

Span Pacific Corporation v ASP Crew Management Ltd and Others
[2003] SGHC 84

Case Number : Suit 1193/2002, RA 34/2003

Decision Date : 10 April 2003

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Chua Choon King (Rajah & Tann) for the Plaintiff; Kueh Ping Yang (Ang & Partners) for the Defendants

Parties : Span Pacific Corporation — ASP Crew Management Ltd; David John Oldfield; Tay Liang Chang; ASP Pacific Holdings Pty Ltd; Crew Management Services S.A.; ASP Crew Management Services Ltd

Civil Procedure – Security for Costs – Minority shareholder party – Whether party was only a nominal plaintiff as it was suing in a representative capacity as a minority shareholder.

Civil Procedure – Security for Costs – Whether a party resident abroad should provide security for costs.

1 The plaintiff is Span Pacific Corporation ("Span"), a company incorporated under the laws of British Virgin Islands. Span was set up by the Monsoon Maritime group of companies to hold 35% of the shares in a joint venture company which is the first defendant ASP Crew Management Ltd ("ASPCM"), a company incorporated under the laws of the Republic of Vanuatu. The joint venture was with the ASP group of companies and its 65% stake in ASPCM was originally held by the fourth defendant ASP Pacific Holdings Pty Ltd but currently held by the fifth defendant, Crew Management Services S.A. ("CSM"). Accordingly, Span was a minority shareholder in ASPCM.

2 ASPCM was set up pursuant to an agreement in 1998 between the joint venture partners to provide crewing agency services to various vessels including vessels managed by the ASP group. After ASPCM was set up, it then proceeded to recruit and provide crew to various ship management companies.

3 However, by late 2001, disputes arose between its shareholders, representing the interests of their respective groups. The disputes were on various issues such as the validity and suitability of ASPCM to serve the needs of the ASP group.

4 By late March 2002, there was an in-principle agreement to transfer the business of ASPCM to a company within the ASP group and that ASPCM would be wound up after the transfer had been effected. In the course of discussions, one of the points of contention was how to deal with the funds of ASPCM, a large portion of which comprised:

- (a) Crew's wages
- (b) Crew's accrued leave pay
- (c) Rejoining bonus
- (d) Training funds

5 Mr Pan Boon Pin, a representative of Span, and also the managing director of ASPCM alleged that he had suggested repeatedly that legal advice be sought on the proper manner of transferring the business but this suggestion was rejected by Mr John Harvey Bowering and the second defendant David John Oldfield. Mr Bowering was the representative of the ASP group although apparently not a director of ASPCM and Mr Oldfield was to be a director of ASPCM in place of Mr Robert Lambert.

However, Mr Pan expressed some doubt as to whether the papers for Mr Oldfield's appointment as director had been executed. On the other hand, Mr Oldfield exhibited his consent to act as a director of ASPCM but not the papers demonstrating his appointment. In any event, as the parties had acted on the basis that Mr Oldfield had been appointed a director of ASPCM, I assumed, for the time being, that he had been so appointed.

6 The discussions finally culminated in a written agreement in July 2002 between ASPCM and CMS ("the Agreement") to transfer the crew management business to CMS.

7 Under clause 2 of the Agreement, all funds relating to the Rejoining/Performance Bonus were to be transferred to a separate account to be jointly administered i.e jointly administered by ASPCM and CMS.

8 Under clause 9 of the Agreement, all balances remaining would be subject to independent external audit and this would include an existing Training Fund.

9 Under clause 10, distribution of the balances after agreement and verification by audit would be the subject to correspondence between "the Shareholders", which presumably means the shareholders of ASPCM. The balances including Training Fund and Rejoining/Performance Bonus were to be allocated between the shareholders in the proportion of 65% and 35%.

10 However, a dispute arose and there was a deadlock about payment of rejoining bonus funds into the joint account.

11 On 18 September 2002, Mr Pan received from Mr Oldfield, a Notice of Directors' Meeting to be held on 20 September 2002. The agenda was:

1. Discuss the Draft Statutory Accounts as at 30 June 2002.
2. Company future.

12 The meeting was held in Mr Pan's office. After some discussion regarding the accounts of ASPCM, Mr Oldfield presented a resolution which Mr Pan said had surprised him. The resolution provided, inter alia, that ASPCM was to transfer all bank account balances to the new company ASP Crew Management Services Ltd, the sixth defendant.

13 Mr Pan objected to the resolution for various reasons, including the reason that it was contrary to the Agreement. The minutes of the meeting which Mr Oldfield subsequently relied on do not assert that the deadlock was due to any unreasonable stand taken by Mr Pan, the Monsoon group or ASPCM. Notwithstanding Mr Pan's objection, Mr Oldfield and another director, Tay Liang Chang, signed the resolution.

14 On 25 September 2002, Mr Pan checked with the Singapore branch of Den Norske Bank SA, which was the bank of ASPCM. He was informed that on the same day of the meeting, 20 September 2002, Mr Tay had authorised the transfer of USD800,000 to another account in the same bank but in the name of ASP Crew Management Services Ltd. According to Mr Pan, the Rejoining Bonus and Training Fund comprised more than half the USD800,000.

15 Accordingly, Span commenced the present action on 9 October 2002 as minority shareholder of ASPCM, for various reliefs including:

- (a) a declaration that Mr Oldfield and Mr Tay were in breach of their fiduciary duties,
- (b) an order that ASP Crew Management Services Ltd do pay ASPCM the USD800,000 with interest.

16 The defendants were and are:

- (a) ASPCM
- (b) Mr Oldfield
- (c) Mr Tay
- (d) ASP Pacific Holdings Pty Ltd
- (e) CSM
- (f) ASP Crew Management Services Ltd.

17 On the same day, Span also applied, inter alia, for an interim injunction to restrain the second to sixth defendants from dealing with the USD800,000. On 10 October 2002, such an interim injunction order was made.

18 Mr Oldfield, Mr Tay and ASP Crew Management Services Ltd ("the Applicants") then applied on 13 January 2003 for Span to provide security for their costs of the action. Their application was heard by an Assistant Registrar on 27 January 2003 and dismissed. They appealed and their appeal was heard by me. I dismissed the appeal. The Applicants have appealed to the Court of Appeal.

19 Before me, the Applicants relied on two grounds:

- (a) that Span was only a nominal plaintiff as it was suing in a representative capacity as a minority shareholder of ASP Crew Management,
- (b) Span was not ordinarily resident in Singapore.

20 As regards the first ground, Mr Chua Choon King, Counsel for Span, pointed out that O 23 r 1(b) of the Rules of Court regarding security for costs from a nominal plaintiff excludes plaintiffs who sue in a representative capacity. This was not disputed by Ms Kueh Ping Yang, Counsel for the Applicants.

21 As for the second ground, I accepted Mr Chua's submission that it was not an inflexible rule that a plaintiff resident abroad should provide security for costs. That was a point made by Justice Chao Hick Tin (as he then was) in *Omar Ali bin Mohd & Ors v Syed Jafaralsadeg bin Abdukadir Alhadad & Ors* [1995] 3 SLR 388. Chao J also said that a major matter for consideration was the likelihood of the plaintiff succeeding although not every application for security for costs should be made an occasion for a detailed examination of the merits of the case. Chao J also added that the conduct of the defendants was also a relevant consideration.

22 Before me, the Applicants took the position that the monies in question did not belong to ASPCM but to the ship-owning companies who are clients of ASPCM. While there may be some merit in this point, the fact of the matter was that there was an agreement to deal with the monies in a certain way and the balance of the monies had been agreed to be shared between ASPCM's shareholders. Mr Oldfield did not explain why the ASP group had agreed to clause 10 of the Agreement if, as he subsequently asserted, the monies held by ASPCM did not belong to ASPCM. It seemed to be that it was one thing for the ship-owning companies to claim back the monies and another for representatives of the ASP group to act contrary to the Agreement which had been reached after some negotiation.

23 It was because of the conduct of these representatives that Span had to commence the present action. I also agreed that Mr Pan was ambushed at the 20 September 2002 directors' meeting when the resolution I have mentioned was suddenly produced for him to accede to. Indeed,

the conduct of the defendants after 18 September 2002 also left something to be desired.

24 As it turned out, after the USD800,000 was transferred on 20 September 2002 to ASP Crew Management Services Ltd's account with Den Norske Bank, it was transferred again, with other funds of CMS, on 25 September 2002 to another account of ASP Crew Management Services Ltd with Den Norske Bank. In the evening of 9 October 2002, Span gave notice of intention to seek an injunction and in the morning of 10 October 2002, the USD800,000, and other monies, were transferred out of Singapore to an account in Switzerland held by another company in the ASP group. Thereafter it was transferred on 29 October 2002 to a bank account in Guernsey.

25 I was also not impressed by letters which the Applicants had obtained from ship managers stating that their principals were authorising the transfer of the monies to CMS. These letters were obtained after the event and emanated from ship managers who were themselves within the ASP group. They were self-serving letters. Besides, the ship-owning companies are not parties to this action.

26 Furthermore, by the time the appeal was heard by me, the contesting parties had reached an interim agreement whereby the USD800,000 was to be deposited into a joint account apparently to be jointly operated by the solicitors for the contesting sides. It was uncertain how much balance would be left for further dispute after all other intended payments were made from that joint account.

27 Accordingly, the main purpose of the action appeared to have been achieved. Although Ms Kueh complained that Span still had not served its Statement of Claim by the time the appeal was heard by me, it seemed to me that this was largely because of the interim arrangement which had been reached. Indeed, if the Applicants had wanted to, they could have called upon Span to proceed with its claim, but apparently did not. In the meantime, the interim injunction was discharged by consent in view of the interim arrangement.

28 In the circumstances, Span was not pursuing its claim actively, if at all, and it seemed to me that the Applicants' application for security for costs was more of a retaliation. This was reinforced by the fact that there was no affidavit from the Applicants to justify the quantum of \$75,000 which was sought as security for costs up to discovery stage. This quantum was mentioned in a letter dated 25 November 2002 from their solicitors to Span's solicitors.

29 In the circumstances, I dismissed the appeal with costs.

Appeal of second, third and sixth defendants dismissed.

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