Tang Yoke Kheng (trading as Niklex Supply Co) v Lek Benedict and Others [2004] SGHC 84

Case Number : Suit 864/2003, SIC 5381/2003, 6667/2003

Decision Date : 28 April 2004

Tribunal/Court : High Court

Coram : Lai Kew Chai J

Counsel Name(s) : P Suppiah and Elengovan Krishnan (P Suppiah and Co) for plaintiff; Daniel John and Lim Fung Peen (John, Tan and Chan) for first and second defendants; Daryll Ng (Haridass Ho and Partners) for third defendant

Parties : Tang Yoke Kheng (trading as Niklex Supply Co) — Lek Benedict; Lim Wee Chuan; Tan Te Teck Gregory

Injunctions – Purposes for grant – Protection of property – Failure to make full and frank disclosure of material facts – Whether plaintiff acted oppressively – Sections 339(1), 339(3), 340(1), 409A Companies Act (Cap 50, 1994 Rev Ed)

28 April 2004

Lai Kew Chai J:

1 On 5 September 2003, the plaintiff, trading as Niklex Supply Company, obtained interim injunctions against the defendants enjoining them from disposing or otherwise dealing with the goods and assets belonging to a company known as Amrae Benchuan Trading Pte Ltd ("Amrae Benchuan"), which were alleged to be in the possession and control of seven companies and one sole-proprietorship. The first defendant ("Lek") and the second defendant ("Lim") were directors of Amrae Benchuan. They were alleged to be linked to the eight entities. At the material times, the plaintiff had sold Bohemian crystals on credit to Amrae Benchuan. Over the years of transactions, the outstanding sum unpaid was alleged to be $1,544,214.02.

2 The High Court granted the injunctions and made other orders, to which I will revert, under s 409A of the Companies Act (Cap 50, 1994 Rev Ed). This new section promulgated by Act No 13 of 1987 empowers the court to grant interim and final injunctions to restrain, *inter alia*, threatened or actual offences against the Act. It also requires a person to do an act he has refused or failed to do. The court may rescind or vary an injunction granted. It may also order a person to pay damages. As it is statutory, the discretionary factors which a court should take into account may not be coincident with, and in certain circumstances may be outwith, those which would operate when a court is exercising its traditional equitable jurisdiction. I shall later in this judgment consider more fully the scope of the statutory injunction provided for under the Companies Act, including its relationship with equitable principles governing injunctions.

3 In support of her application for the injunction, the plaintiff alleged that the defendants had actually contravened ss 339(1), 339(3) and 340(1) of the Companies Act. The first allegation has to do with proper accounts; this allegation was hardly referred to in submissions. Section 339(1) imposes liability where proper accounts are not kept by officers of the company in question. It imposes liability on every officer where it is shown that proper books of account were not kept by the company throughout the period of two years and the commencement of the investigation. The prescribed punishment is a fine not exceeding $5,000 or to imprisonment for a term not exceeding one year.

4 The contravention of the Companies Act, which was heavily relied upon by the plaintiff, was that of s 339(3) of the Companies Act. If it appears that any business of a company has been carried

on with intent to defraud creditors of the company or for any fraudulent purpose, a court may declare the person who was knowingly a party to the carrying on of business in that manner to be personally responsible for all or any of the debts or other liabilities of the company as the court directs.

5 Lastly, the plaintiff also relied on the alleged responsibility of the defendants for fraudulent trading in contravention of s 340(1) of the Companies Act. She alleged that the business of Amrae Benchuan had been carried on with intent to defraud creditors of the company in contravention of s 340(1) of the Companies Act. The plaintiff sought a declaration that the defendants are personally responsible to her for the debt of Amrae Benchuan.

The interim orders

6 As noted earlier, each of the defendants was restrained until further order from selling or otherwise disposing of the goods and assets belonging to Amrae Benchuan which were allegedly, at the time of the application for interim orders, in the custody, control and possession of eight entities named in the order. They are Axum Marketing Pte Ltd ("Axum"); Amrae Benchuan International Pte Ltd ("AB International"); Amrae Benchuan Sdn Bhd, a Malaysian incorporated company ("Amrae Malaysia"); Concept Gifts, a sole-proprietorship ("the sole-proprietorship"); Concept Gifts Pte Ltd ("Concept Gifts Singapore"); Concept Gift (M) Sdn Bhd ("Concept Gift (M)"); Edge Point (M) Sdn Bhd ("Edge Point (M)") and Edge Point (S) Pte Ltd ("Edge Point").

7 Each of the three defendants was further ordered to cause each of the eight abovenamed entities to transfer all the goods and assets in their possession, custody or control back to Amrae Benchuan for no consideration.

8 Each of the defendants were also ordered to disclose all their assets, both in Singapore and outside Singapore, which they own legally or beneficially, giving the value, location and details of all such assets including the goods and assets of Amrae Benchuan. The defendants were ordered to confirm their disclosures in an affidavit to be served within seven days after service of the order.

Discharge of injunctions

9 As the result of the injunctive and mandatory orders, the businesses of the three defendants were brought to a grinding halt. Despite the discharge of the injunctive and mandatory orders on 17 October 2003 all bank accounts of the eight entities were frozen. I was told that the plaintiff was advised that pending further arguments before me, the plaintiff was not obliged to serve on all parties concerned the orders I had made discharging the interim orders. The defendants applied to discharge the interim orders made. Tan, the third defendant, initially applied to vary and strike out various paragraphs of the interim orders. But seeing that both Lek and Lim, the first and second defendants, had successfully applied to discharge the interim orders made, Tan, the third defendant, amended his Summons in Chambers No 5747 of 2003 and sought the discharge of all the interim orders. That he would ask for the same reliefs from the injunctive and mandatory orders was only logical and proper. After all, the grounds for his application and both the factual and statutory background were the same as those affecting the first and second defendants.

10 In the result, all three defendants sought, firstly, the unconditional discharge of the *ex parte* interim injunction, as spelt out in para 1(i) to (vi) of the order of court. Secondly, they applied to set aside the mandatory injunction ordering them to procure the transfer to Amrae Benchuan of all the goods and assets of the eight entities named in the said order of court at no consideration. Thirdly, they applied to set aside the personal orders made against them to disclose all their assets. Fourthly, they applied for an enquiry into damages sustained by them and which ought to be paid by the

plaintiff by reason of the wrongful issue of the injunctive orders. They finally sought indemnity costs against the plaintiff for wrongfully obtaining the injunctive and mandatory orders.

11 The grounds of the defendants' application to set aside the draconian interim orders made were briefly as follows:

(a) The plaintiff had contravened Practice Direction No 2 of 1998 of the Supreme Court Practice Directions;

(b) The plaintiff had failed to make full and frank disclosure in obtaining the statutory interim injunctions, which were also in two respects mandatory;

(c) No real risk of dissipation of assets by the three defendants was shown;

(d) The plaintiff had obtained the injunctive and mandatory orders for the purpose of oppressing the defendants and had abused the process of the court in doing so; and

(e) The plaintiff had wrongfully obtained final relief in obtaining the injunctive orders.

12 On 17 October 2003 I heard the oral application of the first and second defendants to discharge the interim injunctions and the mandatory orders to disclose assets and to confirm the same by an affidavit. They had initially applied to the judge of the High Court who had made the said orders, but the applications were fixed before me for hearing. At the time of the hearing, the first and second defendants had filed their joint affidavit on 10 September 2003. Before I heard the applications to discharge the statutory injunctions and the other orders, the application by Summons in Chambers No 5707 of 2003 filed by Tan, the third defendant, was heard by Choo Han Teck J, who ordered that the earlier orders of the High Court made by another judge should be stayed pending further order "subject to the order preventing disposal of the assets", which were allegedly still in the possession or control of one or more of the eight entities named earlier in this judgment.

13 In relation to the oral applications of the first and second defendants, which I heard on 17 October 2003, I made the following orders after full submissions were made. The application of Tan, the third defendant, which was essentially for variation, was heard later. By the time it was heard, I had announced my decisions in relation to the applications of the first and second defendants. As noted earlier, Tan, the third defendant, amended his application and sought a full discharge of the statutory injunctions and other orders made against him. All three parties asked for an order for enquiry as to damages on the ground that the application for the statutory injunction and the other orders were misconceived and damages ought to be paid.

14 At the conclusion of the hearing of the applications of the first and second defendants, I concluded that the allegations of the plaintiff that the defendants had conducted fraudulent trading, which was the main ground relied on by the plaintiff, required more particulars, although they did raise issues which required investigation at a trial after fuller particulars were filed. But much more had been disclosed after the plaintiff executed her judgment against Amrae Benchuan, which was inconsistent with fraudulent trading. As will be apparent later, when the entire picture was viewed in its perspective, I came to the conclusion that the statutory injunctions and the mandatory orders of disclosure of assets against the individual defendants, including the order that they affirm the list of their assets, were unjustified. The defendants' grounds were made out. I therefore discharged those orders. In announcing my decision, I also observed that the applications against the first and second defendants should have been served and heard *inter partes*. There were, existing between the parties, execution-related proceedings among the plaintiff, Amrae Benchuan and the first and second

defendants just a few days earlier before the plaintiff's application. Their solicitors appealed against each other in court proceedings. I was also of the view that the plaintiff had not made full and frank disclosure of material facts. However, as to damages suffered by reason of the statutory injunctions, I ordered that the question be left to the trial judge. I ordered the plaintiff to pay the first and second defendants costs fixed at $6,000 and to pay the individual disbursements incurred by each of them.

15 I had directed the plaintiff and her lawyers to write to all parties upon whom they had served the statutory injunctions and other orders giving notice of the discharge of the injunctions and the said orders. It is a matter of regret that the plaintiff has chosen not to obey the direction.

Statutory injunctions and other orders

16 As noted earlier, the statutory and other orders were made under s 409A of the Companies Act, the relevant parts of which read as follows:

> (1) Where a person has engaged … in any conduct that … would constitute a contravention of this Act, the Court may, on the application of … any person whose interests have been, are or would be affected by the conduct, grant an injunction restraining the first mentioned person from engaging in the conduct and, if in the opinion of the Court it is desirable to do so, requiring that person to do any act or thing.
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> …
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> (3) Where an application is made to the Court for an injunction under subsection (1), the Court may, if in the opinion of the Court it is desirable to do so, before considering the application, grant an interim injunction restraining a person from engaging in conduct of the kind referred to in subsection (1) pending the determination of the application.
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> (4) The Court may rescind or vary an injunction granted under subsection (1) … or (3).
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> …
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> (8) Where the Court has power under this section to grant an injunction restraining a person from engaging in particular conduct, or requiring a person to do a particular act or thing, the Court may, either in addition to or in substitution for the grant of the injunction, order that person to pay damages to any other person.

17 The court's powers under the provisions are discretionary and it may grant a statutory injunction and other remedies if, in its opinion, "it is desirable to do so". In contract, the foundation for the exercise of injunctions under the traditional equitable principles is also to be found in statutory provisions, namely para 5(a) of the First Schedule to the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) and s 4(10) of the Civil Law Act (Cap 43, 1999 Rev Ed). The former provides that the court has power to make an order for "the interim preservation of property which is the subject matter of the proceedings by … injunction". The latter states that "an injunction may be granted … by an interlocutory order of the court, either unconditionally or upon such terms and conditions as the court thinks just, in all cases in which it appears to the court to be just and convenient that such order should be made". The latter is the basis of the court's jurisdiction to grant interlocutory injunctions: see *Kwek Juan Bok Lawrence v Lim Han Yong* [1989] SLR 655. Anton Piller orders and Mareva injunctions are issued under sub-paras 5(a) and (c) of the First Schedule to the Supreme Court of Judicature Act.

18 A court has to exercise its discretionary powers under s 409A of the Companies Act justly and sensibly. The jurisdiction to issue statutory injunctions and make other orders under s 409A of the Companies Act is conferred so that courts may in exercising it either deter contraventions of the provisions of the Companies Act, such as trading with the intention of defrauding creditors, or prevent the furtherance of such infractions of provisions of the Companies Act. It follows that courts may take into account in relation to s 409A of the Companies Act wider issues than those which arise under traditional equitable principles and, for present purposes, I had to consider whether the statutory injunction would serve the purposes of the Companies Act.

19 On the other hand, traditional equitable considerations of questions such as whether there is a serious question to be tried, the risk of dissipation of assets to defeat a judgment and where the balance of convenience lies, will not limit the scope of s 409A of the Companies Act. At the same time, it seemed to me an unassailable proposition that the interest of justice will always require those questions to be examined carefully when far-reaching and extensive injunctions, including mandatory injunctions, are sought before the entire case has been properly examined and adjudicated upon by the court at a trial: see *Australian Securities and Investments Commission v Mauer-Swisse Securities Ltd* (2002) 42 ACSR 605.

20 In this case, however, I took the view that before any interim statutory injunction and the mandatory injunctions could be issued, there must be established a *prima facie* case of contravention of a relevant provision of the Companies Act and there is an appreciable, and not a fanciful, risk that without the issue of the injunctive and mandatory orders proper corporate compliance under the Companies Act would be frustrated. Equally, a judgment creditor who has been frustrated after several proceedings to execute on the judgment and the public examinations of officers of the corporate judgment debtor must not resort to statutory injunctions and other mandatory orders without disclosing the commercial contexts in which the judgment debt was incurred. The provisions of s 409A of the Companies Act are designed to achieve the purposes of the Companies Act and not as a weapon of oppression by a frustrated judgment creditor.

21 I was satisfied that the plaintiff had *locus standi* to make the application under s 409A of the Companies Act: see *Allen v Atalay* (1993) 11 ACSR 753 which involved the transfer of assets at undervalue between two companies with a common board of directors and where it was held that a creditor having a right to prove in the liquidation of a company may be a person whose interests are affected by a contravention of the Corporation Act, Victoria, Australia.

The background

22 As noted earlier, the plaintiff sold Bohemian crystals on credit to Amrae Benchuan for the sum of $1,544,214.02. Lek and Lim, the first and second defendants, were the directors of Amrae Benchuan. Tan, the third defendant, was an employee of Amrae Benchuan.

23 I now set out the allegations of the plaintiff. She alleged that the defendants, in contravention of s 340(1) of the Companies Act, caused Amrae Benchuan to transfer goods to four of the eight entities mentioned above. AB International, which was incorporated on 24 March 2001, was transferred crystals worth $71,241.26. Secondly, crystals worth $1,268,983.02 were transferred to Axum, incorporated around the same time. Thirdly, crystals worth $331,777.70 were transferred to Amrae Malaysia, incorporated on 8 January 1998. Fourthly, the sole-proprietorship of Tan, the third defendant, received goods worth $390,429.14.

24 According to the plaintiff, she commenced an action in the High Court in Suit No 21 of 2002 against Amrae Benchuan who, through Lek and Lim, denied the receipt of the crystals. The claim

required strict proof. Later in the proceedings, Amrae Benchuan admitted it owed the plaintiff the sum of $245,266.02 and judgment was entered in February for this sum. Amrae Benchuan further admitted to the debt of $821,000 and judgment was further entered for this sum against Amrae Benchuan.

25 The plaintiff further alleged that the defendants caused the crystals sold by the plaintiff to Amrae Benchuan to be "transferred" to Concept Gift (M), Edge Point (M) and Edge Point, all of which only had nominal capital.

26 The plaintiff further disclosed that she only recovered from Amrae Benchuan the sum of $59,710.46 on 26 September 2002.

27 According to the plaintiff, she discovered that the defendants had put in place a scheme to defraud her by inducing her to sell the crystals on credit to Amrae Benchuan with no intention on their part to pay for them. Instead they had transferred the crystals "to some of the companies" within the group of the eight entities mentioned earlier in this judgment. It was submitted on behalf of the plaintiff that "the first and second defendants [had] filed Answers as officers of Amrae [Benchuan] admitting transferring the said goods purchased from the plaintiff to some of the companies" in the group of eight entities. I will revert to these "transfers" later.

28 The plaintiff further alleged that there was urgency in her application. The defendants had advertised sale of the crystals "at greatly discounted prices of 80%". She drew attention to the allegation that the defendants were likely to remove the crystals out of the reaches of the plaintiff as the defendants had changed the premises of Concept Gifts Singapore to a new location within a short time after its incorporation and had even removed its signboard. She also alleged that the defendants had withdrawn huge sums of money as salary, bonus and loans from Amrae Benchuan without any proper basis with "the sole aim of not paying the plaintiff for the [Bohemian crystals]".

The defendants' version

29 In their joint affidavit, Lek and Lim pointed to the fact, which was on the records, that after the two judgments were obtained in August and September 2002 against Amrae Benchuan in Suit No 21 of 2002, the plaintiff had immediately commenced writ of seizure and sale proceedings against Amrae Benchuan. On 26 September 2002, the entire stocks of the company, then under the control of Lek and Lim, at the company's office-cum-warehouse at No 80 Genting Lane, Genting Block, #06-05, Ruby Industrial Complex, Singapore were seized and later auctioned off. Both Lek and Lim asserted that no other stocks of Amrae Benchuan existed or had been in their control since the day of seizure on 26 September 2002.

30 The plaintiff then filed examination of judgment debtor proceedings against Amrae Benchuan in October 2002. Both Lek and Lim were compelled to attend court on 22 October 2002. They later completed a questionnaire, disclosing the company's assets around November 2002. Both Lek and Lim answered a further questionnaire. In the end, the examination of judgment debtor order was discharged. An examination of the answers in response to the two questionnaires confirmed that they were quite exhaustive and substantial.

31 In early 2003, the plaintiff garnished the account of Axum.

32 The plaintiff then commenced Suit No 415 of 2003 against all three defendants on 30 April 2003 seeking to recover from them personally the shortfall of their judgment debt after the process of execution. The claim was mounted under s 340(10) of the Companies Act. The averments in the statement of claim are for all intents and purposes identical to those in the present suit.

33 On 28 May 2003 the defendants successfully struck out the action. The defendants had contended, *inter alia*, that there were no proper and sufficient particulars of fraud and that the plaintiff had no right to lift the corporate veil. They further contended that the proper course was for the plaintiff to have wound up Amrae Benchuan after which the liquidators could and would, if they formed the view, commence proceedings against the defendants to make them liable if it appeared the defendants had carried on trading with the intent to defraud creditors.

34 Being dissatisfied with the decision of the assistant registrar, the plaintiff appealed against the dismissal of the action. The appeal was heard by Choo Han Teck J who dismissed the appeal.

35 In those proceedings, there was no application for any statutory injunction or other orders as prayed for in this suit. As the same facts and identical inferences were relied on, those reliefs ought to have been raised in those proceedings. But they were not.

36 On 22 August 2003, the plaintiff filed a companies' winding up petition against Amrae Benchuan. On 19 September 2003 Amrae Benchuan was wound up.

37 On 25 August 2003 the present suit was filed. The defendants asserted, quite correctly, that the statement of claim in this suit is "a rehash of the earlier Suit 415 of 2003 which [had] been struck out by [the High Court]".

38 After considering the opposing affidavits, I formed the view that the plaintiff ought to have disclosed all the prior enforcement action and the proceedings which had been taken but which were struck out. The impression was that this was a new action and that during the intervening period the defendants had been dissipating the assets of Amrae Benchuan, which was quite untrue.

39 The defendants further contended, in my view with ample justification, that this new action was an attempt to go behind the judgment in Suit No 21 of 2001. In that action, the plaintiff's original claim was $1,544,214.02. Before the hearing, judgment was obtained by the plaintiff for $245,226.02, interest and costs. When the hearing of the action came up before Tan Lee Meng J, the parties were given an adjournment for settlement negotiations. Both Lek and Lim negotiated with one Mr David Chan, the plaintiff's manager. According to Lek and Lim, they satisfied Mr David Chan that the balance sum payable by Amrae Benchuan to the plaintiff was $821,000.00. The parties agreed to this sum. A consent judgment was recorded by Justice Tan Lee Meng in his chambers on 5 September 2002 for the said sum.

40 In this action, the plaintiff through Mr David Chan made repeated references to the original claim of $1,544,214.02. But I noted that there is no claim in the statement of claim in this action that the consent judgment recorded by Tan J should be set aside. In my view, those references should be struck out.

41 On the evidence disclosed, it was clear that Amrae Benchuan did not have any trading with Concept Gifts Singapore, Concept Gift (M), Edge Point (M) and Edge Point. Therefore there was no question of any wrongful transfer of the crystals to them at all.

42 According to Lek and Lim, as regards Axum, AB International, Amrae Malaysia and the sole-proprietorship under which Tan, the third defendant, was trading, the Bohemian crystals in question were sold to them "at arms' length prices and they were duly invoiced and [those entities] had been making payments". Running accounts were maintained between Amrae Benchuan and the four entities in question. The bulk of the purchases by Amrae Benchuan were made sometime before Suit No 21 of 2002 was filed. During the first examination of the judgment debtor proceedings, both Lek and Lim had

disclosed the amounts owed by those entities to Amrae Benchuan for those sales. It was clear from the evidence that Amrae Benchuan fell upon bad times and its 11 years of trading with the plaintiff ended in outstanding debts, for which judgments had been entered. It was not at all true that Amrae Benchuan was the only supplier of crystals to the eight named entities.

43 While it was true that the three defendants incorporated Axum on 28 April 2001, the plaintiff failed to inform the court the reason behind it. By 2001, a serious falling out had happened between Mr David Chan, the manager of the plaintiff and the three defendants. Mr David Chan was charging prices for the crystals at higher prices than those charged by other suppliers of the same crystals. Accordingly, Axum was set up so that the defendants would have another vehicle to obtain crystals from other suppliers. Axum bought crystals from Amrae Benchuan too. The sales were at market price and there was no evidence of any sale at an undervalue. In fact, by a letter dated 13 June 2001, the first and second defendants, on behalf of Amrae Benchuan, wrote to Mr David Chan mentioning the agreement to pay the plaintiff by monthly instalments of $50,000 and the way the accounts were dealt with between them. Though Mr David Chan denied the agreement for payment by instalments, the correspondence showed a course of trading on credit. As claimed by the first and second defendants, Amrae Benchuan fell upon bad times, like so many other companies in the wake of the Asian financial crisis which began in July 1997.

44 The relationship between Amrae Benchuan and Axum was quite open and known in the market. They shared offices and the same warehouses. When the plaintiff seized the goods of Amrae Benchuan, the plaintiff ended up seizing the goods of Axum too! To the shock of everybody, the goods were sold for a song. Both parties suffered huge losses. Axum could have interpleaded but the exercise was pointless since it still had a debt of $474,804.43 for some of the crystals to Amrae Benchuan.

45 The defendants further contended, and I accepted, that the mandatory orders, which were in the nature of Mareva injunctions, were final in their effect although there had been no trial and they were made in spite of the fact that there were previous proceedings at which no application under s 409A of the Companies Act was ever made in the face of similar facts and identical inferences. To my mind, it was wholly unjust to the defendants that they should be ordered to disclose their assets and affirm the same by an affidavit.

46 All three defendants complained, again with ample justification, that the plaintiff had failed to serve the application on them. It was only ten days earlier that their respective solicitors had crossed swords with each other in court proceedings mentioned above. All along, all three defendants had responded to the examination conducted by the plaintiff in enforcement proceedings and there was no basis to allege that they were about to dissipate any of the crystals.

47 In the case of Tan, the third defendant, he was not even a party in Suit No 21 of 2002. Yet Mr David Chan, on behalf of the plaintiff, filed the supporting affidavit and alleged that the Tan, the third defendant, had also induced the plaintiff to consent to the judgment recorded by Tan Lee Meng J.

48 Furthermore, Concept Gifts Singapore has not been a party to any of the proceedings instituted by the plaintiff. Amrae Benchuan did not have any transaction with that company at all. Tan, the third defendant, was only a director of that company. Yet the plaintiff had served copies of the statutory injunctions and mandatory orders on leading department stores such as Takashimaya Singapore Ltd, Robinson & Co (Singapore) Pte Ltd and CK Tang Limited. The reactions from those parties were wholly unfavourable to Concept Gifts Singapore.

49 In the result, I concluded that the plaintiff had acted oppressively against all three defendants. She had obtained the statutory injunctions and the mandatory injunctions by stealth by suppressing the material facts which I had laid out.

Interim orders set aside with costs to defendants.