VBH Singapore Pte Ltd *v* Technobuilt Construction & Engineering Pte Ltd [2013] SGHCR 12

Case Number : Suit No 410 of 2012 (Summons No 1741 of 2013)

Decision Date : 07 May 2013

Tribunal/Court : High Court

Coram : Tan Teck Ping Karen AR

Counsel Name(s) : Mr A Rajandran (M/s A Rajandran) for the plaintiff; Mr Kelvin Tan and Mr Jason Chen (M/s Drew & Napier LLC) for the second defendant.

Parties : VBH Singapore Pte Ltd — Technobuilt Construction & Engineering Pte Ltd

Companies – Striking Out

7 May 2013 Judgment reserved.

AR Tan Teck Ping Karen:

Introduction

1 This is the 2nd defendant's application to be struck out of the Writ of Summons and Statement of Claim as well as all subsequent pleadings under O18 r 19 of the Rules of Court ("the Rules"). The 2nd defendant is relying on all four grounds of this rule, namely, that the claim:

(a) discloses no reasonable cause of action;

(b) is scandalous, frivolous or vexatious;

(c) may prejudice, embarrass or delay the fair trail of the action; and

(d) is an abuse of the process of the court.

Factual Background

2 The plaintiff is a company in the construction business, including providing services as general contractors. The 1st defendant is also a company in the construction business and the 2nd defendant is a director and majority shareholder of the 1st defendant.

3 The 1st defendant was the main contractor of two projects, the first in Ngee Ann Polytechnic ("NAP Project") and the second in Tan Tock Seng Hospital ("EDTC Project"). The plaintiff was engaged as a sub-contractor in the two projects, mainly in relation to aluminium works.

4 The plaintiff's claim is for the total sum of $376,463.05, being the balance monies due and owing to the plaintiffs, including retention monies, in respect of work done, services rendered and materials supplied by the plaintiffs for the two projects.

5 Default judgment has been entered against the 1st defendant and the action proceeds against

the 2nd defendant only.

6 The contracts in respect of the NAP Project and the EDTC Project were entered into between the 1st defendant and the plaintiff. The plaintiff's claim against the 2nd defendant is that he was the controller and manager of the business of the 1st defendant, he was the alter ego of the 2nd defendant and that the 1st defendant was used as a vehicle by the 2nd defendant to perpetrate fraud and/or commit wrong on the plaintiff. For these reasons, the plaintiff is seeking to lift the corporate veil and make the 2nd defendant personally liable for the outstanding sums arising from the two projects which are claimed in this action.

My decision

Preliminary issues

7 As preliminary issues, the plaintiff argued that this application should not be allowed because: (a) there was a delay by the 2nd defendant in filing this application; and (b) this application is an abuse of process as the application was made to avoid/evade giving discovery of documents by the 2nd defendants pursuant to the plaintiff's pending application for specific discovery in Summons No. 1670 of 2013.

8 On the issue of delay, O18 r 19(1) of the Rules states that "The Court may *at any stage* of the proceedings order to be struck out or amended any pleading..." [emphasis added].

9 While an application to strike out a pleading should be made as soon as possible, a late application is not doomed to failure (see *Tapematic SpA v Wirana Pte Ltd and another [2002] 1 SLR(R) 44 at [66], approved in Orient Centre Investments Ltd and another v Societe Generale [2007] 3 SLR(R) 566 ("Orient Centre") at [61]).*

10 Although the Writ of Summons was filed on 17 May 2012, due to various interlocutory applications, pleadings only closed on 14 December 2012. Parties filed their list of documents on 7 February 2013. As parties have just completed discovery, I am of the view that proceedings are still at an early stage and there are no grounds to hold that this application should not be allowed due to delay.

11 Further, in *Orient Centre* at [60], the Court of Appeal accepted that the generality and vagueness of the claims were such that discovery and further and better particulars were required before the appellants could decide whether it has a prima facie case. Similarly, in this case, I note that the plaintiff failed to draw a distinction between the two defendants in the Statement of Claim and frequently referred to them collectively as the "defendants" with no particulars of the claim. Bearing this in mind, it was reasonable for the 2nd defendant to assess the case after the discovery.

12 The plaintiff's second preliminary objection to this application is that this is an abuse of process.

13 The plaintiff argues that, as this application was filed shortly after the plaintiff's application to seek specific discovery from the 2nd defendant, the 2nd defendant is using this application to avoid providing discovery and so this is a proceeding "*where the process of the court is not being fairly or honestly used but is employed instead for some ulterior or improper purpose or in an improper way*". The plaintiff is relying on the second category of proceedings that would amount to abuse stated in

Chee Siok Chin v Minister for Home Affairs [2006] 1 SLR(R) 582 approved at [71] of NCC International AB v Alliance Concrete Singapore Pte Ltd [2008] 2 SLR(R) 565].

14 While the timing of this application does appear to support the plaintiff's argument, I find that, the timing of the application by itself, would be insufficient to elevate this application to one which is an abuse of process. This is especially since a striking out application may be filed at any time and I have found that there is no inordinate delay in this application. I also note that the 2nd defendant has already engaged in general discovery and so it cannot be said that this application was filed to avoid disclosure of the 2nd defendant's documents.

15 Therefore, for the reasons stated above, I find that the filing of this application is not an abuse of process and there was no undue delay in filing this application.

No reasonable cause of action – O18 r19 (a) of the Rules

16 The law relating to O18 r19(a) is well established. See *Ng Chee Weng v Lim Jit Ming Bryan [2012] 1 SLR 457* ("*Ng Chee Weng*") where the Court of Appeal held at [112]:

> ...The pleading itself must fail to make out a reasonable cause of action without reference to other evidence before it can be struck out under limb (a)....

17 The Court of Appeal in *Ng Chee Weng* also held at [110]:

> ...The draconian power of the court to strike out a claim at the interlocutory stage under limb (a) of O 18 r 19(1) can only be exercised when it is patently clear that there is no reasonable cause of action on the fact of the pleadings. The mere fact that a case is weak and not likely to succeed is not a valid ground for striking out a claim under this ground. In the Singapore High Court decision of *Active Timber Agencies Pte Ltd v Allen & Gledhill [1995] 3 SLR(R) 334*, Rubin J held (at [13]) that:
>
> ...a reasonable cause of action means a cause of action with some prospect of success when only the allegations in the pleadings are considered....Another principle enunciated by the courts over the years underpins the proposition that so long as the statement of claim or the particulars disclose some cause of action or raise some question to be decided by a judge..., the mere fact that the case is weak and not likely to succeed, is no ground for striking it out...

18 Therefore, the decision on whether there is a reasonable cause of action is based entirely on what is stated in the pleadings without reference to any other evidence.

19 From the Statement of Claim, it may be seen that the plaintiff is relying on two grounds to lift the corporate veil and make the 2nd defendant personally liable, namely: (a) the 1st defendant is the alter ego of the 2nd defendant; and (b) 1st defendant was used by the 2nd defendant to perpetuate fraud and/or commit wrong on the plaintiffs.

Alter ego

20 The separate legal personality of a company was established in the case of *Aron Solomon (Pauper) v A Salomon and Company, Limited]1897] AC 22* and is an accepted principle of law. However, the corporate veil may be pierced if the company is no more than an alter ego of its director.

21 The key question to be asked is this: is the company carrying on the business of its controller? This is inevitably a question of fact. However, what is clear is that evidence of sole shareholding and control of the company without more will not move the court to intervene. Further, the mere fact that the director used the pronoun "I" when referring to the company's actions is not sufficient to show that the director was the controller of the company. [See *NEC Asia Pte Ltd v Picket & Rail Asia Pacific Pte Ltd [2011] 2 SLR 565 ("NEC Asia") at [31] and [36]*].

22 In the Statement of Claim, the plaintiff relies on the following to establish his case that the 1st defendant is the alter ego of the 2nd defendant:

(a) the 2nd defendant was the controller and manager of the business of the 1st defendants;

(b) the 2nd defendant is a director and majority shareholder of the 1st defendant, the other director and minority shareholder being the 2nd defendant's father; and

(c) the 2nd defendant represented and held himself out to be the "owner" of the 1st defendant and at all material times, the 1st defendant's general manager acted on the instructions and directions of the 2nd defendant.

23 The question here is whether the above statements which have been pleaded would be sufficient to show a reasonable cause of action. I am of the view that it does not. The mere fact that the 2nd defendant is a director and majority shareholder is insufficient to show that he is the controller of the 1st defendant. Secondly, it is normal for a director to give instruction to the staff of a company in the normal course of business and to expect the staff to comply with the instructions. Therefore, the fact that the 1st defendant gives instructions to the staff of the 1st defendant, who comply with these instructions, is, by itself, insufficient to support the alter ego argument.

24 In *NEC Asia* at [36], it was held that the director's frequent use of the pronoun "I" when referring to the companies' actions could not be used as evidence that these companies were his alter ego. In the present case, even if the 2nd defendant did hold himself to be "owner", this is a bare allegation without any particulars as to how this showed that the 2nd defendant was the controller of the 1st defendant and by itself would not be sufficient to show that the 1st defendant was his alter ego.

25 Therefore, for the above reasons, I find that, based on the pleadings, the plaintiff's claim that the 1st defendant is the alter ego of the 2nd defendant has no reasonable prospect of success and should be struck out on the basis that there is no reasonable cause of action.

Fraud

26 The plaintiff's second basis for piercing the corporate veil is that the 1st defendant was used as a vehicle by the 2nd defendant to perpetrate fraud and/or to commit wrong on the plaintiff as follows:

(a) The plaintiff was deceived into believing representations made by the 2nd defendant that the plaintiff would be duly paid and/or that the contractual obligations undertaken by the plaintiff would be duly honoured, which representations turned out to be false and untrue;

(b) The 2nd defendant made promises and assurances to make payment and reneged on the same subsequently;

(c) The promises and assurances were made by the 2nd defendant as a pretext to induce the plaintiff to continue with the projects and/or refrain from commencing proceedings to recover monies due to them, only to renege on the same when payment was sought;

(d) The 2nd defendant would be uncontactable and fail to respond to plaintiff's calls in the hope of evading payment due to the plaintiff;

(e) Plaintiff acted to its detriment by relying on the 2nd defendant's representations as they undertook further works and incurred expenses which they would not be obliged to but for the representations made by the 2nd defendant;

(f) Plaintiff granted indulgence to the 1st defendant at the request of the 2nd defendant and have granted forbearance by withholding the commencement of proceedings against the 1st defendant;

(g) 2nd defendant claimed that the employers of the NAP Project had withheld the retention monies which turned out to be false; and

(h) 2nd defendant sought the plaintiff's assistance to rectify defective works and failed to ensure that the monies owed to the plaintiff for these works were paid.

27 It should first be made clear that the plaintiff's claim against the 2nd defendant is not for misrepresentation and there has been no claim by the plaintiff against the 2nd defendant for damages arising from any alleged misrepresentation. The plaintiff's counsel informed the court during submissions that the cause of action for these representations "should be misrepresentation but I am going on a higher standard that [2nd defendant] should be personally liable for the misstatements that were made as the defendants had no intention to make payment when the statements were made". In other words, the plaintiff is seeking to pierce the corporate veil on the basis of these representations by the 2nd defendant.

28 In *Prest v Prest [2013] 2 WLR 557* at [125], the English Court of Appeal, summarised the principles in respect of piercing of the corporate veil as follows:

> ...First, ownership and control of a company are not themselves sufficient to justify piercing the veil. Second, the court cannot pierce the veil, even when no unconnected third party is involved, merely because it is perceived that to do so is necessary in the interest of justice. Third, the corporate veil can only be pierced when there is some impropriety. Fourth, the company's involvement in an impropriety will not by itself justify a piercing of its veil: the impropriety 'must be linked to use of the company structure to avoid or conceal liability'...Fifth, it follows that if the court is to pierce the veil, it is necessary to show both control of the company by the wrongdoer *and* impropriety in the sense of a misuse of the company as a device or facade to conceal wrongdoing. Sixth, a company can be a facade for such purpose even though not incorporated with deceptive intent:...the question is whether it is being used as a facade at the time of the relevant transaction.... [emphasis added]

29 It follows that the issue to be considered is this: whether the representations by the 2nd defendant would be an impropriety that is linked to the use of the company structure to avoid or conceal liability such that it would be sufficient to lift the corporate veil.

30 The representations made by the 2nd defendant were merely assurances of payment to the plaintiff which the plaintiff allege turned out to be untrue or request for work to be done by the plaintiff for which it is alleged that no payment was subsequently made. The representations made by the 2nd defendant were not in any way "linked to the use of the [1st defendant] to avoid or conceal liability". From the pleadings, it is clear that the plaintiff was not confused over the identities of the 1st and 2nd defendant and the plaintiff was fully aware that the 2nd defendant was the director of the 1st defendant. In my view, none of these statements as pleaded, even if they were false or fraudulent, would be sufficient to show that the 1st defendant was used as a "device or facade to conceal wrongdoing".

31 In these circumstances, while the plaintiff may be aggrieved by the representations by the 2nd defendant, which are alleged to be false or fraudulent, its contractual recourse for the outstanding sums due and owing from the two projects is still against only the 1st defendant, who was the contracting party. The court will not pierce the corporate veil merely in the interest of justice.

32 For the reasons above, I am of the view that there is no reasonable cause of action against the 2nd defendant in respect of the alleged representations made by the 2nd defendant and the plaintiff's claim against the 2nd defendant should be struck out.

Amendment

33 In making my decision to strike out the claim against the 2nd defendant, I am aware of the proposition that a court should not strike out a case if the defect or deficiency could be cured by way of amendment. See *Ching Mun Fong v Liu Cho Chit [2000] 1 SLR(R) 53 ("Ching Mun Fong")*.

34 The plaintiff has submitted that, even if the pleadings are insufficient, the 2nd defendant has not sought any particulars and amendments to the pleading may be made, if necessary. First, it is not for the 2nd defendants to seek particulars to remedy and shore up the plaintiff's inadequate pleadings. It is for the plaintiff to ensure that his pleadings are adequate to show that there is a reasonable cause of action. Second, despite the vigorous attack on the pleadings by the 2nd defendant during the course of submissions before me, the plaintiff has not indicated that any amendments to the pleadings are required and stand by their pleading. Therefore, the proposition in *Ching Mun Fong* has no application here. See *Kim Hok Yung v Cooperative Centrale Raiffeisen-Boerenleenbank BA* [2000] 2 SLR(R) 455 at [18].

Conclusion

35 Accordingly, I order that the plaintiff's claim against the 2nd defendant be struck out.

36 I will hear parties on the issue of costs.

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