Hengwell Development Pte Ltd v Thing Chiang Ching
[2003] SGHC 154

Case Number : OS 601182/2001, SIC 600151/2003

Decision Date : 18 July 2003

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Tay Wee Chong (Hee Theng Fong & Co) for the plaintiff; Yu Siew Fun (Hee Theng Fong & Co) for the plaintiff; Andrew Ang (Rajah & Tann) for the defendant; John Nagulendran (Rajah & Tann) for the defendant

Parties : Hengwell Development Pte Ltd — Thing Chiang Ching

Civil Procedure – Summons in chambers – Summons-in-chambers as subsidiary process drawing life from originating summons

Civil Procedure – Summons in chambers – Whether further applications of fresh and substantial nature may be made by way of summons-in-chambers once originating summons fully heard and finally disposed of

1 The plaintiff applied by way of a summons-in-chambers in Originating Summons No. 601182 of 2001 for leave under s 216A of the Companies Act, Ch 50 to sue in the name of a company called Far East-Hengwell Pte Ltd ('the JV company'). The plaintiff is a shareholder holding 51% of the shares in the JV company and a company called Far East Packaging Industrial Pte Ltd ('FEP') is the other shareholder. There is a deadlock in the board of directors of the JV company that eventually compelled the plaintiff to make this present application. The only business of FEP is to hold shares in a company in China called Quanzhou Factory ('QF'). The business of QF is the manufacture of cardboard boxes and shoe boxes.

2 QF is managed by FEP who appointed the first defendant Thing Chiang Ching ('Thing') as a director of QF, one Wu Yuqin ('Wu') as a manager of QF, and one Lim Seng Kwee ('Lim') as a director and manager of QF. By this summons-in-chambers the plaintiff prayed for leave of court to sue Thing, Wu, Lim and FEP on the ground that these parties had diverted money belonging to the JV company to themselves. The plaintiff alleged that a payment of US$1,206,292 by a Hong Kong debtor of the JV company was not paid into the account of the JV company. The plaintiff gave notice to the directors of the JV company who were nominated by FEP to join a directors' resolution of the Board of Directors of the JV company in order to sue for the recovery of this sum of money. The directors nominated by FEP did not attend the meeting and there was therefore no quorum for the intended purpose. Hence the plaintiff made this application to enable it to sue in the name of the JV company for the recovery of the specified sum of US$1,033,788.80 as well as for damages for breach of fiduciary duty in respect of the directors and officers in question.

3 It transpired in the course of the hearing before me that this originating summons (Originating Summons 601182 of 2001) was heard by the Honourable Justice Lai Kew Chai on 27 November 2002 who granted the plaintiff an order in terms of the prayers sought. The orders of Justice Lai are:

> 1. Leave of Court be granted to the Plaintiffs to bring an action in the name and on behalf of the Fourth Defendant against Far East Packaging Pte Ltd and Thing Chiang Ching ("the action");
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> 2. The Plaintiffs be authorised to have control over the conduct of the action generally;
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> 3. The Fourth Defendant pays reasonable legal fees and disbursements incurred by

the Plaintiffs in connection with the action;

4. The costs of this application be paid by the First to Third Defendants to the Plaintiffs; and

5. Parties are at liberty to apply regarding the future conduct and costs of the proceedings.

4 Consequently, the plaintiff commenced Suit 1233 of 2002 in which they sued in the name of the JV company. Thing and FEP were the defendants. Two other defendants namely Wu Yuqin and Lim Seng Kwee were subsequently added by way of an amendment to the writ. Mr Tay who appeared before me on behalf of the plaintiff submitted that since the amendment to the writ in Suit 1233 of 2002, the plaintiff had discovered the further instance of misappropriation (complained of in this summons-in-chambers) by the four named defendants in the said Suit 1233 of 2002. The case for the plaintiff was that the defendants deceived the directors of QF in believing that no products were sold to Quangzhou Huangqiu Co Ltd or Meideng Investment Co when, in fact, shoe boxes amounting to a value of US$1,033,788.80 were sold, and paid by Meideng. There is some *prima facie* evidence obtained from the Chinese customs authorities by the plaintiff's Chinese lawyers indicating that the alleged transactions had taken place. Mr Ang submitted, however, that this evidence is not credible because the plaintiff had known about it much earlier but failed to introduce it during the application that was heard by Justice Lai. He challenged the reliability of Go Twan Heng who affirmed his evidence on behalf of the plaintiff. Mr Ang submitted that Go had not done a thorough investigation and made no direct enquiries as to whether Meideng actually existed, and so was subsequently forced to correct himself in that he meant a company called *Meridien*. I am not persuaded that the error was indicative of bad faith, given the long history and background of this case. On the merits, I am inclined to treat this application sympathetically and allow the plaintiff's application.

5 Unfortunately, the plaintiff made this application before me by way of a summons-in-chambers under Originating Summons 601182 of 2001. That originating summons had been heard in full and is spent. An *originating summons* is an originating process. Like the *writ of summons* it prescribes the plaintiff’s cause of action and prays for judgments or orders, which in their nature (but subject to the avenues of appeal) are determinative and final. A summons-in-chambers is a subsidiary process which draws its life from the originating process. When the originating process is fully heard and finally disposed of the cause of action is extinquished. No further applications of a fresh and substantial nature may be made by way of a summons-in-chambers save those specifically permitted or directed by the original orders of court. And these are usually provisions for liberty to apply in order that the judgment may be carried into effect. Thus, when an originating process has been finally determined, not only is the judge *functus officio* but the process itself is exhausted. If there is a need to pray for fresh orders arising from the judgment or order of court under the originating process, the correct procedure is to apply by way of a fresh originating summons. It is true that the summons-in-chambers is cheaper and a little more expedient, but is conceptually, the wrong mode on present facts. The practice of law requires precision and consistency as checks against arbitrariness. This discipline must not waver despite the allure of convenience.

6 Reverting to the plaintiff’s present application, it seems to me that the matter in question is one which can form the subject matter of the trial in Suit 1233 of 2002 since it concerned the same cause of action and the same parties although in respect of a separate transaction. The suit itself concerns two other individual transactions. In the circumstances, it is obvious that a fresh suit will repeat a great deal of fact and law that will form the issues in the trial of Suit 1233 of 2002. If the plaintiff is advised to commence a fresh action, the application must be made by a fresh originating summons, and if granted, the fresh suit ought to be consolidated or heard immediately after Suit 1233 of 2002; but that is not a matter within my present purview. If the plaintiff is advised to amend the writ in Suit 1233 of 2002 then it will have to apply for an amendment under that suit. Whether the

plaintiff may succeed in either case must be affected by other considerations not presently before me. I note that there was a previous application to amend Suit 1233 of 2002 by adding two other defendants. For present purposes that application is irrelevant. In any case, this application before me was procedurally and fundamentally wrong, and was therefore dismissed.