

Ser Kim Koi v Metalform Asia Pte Ltd
[2006] SGHC 178

Case Number : OS 1407/2006
Decision Date : 31 August 2006
Tribunal/Court : High Court
Coram : Yeong Zee Kin AR
Counsel Name(s) : Adrian Tan with Vanita Jegathesan for the plaintiff; Moiz Sithawalla with Lavinia Rajah for the defendant
Parties : Ser Kim Koi — Metalform Asia Pte Ltd

31 August 2006

AR Yeong Zee Kin:

1. The Plaintiff is a director of the Defendant company. In a related suit 427 of 2006, the Plaintiff and his brother George Ser (the Sers) are seeking a declaration that the company is insolvent and that the other 4 directors of the company are in breach of their fiduciary duties; the company and the directors have counterclaimed that the Sers are the ones in breach of their fiduciary duties.
2. This present originating summons is taken out by the plaintiff to obtain from the defendant company copies of an engagement letter which the defendant company had issued to their auditors PriceWaterhouseCoopers and drafts of the auditors' report (the PWC report) which the defendant company had obtained. The relevant facts are as follows.
3. The Sers are shareholders of another company, Holland Leedon which is a creditor of the defendant company. In an earlier matter, they had taken the view that the defendant company was insolvent and have thus issued a statutory demand against it. This matter is on appeal to the Court of Appeal.
4. Consonant with their views, they obtained an auditor's report from Deloitte and Touche (the D&T report) to the effect that the defendant company is insolvent. This report was obtained on or about 24 April 2006 and given to the other directors during a board meeting on that day or very soon after. The directors took a different view and—through the defendant company's solicitors—engaged PriceWaterhouseCoopers to prepare a report to address the D&T report and to also advise the company on its financial position.
5. During a board meeting on 5 July, the directors were informed that a draft report had been prepared and there was an agreement amongst the directors that they will await the final report before making a decision. The Sers made a request on the following day, 6 July, for the draft report and engagement letter. On 7 July, Suit 427 of 2006 was commenced seeking a declaration that the defendant company was insolvent and that the other directors were in breach of their fiduciary duties. The PWC report was finalised and issued on 11 July.
6. The plaintiff's position is that *qua* director, he is entitled to both the engagement letter and drafts of the PWC report under section 199 of the Companies Act and common law. The defendant company resists this on the grounds that the plaintiff is only entitled to these documents where he needs them to discharge his fiduciary duties and that in the present circumstances, he was not only in a position of conflict but also that these documents were covered by legal advice privilege. The plaintiff's response is that there is no conflict between the plaintiff and the defendant company and that since the final report was disclosed, legal advice privilege had been waived.

7. I approach this in the following manner. First I consider whether the plaintiff is entitled to the documents either under section 199 of the Companies Act or common law. Next, whether the plaintiff is disentitled by reason of a conflict of interest or legal advice privilege.

8. The first issue is straightforward. The relevant sub-section of section 199 of the Companies Act states:

Accounting records and systems of control.

199. —(1) Every company and the directors and managers thereof shall cause to be kept such accounting and other records as will sufficiently explain the transactions and financial position of the company and enable true and fair profit and loss accounts and balance-sheets and any documents required to be attached thereto to be prepared from time to time, and shall cause those records to be kept in such manner as to enable them to be conveniently and properly audited.

9. The PWC report deals with the financial position of the defendant company and I would interpret section 199(1) of the Companies Act expansively to include the letter of reference and draft reports under the umbrella of 'other records' in that section. Although these documents were prepared by the defendant company's solicitors and an external auditor, once they were received by the defendant company, whereupon they formed part of its records. Access should be given to the plaintiff in order for him to carry out his statutory duty under section 199(1) to "explain the ... financial position of the [defendant] company".

10. Since the plaintiff is entitled, is he somehow disentitled to copies of these documents by reason of conflict of interest or legal advice privilege? I consider first the issue of conflict of interest. As I had opined during submissions, the issue is not so much whether the documents will place the plaintiff in a position of conflict but whether the plaintiff was already in a position of conflict and that the documents should therefore not be given to him. Quite apart from the view which I may have held in an earlier application, recent developments leave no doubt in my mind that the Sers (and hence the plaintiff) are in a position where their interests are potentially in conflict with those of the defendant company's. From the chronology of events, it is clear that the Sers are taking the position that the defendant company is insolvent. By commencing Suit 427 of 2006 before receipt of the final PWC report, it is quite clear that they are not backing down from that position. The PWC report expresses the view that while the defendant company faces financial difficulties, there is no conclusive evidence to show that it is technically insolvent.

11. There is clear conflict in that the Sers as shareholders of creditors are interested in preventing the defendant company from carrying on trading thereby incurring more debt as this may potentially reduce the assets of the defendant company that they, as creditors, may have recourse to. As directors, they are interested to prevent the defendant company from fraudulent trading as they may be potentially personally liable as directors. These flow from their view that the defendant company is insolvent.

12. The remaining directors and the company do not think that the defendant company is insolvent. Their interest is to continue trading in order to get the defendant company out of its financial difficulties.

13. From the above, the interests of the plaintiff and the defendant company are clearly in conflict. Bearing in mind that the plaintiff already has a copy of the final PWC report, I do not think

that disclosure of the letter of engagement or draft reports will be used by the plaintiff to enable him to express a view of the defendant company's financial position. He already has a fairly entrenched view. There is a real likelihood that the plaintiff will use these documents to further his interests in preventing the defendant company from trading and to widen the schism between the Sers and the other directors and the defendant company.

14. I turn now to the question of legal privilege. From the chronology of events—and palpably from the opening paragraph of the PWC report—the report was prepared to counter the D&T report. The defendant company asserts legal advice privilege in that disclosure of the letter of engagement and drafts of the report will substantially disclose the legal input or advice provided by the defendant company's solicitors Tan Rajah & Cheah. The plaintiff argues that since the final report has been disclosed, there is waiver. I do not agree.

15. In the final report, any legal advice which may have been provided by the defendant company's solicitors have been commingled within and forms part of the auditors' report. The legal advice that the defendant company asserts privilege over are the earlier advice in the drafts – not the final report. I think that this falls squarely within the case of *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and Others* [2006] 3 SLR 441; [2006] SGHC 91, where Belinda Ang J disallowed requests by the plaintiffs (the defendant company's banks) for drafts of an accountants' report on the ground that the report was a joint effort of the company's accountants and solicitors which was covered by legal advice and litigation privilege.

16. The plaintiff attempted to distinguish *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and Others* by arguing that, as opposed to the present case where there was waiver of legal privilege by the disclosure of the final report, there was no waiver in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and Others* as there was no final report nor were the drafts disclosed. Further, the plaintiff was a director of the defendant company whereas in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and Others*, the plaintiffs requesting for the draft reports were the company's banks and hence external to the company.

17. As I said earlier, I do not think that mere disclosure of the final report amounts to waiver of the legal advice privilege that the defendant company is entitled to assert over the legal advice identifiable in the earlier drafts. In the final report, what is presented is the final product of the auditors and the legal input of the company's solicitors is not immediately or clearly identifiable. This is to be contrasted with the disclosure of the various draft versions leading to the final report. Legal input by the defendant company's solicitors could appear in the earlier drafts as annotations, comments, editions, etc. If not so evident, than by careful study and juxtaposition of the drafts, it is possible to infer the legal input that the defendant company's solicitors have provided. Unless legal advice is clearly identifiable in the final report, disclosure of the final report cannot be taken to amount to waiver of legal advice privilege.

18. Further, I see no difference in the nature of the assertion of entitlement. In *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and Others*, the plaintiffs' entitlement was based on discovery in the process of litigation. In the present case, the plaintiff's entitlement derives from section 199 of the Companies Act and his position as a director. In both cases, the person seeking disclosure has first to show entitlement. Legal advice privilege operates to prevent disclosure. The fact that the banks in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and Others* were external to the defendant but the plaintiff in the present case is a director of the defendant company makes no difference. First, the applicant has to show entitlement to the documents discovery is requested of

and then the respondent has to show why the applicant's request should be denied.

19. From the chronology of events in the present case and the opening paragraph of the report, it is clear that the PWC report was obtained to counter the P's position and the D&T report. It was clear from submissions that the plaintiff was external to the process of procuring the PWC report. There is a clear split between the Sers on the one camp and the remaining directors and the company on the other. I have also earlier expressed my views on the intransigency of their positions. This would be a clear case where the company is entitled to assert legal advice privilege against some of its directors, namely the Sers.

20. For these reasons, the plaintiff's application is disallowed.

Plaintiffs' application is disallowed.

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