IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1987] SGHC 13

OS 1274/1985

Between

Yip Hock Chye

… *Plaintiff*

And

Santan Engineering Pte Ltd (in receivership)
Another

… *Defendant*

GROUNDS OF DECISION

Companies — Receiver and manager; Credit and Security — Charges

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Yip Hock Chye and Others v Santan Engineering Pte Ltd (in receivership) and Another

[1987] SGHC 13

OS 1274/1985
Lai Kew Chai J
06 May 1987

1 Cur Adv Vult

2 In this originating summons all 31 plaintiffs, who were formerly employees of the first defendants, claim the sum of $74,759.19 being salaries payable to them in lieu of notices of termination of their respective contracts of employment with the first defendants. As against the second defendants, who were debenture holders with a floating charge over the assets of the first defendants, the plaintiffs also claim a declaration that the said sum of $74,759.19 be paid out of the assets of the first defendants comprised in or subject to any floating charge in priority to the claims (if any) of the second defendants. The plaintiffs also seek an order that such sum be paid to the plaintiffs out of such assets or proceeds thereof. As against the first defendants, they also ask for interest on the said sum of $74,759.19. The plaintiffs also ask for costs of the application against both the defendants.

3 The facts may be recited within a very brief compass. Under the terms of their respective contracts of employment or under s 10(3) of the Employment Act(Cap 91) the plaintiffs were entitled to be paid salaries in lieu of their

applicable periods of notices to terminate their employment except in four cases mentioned by learned counsel for the defendants where the contracts concerned only provided for the periods of the notices of termination but not any payment of salary in lieu of such notices. The short answer is that this must have been so and I accordingly imply the term that parties had agreed that salaries in lieu of notices would be payable.

4 On 5 September 1985 the second defendants appointed three members of Peat Marwick Mitchell & Co to be the receivers and managers of the assets of the first defendants which were charged to the second defendants by way of floating charge under a deed of debenture. On the following day the receivers terminated the services of all 31 plaintiffs without any notice of termination or any payment of salary in lieu of notice.

5 The question for my determination is whether the plaintiffs` claims rank in priority over the second defendants` floating charge. The answer to the question depends entirely on the true and proper construction of ss 226 read with ss 328(1)(b) and 328(2) of the Companies Act (Cap 50). By virtue of s 226(1), debts which are preferential debts as set out in s 328 rank prior to any claim under a floating charge. Under s 328(2), which was introduced as an amendment by Act No 15 of 1984 to include salary payable in lieu of notice of termination in the definition of the word `salary`, the plaintiffs` claims to salaries in lieu of the respective notices of termination to which they were entitled were therefore claims for `salary` within the meaning of s 328(1)(b) of the Act.

6 I will now have to reproduce all three relevant provisions of the Companies Act (Cap 50).

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7 Section 226(1) and (2) reads:

> *(1) Where a receiver is appointed on behalf of the holders of any debentures of a company secured by a floating charge or possession is taken by or on behalf of debenture holders of any property comprised in or subject to a floating charge, then, if the company is not at the time in the course of being wound up, debts which in every winding up are preferential debts and are due by way of wages, salary, vacation leave or superannuation or provident fund payments and any amount which in a winding up is payable in pursuance of s 328(4) or (6) shall be paid out of any assets coming to the hands of the receiver or other person taking possession in priority to any claim for principal or interest in respect of the debentures and shall be paid in the same order of priority as is prescribed by that section in respect of those debts and amounts.*
>
> (2) For the purposes of sub-s (1), the references in s (1), the references in s 328(1)(b), (c), (d) and (e) to the commencement of the winding up shall be read as a reference to the date of the appointment of the receiver or of possession being taken as aforesaid, as the case requires.

8 Section 328(1)(b) reads:

> *secondly, all wages or salary (whether or not earned wholly or in part by way of commission) including any amount payable by way of allowance or reimbursement under any contract of employment or award or agreement regulating conditions of employment, of any employee not exceeding an amount that is equivalent to five months` salary whether for time or piecework in respect of services rendered by him to the company within a period of four months before the commencement of the winding up;*

9 Section 328(2) reads:

> *For the purposes of sub-s (1)(b), `employee` shall be deemed to include a sub-contractor of labour, and `salary` shall be deemed to include money due to a subcontractor of labour and any payment on account of wages or salary payable during a period of notice of termination of employment or in lieu of notice of such termination, as the case may be.*

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10 It will be seen that under s 328(1)(b) a claim for `salary` of an employee becomes a preferential debt when two conditions are met: (a) the amount claimed does not exceed five times the monthly salary of the claimant; and (b) it is in respect of services rendered by the (claimant) within a period of four months before the commencement of the winding up. For our purposes, of course, the date of the appointment of the receivers and managers was the commencement of the winding up. It was not disputed that the claims of all 31 plaintiffs have complied with the first condition.

11 With regard to the second condition, learned counsel for the second defendants contended that as a matter of fact the plaintiffs` claims had arisen only ***after*** and not ***before*** the appointment of the receivers and managers. Learned counsel submitted that the intention to confer preference to an employee was plainly for wages or salaries earned or would have been earned in or during the period of four months before the appointment of the receivers and managers. On the other hand, learned counsel for the plaintiffs stressed that the claims of the plaintiffs in this case for salaries in lieu of notices had some relationship to or sufficient connection with the services rendered to the first defendants during the four months immediately before the appointment of the receivers and managers as to have complied with the second condition. In addition to the fact that services were or had been rendered to the first defendants over the entire four months save one day, learned counsel for the plaintiffs also pointed out that the claims for salaries in lieu of notices were based on the same contracts of services under which the services were rendered: the plaintiffs relied on these links.

12 Urging this court to give the words `in respect of` the widest ambit possible, as it was intended by the legislature, learned counsel for the defendants

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also referred to the legal position and case law history of the lack of any preferential status for claims of salaries in lieu of notices, which were analysed by past cases as really claims for damages. Learned counsel for the plaintiffs told me that s 328(2) was enacted by Act 15 of 1984 as a remedial statute because the position prior to its enactment was that salaries in lieu of proper notices of termination were not in law regarded as `salaries` within the ambit of s 328(1) but were regarded as damages: see ***Re Leeds Twentieth Century Decorators*** [1962] CLY 365 and ***Re VIP Insurances Ltd and The Companies Act*** (1978) 3 ACLR 751. Prior to this amendment, we had in Singapore the unfortunate situation that in a corporate failure, claims of workers for `salaries` in lieu of the proper notices were subordinated to floating charges under debentures who took all. Learned counsel for the plaintiffs reminded me what was stated in ***Maxwell`s Interpretation of Statutes*** pp 93-94: `The fact that a section is clearly designed to afford relief may incline the court to construe it more benevolently than it might a less obviously remedial enactment.` This court, I was told by learned counsel, should adopt a construction of a statute `as shall suppress the mischief and advance the remedy: refer ***Heydon`s Case*** (1584) 3 Rep 7a; 76 ER 637.`

13 This court was also invited to take an alternative approach. Learned counsel for the plaintiffs submitted that a distinction between the `salary` contemplated within s 328(l)(b), which must be earned, and the `salary` deemed to be included within its definition under s 328(2) which evidently could be earned by an employee. Bearing this distinction in mind, learned counsel for the plaintiffs urged me to hold that in a claim for salary in lieu of notice of termination, it is not necessary to comply with condition (b) as stated above, that is, it is not necessary to show that the `salary` claimed is in respect of services rendered by the employee to the company within a period of four

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months before the commencement of the winding up of such company. In this regard, learned counsel for the plaintiffs relied on the maxim that the law does not compel a man to do that which he cannot possibly perform: lex non cogit ad impossibilia.

14 I am persuaded by the cogency of the arguments advanced by learned counsel for the plaintiffs, Mr Goh Kok Leong, to whose submissions I am greatly indebted. Accordingly, I accept his construction of the relevant provisions of the Companies Act and I would also adopt the alternative approach suggested.

15 There will be an order in terms of the originating summons. I would award interest on the said sum of $74,759.19 at 10% per annum calculated from 6 September 1985.

16 ***Claim allowed.***

Lai Kew Chai J

Goh Kok Leong (Ang & Partners) for the plaintiffs
Ronnie Quek (Shook Lin & Bok) for the defendants

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