

Koh Ewe Chee v Koh Hua Leong and Another
[2002] SGHC 100

Case Number : OS 533/2000, SIC 600395/2002
Decision Date : 03 May 2002
Tribunal/Court : High Court
Coram : Choo Han Teck JC
Counsel Name(s) : Gopinath Pillai and Tan Siu-Lin (Drew & Napier LLC) for the plaintiff; Lim Khoon (Lim Hua Yong & Co) and R Chandra Mohan (Rajah & Tann) for the defendants
Parties : Koh Ewe Chee — Koh Hua Leong; Anor

Civil Procedure – Judgments and orders – 'Liberty to apply' order – Nature and scope of order – Order appointing receivers and managers over partnership – Whether plaintiff can apply for declaration that firm was sole proprietorship pursuant to such order

Civil Procedure — Judgments and orders — Order of court — Whether further order that firm is a sole proprietorship fell within scope of 'liberty to apply' order

Facts

The plaintiff and the two defendants are brothers. In 1965, the father of the parties founded Sin Wah Seng, a partnership firm ("the firm"). When he died in 1979, the running of the firm was passed on to the parties. Following disagreements, the defendants applied in December 1999 for an order to dissolve the firm and appoint receivers and managers over its assets and liabilities. This was discontinued after they served a notice of dissolution of the partnership on 11 February 2000. On 7 April 2000, the plaintiff applied to appoint two named receivers and managers to realise the partnership properties. On 7 June 2000, TQ Lim JC ("Lim JC") granted the plaintiff's application.

Subsequently, as a result of the alleged inability of the receivers to determine the shares of the partners in six of the seven properties, the plaintiff applied by way of a summons-in-chambers pursuant to Lim JC's "liberty to apply" order for an order that the court declare that the firm is a sole proprietorship. As its sole proprietor, he claimed that he was entitled to ownership over all the properties against the claims of the defendants. In addition, he also prayed for an order to discharge the receivers, and for a declaratory order that the defendants were holding on resulting trust the seven pieces of property, and that they be ordered to transfer title to him.

Held

, dismissing the application:

(1) The "liberty to apply" order is a judicial device intended to supplement the main orders in form and convenience only so that the main orders may be carried out; *Cristel v Cristel* [1951] 2 KB 725 (folld). Within its ambit, errors and omissions which do not affect the substance of the main orders may be corrected or augmented, but nothing must be done to vary or change the nature or substance of the main orders. The variation of orders is governed by other rules. What amounts to a variation depends on the context of the individual case. Even if parties apply by consent to vary the original order under a "liberty to apply" order, where substantial changes are made to the original order or main orders, the proper mode and procedure must be adopted (see 4, 5).

(2) In the proceedings leading to Lim JC's order, the plaintiff had used unequivocal language in the documents and proceeded before Lim JC on the basis that the firm was a partnership. Notwithstanding his present contentions with some of the facts, the matters deposed in his March

affidavit contained matters which he knew or ought to have known before the application to Lim JC was made. The plaintiff could not now assert that the firm was in fact a sole proprietorship. In any case, a "liberty to apply" order was not the right avenue to proceed on and the orders sought were not minor improvements (see 6).

(3) On the prayer to discharge the receivers, it was noted that no affidavit was received from the receivers and managers stating the problems, if any, that require correction by adjudication. In any case, the ambit of their work was to realise only the partnership properties and if there was any doubt as to whether property belonged to the partnership, they should seek legal advice. However, the properties in question have been in existence for years and were not unknown to the parties. In fact, it was incomprehensible that the parties did not think that the ownership of these properties would be an issue when the orders of Lim JC were sought. In any case, the current application under a "liberty to apply" order was not the appropriate forum to unravel these disputes (see 7).

Case(s) referred to

Cristel v Cristel [1951] 2 KB 725, [1951] 2 All ER 574 (folld)

Bairstow and Ors v Queen's Moat Houses plc, 19 Sept 1997 (unreported) (refd)

Tan Yeow Khoo & Anor v Tan Yeow Tat (No. 2) [2000] 3 SLR 323 (refd)

Judgment

GROUND OF DECISION

1. This is an application by the plaintiff who is the brother of the two defendants. The undisputed facts from the Originating Summons and supporting affidavits appear to be as follows (the word 'appear' is a necessary description because of the curious nature of this application). The parties were partners in a partnership firm known as Sin Wah Seng. This firm was founded in 1965 by Mr. Koh Sim, the father of the parties. The principal business of the firm was that of a hardware retailer. Mr. Koh Sim died in 1979 and his three sons carried on the business as the remaining partners. Disagreements arose between the plaintiff and his two brothers and the plaintiff's two brothers applied by way of an Originating Summons (Originating Summons No. 1930 of 1999) in December 1999 for a court order to dissolve the partnership and the appointment of receivers and managers over its assets and liabilities. Shortly thereafter, on 11 February 2000, the defendants served a notice of dissolution of the partnership on the plaintiff and followed that by an application to amend Originating Summons No. 1930 of 1999 by the addition of a fresh prayer for a declaration that the firm was dissolved on 11 February 2000. However, when this application came up for hearing, the defendants (the plaintiffs in Originating Summons No. 1930 of 1999) withdrew their application and filed a notice of discontinuance of Originating Summons No. 1930 of 1999 on 6 April 2000. On the next day, 7 April 2000, the plaintiff filed this Originating Summons praying for an order appointing Mr. Timothy Reid and Mr. Chan Kek Teck as receivers and managers of the partnership. The application was granted by Judicial Commissioner TQ Lim on 7 June 2000.

2. The plaintiff now applies by way of a summons-in-chambers for various orders including an order declaring that the firm (Sin Wah Seng) was a sole proprietorship and that the plaintiff was the sole proprietor. It also prayed for an order discharging the receivers and managers, but more substantially, for orders declaring seven pieces of property to be held in resulting trust by the defendants for the plaintiff and that they be made to transfer the legal title over these properties to the plaintiff. Mr. Pillai appearing for the plaintiff stated that this present application is made under the "liberty to apply" order of JC Lim of 7 June 2000. From the facts that I have stated above this application before me seems to be most unusual. But I must delve further into the details because they are material to my

decision. First, the plaintiff's prayers in this Originating Summons were made on his assumption that the entity in which he wishes to have the court appoint receivers and managers over was a partnership. Furthermore, he filed a supporting affidavit to this Originating Summons on 15 April 2000 and in 2 of that affidavit he emphatically affirmed as follows: "I am one of the three partners and manager of the former partnership known as Sin Wah Seng. The other two partners are my brothers Koh Hua Leong and Koh Yew Huat." He went on to give a brief history of the partnership (as he called it). In 3 of the same affidavit he accepted that "the partnership was dissolved on 11 February 2000 when both [the defendants] served upon me their respective notice setting forth their explicit intention to dissolve the partnership". He continued in the next paragraph to say that he had been advised that pursuant to s 32(1)(c) of the Partnership Act, Ch 391 the partnership is deemed to be dissolved. This was the deposition that the plaintiff himself relied upon for a court order appointing receivers and managers over *the partnership* (his phrase).

3. The two defendants filed a joint affidavit which did not challenge the facts although they challenged the appointment of Reid and Chan as the proposed receivers and managers. The defendants, however, made a serious allegation against the plaintiff in their affidavit. They say that the firm's records as well as the report of an accountant commissioned to review the records, show that the plaintiff, who was managing the partnership by himself at all material times, had purchased and registered various properties in his own name. This affidavit was filed on 12 May 2000. The plaintiff responded merely by amending the Originating Summons on 1 June 2000 to the effect that the receivers and managers be ordered to sell the partnership properties by auction, private contract, or tender as they may think fit. No further affidavit was filed and on 7 June 2000 JC TQ Lim made his orders. It was not recorded as a consent order but the record shows that no resistance was put up by the defendants. I think it fair to conclude that had the plaintiff asserted that he was the sole proprietor of Sin Wah Seng the defendants would undoubtedly have protested as that was not the case they were supposed to meet. In the event, costs of the action was ordered against the defendants in these terms: "The costs of this application be fixed at \$1,500 to be paid by the defendants to the plaintiff on the footing that the costs is to be an expense of the partnership advanced by the defendants".

4. The matter appeared to have ended there but for the alleged inability of the receivers to determine the shares of the partners in six of the seven properties. Arising from the impasse, the plaintiff made this application with the view of having the court declare that he was the sole proprietor of the firm. The idea was obviously to assert ownership over all the properties in their entirety against the claims of the defendants. It is important at this point to examine the correctness of the approach taken by the plaintiff, namely, to plead the present prayers by means of a summons-in-chambers under the cover of the "liberty to apply" order. Notwithstanding the English authority of reasonably longstanding, that is, *Christel v Christel* [1951] 2 KB 725 and the more recent affirmation of the judicial statement therein by the High Court in England in *Bairstow and Ors v Queen's Moat Houses plc*, 19 Sep 1997 (unreported) and here in *Tan Yeow Khoon and Anor v Tan Yeow Tat and Anor* (No. 2) [2000] 3 SLR 323, the "liberty to apply" order seems to remain poorly understood. The important statement of Somervell LJ in the *Christel* case was, "... *prima facie* the words 'liberty to apply' refer, in my opinion, to the working out of the actual terms of the order". Or, as Denning LJ in the same case said, "It can only do what is necessary to carry the agreement into effect". The issue in the *Christel* case arose in this way. A consent order permitted the husband to possession of the matrimonial house then occupied by his wife and children as soon as he has provided an alternative house or bungalow. The husband procured a flat instead and then asked to vary the consent order under the "liberty to apply" order so as to add the words "or flat" after "house or bungalow" in the main order. The Court of Appeal was of the opinion that the consent order cannot be varied under a "liberty to apply" order.

5. In my view, the "liberty to apply" order, which is really, a judicial device not dissimilar to its

procedural cousin the "slip rule", is intended to supplement the main orders in form and convenience only so that the main orders may be carried out. To this end, errors and omissions that do not affect the substance of the main orders may be corrected or augmented, but nothing must be done to vary or change the nature or substance of the main orders because the variation of orders are governed by other rules, depending on the context of the individual case. For example, in a matrimonial matter, the court may have no power to vary unless there is a change of circumstances, or if it was made with the consent of the other party. It is true that sometimes solicitors may be confused as to the ambit of a "liberty to apply" order. There are, in my view, two main reasons for this. First, as I have just said, what amounts to a supplemental order to give effect to the main orders can only be appreciated in the context of the individual case. Thus, what appears to be a further order to give effect to the original order in one case may appear as a variation in a different context. Secondly, parties often, by consent, apply for a variation of the original order under a "liberty to apply" order. But where substantial changes are intended to be made to the original or main orders the proper mode and procedure must be adopted. An application under a "liberty to apply" order is, therefore, not the way. This present case before me is a clear example of why that is so.

6. Here, an application was made by the plaintiff just over two years ago to appoint receivers and managers over an entity which he regards as a partnership in which he asserted that the defendants were the other partners. He also asked for an order that the receivers and managers be authorised to realise, sell or otherwise dispose of the partnership properties. His prayers were granted. Now, he says that what was declared by him, and accepted by the other parties and the court to be a partnership, was in fact a sole proprietorship. His case before me hinges on two premises. First, that things may not be what they seem; that is, labels such as 'sole proprietorship' and 'partnership' mean nothing unless judicially tested. Secondly, in this case, there has been no judicial pronouncement that Sin Wah Seng was indeed a partnership, and it follows therefore that the issue is at large. By themselves, both premises are sound and solid. They are as solid as bones are, but the flesh that the plaintiff hopes to put around these bones have already putrefied. Some aspects of the flaws of this application seem elementary and obvious. How is it that a man who had carried on a business for several decades with his brothers, and had taken them to court on the basis that they were his partners, now suddenly realise that he was the sole proprietor? In his affidavit of 12 March 2002 the plaintiff sought to explain by reciting the history of the firm's registration back in 1965. It is a long tale that hardly recalls anything that was not known to him at the time JC Lim made his orders. I am, however, mindful that the plaintiff alleges that he did not know that his father had made one of his brothers a partner in the firm. In any event, it would be most unlikely that his solicitors would have advised him to proceed with this Originating Summons and entered judgment on the terms set out had he made known his assertions to them that he does now. The statements found in his March affidavit indicate clearly that the matters deposed there are matters he knew or ought to have known before JC Lim's orders were made, including the assertion that he only knew that his brother became a partner in 1997. The point is, the assertions now made are so fundamentally oppose to the basis of his application and his own declarations under oath that Sin Wah Seng was a partnership and that the defendants were his partners. To correct so fundamental a premise, the entire order of court of JC Lim must be overturned and set aside and fresh pleadings be drawn up. It is not a minor improvement to be dealt with, least of all, under a "liberty to apply" appendage. The present cause was therefore irremediably lost from the outset.

7. It must also be pointed out that there has been no affidavit from the receivers and managers to state what were problems, if any, that require correction by adjudication. The receivers and managers were ordered to realise only the partnership properties. So, if the properties belong to the partnership they must come under the ambit of the receivers' work. If they are not, then the receivers have no business to deal with them. The receivers and managers, acting on advice if need be, are the ones who have to make the call. If they are uncertain, they may have to seek legal

advice as to what to do. The properties in question are not unknown to the parties. They have been in existence for years. It would not have been thought amazing that the parties dispute the ownership of these properties, but it is incredible that the parties here did not think that the ownership of these properties would be an issue when the orders of JC Lim were sought. That is a puzzle that may have yet to be solved - but not here, and not by a summons-in-chambers under a "liberty to apply" order.

8. For the above reasons this application is dismissed with costs to be taxed if not agreed and paid by the plaintiff to the defendants.

Sgd:

Choo Han Teck
Judicial Commissioner

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