Woodcliff Assets Ltd *v* Reflexology and Holistic Health Academy Pte Ltd and others [2010] SGHC 315

Case Number	: Suit No. 147 of 2009 (Summons No. 2646 & 3323 of 2010)
Decision Date	: 25 October 2010
Tribunal/Court	: High Court
Coram	: Yeong Zee Kin SAR
Counsel Name(s)	: Melvin See with Ms Ng Hui Min (Rodyk & Davidson LLP) for the plaintiffs; Harish Kumar with Ms Sheila Ng (Rajah & Tann LLP) for the defendants.
Parties	: Woodcliff Assets Ltd — Reflexology and Holistic Health Academy Pte Ltd and others

Civil Procedure

25 October 2010 CAV

Yeong Zee Kin SAR:

Introduction

1 This is the Plaintiff's application to amend its statement of claim in order to add a cause of action for minority oppression and an additional relief that the second to fourth Defendants be ordered to buy him out of the company, ie the first Defendant. The Defendants objected to the application for amendment and, in turn, applied to strike out the Plaintiff's statement of claim on the grounds of, *inter alia*, abuse of process.

Summary of facts

2 The present suit is a consolidation of multiple winding up actions which were commenced in 2008 against three companies – namely, Reflexology and Holistic Health Academy Pte Ltd, My Foot International Pte Ltd and My Foot Reflexology Pte Ltd – that are part of the My Foot group of companies ("My Foot Group"; the My Foot Group comprises of the following additional companies: The Relax Room Pte Ltd, My Summer Day Spa Pte Ltd and Career Design Hub Pte Ltd.) These were initially winding up applications commenced by originating summons, but were converted to and ordered to continue as writ actions in January 2009; the separate writ actions were eventually consolidated in the present suit.

3 Without delving too deeply into the factual matrix of this matter, I summarise the key facts which are relevant to my decision in these applications. The Plaintiffs bought into the My Foot Group in 2005, after a period of due diligence spanning five months and having had full access to the books of the My Foot Group. Between 2005 and 2007, the Defendants – who are the majority shareholders of the My Foot Group – allege that the Plaintiff's financial backers made several attempts to engineer a sale of the My Foot Group. Sometime in the middle of 2007, the Defendants decided to grow the business instead of making attempts to sell. This is alleged to have marked the turning point in the relationship.

4 Arising from this change of heart on the part of the majority shareholders, the Plaintiffs are alleged to have embarked on a course that led to the present set of suits. In January 2008, the

Plaintiffs exercised their right – which hitherto they had waived – to appoint a nominee director, Mr Raymond Wong, to the board of directors of the companies in the My Foot Group. Wong started to look through the books of the My Foot Group with the assistance of his accountants: the Defendants suspected that Wong was on a fishing expedition to try and find something to use against them. The Defendants allege that it was during this period that the Plaintiffs made their initial attempt to seek a buyout from them.

5 During June and July 2008, the Plaintiffs made allegations to the effect that the corporate and franchise structure of the My Foot Group went against the spirit of the Skills Development Fund ("SDF") scheme which the Workforce Development Authority made available. In gist, the Plaintiffs allege that the My Foot Group was structured such that Reflexology and Holistic Health Academy provided training to the rest of the companies in the group. In so doing, the Academy would benefit from the fees and the rest of the companies in the group would apply for subsidies from the SDF. Overlaid on top of this arrangement are franchise arrangements and inter-company loans which the Plaintiffs allege were not strictly enforced, in that franchise fees and loan repayments were waived. The Plaintiffs assert that this complex structure amounted to an artificial business model which was not sustainable without the availability of SDF subsidies. The Plaintiffs also allege that some of the persons trained by the Academy were not "true" employees of the My Foot Group, in that they were not *bona fide* employees.

6 In June 2008, the Plaintiffs commenced winding up proceedings against three of the companies in the My Foot Group — but not the rest — on two main grounds: the complete loss of the substratum or original purpose of the business and loss of trust and confidence between the Plaintiffs and the majority shareholders. The Plaintiffs relied on the following:

(a) The affairs of these companies are being conducted in a manner contrary to the spirit and objectives of the SDF scheme;

(b) Tax evasion by reclassifying loans extended by the My Foot Group to directors as shareholder loans;

(c) Dilution of the Plaintiffs' shareholding by a rights issue that was priced below net tangible asset value; and

(d) Failure to recall outstanding loans.

7 It needs also be noted that subsequent to the commencement of winding up proceedings, the My Foot Group of companies have commenced suits to recover loans made to the Plaintiff; a suit against Wong for breaches of director's duties; and the Plaintiffs have also sued the majority shareholders and the CEO of the My Foot Group for misrepresentation, leading to its investment into the group.

Whether minority oppression and winding up causes of action may be contained in a single writ of summons

8 More than two years after the winding up actions have been commenced, the Plaintiffs seek to

amend the converted winding up actions by inserting a minority oppression action and a relief for a court-mandated buyout. The Defendants have responded with an application to strike out the entire set of winding up actions as an abuse of process. Having considered the arguments of counsel for both Plaintiff and Defendants, I am dismissing both applications. My reasons, in brief, are as follows.

9 The first issue is whether — as argued by the Defendants — the Plaintiff's proposed amendment is one that is precluded by law. If not, are there any reasons why the proposed amendment should nevertheless not be allowed?

10 The Defendants object to the proposed amendment on the following main grounds. First, that the nature and character of the causes of action for winding up and for minority oppression are so different that, as a matter of law, they cannot be brought together in a single writ of summons. Their submissions are that the operative sections in the Companies Act provide for separate regimes: Part X for companies winding up and section 216 for minority oppression. Further, the Defendants submit that a winding up action is governed by the Companies (Winding Up) Rules while an oppression action is governed by the Rules of Court.

11 I do not think that it is impossible that a writ of summons may contain both causes of action where there is unity of procedural regime. In this case, the winding up actions, although commenced as originating summons under the Companies (Winding Up) Rules, have been converted to writ actions under Order 88, rule 2(5) of the Rules of Court. I have held previously in *Woodcliff Assets Ltd v Reflexology and Holistic Health Academy and Others* [2009] SGHC 162, at [28]–[30], that the Rules of Court applies post-conversion. However, this does not mean that the Companies (Winding Up) Rules cease to apply completely: for example, the majority of the Companies (Winding Up) Rules that deal with the procedures post winding up order will apply during the liquidation process. In my view, the Companies (Winding Up) Rules will continue to apply insofar as they are not incompatible with the writ process laid down in the Rules of Court.

12 By virtue of Order 88, rule 2(4), an oppression action has to be commenced by writ under the Rules of Court. To my mind, even if both causes of action are contained in a single writ of summons — as will be in this case if the proposed amendments are allowed — it makes no difference that separate sets of procedural rules applied to the winding up action and the minority oppression action when they were commenced. In this case, the winding up actions have been converted and the Rules of Court applies post-conversion; and the Rules of Court applies to a minority oppression writ from commencement. There is therefore an effective merger of the procedural regimes in the present case. This being the case, I do not see any difficulties which prevent a single writ of summons from containing both causes of action since the procedural rules applicable to both causes of action are now determined by the Rules of Court. In the event of any incompatibility, the court has broad powers to make directions for the proper management of the case: see generally, the court's powers during pre-trial conferences in Order 34A, the court's duties in a summons for direction in Order 25, rule 2 and inherent powers under Order 92, rule 4.

13 To my mind, the juridical grounding of the winding up and the minority oppression causes of action in different parts of the Companies Act does not prevent a single writ of summons from containing both causes of action. The case law on the court's substantive powers in a winding up action and a minority oppression action is clear: see generally, *Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR(R) 827, *Lim Swee Khiang & Anor v Borden Co (Pte) Ltd & Ors* [2006] 4 SLR(R) 745 and *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR(R) 268. In summary, where a cause of action in winding up is made out, the court has to make an order for the winding up of the company. In a minority oppression action, the court will be slow to make a winding up order if there are other options: "a winding-up order is an order of last resort for an oppression application"

per Chan Sek Keong CJ in *Sim Yong Kim v Evenstar Investments Pte Ltd*, at [38]. This power will not be exercised if "the state of affairs … can be remedied by an order other than winding up … In general, the courts are not minded to wind up operational and successful companies unless no other remedy is available." *per* Chan Sek Keong CJ in *Lim Swee Khiang & Anor v Borden Co (Pte) Ltd & Ors*, at [91].

14 If the court were to be presented with a winding up originating summons and a minority oppression writ, it will have to determine which (or both) of them are made out on the facts. In *Kumagai Gumi Co Ltd v Zenecon Pte Ltd & Ors* [1995] 2 SLR(R) 304, the court heard a winding up petition and a minority oppression petition. It found that the minority oppression cause of action was made out and ordered the winding up of the company on this basis; but it did not make any orders in the winding up petitions. On appeal, the Court of Appeal affirmed the trial judge's decision not to make any order in the winding-up petition since oppressive conduct had been established in the minority oppression petition. In *Kumagai*, each cause of action was contained in a separate originating process. I do not think that the analysis would be any different if both causes of action are contained in the same originating process. The court can make orders for the minority oppression cause of action and make no orders for the winding up cause of action; or it can make orders for the latter and no orders for the former.

15 In summary, I am of the view that both a winding up action and a minority oppression action can be contained in a single writ of summons where the winding up action, though commenced by originating summons, has been converted to and ordered to continue as a writ action and the minority oppression action is sought to be added subsequent to such conversion, on the basis that post-conversion, there is a merger of the procedural regime and the Rules of Court applies to both causes of action. I am of the view that the operation of the substantive law on winding up and minority oppression will not be affected by the form in which these causes of action are contained.

Whether proposed amendment should be allowed

16 Having come to the conclusion that there is nothing to prevent an amendment to add the minority oppression cause of action to a winding up writ of summons; is there any reason why the amendment should nevertheless not be allowed? The Defendants' main substantive argument in resisting the proposed amendments is that the amendments betray the Plaintiffs' real motives, in that the entire winding up action is an abuse of process since what the Plaintiffs are truly after is to force a buyout on its terms. The Defendants argue that this is an abuse of process and therefore seek a striking out of the Plaintiff's winding up action. Further, they argue that the proposed amendment should in any event not be allowed on what I will refer to as the ground of estoppel: in that since the Plaintiff had a choice of bringing either a winding up action or minority oppression action, or both, and having chosen to commence a winding up action and conducted the matter along these lines for a substantial period of more than 2 years, they are now estopped from changing tack.

17 On the first argument – that the actions should be struck out as the proposed amendment betrays the Plaintiffs' true intentions of forcing a buyout – I think that the submissions must fail. These arguments had been raised previously when the winding up proceedings were first commenced and the Plaintiffs sought to strike out these actions before Justice Belinda Ang (in Summonses 3519–3521 of 2008). The arguments failed then and they have to fail now, since there has not been any substantive developments such that material relevant to the correct determination of this issue, not available earlier, is now available. In other words, there are no exceptional circumstances that justify revisiting these grounds: see *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd and others* [2009] 4 SLR(R) 43, at [28]–[30]. In any event, I am of the view that the Plaintiffs have a choice on the cause of action which they wish to bring, which they have duly exercised. In *RecordTV*, the exchange

of affidavits of evidence-in-chief justified revisiting the issue of striking out of a portion of the plaintiffs' case on the ground that there was no evidence from the plaintiffs that supported their claims. In the present case, the facts on which Belinda Ang J decided the earlier applications have remained substantially unchanged. There had been no new development or new revelations of fact or evidence that justify revisiting this issue. The application to insert a new cause of action, to my mind, does not amount to new material which was not available earlier. Particularly since in this case, the Plaintiffs have always had this cause of action available to them in law, right from the time when they commenced these winding up proceedings. This is not a case where the Plaintiffs only realised they have this additional cause of action in minority oppression after discovery disclosed documents which they did not have prior access to. On the contrary, the Plaintiffs could have exercised this choice earlier. They choose to do it now. This alone, without more, is insufficient to warrant revisiting the issues.

18 Had the amendment application to add the minority oppression action been taken out earlier, I would have allowed it. However, the application to amend should not be allowed at this stage of the proceedings as it comes too late. A very substantial period of time has elapsed since the winding up actions were first commenced: it has been over 2 years. In *Asia Business Forum Pte Ltd v Long Ai Sin and another* [2004] 2 SLR(R) 173, the Court of Appeal held, at [12], that:

> Generally, it is true that an amendment may be allowed at any stage of the proceedings, including post-judgment. Clearly, the later an application is made, the stronger would be the grounds required to justify it. As it is a matter of discretion, no hard and fast rules may be laid down. But at the end of the day, the court must balance it against the justice of the case.

19 These actions have taken a windy path, meandering towards trial. Several discovery and interrogatory applications have been fought. The issues have crystallised: there appear only to be a final issue relating the scope, nature and extent of expert evidence on the SDF issue to be settled. Crucially, I do not think that the interlocutory proceedings have uncovered any new facts or evidence which cast a different light on these winding up actions. The facts upon which the Plaintiffs elected to proceed with winding up actions remain substantially unchanged.

20 Having chosen to conduct the matter along the path of a winding up action, I do think that the Plaintiffs are now estopped from changing tack by adding in a cause of action of a substantively different nature. At least not at this fairly advanced stage of these proceedings. As I had opined earlier, if this application was made at an earlier stage of the proceedings, I would have allowed it. Where a party has made an election and chosen to commence one cause of action and forego another, he should not afterwards seek an amendment which would effectively give him a second bite at the cherry, particularly where such amendment would cause prejudice to the other party: see *Asia Business Forum Pte Ltd v Long Ai Sin and another*, at [18].

21 I am also persuaded by authorities cited by counsel for the Defendants in support of his proposition that:

> … if a [party] chooses to conduct his case to a certain point, on certain lines, and leads the [other party] on into a certain position, [the first-mentioned party] has no right to change his front; that is only acting on the well-known doctrine of estoppel ...

Per Pollock, B in *Steward v The North Metropolitan Tramways Co* (1885) 16 QBD 178, at p 180. On appeal, the Court of Appeal upheld the decision on the basis that the plaintiff in the case had changed its position based on the defendant's pleadings such that costs would not compensate the prejudice to the plaintiff: *Steward v The North Metropolitan Tramways Co* (1886) 16 QBD 556.

22 To my mind, a winding up action and a minority oppression action are fundamentally different. While both may share similarities where, as in this case, they arise from shareholder disputes, the interests of the actors on this stage are very different, depending on the cause of action. In a winding up action commenced by the minority shareholders, their interest is in the liquidation of the company. In such a cause of action, the interests of the majority shareholders and the company are aligned. Both the majority shareholders and the company join, as in this case, to resist the winding up in order to keep the company as a going concern.

23 In a minority oppression action, the company takes a back seat as it has no interest in the fight between the minority and majority shareholders. This, to my mind, is why s 216 Companies Act provides the court with a broad range of options to resolve the shareholder dispute, without having to wind up the company; and this is also why the courts are slow to make a winding up order against the company in a minority oppression act. The company may only take an active part in the proceedings if its very existence is threatened or its interests are otherwise adversely affected.

24 To my mind, had the Plaintiffs elected to commence both causes of action at an earlier stage, the majority shareholders and the company may have conducted their defences differently from how they have conducted their defences when faced only with the present winding up actions. Having elected to commence only winding up actions, the Plaintiffs cannot now have a second bite at the cherry and add the minority oppression action without good reason. To allow them to do so would be severely prejudicial to the Defendants. To my mind, such prejudice is not something that can be compensated by costs. The Defendants have had to take positions over the past two years as they defended the winding up actions. They may have conducted their defence differently had they known that they were resisting a minority oppression action as well. Further, the substantive facts on which the Plaintiffs had made their election to commence only winding up actions have not changed; discovery and interrogatories have not disclosed major findings which warrant a change of position.

25 Finally, I make the observation that on the facts of this case, had the application to amend been made earlier in the proceedings, I would have allowed it as it would have the benefit of providing the court with a more complete range of options to arrive at a pragmatic resolution of the shareholders' disputes. So far, it has not been argued before me that the My Foot Group is in any financial difficulties; in fact the Defendants submitted that My Foot Group is a going concern and the majority shareholders do not wish to have the companies wound up. However, having picked its horse, the Plaintiffs have to run the course to completion and the track which they have chosen ends either in a winding up order or a dismissal of the action, without any middle ground. They have to convince the Court why it is just and equitable to wind up these companies.

26 For these reasons, I dismiss the Plaintiffs' application to amend and the Defendants' application to strike out.