VisionHealthOne Corp Pte Ltd *v* HD Holdings Pte Ltd and others (Chan Wai Chuen and another, third parties)
[2010] SGHC 78

Case Number : Suit No 678 of 2009 (Summons No 6230 of 2009)

Decision Date : 12 March 2010

Tribunal/Court : High Court

Coram : Chan Seng Onn J

Counsel Name(s) : Dhillon Dinesh Singh, Ong Boon Hwee William and Melanie Chng Ai Ling (Allen & Gledhill LLP) for the plaintiff; Nandwani Manoj Prakash(Gabriel Law Corporation) for the second defendant; Emily Su (Wong Partnership LLP) on watching brief for the first and the third defendants.

Parties : VisionHealthOne Corp Pte Ltd — HD Holdings Pte Ltd and others (Chan Wai Chuen and another, third parties)

Civil Procedure – Discovery of documents

12 March 2010

Chan Seng Onn J:

Introduction

1 The plaintiff in the suit, VisionHealthOne Corporation Pte Ltd ("Plaintiff"), applied for discovery of documents against Bank of China Limited ("BOC") in Summons No 5937 of 2009 ("the Discovery Application") pursuant to O 24 r 6(2) of the Rules of Court (Cap 322, R5, 2006 Rev Ed) ("Rules of Court"). The Assistant Registrar ("AR") allowed the Discovery Application and ordered BOC to produce the relevant documents.

2 The second defendant, Xing Rong Pte Ltd (formerly known as Huadi Projects Pte Ltd) ("2nd Defendant") appealed against the AR's order for discovery ("Discovery Order") in Registrar's Appeal No 449 of 2009 (RA449/09). The Plaintiff took out an application to strike out RA449/09 in Summons No 6230 of 2009 (the "Striking Out Application").

3 On 11 January 2010, I allowed the Striking Out Application and the 2nd Defendant on 9 February 2010 filed an appeal against my decision.

Background Facts

4 The Plaintiff's claim arose from the Cooperation Agreement dated 18 October 2003 between the Plaintiff and 2nd Defendant which object was to establish a network of medical facilities in and outside China. The funds for the joint venture would be provided solely by the Plaintiff.

5 The Plaintiff claimed that it had entrusted the sum of $2.125 million (the "Sum") to the 2nd Defendant for the purpose of the joint venture. The Sum was transferred to the 2nd Defendant's BOC account ("the Account") in three tranches between December 2003 and January 2004.

6 The 2nd Defendant admitted that it had received the Sum. However, the 2nd Defendant alleged that the receipt was pursuant to a currency exchange transaction between the Plaintiff and the 2nd Defendant. Therefore, no funds were provided under the Cooperation Agreement to further any proposals for the purpose of the joint venture.

7 The Plaintiff claimed that, *inter alia*, it was wrongfully induced into transferring the Sum to the 2nd Defendant through the latter and/or its representative's false and fraudulent misrepresentations.

8 Prior to March 2007, the 2nd Defendant represented to the Plaintiff that it had remitted the Sum to a third party Chinese company, Fuzhou Huadi Hebang Construction Renovation Engineering Company Ltd ("FHH") in or about 2004 for the purposes of the joint venture to establish a medical facilities network in and outside China. However, the financial records of FHH obtained by the Plaintiff did not reflect any such receipt of the Sum.

9 It was the Plaintiff's case that one of the main disputed issues in the suit was to whom the 2nd Defendant had transferred the Sum following its receipt of the said Sum between December 2003 and January 2004.

10 The Plaintiff in its Discovery Application sought production of documents from BOC relating to and/or evidencing the movements, *ie*, into and out of the Account.

11 The AR, after hearing the Discovery Application, allowed the Plaintiff to inspect and take copies of the following documents (the "Ordered Documents") with BOC:

> All bank statements, cheques, remittance slips, receipts, transfer instructions and correspondence relating to and/or evidencing the movements of the sum of S$2,125,000.00 which was deposited into the Account of the 2nd Defendant with Bank of China Limited by way of:
>
> (a) OCBC cheque no. 749325 dated 23 December 2003 for the sum of S$400,000.00;
>
> (b) UOB cheque no. 642852 dated 23 December 2003 for the sum of S$1,100,000.00;
>
> (c) UOB cheque no. 642853 dated 10 January 2004 for the sum of S$625,000.00
>
> into and out of the Account.

Plaintiff's case

12 The Striking Out application was on the grounds that:

(a) The 2nd Defendant had no locus standi to challenge an Order of Court which was solely directed to a third party *ie*, BOC; and/or

(b) The AR's order was *res judicata* as between the Plaintiff and BOC as the time for BOC to appeal against the said order had lapsed. The 2nd Defendant's appeal was therefore academic and served no practical purpose; and/or

(c) The 2nd Defendant's appeal lacked substantive merits.

2nd Defendant's case

13 The 2nd Defendant's case was that the Discovery Order made against BOC would not determine the issue that was in dispute between the parties, *ie*, the purpose of transferring the Sum to the 2nd Defendant.

(a) If it was found that the purpose of the transfer of the Sum was for the Cooperation Agreement, as pleaded by the Plaintiff, the proper recourse as against the 2nd Defendant would be in respect of a breach of Cooperation Agreement in which disclosure of the Ordered Documents would be irrelevant and unnecessary as receipt of the said Sum was already admitted by the 2nd Defendant.

(b) If it was found that the purpose of transfer was for the currency exchange scheme, as pleaded by the 2nd Defendant, the 2nd Defendant's position was that the Ren Min Bi (under the currency exchange scheme) was paid out in China and not out of the Sum in the account *ie*, the $2.125 million received in Singapore was not transferred to China.

14 The grounds for the 2nd Defendant's appeal were as follows:

(a) The Discovery Order was too wide as it was not specific in time and did not state the exact period for which the discovery was allowed; and/or

(b) The Discovery Order was made before the 2nd Defendant had filed its defence. As the parameters of the dispute had not been drawn up properly by way of pleadings at the time of the hearing of the Discovery Application, matters of relevancy had not been adequately determined; and/or

(c) Discovery had previously been ordered against the 2nd Defendant of the same class of documents in favour of the fourth defendant under O 24 r 6 of the Rules of Court. Subsequently in Originating Summons No 383 of 2009 (Registrar's Appeal No 171 of 2009) ("OS 383 of 2009"), Tay Yong Kwang J allowed the 2nd Defendant's appeal and discharged it from its duty to provide discovery. The same issues were later rehashed before the AR and the AR's decision effectively nullified Tay J's decision.

Decision of the Court

Lack of Locus Standi

15 The 2nd Defendant had filed the appeal against the AR's decision despite being neither a party to the Discovery Application nor the subject of the AR's order. *Locus standi* to appeal against any and/or all orders made in the Discovery Application against a third person who is not a party to the main suit (*ie*, BOC in this case) does not arise automatically from a person's status (*ie*, the 2nd Defendant's status) as a party to the main suit.

16 Order 24 Rule 6 of the Rules of Court stipulates as such:

Discovery against other person (O.24, r.6)

6. – (1) An application for an order for the discovery of documents before the commencement of proceedings shall be made by originating summons and the person against whom the order is sought shall be made defendant to the originating summons.

(2) An application after the commencement of proceedings for an order for the discovery of documents by a person who is not a party to the proceedings shall be made by summons, which must be served on that person personally and on every party to the proceedings.

...

(6) An order for the discovery of documents may -

(a) be made conditional on the applicant's giving security for the costs of the person against whom it is made or on such other terms, if any, as the Court thinks just; and

(b) require the person against whom the order is made to make an affidavit stating whether the documents specified or described in the order are, or at any time have been, in his possession, custody or power and, if not then in his possession, custody or power, when he parted with them and what has become of them.

...

(8) For the purposes of Rules 10 and 11, an application for an order under this Rule shall be treated as a cause or matter between the applicant and the person against whom the order is made.

17 The references to "the person against whom the order is made" in O 24 r 6(1), "a person who is not a party to the proceedings" in O 24 r 6(2) and the language employed in O 24 r 6(8) (in respect of inspection and production for inspection of the Ordered Documents under O 24 rr 10 and 11 respectively) indicate that an order for non-party discovery is directed solely against the non-party from whom discovery is sought, *ie*, it is clearly envisaged that an application for non-party discovery is a matter exclusively between the applicant and the non-party respondent. This principle applies across the board to both instances in which pre-action non-party discovery was made by way of originating summons (see O 24 r 6(1)) and by way of summons in ongoing proceedings between two parties (see O 24 r 6(2)).

18 Notably, although the 2nd Defendant was served with the application for non-party discovery and was heard by the AR below, this did not *ipso facto* confer upon it standing to file an appeal. All applications filed in an action are served on parties to the action (*eg*, under O 24 r 6(2)), who may be heard subject to the discretion of the court. This involvement, however, does not by itself transform such parties into parties to *that* specific application with standing to appeal the same. Such involvement *per se* has no bearing on the issue of *locus standi*.

19 In the case of *Microsoft Corporation and others v SM Summit Holdings Ltd and another* [1999] 3 SLR(R) 1017, Yong Pung How CJ held that the applicants who were prohibited by way of implied undertaking from using all documents and copies obtained pursuant to a search warrant and information extracted therein had *locus standi* to make an application to the High Court for the restriction to be lifted. Yong CJ held (at [18]) that:

As the applicants were parties directly affected by the restriction, they had a direct personal interest in seeking relief to vary the order of court and/or to be released from the implied

undertaking. It followed they must have the *locus standi* to make an application for the restriction to be lifted.

Hence, it can be deduced that in order to demonstrate *locus standi* to file an appeal against an order, one has to show that one is affected or aggrieved by the court order and therefore has a personal interest in seeking variation or release from the said order. Further and in addition to that, where it is in the nature of an appeal, I take the view that the appellant must generally be a party to the application below that gave rise to the orders that form the subject of his appeal before he has standing to appeal against those orders.

20 On the facts, the 2nd Defendant was in no way personally encumbered by the Discovery Order and its rights and interests vis-à-vis the main suit were likewise unaffected. If anything, the production of Ordered Documents in the possession of a non-party, BOC, would serve to substantiate or negate the 2nd Defendant's version of the facts. The 2nd Defendant could not be said to be affected or aggrieved by the production of any relevant documents simply because they might be or were potentially adverse against him. The whole purpose of discovery is to enable relevant documents to be placed before the court and there is no inherent right or interest to shut out relevant documents albeit adverse to that party's case, unless they fall within certain narrow exceptions such as those privileged professional communications under s128 of the Evidence Act (Cap 97, 1997 Rev Ed) ("Evidence Act").

21 The 2nd Defendant might contend that it was affected or aggrieved by the Discovery Order by virtue of its personal interest to maintain secrecy over its bank account with BOC which was the main subject matter of the Discovery Order. This personal interest could be said to have arisen under s 47 Banking Act (Cap 19, 2008 Rev Ed) (the "Act"), which prohibits the disclosure of customer information by a bank in Singapore or any of its officers to any person except as expressly provided in the Act.

22 The bank's duty of banking secrecy under s 47, however, is not absolute. The Third Schedule of the Act expressly provides that disclosure of information by a bank is not prohibited where it is necessary for compliance with an order of the Supreme Court or a Judge thereof pursuant to the powers conferred under Part IV of the Evidence Act. This includes the power to make an order of production or inspection of banker's book under ss 174 and 175 of the Evidence Act respectively. Hence, a court order made against the bank or its officers for production or inspection would prevail over any personal interest the 2nd Defendant may have concerning the secrecy of its bank account with BOC. In any event, this personal interest does not, by itself, give rise to *locus standi to appeal* against the order that was made in the Discovery Application by the Plaintiff, which is against the non-party, BOC, and not against the 2nd defendant itself.

23 The 2nd Defendant should have asked BOC to appeal within the prescribed period after granting to BOC *ie*, the party with legal standing to appeal, an indemnity or sufficient security to BOC's satisfaction for all potential costs in connection with bringing an appeal against the Discovery Order. The 2nd Defendant had erred in choosing to appeal against the Discovery Order when it had no *locus standi* to do so.

Operation of Doctrine of Res Judicata in respect of the Discovery Order vis-à-vis BOC

24 The operation of the doctrine of *res judicata* in respect of the Discovery Order made against BOC would further preclude the 2nd Defendant from filing an appeal against the said order.

25 The *locus classicus* of *res judicata* is the judgment of Wigram VC in *Henderson v Henderson* (1843) 3 Hare 100, at 115, where the judge says:

> [W]here a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

The doctrine of *res judicata* has been applied in and affirmed by the Singapore courts: see *eg*, *Lee Tat Development Ptd Ltd v Management Corporation of Grange Heights Strata Title No 301 (No 2)* [2005] 3 SLR(R) 157 and *Ching Mun Fong (executrix of the estate of Tan Geok Tee, deceased) v Liu Cho Chit and another appeal* [2000] 1 SLR(R) 53.

26 It should be noted that the party with legal standing to appeal against the AR's decision, BOC, had not filed any such appeal. The period for appealing the Discovery Order expired on 14 December 2009 and under these circumstances, the AR's order had been perfected as between the Plaintiff and BOC. This would be consistent with Tay Yong Kwang J's decision in *Nike International Ltd and another v Campomar Sociedad Limitada* [2005] SGHC 139 at [40] in which it was held that:

> Where an appeal lies against a decision but the right is not invoked by the party entitled to that right, that decision is still final for the purpose of *res judicata*.

27 Logically, the doctrine of *res judicata* in cases involving more than one party with the right of appeal operates in such a way that it renders the decision binding as between the applicant and any party who chooses not to exercise its right to appeal (see *Teo Chee Yeow Aloysious and another v Tan Harry and another* [2004] 3 SLR(R) 588). As Chao Hick Tin JA observed at [18]:

> Suppose for a moment that in that case at hand only the first appellant had appealed, but not the second, and that the first appellant had succeeded in the way he did. Could the second appellant have come to the court after the event to say that since the appellant's liabilities were joint and several, the amount of damages which the second appellant should pay to the respondents should be the same as the reduced amount which the first appellant was liable to pay? The answer is obviously not. Hence the second appellant, having not appealed against the quantum assessed for the dependency loss for whatever reason, must accept the consequences of its own choice.

28 Accordingly, even if the 2nd Defendant had had standing to launch the appeal and subsequently succeeded, BOC having not exercised its right to appeal within the allowed time frame, would not be able to reap the fruits of the 2nd Defendant's appeal. A successful outcome of the 2nd Defendant's appeal clearly would have no bearing upon BOC's accrued obligation to furnish the Ordered Documents in compliance with the AR's order since the finality of the said order would be ensured by the operation of *res judicata*. This would render the 2nd Defendant's appeal merely academic as it would be incapable of reversing or undoing what had already been perfected.

29 The importance of the principle of *res judicata* was observed by the US Supreme Court in *Federated Department Stores Inc v Moitie* [1981] 452 US 394 at 401:

> [T]his court has long recognized that [public] policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties... [The doctrine of *res judicata*] is a rule of fundamental and substantial justice, of 'public policy and of private peace,' which should be cordially regarded and enforced by the courts…

30 Viewed against the backdrop of the present facts, the 2nd Defendant's appeal should be struck out for want of standing. Any further determination on this appeal would be, at best, academic and theoretical given that the Discovery Order was *res judicata* as between BOC and the Plaintiff. Such an exercise would not be conducive to public interest as it would waste the court's time and the litigant's resources.

No Substantive Merits

31 In any event, the 2nd Defendant's appeal was without merit. O 24 r 6(3)(*b*) clearly stated that the documents sought in discovery must be "relevant to an issue arising or likely to arise out of the claim made or likely to be made in the proceedings". Moreover, under the same provision, the person against whom the order is sought must be "likely to have or have had [the documents] in his possession, custody or power". Following O 24 r 7, discovery shall be refused in instances where it is not necessary either for disposing fairly of the cause or matter or for saving costs.

32 The Ordered Documents could not be said to have fallen foul of any of the requirements stated above as they were relevant to the main suit, were in the possession of BOC and were necessary for the fair disposal of the said suit.

33 Whether a document was relevant would depend on whether it would affect a party's claim, or adversely affect another party's case, or support another party's case and it must depend on the issues pleaded in the action: see *UMCI Ltd v Tokio Marine & Fire Insurance Co (Singapore) Pte Ltd and others* [2006] 4 SLR(R) 95 at [71].

34 In the Plaintiff's Statement of Claim, it was clearly pleaded that at all material times prior to March 2007, the first to third defendants had represented to the Plaintiff that the Sum had been remitted by the 2nd Defendant to FHH in or about 2004. Hence, the *onward application* of the Sum subsequent to the receipt by the 2nd Defendant was a matter in issue in the main suit. The Ordered Documents were relevant as they would either affect or support the Plaintiff's case: they would illustrate the status and use of the Sum following the receipt by the 2nd Defendant which in turn would be central in establishing the alleged misappropriation by the 2nd Defendant.

35 The 2nd Defendant's position that the Ordered Documents were irrelevant and unnecessary as receipt thereof was never denied overlooked the broader picture of the dispute between the Plaintiff and itself, *ie*, that there was an alleged misappropriation on the part of the 2nd Defendant through its failure to transfer the Sum to FHH as represented.

36 The crux of the Plaintiff's case was that: (a) the Sum was transferred to the 2nd Defendant pursuant to its representations that the Sum would be subsequently transferred to FHH under the Cooperation Agreement; and (b) in breach of the misrepresentations, the 2nd Defendant failed to so

transfer the Sum and instead misappropriated it. Proof of the 2nd Defendant's dealings with the Sum after its receipt would accordingly be critical to establishing the second limb of the Plaintiff's claim. Hence, the Ordered Documents were relevant as it would directly enable the Plaintiff to advance his own case (see *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* [1882] 11 QBD 55 at 63).

37 It was manifestly clear that BOC had possession, control and/or custody of the Ordered Documents thus satisfying O 24 r 6(3)(*b*). Moreover, the disclosure of the Ordered Documents could not be said to be not necessary either for disposing fairly of the cause or matter or for saving costs under O 24 r 7.

38 BOC has a document retention and destruction policy to which the Ordered Documents are subject. Given that the payment of the last tranche of the Sum into the account was made 6 years ago, there is an imminent need for the Ordered Documents to be disclosed before they are systematically destroyed by BOC. This is compounded by the fact that BOC might be the only party holding such crucial information as the 2nd Defendant had, through its solicitors, earlier stated that the Ordered Documents were not in its possession.

39 The production of the Ordered Documents at this stage would also serve a wider interest in it being facilitative of and conducive to the parties in the main suit as the Plaintiff would not have to wait until the trial to issue a writ of *subpoena duces tecum* against BOC. As Lord Mackay in *O'Sullivan v Herdmans Ltd* [1987] 1 WLR 1047 at 1056 noted:

> The interests of justice are, in my opinion, served by the promotion of settlements rather than prolongation of litigation and by the possibility of early, complete preparation for both parties to a trial rather than by obliging one party to delay its full preparation until after the trial has actually started.

40 In my view, the Ordered Documents were relevant and necessary for the fair disposal of the issues in the Suit and the Discovery Application was rightly allowed by the AR when he ordered BOC to produce the documents. Accordingly, the 2nd Defendant's appeal before me also lacked merit.

41 With regard to Tay J's decision in allowing the appeal filed by the 2nd Defendant against the discovery order in OS 383 of 2009, I noted that factual differences existed between OS 383 of 2009 and the present appeal which should not be overlooked. OS 383 of 2009 was in fact a discovery against the 2nd Defendant which could be distinguished from the present Discovery Application against a *non-party*. The AR in OS 383 of 2009 ordered, *inter alia*, for the 2nd Defendant *itself* to give discovery of the documents sought. This was to be contrasted with the present appeal in which BOC was the non-party required by the Discovery Order to provide the documents sought by the Plaintiff.

42 When the 2nd Defendant appealed against the AR's order before Tay J, it was decided apparently on the basis that the 2nd Defendant was in no position to comply with the said order given that it had affirmed on affidavit that it had no documents in its possession evidencing payment of the Sum to third parties in relation to the Cooperation Agreement. Hence, the scenario in that case was that the 2nd Defendant, being the party encumbered with the duty to disclose the documents, appealed against the order imposed upon it as it had no possession of them. Tay J rightly discharged its duty to disclose as under those circumstances the 2nd Defendant would not be able to fulfil the Discovery Order if indeed the 2nd Defendant had truthfully affirmed that it no longer had the bank

documents in question.

43 The facts of the present appeal were, however, dissimilar from that in OS 383 of 2009. That BOC had the bank documents requested by the Plaintiff was not in dispute and the only real question at the Discovery Application against BOC was one of relevancy and necessity. Thus any argument about any potential nullification of Tay J's decision by the permission to allow discovery as against BOC was distracting and misguided.

44 In summary, the facts before me were that the AR below had made an order, not against the 2nd Defendant, but against BOC, which had in its possession the same class of documents that were sought in OS 383 of 2009. The Ordered Documents were vital in establishing and resolving the disputed issues raised in the main suit. Apart from substantiating the claim that there in fact was a receipt of such Sum (which was admitted by the 2nd Defendant), the Discovery Order also served a wider facilitative purpose in allowing early disclosure of documents crucial to the main suit itself. For instance, if upon trial it was found that the Plaintiff's version of facts was in fact true and correct, *ie*. that the Sum was paid under the Cooperation Agreement, the Ordered Documents would provide useful information pertaining to the onward application of the Sum by the 2nd Defendant by allowing the court to trace its whereabouts since the transfer of the Sum into the 2nd Defendant's account, including whether or not the Sum was in fact subsequently paid over to FHH as represented by the 2nd Defendant in order to establish a medical facilities network in and outside China pursuant to the joint venture. This would assist the court in effectively determining the liability of the 2nd Defendant under the Cooperation Agreement (if any).

45 In the event that the Sum was found to have been paid to the 2nd Defendant pursuant to a currency exchange transaction, there is no apparent prejudice in disclosing the Ordered Documents in respect of the 2nd Defendant's account. The movement of the Sum that the Plaintiff was allowed to question and scrutinise was limited only to those flowing from those cheques delineated by the AR (see [11] above). The Discovery Order was not by any means a blanket permission to intrude into the financial status and activities of the 2nd Defendant. The Discovery Order allowed only disclosure of documents that were necessary for the Plaintiff to establish its claim. It was never intended to warrant a fishing expedition on the Plaintiff's part. Hence, details of the 2nd Defendant's use of its other financial resources would not by way of the Discovery Order be exposed. As such, the financial interests of the 2nd Defendant were sufficiently safeguarded.

46 The Discovery Order against a non-party was a matter that was exclusive to the Plaintiff and the non-party, BOC. Any legal grievances stemming from such an order should be raised and vented by either of the two parties privy to the order. The 2nd Defendant's filing of the appeal where BOC itself had chosen not to do so was an attempt at circumventing the procedures of the court that were streamlined to ensure the systematic and efficient administration of justice.

Conclusion

47 Given the lack of *locus standi* and, in any event, the lack of substantive merits advanced by the 2nd Defendant, I allowed the Striking Out Application and awarded $3,000 as costs inclusive of disbursements for the entire hearing to be paid by the 2nd Defendant to the Plaintiff.