Woodcliff Assets Ltd v Reflexology and Holistic Health Academy and Others [2009] SGHC 162

Case Number : Suit 147/2009

Decision Date : 10 July 2009

Tribunal/Court : High Court

Coram : Yeong Zee Kin SAR

Counsel Name(s) : Melvin See Hsien Huei and Ng Hui Min (Rodyk & Davidson LLP) for the plaintiff; Harish Kumar and Sheila Ng (Rajah & Tann LLP) for the defendant

Parties : Woodcliff Assets Ltd — Reflexology and Holistic Health Academy; Lee Hoon Chai Shirley; Loh Lay Hoon Ivy; Michael Wong CK

Civil Procedure – Production of documents

Civil Procedure – Rules of court

Companies – Winding up

10 July 2009

Yeong Zee Kin SAR

Procedural History

1 The Plaintiff and the 2nd, 3rd and 4th Defendants are shareholders in the 1st Defendant. The present proceedings started life as a winding up application commenced on 16 June 2008 by originating summons. It is part of a broader matrix of suits involving the directors and shareholders of the My Foot group of companies, which is set out in a little more detail below in paragraph 32, *et seq.* For the present application, the salient facts are as follows.

2 On 21 January 2009, it was ordered that these proceedings be converted and to continue as if they had been begun by writ. Subsequent to this conversion, the Plaintiff served a notice to produce documents referred to in the affidavits filed variously on 2 December 2008 and 31 December 2008 in the present proceedings.

3 This notice to produce forms the genesis of an impasse between parties as they took opposing interpretations of O 1, r 2 and O 88, r 2(5) of the Rules of Court, which ultimately led to the present application before me. In brief, the notice to produce, served on 30 January 2009, was resisted by the Defendants on the ground that O 24 of the Rules of Court did not apply to companies winding up proceedings, even after they have been converted to writ actions. The Plaintiff took the opposing view that the Rules of Court applied to these proceedings upon conversion to a writ action.

4 In the present application, the issue before me is whether, on a proper interpretation of O 88, r 2(5), a company winding up application commenced by an originating summons and thereafter converted into a writ action benefits from all the investigative tools of a writ action offered by the Rules of Court or is the Rules of Court applicable only within the confines established by O 88, r 2(5).

Summary of Defendants' submissions: a literal approach

5 The Defendants prefer an interpretation that gives effect to the literal meaning of the relevant provisions. Their submissions are that the effect of O 1, r 2 is that the entirety of the Rules

of Court is not applicable to proceedings relating to the winding up of companies, except for specific provisions set forth in that Order. One of the provisions set forth in O 1, r 2 is O 88, r 2(5). The Defendants further argue that in the event of a conversion of a winding up application, commenced by originating summons, into a writ action, only O 25, rr 2–7 of the Rules of Court is thereby applicable by virtue of O 88, r 2(5)(c). They rest on the assurance that O 25, rr 2–7 would allow the registrar to make all directions necessary for the matter to proceed to trial.

6 Upon considering O 88, r 2(5) and O 25 further, I note that the drafters had intentionally omitted O 25, r 1(1) and part of O 25, r 7(1) such that Forms 44 and 46 are not available to a converted winding up writ action. In a typical writ action, the plaintiff files a summons for direction using Form 44. This Form contains an almost exhaustive list of directions which the Court may make to move the matter on to trial. The defendant may make applications by filing a notice under the summons for direction in Form 46. The omission of these forms suggests that, upon a literal interpretation of O 88, r 2(5), the Court may make directions as though a summons for direction had been filed but parties may not file any notice in the summons for direction.

Summary of the Plaintiff's submissions: a purposive approach

7 The Plaintiff prefers a purposive approach in interpreting O 88, r 2(5). Their submissions are that the Rules of Court (Amendment No 4) Rule 2002, *inter alia*, introduced O 88, r 2(5) which provided for the conversion of a winding up petition to a writ action. They argue that the purpose of the amendment is to allow the court to apply the more investigative elements of a writ action to converted winding up proceedings. The Plaintiff refers to Jeffrey Pinsler, *Singapore Court Practice 2006*, at p 1718, to corroborate this intention which they seek to infer.

8 The Plaintiff further argues that the Rules of Court apply by virtue of Rule 4 of the Companies (Winding Up) Rules. Rule 4 provides that a registrar shall "have all the powers and duties assigned to him under section 62 of the Supreme Court of Judicature Act"; section 62 in turn provides that a registrar shall "have such jurisdiction, powers and duties as may be prescribed by Rules of Court".

Case law on the operation of the Companies (Winding Up) Rules and the Rules of Court

9 Both parties cited the cases of *Kuah Kok Kim v Chong Lee Leong Seng Co (Pte) Ltd* [1991] SLR 122 and *Tohru Motobayashi v Official Receiver & Anor* [2000] 4 SLR 529.

10 In *Kuah Kok Kim*, the Court of Appeal held that although the Companies (Winding Up) Rules 1969 and the Rules of the Supreme Court 1970 were mutually exclusive in their operational effect, this did not prevent the operation of O 2, r 1(1) to cure a formal defect. In this case, the petitioners had commenced a section 216 Companies Act minority oppression action by way of a winding up petition under the Companies (Winding Up) Rules 1969, instead of an originating *petition* under the Rules of the Supreme Court 1970. An application was made under 0 18, r 19 of the Rules of Court and the courts' inherent jurisdiction to strike out the proceedings. The Court of Appeal held that the mode of commencement of the proceedings by way of a petition was correct but that the title of the petition as a winding up petition was an irregularity which could be cured by re-titling the petition as an originating petition. There was nothing else that was wrong with the petition as a matter of form. The Court of Appeal therefore ordered that the title of the petition and all subsequent cause papers be amended accordingly.

11 *Kuan Kok Kim* was cited in the subsequent Court of Appeal decision of *Tohrun Motobayashi* as authority that the Companies (Winding Up) Rules and the Rules of Court operated in a mutually exclusive manner. The Court of Appeal observed further that, unless there was a provision for the

extension of the Rules of Court in the Companies (Winding Up) Rules, the Rules of Court does not apply in areas where the Companies (Winding Up) Rules are silent.

12 The salient facts of *Tohrun Motobahashi* are as follows. Okura Singaporewas the local branch of Okura Japan. Okura Japan was adjudicated bankrupt and the appellant was appointed the trustee in bankruptcy of Okura Japan. Okura Singapore was in turn wound up as part of the global liquidation of Okura Japan and a liquidator of Okura Singapore was appointed. The liquidator of Okura Singapore made certain applications by way of Summons-In-Chamber 325/99 (SIC 325/99) to allow, inter alia, the remittance of assets realised in the liquidation of Okura Singapore to the appellant after preferential creditors had been paid off. This particular prayer was not granted. The appellant requested the Singapore liquidator to appeal; but the Singapore liquidator declined to do so. The appellant subsequently commenced a new action for certain declarations to compel the liquidator to pay over the net amount of all sums recovered and realised in the liquidation of Okura Singapore to the appellant, after payment of all preferential debts.

13 One of the issues which arose was whether the appellant could have been joined as a party to SIC 325/99 and, if so, whether the present originating summons was an abuse of process. In this context, the Court of Appeal held that since the Companies (Winding Up) Rules and the Rules of Court operated in a mutually exclusive manner, the Rules of Court cannot be called upon to fill in areas where the Companies (Winding Up) Rules are silent. The application of the Rules of Court can only be extended where such extension is specifically provided for. Since the Companies (Winding Up) Rules did not provide for the joinder of parties, and there was not express extension of the Rules of Court to allow for joinder of parties, the appellant could not have been joined as a party to SIC 325/99.

Rationalising the case law: limited applicability of the Rules of Court pre-conversion

14 In considering these cases, I note the following. First, both cases were decided before the 2002 amendments which introduced the power to convert a winding up petition to a writ action in O 88, r 2(5). Second, these cases seem to suggest that certain aspects of the Rules of Court, apart from those provisions which are expressly extended by virtue of O 1, r 2, apply to winding up proceedings either by implication of law or as part of the courts' inherent jurisdiction. It would appear that at the minimum, the power of the Court under O 2, r 1 to cure procedural irregularities is thus available. On the basis of *dicta* in the Court of Appeal's decision in *Kuah Kok Kim*, O 18, r 19 may also be available since the Court of Appeal did not dismiss the striking out application on the basis that the Rules of Court did not apply, but proceeded to cure the procedural irregularity: *supra*, at paragraph 24.

15 However, I am not persuaded by the Plaintiff's argument that rule 4 of the Companies (Winding Up) Rules extends the application of the Rules of Court in its entirety via section 62 of the Supreme Court of Judicature Act to all winding up proceedings. A plain reading of Rule 4 of the Companies (Winding Up) Rules shows that this is not the effect intended by the provision:

> **Office of Registrar**
>
> **4.**—(1) All proceedings in the winding up of companies in the Court shall be attached to the Registrar, who shall, together with the necessary clerks and officers, and subject to the Act and these Rules, act under the general or special directions of the Judge.
>
> (2) In every cause or matter within the jurisdiction of the Judge, whether by virtue of the Act or by transfer, or otherwise, the Registrar shall, in addition to his powers and duties under these Rules, have all the powers and duties assigned to him under section 62 of the Supreme

Court of Judicature Act (Cap. 322).

16 Section 62 of the Supreme Court of Judicature Act in turn states:

> **Powers and duties of Registrar, Deputy Registrar and Assistant Registrars**
>
> **62.**—(1) The Registrar, the Deputy Registrar and the Assistant Registrars shall, subject to the provisions of this Act or any other written law, have such jurisdiction, powers and duties as may be prescribed by Rules of Court.
>
> (2) Subject to Rules of Court, all the powers and duties conferred and imposed on the Registrar may be exercised or performed by the Deputy Registrar or the Assistant Registrars.

17 To my mind, these provisions are not intended to – and therefore cannot be interpreted to – import the Rules of Court into the Companies (Winding Up) Rules. On a plain reading of these provisions, it is clear that they deal with the powers and duties of the registrar. There is no express extension of the Rules of Court to companies winding up proceedings. An example of a provision which expressly incorporates the Rules of Court may be found in Rule 3 of the Women's Charter (Matrimonial Proceedings) Rules:

> **Application of Rules of Court**
>
> **3.** —(1) Subject to these Rules and any other written law, the Rules of Court (Cap. 322, R 5) shall apply, with the necessary modifications, to the practice and procedure in any proceedings under Part X of the Act to which these Rules relate.
>
> (2) For the avoidance of doubt, Order 6, Rule 4, Order 15, Rule 1 and Orders 13, 14, 19, 21, 23, 24, 25, 26 and 26A of the Rules of Court shall not apply to any proceedings under Part X of the Act to which these Rules relate, unless otherwise stated.

18 The language of Rule 3 of the Women's Charter (Matrimonial Proceedings) Rules clearly evinces the draftsman's intention to extend the Rules of Court to matrimonial proceedings. The scope of such extension is also clearly expressed. Unlike a specific reference like Rule 3 of the Women's Charter (Matrimonial Proceedings) Rules, Rule 4 of the Companies (Winding Up) Rules deals mainly with the powers and duties of the Registrar. To give effect to the language of Rule 4 of the Companies (Winding Up) Rules, the provisions of the Rules of Court which deal with the powers and duties of the Registrar are impliedly extended to companies winding up proceedings: for example, the jurisdiction of the Registrar (O 32, r 9) and the Registrar's power to try any question or issue of fact (O 36). However, it will be quite a stretch to say that this also amounts to an implied extension of all other *procedural* rules within the Rules of Court to winding up proceedings as well.

19 Hence, the combination of *Kuah Kok Kim* and *Tohrun Motobahashi* has the following effect. First, the Companies (Winding Up) Rules and the Rules of Court operate in a mutually exclusive manner in winding up proceedings. Second, the only situations where the procedural rules in the Rules of Court apply to winding up proceedings are when (a) there is an express extension of the Rules of Court, for example, by virtue of O 1, r 2, or (b) where specific procedural rules have been held to be applicable, for example, the applicability of O 2, r 1 as established in the decision in *Kuah Kok Kim*. Finally, the rules in the Rules of Court dealing with the jurisdiction, powers and duties of the Registrar are applicable to companies winding up proceedings by virtue of Rule 4 of the Companies (Winding Up) Rules.

Applicability of the Rules of Court post-conversion

20 The question which now arises is to what extent is the Rules of Court applicable when there is a conversion of the companies winding up proceeding, commenced by way of an originating summons into a writ action. *Kuah Kok Kim* and *Tohru Motobayashi* were both decided prior to the 2002 amendments which introduced the power to convert a winding up petition into a writ action. Subsequently, the petition as a mode of commencement of winding up proceedings was replaced with the originating summons: see Rules of Court (Amendment) Rules 2006.

21 The issue of how O 1, r2 and O 88, r 2(5) operate after conversion of winding up proceedings commenced by way of originating summonses to writ actions have not been considered before. The starting point should be a careful consideration of the words in O 88, r 2(5):

> (5) In the case of a winding up application made under section 254 (1) (i) of the Act, the Court may order the proceedings *to continue as if the proceedings had been begun by writ* and may, in particular, order that —
>
> (a) pleadings be delivered or that the originating summons or any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof;
>
> (b) any persons be added as parties to the proceedings; and
>
> (c) that Order 25, Rules 2 to 7, shall, with the omission of so much of Rule 7 (1) as requires parties to serve a notice specifying the orders and directions which they require and with any other necessary modifications, apply as if there had been a summons for directions in the proceedings.
>
> [emphasis added]

22 The operative words are "to continue as if the proceedings had been begun by writ". These words suggest that upon conversion, the winding up proceedings may join the path of a writ action at any point: in other words, there is no prescribed "entry point" into the writ process. Further, the words "and may … order" suggests that the directions in sub-paragraphs (a), (b) and (c) are directory in the sense that not all of these directions have to made in every case of conversion. This accords well as in some circumstances, like the present, pleadings are ordered to be filed and directions for discovery are to follow; in other circumstances, affidavits may be directed to stand as pleadings and the court, when giving the order for conversion, may proceed to give directions under O 25 as though a summons for direction had been filed.

23 Looking at the legislative history of O 88, r 2 provides further elucidation of the intentions of the draftsman. O 88, r 2 prior to the 2002 amendments did not provide for the conversion of winding up proceedings commenced by petition into writ actions.

24 Prior to 1 December 2002, O 88, r 2 read as follows:

> **Applications to be made by originating summons (O. 88, r. 2)**
>
> **2.** —(1) Unless otherwise provided in the Act , every application under the Act must be made by originating summons and these Rules shall apply subject to this Order.

(2) No appearance need be entered to an originating summons under this Rule unless the application made by the summons is —

(a) an application under section 13 of the Act for an order directing a company and any officer thereof to make good any such default as is mentioned in that section;

(b) an application under section 32 of the Act for an order directing a company be relieved from the consequences of default in complying with conditions constituting the company a private company;

(c) an application under section 216 of the Act for relief in cases of oppression;

(d) an application under section 227 of the Act for an order directing a receiver and manager of a company to make good any such default as is mentioned in subsection (1) of that section; or

(e) an application under section 236 (5) for an inquiry into such case as is mentioned therein.

(3) An application under section 394 of the Act may be made by ex parte originating summons.

25 With the 2002 amendments, the following sub-rules were introduced with effect from 1 December 2002:

(4) An application under section 216 of the Act shall be made by writ.

(5) In the case of a winding up petition presented under section 254 (1) (i) of the Act, the Court may order the proceedings to continue as if the proceedings had been begun by writ and may, in particular, order that —

(a) pleadings be delivered or that the petition or any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof;

(b) any persons be added as parties to the proceedings; and

(c) that Order 25, Rules 2 to 7, shall, with the omission of so much of Rule 7 (1) as requires parties to serve a notice specifying the orders and directions which they require and with any other necessary modifications, apply as if there had been a summons for directions in the proceedings.

26 O 88, r 2(5) is *in pari materia* with O 28, rr 8(1)–(2) which is the rule under which any originating summons commenced under the Rules of Court may be converted into a writ action. The introduction of the conversion provision into the Rules of Court in 2002 was not accompanied by amendments to the Companies (Winding Up) Rules to cater for procedures following conversion of a winding up petition to a writ action. The fact that the Companies (Winding Up) Rules are silent as to what procedures are applicable post conversion strongly suggests that the intention was for companies winding up proceedings to follow the procedures applicable to writ actions set forth in the Rules of Court upon their conversion. This is further buttressed by the similar language between O 88, r 2(5) and O 28, r 8(1)–(2), which is the provision under the Rules of Court that is applicable to the

conversion of an originating summons to a writ action.

27 The Defendants' argument that O 88, r 2(5)(c) imports the wide array of orders and directions prescribed in Form 44 (the summons for direction form) fails upon a closer examination. Under the scheme for summons for directions set forth in O 25, the plaintiff is to file a summons for direction in Form 44 under O 25, r 1(1) setting out the applications which is necessary to simplify or expedite proceedings; a defendant may add to the list of applications in the summons for directions other interlocutory applications which he seeks by filing a notice in the summons for direction in Form 46 under O 25, r 7(1). Unfortunately, O 25, r 1(1) is omitted from the extension provision in O 88, r 2(5)(c); similarly, the provision for the service of a notice in the summons for direction is omitted from the extension provision in O 88, r 2(5). With these omissions, the Defendants' argument that the wide array of orders and directions prescribed in Form 44 is severely weakened: the Defendants cannot – on a literal interpretation of O 88, r 2(5)(c) – file Form 44 nor can the Plaintiff serve the notice in Form 46.

28 Having in mind the above, I am of the view that the interpretation of O 88, r 2(5) should be that it provides for the power to convert winding up proceedings commenced by way of originating summonses to continue as writ actions. It does not prescribe specific entry points into the writ process and allows the court making the order wide discretions to determine the appropriate entry point. Hence, sub-paragraphs (a) to (c) of O 88, r 2(5) should be treated as directory in nature. The court making the conversion order may make any or all of these directions; or it may make none at all.

29 Considering the fact that the Companies (Winding Up) Rules is silent as to the procedures which should apply to converted winding up proceedings, bearing in mind the legislative history of the introduction of the power to convert in O 88, r 2(5) and the similarities in drafting of O 88, r 2(5) and O 28, rr 8(1)–(2), this leads me to the inexorable conclusion that the draftsman had only one intention: that is to say, that upon conversion, the procedural rules set forth in the Rules of Court which apply to a writ action would, by reason of such conversion, apply to the converted winding up proceeding.

30 In light of the conclusions set forth in paragraphs 18 and 28, the exclusion of the application of the Rules of Court to winding up proceedings contained in O 1, r 2 should be read subject to (a) the power of conversion in O 88, r 2(5) and (b) Rule 4 of the Companies (Winding Up) Rules. In other words, the exclusion operates on procedural rules in the Rules of Court pre-conversion: upon conversion, the procedural rules in the Rules of Court which apply to a writ action would apply equally to a company winding up proceeding "as if the proceeding[] had been begun by writ".

Applicability of the Rules of Court to documents filed pre-conversion

31 There is a subsidiary issue of whether the procedural rules in the Rules of Court which are applicable to a writ action are available and applicable to documents filed prior to the order for conversion of the winding up proceedings. In the present application, the notice to produce relates to documents referred to affidavits filed on 2 and 31 December 2008, prior to the order for conversion made on 21 January 2009. The subsidiary issue is whether a notice to produce may be served in respect of such affidavits.

32 Although this issue was not brought up in argument, I think that it may be dealt with succinctly. Upon conversion, the procedural rules in the Rules of Court which are applicable to a writ action would apply to the company winding up proceedings "as if [it] had been begun by writ". In other words, there is no fixed entry point into the writ process and the entire winding up proceedings is treated as if it started life as a writ action. There is no need to draw a distinction between

documents which were filed before the order for conversion for which O 24 does not apply and those filed post conversion to which O 24 applies. Such a pedantic approach is not necessary nor required by the wording of O 88, 2(5). After an order for conversion is made, the Rules of Court provisions which apply to a writ action will apply equally to documents filed prior to the making of the order. Hence, a notice to produce documents referred to in affidavits filed before the making of the order for conversion has to be complied with, if such production is necessary.

Whether production for inspection is necessary

33 Having come to my conclusion on the applicability of O 24 to a converted company winding up proceedings and to documents referred to in affidavits filed before the date of the order for conversion, I turn now to deal with the issue of whether inspection is necessary. As the application is for documents referred to in affidavits, these would be *prima facie* relevant. Indeed, the Defendants do not object to production but their objections are that this application is premature. The Defendants point out that there are two other related winding up proceedings which have been ordered to be converted to writ actions (ie S 145 & 146/2009) as well as a multiplicity of related litigation:

(a) S 631, 920 and 947/2008 are suits between the companies and its shareholders for the recovery of shareholder loans;

(b) S 945/2008 is a suit between the companies and its director for alleged breaches of fiduciary duties; and

(c) S 249/2009 is a suit between the shareholders for alleged misrepresentations made prior to the entry of a share subscription agreement, and subsequent breaches of the share subscription agreement.

There is a pending application by the Plaintiff for consolidation of some or all of these related suits.

34 The Defendants submit that although directions for pleadings had been given in the winding up suits, no order for consolidation has been made and discovery directions are to be given in an upcoming pre-trial conference. Given the complex procedural history of the various related suits, the nub of the Defendants' objections is that discovery of these documents should be given when directions are given for discovery of the consolidated actions after the consolidation application has been heard.

35 Their point is that the documents requested for under the notice to produce would be discovered in the course of general discovery. In other words, discovery is not necessary at this stage of the proceedings as it would not assist either in the fair disposal of the matter or save costs. The Defendants argue that to order discovery of these documents now, when general discovery of the consolidated actions has not commenced would result in the escalation of costs. Hence, they submit that the present application is premature and production for inspection at this juncture is unnecessary.

36 The Plaintiff's argument is that the obligation to give discovery is not a mutual obligation where the discovery is sought of documents referred to in pleadings or affidavits. I am minded to agree with this submission. For discovery applications under O 24, rr 1, 5, and 6, the court is permitted to decline to make an order for discovery if it is "satisfied that discovery is not necessary, *or not necessary at that stage of the cause of matter*" (emphasis mine). It is possible to defer discovery of a document on the basis that disclosure at that stage of the proceedings is not

necessary but to leave it open for a subsequent discovery request to be made at a later stage of the proceedings: see Jeffrey Pinsler, *Singapore Court Practice 2006*, at page 689 citing *Trek Technology v FE Global Electronics* [2003] 3 SLR 685.

37 In an application for production of documents for inspection under O 24, r 13, there is no temporal dimension to the test of necessity. In other words, if production is necessary then the document has to be produced for inspection. Even if I empathised with counsel for Defendants' submissions that the present application seeks to "steal a march" on the Plaintiff, I do not think that O 24, r 13 gives me the flexibility to defer an order for production to a later stage of the proceedings once I find that it is necessary.

38 As noted above, parties do not quarrel over the relevance or necessity of the documents, only the timing for inspection. Given my views on how O 24, r 13 operates, I am of the view that the documents sought should be produced for inspection forthwith and I would make the order accordingly.

39 An order for production of documents for inspection under o 24, r 13 may be made for documents explicitly referred to in pleadings or affidavits, but not for documents which are referred to by inference: see Jeffrey Pinsler, *Singapore Court Practice 2006*, at page 694 citing *Dubai Bank v Galadari (No 2)* [1990] 1 WLR 731. As one of the items prayed for do not relate to documents explicitly referred to in the affidavits but is a passage of the affidavit from which an inference of documents may be drawn, prayer 1(d) is excluded from my order to produce.

40 Order in terms granted of prayer 1(a)–(c) and (e).