Asia Pacific Wire & Cable Corp Ltd and Others v Chik Kai-Ming Aaron and Another [2007] SGHC 102

Case Number : Suit 438/2005

Decision Date : 27 June 2007

Tribunal/Court : High Court

Coram : Lee Seiu Kin J

Counsel Name(s) : Quentin Loh, SC Simon Goh Keng Yeow, Tan Lee Meng and Baldev Singh Bhinder (Rajah & Tann) for the plaintiffs; Quek Mong Hua, Gan Theng Chong and Alma Yong (Lee & Lee) for the defendants

Parties : Asia Pacific Wire & Cable Corp Ltd; Sigma Cable Company (Pte) Ltd; Crown Century Holdings Ltd — Chik Kai-Ming Aaron; Han Chung Yuan alias Hang Chung Yuan

27 June 2007

Lee Seiu Kin J:

1 At the start of the trial on 18 October 2006, the applicable pleading was the amended statement of claim filed on 3 May 2006. In that amended statement of claim, the first plaintiff had withdrawn its claim against both defendants. The second plaintiff's claim was against both defendants for sums of money that it claimed were wrongfully paid to them as director's bonus, director's pension, remuneration and expenses. The third plaintiff's claim was against both defendants for sums of money allegedly wrongfully paid to them as director's bonus, consultation fees and consultation bonus.

2 The defendants closed their cases on 30 October 2006. On 28 November 2006 the plaintiffs filed a second amended statement of claim in which their claims against the defendants were reduced to the following:

(a) Second plaintiff against second defendant:

(i) US$101,557 being payments for director's bonus in excess of the second defendant's entitlement under the written contract of employment;

(ii) US$342,989.05 being pension payments paid in excess of contractual entitlement; and

(iii) US$718,060.49 being reimbursement for expenses which were unauthorised.

(b) Third plaintiff against first and second defendants:

US$126,905.56 being director's bonus paid to the first defendant and the second defendant without authority of the general meeting of shareholders.

3 The first defendant counterclaimed against the first plaintiff for the following:

(i) Unpaid directors' fees from the first plaintiff from 27 March 2003 to 24 September 2004 amounting to US$6,653.30; and

(ii) Salaries, bonuses and expenses for the period January to March 2005 amounting to

S$46,471.23.

4 The second defendant counterclaimed against the first plaintiff for unpaid salaries and bonuses from 2003 to 2005 amounting to US$96,508.17.

5 Counsel made oral submissions before me on 12 February 2007 and on 2 March 2007, I made the following orders:

(a) The second plaintiff's claims against the second defendant:

(i) for US$101,557 is dismissed;

(ii) for US$342,989.05 is dismissed; and

(iii) for US$718,060.49 is allowed only to the extent of US$842.69 and the claim for the remaining US$717,217.80 is dismissed.

(b) The third plaintiff's claims against the first and second defendants for the sum of US$126,905.56 are dismissed.

(c) The first defendant's counterclaims against the first plaintiff are allowed and there shall be judgment for the sums of:

(i) US$6,653.30; and

(ii) S$46,471.23.

(d) The second defendant's counterclaim against the first plaintiff in the sum of US$96,508.17 is allowed.

(e) The Mareva Injunction against the second defendant is discharged.

(f) The second and third plaintiffs are to pay costs to the first and second defendants in respect of their claims in this action, and the first plaintiff is to pay the first and second defendants their costs in respect of the counterclaims.

6 On 30 March 2007, the second plaintiff appealed against my orders dismissing its claims against the second defendant in the following:

(a) US$101,557 being payments for director's bonus in excess of the second defendant's entitlement under the written contract of employment;

(b) US$342,989.05 being pension payments paid in excess of contractual entitlement; and

(c) US$717,217.80 being reimbursement for expenses which were unauthorised.

The second plaintiff also appealed against the order for costs against it in relation to those claims against the second defendant.

7 There has been no appeal filed by the third plaintiff. Both plaintiffs also did not appeal against the orders made in the counterclaims. These grounds of decision will therefore concern only the orders that are the subject of the appeal.

Parties

8 The first plaintiff is a public company incorporated in Bermuda in 1996. It is engaged in the manufacture and distribution of telecommunication and power cable and enamelled wire products in Asia-Pacific through its various subsidiaries. As at 31 December 2003, the first plaintiff was 75.4% owned by Pacific Electric & Wire Company ("PEWC"), a public company listed in Taiwan.

9 The second plaintiff was incorporated in Singapore in 1964 and the first plaintiff owns 98.3% of its shares. The second plaintiff is in the business of manufacturing and distributing wire and cable products in Singapore for the domestic market.

10 The third plaintiff was incorporated in Hong Kong in 1995 and is a wholly-owned subsidiary of the first plaintiff. It is in the business of trading of enamelled wire for electronic, video and audio products manufactured by its wholly-owned subsidiary, Pacific Electronic Wire & Cable (Shenzhen) Co Ltd ("PEWC Shenzhen").

11 The first defendant was employed by the first plaintiff as its Deputy Chief Financial Officer in January 2000 and promoted to Chief Financial Officer ("CFO") in March 2002. He was also the company secretary of the first plaintiff from 23 March 2001. He was appointed a director of the third plaintiff on 22 March 2002, of the first plaintiff on 27 March 2003 and of the second plaintiff on 8 December 2003. The first defendant resigned as director of the first plaintiff on 24 September 2004 and stepped down as its CFO on 1 November 2004. At the time of the trial the first defendant was the General Manager of Bleau Investment Pte Ltd, a subsidiary of PEWC.

12 The second defendant began his career in Taiwan with the founders of the PEWC Group ("the Group"). He was sent to Singapore in the late seventies, and appointed as acting general manager of the second plaintiff in 1980, and was confirmed as general manager in 1982. The second defendant was appointed a director of the second plaintiff on 15 July 1988. At the same time he was appointed Chief Operating Officer ("COO") of the first plaintiff, which appointment was deemed to have commenced on 1 January 1997. The second defendant was appointed a director of the first plaintiff in September 1996 and of the third plaintiff on 22 March 2002. The second defendant resigned as director of the first plaintiff on 24 September 2004 and of the second plaintiff and the third plaintiff on 11 January 2005. At the time of the trial the second defendant was a senior executive vice president of PEWC.

Evidence

13 The plaintiffs called five witnesses of fact and two expert witnesses on Hong Kong and British Virgin Islands law. Their primary witness of fact was Wellan Sham, the CFO of the first plaintiff (appointed on 1 November 2004) and concurrently CFO and director of the second plaintiff, as well as a director of the third plaintiff.

Sham's evidence on background

14 Sham gave evidence of the background to the plaintiffs' group of companies, which is headed by PEWC of Taiwan. This evidence was not really disputed by the defendants although they challenged its relevance. Essentially there was a large corporate scandal in Taiwan which arose from allegations of financial and corporate fraud on the part of senior officers of PEWC. This resulted in the delisting of PEWC from the Taiwan Stock Exchange in April 2004. Six directors of PEWC were indicted on criminal charges in December 2004, including Jack Sun who was the chairman of the first plaintiff

and the second plaintiff during the material time. The Investors' Protection Bureau in Taiwan also commenced proceedings against other directors, including David Sun, who was a brother of Jack Sun and a witness in the present suit.

15 Due to these developments, PEWC sought financing from Asset Managers Co Ltd ("AM") and this led to AM acquiring 72.84% of the first plaintiff in September 2004. Under this arrangement, PEWC had an option to buy back 52.84% of the shares within three years (this buyback option was exercised by PEWC in September 2005). The share purchase agreement provided for AM to appoint up to three directors to the first plaintiff and each of its subsidiaries. These directors would have veto rights and power to supervise the financial operations of the Group. Prior to completion of the share purchase, AM commissioned Kingston CPA Ltd to carry out pre-acquisition financial due diligence on some of the companies in the Group. This included the second plaintiff and the third plaintiff. The Kingston report identified a number of deficiencies including weak corporate governance culture and weak financial control. Notwithstanding this, the share purchase went ahead. After the acquisition, Sham was appointed the CFO and a director of the first plaintiff and the second plaintiff. However Sham encountered difficulties with various officers of the first plaintiff and the second plaintiff, notably the first defendant. He claimed that he was blocked from accessing the financial records of the second plaintiff under the guise of problems with viruses in the computer system. Although he complained about this to David Sun, who was the CEO of the first plaintiff at the time, David Sun refused to do anything. It was only after he approached another director, Tony Yuan, about this that he managed to gain access. Sham rounded up a team to conduct an internal investigation and discovered numerous financial irregularities within the Group. The report, called the CFO Report, was exhibited with his affidavit evidence-in-chief. The report was presented and discussed at a board meeting of the first plaintiff on 31 December 2004. The meeting resolved to suspend the first defendant and the second defendant from all their offices and duties in the Group. Sham was instructed to arrange for further investigations to be conducted. He appointed Ulyos Maa of the auditing firm KPMG to conduct further investigations into the financial irregularities mentioned in the CFO Report. This was completed around March 2005 ("the KPMG Report"). The KPMG report alleged that the first defendant and the second defendant had received unauthorised payments from the first plaintiff, the second plaintiff and a number of other companies in the Group. In April 2005, Sham instructed M/s Simmons & Simmons ("SS"), the first plaintiff's solicitors in HK, to further investigate and verify the conclusion in the KPMG report. On 11 April 2005, SS confirmed that certain past and current officers of the first plaintiff and some of its subsidiaries, including the defendants in this suit, had received unauthorised or improper payments during the relevant period. This led to the present proceedings against the defendants.

The second plaintiff's claims against the second defendant

(i) US$101,557 director's bonus

16 The second plaintiff's case is that the employment contract between the second plaintiff and the second defendant, dated 3 March 2004, did not provide for any remuneration beyond what is provided in clause 4 of that document, *viz*:

(a) US$5,000 per month as COO of the first plaintiff and US$10,000 per month as general manager of the second plaintiff;

(b) One month year-end bonus; and

(c) Performance bonus of US$100,000 if pre-tax profits for the year of the first plaintiff equals or exceeds forecast or target.

17 From 2001 to 2004 payments were made by the second plaintiff as director's bonus in excess of those provisions in clause 4, which amounted to US$101,557. The second plaintiff's position is that although these payments had been approved by the board of directors of the second plaintiff each year by way of resolution, since these were payments of director's remuneration, Art 78 of the Articles of Association required this to be approved by the general meeting of shareholders, which was not done. Therefore the payments were invalid and the second defendant is liable to refund the second plaintiff for this sum.

18 The problem faced by the second plaintiff is that on the face of this employment contract, the parties are the first plaintiff and the second defendant. The second plaintiff is not expressed to be a party. The only mention of the second plaintiff is in clause 4.1 which states that with effect from 1 January 2003, the first plaintiff shall pay to the second defendant an overall monthly salary of US$15,000 which comprises US$10,000 as general manager of the second plaintiff and US$5,000 as COO of the first plaintiff. The provisions on the one month year-end bonus and performance bonus is linked only to the first plaintiff and there is no mention therein of the second plaintiff. In any event the contract states what the second defendant is entitled to receive; it does not prohibit any payment in excess of this.

19 The only question is whether the board resolutions are effective without the approval of the general meeting of shareholders. I am satisfied from the evidence that this sum was paid to the second defendant in his capacity as general manager of the second plaintiff and not as director's remuneration. Although it is stated in the board resolutions as "Director's remuneration", in the context of the entire resolution, in particular, the persons who were paid under this part and a subsequent provision in each of the resolutions for "Directors' Fee" which were put to the general meeting for approval, it is clear that the payments were made to the second defendant as employee's remuneration, which is within the power of the board to approve.

20 Therefore the second plaintiff's claim against the second defendant for refund of bonus payments amounting to US$101,557 fails.

(ii) US$342,989.05 pension

21 The second plaintiff's case is that the second defendant had caused or procured or dishonestly assisted the second plaintiff to incur payment of US$342,989.05 to him in breach of trust of his fiduciary duties as director of the second plaintiff. There is also an allegation of a conspiracy with the first defendant to do this. However from the evidence I am satisfied that this was the result of an initiative on the part of the then managing director, Jack Sun. He put up a memorandum on 1 March 2002 directing the human resources/accounts department to effect payment of pension, on the occasion of the second defendant attaining the retirement age of 62, in accordance with the retirement rules of PEWC. The second defendant gave evidence that Jack Sun was fully aware of the matter of his pension and he believed that the latter had wanted to reward him for the contributions he had made to the second plaintiff. The board of directors of the second plaintiff approved this payment by way of resolution dated 28 February 2002. There was no evidence to contradict this.

22 Therefore the second plaintiff's claim against the second defendant for refund of the pension payment amounting to US$342,989.05 fails.

(iii) US$718,060.49 expense reimbursements

23 There are two components to this claim:

(a) Reimbursement for income tax; and

(b) Reimbursements for expenses incurred on behalf of the second plaintiff.

24 On income tax reimbursement, the second defendant had given evidence of an oral agreement with Jack Sun that the second plaintiff would pay his income tax. The second defendant had been reimbursed by the second plaintiff for income tax payments since 1988 and these payments had been reflected in the monthly management accounts sent to Jack Sun. Jack Sun was not called as a witness by the second plaintiff to contradict this. The evidence before me therefore is that the reimbursements for income tax were authorised.

25 On the expenses incurred by the second defendant on behalf of the second plaintiff, the second defendant had given evidence that Jack Sun had agreed that he could incur up to 1% of sales revenue for sales and entertainment expenses. This had been the practice since 1988. Again Jack Sun did not give evidence. Although some of the items were rather bizarre in nature, given the background of the company and its clientele, I cannot say, in the absence of evidence to the contrary, that those expenses were unauthorised or were not for the benefit of the second plaintiff. In the circumstances of this case it would, in my view, be necessary for such evidence to be given by somebody having charge of the affairs of the company at the material time. At the very least, if the second plaintiff had wanted the court to make an inference from the nature of some of those purchases, evidence ought to be given by a person familiar with the business. Based on the evidence before me the second plaintiff had not proven its case that the second defendant was not entitled to such reimbursements with the exception of the following items that the second defendant had admitted were not valid claims:

(a) A book entitled "Sex Guide of Fam" costing HKD98 for which the second defendant was reimbursed the sum of $22.47;

(b) Airfare for maid from Singapore to Taipei in November 2001 costing $441; and

(c) Expenses in Japan (female underwear and nightwear) totalling JPY25,640 for which the second defendant was reimbursed the sum of $379.22.

26 Therefore, apart from the sum of $842.69, the second plaintiff had not proven its case against the second defendant in respect of this part of the reimbursements claim. I accordingly gave judgment for the second plaintiff against the second defendant for the sum of $842.69.

27 On the question of costs, the plaintiffs have succeeded in recovering only the sum of $842.69 against their claims which, at the start of the trial, totalled in excess of US$1.3 million. Both defendants had also succeeded in their counterclaims against the first plaintiff. In the circumstances, I awarded costs to the defendants in both the claims and counterclaims.

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