Scintronix Corp Ltd *v* Ho Kang Peng and another
[2011] SGHC 28

Case Number : Suit No 207 of 2009 (Registrar's Appeal No 392 of 2009)

Decision Date : 02 February 2011

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Tony Yeo and Terri Lim (Drew & Napier LLC) for the plaintiff; Alvin Tan (Wong Thomas & Leong) for the defendants.

Parties : Scintronix Corp Ltd — Ho Kang Peng and another

Civil Procedure

2 February 2011

Kan Ting Chiu J:

1 The issue in this appeal is whether the hearing of the plaintiff's action against the two defendants should be bifurcated, with the issue of liability to be dealt with separately from the issue of damages. The plaintiff had applied for an order of bifurcation in its summons-for-directions ("Summons"). The two defendants objected to bifurcation, and the Assistant Registrar ("AR") who heard the Summons dismissed the application. The plaintiff appealed against the AR's order. I heard the appeal and allowed the application for bifurcation. Now the two defendants appeal against my decision.

Background

2 The plaintiff, Scintronix Corporation Ltd, is a company listed on the Singapore Stock Exchange. The first defendant, Ho Kang Peng, was the plaintiff's former Chief Executive Officer ("CEO") and Executive Director, and the second defendant, Chow Weng Fook, was the plaintiff's former Executive Chairman and Executive Director. The plaintiff's action against the first defendant was for breaches of his contractual, fiduciary and/or statutory duties, and the action against the second defendant was for breaches of his contractual duties while they were in office.

3 The defendants' duties were specifically pleaded in the Statement of Claim. With reference to the first defendant, it was stated that:

> Duties owed by the 1st Defendant to the Plaintiffs
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> 6. It was an express term of the 1st Defendant's Employment Contract that the 1st Defendant owed a duty of honesty, diligence and fidelity to the Plaintiffs.
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> This duty obliges the 1st Defendant to act in good faith and in the best interests of the Plaintiffs.
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> 7. Further, as a director of the Plaintiffs, the 1st Defendant owed to the Plaintiffs *inter alia* the following fiduciary duties:

a. A duty to act *bona fide* and in good faith in the interest of the Plaintiffs in the discharge of all duties, powers, responsibilities, obligations and functions assigned to or vested in or attached to him as a director of the Plaintiffs;

b. To act for the proper purpose of the Plaintiffs in relation to its affairs;

c. A duty to ensure that the affairs of the Plaintiffs are properly administered; and/or

d. A duty to ensure that each contract/transaction/agreement is entered into at arm's length in fulfilment of the corporate objectives of the Plaintiffs to maximise profits and to advance and promote the business of the Plaintiffs.

8. Further, in addition to and not in derogation of the said fiduciary duties, the 1st Defendant owed obligations under section 157(1) of the Companies Act, Cap.50 and under common law and equity, including the duty to exercise reasonable care, to act honestly and use reasonable diligence in the discharge of the duties of his office as director.

And with reference to the second defendant, it was stated that:

Duties owed by the 2nd Defendant to the Plaintiffs

9. It was an implied term of the 2nd Defendant's Employment Contract that the 2nd Defendant had *inter alia* the following duties of fidelity:

a. a duty to the Plaintiffs not to act in conflict of the Plaintiff's interest;

b. a duty not to work for a competitor of the Plaintiffs;

c. a duty not to persuade other employees to work for a competitor of the Plaintiffs.

10. Further, it was an express term of the Plaintiffs' Employee Handbook ("Employee Handbook") that the 2nd Defendant had *inter alia* a duty not to have a second job which interferes with the efficient performance of his duty to the Plaintiffs.

4 It was also pleaded against both defendants that:

11. Further, it was an express term of the Plaintiffs' Employee Handbook ("Employee Handbook") that both Defendants had *inter alia* the following contractual duties:

a. A duty of fidelity to the Plaintiffs; and

b. A duty to not incite others to commit breaches of the Plaintiffs' rules and regulations.

5 The specific breaches of duties were also set out in the Statement of Claim. It is not necessary to set out the pleaded breaches *verbatim*, and I will summarise them instead.

A. The first defendant's breaches

(i) Appointment of Ng Hock Ching ("NHC") and the second defendant as the plaintiff's advisors

NHC and the second defendant were first appointed as the plaintiff's executive director and executive chairman respectively, until they resigned from these offices on 27 April 2007 and 23 November 2007 respectively. The plaintiff claimed that the first defendant had in the name of the plaintiff, wrote to NHC and the second defendant and informed them that they were to remain in the employment of the plaintiff as advisors. The plaintiff further claimed that the first defendant had, without the formal approval of the plaintiff, approved the terms of employment of NHC and the second defendant, where as advisors, they were paid the former basic annual salaries they previously received as executive directors.

(ii) Retention of NHC and the second defendant as the plaintiff's advisors

The plaintiff claimed that NHC and the second defendant continued to be employed as the plaintiff's advisors even when they were employed as advisors and managers by a competitor of the plaintiff referred to only as Fu Yu, a competitor of the plaintiff, and/or Fu Yu's subsidiaries. The plaintiff claimed the first defendant had breached his duties to the plaintiff by allowing NHC and the second defendant to continue to be the plaintiff's advisors when NHC and the second defendant were in positions of conflicts of interests.

(iii) Consulting Agreement with Bontech Enterprise Co Ltd ("Bontech")

The plaintiff claimed that the first defendant signed a consulting agreement with Bontech whereby Bontech was to "perform the Consulting Services set forth in Schedule A" of the agreement that the plaintiff shall pay Bontech US$15,500 on a quarterly basis for and Bontech "shall issue invoices and/or receipts for all amounts paid" by the plaintiff. The plaintiff claimed that first, there was no "Schedule A" to the consulting agreement; second, that the first defendant did not obtain the formal approval of the board of directors of the plaintiff before he signed the agreement; and third, that he authorised payment of $169,644.97 to Bontech without the authorisation of the Board of Directors of the plaintiff and that he authorised two payments for the same period although the plaintiff did not receive Bontech's invoices for the payments. The plaintiff also claimed that after the expiry of the agreement, the first defendant continued to authorise payments to Bontech without the authorisation of the plaintiff's board of directors.

B. Breach by both defendants

Poaching of the plaintiff's employees

The plaintiff claimed that while the first defendant was Executive Director, Executive Chairman and CEO of the plaintiff, and the second defendant was an advisor to the plaintiff, they planned to relocate Toh Boon Hou William ("Toh"), an employee of the plaintiff in its Shanghai operations, to Fu Yu or its subsidiaries and had arranged for Toh to be employed by Fu Yu or its subsidiaries.

Damages

Claims against the first defendant

6 The plaintiff claimed against the first defendant the $180,946.75 paid as salary to NHC, the $73,274.09 paid as salary to the second defendant, and $169,644.97 paid to Bontech.

Claim against the second defendant

7 The plaintiff claimed against the second defendant damages for the breach of the employment

contract governing the plaintiff's appointment as Executive Chairman, and breaches of the terms of the plaintiff's Employee Handbook. These damages were not quantified and were to be assessed.

The defences

8 The defences filed by the two defendants did not answer each of the plaintiff's claims against them.

The first defendant's defences

Appointment of NHC

9 The first defendant pleaded that the plaintiff's Board of Directors were fully apprised of the circumstances of NHC's appointment as advisor and had authorised the management of the plaintiff to decide on NHC's remuneration, and the Board of Directors had "impliedly approved" NHC's terms of appointment and remuneration. It was also pleaded that the management of the plaintiff had the general authority to decide on NHC's terms of employment without the express or formal approval of the Board of Directors.

Appointment of the second defendant

10 The first defendant's defence was that he had assumed on the basis of the precedent of NHC's appointment that he had the authority of the Board of Directors to decide on the second defendant's terms of appointment. He also pleaded that he had the implied authority of the Board of Directors to decide the second defendant's terms of appointment and alternatively that the Board of Directors' express or formal authority was not required as the authority to decide on the second defendant's terms of employment was within the general authority of the management of the plaintiff.

Payments to Bontech

11 The first defendant pleaded that the payments paid to Bontech were made for the purpose of "procuring that the Plaintiffs continued to receive orders from Pioneer Technology (Shanghai) Co Ltd ("Pioneer Technology"), and that the management of the plaintiff were aware that the payments were made for that purpose, and the Board of Directors had approved such payments. He also pleaded that the payments made to Bontech were in the interest of the plaintiff as the plaintiff received annual orders of approximately RMB50 million from Pioneer Technology, but he did not aver to the relationship between Bontech and Pioneer Technology.

Toh Boon Hou William ("Toh")

12 The first defendant pleaded that he had not renewed Toh's contract with the plaintiff as Toh was not performing up to expectations because of his medical condition, and he did not play any role in Toh's employment with Fu Yu.

The second defendant's defence

Toh Boon Hou William ("Toh")

13 The second defendant pleaded that Toh was not retained as an employee of a subsidiary of the plaintiff because of his inability to perform his designated role because of a medical condition. He further pleaded that Toh was employed by Fu Yu because of his technical knowledge and that the employment had also been terminated. The second defendant did not state whether he played any

role in Fu Yu's employment of Toh. The second defendant also denied that Fu Yu is a competitor of the plaintiff.

The law relating to bifurcation

14 The courts have the power to make a bifurcation order by virtue of the Rules of Court (Cap 322, R5, 2006 Rev Ed), O. 33 r. 2 which reads:

> The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

and r. 3(1) provides that:

> (1) In every action begun by writ, an order made on the summons for directions shall determine the mode of the trial; and any such order may be varied by a subsequent order of the Court made at or before the trial.

15 The Court of Appeal had in *Lee Chee Wei v Tan Hor Peow Victor and others and another appeal* [2007] 3 SLR(R) 537 addressed this issue. This was an action by the plaintiff who was suing the defendants for breach of agreement to buy his shares, and was seeking specific performance or damages in lieu of specific performance. It was a fairly complex case. Several issues were raised over the question of liability, and the Court noted that the question of damages was somewhat controversial requiring expert evidence on the valuation of the shares and other potentially complex issues. The trial had proceeded with both issues of liability and damages to be decided.

16 When the matter went on appeal, the Court commented (at [64]):

> As a matter of procedural propriety, any of the parties could have applied prior to the trial for a bifurcation of the hearing on liability and damages pursuant to O 33 r 2 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). Such an application will inevitably succeed if the circumstances render it just and convenient to so order (Polskie *Towarzystwo Handlu Zagranicznego Dla Elektrotechniki "Elecktrim"* Spolka Z Ograniczona Odpowiadziolnoscia v Electric Furnace Co Ltd [1956] 1 WLR 562 ("*Pols*kie"))... It cannot be gainsaid that substantial costs and time would have been saved if the liability issues had been resolved first, as a negative finding on this critical question alone would have rendered otiose any need to adduce evidence on damages. *The conduct of the trial should have been divided into liability* first followed by the assessment of damages and should essentially have been one where the issues "directed to be tried first will, when decided one way or the other, really be likely to dispose of the case" (Polskie at 566).
>
> [emphasis added]

1 7 *Polskie* also related to contracts, particularly contracts for the sale of industrial plants. On an application by the defendant/purchasers made under the provisions of English rules of court which are similar to our rules, Devlin J directed that the issue of liability be determined first at the trial, and that all questions on damages were to be subsequently referred to an official referee. The defendant/purchaser appealed against the order, and the Court of Appeal allowed the appeal.

18 Jenkins LJ in delivering the judgment of the court stated at p 565 that:

> the making of an order of this sort ... was a rare occurrence,

then at p 566 that:

> no general rule ought to be laid down to define the circumstances in which orders of this sort ought to be made and, secondly, that, without attempting to lay down any general rule, the kind of case in which an order of that sort can usefully be made is a case in which the matter directed to be tried first will, when decided one way of the other, really be likely to dispose of the case

and at p 567 that:

> generally speaking, an order such as this ought not to be made unless there is on the pleadings a clear line of demarcation between issues bearing on liability and issues bearing on quantum of damages.

19 The English Court of Appeal addressed the question of bifurcation of hearings again in a later decision, *Coenen v Payne and Another* [1974] 1 WLR 984 ("*Coenen*") where a more flexible approach was taken. *Coenen* was a road accident case. The plaintiff, a German veterinary surgeon was seriously injured in a road accident and he sued the defendant. The plaintiff claimed, *inter alia*, damages for loss of future earnings, which raised questions of law and fact which involved documentary and expert evidence and witnesses from Germany. The defendant applied for the issue of liability to be tried separately from the issue of damages. That was allowed by a registrar. The plaintiff appealed against the order, and a judge reversed the order. When the matter went on appeal to the Court of Appeal, the appeal was allowed and the bifurcation order was restored.

20 Lord Denning MR noted (at p 988) that the judges had stated that the normal practice had been to try liability and quantum at the same time. However, he declared that "the time has come to adopt a new approach" and that:

> In future the courts should be more ready to grant separate trials than they used to do. The normal practice should still be that liability and damages should be tried together. But the courts should be ready to order separate trials wherever it is just and convenient to do so.

21 Stamp LJ and Stephenson LJ agreed with Lord Denning. It is noteworthy that Stephenson LJ arrived at his decision even though:

> It is usually most convenient for the parties to have all the issues between them decided together and that it helps the judge to assess the credibility of the plaintiff if he can hear what the plaintiff has to say not only about his accident but about his injuries and his financial loss.

In other words, bifurcation was allowed even though there was some overlap between liability and quantum.

The plaintiff's submissions

22 The plaintiff's arguments for the bifurcation can be summarised as follows:

(i) the liability and damages issues are distinct and do not overlap;

(ii) the assessment of damages will be complex and will require expert evidence on the impact of the defection of Toh from the plaintiff to Fu Yu;

(iii) there will be substantial savings in time and space to both parties; and

(iv) there will be no prejudice to the defendants, as the application has been taken out at an early stage of the proceedings.

The defendants' submissions

23 The defendants relied on the decision of *Polskie* in objecting to the application. They contended that:

(i) the normal practice is for a unified trial of liability and damages; and

(ii) there was no clear demarcation between the issues of liability and quantum.

24 The defendants contended that the liability and damages overlap in the claim on the remunerations of the first defendant and NCH as advisors, and in the claim arising from the termination of Toh's employment with the plaintiff, and his joining Fu Yu.

My analysis

25 The rules on the bifurcation of hearings are not written in stone. Bifurcation is intrinsically related to case management. When policies on case management change, the attitude on bifurcation changes accordingly. The contrast between the position in the 1950s as exemplified by *Polskie* – that bifurcation is "a rare occasion" – and the position in the 1970s as manifested in *Coene*n – that time has come to adopt a new approach such that in the future the courts should be more ready to make bifurcation orders – clearly reflects this change.

2 6 *Polskie* and *Coenen* are English decisions, and the developments that gave rise to the aforementioned change do not necessarily apply to Singapore. However, the Court of Appeal's observation in *Lee Chee Wei* that the trial should have been divided into liability followed by damages is entirely applicable. Courts in Singapore, as their counterparts in England, have been more amenable to bifurcate hearings. The Court of Appeal's observation in *Lee Chee Wei* that the hearing should have been bifurcated reflects the present attitude. This development may be a response to the increased caseload of the courts. Bifurcation enables the courts to deal with more cases, and depose with those cases where liability is not established. Even in a case where liability is established, there is still savings of court time, as the damages can be dealt with by a registrar, allowing the judge to go on and hear other cases.

27 The case for bifurcation is stronger in a case like the present one, where there are multiple claims (and multiple issues of liability) and multiple forms of damages claimed (and multiple issues of damages). A liability / damages bifurcation means that instead of dealing with the different issues of damages at the trial, only the issues of damages which remain after the determination of the issues of liability will be addressed after the trial.

28 There is room for an examination of the basis for granting or denying bifurcation. Jenkins LJ in *Polskie* referred to the need for the pleadings to show a clear line of demarcation between issues of liability and issues on damages. Even in a case when there is some overlapping in the issues, a bifurcation may be justified because damages need not be considered if liability is not established; the facts of each case must be considered, and the factors for and against bifurcation must be weighed.

29 Reverting to the issues in the present case, was there any overlap which weighed against

bifurcation? The defendants submitted that there was. First, on the claim regarding remuneration of the second defendant and NHC as the plaintiff's advisors, the defendants submitted:

> 17. If they both had carried out substantially the same work in both roles, as executive directors and advisors then this would be a fact supportive of the 1st Defendant's defence against this claim. (This is not to say that if they did not perform substantially the same work, it would be necessarily conclusive of the issue against the 1st Defendant.)
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> 18. If the liability issue is decided in favour of the Plaintiffs then the quantum of recovery by the Plaintiffs would be the difference of the value of work they carried out as executive directors as compared with the value of the work they carried out as advisors. There would thus be an extremely significant or near complete overlap in the evidence to be presented to the court. The same issues would be canvassed. The same documents would be scrutinised. The same witnesses would be called. [note: 1]

30 These submissions must be examined against the pleadings. The plaintiff's claim was that the first defendant caused it to overpay the second defendant and NHC as advisors when he arranged for them to be paid their previous remuneration as directors. The defence was not that those two persons were carrying out the same work they performed as directors, as the submissions stated. The defence pleaded was that the remuneration was impliedly approved by the plaintiff's Board of Directors, or that no approval was required. On the pleaded case, there was no overlap between the questions of liability and damages.

31 The second area of overlap relied on by the defendants related to Toh's termination of employment with the plaintiff and his employment with Fu Yu. The defendants submitted that:

> 22. The Defence of both Defendants is effectively that William Toh could not perform in his designated role for the Plaintiffs. His contract was therefore not renewed. His employment with the alleged competitor was in a much more restricted role. The performance of the Plaintiffs' Shanghai operations improved immediately in the period following the departure of William Toh. This is an express averment in both Defendants' pleadings. There is a joinder of issue as the Plaintiffs have denied this in their Reply.
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> 23. Again, the issue of the performance of the Plaintiffs' Shanghai operations both before and after the departure of William Toh is relevant to the issues of liability and damages. [note: 2]

32 The defendants should have made it clear in the submissions that the poor performance of the plaintiff's Shanghai operations was not in the pleaded defence to this claim. When that is revealed, their submission of the relevance of said Shanghai operations' poor performance to the issues of liability and damages falls away by itself.

33 When all the matters discussed were taken into consideration, it was clear to me that it was just and convenient that the hearing of the action be bifurcated.

[note: 1] Defendant's Written Submissions

[note: 2] Defendants' Written Submissions