Yap Jeffery Henry v Seow Timothy and Others
[2006] SGHC 6

Case Number : Suit 217/2004

Decision Date : 18 January 2006

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Sankaran Karthikeyan and George John (Toh Tan and Partners) for the plaintiff; Chandra Mohan, Robert Tay and Tan Lee Meng (Rajah and Tann) for the defendants

Parties : Yap Jeffery Henry — Seow Timothy; Seow Lian Yew Colin; Chiang Kwok Wai Kelvin; Loo Sin Seng Henry; Lim Kim Soon

Companies – Winding up – Company purchasing business of firm already acquired previously – Firm taking over company's existing projects when company liquidated – Proceeds from projects paid into undisclosed account – Whether directors conducting company's business with intention to defraud creditors – Section 340 Companies Act (Cap 50, 1994 Rev Ed)

Tort – Conspiracy – Directors winding up company after judgment issued against it – Whether directors conspiring to defraud creditor under a judgment debt

18 January 2006 *Judgment reserved.*

Choo Han Teck J:

Background

1 The plaintiff and the first defendant are no strangers to each other. In 1998 (Suit No 664 of 1998) the plaintiff sued Timothy Seow Group Architects Pte Ltd ("the Company") in which the first defendant was the major shareholder and managing director. He obtained a consent judgment before Lai Kew Chai J on 25 February 1999 for $600,321.00 and interest at $19,605.00 as well as costs of the action against the Company. He had also previously worked for the first defendant, and it was in respect of unpaid services that he sued the first defendant in that suit. He was not paid the judgment debt at all because the day after the Company consented to judgment the first, second, and third defendants (in the present action), as directors of the Company, convened a meeting to place the Company under voluntary liquidation on account of its inability to pay its debts. For that purpose, the record (as produced by the Company) showed a total liability of $1,963,374.00 against a net asset of $505,202.00. A resolution to put the Company in liquidation was eventually passed on 6 April 1999 and the Company was wound up on 13 April 1999. The plaintiff now returns to court suing the five defendants as directors of the company. The present action is based on the tort of conspiracy to defraud as well as for a breach of s 340 of the Companies Act (Cap 50, 1994 Rev Ed) for conducting the affairs of the Company with the intention of defrauding its creditors. The facts in this action are complicated not only because they were intertwined with the facts in the 1998 suit but also because the first defendant's name, "Timothy Seow", was used solely or as part of the name of two other entities, namely, the Company, which was incorporated on 20 January 1996; a sole proprietorship known as "Timothy Seow Group Architects" that was established in August 1995 and dissolved on 20 January 1996 when it was taken over by the Company; and it was also used as the name of a partnership by the first, second, and third defendants after the Company was wound up. The fact that the transfer of Timothy Seow Group Architects by sale was not formalised until 11 July

1997 and backdated to 1 March 1996 will assume its true significance later (I shall revert to this shortly). The facts were also complicated by the operation of a bank account under the name of TSG International Architects Inc maintained in London, into which money due to the Company was sometimes paid.

Timothy Seow, sole proprietorship, partnership, corporation

2 It would be appropriate and convenient, at this point, to digress a little and trace the entities in which the first defendant practised as an architect. Unless this is dealt with here, the narration of the rest of the evidence will be difficult to follow. Although the plaintiff and the first, second and third defendants were each qualified with a degree in architecture, only the first defendant went on to qualify himself in Singapore to practise professionally as an architect. This meant that while the plaintiff and the second and third defendants could do most of the kind of work an architect does (such as designing), they could not hold themselves out as architects and sign or approve documents, plans, drawings and the like. Sometimes, however, their employers might introduce them as "architects" to third parties. This practice in itself is usually harmless. It is like referring to a law graduate as a lawyer even though he has not been admitted to the Bar. The fact that only the first defendant was a qualified architect is relevant because, ostensibly, the others cannot be partners with him in a firm of architects. They can, it seems, be employed by a company (such as the Company) providing architectural services. However, the first defendant had in the course of events been holding out the second and third defendants as his partners, and the Company as a "partnership". Whether that amounted to any breach of the relevant regulations is of no concern to the present proceedings but it is inevitable that this fact needed to be mentioned because the word "partnership" had been referred to in significant instances. Indeed, the first defendant testified that the pre-incorporation "Timothy Seow Group Architects" was a *sole-proprietorship* in which the first defendant held the interests of the second and third defendants in trust. Prior to the establishment of the pre-incorporation "Timothy Seow Group Architects", the first defendant was a partner, while the second and third defendants were consultants, in a firm called SLH International; and prior to joining SLH International (in 1994), this trio of defendants had worked together as partners in an architectural firm in Vancouver, Canada, where it appears that such practice was permissible.

3 The Registrar ("the Registrar") of the Board of Architects ("the Board") testified on behalf of the plaintiff. The Registrar testified that the first defendant initially informed the Board in 1995 that he was practising "alone on his own account" under the name of "Timothy Seow Group Architects", and applied for a practising certificate for the year 1996. He was granted the practising certificate in his name as he qualified for it. Subsequently, the first defendant decided to incorporate a company with the object of providing architectural services. Such a company, when registered, could also apply for a practising licence if it satisfied the conditions under s 20(1) of the Architects Act (Cap 12, 2000 Rev Ed) which requires, among other things, that the company has a paid-up capital of at least $1,000,000.00, and that the business of the company, so far as it relates to architectural services, be under the control and management of a director who is a registered architect ordinarily resident in Singapore, and who has a practising certificate in force. In the course of that application, the Registrar of Companies had to be satisfied that there would be no objection from the Board of Architects in respect of the use of the name "Timothy Seow Group Architects Pte Ltd" or for any other reason. The only other major concern at that time related to the requirement for a $1,000,000.00 paid-up capital. To that end, the first defendant's then solicitors, M/s Phyllis Fong & Associates, who later also acted as solicitors for the Company, made further enquiries to the Board about the requirement regarding the Company's paid-up capital. On 7 February 1996, Phyllis Fong & Associates notified the Board that the Company intended to obtain the requisite licence. The relevant portion of this letter stated as follows:

> Our clients intend to meet the pre-requisite requirement of S$1 million paid-up capital through their purchase of assets of up to S$1 million in value from the current firm Heah Hock Heng & Partners. This purchase of assets is duly evidenced by a "Deed" to be duly entered into between our clients (Timothy Seow Group Architects Pte Ltd) and Timothy Seow and others who in turn would purchase the assets from Heah Hock Heng & Partners.

4 The Board replied through the Registrar, stating that the Board would require proof of such paid-up capital "at the time of the application [for the architectural licence]" from the documents lodged with the Registry of Companies, and that a copy of the directors' resolution confirming the paid-up capital had to be given to the Board. The Registrar also informed the solicitors that the Board "would not normally enquire on how the paid up capital was utilized by the company". Thus the Company was registered, but at the time, it had not yet applied for a practising licence. On 26 December 1995 the Board reminded the Company to comply with the requirements under the Architects Act, including the requirement for the $1,000,000.00 paid-up capital, and that the "chairman and at least two-thirds of the directors of the corporation shall be registered architects or allied professionals".

5 The Registrar further testified that on 23 June 1996 the first defendant applied for another practising certificate and in that application he stated that he was practising under the name of Timothy Seow Group Architects *as a partnership*. However, the Board thought that since the first defendant was already issued with a practising certificate, his application was treated as if it was an application for the 1997 certificate and he was subsequently issued one as such. In August 1997 the Company applied for a renewal of its licence and was granted one. On 14 August 1998 it applied for a renewal and was granted one commencing from 3 September 1998 for a year. In the latter instance, the only change was that the fourth defendant replaced the fifth defendant as a director. Both these directors appeared to be nominal directors and did not participate in any active management of the Company.

6 It will be recalled that the Company was wound up on 13 April 1999, but according to the Registrar, the Board only learnt that the Company had "gone into provisional liquidation" after receiving a letter dated 18 March 1999 from the plaintiff's solicitors. On 22 March 1999 the Board was notified that the first defendant had ceased practising under the name "Timothy Seow Group Architects Pte Ltd" from 10 March 1999 and was practising under the name "Timothy Seow Group Architects". By a separate letter of the same date (22 March 1999) the Board was informed that the first and fourth defendants were practising under the "partnership" of "Timothy Seow Group Architects". However, on the same date, 22 March 1999, the first and fourth defendants wrote to the Board to say that they wished to practise under the name of "Timothy Seow Architects". Then on 3 May 1999 the liquidator Don Ho wrote to the Board and stated that "there were outstanding projects which certain directors of the company have requested the Liquidators to allow them to continue to service under a partnership by the name of 'Timothy Seow Group Architects'". One ought to be alert when reading the names being used or proposed because the change is often just the drop of the word "Group" and sometimes with and other times without the words "Pte Ltd". The confusion it caused, when put to him, was refuted nonchalantly, and with a touch of indignation, by the first defendant, merely by reiterating, *ad nauseum*, that Timothy Seow was his name and that one should not expect him not to use it.

7 The Board replied by a letter dated 31 May 1999 in which it stated as follows:

> For the record, the name "Timothy Seow Group Architects" was approved by the Board on the application of Mr Timothy Seow to use that name for his sole proprietorship. This was prior to the incorporation of the company known as "Timothy Seow Group Architects Pte Ltd" ("The

Company").

The Board has been advised that the Company is in liquidation and has not been dissolved. Until then, the Company's legal personality remains. The Board understands that the Company had purchased the goodwill attached to the name "Timothy Seow Group Architects".

In the circumstances, the use of either "Timothy Seow Architects" or "Timothy Seow Group Architects" is likely to cause confusion because of the similarities with the name of the Company. Therefore, the Board is unable to approve the use of either business name.

The Registrar testified that after initially using a different firm of solicitors to take issue with the Board's refusal to approve the said names, the first and fourth defendants eventually relented and practised under the name of "Timothy Seow Associates". He further testified that the Board subsequently convened an inquiry on 17 August 1999 and then exercised its powers under s 29(1) of the Architects Act to revoke the licence to "Timothy Seow Group Architects Pte Ltd" (*ie*, the Company). The closing episode in respect of the parade of names came in October 2002 when, after an exchange of correspondence with M/s Drew & Napier, who acted through the first defendant for a new company, TSG Architects Pte Ltd, the Board granted a practising licence to TSG Architects Pte Ltd. In respect of all the entities bearing the name "Timothy Seow" or "TSG", it was clearly established to my satisfaction that the first defendant was the principal and directing mind behind them.

8 The documentary evidence also showed that the first defendant had at different times held out his firm as a sole proprietorship and at other times as a partnership. Added to this ambiguity was his and the defendants' reference to the Company as a partnership. That may reflect the genuine character of the relationship among the defendants but whether that is permitted by the Board is not a subject of the present proceedings. What is relevant is that the first defendant had at various times in the course of the trial used those terms loosely and interchangeably, and that served to reinforce the impression that he was the principal and directing mind behind his firm and the Company.

Sale of the firm to the company

9 I now revert to the plaintiff's claim proper. Briefly, it was submitted by his counsel, Mr Karthikeyan, that the facts established by the evidence proved either, if not both, the tort of conspiracy to defraud or a breach of s 340 of the Companies Act, in that the business of the company was conducted with the intention to defraud its creditors. The date in which the plaintiff commenced his first action (Suit No 664 of 1998), that is 4 May 1998, is an appropriate starting point. That was the time when the first defendant must have become aware of the seriousness of the plaintiff's claim and its potential repercussion on him and his practice. It also precipitated a controversial transaction three months later. That is, on 27 August 1998 the first, second, and third defendants signed a contract with the Company which purportedly sold the business of "Timothy Seow Group Architects" as a going concern for $2,201,791.00 to the Company, and under that contract, the completion date was backdated to 1 October 1996. Of the sale price, $1,500,000.00 was stipulated to represent the goodwill of the firm, and $701,791.00 represented the other assets of the business. This effectively meant that a huge debt was created against the Company which must be justified in any event, least of all in circumstances where the debt immediately placed the plaintiff in a disadvantageous position should he succeed (as it turned out he did) in his suit against the Company. Not only that, the first, second and third defendants had withdrawn moneys from that sale although the first defendant initially denied this under cross-examination. His denial could not be maintained after counsel showed him the liquidator's report and the bank statements.

10 Given the history of the setting up of Timothy Seow Group Architects Pte Ltd, this contract for the sale of Timothy Seow Group Architects in itself, even without any suit by the plaintiff, is a remarkable transaction. It will be recalled that the business of Timothy Seow Group Architects was sold on 11 July 1997 and backdated to 1 March 1996. This was evidenced by the letter of Freddi Lim, the solicitor for the vendor and purchaser, dated 7 August 1997. That deed for the sale was dated 1 March 1996. In that transaction, the business of Timothy Seow Group Architects was sold for $1,000,000.00, including the value of the goodwill of "Timothy Seow Group Architects", and defined as "goodwill in connection with the use of the name of Timothy Seow Group Architects". After that, the business belonged to the Company; it simply could not be sold a second time – for any price, let alone more than twice the original price – again. Mr Chandra Mohan made a strong argument merely by asking: How could the first defendant in 1997 have imagined that he would be sued by the plaintiff in 1998 and thus make an elaborate plan to defraud him? In itself, this was an unassailable point but only in so far as fraud against the plaintiff was concerned. It does not alter the fact that the business cannot be sold twice. But the facts reveal the consistency of a cunning mind. The first sale was made because the defendants had to justify the Board's requirement that the Company must have a paid-up capital of $1,000,000.00. This must be proved and done at the time of the incorporation of the Company. It was not done. The Company did not at that time have that amount of paid-up capital. It is arguable whether it had that paid-up capital at any time – though that issue is not an issue before this court. The deception then, in respect of the first sale, was not against the plaintiff, but against the Board. The defendants' explanation, that it was due to an oversight, seemed to me to be a convenient excuse. The bare fact was that it did not have a paid-up capital of at least $1,000,000.00 at the time when it was required to do so. The second purported sale, unlike the first, was intended to create a debt against the Company. The first sale was to create an asset so as to back up the requirement of the Board for a paid-up capital of $1,000,000.00. It is not relevant for me to determine whether the Board's requirement had been complied with.

Revival of the firm

11 I now continue with the facts from the point when the Company was liquidated. The first defendant simultaneously resuscitated "Timothy Seow Group Architects", transferred the staff of the Company to the revived "Timothy Seow Group Architects", took over the existing clients of the Company, the furniture, and even the hire-purchase of the computer equipment, and carried on business as usual. In case one forgets, it must be recalled that by the sale contract (the second one), the assets of Timothy Seow Group Architects had been sold to the Company. There was no suggestion that the retaking of the assets post-liquidation was done pursuant to a genuine sellback contract, what in commercial parlance is referred to as a "contract at arm's length". The revived "Timothy Seow Group Architects" seemed to have gained financially through its work from the former clients of the Company. It has also to be noted that the defendants continued to use the name "Timothy Seow Group Architects" (even in new projects) after the Company's liquidation even though the Board had told them not to do so.

12 It is also significant that the defendants used an old letter dated 19 August 1995 from the Board to convince the liquidator that the new firm of "Timothy Seow Group Architects" was approved by the Board (which it specifically said approval would not be given) for use after the liquidation of the Company. This was an incident of outright deceit. The said letter of 19 August 1995 was the letter approving the use of that name when, as it will be recalled, the first defendant left SLH to start his own firm – even before the Company was incorporated, in respect of which a fresh application for approval was required.

The "secret account"

13 After the Company was put in liquidation, the first, second, and third defendants opened a bank account in the name of the Company. The first defendant vehemently objected to plaintiff's counsel referring to that as "the secret account". I would hold that in so far as there were at least three people (the first, second and third defendants) who knew about it, it was not a "secret" account in that sense. But the liquidator did not know about it. The plaintiff did not know about it until after the trial had started because the said defendants did not disclose that account. It would have remained unknown if not for references made to it in other documents. The first defendant testified that this account was opened on the advice of the provisional liquidator. The latter was not asked to verify that, and in any event, even if he had so advised, there was no reason not to disclose it. On the contrary, there was, in my view, every reason to disclose the account. On Mr Karthikeyan's application, I ordered that the statements relating to the account be disclosed. The existence of this account was not disclosed in the Statement of Affairs in the liquidation dated 9 March 1999 although it was opened just a week before that date (on 3 March 1999) and very shortly after the plaintiff obtained judgment in Suit No 664 of 1998 (25 February 1999). The relevance of this account gained in significance when the first defendant ultimately conceded under cross-examination that proceeds from existing projects that the revived "Timothy Seow Group Architects" had taken over from the Company were paid into that account. Those proceeds were not merely from existing clients of the Company but from existing projects. In simple terms, the money belonged to the Company, not the revived "Timothy Seow Group Architects". Mr Karthikeyan's cross-examination of the first defendant on those statements established that at least $820,000.00 relating to the projects of the Company was transferred into this account.

14 Mr Chandra Mohan, counsel for the defendants, submitted that there was nothing secret about this account because the liquidator was paid from this account. In my view, that is not a sufficient discharge of the duty to disclose it in the Statement of Affairs and to the plaintiff in disclosure proceedings. It was because of the defendants' strenuous insistence that this account was personal and irrelevant that no order was made for its disclosure in the interlocutory proceedings. There was thus a clear impression that the defendants had wanted to keep this account a secret. Counsel for the defendants also submitted that the money paid into this account was held in trust for contractors (of the projects) although no details as to the precise terms of such trusts, and also the money that came from new projects, were given. It would be precisely for this reason that the account and how it was operated must be disclosed in the Statement of Affairs. The liquidator can then determine whether any of the transactions were relevant. Reviewing the evidence, I am satisfied that this account was relevant to the liquidator and to this action.

The witnesses and the overall evidence

15 The contemporaneous (as well as backdated) documents gave a clear impression of what really transpired and the motives and intentions behind the acts. The witnesses called in defence, especially the first defendant, strenuously and, at times, denied with great indignation, that there was any fraud or dishonest intention involved in the transactions. I accept that sometimes the oral testimonies of the witnesses might persuade the court to take a more sympathetic view of alleged errant conduct in spite of the signs to the contrary in the documentary evidence. However, in this case, I am not inclined to accept the explanations of the defence witnesses, and least of all, that of the first defendant. Although he gave his evidence, without interruption, repetitively, and calmly, it was a touch too glib, even in the many moments where no exculpatory explanation was possible – such as when he denied, against incontrovertible evidence, that as the goodwill of Timothy Seow Group Architects had been sold, he could no longer use it when the Company was in liquidation. The second defendant (who is also the nephew of the first defendant) and the third defendant seemed to be fully under the control and direction of the first defendant. Neither of them showed any inclination to exert an independent view of their own. Their reticence was not kept or maintained as a result of

ignorance of what went on. The evidence showed that they (as directors of the company) acquiesced in the acts of the first defendant. As directors they owe a duty to the Company to act honestly and in good faith. In the present case, they had full knowledge of what the first defendant was up to and in the circumstances, the silence and omission on their part enabled the first defendant to carry out his deeds. As such, I am of the view that they were part of the conspiracy to defraud the plaintiff, as well as the officers responsible in the Company's defrauding of its creditors. The fourth and fifth defendants were directors of the Company during some of the material times in which dishonest conduct was being perpetuated; I am satisfied that they were purely nominal directors and they were not fully aware of what was in fact going on. In their case, although they might not have been fully vigilant as directors, but that alone is not sufficient, in my view, for me to find that they were part of the conspiracy to defraud, or that they were aware that the affairs of the Company were being carried out with the intent to defraud its creditors. The difference between them and the second and third defendants is the extent of their knowledge and involvement. That does not mean that the fourth and the fifth defendants were not in breach of their duties as directors, but that was not a relevant inquiry before me on the case as pleaded.

16 There were instances in which the first defendant appeared to conceal or attempted to conceal damaging evidence. For instance, he wrote to the provisional liquidator on 12 March 1999 to inform the latter that the company had 13 ongoing projects. When the provisional liquidator was replaced by Mr Don Ho as the liquidator, the first defendant wrote (on 5 May 1999) to inform him that only four projects were ongoing. Nine projects seemed to have vanished in less than two months. When questioned by counsel, the first defendant gave some ostensibly plausible answers suggesting that some projects were withdrawn or just could not take off. Further cross-examination showed that these suggestions could not possibly be true because some of the projects that the first defendant had identified as "not taking off" had in fact taken off and were paying money that was then deposited into the secret account.

The defendants' professional witnesses

17 Although the three professional witnesses of the defendants, namely, the auditor, John Teo, and the solicitors, Freddi Lim and Phyllis Fong, testified on behalf of the defendants to show that the first defendant and the Company acted on professional advice and thus did nothing that merited closer scrutiny, I am unable to accept an implication embedded in their testimonies that the conduct of the first, second and third defendants was without blemish because evidence elsewhere showed otherwise. Furthermore, these professionals were too closely connected to the affairs of the Company and, therefore, lacked sufficient detachedness. John Teo, the auditor, appointed by the Company, also introduced the provisional liquidator. Furthermore, his firm owned the secretarial services that prepared some of the crucial documents for the Company, including the resolution of directors purporting to rectify the failure of the Company to have the paid-up capital required by the Board. Don Ho was the more independent of the professionals; but as the evidence showed, he was not given the full facts.

Had the plaintiff proved his case?

18 The first defendant testified that the Company had no alternative but to declare insolvency when the plaintiff rejected its offer to pay $10,000.00 and insisted, instead, for a sum of $100,000.00, declaring that there was no room left for negotiation in those circumstances. Given the full picture that we now have, the Company was clearly not insolvent but a viable going concern with more than adequate resources to pay at least $100,000.00 if not the full judgment sum of $600,000.00. The first, second and third defendants, in my view, had no intention of paying the plaintiff his due or any part of it. Their intention was to scorch the Company and take all its stock of

assets and projects out of the plaintiff's reach in the event of enforcement proceedings. The handwritten notes in the documents indicated that the first, second and third defendants had braced themselves for the eventuality of judgment against them in Suit No 664 of 1998. The fine defence put up by counsel to support his submission that the defendants' conduct was not sinister, created instead the ironic effect of emphasising the incongruity between the defence and the evidence. I am satisfied that the plaintiff had proved his case sufficiently. There will therefore be judgment against the first, second and third defendants as claimed. Although the fourth and fifth defendants might not have been culpable in the conspiracy or involved in the defrauding of the company's creditors, they had not acted diligently as directors to merit any award of costs in their favour, and thus, must each bear his own costs. The plaintiff's costs shall be paid by the first, second and third defendants.