

Tong Guan Food Products Pte Ltd v Ong Leong Chuan (Ong Heng Chuan and another,
interveners, Third Party)
[2004] SGHC 80

Case Number : Suit 1633/1999, NM 600006/2004
Decision Date : 23 April 2004
Tribunal/Court : High Court
Coram : Choo Han Teck J
Counsel Name(s) : Loy Wee Sun (Loy and Co) for plaintiff; Kenneth Tan SC (Kenneth Tan Partnership) and Leslie Phua Oei Heong (Phua Wai Partnership) for second intervener
Parties : Tong Guan Food Products Pte Ltd — Ong Leong Chuan — Ong Heng Chuan and another, interveners

Civil Procedure – Appeals – Leave – Whether leave should be granted to appeal against orders on costs.

23 April 2004

Choo Han Teck J:

1 This is an appeal against an order (made on 18 March 2004) refusing leave to the second intervener to appeal against an order on costs. That order on costs was made on 31 October 2003. The other parties have not appealed.

2 The background facts are straightforward, but it will be helpful to trace the events to the origin of this action. This action, Suit No 1633 of 1999, was commenced by the plaintiff company, then represented by Drew & Napier, against the defendant, then represented by Hee Theng Fong & Co. The defendant was a director of the plaintiff and was sued in respect of alleged breaches of duties as director. One of the reliefs sought by the plaintiff was for an order for an accounting of assets purchased through company funds. There was also an allegation of misappropriation of \$200,000 belonging to the company. The first and second interveners are the defendant's brothers and they were also directors of the plaintiff company at the material time. The trial of this action commenced on 18 August 2000, and was adjourned part heard on 22 August 2000. It was scheduled to resume for hearing from 5 to 8 September 2000. On 7 September 2000, the plaintiff and the defendant entered a consent judgment. The judgment was in the following terms:

In respect of the plaintiffs' claim for \$200,000

By consent it is this day ordered that, the parties by their counsel have agreed on the terms of settlement as set forth in Schedule 1 hereto. All further proceedings in this part of the suit be stayed except for carrying such terms into effect.

The schedule to the order of court provided that the plaintiff and the defendant would appoint a special accountant to determine whether the defendant as well as the first and second interveners had "respectively used monies or assets belonging to the plaintiff or its subsidiaries to purchase shares in the plaintiff company that belonged to Ong Siew Kuan and Ong Siew Chin" (Ong Siew Kuan and Ong Siew Chin are sisters of the defendant and interveners). The schedule also provided that the purchase of any such shares "using the monies or assets of [the plaintiff or its subsidiaries] shall be void".

3 Ernst & Young were appointed as the special accountant and they rendered a report in July 2002. The report indicated that the two interveners were to be liable in respect of irregularities stated in the said schedule. Consequently, the plaintiff applied by way of a summons in chambers on 18 July 2002 to "implement the terms of the settlement" of 7 September 2000 against all three brothers. The summons was served on the defendant as well as his two brothers, claiming relief not only against the defendant but also against his two brothers.

4 The defendant, now represented by Allen & Gledhill, indicated no desire to challenge the special accountant's report. However, on 19 July 2002 the two interveners applied by a summons in chambers for leave to intervene and challenge the plaintiff's application to enforce the consent judgment of 7 September 2000. The second intervener also applied to cross-examine the special accountant.

5 The second intervener's application was fixed for hearing before another court (not the original trial judge). At the hearing, it became apparent that the primary issue was whether the interveners were bound by the consent judgment of 7 September 2000. The parties then agreed to have that issue determined as a preliminary issue. As a result, that issue was fixed for hearing before this court on 30 October 2003.

6 The critical and foremost question at the hearing was whether persons who were not parties to the action could be bound by a consent judgment obtained between the plaintiff and the defendant there. Secondly, whether the unusual procedure adopted by the interveners in response to the plaintiff's summons (to enforce the consent judgment) was correct and appropriate.

7 On 31 October 2003, Mr Loy, now counsel for the plaintiff, asked for leave to withdraw the plaintiff's summons in chambers. The defendant and interveners had no objections but asked for costs. Reasonable disbursements were ordered to be paid to the defendant who did not challenge the special accountant's report, and was present only because he was a party on record.

8 So far as the interveners were concerned, no costs were awarded to them as the summons in chambers taken out by them was an incorrect and inappropriate response. An error was first made when the consent judgment was entered which purported to affect the interests and rights of persons (the interveners) who were not parties to the action. The error was compounded by the interveners' application to intervene as interveners. In my view, the correct procedure, in the circumstances, was to apply by way of an originating summons to declare that the consent judgment did not bind them, and consequently, that the plaintiff's summons in chambers should also be struck out. Even the plaintiff ought to have proceeded by way of an originating summons to enforce the terms of the consent order. The judgment had ended the action in this suit.

9 The third error arose when the parties proceeded to act on the intervention of the interveners, whose intention was to attack the consent judgment on the merits by challenging the findings of the special accountant. It was a long while before the simple issue of whether they were in fact bound by the terms of the 7 September 2000 consent order became apparent to them, by which time, much time and costs had been incurred by all parties concerned. Taking the entire history of this matter into account, no party was deserving of costs being awarded either against him or for him, save for the defendant who had attended the proceedings, more as a spectator than a party. Therefore, other than the defendant, each party ought to bear his own costs.

10 Thereafter, on 18 March 2004, the second intervener applied for leave to appeal against the

orders in respect of costs. On the facts above, there appeared no merit to warrant an appeal to the Court of Appeal. The only substantial point raised by counsel was that the interveners had no alternative but to apply to intervene, and that in the process, lengthy affidavits had been filed by them and the plaintiff. Counsel thus argued that the work done must be compensated by costs. These arguments had been taken into account when the orders on 31 October 2003 were made, and therefore, there was no need to revise the orders since no new grounds were given.

Second intervener's appeal dismissed.