Elbow Holdings Pte Ltd *v* Marina Bay Sands Pte Ltd
[2015] SGHC 209

Case Number : Suit No 954 of 2012 (Summons No 3332 of 2015)

Decision Date : 11 August 2015

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Plaintiff in-person; Tsin Jenny and Fong Xian Jun Benjamin (WongPartnership LLP) for the defendant.

Parties : Elbow Holdings Pte Ltd — Marina Bay Sands Pte Ltd

Civil Procedure – Representation of companies – Order 1 rule 9

11 August 2015 Judgment reserved.

Choo Han Teck J:

1 In Summons No 3332 of 2015, the plaintiff seeks leave under O 1 r 9(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) for its newly appointed director, Mr Ted Tzovaras, to act on its behalf in the proceedings in court.

2 The plaintiff is a tenant of the defendant and commenced Suit 954 of 2015 against the defendant in November 2012 for damages for misrepresentation and breach of a tenancy agreement and a collateral contract. In response, the defendant filed a counterclaim for arrears in rent and commenced two suits against the defendant for further arrears allegedly due and owing to it by the plaintiff across two periods (*ie*, Suit Nos 702 of 2013 and 553 of 2014). The three actions were subsequently consolidated. Even though more than two years have passed, the trial has not begun because the parties are still engaged in interlocutory disputes. I heard and dismissed the plaintiff's appeal against the Registrar's decision to award security for costs in favour of the defendant in October 2014: see *Elbow Holdings Pte Ltd v Marina Bay Sands Pte Ltd* [2014] SGHC 219, where a brief summary of this action can be found.

3 Presently, four interlocutory matters are before the court. All four matters arose from the Assistant Registrar's decision to grant interim payments and instalment payments to the defendant in an earlier summons, Summons No 1564 of 2015. Before these interlocutory matters can be heard, the preliminary issue of whether leave should be given for Mr Tzovaras to represent the plaintiff, who is no longer legally represented, has to be dealt with.

4 On 24 June 2015, M/s Wong & Leow LLC discharged itself as the plaintiff's solicitors. It had earlier taken over from M/s Rajah & Tann LLP on 27 February 2014. Trial dates that were originally fixed from 28 September to 9 October 2015 have since been vacated.

5 Pursuant to O 5 r 6(2) and O 12 r 1(2) of the Rules of Court, a company may not appear in court except through an advocate and solicitor. Order 1 r 9(2) of the Rules of Court gives a discretion to the court to grant leave to a duly-authorised officer of the company to act on the company's behalf in the court proceedings. O 1 r 9(2) provides as follows:

> (2) For the purposes of section 34(1)(*ea*) of the Legal Profession Act (Cap. 161) and paragraph

(1), the Court may, on an application by a company or a limited liability partnership, give leave for an officer of the company or limited liability partnership to act on behalf of the company or limited liability partnership in any relevant matter or proceeding to which the company or limited liability partnership is a party, if the Court is satisfied that —

(*a*) the officer has been duly authorised by the company or limited liability partnership to act on behalf of the company or limited liability partnership in that matter or proceeding; and

(*b*) it is appropriate to give such leave in the circumstances of the case.

An "officer" in relation to a company is in turn defined in O 1 r 9(6)(*a*) of the Rules of Court as "any director or secretary of the company, or a person employed in an executive capacity by the company".

6 Order 1 r 9(4) stipulates the procedural requirements that have to be met. I am satisfied that the plaintiff has complied with these procedural requirements by filing two affidavits sworn by Mr Brian Oliver Patrick McGettigan, another director of the plaintiff, which set out the necessary contents in support of its application. The issue I have to decide is whether it is "appropriate to give such leave in the circumstances of the case".

7 Both parties referred me to the two High Court cases that have discussed the amended O 1 r 9 in some detail: *Bulk Trading SA v Pevensey Pte Ltd and another* [2015] 1 SLR 538 ("*Bulk Trading*") and *Allergan, Inc and another v Ferlandz Nutra Pte Ltd* [2015] 2 SLR 94. In *Bulk Trading*, Steven Chong J identified a range of factors the court ought to consider in deciding an application under O 1 r 9(2). The list includes the following:

(a) whether the application for leave has been properly made pursuant to the Rules of Court;

(b) the financial position of the corporate application and/or its shareholders;

(c) the *bona fides* of the application;

(d) the role of the company in the proceedings;

(e) the structure of the company;

(f) the complexity of the factual and legal issues;

(g) the merits of the company;

(h) the amount of the claim;

(i) the competence and credibility of the proposed representative; and

(j) the stage of the proceedings.

8 Mr Tzovaras was recently appointed as a director of the plaintiff on 24 June 2015, the day that the plaintiff's solicitors discharged themselves. This was less of a coincidence and more of a deliberate move on the part of the plaintiff. Mr McGettigan candidly deposed that the very purpose of appointing Mr Tzovaras as a director was to allow him to act on behalf of the plaintiff in the proceedings through O 1 r 9(2). Mr McGettigan explained in his second affidavit that Mr Tzovaras's motivation for representing the plaintiff in his new capacity as its director is not for commercial gain

but to help his "dear friend" Mr McGettigan.

9 Mr Tzovaras has been providing legal services to the plaintiff on this matter since mid-2012. He had been working with the plaintiff's local solicitors from Rajah & Tann and subsequently, those from Wong & Leow. Mr Tzovaras claims to have drafted the plaintiff's pleadings, affidavits and other legal documents. According to the plaintiff, Mr Tzovaras temporarily stopped charging the plaintiff since May 2014 and has undertaken not to do so until the plaintiff is in a position to pay his fees. But Mr McGettigan stated that he has "every intention to ensure that Mr Tzovaras is paid all fees that are properly due to him when [the plaintiff] is in a position to do so".

10 Mr Tzovaras admits that he is a qualified lawyer who was licensed to practise in the Supreme Court of New South Wales as a solicitor in 1981. He was practising as a solicitor up to November 2009. Since then, he has been involved in arbitration matters and has been providing legal services to clients, mostly from Australia, in collaboration with Sydney-based law practices.

11 The plaintiff cites financial reasons for discharging its solicitors and for applying to have Mr Tzovaras act on its behalf under O 1 r 9(2). It asserts that this litigation is getting too expensive for it. It claims to have incurred $1m in legal fees. It owes Wong & Leow $200,000 and its solicitors before that, $150,000. It also owes Mr Tzovaras close to $280,000 in legal fees. Mr McGettigan deposed that neither the plaintiff itself nor its directors can afford to continue to fund its legal fees. The plaintiff asserts that Mr Tzovaras is the appropriate person to represent the plaintiff because he is familiar with the history of this action and has the competence and credibility to act in the proceedings. Further, the plaintiff asserts that the proceedings are at an advanced stage.

12 Ms Jenny Tsin, counsel for the defendant, submitted that there are no compelling reasons to allow this application. She argued that the plaintiff has not satisfactorily shown that it is so impecunious that it cannot afford legal representation. Ms Tsin also submitted that the *bona fides* of this application is suspect given that Mr Tzovaras was appointed a director of the plaintiff only because the plaintiff wanted to take advantage of the exception to the rule in O 1 r 9(2). She also pointed out that the matter cannot be said to be at such an advanced stage since trial dates have been vacated. The plaintiff thus has time to get legal representation for itself.

13 The strongest point of the defendant's case is that O 1 r 9(2) is not a special corridor for foreign lawyers to circumvent s 33 of the Legal Profession Act (Cap 161) ("the LPA") and enter to represent parties in our courts. Ms Tsin argued that s 33 of the LPA explicitly prohibits unauthorised persons to act as an advocate and solicitor. She submitted that even with the move towards liberalisation of our legal industry, there are still strict restrictions governing foreign counsel practising in Singapore. If a foreign lawyer wishes to practise in Singapore, whether in the area of Singapore law or foreign law, he has to make an application under ss 130I or 130K of the LPA and his application must be approved by the Attorney-General ("the AG"). The AG may also impose any condition that he thinks is necessary. Additionally, a foreign lawyer who is registered under s 130I automatically becomes a member of the law society pursuant to s 40A of the LPA, and will be subject to the same disciplinary rules as lawyers who are admitted to the local bar. It is clear that the strict and structured framework in the LPA that governs when and how foreign counsel can practise in Singapore does not include an exception through O 1 r 9(2).

14 I agree with Ms Tsin that O 1 r 9(2) cannot be used to circumvent the strict laws of admission of foreign lawyers. The evidence before me is clear. This is not a case in which the proposed representative, Mr Tzovaras, is an officer of the company who happens to be a lawyer. He is not merely a foreign lawyer. He was, and still is, primarily a foreign lawyer who has been advising the plaintiff in this action. This fact remains regardless of his motivations for agreeing to be the plaintiff's

representative, or his charitable arrangements with the plaintiff. Ironically, the plaintiff relies on these same facts to argue that Mr Tzovaras is thus a competent and suitable candidate to act on its behalf in the proceedings. That argument misses the bigger point: the rules in the LPA cannot be circumvented by an application under O 1 r 9(2).

15 On the problem of financing, the plaintiff has the option of terminating Mr Tzovaras instead of the local lawyers. It is true that from a personal viewpoint, Mr Tzovaras might be closer to the plaintiff's shareholders and directors, but the law is clear, the company must be represented in court only by a lawyer unless leave is granted under O 1 r 9(2). If the plaintiff is unable to retain so many lawyers, it is only sensible that they elect to retain the ones who have been admitted to practise at the bar in the forum of litigation.

16 Lastly, I agree with Chong J's observation in [100] to [102] of *Bulk Trading*. The difference between an applicant who is a plaintiff and one who is a defendant is a small one but I can envisage that it is one that might tip the balance in a finely balanced case. The difference lies in the court's sympathy for an impecunious defendant company which is dragged into litigation. But this is not such a case.

17 For the reasons above, the application in this summons is dismissed. I will hear parties on costs at a later date.

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