United States Trading Co Pte Ltd v Ting Boon Aun and Another [2008] SGHC 15

Case Number : Suit 387/2007, RA 331/2007

Decision Date : 30 January 2008

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Melvin Lum (Rajah & Tann) for the plaintiff; Lee Mun Hooi (Lee Mun Hooi & Co) for the second defendant

Parties : United States Trading Co Pte Ltd — Ting Boon Aun; Ting Boon Kiat

Civil Procedure – Summary judgment – Whether defendant bound by four corners of defence

Partnership – Partners and third parties – Firm liable for acts of partner – Partner of firm absconding with money received by firm but intended for another party – Whether money was received in course of firm's business under s 11(b) Partnership Act (Cap 391, 1994 Rev Ed) – Whether other partners liable to make good loss of money

30 January 2008 Judgment reserved.

Judith Prakash J

1 The plaintiff in this action, United States Trading Co. Pte Ltd, made a successful application for a summary judgment against the second defendant, Ting Boon Kiat ("TBK"). TBK has appealed.

The claim

2 TBK and his elder brother, Ting Boon Aun aka Jason Ting ("Jason Ting"), the first defendant in this action, were the partners of a partnership firm known as Philips COC Singapore ("the firm"). The firm was formally registered as a partnership at ACRA on 13 September 2006 and its registration number was 53076627B. There were only two partners of the firm, the two siblings, and the firm's place of business was at TBK's residential address. The principal activity of the firm, according to the search report, was that of "General Wholesale Trade (including General Importers and Exporters)". The firm was de-registered on 15 January 2007.

3 Jason Ting was at all material times a full-time employee of Philips Electronics Singapore Pte Ltd ("Philips Electronics"), a member of the well known multinational Philips group which deals in electronic and consumer products among other things. Jason Ting's designation in Philips Electronics according to his correspondence was "Chemical and Raw Materials Manager, Purchasing Department, Philips COC Singapore". The acronym "COC" stands for "Centre of Competence".

4 The plaintiff company is in the business of supplying aluminium ingots and, according to the statement of claim, had supplied its products to Philips Electronics for more than 15 years. In the course of its business with Philips Electronics, the plaintiff came into contact with Jason Ting. According to the statement of claim, on 11 September 2006, Jason Ting, purportedly acting on behalf of Philips Electronics, asked the plaintiff for a loan of US$360,000. He proposed that the loan should be repaid by a re-pricing of the existing contract price arranged in respect of an order that Philips Electronics had placed with the plaintiff for 1500mt of aluminium ingots. The original price for these goods was US$2,580 per metric ton and in order to repay the loan, Jason Ting suggested that the

price be adjusted to US$2,850 per metric ton.

5 On 18 September 2006, using the letterhead of Philips Electronics, Jason Ting sent a letter to the plaintiff stating that on behalf of Philips Electronics, he accepted the plaintiff's offer to lend it US$360,000. The letter set out the terms of the loan including the interest payable and the method of repayment. On the same day, using his office e-mail account, Jason Ting sent an e-mail to the plaintiff's managing director, Mr Ross, telling him that the payee in respect of the loan should be "Philips COC Singapore". Due to this statement the plaintiff believed that "Philips COC Singapore" was one of the subsidiaries of Philips Electronics and handled such loan transactions for the latter.

6 The plaintiff duly handed Jason Ting a cheque for US$360,000 drawn in favour of Philips COC Singapore. This cheque was paid into the firm's account with UOB Limited in Singapore and the money was credited into the account on or about 21 September 2006. Some time thereafter, Jason Ting withdrew the money and absconded with his family. To date, he has not been found.

7 This action was commenced in June 2007. On 15 August 2007, the plaintiff obtained judgment in default of appearance against Jason Ting.

8 In the statement of claim as originally drafted, the plaintiff averred that the loan had been drawn in the name of the firm by reason of misrepresentations made to it by Jason Ting. Further, Jason Ting and TBK had also wrongfully, with intent to injure or cause loss to the plaintiff by unlawful means, conspired and combined together to defraud the plaintiff and to conceal such fraud from the plaintiff. There was a further claim that the defendants had knowingly participated in a fraudulent and dishonest design against the plaintiff and had thereby become constructive trustees of all moneys received by them from the plaintiff.

9 In October 2007, the plaintiff amended the statement of claim by inserting the following paragraph which contained a new cause of action:

> 13. The Plaintiff also avers that the said USD360,000.00 was received by Philips COC Singapore in the course of its business and was misapplied by one or more of the partners while the monies was *(sic)* in the custody of the firm and the firm is liable to make good the loss.

The cause of action relied on by the plaintiff arises under s 11(b) and s 12 of the Partnership Act (Cap 391, Rev Ed 1994) ("the Act") which read:

> 11. In the following cases:
>
> (a) …
>
> (b) where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm,
>
> the firm is liable to make good the loss.
>
> 12. Every partner is liable jointly with his co-partners and also severally for everything for which the firm while he is a partner therein becomes liable under section 10 or 11.

10 The plaintiff's application for summary judgment was based on this new cause of action. In his affidavit in support of the application, Mr Ross stated that TBK had never dealt directly with the

plaintiff but had left it to Jason Ting to liaise with the plaintiff. He asserted, however, that TBK was fully aware of the registration of the firm and the opening of the firm's bank account with UOB Limited. Further, as TBK and Jason Ting were partners in the firm, TBK was liable for the judgment debt incurred by Jason Ting as a partner of the firm.

The defence

11 The defence filed was basically a denial. TBK pleaded ignorance of everything done by Jason Ting and also denied the allegations made in the statement of claim. TBK pleaded that at the request of Jason Ting, the firm was set up as a partnership between himself and Jason Ting to carry on general trading business. TBK was only a dormant partner and the affairs and businesses of the firm were managed by Jason Ting. The firm was de-registered on 15 January 2007 at the request of Jason Ting. TBK pleaded that he was aware that Jason Ting worked for Philips Electronics but asserted that he had no knowledge whatsoever of the nature or scope of such employment. He further averred that he had no knowledge of the relationship between the plaintiff and Philips Electronics or of the proposals purportedly made by Jason Ting to the plaintiff or the circumstances under which the loan was made. These matters related solely to Jason Ting's dealings on behalf of Philips Electronics and had no connection to the business of the firm. He admitted that a sum of US$360,000 was paid to the firm's account with UOB Bank but said he became aware of this only after the commencement of the proceedings and had no knowledge that the remittance was induced by representations made by Jason Ting.

12 In para 9 of the defence, TBK averred that:

(a) Jason Ting was acting on his personal account and not for or in the course of any transactions or business on behalf of the firm;

(b) the firm had not authorised Jason Ting to deal with the plaintiff in the manner and for the purposes alleged in the statement of claim;

(c) the firm did not benefit from Jason Ting's wrong doings and Jason Ting had withdrawn moneys from the bank account for his own personal benefit; and

(d) it was not within the apparent authority of Jason Ting or the scope of the firm's business to negotiate for or accept loans or receive moneys of the nature alleged in the statement of claim.

In para 10 of the defence, TBK specifically denied para 13 of the statement of claim. He averred that the firm was set up to be a general wholesale trader and it was not agreed nor was it within the scope of the firm's business to receive moneys or loans from third parties in relation to any business or transactions that had no connection whatsoever with or relation to the wholesale trade of the firm.

13 TBK filed three affidavits in response to the application for summary judgment. In his first affidavit, he said that the firm had been set up at the instance of his elder brother, Jason Ting, because his brother wanted to engage in general wholesale trade including imports and exports. As Jason Ting was his eldest brother and as there was no cause for him to have any suspicion, TBK agreed to be a dormant partner. He left the management and the running of the business totally to Jason Ting.

14 The firm was terminated on 15 January 2007 at the instance of Jason Ting. He informed TBK that since the firm was not progressing with its business, the firm should be terminated to save costs. TBK agreed to this course. TBK only came to know of the present action after the writ was served on

him and Jason Ting and his family suddenly departed from Singapore. TBK had not been able to contact his brother so as to verify the allegations made by the plaintiff.

15 TBK then referred to documents supplied to him by the plaintiff's solicitors *viz*, the letter and e-mail of 18 September 2006 signed by Jason Ting and a letter of indemnity dated 28 October 2006 bearing the letterhead of Philips Electronics. This letter of indemnity was signed by Jason Ting and purportedly countersigned by one David Lim T H., VP & CFO of Philips Electronics. He asserted that from the documents evidencing the alleged loan, it was clear that the loan was made in connection with and was granted in the course of business with Philips Electronics. The loan had no connection whatsoever with the business of the firm except for the direction that Jason Ting gave for the same to be made payable in the name of the firm. The sum of US$360,000 was not, therefore, a partnership debt incurred by the firm nor was it a sum incurred during the course of the firm's business. TBK denied that he had acted in concert with Jason Ting to deceive the plaintiff in respect of the loan or in setting up the firm. He did not receive any part of the loan and was not aware that it had been paid to the firm's bank account with UOB Bank.

16 It is pertinent to note that throughout his first affidavit, TBK misspelt the name of the firm. He called it "*Phillips* COC Singapore" instead of "*Philips* COC Singapore". Annexed to TBK's first affidavit (as exhibit TBK-1) was a copy of a search carried out at ACRA and this showed that there was a partnership business with the registration number 53076621C registered on 13 September 2006 and called "Phillips COC Singapore" (*ie* the word "Phillips" was spelt with two ells instead of one). This business had exactly the same partners and same address and same business activity as the firm and it was also terminated on 15 January 2007.

17 About three weeks later, having been apprised of his mistake, TBK filed a second affidavit. He said that the ACRA search for "Phillips COC Singapore" had been erroneously exhibited in his first affidavit. The correct search should have been the search on the firm and he then produced a copy of his ACRA search on the firm and exhibited it as exhibit TBK-7. He explained that he had been told by Jason Ting that as the name "Phillips COC Singapore" was wrongly spelt, there was a necessity to correct the error by incorporating a new firm under the correct name "Philips COC Singapore". He said he agreed to the registration of the firm "as there was nothing insidious in the explanation". Apart from the error in the name of the firm and the fact that all references to "Phillips COC Singapore" in his first affidavit should be references to the firm, TBK maintained the correctness of the contents of his first affidavit.

18 In his third affidavit filed on 30 October 2007, TBK dealt with para 13 of the amended statement of claim in which the plaintiff had alleged that the loan had been received by the firm in the course of its business. He stated that the firm was set up in partnership by Jason Ting and himself to do general wholesale trading. It was never agreed nor was it the firm's business or part of the course of its business of wholesale trading for it to receive money or loans from third parties arising from transactions or matters that had no connection with the firm's business. The alleged loans and business transactions between Philips Electronics and the plaintiff had no connection with the firm and were extraneous to the firm's wholesale trading. Jason Ting was acting for and on behalf of Philips Electronics in the transactions with the plaintiff and TBK had not authorised Jason Ting to engage in those transactions. He also averred that he did not manage the firm's accounts and up to the date of the affidavit, he had not signed any cheques drawn on the firm's bank account with UOB Bank.

The decision below

19 The assistant registrar, Yap Yew Choh Kenneth, who heard the plaintiff's O 14 application,

considered that the central issue in relation to the claim under para 13 of the amended statement of claim was what the firm's course of business was. He considered that the phrase "course of business" as used in s 11(b) of the Act had to be determined by an objective inquiry *ie* what the world at large viewed the course of business of the firm to be. In this case, there were no partnership documents to indicate the course of business. The name of the firm, *ie* "Philips COC Singapore" contained an oblique reference to Philips Electronics' slogan and that would create an impression that the course of business had something to do with the Philips group of companies. Due to this, it would be incumbent on TBK to rebut that *prima facie* impression by showing proof of why, objectively, the firm's course of business was something else.

20 The assistant registrar concluded that TBK had not been able to rebut that impression. TBK had had the opportunity of doing so in three affidavits and all that had been produced was a bare statement that there had been some wholesale business. There were, however, no transactions, accounts or anything else in terms of documents to show what the business was. Nor was there any other source of objective information on the course of business that could have put a third party on notice – for example, a shop front or website from which the type, nature, scale and source of business could be ascertained. On this basis, the assistant registrar concluded that there was no real prospect of success for the defence and therefore gave judgment in favour of the plaintiff for the full amount of the claim.

The appeal

21 Mr Lee Mun Hooi, counsel for TBK, made the following arguments on appeal. First, he pointed out that the claim for US$360,000 arose from a purported loan made by the plaintiff to Philips Electronics. From the facts, he submitted, it was clear that:

(a) the loan transaction has no connection whatsoever with the firm or its business; and

(b) it was peculiar that Philips Electronics as a big conglomerate should borrow a sum of US$360,000 and agree to repay the same by the devious means of jacking up the price of materials bought from the plaintiff.

Mr Lee submitted that the whole transaction was suspicious and it had to be determined whether the plaintiff had conspired with Jason Ting to deceive Philips Electronics and whether the sum in question was a loan or a kick-back to Jason Ting. If the transaction was not a true loan, then as the plaintiff was a party to this scheme, the court should not lend its hand to assist the plaintiff to recover money paid out in an illegal transaction.

22 Secondly, he argued that the plaintiff's loss was due to its own negligence. It should have enquired why the loan moneys were to be remitted to "Philips COC Singapore" instead of to the borrower, Philips Electronics, and should also have asked for a confirmation from Philips Electronics to divert the moneys as directed. The loss arose from the plaintiff's failure to seek such confirmation and its failure to verify that the firm was actually connected with Philips Electronics. In the circumstances, the plaintiff was not entitled to recover the money from TBK.

23 Mr Lee stated that the assistant registrar had not accepted these arguments because they were not based on matters pleaded in the defence. He argued that the omission to plead such arguments as defences was irrelevant because at a summary judgment hearing, the defendant was entitled to raise matters which had not been pleaded. In support he cited the 1999 case of *Lin Securities (Pte) Ltd v Noone* [1989] 1 MLJ 321 ("the *Lin Securities* case"). That was a Malaysian case which held that whilst the defendant was bound by the four corners of his pleadings at the trial of the

action, he would not be so bound at the O 14 proceedings. The Malaysian O 14 r 4(1) provided that a defendant may show cause against an application for summary judgment by affidavit or otherwise and it was held that he was therefore entitled to show at the hearing of an O 14 application that over and above what had been pleaded in the statement of claim, he had other defences.

24 The present O 14 regime as encapsulated in the Rules of Court (2006 Rev Ed) is predicated, unlike the regime that applied in Malaysia and Singapore in 1989 when the *Lin Securities* case was decided, on both the statement of claim and the defence having been filed before the application for summary judgment is taken out. As the commentary in *Singapore Civil Procedure 2007* ("the *White Book*") notes at para 14/1/7, the previous procedure was unsatisfactory:

> … as the plaintiff who applies for summary judgment may not be in a position to pinpoint the specific defences that the defendant may raise. This has often resulted in the plaintiff's affidavit in reply to the defendant's show cause affidavit raising new issues, which the defendant then requires leave of court to respond to. This disrupts the timetable for filing of affidavits set out in O. 14, r. 2. With the amendments, the service of a defence by the defendant and not just the entry of appearance is now a prerequisite to an application under O. 14.

The *White Book* at para 14/2/12 also restates the principle established by the *Lin Securities* case that the defendant is not bound by the four corners of his defence at the summary judgment stage but follows that with a reference to the case of *Pembinaan V-Jaya Sdn. Bhd. v Binawisma Development Sdn. Bhd.* [1987] 2 C.L.J. 446 which it cites for the principle that where the defence amounts to nothing more than a bare denial of the claim, the court may be particularly cautious about defences suddenly raised by the affidavit.

25 In my view, now that the Rules have been amended to require the defence to be filed before the summary judgment application can be made, the principle in the *Lin Securities* case must be looked at again. I consider that it behoves a defendant to set out all his defences in his defence so that the plaintiff can make a proper assessment of the chances of an application for summary judgment being successful. It is not correct for the defendant to plead one thing which, objectively, does not seem to afford him a good defence and then when the application is made by the plaintiff to bring up various other points and take the plaintiff by surprise. To allow a defendant to do this as a matter of course would be to allow an abuse of process. This does not mean that in all circumstances a defendant should not be able to raise a new defence in his affidavit responding to the O 14 application but he should be able to give good reasons for not having raised such defence in his pleading and, if he is not able to do so, the defences should be either disregarded or treated with a great deal of suspicion.

26 In the present case, there was no reason given why the allegations of negligence and complicity in the fraud could not have been raised in the pleaded defence. In any case, these allegations are bare assertions and the defendant produced no evidence to support them. All he did in effect was to invite me to make inferences from the factual background. No doubt the plaintiff behaved rather foolishly in making a cheque payable to an entity called "Philips COC Singapore" instead of to the intended borrower Philips Electronics. In the circumstances of the case, however, there was on the face of it no reason for the plaintiff to doubt Jason Ting with whom it had been dealing for some time and who was an employee of Philips Electronics and to act in accordance with his instructions purportedly given on behalf of Philips Electronics. I do not think that these points made by the defendant in his affidavit had any substance or afforded him a defence.

27 The next argument put forward by Mr Lee related to the transaction itself. He argued that it could not be said that the partnership received the US$360,000 in the course of its business. Case

law had established that receipt of moneys *per se* could not render one partner responsible for the defalcation of another. It was still essential to determine whether the moneys were received in consequence of or within the nature of the business conducted by the firm in question. The holding by the assistant registrar was tantamount, it was submitted, to saying that as long as moneys are received by a partnership, the partners would be responsible for the loss of the same even though the moneys had no connection with the ordinary course of the partnership business. This would lead to the ridiculous result of holding all partners liable even though the fraud was committed by the defaulting partner's own frolic.

28 The above argument dealt with the nub of the case which was whether or not the US$360,000 was received by the firm "in the course of its business" as those words are used in s 11(b) of the Act. It is quite clear from the Act that if the moneys in dispute were received by a firm in the course of its business, then if one of the partners goes on a frolic of his own and dissipates those moneys, the other partners of the firm would be liable to make good the loss even though they were ignorant of the defaulting partner's actions and had no part whatsoever to play in the same. Mr Lee might think this result to be "ridiculous" but that is the legal position.

29 It is also pertinent to note that s 11(b) was, as indicated by the authors of *Lindley & Banks on Partnership* (18th Ed, London, Sweet & Maxwell 2002) at para 12-126, a statutory enactment of the common law position as enunciated by Lord Lindley:

> *Group 1: Firm held liable*
>
> *Where a firm in the course of its business receives money belonging to other people, and one of the partners misapplies that money whilst it is in the custody of the firm, the firm must make it good.*
>
> Having formulated the above rule, Lord Lindley explained the principle which underlies the cases in this group, as follows:
>
> > "The principle … is that the firm has, in the ordinary course of its business, obtained possession of the property of other people, and has then parted with it without their authority. Under such circumstances the firm is responsible: and the fact that the property has been improperly procured and placed in the custody of the firm by one of the partners does not lessen the liability of the firm; for whether the firm is or is not liable for the original fraud by which the property got into his hands, it is responsible for the subsequent misapplication thereof by one of its members."

30 It is clear from the above exposition that the section is concerned only with a partnership's receipt of money and not with how the money was acquired by the partner who put it in the firm's account. In other words, it is irrelevant if one partner acted fraudulently in procuring the money. What is important is whether the money was received by the partnership in the course of its business. Thus, the facts that Jason Ting's actions in pretending that the money was required as a loan by Philips Electronics were fraudulent and that TBK may have been completely ignorant of the same, are irrelevant to the firm's liability under s 11(b).

31 To succeed in a claim based on s 11(b), the claimant would have to show the following:

(a) that the firm received the moneys that are claimed;

(b) that such receipt was in the course of the firm's business; and

(c) that the moneys received were misapplied by a partner of the firm.

In this case, conditions (a) and (c) are not in dispute. It is only condition (b) that TBK disputes and therefore the question before me is the same one that was before the assistant registrar *ie* whether the US$360,000 was received by the firm in the course of its business.

32 The issue then becomes what was the business of the firm. This is a question of fact. In this case, it was represented to the plaintiff by Jason Ting that the firm acted as the agent for Philips Electronics in relation to the collection of loan moneys. The plaintiff, thinking that because of its name the firm had a connection with Philips Electronics, accepted this representation and paid over the loan funds. TBK contended that it was not the firm's business to receive loans on behalf of third parties and therefore the section did not apply to impose liability on him.

33 In my view, the name of the firm was a representation that it had a connection with the Philips conglomerate, either as a subsidiary or a business name. As the assistant registrar held, to an objective third party, the business of the firm would appear to be connected with the business of Philips Electronics. There were, additionally, no external indicia to indicate otherwise.

34 As a partner of the firm, TBK should have been in a position to show the court exactly what the business of the firm was and why the section did not apply. He was, in my judgment, not able to do this. He was very evasive in his affidavits as regards the business and actual transactions carried out by the firm. Whilst asserting that the firm was set up for general trading purposes, he professed ignorance of what it actually did and asserted that he was simply a "dormant" partner and left everything to his brother. He did not explain why the firm bore the name it did or why the first firm registered did not have an acceptable name simply because there was an extra letter ell in the first partnership name. He must have known that the firm was carrying on or intending to carry on some business since he was a party to the opening of a bank account for the firm but he did not take it upon himself to find out exactly what business was carried out and how. In fact, if he really was as ignorant of the firm's business as he said, he was in no position to assert that it was not part of the business of the firm to collect loan moneys for third parties. As he was content for Jason Ting to carry on the business of the firm, he must have been content too for Jason Ting to represent to the plaintiff that the receipt of loan moneys was part of the business of the firm. From what he said in his affidavit it was plain he did not care what the business of the firm was and left it to Jason Ting to decide what the business of the firm should be.

35 In the circumstances of this case, I agree with the assistant registrar that there is no objective evidence to establish that the business of the firm was anything other than what Jason Ting held it out to be from time to time. It has not been shown that the payment of US$360,000 into the loan account could not have been a payment made in the course of the firm's business because the firm had a completely different business which would not extend to collection of loans for third parties. I therefore consider that the defendant has not been able to raise a triable issue to the claim mounted pursuant to s 11(b) of the Act.

36 The next submission made by Mr Lee was that the judgment below was bad in that it was for an excessive amount. The argument was based on the fact that in another High Court action, Suit 402 of 2007, Philips Electronics has taken action against Jason Ting and TBK to recover the sum of US$160,125.52. In its statement of claim, Philips Electronics averred that it had overpaid this sum to the plaintiff in this suit for aluminium ingots because Jason Ting had fraudulently agreed to pay a higher price for the material than was originally contractually agreed on. Mr Lee submitted that as Philips Electronics had already paid the plaintiff US$160,125.52, the plaintiff had recovered part of its loan moneys and should not be entitled to judgment against TBK for the full sum of US$360,000.

37 There is I think a point here. The plaintiff is not entitled to recover the same sum of money from two different parties. The position in relation to the sum of US$160,125.52 is far from clear and in order to recover it the plaintiff will have to show that it has not received this sum back or dealt with it in any way. It may be that Philips Electronics will also make a claim against the plaintiff for the return of that sum of US$160,125.52 but whether or not it will be successful in that claim, if made, is not yet decided.

Conclusion

38 The appeal is allowed in part. The judgment below is varied to the sum of US$199,874.48 and the defendant is given leave to defend the remaining sum of US$160,125.52. The defendant shall file an amended defence within 14 days of the date hereof. Save as aforesaid, the order below shall remain. I shall hear the parties on costs.