Nanyang Law LLC *v* Alphomega Research Group Ltd
[2012] SGHC 184

Case Number : Suit No 540 of 2009 (Registrar's Appeals Nos 156, 161 and 170 of 2011)

Decision Date : 10 September 2012

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Wendell Wong and Brenda Lim (Drew & Napier LLC) for the plaintiff in counterclaim; Prakash Mulani (M & A Law Corporation) for the liquidators of the plaintiff in counterclaim; Kirindeep Singh and Ng Hui Min (Rodyk & Davidson LLP) for the first and second defendants in counterclaim; Andrew Ang Chee Kwang and Andrea Tan (PK Wong & Associates LLC) for the fourth defendant in counterclaim; Tham Wei Chern and Joel Lim Junwei (Allen & Gledhill LLP) for the fifth defendant in counterclaim; Adrian Wee Heng Yi (Characterist LLC) for Tan Choon Yong, the non-party.

Parties : Nanyang Law LLC — Alphomega Research Group Ltd

Civil Procedure – Costs

10 September 2012

Choo Han Teck J:

1 These applications concerned one Dr Tan Choon Yong ("Dr Tan"), an unusual party (the non-party) in an unusual situation. The story began as long ago as 2008 when Dr Tan commenced an action in Suit 49 of 2008 against the majority shareholders in Alphomega Research Group Ltd ("Alphomega") (the plaintiff in the counterclaim in this suit – Suit 540 of 2009). Dr Tan was then represented by Drew & Napier LLC. Alphomega was represented, first by the first defendant in the counterclaim, Nanyang Law LLC, and then by Sterling Law Corporation.

2 In Suit No 49 of 2008, Tan Lee Meng J found in favour of Dr Tan at trial and the majority shareholders were ordered to buy over Dr Tan's shareholding in Alphomega. What transpired thereafter was the reverse. Dr Tan bought over the shareholding of his opponents instead. When its fees were not paid, Nanyang Law LLC sued in this action for payment. It obtained judgment in default in July 2009. Dr Tan was re-appointed a director of Alphomega on 28 September 2009 and the company obtained a court order setting aside the judgment in default and proceeded to pursue a counterclaim against Nanyang Law LLC and various parties involved.

3 The defendants in the counterclaim applied for security for costs against Alphomega. Those applications were dismissed by the Assistant Registrar on the ground that it was more likely than not that Alphomega would be able to meet any cost orders that may be made against it, but on appeal, further evidence showed that Alphomega was indeed insolvent. Consequently, an order for security for costs was ordered in respect of the applications by the defendants in the counterclaim. On its failure to pay up a debt set out in a statutory demand by a creditor, Habib Ali, Alphomega was ordered to be wound up on 22 September 2011. Dr Tan's application for judicial management was dismissed. Alphomega had applied for further arguments but a liquidator was appointed before the hearing and no further action was proceeded with. The only issue remaining concerned costs. In this regard Dr Tan was named a "non-party" because the first, second, fourth and fifth defendants in the counterclaim sought to have an order for costs made against him personally.

4 Counsel for the defendants in the counterclaim relied on *DB Trustees (Hong Kong) Ltd v Consult Asia Pte Ltd and another appeal* [2010] 3 SLR 542 ("*DB Trustees*") for the proposition that they were here entitled to costs against the non-party Dr Tan because the latter had a close connection with the case and was the main director and shareholder of Alphomega. It seemed to me that counsel read too much into *DB Trustees*. The Court of Appeal in *DB Trustees* enunciated the basic principle that costs is always discretionary and, thus, there should be no fixed rule that unless notice had been given to him, a non-party to an action cannot have an order of costs made against him (see [47]). The court in *DB Trustees* also relied on the Privy Council decision in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807 and concluded that the "core consideration in relation to the court's exercise of discretion in ordering costs against a non-party is that it must be *just*, in all the circumstances of the case to do so".

5 I accept that all that was held in the decisions cited above were the principles that the court ought to consider before ordering or refusing to order costs against a non-party. There is also another equally important general principle to bear in mind, namely that by ordering costs against a non-party who is a shareholder and director of an impecunious litigant company, the court pierces the corporate veil. The law is replete with examples of when the corporate veil might be pierced. It suffices for me to say that it is not an order the court would be quick to make. Hence, being the managing director alone, and thus, having a substantial connection to the case is only one of the many factors the court would take into account. It is also not a principle of law that where a litigant company is unable to pay costs the successful party can look to the person with a close connection to it and the litigation for costs. Much of the law that permits the corporate veil to be lifted concerns fraud or highly unconscionable conduct. I am not here setting new law but generalising the principle that the company is a separate entity from its members. Exceptions are what exceptions are — not too many as to upstage the general rule, enough so as to prove it. In this case, the defendants in counterclaim alleged that Dr Tan was the person who was directly connected to the counterclaim and thus he ought to bear the costs himself. I am of the view that the evidence was inferential, but the defendants did not rebut Dr Tan's affidavit in which he maintained that he was not the only director of Alphomega. In any event, a decision to sue that turned out to be unwise is not in itself adequate grounds to impose costs personally against the voice behind the veil. It was also important here that the solicitor for the liquidators of Alphomega, Mr Prakash Mulani, had asked for leave to withdraw the counterclaim and that his presence at the hearing for costs be dispensed with. Counsel for the defendants in the counterclaim did not object. Leave was thus granted to Alphomega to withdraw its counterclaim and for its counsel to be excused thereafter. Consequently, the liquidator took no position regarding payment of costs by Dr Tan. It seemed unusual that the liquidators would not join in support of the application because if an order was so made, the pool of money to be shared amongst the creditors would naturally be higher. The only affidavit filed for the costs application was that of Dr Tan.

6 Taking into account the matters referred to above, I was not persuaded that it would be just to order the non-party to bear the costs. The application that costs be paid by the non-party was therefore dismissed with costs to the non-party.

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