# Tohru Motobayashi v Official Receiver and Another
[2000] SGHC 113

**Case Number** : OS 210/2000

**Decision Date** : 22 June 2000

**Tribunal/Court** : High Court

**Coram** : Kan Ting Chiu J

**Counsel Name(s)** : Michael Hwang SC and Darren Shiau (Allen & Gledhill) for the plaintiff; Sarjit Singh (Shook Lin & Bok) for the first defendant; Leo Cheng Suan (Chu Chan Gan & Ooi) for the second defendant

**Parties** : Tohru Motobayashi — Official Receiver; Another

*Civil Procedure – Parties – Joinder – Abuse of process – Estoppel – Foreign trustee in bankruptcy making fresh application to determine matter previously adjudicated when Singapore liquidator brought matter before court – Whether application an abuse of process of court – Whether foreign trustee estopped from making application – Whether foreign trustee should have applied to join as party in original proceedings and appealed against previous decision*

*Civil Procedure – Rules of court – Winding up of companies – Whether Rules of Court applicable to company winding up*

: The plaintiff is the trustee in bankruptcy of Okura & Co Ltd, a company incorporated in Japan in 1911 and registered as a foreign company in Singapore under the Companies Act in 1973.

On 21 August 1998 the company was adjudicated bankrupt by the Tokyo District Court (20th Civil Division). On 3 November 1998 the company filed a winding-up petition in Singapore in CWU 358/98, pursuant to which it was wound up on 4 December 1998 with the appointment of Ong Sin Huat as the liquidator.

On 11 February 2000, Tohru Motobayashi, the Trustee in Bankruptcy of the company appointed in Japan (`the trustee`) filed the present action, naming the Official Receiver and the liquidator as the defendants.

The trustee sought the declarations:

1 That, on its true construction, the effect of s 377(3)(c) of the Companies Act is that a liquidator of a foreign company appointed for Singapore by the court is required to pay the net amount of all sums recovered and realised in Singapore to the liquidator in the country where the foreign company was formed or incorporated after making payment of all preferred debts as defined in s 328 of the Companies Act.

2 That Mr Ong Sin Huat (the liquidator appointed by the Singapore High Court as the Singapore liquidator of Okura & Co Ltd) is required to pay the net amount of all sums recovered and realised in Singapore to the plaintiff (the Japanese liquidator of Okura & Co Ltd) after making payment of all preferred debts as defined in s 328 of the Companies Act.

When the application came before me, I declined to hear it because I found it to be an abuse of the process of court. The trustee is not satisfied with my decision, and I shall set out the developments leading up to the application and my reasons for dismissing it.

Before the trustee made his application an application had been made in the winding-up action for similar relief. On 31 May 1999 the liquidator took out SIC 3525/98 in the winding-up proceedings for,

inter alia, a declaration

> *that the liquidator do remit all the assets recovered and realised for Okura & Co Ltd (Singapore branch), (after paying off the priority creditors and payments as set out under s 328 of the Companies Act (Cap 50, 1994 Ed) including liquidator fees on a time based basis) to the Trustee in Bankruptcy of Okura & Co (Japan) for global distribution to all the creditors of Okura & Co Ltd in accordance with the law of Japan.*

In support of the application the liquidator filed an affidavit deposing that

> *7 I have checked with the trustee and have ascertained that some of the creditors, namely, Bank of Tokyo-Mitsubishi, The Ashai Bank Ltd, and The Fuji Bank Ltd have filed identical proofs of debt with the company and the parent company.*
>
> *8 The trustee and I anticipate some problems with such filing of identical proofs of debt in Singapore and Japan, because:*
>
> *(a) In the event of distribution of the assets of the company to the Singapore creditors, there may be double payments in Singapore and Japan.*
>
> *(b) In law, the company and the parent company have no separate legal entity. Distributions in one jurisdiction may be at the expense of creditors of other jurisdiction.*
>
> *(c) It will create unfair voting rights for such creditors in Singapore and Japan.*
>
> *9 At the second creditors meeting of the company held on 23 March 1999, the creditors have instructed me to pursue the foreign debts of the company, but only 54% of the creditors present were in favour of giving me an indemnity against all costs and claims arising from my duties as a liquidator. I also anticipate difficulties in enforcing the indemnity as the creditors in the meeting have indicated that it is not binding on those who voted against the same.*
>
> *10 My solicitors have drawn my attention to s 377 of the Companies Act. I have discussed the issue with the trustee, and he has, by letter dated 6 May 1999 indicated that he would prefer that I remit to him the nett proceeds of assets of the company realised and recovered, and that he will handle the foreign debts of the company.*

The salient part of the letter of 6 May 1999 reads

> *[W]e would request that you make an application to the Singapore court for the following clarifications and order:*
>
> *(a) that you, as the liquidator of Okura (Singapore), a branch office of Okura (Japan), with no separate legal entity, do remit all the assets recovered and*

> *realised for Okura (Singapore), (after paying off the priority creditors and payments as stipulated by the Singapore law, including liquidator fees on a time based basis) to the Trustees in Bankruptcy of Okura (Japan) for global distribution, so that we would be able to make distribution to all creditors, including creditors of Okura (Singapore) in accordance with Japanese law, provided that proof of claim should be filed to the Tokyo District Court by those Singapore creditors as soon as possible but no later than 21 May 1999.*

On 29 July 1999 Judicial Commissioner Lim Teong Qwee refused to grant the order after hearing counsel for the liquidator and the Official Receiver. No appeal was filed against that decision.

When the trustee filed the present application, an affidavit filed by Mr Daren Shiau, one of the solicitors acting for the trustee in which he set out the history of the company and its travails in the Japanese and Singapore courts, and deposed that

> *On 6 May 1999, the plaintiff wrote to the Singapore liquidator giving him instructions to apply to court for an order that the Singapore liquidator be allowed to remit all assets recovered and realised to him (after paying off preferential creditors and payments as stipulated by Singapore law).*

The new application first came for hearing before Judicial Commissioner Lee Sieu Kin on 3 March 2000. Counsel applied for the matter to be adjourned and fixed for hearing for a whole day. In allowing the adjournment the learned Judicial Commissioner queried whether the application amounted to an appeal against Judicial Commissioner Lim Teong Qwee`s order, but left it without coming to a conclusion.

When the matter came before me on 24 March, I raised the same question to Mr Michael Hwang SC who appeared on behalf of the trustee. Mr Hwang who was not present on the hearing of 3 March was unaware that the question had been raised and had not prepared to address it.

Nevertheless he pointed out that the trustee and the liquidator had their own rights and liabilities. He explained that the liquidator was not comfortable with the position taken by the trustee on the effect of s 377, and had taken out the application to seek guidance through his own solicitor, Mr Leo Cheng Suan. After the refusal of the application Mr Leo and Mr Hwang met to discuss the decision. Mr Hwang did not agree with the decision and suggested an appeal, but Mr Leo was not prepared to advise the liquidator to expend funds on an appeal.

The affidavits of the liquidator and Mr Shiau and Mr Hwang`s submissions reveal that the trustee has a moving force behind the liquidator`s application from the start. He requested the liquidator to make the application. His counsel kept in touch with the progress of the application and recommended an appeal when it failed.

When he was informed that the liquidator would not appeal, it was open for the trustee to step in. He could have applied to be added as a party in the proceedings under O 15 r 6(2)(b)(ii) of the Rules of Court which provides that

> *[A]t any stage of the proceedings in any cause or matter, the Court may, on such terms as it thinks just and either of its own motion or on application -*

*(b) order any or the following persons to be added as a party, namely:*

*(i) ...*

*(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.*

It was clear that the same question whether s 377 required the liquidator to remit assets he recovered to the trustee existed between the both of them.

The English Court of Appeal allowed an application under the English O 15 r 6(2) which is identical with our provision in **Tetra Molectric Ltd v Japan Imports Ltd (Win Lighter Corp, intervening)** [1976] RPC 547.

In that case the plaintiffs Tetra Molectric Ltd commenced an action against the defendants Japan Imports Ltd for the infringement of a patent for a lighter. The defendants were not the manufacturers of the lighters, but imported them from the interveners Win Lighter Corporation for distribution.

When the plaintiffs` action came for trial it was successfully defended by the defendants. The plaintiffs appealed against the decision.

Before the appeal was heard, the relationship between the defendants and Win Lighter Corporation broke down and the latter appointed a new distributor for their lighters. The defendants decided not to resist the plaintiffs` appeal and took steps to remove their name from the record.

Win Lighter Corporation was allowed to join as a respondent in the appeal over the plaintiffs` objection. In his judgment Buckley LJ referred to O 15 r 6(2) and held:

*It has been argued that ... there must be shown to be a question or issue between the applicant - that is Win in the present case - and the party to the proceedings between whom and the applicant it is said that a question or issue exists; and, of course, that must be so. It seems to me that in the present case there clearly is a question or issue between Win and the plaintiff company in which both parties have an important interest, namely, the validity of the plaintiffs` patent and, if it is valid, the question whether Win`s product constitutes an infringement of that patent, or any of Win`s products constitute an infringement of that patent. It is perfectly true that at the date of the issue of the writ the plaintiff had no cause of action against Win, as I conceive, between Win had not, it would appear, sold any of their lighters in this country. They had sold them in Japan, or outside this country, to persons who imported them into this country and who then sold them on the market here. But that does not mean that there was not then or there is not now a question or issue between Win and the plaintiff company which answers to the description contained in the sub-paragraph. As I conceive it, Win could have at any time presented a petition for the revocation of the plaintiff company`s patent, or could have instituted proceedings for a declaration of non-infringement in relation to Win`s cigarette lighters. The validity of the patent and the question of which Win`s lighters infringe the patent are matters of very considerable commercial importance to Win, because there is a large market for their lighters in this country, and that is a market which they obviously wish to*

*preserve and do not want to be excluded from. So I find no difficulty myself in saying that there is here such a question or issue as is referred to in the paragraph.*

There is no real difference in the position of Win Lighter Corporation and the liquidator. Both were interested in an action in which they were not a party. Both had a legitimate interest to pursue in those actions, Win Lighter Corporation to defend the charge of patent infringement, and the trustee to ensure that the liquidator remits the recovered assets to him. Win Lighter Corporation was allowed to join in the appeal when the original defendants lost interest in the appeal. If the trustee applied to be joined as a party in this case when the liquidator decided not to appeal, there is little reason to suppose that he would be denied the opportunity.

The trustee did not apply to join in the action. He took no action for more than half a year after the dismissal of the liquidator`s application before filing his application on 11 February 2000.

In their letter of request for further arguments, his counsel sought to justify his non-intervention on the ground that `O 15 r 6(2)(b)(ii) of the Rules of Court does not apply to the second defendant`s (liquidator`s) application since O 1 r 2(4) of the Rules of Court explicitly provides that the Rules of Court do not apply to proceedings relating to the winding-up of companies.`

I do not accept this explanation. Order 15 r 2(4) makes reference to s 410 of the Companies Act which empowers the Rules Committee to make rules generally with respect to the winding-up of companies. In the exercise of these powers, the Rules Committee promulgated the Companies (Winding-Up) Rules.

Order 1 r 2(4) should be read to mean that where there are winding-up rules touching on any aspect of winding-up proceedings, the Rules of Court do not apply. But where the winding-up rules are silent, the Rules of Court apply, eg as the winding-up rules do not refer to amendments of petitions and orders, the Rules of Court apply to them. Likewise, as the winding-up rules contain no provisions for the addition of parties, O 15 applies to joinder applications. If this were not the case, .it would mean that no parties can be added in winding-up proceedings, or that such joinders are not regulated.

Counsel also sought to distinguish the ***Tetra Molectric*** decision on the ground that `it was clear that the intervener in that case clearly had the locus standi to intervene` but `in the present case, it was conceivable that either defendant could argue that the plaintiff had no locus standi in the earlier proceedings ...` While it is not inconceivable that such a submission may be made, it is difficult to see how it would be sustained in the light of the rule and the decision.

As further point was made that `(e)ven if the plaintiff had the locus standi to intervene, it could be argued that a direction given (or in this case, not given) by the court is not an order from which an appeal lies` because `(d)irections given under s 273(3) of the Companies Act ... are not binding.` There are substantial difficulties with this argument. Firstly, no authority was cited for the proposition that there can be no appeal from an order giving directions which are not binding, and it does not appear to me to be correct. Secondly, even if it is assumed that there is basis for that submission, it does not apply where the court refuses to give a direction. Thirdly, there is no basis for saying that any direction given under s 273(3) will not be binding without referring to the wording of the direction. The order sought by the liquidator was framed in mandatory terms. If the declaration was made it would be binding on the liquidator.

I was not persuaded by the reasons put forward to justify the failure to intervene. The trustee should have intervened when he learnt of the liquidator`s decision not to appeal, and appealed in his own name.

Instead, he did nothing for more than half a year, then took out the fresh proceedings. This was an abuse of process of court.

The trustee was also estopped from taking out the fresh proceedings. In the House of Lords` decision in **Arnold & Ors v National Westminister Bank plc** [1991] 2 AC 93, 104; [1991] 3 All ER 41, 45, where Lord Keith of Kinkel held that:

> *Cause of action estoppel arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment.*

The trustee had instructed the liquidator to seek a declaration on the construction of s 328. The liquidator had done at his bidding, and the court had ruled against him after hearing his counsel and the Official Receiver. As he did not appeal against the decision he was estopped from attempting to have the issued decided again, and his action was an abuse of process of court.

## Outcome:

Application dismissed.