

Delta Engineering & Construction Pte Ltd v Wiseco Trading Pte Ltd and Others
[2002] SGHC 44

Case Number : Suit 334/2001/J
Decision Date : 05 March 2002
Tribunal/Court : High Court
Coram : Lai Kew Chai J
Counsel Name(s) : Justin Phua/Dennis Loh [Chin Patrick Dennis Loh & Co] for the plaintiffs; Harbajan Singh [Daisy Yeo & Co] for the defendants
Parties : Delta Engineering & Construction Pte Ltd — Wiseco Trading Pte Ltd; V S Integrated Pte Ltd; Ong Kuy Hwa; Ong Her Seng

Judgment

GROUND OF DECISION

In this action, the plaintiffs are asserting two causes of action, in the alternative against the defendants. First, they claim damages which they have suffered as a consequence of the civil conspiracy in which two related persons in August 1998 had conspired with all the defendants or any of the defendants with the predominant purpose to injure the plaintiffs. According to the plaintiffs the conspirators by deception had defrauded them and had prevented them from recovering the sum due to them under the building contract between them and the first defendants ("Wiseco"). In the alternative, the plaintiffs seek to invalidate the assignment in writing dated 30 July 1999 of the property in question by Wiseco to the second defendants ("VS Integrated") under section 73B(1) of the Conveyancing and Law of Property Act, Cap 61 ("the CLPA") on the ground that it was made "with intent to defraud creditors" within the meaning of that expression in the sub-section. Under this head of claim, they seek rectification of the register of title of the property by deletion in the land titles registry or an order that VS Integrated do re-assign their property to Wiseco, the intention being that the plaintiffs could levy execution on the judgment they had entered against Wiseco.

The Facts

2 The material facts are these. The plaintiffs at all material times carry on business as building contractors. Mr Ong Kuy Kiong ("Mr Ong") and his wife were the original promoters, shareholders and directors of both Wiseco and VS Integrated. Eventually, Mr Ong and his wife owned 254,000 shares and 146,000 shares in Wiseco, all of \$1 each.

3 Wiseco proposed to build a warehouse. By a building agreement dated 21 October 1995 between Jurong Town Corporation ("JTC") and Wiseco, Wiseco agreed to build a warehouse and ancillary buildings on a piece of land known as Private Lot A13923 forming part of Government Resurvey Lot 1790, Mukim No. 11 Kranji, Singapore estimated to contain an area of 4,2128 square metres ("the property"). For that purpose, Wiseco was granted a licence. When Wiseco put in the stipulated minimum investment, completed the building satisfactorily and otherwise complied with the provisions of the building agreement, JTC would grant it a 30 year lease.

4 For the purposes of evaluating the evidence and determining the issues of fact in this case, it is important to bear in mind in particular the over-reaching rights of JTC as the owner of the property of which Wiseco, the licensee coupled with an interest in land which may be defeasible. If Wiseco had breached any part of the building agreement, which remained un-remedied after due notice, or if they suffered any process of execution by any of their judgment creditors, JTC under clause 3(b) of the

building agreement had the "right" and "power" at their option to re-enter and take possession of the property "and all buildings structures fixtures and plant material and effects whatsoever thereon with power to hold and dispose thereof as if [the building agreement] had not been entered into and without making to the [Wiseco] any compensation or allowance for the same and [the building agreement] shall thereupon determine..." (the words within the brackets are added for clarity). To encourage financial institutions to finance industrial development, there was the usual proviso stipulating that JTC shall not re-enter and re-possess the property "until the Owner (i.e. JTC) has served upon the mortgagee notice in writing specifying the breach and the mortgagee has failed to remedy such breach". (the words in brackets are added).

5 In 1996 Wiseco obtained a construction loan of \$3.3 million from Overseas Chinese Banking Corporation Ltd. Wiseco began to build. They engaged a piling contractor to complete the piling works. The piling contractor was paid \$332,008.46 and the additional sum of \$9,960.25. The piling contractor was paid these sums out of the construction loan as to 70%. The balance was paid by Wiseco out of their own funds.

6 By a building contract in writing dated 5 May 1998 between the plaintiffs and Wiseco, the plaintiffs agreed to carry out the civil works and build the warehouse on the property according to the approved plans. It was common ground that as at 3 June 1998 the plaintiffs had not commenced the construction works, though the plaintiffs had already started on the preliminaries and mobilized their manpower and equipment for the building and civil work. It was during this period of time that the plaintiffs, through their director Mr Tay Kia Lim ("Mr Tay"), learnt that Mr Ong was adjudged a bankrupt on 29 May 1998 and so was his wife Madam Ng shortly thereafter.

7 There was some controversy over the reasons why the plaintiffs continued with their construction works, as to which I will return later in this judgment, the fact remained that they carried on with the construction works. The sub-structure work was completed and the architects certified, in response to the plaintiffs' Progress Claim No. 2 dated 19th August 1998 that a sum of \$264,843.00 was due and payable, together with the GST amounting to \$7,945.29.

8 No payment was made and on 8 September 1998 the plaintiffs ceased all further work under the building contract. On 23 February 1999 the plaintiffs sued Wiseco and obtained judgment in the sum of \$272,788.29 and costs of \$1,200. The plaintiffs took no effective action to execute on the judgment or wind up Wiseco. The reasons are again in controversy and I will return to them when I consider the plaintiffs' allegations of conspiracy against Mr Ong, his wife and the defendants.

9 In October 1998, Mr Ong and his wife Madam Ng transferred all their shares in VS Integrated to the 3rd and 4th defendants who are respectively Mr Ong's brother and father. On 28 July 1999 the paid up capital of VS Integrated was increased to \$300,000.00 and they were held by the 3rd and 4th defendants. In mid-March, 2000 the 4th defendant transferred to another brother of Mr Ong, Mr Ong Kway Kiau. Mr Ong Kway Kiau was later convinced of the viability of the warehouse project and agreed to be the financier. He later became the substantial shareholder of VS Integrated. By an agreement dated 27 February 1999 Wiseco agreed to sell and VS Integrated to purchase Wiseco's right, title and interest over the property under the JTC building agreement for the price of \$50,000.00. On 30 July 1999 Wiseco with the consent of JTC by a Deed of Assignment assigned all their rights, title and interest in and under their building agreement with JTC to VS Integrated for the consideration of \$50,000. Not counting the value of the property as such, the worth of the piling works and the sub-structure works was just over \$600,000.00. At the trial, counsel for the plaintiffs itemised the works done and materials supplied and paid for by the plaintiffs. They totalled \$708,759.29. There was no challenge to this figure and upon the assignment to VS Integrated, the

latter would take the benefit of it. Before the assignment the only 2 shares in Wiseco, which were previously each owned by Mr Ong and his wife, Madam Ng, were transferred in October 1998 by the Official Assignee of their bankruptcy estates to the 3rd defendant and the 4th defendant.

10 After becoming licensees of the property of the JTC, VS Integrated engaged another construction company to complete the unfinished building and civil work. The plaintiffs were evicted from the property. In January 2001 VS Integrated obtained a construction loan of S1.5 million from United Overseas Bank ("UOB") against a legal mortgage of their rights, title and interests over the property. A joint and several personal guarantee was signed by the 3rd and the said Mr Ong Kway Kiau in favour of UOB as additional security. At the time when the action came up for trial, the construction works were substantially completed.

11 I should mention the amounts of money which VS Integrated had to pay out in taking over the rights of Wiseco over the property. They paid off the outstanding monies due to OCBC in exchange for OCBC's release of their mortgage. The payment totaled \$303,407.23 and this sum included the sum of \$50,000 which VS Integrated had paid to Wiseco.. They also paid the arrears of rental due to JTC who required payment as a condition of their consent to the assignment by Wiseco to VS Integrated. The sum paid was \$34,134.39.

Allegations of civil conspiracy and intention to defraud creditors

12 I now turn to plaintiff's allegations that from August 1998 Mr Ong and/or his wife and the defendants or any of them had "unlawfully conspired with the predominant purpose to injure the plaintiffs by cheating and defrauding them and preventing the plaintiffs from recovering the sum due to them under the certificate of payment and/or the judgment". They alleged that Mr Ong, in failing to obtain a special resolution of Wiseco in general meeting approving the assignment, had contravened sections 157 and 160 of the Companies Act, Cap 50. He and inferentially the Ong family members, all of whom had been referred to earlier, had deceived the plaintiffs' Mr Tay, had made fraudulent misrepresentations and had converted some of the plaintiffs' building materials, formworks and steel scald-folding works which were left behind in the property after they were evicted from the property.

13 Mr Tay in evidence alleged that though he was concerned about non-payment, he was deceived by Mr Ong when he saw him at the latter's office on 3 June 1998. Mr Ong he said lied to him that the OCBC would pay the plaintiffs in the same way that the piling contractor had been paid. Mr Ong showed him the documents about the construction loan, though he admitted that the availability period of the loan was only just about 2 more months down the road. During the period from August 1998 to July 1999, Mr Ong also misled Mr Tay by assuring the latter that Mr Ong's brother would take over the shares of Wiseco and provide the funds for Wiseco to proceed with the construction of the warehouse. Relying on those assurances, which turned out to be false, Mr Tay of the plaintiffs decided not to take any further action, even though they had obtained judgment against Wiseco. Neither did he petition for the winding up of Wiseco although the usual statutory demand was served on Wiseco on 18 May 1999. Mr Tay explained that he stayed his hand because of the assurances of Mr Ong which turned out to be false. Had he filed the company winding up petition, the assignment which took place later would have been stopped and the plaintiffs' claims as judgment creditors would have to be arranged or compromised before the assignment to VS Integrated could proceed.

14 The plaintiffs relied on a number of overt acts by Mr Ong, his wife and the other defendants. In September, Mr Ong and his wife transferred the 2 shares in VS Integrated to the 3rd and 4th defendants. They and all the defendants had firmed up the intention to use VS Integrated to take

over the property from Wiseco. Third parties replaced them as directors of Wiseco. The assignment took place. According to the plaintiffs, the assignment was done at such an undervalue that Mr Ong and his wife as directors were clearly in breach of their duties under section 157 of the Companies Act, Cap 50 to act honestly and diligently in the discharge of their duties to Wiseco. Further, they failed to obtain the necessary approval of Wiseco in general meeting as required by section 160 of the Companies Act, Cap 50. In taking over the property, the defendants (who were not named) also converted to their use building materials and equipment belonging to the plaintiffs, namely the steel reinforcement bars, timber shutter formworks, used timber formworks and used steel scaffoldings.

15 The plaintiffs conducted an examination of Wiseco's financial matters. The plaintiffs were told in the examination that the financial records and accounts of Wiseco had been misplaced. They drew a blank; the point was made that the unavailability of the accounts added further suspicion against the good faith of Wiseco and their directors.

16 The plaintiffs rely on the evidence set out above to found their claims of conspiracy and the invalidation of the assignment on the ground that it was made by Wiseco with the intention to defraud creditors.

The defence version

17 Mr Ong gave evidence. At that time, he was in the employ of VS Integrated. He was dealing with the purchase and sale of furniture. According to him, he told Mr Tay of the plaintiffs when the prospects of bankruptcy loomed large. Mr Tay was reassuring saying that he would continue with the project and complete the warehouse after which it could be sold. He did not deceive him or make any of those misrepresentations. In fact, by their letter of 3 June 1998 to the architects, the plaintiffs stated that judgment had been entered on 29 May 1998 against Mr Ong by Chen Hock Heng Textile Co. Pte Ltd in the sum of \$200,000 and that the solicitors of the judgment creditor were proceeding to serve a bankruptcy petition on him. He sought instructions from both the architects and Wiseco. At that time, he had not commenced civil works on the superstructure, though he had carried out preliminaries as mentioned earlier.

18 Mr Ong met Mr Tay again sometime in December 1998. He told him that he was unable to carry on the business of the company. He had approached many people to take over the company but no one wanted to take over. Mr Ong said he had also approached JTC officers and offered to return the land. The officers told him that as he had started piling work, it would be very troublesome for them to take back the land. They also considered the loan to the OCBC as a very troublesome matter. The officers indicated to him that JTC would consider any party taking over if that party would pay the loan to the bank.

19 Mr Ong then suggested to Mr Tay to take over the land. He informed him that he had paid yearly rental of about \$80,000; and it totalled about \$240,000. The property tax paid was \$30,000. Wiseco took a loan of about \$300,000. Mr Ong told Mr Tay that the pressing items were the bank loan of about \$200,000, JTC rental arrears of \$50,000 and property tax of about \$10,000 which had to be paid by the party taking over the land. He requested Mr Tay to take over the land and pay for those items only. But Mr Tay declined, saying that Wiseco already owed him about \$200,000. It was clear that he had apprised Mr Tay of the fact that JTC did not want to re-enter and re-possess, outsiders did not want it and he told Mr Tay that he would ask his elder brother, Ong Kway Kiau whether he would be interested to take over the property. In these circumstances, Mr Ong did not agree that the value of the property was \$680,00 as suggested to him in cross examination. He said even though about \$900,000 was expended for the project, there were no takers at all.

20 Mr Ong said that the idea of his brother Mr Ong Kway Kiau taking over Wiseco's rights and interest in the property by means of VS Integrated came from him, after he had asked Mr Ong questions about the viability of the project. Mr Ong Kway Kiau said the idea of using VS Integrated came from him. Mr Ong Kway Kiau's evidence about the date when he first thought of taking over was tentative; at one stage he said it was at the end of December 1998 or January 1999. He told the court he was not sure as to the date when the decision to invest in VS Integrated was first made. When his attention was drawn to the fact VS Integrated had applied to PUB for supply of water in November 1998 and the fact that Wiseco and VS Integrated had applied to JTC for approval of the proposed assignment on 15 December 1998, he said he did not know, meaning I gathered that he was not sure. It was, in my view, immaterial to know the precise date. He even said that prior to December 1998 there was a meeting between him and his brother but that no decision was made whether he would take over through VS Integrated.

21 He was told of the debts of Wiseco and obviously he would not want to carry those burdens in addition to the investments to complete the project. He left it to his solicitors to effect the taking over. Mr Ong Kway Kiau also told the court that he left it to his lawyers to advise on the sum he was to pay. He said he would listen to his lawyers and would pay whatever the sum they advised. Mr Ong waived privilege of his communications with the solicitors but plaintiffs decided not to call the solicitor in charge to give evidence. The question of Mr Ong Kway Kiau waiving privilege was not raised by anybody. When asked to account for the sources of his wealth, he told the court that his means came from his business in buying and selling second hand machinery.

Law of conspiracy and intention to defraud creditors

22 In *Chew Kong Huat v Recwill (Singapore) Pte Limited* [2000] 1 SLR 385, the Court of appeal in page 399, para 34 laid down that "a conspiracy by unlawful means is constituted when two or more persons combine to commit an unlawful act with the intention of injuring or damaging the plaintiff, and the act is carried out and the intention achieved". It was pointed out that the presence of a predominant intention to injure the plaintiff was "not a necessary ingredient for the tort of conspiracy by unlawful means". It was only necessary when a conspiracy by unlawful means was alleged. In the present case, the plaintiffs have to prove, inter alia, that Mr Ong, his wife Madam Ng and all and any of the defendants had combined with the intention of defrauding the plaintiffs by means of the assignment to VS Integrated.

23 I turn to the ambit of section 73B(1) of the CLPA. The subsection provided that "every conveyance of property made whether before or after 12th November 1993, with intention to defraud creditors, shall be voidable, at the instance of any person thereby prejudiced". In *Quah Kay Tee v Ong & Co Pte Ltd* [1997] 1 SLR 390 the Court of Appeal ruled that on the evidence in that case the presumption of fraudulent intent could be properly triggered against the transferor of the shares. Therefore, the voluntary share transfer was rendered voidable.

Central Issue of fact

24 Common to both causes of action was the intention of Mr Ong and Mr Ong Kway Kiau representing the minds and management of Wiseco and VS Integrated. The common question of fact is this: did they and the companies intend to defraud the plaintiff and other creditors of Wiseco when they effected the assignment for the consideration and in the circumstances recited in this judgment?

My findings

25 In my judgment, they did not intend to defraud the plaintiffs as creditors. Both Mr Ong and Mr Ong Kway Kiau were interested to salvage whatever they could in the project to be developed on the property. They left it to the solicitors to advise on the amounts to pay both for the assignment and in order to obtain both the consent of JTC and the release of OCBC in respect of the mortgage. If the plaintiffs had proceeded to wind up Wiseco, the assignment could not have taken place. The Liquidators of Wiseco could have assigned the company's rights and interests (if any) with the consent of JTC. It would inevitably have followed that plaintiffs would have had to file their proof of debt and one could not possibly speculate on the dividend that could be available for distribution *pari passu* among the unsecured creditors. It could well have been either a re-entry by the JTC or the payment of the secured mortgagee, OCBC, and other charges such as the JTC rental arrears and the property taxes. It was not demonstrated before me whether Wiseco could get any surplus for *pari passu* distribution among their creditors after the payments of these priority claims. In the case of a JTC re-entry, Wiseco would end up with nothing but the un-discharged liabilities still remained. If nothing was done, the rights and interests of Wiseco in the property might well have been nil. I entirely accept that Mr Ong tried to secure buyers of the rights and interests of Wiseco, including the plaintiffs through his conversations with Mr Tay, but he could not get any party interested except his brother, Mr Ong Kway Kiau who had the financial means and who, through his ties of kinship with Mr Ong, had the added emotional incentive to jump in and salvage what could be salvaged. There was not a shred of evidence to suggest that Mr Ong Kway Kiau was standing in for Mr Ong, as one question in cross had suggested. The question was impermissible as this important allegation was not pleaded.

26 On this analysis of the very limited options available to both Mr Ong and Mr Ong Kway Kiau, it is in my view predictable that VS Integrated would be a convenient vehicle to take the assignment and for fresh banking facilities and injection of capital to continue with and complete the warehouse project. After all, Mr Ong Kway Kiau invested a substantial sum and undertook the burden of the joint and several guarantee in favour of the UOB.

27 On the evidence, I accept Mr Ong's evidence that he did not deceive Mr Tay in the ways and by the misrepresentations as alleged. The plaintiffs took a decision not to wind up Wiseco. Through their solicitors they made many demands but they did not take effective steps to stop the assignment by winding up Wiseco before the Deed of Assignment was executed. I also find on the defence evidence that the allegations of conversion of the plaintiffs' materials and equipment were not proven.

Conclusion

28 Accordingly, the claims of the plaintiffs are dismissed with costs.

Sgd:

Lai Kew Chai
Judge