

The plaintiff's arguments

19 The first objection to the applications was that the Third and the Fourth Defendants had

ample opportunity to apply to Court to strike out the claim against them but had delayed doing so until after substantive affidavits had been filed and directions taken. They ought to have done so as soon as possible after the service of process. Further, the Court should not grant the applications to strike out unless there was a manifestly clear case for doing so.

20 The Plaintiffs were not alleging that the first two Defendants would not be able to effect a buy-out. The relief sought was not a simple buy-out – the Plaintiffs wanted the conduct of the Third and the Fourth Defendants to be taken into account for the valuation of the shares.

21 In this case, representations were made by representatives of the Third and the Fourth Defendants and prejudicial acts were carried out by them. The Business Plan was originally given to the Third Defendant but the First Defendant was now counterclaiming against the Plaintiffs based on representations allegedly made by them to the Third Defendant. Further, a Confidentiality Agreement and Memorandum of Understanding was signed with the Third Defendant.

22 The Plaintiffs did not join the Defendants in question merely because they were the holding companies of the shareholders. The Plaintiffs dealt with the same representatives of the Defendants in question before and after the agreements were signed. The Third Defendant's representatives explained that their internal practices required such investments to be held by the Third Defendant's investment holding subsidiary, the First Defendant. It was also represented that the nomination of the First Defendant as a shareholder of the Fifth Defendant would make no difference to the arrangements and that the Third Defendant would support the Fifth Defendant fully and would lend its resources and influence to the Fifth Defendant. Similar representations were made about the Fourth Defendant's overseas investments being held through its subsidiary, the Second Defendant.

23 The Third and the Fourth Defendants committed prejudicial acts against the Fifth Defendant. On the facts here, they were not free to do as they wished on the ground that they were not shareholders of the Fifth Defendant.

24 There were many authorities holding that non-members and non-shareholders could be joined in an action under section 216 Companies Act. The Court did not need to decide on the strength of the claims at this stage. So long as the joinder was not clearly and manifestly bad, the appeals should be dismissed.

The decision of the court

25 Section 216 Companies Act, as summarised in its marginal notes, deals with personal remedies in cases of oppression or injustice.

26 There are English authorities which hold that it may be appropriate to join a non-member or non-shareholder in an application taken out under their equivalent of our section 216 Companies Act.

27 In *Re a company* [1986] BCLC 68, Hoffmann J refused to strike out a claim by minority shareholders in a family company against a former shareholder who held a controlling interest in the company and who was alleged to have breached his fiduciary duties. In *Re BSB Holdings Lt*d [1993] BCLC 246, a company (B Sky B) to which the business of its former parent company was transferred was held to be a proper or necessary party in a petition by a shareholder of that parent company for relief under section 459 of the UK Companies Act 1985 because the relief sought, if granted, would affect the composition of B Sky B's shareholders' meeting. In addition, B Sky B was directly involved in the various transactions involving the said parent company which were alleged to be unfairly prejudicial to the petitioner.

28 Relief could be sought against a non-member and, in appropriate cases, a person could be made a party to such proceedings even though no relief was sought against him. However, the Court may strike out a claim, even against a person involved in the alleged unfairly prejudicial conduct, if no remedy was sought against that person (*Re Little Olympian Each-Ways Ltd* [1994] 2 BCLC 420). On the facts of that case, since no Court would make the buy-out order sought against the entity in question, the Court declined to exercise its discretion to join that entity as a party.

29 Relief could be sought against a person in *de facto* control of the company at the material time as well as against a second company under the same or substantially the same *de facto* control to which the assets of the first company had been transferred at an undervalue as part of a 'hiving up' operation (*Re Little Olympian Each-Ways Ltd (No. 3)* [1995] 1 BCLC 636). Similarly, it was held that the said UK statute conferred a very wide jurisdiction on the Court and where the conduct complained of involved the diversion of company funds, an order for payment to the company could be sought against members, former members or directors allegedly involved in the unlawful diversion and third parties who had knowingly received or improperly assisted in the wrongful diversion (*Lowe v Fahey and others* [1996] 1 BCLC 262).

30 It can be seen that the general principle is that relief under section 216 Companies Act is sought against members and directors of the company in issue and that an action under that provision against non-members is exceptional. Indeed, where the Court will not grant any relief against a non-member brought into the proceedings, it would be an abuse of process of Court to allow that non-member to remain on the record.

31 Here, it is undisputed that any buy-out order will affect only the First and the Second Defendants and these two Defendants undoubtedly have the financial strength to comply with any such order whatever the value of the shares of the Fifth Defendant may eventually be determined to be. There is no indication what role the Third and the Fourth Defendants have in such an eventuality. Even the alternative claim for damages is nebulous. If a winding up order is made in respect of the Fifth Defendant, it will also have no implications for the Third and the Fourth Defendants beyond the fact that a company in which their respective subsidiary has a one-third share is going to be liquidated.

32 The undisputed facts show that the First and the Second Defendants are the contracting parties while the Third and the Fourth Defendants are not. The Shareholders' Agreement of 29 September 2000 defines 'PSA' as the First Defendant and 'P & O' as the Second Defendant. The Statement of Claim as pleaded disregards any distinction between corporate entities. What the Plaintiffs are saying by this is that so long as a company indicates it belongs to a particular group of companies, any act done by one company in that group is tantamount to an act done by another company in that group. I do not think such a position is tenable because it will enlarge a section 216 conflict to include shareholders of the shareholders of the company in question and directors of the parent company and controlling interests up the line.

33 Where the First Defendant's Counterclaim based on the Business Plan is concerned, it is up to the said Defendant to show how it came to be induced by and to rely on that plan which it avers was presented by the First Plaintiff to the Third Defendant.

34 Any delay in taking out the applications below was not so egregious as to justify denying the relief sought.

35 In the circumstances, therefore, there is no good ground to have the Third and the Fourth Defendants remain as parties to these proceedings and their applications should be granted.

Accordingly, I allowed their appeals and ordered the Plaintiffs to pay each of them $4,000 costs for the hearing here and below.