Jinsung Construction Co Ltd Singapore Branch *v* Roko Trading Pte Ltd and another and another suit
[2012] SGHC 50

Case Number	: Suits Nos 716 and 641 of 2010
Decision Date	: 09 March 2012
Tribunal/Court	: High Court
Coram	: Lai Siu Chiu J
Counsel Name(s)	: Shiever Subramanium Ramachandran (Grays LLC) for the plaintiff; Prabhakaran s/o Narayanan Nair (Derrick Wong Lim BC LLP) for the defendants in Suit 716/2010; Chopra Sarbjit Singh (Lim & Lim) for the defendants in Suit 641/2010.
Parties	: Jinsung Construction Co Ltd Singapore Branch — Roko Trading Pte Ltd and another

Companies – Separate legal personality – alter ego – piercing of corporate veil

9 March 2012 Judgment Reserved.

Lai Siu Chiu J:

Introduction

1 This consolidated suit centres around a claim in Suit No 716 of 2010 by Jinsung Construction Co Ltd Singapore Branch ("the plaintiff") against Roko Trading Pte Ltd ("the first defendant") and Choi Sung Jong ("the second defendant") (collectively "the defendants"), for the conversion of a piece of construction equipment called the SR-90 Hydraulic Drilling Rig and its component parts ("the equipment"). The second defendant was at all material times the sole shareholder and the main director of the first defendant (the other director being his wife). As the first defendant has admitted liability for the plaintiff's claim, the trial before me was solely to determine whether the second defendant should be made personally liable for the plaintiff's claim.

Facts

2 The equipment was kept in a storage facility owned by Tiong Woon Crane Pte Ltd ("Tiong Woon Crane") who is the defendant in Suit No 641 of 2010 (since been discontinued). In and around February 2010, the second defendant was instrumental in arranging for the equipment to be stored at Tiong Woon Crane's facility. When the second defendant found out subsequently that the plaintiff had difficulty selling the equipment, he thought he would be able to make a quick profit by buying the equipment (at what he believed to be a bargain price), and on-selling it at a higher price. Therefore, on 17 May 2010, the plaintiff and the first defendant entered into an agreement for the sale of the equipment to the first defendant ("the agreement") at the price of $1.5m. Pursuant to the terms of the agreement, a deposit ($150,000) was paid to the plaintiff, with the balance ($1.35m) to be paid within sixty days after the signing of the agreement.

3 As it turned out, the market was not in the defendants' favour, and the second defendant found it difficult to sell the equipment. He thus decided to sell the equipment in two separate parts. First, on 7 June 2010, the first defendant entered into an agreement with ZYG Investment Pte Ltd ("ZYG") to sell one part of the equipment for $350,000. Subsequently, on 2 August 2010, the first

defendant entered into another agreement with Soilmec Far East Pte Ltd ("Soilmec"), to sell the remaining part of the equipment for $800,000.

4 However, those transactions were not made known to the plaintiff, which was, understandably, anxious about the payment of the balance sum of $1.35m. A series of emails were thus sent to the second defendant by the plaintiff in July, reminding him about the payment obligation under the agreement. In particular, on 21 July 2010, as payment for the balance sum of $1.35m had not been forthcoming, the plaintiff sent an email to the first defendant, with an official letter attached demanding payment. The second defendant's response throughout, as evinced by his emails sent on 14 July 2010 and 3 August 2010, was to state that he was encountering difficulties in selling the equipment, and to ask for payment to be delayed. At no point was the plaintiff informed of the fact that the first defendant had, in fact, already sold the equipment in parts to ZYG and Soilmec.

5 The matter eventually came to a head when the second defendant sent an email to the plaintiff on 12 August 2010, proposing that the first defendant make payment of the sum of $600,000, in full and final settlement of the payment obligation under the agreement, since the market conditions were "unfavourable". The plaintiff tersely replied that this was unacceptable. Sensing that something was amiss, the plaintiff first sent an email to Tiong Woon Crane on the same day, instructing the company not to release the equipment. It later sent its own representative to the storage site to check on the equipment. To its horror, the plaintiff found that the machine was missing.

6 The plaintiff then approached the second defendant on 13 August 2010 to seek an explanation about the missing equipment, to which the second defendant responded by giving the plaintiff an ultimatum to accept $600,000 or nothing at all. As a result, the plaintiff commenced these proceedings.

The submissions

The plaintiff

7 Although the first defendant had admitted liability for the plaintiff's claim in conversion, the plaintiff sought to persuade the court to find the second defendant personally liable as well. In essence, the plaintiff's case was that the second defendant was the controlling mind and spirit of the first defendant, and was intimately involved in the entire chain of events leading to the conversion of the equipment. He should not therefore be allowed to evade responsibility by hiding himself behind the corporate veil.

The second defendant

8 In contrast, the second defendant emphasized that the agreement was always between the plaintiff and the first defendant - at no time did he assume personal liability. He asserted that at the end of the day, the debt was an ordinary trading debt between the two companies, and there was no sound reason to justify the lifting of the corporate veil. The second defendant also claimed that the plaintiff had not specifically pleaded for the veil of incorporation to be lifted.

The evidence

The plaintiff's case

9 The plaintiff's first witness was Choi Jong Im ("Ms Choi"), who is a senior manager of the

plaintiff. While Ms Choi conceded under cross-examination by counsel for the defendants (Mr Prabhakaran) that it was one Yi Jin Su (who has since left the plaintiff company) ("Yi") who was personally involved in the correspondence with the second defendant, I accepted that Ms Choi was capable of giving evidence for the plaintiff since she was at all material times in charge of, and oversaw, the plaintiff's operations in Singapore. In particular, she had oversight, and kept track of Yi's dealings with the defendants.

10 Mr Prabhakaran focused much of his cross-examination of Ms Choi, on trying to establish that the handing over of the keys to the first defendant on 25 May 2010, pursuant to a term in the agreement that the keys were to be so handed over once the 10% deposit was paid, signified that title and ownership of the equipment had passed over to the first defendant. That was an attempt by the second defendant to undermine the plaintiff's claim that the equipment had been converted by the defendants, which was a most puzzling course of action, not least because the first defendant had already admitted liability for conversion. The focus of the trial was on the extent and nature of the second defendant's involvement in the entire transaction and not whether ownership had passed with the handing over of the keys. Given that the first defendant had admitted liability for conversion, the position must be taken to be that the parties did not intend ownership to pass on the handing over of the keys.

11 Subsequently, in response to Mr Prabhakaran's question about why the plaintiff sought to hold the second defendant personally liable, Ms Choi testified that all the email exchanges between the plaintiff and the second defendant revealed that the second defendant was the person who was orchestrating the entire transaction. In addition, she also testified that the second defendant's conduct had been highly questionable throughout, and was indicative of an individual who was trying to exploit the commercial situation to his own advantage.

12 The plaintiff's second witness was Thomas Sommerville ("Sommerville"), who was engaged by the plaintiff to try and locate the equipment after the plaintiff's suspicions about the whereabouts of the equipment were aroused. As Sommerville admitted during cross-examination that he had no personal knowledge of the dealings between the plaintiff and the defendants, his evidence was not helpful for the purpose of determining whether the second defendant ought to be held personally liable.

13 The plaintiff's last witness was John Tan ("Tan"). Tan was the commercial manager of Tiong Woon Crane, and had dealt with the second defendant in relation to the transportation and storage of the equipment. Tan testified that the second defendant had been involved with the transaction from the very beginning and that he had dealt extensively with the second defendant in matters relating to the equipment. Tan also testified that the second defendant had represented to him that the second defendant was the owner of the equipment.

The second defendant's case

14 The only witness for his case was the second defendant himself. At the outset, I should mention that, language difficulties aside, the second defendant was an extreme evasive and difficult witness. To take a simple example, when questioned by counsel for the plaintiff Mr Subramanium ("Mr Subra"), on whether he knew about the pricing of the equipment, the second defendant initially claimed that he did not know. That was in spite of the fact that he had earlier claimed to understand machines like the equipment, by virtue of his professional training as a marine engineer. It was only when he was confronted with the evidence stated in his own affidavit that he had purchased the equipment from the plaintiff as he "thought it was a bargain", that the second defendant conceded knowing about the pricing of the equipment in the market.

15 In addition, the second defendant also showed himself to be prone to vacillating from one position to another. While he had stated in his affidavit of evidence-in-chief ("the AEIC") that he was not involved in the dealings between Tiong Woon Crane and the plaintiff beyond introducing Tiong Woon Crane to the plaintiff, this was contradicted by the evidence of Tan, who had testified that he had dealt extensively with the second defendant regarding the equipment. Indeed, it was only when it was pointed out that Tan had testified that the second defendant had been in constant contact with Tan from the beginning regarding the storage of the equipment, that the second defendant eventually conceded the extent of his involvement in the matter.

16 It was also revealed during cross-examination, and despite the second defendant's initial taciturn answers, that the second defendant had known that the plaintiff was facing financial difficulties at the time of the sale and was in need of money urgently. That would explain the second defendant's motives in acting in the way he did, which I will elaborate on later.

17 Notably, the second defendant was shown to be less than forthright in relation to the dealings with ZYG and Soilmec. Initially, the second defendant had stated in his AEIC that he had found it difficult to sell or dispose of the equipment after purchasing it from the defendant. However, as Mr Subra pointed out during cross-examination, the second defendant had managed to sell part of the equipment to ZYG by 7 June 2010, less than one month after the agreement was signed. The second defendant's explanation that he was referring, in his AEIC, to the fact that it was difficult to dispose of the equipment as a whole, rather than in parts, was hardly convincing since the plaintiff had never indicated that it wanted the equipment sold as a whole to one party.

18 The second defendant also conceded that he had not informed the plaintiff of the sale to ZYG and Soilmec. Indeed, while the second defendant had finalised the sale to ZYG on 7 June 2010, and was in the midst of finalising the deal with Soilmec, when pressed by the plaintiff for payment, the second defendant not only kept silent about the ZYG and Soilmec deals, but asked for an extension of the payment deadline.

The findings

19 I return now to the second defendant's motives, which appeared to me as being quite insidious when seen in context. As discussed at [16] above, the second defendant knew that the plaintiff was facing serious financial difficulties and was in urgent need of payment of the balance sum of $1.35m from the agreement. Yet despite having sold the equipment in parts to ZYG and Soilmec, albeit at a loss ($1.15m), the second defendant deliberately concealed that fact from the plaintiff and further delayed payment, only to eventually offer the plaintiff the reduced sum of $600,000 in full and final settlement of his payment obligation under the agreement. Indeed, in an email dated 14 July 2010, after concluding the deal with ZYG and while in the midst of finalising the Soilmec deal, the second defendant had represented to the plaintiff that the "unfavourable conditions of Singapore have made it difficult to finalize a deal (*sic*)". The plaintiff was so misled by the second defendant's representations and driven to desperation that it had, by an email sent on 5 August 2010 to the second defendant, actually recommended another Korean company as a possible buyer.

20 At the same time, in the sales agreement concluded with Soilmec, the defendants had certified that they were "the legal owner" of the equipment and that the equipment was "free of financial encumbrances". This was despite the fact that the balance sum of $1.35m was still due to the plaintiff under the agreement.

21 It was evident that the second defendant's chain of conduct was part of a deliberate and reprehensible scheme to evade the payment obligation under the agreement. Having found out that

the plaintiff was facing financial difficulty, the second defendant had hoped to profit by entering into the agreement with the plaintiff, at what he believed to be a bargain price, before on-selling it at a higher price. It must be remembered that this was a high-risk manoeuvre as the purchase from the plaintiff was essentially on credit, since he paid only 10% of the purchase price, and no more. When it transpired that he could only sell the equipment at a loss, he decided to embark on a course of deception, by keeping his subsales from the plaintiff. As he was aware that the plaintiff was in a serious cash-flow situation, he thought he would be able to compel the plaintiff to accept a paltry $600,000 in full and final satisfaction of the remaining 90% of the purchase price, thereby allowing himself to still profit from the transaction.

22 The second defendant himself had admitted in court that his conduct was reprehensible and dishonest:

> Court: All right, you didn't pay the plaintiffs the balance 90%. Then you tell the plaintiffs, "Sorry, I have changed my mind, I'm only willing to pay you 600,000". That's what you did, didn't you?
>
> Witness: Yah, this is the...not fair.
>
> Court: You are telling me not fair, but you come to Court and say you don't have to pay.
>
> Witness: Yes.

The issue

23 Nevertheless, as the second defendant is seeking to hide behind the corporate veil of the first defendant company, the issue remains whether the circumstances are such that the second defendant ought to be held personally liable.

The law

24 The leading local authority on this point is *TV Media Pte Ltd v De Cruz Andrea Heidi and another* [2004] 3 SLR(R) 543 ("*TV Media Pte Ltd*"). In *TV Media Pte Ltd* at [117] and [118], the Court of Appeal stated:

> 117 A fundamental tenet of company law is that a company is a separate legal entity from its members or shareholders. As such, the members are not liable to be sued in respect of a breach of the company's obligations: *Salomon v A Solomon and Co, Ltd* [1897] AC 22. In an extension of this principle, the courts have held that proof of the commission of a tort by a company does not automatically prove that the directors who manage its affairs are also guilty of the tort: *Rainham Chemical Works, Ltd v Belvedere Fish Guano Co Ltd* [1921] 2 AC 465, *Gabriel Peter & Partners* v *Wee Chong Jin* [1997] 3 SLR(R) 649.
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> 118 The law has carved out an exception to this principle. Where directors order an act by the company which amounts to a tort by the company, they may be liable as joint tortfeasors on the basis that they have "procured or directed" the wrong to be done: *Performing Right Society, Ltd v Ciryl Theatrical Syndicate, Ltd* [1924] 1 KB 1.

25 In its analysis of whether or not the director in that case was deemed to have 'procured or directed' the wrong, the Court of Appeal considered the following facts material:

(a) The fact that the director was the founder, director and president of the company, "its one constant director and shareholder from its inception". In other words, he had absolute control of the company (see [132], [133] and [140] of *TV Media Pte Ltd*);

(b) The total involvement of the director in the company's negligence (see [134] and [138] of *TV Media Pte Ltd*); and

(c) That the director had represented the company in all significant deals with third parties (see [136] of *TV Media Pte Ltd*).

26 At the end, the Court of Appeal at [144] recognised that the issue of a director's personal liability for his company's torts involves the consideration of difficult policy questions, and that these considerations must be weighed in the balance, taking into account the factual situation at hand. In particular, the court must look at the level of the director's involvement in the tort and the extent to which he was the controlling mind and spirit of the company (see [144] and [145] of *TV Media Pte Ltd*).

27 In other words, two critical elements must be satisfied in order for a director to be held personally liable, as a joint tortfeasor, for a tort committed by his company. First, the director must be the company's controlling mind and spirit. Second, he must have 'procured or directed' the commission of the tort by the company.

The decision

28 With the above principles in mind, I turn now to consider the second defendant's position in the present case. There is no question that the second defendant was, at all material time, the controlling mind and spirit of the first defendant. He was at all material time the sole shareholder and the main director of the first defendant. The registered address of the first defendant, all the way up till 14 July 2010, was at 18 Lentor Green Singapore 789267, the second defendant's home address. There is no doubt that the first defendant company was essentially a "one-man show", with the second defendant alone running its business.

29 Next, I turn to consider the extent of the second defendant's involvement in the conversion of the equipment. Once again, there can be no doubt that it was the second defendant who directed and procured the commission of the tort. His involvement was total. First, it was he who convinced the plaintiff to enter into the agreement with the first defendant. He drafted and prepared the agreement for the plaintiff to sign. He not only represented the first defendant in dealings with Tiong Woon Crane, but was also responsible for arranging for the equipment to be stored at Tiong Woon Crane's premises. In all the correspondence exchanged with the plaintiff, he deliberately hid the fact that the equipment had been sold to ZYG and Soilmec, while simultaneously misrepresenting to ZYG that the first defendant owned the equipment, and that it was free of any financial encumbrance. And it was the second defendant who eventually suggested to the plaintiff, when it was clear that the plaintiff was in desperate need of cash, that the plaintiff accept a payment of $600,000 in full and final settlement of its claim to the balance payment under the agreement, despite the fact that the equipment had already been sold for a total sum of $1.15m.

30 In other words, the factual situation in the present case was on all fours with that in *TV Media Pte Ltd*. The second defendant had absolute control of the first defendant and his involvement in the conversion by the first defendant of the plaintiff's equipment was not merely great but total.

31 I should also address the second defendant's (technical) objection that the plaintiff did not

plead specifically for the corporate veil to be lifted. In *TV Media Pte Ltd*, the court dealt with exactly the same objection (at [119]), and explained that the fact that the plaintiff was claiming against the director personally for the company's tort, was akin to asking the court to lift the company's corporate veil. That objection was accordingly disposed of by the Court of Appeal. In the present case, I saw no reason not to do likewise.

Conclusion

32 In the light of my findings, I hold that the second defendant is personally liable for the conversion of the equipment, as a joint tortfeasor together with the first defendant, on the basis that he had 'procured or directed' the wrong. Although the plaintiff's statement of claim prayed for damages from the defendants (in addition to delivery up of the equipment which relief is now moot in view of the equipment's sale), it serves little purpose to award the plaintiff interlocutory judgment with damages to be assessed by the Registrar at a later date. The plaintiff's loss arising from the second defendant's conversion of the equipment was the balance sale price of $1.35m. That being the plaintiff's loss, the final judgment is for that amount. Accordingly, the plaintiff is awarded final judgment against the second defendant in the sum of $1.35m for the outstanding balance of the equipment's sale price together with interest from the date of the writ, namely 17 September 2010, and with costs on a standard basis.