Rankine Bernadette Adeline *v* Chenet Finance Ltd
[2011] SGHC 79

Case Number : Suit No 971 of 2009 (Registrar's Appeal No.122 of 2010)

Decision Date : 31 March 2011

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Cavinder Bull SC and Gerui Lim (Instructed) (Drew & Napier LLC), and Dawn Tan (Eldan Law LLP) for the Plaintiff; N Sreenivasan and K Gopalan (Straits Law Practice) for the Defendant.

Parties : Rankine Bernadette Adeline — Chenet Finance Ltd

CIVIL PROCEDURE – summary judgment

31 March 2011

Kan Ting Chiu J:

1 In this action, the Defendant, Chenet Finance Limited, was given conditional leave to defend the claim of the Plaintiff, Rankine Bernadette Adeline. The Defendant has appealed against my order. In the meantime, final judgment has been entered after the Defendant failed to comply with the condition imposed.

The claim

2 The Plaintiff was a holder of 1,000,000 shares of a company Berlian Ferries Pte Ltd ("Berlian") in May 2004. The Plaintiff discovered that those shares in Berlian ("the shares") had purportedly been sold by her with consideration paid to her, and that the Defendant was the purchaser of the shares. As the Plaintiff had not agreed to sell the shares to the Defendant and had not received any consideration from the Defendant, she sought from Berlian copies of any transfer of shares signed by her. Berlian in turn informed the Defendant that it (Berlian) did not have the transfer forms relating to the shares. Berlian also informed the Defendant that as the Defendant's representatives had inspected and made copies from the secretarial files of Berlian, the Defendant should reply to the Plaintiff, but the Defendant had not supplied copies of the transfer forms to the Plaintiff.

3 When she received no satisfactory reply to her queries, the Plaintiff sued the Defendant. She asserted that the alleged transfer was a fraud and was void, that the Defendant is not the legal or beneficial owner of the shares, and claimed for the return of the shares and damages.

The pleaded defence

4 The Defendant filed its defence to the Plaintiff's claim. In the defence, the Defendant stated that it was the holder of 24,017,983 shares of Berlian including the 1,000,000 shares claimed by the Plaintiff. The Defendant pleaded that it was unable to give full particulars of the acquisition of the Plaintiff's shares, and the best particulars that the Defendant could give was that "1,000,000 shares was acquired from the Plaintiff around 2005". [note: 1]

5 The Defendant pleaded further that:

7. ... The Plaintiff was well aware of the transfer of her shares in Berlian to the Defendant and also signed all relevant documents including the share transfer form to transfer her shares to the Defendant. Further, the Plaintiff was at all times also aware of the corporate structure of Berlian and the fact that [the Defendant] had invested further sums of monies to increase its shareholding in Berlian over time.

8. By reason of the matters aforesaid, the Plaintiff is estopped from denying the transfer of the shares to the Defendant. Further, the Defendant's claim to be unaware of the transfer of her shares in Berlian to [the Defendant] is frivolous, vexatious, and scandalous and/or the claim herein is an abuse of process.

The unpleaded defence

6 The Defendant resisted the Plaintiff's application for summary judgment and filed an affidavit through its director and shareholder, Tan Yeang Tze Tobby ("Tan"). In this affidavit, it was alleged that:

9. As far as the Defendant is concerned, the shares were lawfully acquired in 2005 from the Plaintiff, and certainly not by fraudulent means. The Plaintiff's shares were issued to her in 2004 at a time when the Defendant stepped into Berlian to rescue it from its severe business difficulties by injecting S$2,000,000 in cash into Berlian. This sum was converted to 2 million shares at S$1.00 per share. *1 million shares were then allocated to the Plaintiff by the Defendant as part of a re-structuring arrangement for no consideration*, as the Plaintiff and the Defendant were on friendly business terms at that point in time. *In 2005, the 1 million shares were transferred from the Defendant back to the Plaintiff for no consideration*. Since 2005 up to the commencement of the Suit, the Defendant has never objected to or raised any of her alleged concerns as regards the transfer.

[emphasis added]

I refer to this defence as the "re-structuring arrangement defence", and will comment on this later.

7 Tan also referred to the absence of the records of the transfer. He deposed that:

13. ... the Defendant unable to access to its documents which were located in Berlian's premises. These document have been relocated to a warehouse in Tanjong Pagar Distripark, as they are allegedly part of a group of documents which are the subject of competing claims by various parties. ... In order to fully explain to the Court the circumstances behind the transfer of the shares to the Defendant, the Defendant requires access to these documents and to adduce them before the Honourable Court at trial.

8 In the Defendants' Submissions, the same matter was brought up, that:

Some time in April 2009, a series of events began, which resulted in the Defendant losing possession, custody and control of its Company Kit and other corporate secretarial documents, ...

The Plaintiff's application

9 After the statement of claim and defence were filed, the Plaintiff applied for summary judgment

under O 14, Rules of Court (Cap 322, R5, 2006 Rev Ed). The matter went on for hearing before an Assistant Registrar who dismissed the application and gave the Defendant unconditional leave to defend the action. The Plaintiff appealed against the Assistant Registrar's decision and the appeal came before me.

The appeal

10 The Plaintiff started its submission in the appeal with the law governing applications for summary judgment. This has been succinctly stated by Justice Judith Prakash in *Associated Developments Pte Ltd v Loong Sie Kiong Gerald* [2009] 4 SLR(R) 389 at [22]:

> ... that in order to obtain judgment, a plaintiff has first to show that he has a *prima facie* case for judgment. Once he has done that, the burden shifts to the defendant who, in order to obtain leave to defend, must establish that there is a fair or reasonable probability that he has a real or *bona fide* defence.

11 Counsel submitted that the Plaintiff had established that she was the owner of 1,000,000 Berlian shares by producing a copy of the share certificate. In any event, the Defendant acknowledged that the Plaintiff held 1,000,000 shares, and the Defendant claimed ownership over them.

12 For the purpose of the application under O 14, the Plaintiff had a *prima facie* case for judgment on her claim that she was the owner of the shares, and the shares were transferred to the Defendant without her consent or knowledge. Although the Defendant disputes the Plaintiff's ignorance over the transfer, the Plaintiff had put forward a *prima facie* case for judgment in that she can get judgment *if* her case is accepted. It does not mean that she is entitled to judgment as of right; that is the very question to be decided at the hearing of her application, when her claim as well as the defence is examined.

Admissibility of the re-structuring arrangement defence

13 Counsel for the Plaintiff questioned the Defendant's right to rely on the re-structuring arrangement defence. The objection was taken because the arrangement was not raised as a defence to the Plaintiff's claim, and was not even mentioned in the defence filed.

14 There have been several decisions on this question. In *Lim Leong Huat v Chip Hup Hup Kee Construction Pte Ltd* [2008] 2 SLR(R) 786 ("*Lim Leong Huat*"), Justice Woo Bih Li addressed the issue with admirable thoroughness in his decision delivered on 25 January 2008. He took note of the Malaysian decision in *Lin Securities (Pte) Ltd v Noone & Co Sdn Bhd* [1989] 1 MLJ 321 ("*Lin Securities*") where it was said in p 322:

> No doubt a defendant is bound by the four corners of his pleading at the trial of the action but he is not so bound at the O 14 proceedings. Order 14 r 4(1) provides that a defendant may show cause against an application for summary judgment by affidavit or otherwise. He is entitled to show at the hearing of the O 14 application that over and above what has been pleaded in the statement of defence he has other defences. The issue at an O 14 application is whether the defendant has a defence and not whether the statement of defence provides him with a defence.

but he was not content to adopt that approach to the issue. He went on to give further thought to the matter. He explained:

22 I had some reservation about the correctness of the decision in *Lin Securities* for various reasons. It is one thing for a rule to say that a defendant may show cause against an application for summary judgment by affidavit or otherwise. In such a rule, a defendant need not file an affidavit to show cause if, for example, he is able to rely on the statement of claim and/or the affidavit for the plaintiff to establish that summary judgment should not be granted. The rule does not necessarily mean that a defendant may say something in his affidavit which is not pleaded in his defence. Let me elaborate. Supposing a defendant were to be allowed to rely on an allegation in his affidavit which is not in his defence and, solely because of that allegation, he is able to avoid summary judgment. What happens if, when he subsequently applies to amend his defence to include this allegation he is not allowed to amend? This would mean that summary judgment should have been entered in the first place. Such an incongruous situation would be avoided if he were not to be allowed to rely on the allegation unless the defence is first amended to include that allegation. I was also of the view that the pleadings govern the issues between the parties throughout the action and the pleadings apply to all interlocutory proceedings. On the other hand, the decision in *Lin Securities* seemed to suggest that for the purpose of applications for summary judgment, the pleadings did not govern.

23 It should also be remembered that previously, applications for summary judgment were often made before a defence was filed. Accordingly, there was usually no question of an affidavit for a defendant raising an allegation which was not in the defence. Such a problem would arise only when a defence had already been filed. I will say more about this later.

24 Secondly, it is one thing to say that a defendant may rely on an affidavit allegation not pleaded in his defence but it is quite a different thing to say he may rely on an affidavit allegation which is contradictory to that which has already been pleaded in his defence. In such a situation, it seemed to me all the more so that the defence must first be amended before he can rely on the affidavit allegation. As mentioned above, it is by no means certain that the application to amend the defence would be allowed. Certainly in the case before me, Lim and Tan [the Defendants in the application] would have to explain why, if the new allegation were true, it was not mentioned at the earliest opportunity when the initial defences were filed. It would then be questionable whether an application to amend the defence would be allowed.

25 Thirdly, our Rules of Court were amended recently in 2006 so that currently, a plaintiff may apply for summary judgment only after the defence has been served. This is unlike the previous situation where, as I have mentioned, a plaintiff might and often did apply for summary judgment even before the defence was filed. The purpose of the amendment was so that a plaintiff would know the specific defence before applying for summary judgment. *I was of the view that to allow a defendant to raise a substantive allegation in his affidavit which was not pleaded in his defence would undermine the purpose of the amendment*.

[emphasis added]

15 Woo J re-visited the question in his decision in *HSBC Institutional Trust Services (Singapore) Ltd v Elchemi Assets Pte Ltd and another* [2010] SGHC 67 ("*HSBC v Elchemi*") delivered on 3 March 2010. In this case, the plaintiff as landlord sued the first defendant, its tenant, and the second defendant, the guarantor of the first defendant, for arrears in rent. After the defendants had filed their defence and counterclaim, the plaintiff applied for and obtained summary judgments against the defendants, and the defendants applied to set aside the judgments. Woo J dismissed their appeals. In his judgment, he noted that the second defendant had, in the affidavit filed to resist the application for summary judgment, raised fresh allegations not found in the defence. Woo J stated at [21] of his grounds of decision:

I was of the view that he was not entitled to do so unless the defendants had first applied for and obtained leave to amend his defence (see my decision in *Lim Leong Huat v Chip Hup Hup Kee Construction Pte Ltd* [2008] 2 SLR(R) 786). The defendants did not seek leave to do so and accordingly, were not entitled to rely on the fresh allegations.

16 Within a week after Woo J stated his view in *Lim Leong Huat*, Judith Prakash J delivered her grounds of decision on 30 January 2008 in *United States Trading Co Pte Ltd v Ting Boon Aun and another* [2008] 2 SLR(R) 981 ("*United States Trading*") which touched on the same issue. In this case, the plaintiff sued the two defendants for the return of a loan, and applied for summary judgment against the second defendant after he had filed his defence, judgment in default of appearance having been entered against the first defendant. In his affidavit filed to resist the application, the second defendant raised a defence that was not pleaded in the defence he filed. An Assistant Registrar allowed the plaintiff's application and entered judgment against the second defendant.

17 In the appeal against the Assistant Registrar's decision, counsel for the second defendant argued that the judgment should be set aside. That did not find favour with Prakash J who took care to explain:

> 23 [Counsel] stated that the assistant registrar had not accepted these arguments [on the unpleaded defence] because they were not based on matters pleaded in the defence. He argued that the omission to plead such arguments as defences was irrelevant because at a summary judgment hearing, the defendant was entitled to raise matters which had not been pleaded. In support he cited the 1989 case of *Lin Securities (Pte) v Noone & Co Sdn Bhd* [1989] 1 MLJ 321 ("the *Lin Securities* case"). That was a Malaysian case which held that whilst the defendant was bound by the four corners of his pleadings at the trial of the action, he would not be so bound at the O 14 proceedings. The Malaysian O 14 r 4(1) Rules of the High Court 1980 (PU(A) 50/1980) provided that a defendant may show cause against an application for summary judgment by affidavit or otherwise and it was held that he was therefore entitled to show at the hearing of an O 14 application that over and above what had been pleaded in the statement of claim, he had other defences.
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> 24 The present O 14 regime as encapsulated in the Rules of Court is predicated, unlike the regime that applied in Malaysia and Singapore in 1989 when the *Lin Securities* case was decided, on both the statement of claim and the defence having been filed before the application for summary judgment is taken out. As the commentary in *Singapore Civil Procedure 2007* (G P Selvam ed) (Sweet & Maxwell, 2007) ("the *White Book*") notes at para 14/1/7, the previous procedure was unsatisfactory:
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> > ... as the plaintiff who applies for summary judgment may not be in a position to pinpoint the specific defences that the defendant may raise. This has often resulted in the plaintiff's affidavit in reply to the defendant's show cause affidavit raising new issues, which the defendant then requires leave of court to respond to. This disrupts the timetable for the filing of affidavits set out in O.14, r.2. With the amendments, the service of a defence by the defendant and not just the entry of appearance is now a prerequisite to an application under O.14.
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> The *White Book* at para 14/2/12 also restates the principle established by the *Lin Securities* case that the defendant is not bound by the four corners of his defence at the summary judgment stage but follows that with a reference to the case of *Pembinaan V-Jaya Sdn Bhd v Binawisma Development Sdn Bhd* [1987] 2 CLJ 446 which it cites for the principle that where the defence

amounts to nothing more than a bare denial of the claim, the court may be particularly cautious about defences suddenly raised by the affidavit.

25 In my view, now that the Rules of Court have been amended to require the defence to be filed before the summary judgment application can be made, the principle in the *Lin Securities* case must be looked at again. I consider that it behoves a defendant to set out all his defences in his defence so that the plaintiff can make a proper assessment of the chances of an application for summary judgment being successful. It is not correct for the defendant to plead one thing which, objectively, does not seem to afford him a good defence and then when the application is made by the plaintiff to bring up various other points and take the plaintiff by surprise. To allow a defendant to do this as a matter of course would be to allow an abuse of process. This does not mean that in all circumstances a defendant should not be able to raise a new defence in his affidavit responding to the O 14 application but he should be able to give good reasons for not having raised such defence in his pleading and, if he is not able to do so, the defences should be either disregarded or treated with a great deal of suspicion.

18 From these three decisions, the position appears to be that a fresh defence that is not pleaded cannot be relied on unless the defence is amended, or in exceptional cases where the court finds that there are good reasons to allow that to be done.

19 These cases have been noted and discussed in *Singapore Court Practice 2009* (LexisNexis 2009) at 14/3/2A:

Pleading defences for the purpose of challenging O 14 application.

A respondent to an application for summary judgment must ensure that he pleads all the defences he intends to rely on in his pleading. If he fails to do this, he may not be able to raise a defence at the hearing of the application even if it is stated in his affidavit or other source. This principle, which was propounded by Judith Prakash J in *United States Trading Co Pte v Ting Boon Aun* [2008] SGHC 15 (‘*United States Trading*’), reverses the previous practice which did not bind the defendant to the four corners of his pleading (see, for example, *Lin Securities (Pte) Ltd v Noone* [1989] 1 MLJ 321, which is cited in United States Trading, at [24]–[25]; and *Superbowl Jurong Pte Ltd v Sami’s Curry Restaurant Pte Ltd* [2007] SGDC 157). The binding effect of the defence pleading was also propounded in *Lim Leong Huat v Chip Hup Hup Kee Construction Pte Ltd* [2008] SGHC 12 (decided within a week of *United States Trading*). Woo J considered that the rule permitting the defendant to challenge an application for summary judgment by ‘by affidavit or otherwise’ (see O 14, r 2(3)) (RC) did not mean that he was entitled to omit defences from his pleading (ibid, at [20]–[28]).

20 The latest decision on the question is the decision of the Court of Appeal in *Poh Soon Kiat v Desert Palace Inc (trading as Caesars Palace)* [2010] 1 SLR 1129 delivered on 28 April 2009. In this case, the appellant, against whom summary judgment had been entered, applied to the Court of Appeal to amend his defence as a prelude to his appeal.

21 The Court of Appeal did not deal with the application to amend, and explained in its judgment:

15 In this connection, the Appellant applied to this court via SUM 1312/2009 for leave to amend his defence to plead that the 2001 California Judgment was not a foreign money judgment ... We declined to hear this application and treated it as withdrawn. In our view, it was an unnecessary application as, in summary judgment proceedings, "[a] defendant may raise defences in his affidavit even if they are not referred to in the pleaded defence" (see *Singapore Civil*

Procedure 2007 (G P Selvam chief ed) (Sweet & Maxwell Asia, 2007) at para 14/2/12) and is "bound by the four corners of his pleadings [only] at the trial of the action but ... not ... [in] the O. 14 [*ie*, summary judgment] proceedings"

22 The quoted statements are from a passage:

> A defendant may raise defences in his affidavit even if they are not referred to in the pleaded defence (*Lin Securities (Pte) Ltd v. Noone & Co Sdn Bhd* [1989] 1 MLJ 321). A defendant is bound by the four corners of his pleadings at the trial of the action but is not so bound at the O.14 proceedings.

which did not have the advantage of considering the reasoning in the decisions of Woo J and Prakash J and their views on the statement of law laid down in *Lin Securities*.

23 There is a possibility that the Court of Appeal would have dealt with the issue differently if its attention was drawn to *Lim Leong Huat*, *United States Trading* and the *Singapore Court Practice 2009*. We have to wait till the question goes before the Court again to have an answer. In the mean time, it can only be said that there is room for greater clarity and certainty on this issue.

24 I did not exclude the unpleaded defence from the appeal as counsel for the Plaintiff was prepared to deal with it.

Examination of the defences

The re-structuring arrangement defence

25 Counsel for the Plaintiff had pointed out that this defence was not only absent from the pleaded defence, but was not consistent with it. In the defence filed on 4 December 2009, the Defendant pleaded:

> The Defendant is a shareholder of Berlian and currently hold 24,017,983 shares in Berlian amounting to some 88.9% of the paid capital of Berlian. The Defendant acquired its shareholding in Berlian over time and complied with all applicable regulations and requirements in relation to the same. The Defendant is unable to give full particulars of the due acquisition of the said shares as many of the documents of the Defendant has been wrongfully withheld [from the Defendant] ... The Defendant reserves its rights to give further particulars upon discovery of the said documents. Save as aforesaid*, the best particulars the Defendant can give* at this time are as follows:
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> ...
>
> c) 1,000,000 shares was acquired from the Plaintiff around 2005;
>
> [emphasis added]

26 In Tan's affidavit filed six weeks later on 18 January 2010, clear references were made to the re-structuring arrangement and the transfer of the 1,000,000 shares (see [7] *supra*).

27 Obvious questions arise from this. One question is why was the re-structuring arrangement not mentioned in the defence pleaded? The Defendant stated that "(t)he Defendant is unable to give full particulars of the acquisition of the shares as many of the documents of the Defendant has [sic] been wrongfully withheld ..." That only means that the Defendant was unable to produce documentary

evidence of the re-structuring arrangement; it cannot mean that the Defendant cannot remember that it had acquired the shares through a re-structuring arrangement. The pleaded defence made no reference to any re-structuring arrangement, and only stated that the 1,000,000 shares were acquired from the plaintiff around 2005.

28 A second question is why was no documentary evidence produced? The Defendant had stated that it did not have access to the corporate secretariat documents. It did not say that its non-secretarial records, *eg*, its account books, external correspondence and internal records were also in the possession of its corporate secretaries; such records would not be kept by the corporate secretaries whose duties do not extend to the management and custody of such records. It is unlikely that matters as important as the injection of $2 million by the Defendant into Berlian and the re-restructuring arrangement were not referred to in the account books, external correspondence and internal records of the Defendant. In any event, if the Defendant had injected $2 million into Berlian, evidence of the payment would be obtainable from its bank.

29 Tan's account of the re-structuring arrangement and the transfer of the Plaintiff's 1,000,000 shares should be read carefully. He had deposed that:

> 1 million shares were then allocated to the Plaintiff by the Defendant as part of a re-structuring arrangement for no consideration, as the Plaintiff and the Defendant were on friendly business terms at that point in time. In 2005, the 1 million shares were transferred *from the Defendant back to the Plaintiff* for no consideration. Since 2005 up to the commencement of the Suit, the *Defendant has never objected* to or raised any of her alleged concerns as regards the transfer.
>
> [emphasis added]

The reference to the "Defendant" and the "Plaintiff" in the second and third sentences are clearly reversed, and these two sentences can only be meaningful if they are taken to mean that the shares were transferred from the Plaintiff back to the Defendant, and the Plaintiff had not objected to that. This is in fact the position taken in the Defendant's submissions in the appeal at para 41(d) and (e) that:

> (d) the Shares were transferred back to the Defendant for no consideration in 2005; and
>
> (e) since 2005 up to the commencement of the present action, the Plaintiff has never objected to or raised any of her alleged concerns as regards the transfer.

The mistake and carelessness in the narration of the re-structuring arrangement and the movement of the shares raise further questions over the veracity of the defence.

The estoppel defence

30 Besides the defence that the Defendant acquired the Plaintiff's shares in 2005, the other defence is the defence of estoppel pleaded in para 8 of the defence (see [5] *supra*). Although it was pleaded that "the Plaintiff is estopped from denying the transfer of the shares to the Defendant", the Defendant really meant that on the facts, the Plaintiff cannot deny that she had transferred the shares to the Defendant, and "estopped" was not used in the strict sense of the Plaintiff having made a representation which the Defendant had relied on to its detriment. This point was alluded to by the Plaintiff's submissions, [note: 2] and the Defendant did not respond to it.

My decision

31 In the appeal the Plaintiff did not ask for summary judgment to be entered against the Defendant. Instead it was submitted that:

> Given the highly questionable nature of the Defendant's case, it is respectfully submitted that the imposition of conditional leave to defend is called for. [note: 3]

32 The submission accorded with my findings on the issues. The defences raised by the Defendant were indeed questionable, but I was not minded to reject them and to enter final judgment. The Defendant should be given the opportunity to produce direct or corroborative documentary evidence to support its defences, but appropriate conditions should be imposed before the Defendant is allowed to proceed further with those defences.

33 As the primary claim was for the return of the 1,000,000 shares, a condition that the shares be placed into the custody of stakeholders pending the disposal of the trial would be a suitable condition, but the Defendant stated that the shares are not in its possession. In these circumstances, an order that the Defendant is to furnish security at the value of the shares was discussed with counsel. However, there was no satisfactory evidence on the value of the shares. Counsel for the Plaintiff proposed that the par value of $1 be used, while counsel for the Defendant countered with a suggestion of 10¢ a share. In the absence of any reliable evidence, I adopted a value of 20¢ a share, and gave the Defendant leave to defend on the provision of security in the sum of $200,000. The quantum of the security could be set on a more informed basis. If the professional evidence on the value of the shares is now or shall become available, the parties may consider seeking the leave of the Court of Appeal to admit that evidence for the appeal.

[note: 1] Defence para 6(c)

[note: 2] Plaintiff's Submissions, para 61

[note: 3] Plaintiff's Submissions, para 66