

Hong Hin Kit Edward and another v PT Nusautama Medicalindo and another
[2010] SGHC 192

Case Number : Suit No 1059 of 2009 (Registrar's Appeal Nos 139 and 142 of 2010)
Decision Date : 06 July 2010
Tribunal/Court : High Court
Coram : Choo Han Teck J
Counsel Name(s) : Liew Teck Huat and Niru Pillai (Global Law Alliance LLC) for the plaintiffs; Harish Kumar (Rajah and Tann LLP) and Troy Yeo (Troy Yeo & Co) for the defendants.
Parties : Hong Hin Kit Edward and another — PT Nusautama Medicalindo and another

Civil Procedure

6 July 2010

Choo Han Teck J:

Background

1 The first and second plaintiffs are Edward Hong and Albert Hong (collectively “the Hongs”). The first defendant is an Indonesian company PT Nusautama Medicalindo (“PTNM”) and the second defendant is a Malaysian healthcare company Columbia Asia (collectively “the Defendants”). The Hongs, along with one Boelio Muliadi, owned shares in an Indonesian company, Universal Medicare, which owned PTNM. Edward Hong is also a shareholder and director of Thermal Industries, a Singapore company dealing with the supply of medical equipment.

2 On 1 December 2007, the Hongs and Muliadi intended to sell 99% of the shares in Universal to Columbia Asia at a total price of US\$30,159,000.00. Subsequently however, on 24 Dec 2007, the Hongs and Muliadi agreed to sell the shares to Columbia Asia for US \$18,230,550.00 (“the share sale agreement”). In the share sale agreement, the parties agreed that the shares would be sold to Columbia Asia free from all liabilities defined as any present or future liabilities of Universal and PTNM, excluding the Goldman Sachs debt. The relevant clauses were as follows:

Section 2.1.24 Liabilities means all and any present or future liabilities or obligations of [Universal] and [PTNM] whether actual, contingent or otherwise whatsoever (excluding the Goldman Sachs Indebtedness, all obligations to trade vendors and doctors that are a part of the day to day operations of [PTNM] and the intercompany debts between [Universal] and [PTNM] incurred by [Universal] and [PTNM] less the current assets of [PTNM], up to and include (sic) the Completion Date.

Section 3.1 The Vendors hereby agree to sell and the Purchaser hereby agrees to purchase the Sale Shares free from all Encumbrances and Liabilities whatsoever together with all rights attached thereto and all dividends and distributions declared paid or made in respect thereto and after the Completion Date hereof at the Purchase Price and subject to the terms and conditions herein contained.

The sale was completed on 22 January 2008. The deposit sum and balance purchase price were paid out to the Hongs on or around January 2008.

The first action- the Indemnity action (Suit 861 of 2008)

3 On 19 November 2008, Thermal Industries brought a claim against PTNM, alleging that PTNM is indebted to it for sum of \$272,934.48 paid by it on PTNM's behalf to discharge PTNM's indebtedness to another company, Medical Equipment Credit ("MEC"). PTNM joined Columbia Asia as co-defendants. Both defendants disputed the claim. First, the Defendants claimed that MEC made the loan to Universal Medicare, and not PTNM. Furthermore, the loan was subsequently assigned to Goldman Sachs (the Goldman Sachs indebtedness), and Columbia Asia had already made payment to Goldman Sachs. Secondly, even if Thermal Industries paid PTNM's debt to MEC, the Defendants contended that even if the Hongs and Muliadi were the ones liable to pay the MEC debt under the share sale agreement.

4 The Defendants applied to join the Hongs as third parties to the action on the grounds that in the event that PTNM is held liable to Thermal Industries, the Defendants are entitled to an indemnity or contribution from the Hongs. The Defendants claim that the Hongs warranted that they would settle and fully discharge all liabilities and obligations of PTNM (unless otherwise excluded), and as they have failed to do so, the Hongs were liable to indemnify Columbia Asia for all losses arising from the warranty. In the alternative, the Defendants alleged that Thermal Industries is the alter ego of Edward Hong. Muliadi however, was not joined as Third Party.

5 The Hongs resisted and contended that they had complied with all their obligations under the share sale agreement, and that Thermal Industries' claims against the Defendants were either part of the Goldman Sachs indebtedness or day to day operations of PTNM. Therefore, they were not liable for Thermal Industries claim. They further denied that Thermal Industries is the agent alter ego of Edward Hong, or that Edward Hong was attempting to evade his legal obligations by recovering Thermal debts through Thermal Industries. Finally, the Hongs contended that the share sale agreement was between them, Muliadi and Columbia Asia, therefore PTNM was not entitled to rely on the agreement.

The second action- the Debt Action (Suit 862 of 2008)

6 Again on 19 November 2008, Thermal Industries brought another claim against PTNM for non-payment of a debt of US\$396,719.90 and US\$9,763.00. The proceedings were largely identical to the Indemnity Action. Here, PTNM joined Columbia Asia as co-defendants and both disputed the claim. The Defendants contended in the alternative that that under the share sale agreement it fell on the Hongs and Muliadi to discharge such liabilities. The Defendants again applied to join the Hongs but not Muliadi, as third parties. As in the other action, the Hongs denied liability on similar grounds.

The third action- the Defendants' Action (Suit 964 of 2009)

7 On 11 November 2009, the Defendants commenced action against the Hongs on the grounds that the Defendants overpaid for the purchase of shares under the share sale agreement. First, the Defendants alleged that the Hongs and Muliadi were not entitled to payment as they had not complied with the conditions for the release of the deposit sum and balance purchase price. This included the Hongs' and Muliadi's alleged failure to settle its alleged liabilities which are the subject of the Debt and Indemnity Actions. Secondly, the Defendants alleged around June 2002, Universal entered into a loan agreement with MEC for a sum of US\$12,000,000 which was secured by a security interest over a plot of land in Indonesia ("the Land"). MEC's rights were subsequently assigned to Goldman Sachs, and Columbia Asia paid to the Hongs' solicitors a sum of money which was used to discharge the Goldman Sachs indebtedness. However, MEC's security interest over the Land had not been discharged. The

Defendants thus alleged that in breach of the share sale agreement, the Hongs and Muliadi failed to deliver to PTNM the Land free of encumbrances. Third, the Defendants alleged that the Hongs and Muliadi were liable for some of PTNM's liabilities arising from unpaid taxes and failure to keep proper books and account. The Hongs denied liability. They claimed that MEC loan was assigned to Goldman Sachs and that the debt had already been settled. The failure to remove the charge over the land was, in their explanation, an administrative oversight.

The fourth action- the Present Suit

8 In the present suit brought by the Hongs against the Defendants, the Hongs alleged that:

(a) the Third Party proceedings taken out by the Defendants against the Hongs in the Indemnity and Debt actions, and the Defendants' action, are in abuse of process. The Hongs contended that PTNM joined Columbia Asia as co-defendants so as to join the Hongs as Third Parties to the actions as it was Columbia Asia, and not PTNM which may have a cause of action against the Hongs;

(b) the Defendants' acts were carried out in conspiracy with each other with the predominant purpose to injure the Hongs;

(c) Section 2.1.24 of the share sale agreement should be rectified to read:

Liabilities means all and any present or future liabilities or obligations of the Company and [PTNM] whether actual, contingent or otherwise whatsoever (excluding the Goldman Sachs Indebtedness, all obligations to trade vendors and doctors that are a part of the day to day operation of [PTNM], and the debts between Thermal Industries & Supplies (Pte) Ltd and Thermal Intentional (S) Pte Ltd on the one hand, and the Company and/or Indo Co on the other) incurred by the Company and/or [PTNM], up to and including the Completion Date.

9 The Hongs therefore prayed for:

(a) declarations that the Indemnity and Debt Action were commenced in abuse of process and injunctions restraining commencing similar proceedings;

(b) declarations that the Defendants have no cause of action against the Hongs in the Defendants' action;

(c) damages for conspiracy; and

(d) an order rectifying the sales and purchase agreement.

Another claim was made relating to an Indonesian nursing academy, Yayasan Gleni, however, that was not relevant to the current proceedings.

The present proceedings- the striking out application

The proceedings before the AP

The proceedings before the AR

10 The Defendants applied to strike out the Hong's claims in the present suit pursuant to O 18 r 19 of the Rules of Court, on the ground that there was no basis for the Hong's claim. With respect to the order for rectification, the Defendants contended that the Hong's had no basis to seek rectification since there was no evidence to suggest a contrary intention other than that expressed in the clause, and in fact, the Hong's had affirmed the wording of the clause in the previous suits. With respect to the declarations for abuse of process and injunction from making similar allegations or commencing similar proceedings, the Defendants contended that the proper course would have been for them to take their objections in the other actions. With respect to the claim for damages for conspiracy, the Defendants contended that this was dependent on the claims that the Defendants have no cause of action against the Hong's in the earlier actions.

11 The Hong's contended that the striking out application rested on a misunderstanding of their action as it failed to appreciate the difference between the merits of the three previous actions, and the cause of action for abuse of process. In the present suit, the Hong's were claiming under the tort of abuse of process of the court. The tort could be established even if the actions had been commenced for legitimate purposes or if it was concluded in favour of the party now suing for abuse of process, although the fact (as alleged by the Defendants) that there was no causes of action supported the claim that the action was commenced in abuse of process. This was distinct from applying abuse of process as a defence to a claim. As the claim was therefore distinct from the merits of the actions in the earlier suits, it was open to them to commence fresh proceedings even if they were capable of being the subject of a counterclaim in an existing action. With regard to the claim for rectification, the Hong's contended that there was a question of fact which could only be determined after a trial. As for the other claims, the Hong's contended that the defendant's contention that the action should be subsumed within the existing actions was an acknowledgement that the Hong's have a case of action, and that the Hong's had applied to consolidate all four actions to be heard together. In response, the Defendants reiterated its submissions and contended further that the tort of abuse of process has not been expressly recognised in Singapore, and even if it is, it required both special damages and an overt act to be made out, neither of which had been made out in the statement of claim. Although the Hong's prayed for declarations for abuse of process by the Defendants, they had not claimed damages arising from the alleged abuse of process. The AR struck out all the prayers except the claim for rectification of contract.

The appeal against the AR's decision (RA 139 and 142 of 2010)

12 The Hong's appealed against the AR's striking out orders (RA 139 of 2010), and the Defendants appealed against the AR's refusal to strike out the claim for rectification (RA 142 of 2010). The Defendants reiterated its contentions:

- (a) that the tort of abuse of process fails as firstly, the defendant's claims were legitimate. Columbia Asia was brought into the Debt and Indemnity actions as it was a party to the share sale agreement and they were enforcing their rights under it to seek indemnity from the Hong's against Thermal's claims. Furthermore, if the Hong's believed that the Defendants had no cause of action against them in third party proceedings in those two actions or in the Defendants' action, they could have applied to strike out the applications/claims there. Secondly, the Hong's had not pleaded any overt act to support the tort of abuse of process. Instead, the Defendants contended that they had prima facie good claims e.g. the Thermal claim fell within the definition of liabilities in the share sale agreement that the Hong's were obliged to shoulder, and the land was encumbered with a charge in favour of MEC when the Hong's were obliged to give clean title;
- (b) as for the claim for an injunction, the Defendants further contended that since there was

no abuse of process, the injunction had no basis;

(c) likewise, the claim for conspiracy was predicated upon the Defendants having no cause of action in the earlier suits. This was because the bringing of legal actions per se was insufficient to support the tort of conspiracy; and

(d) with regard to the Hongs' claim for rectification, the Defendants contended that first, the plaintiffs had relied on the agreement and based its claims in the Debt and Indemnity action on the wording of the clause; that if the alleged errors were obvious, there would be no need to seek the equitable remedy of rectification. There was no evidence that the clause did not properly reflect the intention of the parties.

13 First, the Hongs contended that the AR erred in failing to distinguish between an action alleging abuse of process and an allegation that the action complained of was commenced without legal basis. This was because first, an action for abuse of process is not precluded even if the action complained of was resolved in favour of the party subsequently sued for abuse of process, and second the merits of an action are conceptually distinct from the reason that action was commenced. Furthermore, unlike an application to strike out, under the action for abuse of process, the Hongs would be able to obtain damages and not only costs. Finally, there would be no multiple decisions as the Hongs have applied for all four actions to be heard together. The Hongs therefore grounded their claim on the basis that the Defendants sued without a cause of action (allegedly), which was evidence (but not the only test) that the action was commenced in abuse of process. Secondly, they argued that the AR was right to refuse to strike out the rectification claim. This was because the question whether the share sale agreement should be rectified can only be determined after a trial, and therefore had the Defendants wanted more information on the Hongs' basis for pleading rectification, the proper application would be one for particulars, not striking out. Furthermore, the Hongs' position in the Indemnity and Debt Actions was not inconsistent with the claim for rectification as they disputed liability to the Defendants in those actions.

14 I was of the view that this suit was totally unnecessary because all the claims of the plaintiff were matters that could be and should be determined in the prior actions. It would be more appropriate to amend the existing prior actions to add the necessary parties and the new prayers because the facts leading to the dispute as well as the facts in this action overlap. The parties ought to choose a course that is least likely to result in confusion or conflicting findings of fact. The action for rectification was an action to rectify a contractual document that is the subject matter of another suit. If that document is to be rectified, it must be done in that suit. For the above reasons, the appeal in RA 139 of 2010 was dismissed and the appeal in RA 142 of 2010 was allowed. Costs should follow the cause and be taxed if not agreed.

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