

Peh Yeng Yok v Tembusu Systems Pte Ltd (formerly known as Tembusu Terminals Pte Ltd)
and others
[2016] SGHC 36

Case Number : Suit No 504 of 2015 (Summons Nos 2958 and 2962 of 2015)
Decision Date : 15 March 2016
Tribunal/Court : High Court
Coram : Chua Lee Ming JC
Counsel Name(s) : Kevin Lim Meng Ern, Philip Fong Yeng Fatt, Tan Yong Seng Nicklaus and Wong Hui Juan Lynn (Harry Elias Partnership LLP) for the plaintiff; Adrian Tan (August Law Corporation) for the first defendant; Joseph Tay Weiwen, Tan Aik Thong and Claire Yeo (Shook Lin & Bok LLP) for the second and third defendants.
Parties : Peh Yeng Yok — Tembusu Systems Pte Ltd (formerly known as Tembusu Terminals Pte Ltd) — Andras Kristof — Jarrod Luo

Civil Procedure – Anton Piller orders

15 March 2016

Chua Lee Ming JC:

Introduction

1 The plaintiff, Mr Peh Yeng Yok, applied for a search order against the defendants. On 17 June 2015, I granted the order. The defendants are Tembusu Systems Pte Ltd (formerly known as Tembusu Terminals Pte Ltd) (“the Company”), Mr Andras Kristof (“Andras”) and Mr Jarrod Luo (“Jarrod”). Andras and Jarrod are directors of the Company.

2 All three defendants applied to set aside the search order. On 19 November 2015, I set aside the search order against all three defendants and ordered the plaintiff to pay costs to the Company (which was separately represented) fixed at \$20,000 excluding disbursements, and to Andras and Jarrod fixed at \$25,000 excluding disbursements.

3 The plaintiff has appealed against “part of [my] decision” setting aside the search order against the Company. The Notice of Appeal filed on 15 December 2015 does not state which part of my order is being appealed against. There is no appeal against my decision setting aside the search order against Andras and Jarrod.

The plaintiff’s claim

4 The plaintiff holds 0.74% of the shares in the Company. The Company was incorporated in Singapore on 3 March 2014. Its founding directors were the plaintiff’s son, Peh Sik Wee (“PSW”), Andras and Jarrod. Its business is developing crypto-currencies, crypto-currency platforms and associated software and hardware.

5 The majority shareholder of the Company is Estates General Pte Ltd (“Estates General”), a holding company with shares held by PSW, Andras and Jarrod in equal proportions. The following table shows the shareholding structure of the Company:

Name	Shares	Percentage
Estates General Pte Ltd	4,288,000	61.88%
OUE Investments Pte Ltd	1,823,709	26.32%
Red Steed Studios Pte Ltd	432,000	6.23%
Likok Paper Trading Pte Ltd	255,321	3.68%
Peh Yeng Yok	51,064	0.74%
Yap Su-Chin Nadine	50,000	0.72%
Attila Kis	30,000	0.43%

6 When these proceedings started in May 2015, the Board of Directors of the Company ("the Board") comprised PSW, Andras, Jarrod and 2 nominee directors from OUE Investments Pte Ltd ("OUE"). Andras is also the Chief Executive Officer and Jarrod the Chief Operating Officer of the Company. PSW was the Chief Strategy Officer until 4 May 2015 when his employment was terminated. The two OUE nominee directors resigned from the Board sometime in November 2015.

7 The plaintiff claims that Andras and Jarrod have conducted the affairs of the Company in a manner oppressive to him as a minority shareholder. Specifically, the plaintiff alleges that Andras and Jarrod had breached their duties as directors of the Company. He alleges that they have disregarded the corporate governance structure of the Company in a manner unfairly prejudicial to him as a shareholder. The plaintiff's claim is based principally on three grounds:

(a) First, the plaintiff alleges that Andras and Jarrod authorized payments (totalling S\$358,419.12) on 32 dates from the Company's bank accounts with Malayan Banking Berhad ("MayBank") and CIMB Bank Berhad ("CIMB") and intended to make six payments (totalling US\$30,816) from the Company's CIMB account ("the Suspicious Transactions"). The plaintiff claims that Andras and Jarrod refused to furnish information and supporting documents despite repeated requests made by PSW between March and May 2015. He claims that these payments have not been authorized by the Board and/or are in fact misappropriations by Andras and Jarrod.

(b) Second, the plaintiff claims that Andras and Jarrod offered to pay PSW \$200,000 and give him complete intellectual property rights to the Company's products if he would discontinue his investigations into the Suspicious Transactions and leave the Company ("the Offer"). PSW's employment as Chief Strategy Officer was terminated after PSW rejected the offer. The plaintiff says that the termination was meant to punish PSW for refusing to accept the Offer.

(c) Third, the plaintiff claims that Andras and Jarrod had caused the Company to develop business in Ukraine ("the Ukraine Deal"). The plaintiff claims that Andras and Jarrod once again refused to provide any information on this deal or on various transactions and expenditures related to it. The plaintiff claims that these transactions and expenditures may be in breach of various sanctions imposed by the United States of America, the European Union and other states in relation to the Ukrainian conflict.

8 The plaintiff contends that Andras and Jarrod have breached their duties to the Company as directors by (a) refusing to provide information on the Suspicious Transactions and the Ukraine Deal to PSW, and (b) making the Offer to PSW in order to stop his inquiries and terminating his

appointment as Chief Strategy Officer when he refused to accept the Offer. The plaintiff says that these breaches have unfairly prejudiced him as a minority shareholder.

The search order

9 The plaintiff applied *ex parte* for the search order on 25 May 2015. I heard the plaintiff's application over a few hearings. On 17 June 2015, I granted a search order which allowed the plaintiff's solicitors, the supervising solicitor and computer forensic experts to enter the Company's office premises and search the premises, and any vehicles on the premises belonging to and/or habitually used by Andras and Jarrod, for:

- (a) electronic and computer stored data contained in the hard disks of personal computers and mobile phones of Andras and Jarrod and/or personal computers on the Company's premises which are used by Andras and Jarrod;
- (b) electronic and computer stored data contained in the shared drives of the Company's server accessible by Andras and Jarrod;
- (c) electronic and computer stored data of all email accounts used and accessible by Andras and Jarrod on the Company's server; and
- (d) hard copy documents and correspondence relating to bank transaction payments from 1 June 2014 to date from three specific bank accounts that the Company had in MayBank, CIMB and DBS Bank Ltd ("DBS").

10 I also ordered that all copies of electronic data and hard copy documents and correspondence relating to bank transaction payments be delivered to the supervising solicitor for safekeeping. My intention was to hold a subsequent *inter partes* hearing to work out the details for the supervising solicitor to retrieve the relevant information so that the plaintiff will not have access to information that is not necessary for purposes of these proceedings.

11 The order was served on the defendants on 19 June 2015 at 9.17 a.m. at the Company's registered office at 6 Eu Tong Sen Street #19-88 The Central, Singapore 059817. The defendants promptly applied to set aside the search order. The Company was separately represented from Andras and Jarrod.

12 On 19 June 2015, before Senior Judge Kan Ting Chiu, the parties agreed to certain temporary orders pending the hearing of the substantive applications to set aside the search order. Pursuant to the consent order, the laptops of Andras and Jarrod were to be surrendered to the supervising solicitor, while their mobile phones were to be cloned and returned. Andras and Jarrod were ordered to allow the plaintiff's solicitors to take screen shots of the inboxes and sent boxes of their email accounts, without having to disclose their passwords. Parties were to find a technical solution to allow copying of data of the Company's servers in a way which would not compromise its performance. Such copied data was also to be handed over to the supervising solicitor.

13 I heard the defendants' applications to set aside the search order on 11 November 2015. On 19 November 2015, I gave my decision to set aside the search order dated 17 June 2015. I also ordered all information, data, evidence and/or materials previously seized pursuant to the search order, whether in the custody of the supervising solicitor or not, to be returned to the defendants.

The law

14 A search order is a draconian measure and will only be granted if necessary in the interests of justice. In line with this overriding principle of necessity, a plaintiff applying for a search order must show that:

- (a) there is an extremely strong *prima facie* case;
- (b) the damage that would be suffered if a search order was not granted is very serious;
- (c) there is a real possibility that the defendant(s) would destroy relevant documents; and
- (d) the effect of the search order would not be out of proportion to the legitimate object of the order.

See *Asian Corporate Services (SEA) Pte Ltd v Eastwest Management Ltd (Singapore Branch)* [2006] 1 SLR(R) 901 ("*Asian Corporate Services*") at [14].

A search order can be set aside if the defendant subsequently shows that one or more of these elements had not been proven. It can also be set aside if the party obtaining it had failed to make full and frank disclosure of material facts that would affect the likelihood of the order being granted: *Bengawan Solo Pte Ltd and another v Season Confectionery Co (Pte) Ltd* [1994] 1 SLR(R) 448 at [12]. Material non-disclosure alone would be sufficient ground to set aside the order.

16 For the purpose of setting aside an order, the court can also consider events subsequent to the grant of the order in determining whether the requirements of a search order have been met: *BP Singapore Pte Ltd v Quek Chin Thean and others* [2011] 2 SLR 541 ("*BP Singapore*") at [55].

17 In my view, the plaintiff failed to show that (a) he had an extremely strong *prima facie* case, (b) there was a real possibility that the defendants would destroy evidence, and (c) the effect of the search order was proportionate to the legitimate object of the order.

Whether the plaintiff has an extremely strong *prima facie* case

18 The defendants first submitted that the plaintiff's suit was a backdoor derivative action against Andras and Jarrod for breach of directors' duties, brought under the guise of a minority oppression suit. I disagreed with the defendants. In my view, the plaintiff's complaint was that by their conduct, Andras and Jarrod had disregarded the corporate governance structure of the Company. As a shareholder, the plaintiff was entitled to expect that Andras and Jarrod, as directors of the Company, would not prevent PSW (also a director) from having access to information relevant to investigations being conducted by PSW. Any such conduct on the part of Andras and Jarrod could be unfairly prejudicial to the plaintiff as a shareholder. In addition, misappropriation of the Company's funds could amount to conduct that was unfairly prejudicial to the plaintiff.

19 However, although the plaintiff's claim could fall within the scope of s 216 of the Companies Act (Cap 50, 2006 Rev Ed), in my judgment, the plaintiff has not made out an extremely strong *prima facie* case that Andras and Jarrod had either conducted the affairs of the Company or exercised their powers as directors in a manner that was unfairly prejudicial to him as a shareholder.

20 As stated at [7], the plaintiff's claim is based on the Suspicious Transactions, the Offer and the Ukraine Deal.

21 With respect to the Suspicious Transactions, the defendants have furnished details of the

Suspicious Transactions with supporting documents. The payments appear to have been for legitimate purposes, including rental deposit, salaries, office furniture, director's fees (including PSW's director's fees), and payments for consultancy services rendered. The plaintiff was not able to challenge these details apart from a bare assertion by PSW that he did not believe that the supporting documents were credible or related to the transactions in question.

22 As for the Offer, I accepted the defendants' explanation that this was an offer to buy out PSW's shares in Estates General and it was part of legitimate without prejudice settlement proposals made to PSW. Pursuant to a separate application by Andras and Jarrod (which was heard together with the applications to set aside the search order), I ordered that the allegations in the Statement of Claim relating to the Offer be struck out. There is no appeal against my decision to strike out the allegations relating to the Offer. Interestingly, I noted that PSW had asked for more time to consider the Offer. This was an odd response if PSW had (as he alleged) viewed the Offer as an illicit offer to buy his silence.

23 I turn next to the Ukraine Deal. Apart from certain payments which formed part of the Suspicious Transactions, it is not even clear what the plaintiff's case is. The Statement of Claim refers to PSW's concern that the Ukraine Deal may be in breach of sanctions relating to the Ukrainian conflict. However, this is just a bare allegation; no details or evidence have been provided.

24 Mr Hee En Ming ("Hee"), an employee of the Company who has since resigned, filed an affidavit on behalf of the plaintiff. Apparently, Hee was close to PSW. In his affidavit, Hee said that:

(a) during a meeting on 24 April 2015, Andras had said that one of the objectives of the Company's dealings in Ukraine was to assist in the Ukrainian war effort;

(b) subsequently, PSW provided Hee with a recording device to record his conversations with Andras and Jarrod; and

(c) during a meeting on 11 May 2015, Jarrod had said that the Ukraine Deal was concerned with supplying the counterparties with the Company's technology for a crypto-currency platform for them to carry out financial transactions, that it was not the Company's concern what these counterparties used the technology for even if it involved shady deals, and that the dealings had the backing of a Ukrainian oligarch who was well connected in Ukrainian financial circles.

Andras and Jarrod have disputed Hee's allegations.

25 Hee produced a transcript of the recorded conversation with Jarrod on 11 May 2015. Unfortunately, the transcript contained many missing parts of the conversation because the recording was inaudible. I did not think it safe to rely on the transcript.

26 As for the payments that PSW queried the defendants about, Andras and Jarrod explained that the payments were to Hungarian and Ukrainian software developers hired by the Company. According to Andras and Jarrod, this practice of hiring Hungarian and Ukrainian software developers was known to PSW. Andras and Jarrod also explained that the Company had been working with a non-governmental organisation that was involved in humanitarian work in Ukraine and which was interested in using the Company's software to build a generic system that could be used by volunteer or donation-based organisations (such as the Red Cross) to make donations and the use of such donations transparent. The plaintiff disclaimed knowledge about the hiring of Hungarian and Ukrainian software developers, but had produced no other evidence in support of his and/or PSW's suspicions about the Ukraine Deal.

27 I also noted that Andras and Jarrod had kept the plaintiff updated on developments in the Company. On 1 April 2015, Andras sent the plaintiff an email updating him on developments in the Company. Profit and loss statements and management accounts were attached to the email. On 1 May 2015, Andras sent an email to investors of the Company (including the plaintiff) providing a periodic update of the Company's affairs for April 2015. Draft 2014 Audited Financial Statements were attached to the email.

28 It also seemed to me that this case included disputes that had more to do with PSW than the plaintiff. First, it involved disputes between PSW (as a director) and his fellow directors, Andras and Jarrod. Second, it involved a dispute between PSW and his fellow shareholders of Estates General. One of the remedies sought in this case is an order that Andras and Jarrod *sell their shares in Estates General* to PSW. However, this remedy is relevant only to PSW as a shareholder in Estates General and has no place in the present case which involves allegations that the affairs of the Company are being conducted in a manner that is unfairly prejudicial to the plaintiff.

29 Looking at the case as a whole, in my judgment, the plaintiff may have shown a *prima facie* case but he has not met the threshold of an extremely strong *prima facie* case.

Whether there is risk of serious damage

30 The plaintiff sought the search order to preserve evidence which the plaintiff alleged would show that Andras and Jarrod misappropriated the Company's funds. In my view, if the plaintiff is correct about the misappropriation, there would be serious damage to the plaintiff's case at trial if the search order is set aside and evidence of the misappropriation were destroyed as a result.

Whether there is a real possibility that the defendants would destroy the evidence

31 The plaintiff relied on *Nikkomann Co Pte Ltd and others v Yulean Trading Pte Ltd* [1992] 2 SLR(R) 328 ("*Nikkomann*") for the proposition that the risk that evidence may be destroyed can be inferred from the conduct of a defendant who is untrustworthy, has acted in a clandestine manner and is prepared to resort to subterfuge to cover his tracks. It is true that direct evidence of a threat to destroy evidence is seldom readily available. However, surreptitious behaviour alone does not compel the conclusion that a defendant will destroy evidence in contempt of court to frustrate a claim brought by the plaintiff; to hold otherwise would undermine the principle that a search order is an extreme remedy meant for extreme cases: *BP Singapore* at [48]. It is not sufficient to just allege nefarious conduct or that the defendant is untrustworthy. The question to be asked in every case is whether a defendant's conduct or untrustworthy nature shows a propensity to destroy relevant evidence. The cases demonstrate this. In *Nikkomann*, the court was satisfied that the defendants' conduct gave rise to concerns that they might try to cover their trails by destroying incriminating documents. In *Asian Corporate Services*, the court was of the view that destroying company data in a laptop computer showed a propensity to destroy evidence (at [29]). In *BP Singapore*, the defendant's conduct in deleting two documents was held to demonstrate a real possibility that he might destroy other documents (at [57]).

32 In *Bouvier, Yves Charles Edgar and another v Accent Delight International Ltd and another and another appeal* [2015] 5 SLR 558 ("*Bouvier*"), the Court of Appeal was of the view (albeit in the context of Mareva injunctions) that an allegation of dishonesty is no substitute for examining whether there is in fact a real risk of dissipation of assets, and that it is incumbent on the court to examine the precise nature of the dishonesty and the strength of the supporting evidence, bearing in mind that proceedings are only at an interlocutory stage (at [94]). It has been suggested that the stringent approach in *Bouvier* is likely to apply in the context of search orders when considering

whether there is a real possibility that the defendant will remove or destroy evidence (*Singapore Civil Procedure 2016* vol 1 (Foo Chee Hock JC gen ed) (Sweet and Maxwell, 2016) at para 29/8A/3). I agree but would respectfully add that the approach taken in *Nikkomann, Asian Corporate Services*, and *BP Singapore* is consistent with the approach in *Bouvier*.

33 In the present case, the plaintiff argued that the defendants' conduct supported an inference that they would destroy the evidence if a search order was not granted. First, the plaintiff relied on allegations that (a) Andras and Jarrod had secretly made multiple transfers of less than \$10,000 each from the Company's CIMB account to its DBS account, so that PSW's signature would not be required; and (b) Andras and Jarrod wrongfully removed PSW as a signatory for the DBS account without a resolution of the Board.

34 Andras and Jarrod explained that they were not getting PSW's co-operation as a signatory to the Company's bank accounts. They therefore transferred funds from the Company's CIMB account to the Company's DBS account in order to preserve the Company's cash-flow and ability to make payment for operational expenses. The details of the Suspicious Transactions provided by the defendants support the defendants' assertions. As for the alleged wrongful removal, this was necessitated by PSW's unwillingness to cooperate, which had made it difficult for the company to make payments for operational expenses. In my view, the explanations by Andras and Jarrod seemed consistent with the evidence.

35 The plaintiff also submitted that as Andras and Jarrod had stonewalled PSW's requests for information and were willing to pay \$200,000 for his silence, this meant that they must be trying to hide the documents and would be likely to destroy them before the discovery process. In my view, this was clearly nothing more than speculation. In addition, there was at least one occasion when it had been arranged for PSW to review the Company's operational expenses, but PSW did not turn up. PSW's reason for not turning up had to do with the Offer but it was not clear why the Offer (which he did not accept) should have stopped him from carrying out the review. Finally, and in any event, I have already held that the Offer was part of legitimate without prejudice settlement proposals and I have struck out the allegations in the Statement of Claim relating to the Offer.

36 Next, the plaintiff alleged that it is highly likely that Andras and Jarrod are misappropriating the Company's funds, exchanging them for crypto-currency and then diverting them to various electronic depositories set up for or by them so that their actions would be untraceable. In this regard, the plaintiff claimed that Andras was very familiar with ways to manipulate the crypto-currency system and could therefore "dissipate funds and destroy such evidence of dissipation". The plaintiff also alleged that Andras and Jarrod would surely and easily delete all records of such transactions from the crypto-currency depositories if he was not able to obtain the defendants' computer records. These were serious allegations; however, they were also highly speculative and based on nothing more than PSW's suspicions.

37 In my view, the evidence in this case did not compel the inference that the defendants have the propensity to destroy evidence. The plaintiff's allegations are based on conjecture and suspicion. The defendants had disagreements with PSW and may have been uncooperative. However, this was hardly enough for me to conclude that they would destroy evidence.

38 I must add that one of the factors I had considered was the presence of the two OUE directors who had been kept informed of the dispute. I had felt that they could help secure compliance with the Company's discovery obligations. When I gave my decision on 19 November 2015, I was informed that they had resigned. However, as their presence on the Board was not a crucial factor, their resignation did not change my conclusion that there was no ground to infer any risk of destruction of

evidence.

Whether the effect of the search order would be out of proportion to the legitimate object of the order

39 I accepted the defendants' assertion that the search order would adversely affect potential investors' confidence in the Company. The Company needed fresh funding to continue developing and implement its projects. In contrast, the object of the search order was principally to preserve evidence of misappropriation of the Company's funds, and this was largely based on the Suspicious Transactions in respect of which the defendants have provided details and supporting documents. In addition, much of the plaintiff's case has turned out to be based on speculation and suspicion. I concluded therefore that the effect of the search order on the Company was out of proportion to the legitimate object of preserving the evidence.

Conclusion

40 For the foregoing reasons, I set aside the search order against the defendants and made the costs orders mentioned at [2] above.

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