

Nordic International Ltd v Morten Innhaug
[2014] SGHCR 20

Case Number : Suit No 875 of 2010 Summons No 3227 of 2014
Decision Date : 13 October 2014
Tribunal/Court : High Court
Coram : Tan Teck Ping Karen AR
Counsel Name(s) : Mr Anthony Soh (One Legal LLC) with Instructed Counsel, Ms June Lim (Eden Law Corporation) for the plaintiff and non-party; Mr Joseph Tan and Ms Joanna Poh (Legal Solutions LLC) for the defendant.
Parties : Nordic International Ltd — Morten Innhaug

Civil Procedure – Security for Costs – Non-party

Civil Procedure – Security for Costs – Nominal Plaintiff

13 October 2014

Judgment reserved.

Tan Teck Ping Karen AR:

Introduction

1 This is the Defendant's application for security for costs of the action from the Plaintiff and/or Sinwa SS (HK) Co Ltd ("Sinwa HK"), a non-party. The application for security for costs is based on two grounds, first, on the basis that Sinwa HK is a non-party under Order 23 rule 1(3)(b); and second, on the basis that the Plaintiff is a nominal Plaintiff under Order 23 rule 1(1)(b).

2 The Plaintiff is a company whose shares are equally owned by the Defendant and Sinwa HK. The Defendant is also a director of the Plaintiff.

3 Prior to the commencement of this action, Sinwa HK obtained leave from the Court of Appeal to bring an action in the name and on behalf of the Plaintiff against the Defendant for alleged breaches of directors' duties arising from a time-charterparty of a vessel owned by the Plaintiff. Pursuant to the leave granted by the Court of Appeal, Sinwa HK commenced this current suit as a derivative action in the name of the Plaintiff against the Defendant.

Security for Costs against a Non-party

4 The Defendant's application for security for costs against Sinwa HK, a non-party, is based on Order 23 rule 1(3)(b), which states:

(3) Where, on the application of a defendant to an action or other proceeding in the Court, it appears to the Court –

(a) ...

(b) that the non-party has contributed or agreed to contribute to the plaintiff's costs in return for a share of any money or property which the plaintiff may recover in the action or

proceeding,

and the non-party is a person against whom a costs order may be made, then, if having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the non-party to give such security for the defendant's costs of the action or other proceeding as the Court thinks just.

5 A two-stage test is to be applied to determine whether a non-party should be ordered to provide security for the defendant's costs. At the first stage, the defendant has to establish that the non-party contributed or agreed to contribute towards the plaintiff's legal costs in return for a share of the money or property which the plaintiff may recover in the action or proceedings. If the first stage is satisfied, then the issue at the second stage would be whether the non-party is a person against whom a costs order may be made and whether it would be just to order the non-party to provide security for costs.

Stage One – Litigation Funder?

6 For the first stage, it was not disputed that Sinwa HK had made payment of the costs owed by the Plaintiff to the Defendant. The issue before me was whether this payment of costs was **in return** for a share of any money or property which the Plaintiff may recover in the action or proceedings. On the facts before me, there was no agreement between Sinwa HK and the Plaintiff that Sinwa HK will receive any direct benefit or share in the damages received if the Plaintiff is successful. Rather, the Defendant counsel argued that a wide interpretation should be applied and an indirect benefit of the fruits of the litigation would be sufficient to satisfy this limb. It was pointed out that Sinwa HK had admitted on affidavit that its shares in the Plaintiff will increase in value if the Plaintiff is successful. This is the indirect benefit which Sinwa HK would receive in return for its contribution to the Plaintiff's costs. The Defendant counsel submitted that if the Plaintiff was successful and assuming it recovers USD10 million from the Defendant, the value of Sinwa HK's shares in the Plaintiff would increase by USD5 million as Sinwa HK owns 50% of the issued share capital of the Plaintiff. This would amount to Sinwa HK paying for the Plaintiff's costs of litigation in return for a share of money that the Plaintiff may potentially recover from the Defendant.

7 Sinwa HK's counsel argued that this rule covers litigation funders, who fund litigation in exchange for a direct share of the benefits of the litigation. It was submitted that this does not apply to a derivative action where Sinwa HK's contribution towards the Plaintiff's costs is not in exchange for a share of the proceeds of the action, but to pursue the Plaintiff's rights. The fact that Sinwa HK, a shareholder, will receive some indirect benefit due to an increase in the share value does not satisfy the requirements of this rule.

8 An understanding of the purpose behind this rule would assist in the interpretation to be applied. In the commentary on Order 23 Rule 1(3) in the *Singapore Court Practice 2014* (LexisNexis, 2014) at page 1021, Professor Jeffrey Pinsler noted that the scope of the security for costs provisions were extended to non-parties as the "*limitation of O 23 to the power to award security for costs against a nominal plaintiff (and the absence of such a power against the non-party plaintiff) was a weakness because the nominal plaintiff might have been uninterested and impecunious while the non-party, who was **funding the litigation**, was beyond the reach of the court.*" (emphasis added) Therefore, it appears that the securities for costs provisions were extended to cover litigation funders.

9 The rationale for extending the security for costs provisions to cover litigation funders may be seen from the observations of Hodgson JA sitting in the New South Wales Court of Appeal in *Green*

(as liquidator of *Arimco Mining Pty Ltd*) v *CGU Insurance Ltd* [2008] NSWCA 148 at [51]:

...a court should be readier to order security for costs where the non-party who stands to benefit from the proceedings is not a person interested in having rights vindicated, as would be a shareholder or creditor of a plaintiff corporation, but rather is a person whose interest is solely to make a commercial profit from funding the litigation. Although litigation funding is not against public policy (*Campbells Cash and Carry Pty Limited v Fostif Pty Limited* [2006] HCA 41; 229 CLR 386 at [87]-[95]), the court system is primarily there to enable rights to be vindicated rather than commercial profits to be made; and in my opinion, courts should be particularly concerned that persons whose involvement in litigation is purely for commercial profit should not avoid responsibility for costs if the litigation fails.

10 It seems to me that the Defendant counsel's interpretation of Order 23 rule 1(3)(b) is not in line with the purpose behind this rule. The words of Order 23 rule 1(3)(b) support the interpretation that it is aimed at non-parties whose only interest in the proceedings is to make a commercial profit i.e. litigation funders. Sinwa HK is a shareholder who had obtained leave of the Court of Appeal to commence this derivative action. Sinwa HK clearly has an interest in the proceedings and is not a litigation funder. Therefore, Stage One is not satisfied.

Stage Two – Whether it would be just to order security

11 Even if I were to accept that a wide interpretation should be given to Order 23 rule 1(3)(b), which I do not, I am of the view that the second stage is not satisfied as it would not be just to order Sinwa HK to provide security for the Defendant's costs.

12 The principles governing the court's exercise of discretion in respect of costs to be paid by a non-party were summarised by the Privy Council in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807 ("*Dymocks*"). These were adopted with approval by the Singapore Court of Appeal in *DB Trustees (Hong Kong) Ltd v Consult Asia Pte Ltd* [2010] 3 SLR 542 ("*DB Trustees*") at [36]:

...The core consideration in relation to the court's exercise of discretion in ordering costs against a non-party is that it must be *just*, in all the circumstances of the case, to do so. ...Ordinarily, considerable weight would be placed on the presence of two factors, *viz*, a close connection between the non-party and the proceedings and a causal link between the non-party and the incurring of costs. [emphasis added]

13 The principles governing the court's discretion in respect of costs to be paid by a non-party would similarly apply to the court's discretion in respect of the provision of security of costs by a non-party.

14 First, while there is a close connection between Sinwa HK and the current proceedings, this factor by itself would not be sufficient to justify ordering Sinwa HK to provide security for the Defendant's costs.

15 While Sinwa HK is one of the two shareholders of the Plaintiff and would, therefore, be one of beneficiaries of a successful outcome of the current proceedings, that is merely one factor to be taken into consideration. Chan Seng Onn J in *Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others (Tung Yu-Lien Margaret and others, third parties)* [2011] 1 SLR 582 ("*Raffles Town Club*") was of the view (at [26]) that the fact that the non-parties were the only shareholders of the company should not be the "overriding factor in consideration". Otherwise, this would "drive a coach and horses through the doctrine of the separate liability of the company". It was further held at [26]:

...Fiduciary duties are owed by directors to the company, not to the shareholders directly, and it is the *company* which has to enforce those duties against the directors even though it may well be the present shareholders and directors who are controlling the litigation. Thus, if the company has not succeeded in establishing its claim of breach of fiduciary duties against the directors who are not or no longer shareholders of the company, it is the company which has to pay the legal costs of the directors who have successfully resisted its claims, not the shareholders of the company. Such are the consequences of the doctrine of separate legal personality. In *DB Trustee*, it was Ms Koh's lack of cooperation with the receivers, denying them access to documents pertaining to the affairs and property of Consult Asia that precipitated the litigation instituted by DB Trustees. [emphasis added]

16 Similarly in *Nanyang Law LLC v Alphomega Research Group Ltd* [2012] 4 SLR 1153 ("*Nanyang Law*"), the doctrine of separate legal personality of a company was the basis on which Choo Han Teck J declined to order the non-party to bear the costs of the proceedings. Choo Han Teck J held at [5]:

...that by ordering costs against a non-party who is a shareholder and director of an impecunious litigant company, the court pierces the corporate veil... [this] is not an order the court would be quick to make. ...being the managing director alone, and thus, having a substantial connection to the case is only one of the many factors the court would take into account. It is also not a principle of law that where a litigant company is unable to pay costs the successful party can look to the person with a close connection to it and the litigation for costs. Much of the law that permits the corporate veil to be lifted concerns fraud or highly unconscionable conduct. ...

17 Second, the causal link. A non-party would generally not be made liable for costs if those costs would have been incurred in any event even without the non-party's involvement in the proceedings. On the present facts, this is a derivative action which was commenced in the name of the Plaintiff by Sinwa HK. While on the surface, it appears that the causal link is satisfied, it has to be borne in mind that Sinwa HK did not act unreasonable in commencing this derivative action as it had obtained and commenced this action with the leave from the Court of Appeal.

18 Before I move on to the third factor, I wish to deal with the Defendant's argument that since Sinwa HK is the shareholder directing this common law derivative action on behalf of the company, it would normally be expected to pay for the costs of the action, though the fruits of the victory go to the company. Reliance is placed on *Walter Woon on Company Law* (Sweet & Maxwell Asia, 2005) 3rd ed at [9.65] for this argument. I believe the Defendant has misunderstood Professor Woon. The position stated by Professor Woon refers to an action where a shareholder commences the derivative action on behalf of all the shareholders except the defendants and the company is joined as a defendant in order to be bound by the results of the the action. It is in this context that Professor Woon commented that the shareholder, who is the plaintiff in the derivative action, should expect to pay for the costs of the litigation. The current proceedings are different as it is the company who is named as the Plaintiff. As stated above, the decision to pierce the corporate veil and hold a shareholder, a non-party, responsible for the costs incurred by the company who is the Plaintiff is not one which is to be taken lightly.

19 The third and most important factor is that the Plaintiff is at all material times a solvent company. Chan Seng Onn J in *Raffles Town Club* at [28] held that "apart from the "close connection" and "causal link" elements, the *inability of the unsuccessful party to pay the costs of litigation* is an important factor in the determination of whether it would be just to make the non-party bear the costs" (emphasis added). The inability of the unsuccessful company to pay the costs of litigation in *Dymocks* and in *DB Trustees* was a determinative factor in the court's decision to order a third party to bear the litigation costs of the unsuccessful company.

20 Both solicitors for the Plaintiff and the Defendant admitted that the Plaintiff is a solvent company and there is no evidence that it would not be able to pay the costs of litigation. The Plaintiff has stated on affidavit that the Plaintiff has funds in a bank account in Singapore and is also the owner of a vessel which has a desk top value of approximately USD15.5 million. The Defendant has challenged the valuation of the vessel saying that the vessel only has a value of USD2 million. However, the Defendant did not provide any documents in support of its valuation. In any event, it is clear that the vessel is a valuable asset which belongs to the Plaintiff.

21 I also understand from both counsels for the Plaintiff and Defendant that the Plaintiff has not been able to access its funds in its Singapore bank account as the Defendant has so far not agreed to authorise any withdrawals from the Plaintiff's bank account. Therefore, Sinwa HK has had to pay the costs payable from the Plaintiff to the Defendant. Since the Plaintiff's inability to access its funds to pay legal costs was caused by the Defendant, it would not be just to allow the Defendant to rely on this as a basis to seek security for costs from Sinwa HK.

22 For the above reasons, I am of the view that it would not be just to order Sinwa HK, a non-party, to provide security for the Defendant's costs.

23 As the Defendant has failed to satisfy both Stage One and Two, Sinwa HK will not be ordered to provide security for the Defendant's costs.

Nominal Plaintiff

24 The Defendant's application for security for costs from the Plaintiff is on the basis that the Plaintiff is a nominal plaintiff. This is based on Order 23 Rule 1(1)(b) which provides:

1(1) Where, on the application of a defendant to an action or other proceeding in the Court, it appears to the Court –

...

(b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so;

...

then, if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just.

25 The Defendant submits that as the current proceedings were commenced by Sinwa HK as a derivative action in the Plaintiff's name and as Sinwa HK is the main party who has conduct of the current proceedings, the Plaintiff should be regarded as a nominal plaintiff.

26 It is necessary to understand the nature of a derivative action to access the weight of the Defendant's submissions. In *Wallersteiner v Moir (No. 2)* [1975] 2 WLR 389 ("*Wallersteiner*"), the English Court of Appeal at [396 C-D] adopted the observation of *Professor Gower in Modern Company Law*, 3rd ed (1969), p587 as to what constitutes a derivative action:

[where an action brought on behalf of the company by minority shareholders as the company's representatives to seek redress for the company] is allowed, the member is not really suing on his own behalf nor on behalf of the members generally, but on behalf of the company itself. Although... he will have to frame his action as a representative one on behalf of himself and all the members other than the wrongdoers, this gives a misleading impression of what really occurs. The plaintiff shareholder is not acting as a representative of the other shareholders, but as a representative of the company...In the United States ... this type of action has been given the distinctive name of a 'derivative action,' recognising that its true nature is that the individual member sues on behalf of the company to enforce rights derived from it.

27 *Walter Woon on Company Law* (Sweet & Maxwell Asia, 2005) 3rd ed at [9.65] confirms that in a derivative action, "[normally], the shareholder who instigates a suit should expect to pay for it, even though the *fruits of the victory go to the company.*" (emphasis added)

28 It is clear that in while a derivative action is commenced by a shareholder who has conduct of the proceedings, it is the plaintiff company who would receive the benefits and fruits of the derivative action. Therefore, in the current derivative action, the Plaintiff is not suing for the benefit of some other person. It is the Plaintiff who will receive the benefits of a successful outcome of the proceedings. The Plaintiff is not a nominal plaintiff.

29 Further, Order 23 Rule 1(1)(b) also requires the Defendant to show that the Plaintiff is not able to pay the costs of the Defendant if ordered to do so. As stated above at [20], I am of the view that the Plaintiff is a solvent company and will be able to pay the costs of the Defendant if ordered to do so.

30 Accordingly, I am of the view that the Plaintiff company is not a nominal plaintiff and there are no grounds to order it to provide security for costs under Order 23 1(1)(b).

31 In light of the above, the application for security for costs from Sinwa HK, a non-party and/or the Plaintiff on the basis it is a nominal plaintiff was therefore dismissed with costs to the non-party and the Plaintiff.

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