IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC 136

Suit No 821 of 2021
(Registrar's Appeal No 81 of 2022)

Between

Oni Global Pte Ltd

… *Appellant*

And

Wong Yong Kai

… *Respondent*

JUDGMENT

[Civil Procedure — Service Out of Jurisdiction]

Oni Global Pte Ltd
v
Wong Yong Kai

[2022] SGHC 136

General Division of the High Court — Suit No 821 of 2021 (Registrar's Appeal No 81 of 2022)
Choo Han Teck J
9 May 2022

9 June 2022 Judgment reserved.

Choo Han Teck J:

1 The plaintiff is a Singapore-incorporated company and is a distributor and franchisee of the nutritional foods brand, known as "GNC". The plaintiff conducts its business in Singapore directly through itself, and in Taiwan and Malaysia through its subsidiaries, ONI Retail Pte Ltd ("ONI Taiwan") and ONI Global (Malaysia) Sdn Bhd ("ONI Malaysia") (collectively referred to as the "ONI Subsidiaries").

2 The plaintiff and the ONI subsidiaries entered into several franchise agreements with GNC Holdings LLC ("GNC LLC"), a company incorporated in the United States ("US"). The defendant is a Singapore citizen who is resident in Hong Kong. He is the director and Vice Chairman of GNC LLC and also holds an executive position in companies associated with the Harbin Pharmaceutical Group, which wholly owns GNC LLC.

3 The plaintiff commenced Suit 821 of 2021 against the defendant on 5 October 2021, alleging that the defendant had conspired with GNC LLC and Harbin Pharmaceutical Group to damage or destroy the plaintiff's business. The plaintiff says that the conspiracy was driven by a personal vendetta against its director, Cynthia Poa ("Poa"), because Poa fought off the defendant's attempt to recruit the plaintiff's management staff into GNC LLC. The plaintiff says that the defendant had, *inter alia*:

(a) caused GNC LLC to terminate the ONI Subsidiaries' internet distribution rights in Taiwan and Malaysia in January 2021;

(b) caused GNC LLC to terminate the franchise agreements with the ONI subsidiaries in March 2021;

(c) sought an injunction through arbitration proceedings in the US to compel the ONI Subsidiaries to surrender their leases, cancel their product registrations, and stop selling GNC products that the plaintiff had paid for in Malaysia and Taiwan; and

(d) caused GNC LLC to rescind its approval for the plaintiff to sell certain "LAC" brand products in the GNC retail stores worldwide.

4 On 3 November 2021, the plaintiff applied *ex parte* for leave to serve the suit on the defendant out of jurisdiction, in his Hong Kong office or his Pennsylvanian office. On 8 November 2021, the court granted the plaintiff leave to serve out of jurisdiction. Service was effected thereafter, and the defendant entered an appearance on 9 December 2021. On 17 January 2022, he applied to challenge and set aside the order for service out of jurisdiction by way of Summons 2 of 2022.

5 The learned Assistant Registrar ("AR") Jacqueline Lee set aside the leave to serve out of jurisdiction for the following reasons:

(a) In relation to GNC LLC's termination of the ONI Subsidiaries' internet distribution rights and franchise agreements, the learned AR took the view that the ONI subsidiaries had taken the position that the terminations were unlawful in US arbitration proceedings and the plaintiff cannot take a diametrically opposite position in Suit 821 of 2021 that the same terminations were lawful.

(b) In relation to the injunction that GNC LLC sought against the ONI subsidiaries in the US arbitration proceedings, the learned AR found that the plaintiff was not the proper party to bring the action and in any event, the emergency arbitrator in the US arbitration proceedings denied the very injunction that GNC LLC sought.

(c) In relation to the rescission of the approval for the plaintiff to sell "LAC" brand products, the learned AR took the view that the plaintiff had no good arguable case since, on the plaintiff's own case, GNC LLC's recission of approval was purely retaliatory to the plaintiff's re-identification of its retail stores in Taiwan and Malaysia and there was no predominant intention to injure the plaintiff.

6 The plaintiff now appeals against the learned AR's decision, on the grounds that:

(a) the AR erred in finding that the plaintiff could not argue lawful means conspiracy in the present proceedings while its subsidiaries were alleging unlawful means conspiracy in a separate arbitration proceeding in US. The plaintiff says that it is not inconsistent for it and the ONI

Subsidiaries to take alternative positions in separate proceedings, because "lawful conspiracy" and "unlawful conspiracy" are sometimes pleaded as alternative arguments;

(b) the plaintiff's claims are not affected by the reflective loss principle because its losses were direct, not reflective, namely, the loss of valuation of its own shares and damage to goodwill;

(c) the defendant deserves no protection under the rule in *Said v Butt* [1920] 2 KB 497 ("*Said v Butt*") because the defendant was actuated by malice; and

(d) Singapore is the more appropriate forum because the plaintiff and one of its subsidiaries are Singapore incorporated companies, the acts of the conspirators occurred in Singapore and the loss was suffered in Singapore.

7 The prevalent usage of the nomenclatures "lawful conspiracy" and "unlawful conspiracy" has created the confusion that these are two separate causes of action, when in fact, they both fall under a claim of conspiracy. In a conspiracy claim, when the acts by the conspirators are entirely lawful, the court requires the plaintiff to satisfy a higher threshold, by showing that the conspirators have a "predominant intention to injure the plaintiff". If the plaintiff can show that the "predominant intention" of the conspirators was to injure the plaintiff, the plaintiff does need to go further to prove that the conspirators' actions were lawful. Therefore, I agree with the plaintiff that it is not inconsistent to plead "lawful conspiracy" and "unlawful conspiracy" in separate proceedings. However, that does not dispose of this appeal.

8 Although I agree that the plaintiff and its subsidiaries have not taken inconsistent positions, I am not satisfied that the plaintiff has shown a "good and arguable case" under Order 11 rules 1(p) and 1(f) of the Rules of Court (Cap 322, 2014 Rev Ed) ("ROC"). First, it is unclear whether the plaintiff is even the proper plaintiff in this suit. It is trite law that a shareholder cannot sue for the diminution in their shareholdings or in distributions they receive as a shareholder as a result of an actionable loss suffered by their company (*Miao Weiguo v Tendcare Medical Group Holdings Pte Ltd* [2021] SGCA 116 at [206]). In the present case, the plaintiff is the sole shareholder of the ONI Subsidiaries and the ONI Subsidiaries allegedly suffered a loss of profits as a result of the defendant's conspiracy. The plaintiff is barred by the reflective loss principle to sue for any loss of dividends or loss of share value as a result of the losses of its subsidiaries.

9 The plaintiff seeks to get around the reflective loss rule by arguing that it has suffered a loss of goodwill. However, the loss of goodwill is not a recognized category of loss that is recoverable under a claim for conspiracy (*Arul Chandran v Gartshore and others* [2000] 1 SLR(R) 436 at [14]). It should be noted that the ONI Subsidiaries have commenced arbitration proceedings in the US against GNC LLC for the losses that they have sustained from the alleged conspiracy. That raises the prospect of double-recovery should the plaintiff be allowed to pursue the present suit.

10 Second, the plaintiff failed to show a "good and arguable case" that the defendant had a predominant intention to injure the plaintiff. The plaintiff's statement of claim contains bare assertions that the defendant had a predominant intention to injure the plaintiff and that the conspiratorial acts were motivated by malice. The plaintiff seeks the court to draw an inference that there was a

predominant intention to injure since the alleged conspiratorial acts "conferred no or no substantial benefit to the defendant or the GNC entities". However, these suppositions are entirely speculative — the defendant could have been acting in what they perceived to be their best interest, in which case, there would not be a predominant intention to injure the plaintiff (*Syed Ahmad Jamal Alsagoff v Harun bin Syed Hussain Aljunied* [2017] 3 SLR 386 at [65]).

11 In the present case, the defendant has provided adequate explanations as to why the alleged conspiratorial acts were in furtherance of GNC LLC's business strategies. For instance, Ms Cheri Mullen, Chief International Officer of GNC LLC, explained in her affidavit that one of the reasons GNC LLC terminated the franchise agreements with the ONI Subsidiaries was that the ONI Subsidiaries had failed to meet the minimum purchase amounts for more than two years in a row. Ms Mullen also explained that GNC LLC terminated the ONI Subsidiaries' exclusive internet rights in Malaysia and Taiwan because of GNC LLC's strategic decision to expand into the e-commerce market, and that similar discussions were made with other international markets. The plaintiff was not singled out as it had imagined. I am not satisfied that there is a "good and arguable case" that the defendant had a predominant intention to injure the plaintiff.

12 Third, the plaintiff has not shown a "good and arguable case" that the defendant should not be protected under the *Said v Butt* rule, which provides that a director who acts *bona fide* within the scope of his authority is immune from tortious liability for procuring his company's breach of contract, even if he had the predominant intention of causing loss to another (*PT Sandipala Arthaputra and others v ST Microelectronics Asia Pacific Pte Ltd and* others [2018] 1 SLR 818 at [56]). For cases of lawful conspiracy, "something more"

beyond a predominant intention to injure would be required to take the director out of the protection of the *Said v Butt* rule (*Chong Hon Kuan v Levy Maurice and others* [2004] 4 SLR(R) 801 at [46]). In the present case, the defendant is the director and Vice Chairman of GNC LLC, and the alleged conspiratorial acts were actions decided upon by the management of GNC LLC. As mentioned above, the defendant has provided adequate explanations on why the alleged conspiratorial acts were in furtherance of GNC LLC's business interests. The plaintiff's bare assertion that the defendant acted with malice is surely insufficient to deny the defendant protection under *Said v Butt*.

13 For the aforementioned reasons, I am not satisfied that there is a sufficient degree on merit to grant the plaintiff leave to serve out of jurisdiction. Given my findings, it is unnecessary for me to deal with the issue of *forum non conveniens*, save to say that I would have found that Singapore is not the more appropriate forum. This is especially when the ONI Subsidiaries have commenced parallel arbitration proceedings in the US against GNC LLC for the wrongful termination of the internet distribution rights and franchise agreements. It is true that the named parties in the two proceedings are different, but the common facts in the two proceedings create a risk of conflicting judgment. The present proceeding in the Singapore courts is a deliberate bid by the plaintiff to hedge its bets and to have two attempts to win — if the plaintiff's subsidiaries lose in the US arbitration proceedings, the plaintiff can still stand a chance to obtain a conflicting judgment in the present proceedings. In the light of the risk of conflicting judgments, it is more appropriate for the entire matter to be resolved in the US arbitration proceedings, and for the plaintiff to be added as a party. The defendant will presumably have no objections given that GNC LLC had filed a motion on 4 May 2022 to add the plaintiff as a party to the arbitration in the first place.

14 The plaintiff's appeal is dismissed. I will hear parties on cost at a later date if it is not agreed upon by the parties.

- Sgd -
Choo Han Teck
Judge of the High Court

Lee Sien Liang Joseph, Qabir Singh Sandhu, Joshua Ling and Law May Ning (LVM Law Chambers LLC) for the plaintiff;
Melvin See Hsien Huei, Lavan Vickneson and Alexander Kamsany Lee (Dentons Rodyk & Davidson LLP) for the defendant.