Quek Tiong Kheng and another *v* Chang Choong Khoon Mark and others [2013] SGHC 36

Case Number : District Court Appeal No 12 of 2012 (Summons No 5961 of 2012)

Decision Date : 14 February 2013

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : First appellant in-person; Andrew Tan (Andrew Tan Tiong Gee & Co) for the second respondent.

Parties : Quek Tiong Kheng and another — Chang Choong Khoon Mark and others

Civil Procedure

14 February 2013

Choo Han Teck J:

1 The applicant in this summons before me was the first plaintiff in the action in DC Suit No 1017 of 2009. His wife Lim Soon Boey was the second plaintiff. He is a 60-year old retiree and his wife is a music teacher. They have three children aged 11, 13 and 15 years old respectively. In November 2006 the plaintiffs invested a total of US$45,000 in some dubiously described investments units in alleged property interests in Weesatche, Goliad County, Texas ("WSG") and Brookshire Salt Dome County, Texas ("BSW") respectively. It transpired that these were very poor investments, if indeed they could be true investments. The plaintiffs have since described the nature of these interests as "junk bonds" and a "Ponzi scheme". They soon realised the folly of their investment and sued one Mark Chang ("Mark") and Oilpods Singapore Pte Ltd ("Oilpods"). The former was a director of the latter. The plaintiffs also sued one Karin Yan ("Karin"), who was the second defendant at trial and the second respondent in DCA 12 of 2012. Karin was a salesperson employed by Oilpods. The claims were filed on 27 February 2009.

2 The action was tried in the District Court, and after two weeks' trial, the first plaintiff's claim against Mark and Oilpods was allowed on 27 March 2012. The District Judge ("DJ") dismissed his claim against Karin. The second plaintiff's claims against all three defendants were dismissed. The plaintiffs' claims were based mainly on fraud and misrepresentation. The second plaintiff was of the view that the DJ was wrong to dismiss her claims on the basis that she had suffered no damage.

3 The plaintiffs appealed to the High Court in DCA 12 of 2012. Consequently, an application was made to the High Court for leave to adduce further evidence for the purpose of DCA 12 of 2012. The application was allowed by Lai J on 7 August 2012. The further evidence concerned mainly banking transactions which the second plaintiff claimed showed that the money invested came from her earnings as a music teacher. The appeals by the plaintiffs against the DJ's judgment were eventually heard by Coomaraswamy JC on 9 October 2012. The appeals were dismissed.

4 The plaintiffs were represented by Winston Quek at trial, and a Wendy Low (from a different law firm) on appeal. Although the plaintiffs seemed to be advised by yet another solicitor, no counsel appeared on their behalf in this summons. The second plaintiff did not appear and the first plaintiff appeared in person. The summons itself was a prolix document that in the main was an appeal against the District Court's decision. It also prayed the admission of various documents which Mr Andrew Tan

("Mr Tan"), counsel for Karin, said were the subject of Lai J's orders.

5 This present summons was fixed for hearing before Coomaraswamy JC but the first plaintiff objected to Coomaraswamy JC hearing this application. In the meantime, the solicitors for Karin had taken out garnishee proceedings against the plaintiffs but the garnishee proceedings were stood down pending the outcome of the summons before me.

6 It was clear that there was no further appeal to the High Court against the decision of Coomaraswamy JC on the District Court's judgment. In the premises, this summons failed and was dismissed. However, I made no order as to costs for what I considered to be very unusual circumstances. It seemed clear that the plaintiffs had lost US$45,000 in a dubious product sold by Mark and Oilpods. Though the first plaintiff won his case against them, his case against Karin was dismissed with costs which, according to Mr Tan, were awarded at $116,206 plus $6,995 court fees on taxation. The plaintiffs' appeals were dismissed with costs taxed at $57,759.20 plus court fees of $3,518. I did not have the full facts before me although it seemed that the taxed costs of the trial and the appeal seemed high in the circumstances. The trial judge did not make a *Sanderson* order on costs at trial as he thought that it was inappropriate. Had the order been made, the costs that the plaintiffs had to pay to Karin would have to be paid by the other two defendants to Karin directly. The trial judge declined to make the order on grounds stated in paragraphs 82 and 83 of his grounds of judgment as follows:

> 82 The special reasons raised by 1P and 2P's counsel were (a) the claim against 1D and 3D was inextricably linked to 2D; (b) if she was not made a party, P would not be able to sue or prove their case against 1D and 3D; and (c) 1D and [sic] shifted blame on 2D in paragraph 6 of the 1D and 3D's Defence (Amendment No 1) (PSP Tab C pg. 2). After careful consideration, I declined the Plaintiffs' request as I did not see sufficient grounds not to apply the usual costs order. In determining whether to grant a *Bullock* or *Sanderson* order, the court looks at these factors: *Denis Mathew Harte v 1. Dr Tan Hun Hoe 2. Gleneagles Hospital Ltd (Suit No 1691 of 1999)*, Chan Seng Onn JC (as he then was) stated at [11]:
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> > "(a) What facts are reasonably ascertainable by the plaintiff before the decision is made to join the successful defendant ('D1');
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> > (b) Whether the facts themselves are unclear to such an extent that it is necessary to safeguard the plaintiff's position by bringing in D1. Where it is reasonable for the plaintiff to adopt the position that either one or the other or both defendants may be liable and hence prudence dictates that both should be joined, then a *Bullock* or *Sanderson* order may be appropriate;
> >
> > (c) Of considerable importance is whether the unsuccessful defendant ('D2') has tried to shift all or some of his liability to D1 or has characterised the facts such that D1 is more blameworthy and should bear a greater proportion of the damages, in which case it may be appropriate to make D2 (and not the plaintiff) shoulder D1's costs because D2 has put the plaintiff in a difficult position, thereby forcing him to join D1.
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> > (d) Whether the plaintiff's claim against D1 and D2 is in reality separate and distinct, in which case it will be inappropriate for D2 to pay D1's costs (see *Donovan v Walters* (1926) 135 L.T. 12). Being independent claims, it is unlikely for D1 to have influenced the joinder of D2. Hence, the plaintiff must answer for the costs of D1 himself.
> >
> > (e) The likelihood of the plaintiff or D2 becoming insolvent may dictate whether a *Bullock* or

Sanderson order should be made. The court has to determine whether it is more equitable to put the risk of non-recovery of D1's costs from D2 on the shoulders of the plaintiff or on D1 himself. Thus the conduct of the plaintiff *vis-à-vis* the successful defendant has to be considered.

83 On the outset, the Plaintiffs never claimed against the Defendants on an 'either-or' basis i.e. that either 2D or in the alternative, 1D and 3D are liable. Instead, they pushed for each of them to be independently liable for fraud, negligence and conspiracy. They could have proceeded (and succeeded) against 1D and 3D without bringing in 2D as a party. After all, they knew she was merely a sales consultant employed by the 3D to sell investment units. If they needed her participation to prove their case, they could have easily summoned her as a witness. In fact, 2D counsel mentioned that his client repeatedly offered herself as the Plaintiffs' witness if they discontinued their action against her. As for paragraph 6 of the Defence (Amendment No. 1), I think it would be harsh to treat it as a shifting of blame by 1D and 2D. One could equally construe it as a standard blanket denial for such claims. I also noted that 1D and 3D consistently refrained from foisting liability onto 2D. There was no accusation against 2D in their affidavits, opening statement, written submissions or even when 1D took the stand as a witness. Finally, it would also be inequitable to 2D if I were to make a *Sanderson* order. It emerged at trial that 1D is now an Australian PR in Perth, Western Australia. He has little or no assets within jurisdiction. His residential address in Singapore belongs to a property owned by his mother-in-law. The 3D company is also dormant.

7 I asked if the plaintiffs had applied for a review of the taxation of costs. Mr Tan informed me that there was no application to review either set of costs and, further, that the time for review had expired. In the meantime, Karin's application to garnish the plaintiffs' bank accounts was pending. I was thus of the view that no further order as to costs should be made against the plaintiffs because the amount that I would otherwise have awarded would not have added significantly to the costs recoverable by the second respondent but would have been more severely felt by the appellants and would be unjust given the circumstances.