Allergan, Inc and another *v* Ferlandz Nutra Pte Ltd [2015] SGHC 5

Case Number : Suit No 34 of 2013 (Summons No 5175 of 2014)

Decision Date : 13 January 2015

Tribunal/Court : High Court

Coram : George Wei JC

Counsel Name(s) : Alban Kang Choon Hwee and Oh Pin-Ping (ATMD Bird & Bird LLP) for the plaintiffs; The defendant in person.

Parties : Allergan, Inc and another — Ferlandz Nutra Pte Ltd

Civil Procedure – Representation of companies – Order 1 rule 9

13 January 2015 Judgment reserved.

George Wei JC:

Introduction

1 This is an application by the defendant for leave under O 1 r 9(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the Rules of Court") for its officer, Mr Lee Boon Guan ("Mr Lee") (who is the sole director and shareholder of the defendant), to act on the defendant's behalf in Suit No 34 of 2013 ("the Suit"). This application raises two main issues. First, whether the procedural requirements for an O 1 r 9(2) application have been complied with; and second, whether the court should exercise its discretion to grant leave for Mr Lee to act on behalf of the defendant in the Suit.

2 The Suit concerns an action against the defendant for trade mark infringement, passing off and injurious falsehood. The first plaintiff is an American pharmaceuticals corporation. It manufactures an eyelash-growth product that is used to treat a medical condition known as hypotrichosis, which causes inadequate hair growth. The product is marketed under the LATISSE trademark. The LATISSE trademark is registered in Singapore under the Trade Marks Act (Cap 332, 2005 Rev Ed) ("the TMA") in Class 5 in respect of "pharmaceutical preparations used to treat eyelashes". The first plaintiff is the registered proprietor of the trade mark. The second plaintiff is a subsidiary of the first plaintiff and the distributor of the product in Singapore. The plaintiffs claim to have been using the LATISSE trademark in Singapore since January 2011.

3 The defendant is a limited exempt private company incorporated in Singapore carrying on the business of distributing "cosmeticeutical and neutraceutical" products. One of the defendant's products is an eyelash-growth product distributed under the LASSEZ trade mark.

4 The plaintiffs claim that the defendant's product under the LASSEZ trade mark infringes the registered LATISSE trade mark and also amounts to passing off. The claim for injurious falsehood against the defendant arises in connection with the defendant's alleged distribution of a letter from the United States Food and Drug Administration ("the FDA"). The letter is said to create the impression that the plaintiffs' product was considered risky, hazardous and unsafe. The plaintiffs' position is that the issue over safety had long been resolved with the FDA, and that the product is the only FDA-approved product for the treatment of hypotrichosis.

5 The defendant denies registered trade mark infringement and passing off on the basis, amongst others, that the plaintiffs' trade mark and the alleged offending trade mark are dissimilar and conceptually different. The defendant has also raised certain statutory defences to registered trade mark infringement, connected with alleged fair use and comparative advertising. The defendant also denies the existence of any injurious association, dilution or tarnishment of the plaintiffs' trade mark. In the case of the claim for injurious falsehood, the defendant denies distribution of the FDA letter and the alleged injurious meaning. The defendant has also counterclaimed against the plaintiffs for making a groundless threat of suit for trade mark infringement under s 35 of the TMA.

The application before the court

6 The writ in the Suit was issued on 14 January 2013 with an endorsed statement of claim. The defence and counterclaim was filed on 6 February 2013. Prior to the present application under O 1 r 9(2) of the Rules of Court, there have been various interlocutory matters, and the parties had already filed their affidavits of evidence-in-chief in preparation for the trial which was fixed for end-November 2014.

7 The pleadings, affidavits of evidence-in-chief and interlocutory matters were filed or conducted by the defendant's former solicitors. These solicitors discharged themselves from acting for the defendant on 22 August 2014.

8 After the defendant's solicitors discharged themselves, the defendant filed Summons No 5175 of 2014, seeking leave under O 1 r 9(2) of the Rules of Court for Mr Lee to act on behalf of the defendant in the Suit. Mr Lee swore an affidavit in support of the application dated 8 October 2014 ("the First Affidavit").

9 The First Affidavit stated that Mr Lee was a director of the defendant and that he was duly authorised to make the affidavit on behalf of the defendant. The affidavit also stated that Mr Lee was authorised to make an affidavit in support of the application for him to represent the defendant in the Suit. The First Affidavit did not, however, state *why* leave should be granted for Mr Lee to represent the defendant. The only relevant exhibit was a copy of an Accounting and Corporate Regulatory Authority ("ACRA") report dated 14 September 2014 ("the ACRA Report"). [note: 1] The ACRA Report stated that the defendant had an issued share capital of 5,000 shares, and that Mr Lee was the sole shareholder and the only named director. The corporate secretary was named as Goh Bee Kwan. The rest of the First Affidavit set out various allegations relating to the merits of the plaintiffs' claim in the Suit, which were of little or no relevance to the O 1 r 9(2) application.

10 I first heard the application in chambers on 27 October 2014. I adjourned the hearing to enable the defendant to file a further affidavit in support of the O 1 r 9(2) application that complied with the requirements set out in O 1 r 9(4) of the Rules of Court. I will examine these requirements in further detail below. It is sufficient to state at this juncture that the First Affidavit did not set out any reasons why Mr Lee should be allowed to act on behalf of the defendant. The First Affidavit was also sworn by Mr Lee, the very person for whom leave was sought by the defendant under O 1 r 9(2) of the Rules of Court.

11 On 31 October 2014, a further affidavit in support of the defendant's O 1 r 9(2) application ("the Second Affidavit") was affirmed and filed by Ms Lee Lay Hong ("Ms Lee"). The Second Affidavit stated that Ms Lee was the corporate secretary of the defendant, and that she was authorised to make the affidavit on behalf of the defendant.

12 The Second Affidavit was brief. It stated that Mr Lee was the sole director and business

manager of the defendant since its incorporation in 2005. He had vast experience working in pharmaceutical companies and he had the necessary knowledge to act on behalf of the defendant in the Suit. The Second Affidavit also stated that the defendant had depleted its financial resources due to heavy legal expenses. The time spent on the proceedings was said to have affected the defendant's business operations and revenue.

13 The Second Affidavit referred to an exhibit that was purportedly a copy of the defendant's financial statement. [note: 2] The exhibit, however, was not a financial statement as such. It was a bank statement for a bank account maintained by the defendant with United Overseas Bank ("UOB"). The bank statement indicated that the defendant held only $3,420.40 in its UOB account as at 31 August 2014. [note: 3] There was no other information about the defendant's financial position. There was also no other information about when Ms Lee had been appointed as the defendant's corporate secretary. The only other information available on affidavit was Ms Lee's address, which was stated to be the same as that of Mr Lee. Indeed, it will be recalled that in the ACRA Report referred to above at [9], the defendant's corporate secretary was named as Goh Bee Kwan.

14 On 10 November 2014, the hearing resumed before me in chambers. After brief submissions, the hearing was again adjourned to provide the defendant with another opportunity to file an affidavit to explain Ms Lee's position as the corporate secretary of the defendant, and to provide evidence of the defendant's impecuniosity and reasons for the application.

15 On 14 November 2014, Mr Lee filed a supplemental affidavit in support of the application ("the Third Affidavit"). The Third Affidavit stated that Ms Lee was appointed as the corporate secretary of the defendant on 1 November 2014. A copy of her appointment letter was exhibited under the defendant's letterhead and signed by Mr Lee. [note: 4]

16 The Third Affidavit also asserted that the defendant had depleted its financial resources due to the incurrence of heavy legal expenses. It exhibited interim bills and discharge requests from the defendant's former solicitors. [note: 5] Some of the correspondence from the defendant's former solicitors to the defendant was heavily redacted. The Third Affidavit did not, however, exhibit any letter or correspondence in response from the defendant. In particular, there was no communication explaining why the defendant was not putting its former solicitors into funds; whether it was due to a lack of funds or other reasons.

17 Much of the Third Affidavit dealt with matters irrelevant to the application before me. These included issues concerning witnesses and the discovery of documents. At the second hearing, Mr Lee was keen to raise issues concerning the conduct of the plaintiffs' counsel in respect of the disclosure of some documents. Those allegations had no relevance to the issues before me.

18 The plaintiffs have maintained a neutral position in the defendant's O 1 r 9(2) application. While they did not object in principle to the application, counsel for the plaintiffs nevertheless pointed out that the affidavits filed in support of the O 1 r 9(2) application were non-compliant with the Rules of Court.

19 Although the application was not opposed, the decision of whether to grant leave under O 1 r 9(2) of the Rules of Court lies with the court. It therefore does not follow that leave will be granted as a matter of course when parties consent. In view of the novelty of O 1 r 9(2), and the absence of local authorities on the applicable principles, on 17 November 2014, I directed that the trial dates which had been fixed for end-November 2014 were to be vacated pending my decision on the application.

20 On 24 November 2014, the High Court handed down judgment in *Bulk Trading SA v Pevensey Pte Ltd and another* [2014] SGHC 236 ("*Bulk Trading*"). *Bulk Trading*, a decision of Steven Chong J, addressed the principles applicable to an O 1 r 9(2) application *in extenso*. Because of the importance and relevance of *Bulk Trading*, I invited parties to file further submissions to address *Bulk Trading* if they desired.

21 Solicitors for the plaintiffs wrote in to the Supreme Court Registry by a letter dated 17 December 2014, stating that they were in full agreement with Chong J's judgment in *Bulk Trading*. Mr Lee wrote in by email on 18 December 2014 raising issues relating to the corporate ownership of the plaintiffs. Those issues are not relevant, and will not be mentioned further.

Whether the procedural requirements of the defendant's O 1 r 9(2) application have been complied with

22 The starting point for the representation of companies in legal proceedings is O 5 r 6(2) of the Rules of Court. It provides that a company must be represented by a solicitor in legal proceedings. This rule is expressly subject to O 1 r 9(2) of the Rules of Court which, pursuant to some recent amendments which will be discussed further below, provides that the court may on application by a company, give leave for an officer of the company to act on the company's behalf in any matter or proceeding. Order 1 r 9(2) as amended applies to any matter or proceeding whether or not it was commenced on or after 1 May 2014. It therefore applies to the present case.

23 Section 33(1) of the Legal Profession Act (Cap 161, 2009 Rev Ed) ("the LPA") is also relevant. Section 33(1) provides that any unauthorized person who acts as an advocate and solicitor and defends any action is guilty of an offence. The exceptions are set out in s 34 of the LPA. The exception in s 34(1)(*ea*) of the LPA is where an officer of a company has been authorised to act in accordance with the Rules of Court. The circle is completed by O 1 r 9(2) of the Rules of Court, which expressly provides that it applies to s 34(1)(*ea*).

24 Order 1 r 9(4) of the Rules of Court sets out the procedural requirements for an affidavit filed in support of an application under O 1 r 9(2) of the Rules of Court. The affidavit is required to:

(a) State the position or office in the company held by the officer, the date on and manner by which he was authorised to act, and *the reasons why leave should be given for him to act on behalf of the company* in that matter or proceeding.

(b) Exhibit copies of any document of the company by which the officer was authorised to act on behalf of the company.

(c) Be *made by any other officer of the company*.

An "officer" of the company is defined in O 1 r 9(6) of the Rules of Court as any director or secretary of the company or a person employed in an executive capacity by the company.

25 Order 1 r 9(4)(*c*) of the Rules of Court requires the affidavit in support of the O 1 r 9(2) application to be made by "any *other* officer of the company" [emphasis added]. The reason for this requirement is clear. It is a procedural safeguard which ensures that the company has indeed given its authorisation to that officer for whom leave is sought to represent it in the proceedings. It prevents an officer from making a self-serving affidavit in support of an application seeking leave for himself to act on behalf of the company. Chong J observed in *Bulk Trading* at [91] that the "requirement is to ensure that the application is made objectively with the authority of the company".

Since Mr Lee was the sole director of the defendant, it would follow that the affidavit in support of the application had to be sworn by a secretary of the defendant or some other person employed by the defendant in an executive capacity.

26 In *Bulk Trading*, two affidavits were filed by S (a director) in support of the company's application for leave to be granted to S to act for the company. The first affidavit exhibited a warrant to act from the company. The second affidavit exhibited, amongst others, the company's memorandum and articles of association. While Chong J recognised that the affidavits were not strictly in compliance with O 1 r 9(4)(*c*) of the Rules of Court, he reasoned that the non-compliance was not fatal. A warrant to act had been exhibited. The only other officer of the company was a nominee director from a firm providing corporate secretarial services. S was also the sole shareholder of the company. Looking at the affidavits as a whole, Chong J accepted that the company had objectively consented to the application.

27 In the present case, Mr Lee is the sole director and sole shareholder of the defendant. The First Affidavit is, in my view, not in compliance with O 1 r 9(4)(*c*). It was made by Mr Lee himself, the person for whom leave was being sought to act on behalf of the defendant.

28 The Second Affidavit was filed by Ms Lee in her capacity as the corporate secretary of the company. This was followed by the Third Affidavit by Mr Lee exhibiting a letter appointing Ms Lee as the corporate secretary. I am therefore satisfied that the initial non-compliance with the Rules of Court had been rectified. Ms Lee on the face of it is an officer of the company and is entitled to make the further supporting affidavit. Given that Mr Lee is the sole director and sole shareholder, I am also satisfied that the underlying rationale for the requirement (of an affidavit by another officer) has been met on the present facts.

Whether the court should exercise its discretion to grant leave for Mr Lee to act on behalf of the defendant in the Suit

29 Order 1 r 9(2) of the Rules of Court provides that leave may be granted if the court is satisfied that: (a) the officer has been duly authorised by the company; and (b) it is appropriate to give leave in the circumstances of the case. The first requirement is undoubtedly satisfied and the only concern is whether it is appropriate to give leave in the circumstances. Based on the three affidavits filed by the defendant in support of its O 1 r 9(2) application, it appears that the only reason given by the defendant for its seeking leave is its financial impecuniosity.

30 I mentioned above that *Bulk Trading* has addressed the factors to be considered in an O 1 r 9(2) application. I am in broad agreement with the reasoning and decision in *Bulk Trading*. I will nonetheless make a few observations on O 1 r 9(2) in the light of the importance and novelty of the provision.

The position prior to the amendments allowing an officer of the company to act on the company's behalf

31 The current wording found in O 1 r 9(2) of the Rules of Court was introduced in 2011. The 2011 amendments, however, restricted the application of O 1 r 9(2) to proceedings in a District Court or Magistrate's Court. The significance of the recent 2014 amendments is that they extended the application of O 1 r 9(2) to proceedings before the Family Court, the High Court and the Court of Appeal.

32 The leading Singapore decision on an officer acting on behalf of a company prior to the 2011

and 2014 amendments is *Lea Tool and Moulding Industries Pte Ltd (in liquidation) v CGU International Insurance plc (formerly known as Commer Union Assurance Co plc)* [2000] 3 SLR(R) 745 ("*Lea Tool*"). Then, there was no express provision that allowed an officer to act on behalf of a company in legal proceedings. *Lea Tool* nonetheless held that the court had an inherent power in exceptional cases to allow an officer to appear on behalf of a company and to take steps to continue with pending litigation. While such power existed, it flowed from the court's inherent jurisdiction and was only to be exercised in exceptional circumstances. The default position was that a company had to be represented in legal proceedings by a qualified advocate and solicitor.

The position post-amendments

33 Under the new regime, the default position remains the same. A company ordinarily has to be represented in legal proceedings by a qualified advocate and solicitor. The difference is that there is now an express provision, in the form of O 1 r 9(2) of the Rules of Court, which allows the court to grant leave in appropriate cases for an officer of the company to act on its behalf. There is no longer a need to rely on the court's inherent jurisdiction.

34 I am in full agreement with Chong J's conclusion in *Bulk Trading* at [78] that under the new regime, it is not necessary for the company to establish that there are exceptional circumstances justifying the grant of leave. After reviewing the case law and the arguments, Chong J came to the view at [78] that to do so would be to apply an unduly restrictive approach. If the drafters of O 1 r 9(2) intended the exceptional circumstances test as articulated in *Lea Tool* to be the litmus standard, much clearer words, such as "special circumstances" could have been used.

35 What the new provision requires is that the court must be satisfied that it is appropriate to grant leave in the circumstances of the case. In contrast, reliance on inherent jurisdiction, while not circumscribed by rigid criteria or tests, must be exercised judiciously, by reference to the needs of justice. As the Court of Appeal stated in *Wee Soon Kim Anthony v Law Society of Singapore* [2001] 2 SLR(R) 821 at [29], the court's inherent jurisdiction could only be invoked when there was "a need of such a gravity ...". The reason was stated by Andrew Phang J (as he then was) in *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR(R) 117 at [81]:

> … It is commonsensical that [the court's inherent jurisdiction] was not intended to allow the courts *carte blanche* to devise any procedural remedy they think fit. That would be the very antithesis of what [it] is intended to achieve. The key criterion justifying invocation of the [court's inherent jurisdiction] is therefore that of "need" – in order that justice be done and/or that injustice or abuse of process of the court be avoided. …

It is therefore not surprising that stringent safeguards are needed where the power is said to flow from the court's inherent jurisdiction. The position is different where the court is exercising a statutory power conferred on it by the Rules of Court and the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed). In such a case, it is far more helpful to focus on the words of the provision that confers the power on the court. In this case, the question is therefore whether it is "appropriate to give such leave in the circumstances of the case".

36 A more difficult question is the underlying justification for the default rule that a company may only participate in proceedings with legal representation. The justification is important because it shapes the manner and ease with which leave would be granted for an officer to act on behalf of a company in legal proceedings. It will assist in the determination of whether leave is appropriate in the circumstances.

37 Chong J helpfully identified several historical reasons for the restriction on lay representation for companies. These included a concern flowing from the doctrine of limited liability, that those who litigate with a company are in a disadvantageous position as the company may not be able to compensate them and the company's shareholders' assets are not at risk. Chong J observed at [28] that it was therefore in the interests of a corporate litigant's potential creditors and opponents that certain constraints be imposed on the company in litigation, including having to act through lawyers.

38 Chong J, however, doubted the merits of such a view, stating at [28] that "it is not obvious that a company is very different from an individual litigant in this respect". The point made was that if the company was a plaintiff, then the defendant could always ask for security for costs. If the company was a defendant, then the plaintiff had to take his chances that the defendant would not be able to compensate it, just as any other plaintiff does. Chong J therefore commented that it was difficult to see how requiring the company to be legally represented would make a difference. After considering a number of other historical reasons, Chong J concluded at [34] that it was not immediately apparent that the distinction between litigants in person and corporate litigants remains justifiable.

39 Another prevailing view is that the benefits of incorporation are bought at a price. Part of that price is that security for costs can be obtained in some circumstances against a company. Another part of the price is the default rule that a corporation cannot act without legal advisers. This was the view taken by Maria Yuen JA in the decision of the Hong Kong Special Administrative Region ("Hong Kong") Court of Appeal in *Hondon Development Limited and another v Powerise Investments Limited and another* [2003] HKCA 323 ("*Hondon v Powerise*") at [19].

40 In *Hondon v Powerise*, a defendant company sought leave for its corporate director "to begin and carry on an appeal" against a judgment obtained by the plaintiff. The only ground relied on was "the stringent financial condition" which was said to have prevented it from instructing lawyers to launch and pursue the appeal. The Hong Kong Court of Appeal endorsed the policy argument summarised in the preceding paragraph. The practical effect was that lack of financial resources was no longer "per se" a good enough reason for grant of leave. Further, the policy rationale was said, at [20], to be even stronger (protection of creditors) where the corporate defendant has had judgment given against it. Nevertheless, it is noted that the reason why the Hong Kong Court of Appeal revoked the leave was because the corporate defendant had advanced a $12.2m unsecured, interest-free loan to its corporate director with nothing known of the financial viability of the corporate director. In short, the evidence as to the financial condition of the defendant company was very thin, especially so in light of the substantial loan that it had made to its corporate director. While financial constraint may not be enough on its own to justify leave, the absence of sufficient details or proof of the financial constraint was clearly the major reason why leave was not granted.

41 Chong J in *Bulk Trading* disagreed with this approach. He expressed at [60] that this policy rationale, while accepted in Hong Kong, was not "particularly satisfactory". In doing so, Chong J referred back to his earlier comment on the question whether a corporate litigant is to be regarded as different from an individual litigant in this respect. At [28] it was said that if the corporate litigant is a defendant and the corporate cupboard is bare, that is a risk that the plaintiff must take. The position is no different from the case where an individual defendant turns out to be penniless. Nevertheless, even if the default position, that a company is to be represented by lawyers, is no longer to be seen as a restraint imposed as part of the *quid pro quo* for the benefits of incorporation, it may still be a relevant factor in appropriate cases when making the determination as to whether leave should be granted.

42 That said, it bears mention that the present regime in Singapore has not gone so far as to

remove the distinction between litigants in person and corporate litigants altogether. What it has done is to make it unnecessary to rely on the court's inherent power as the source of the discretion in the case of corporate litigants. Even if an affidavit has been filed in accordance with the Rules of Court by another officer of the company, the court must still examine the reasons as to why leave is necessary in order to make a determination as to whether the grant is appropriate on the facts before it. The mere fact that the company wants the officer to represent it in the legal proceedings and the mere fact that the officer agrees and wishes to act for the company in such proceedings is not enough.

43 Turning to the approach that the court should take when faced with an O 1 r 9(2) application, Chong J stated in *Bulk Trading* at [80] that a neutral approach was to be preferred. This statement must be seen in the light of the fact that Singapore has not gone so far as to equalise the position between litigants in person and corporate litigants. The default position remains as before: corporate litigants are to act through lawyers in legal proceedings.

44 Indeed, Chong J recognised at [47] that there were sound reasons for requiring a corporate litigant to first seek the leave of court before being able to represent itself in proceedings. Three reasons advanced in *Winn v Stewart Bros Constructions Pty Ltd* [2012] SASC 150 were cited:

(a) The opposite party may be disadvantaged by the time and cost of the proceeding being extended due to the company not being represented by a legally qualified advocate.

(b) The public interest in the efficient and timely administration of justice may be prejudiced by the time and cost of the proceeding being extended due to the company not being represented by a legally qualified advocate.

(c) The public interest in the fair administration of justice may be prejudiced by the fact that a lay advocate (unlike a legally qualified advocate) does not owe a duty to the court and to the parties in the litigation to ensure that the court is properly informed and not misled.

45 Chong J, with respect, rightly concluded at [48] that if the general prohibition against lay representation had been completely abolished, the balance would be tilted too far in favour of considerations of access to justice while at the same time ignoring the three identified concerns. It follows that while it is no longer the law in Singapore that only exceptional circumstances will justify the grant of leave, the court in taking a "neutral approach" must still assess the reasons for leave in the light of the reasons as to why the default rule exists in the first place. It is for the applicant to demonstrate that the circumstances are appropriate for the grant of leave: appropriate as measured against the reason why the default rule exists.

46 The question whether leave should be granted involves an exercise of discretion. The court must look at all the circumstances, not just the reason relied on by the applicant company. The court is bound to consider the matter from the perspective of all the parties as well as the public interest in the fair, efficient and timely administration of justice. It follows that the reason relied upon must be evaluated on its own merit and also balanced against the circumstances as a whole.

47 Take for example the English decision in *Tracto Teknik GMBH and another v LKL International Pty Ltd and others* [2003] 2 BCLC 519 ("*Tracto*"). The case involved a claim for patent infringement against six defendants. The first defendant was the supplier of the infringing articles and the second defendant was the distributor. The fourth to sixth defendants were members of another group of companies. The question was whether a full-time employee should be allowed to represent all the defendants. It was clear that the first and second defendants were in a poor financial state. The

fourth to sixth defendants on the other hand were financially healthy but were unwilling to pay the costs of litigation. The English High Court granted leave for the employee to represent the first and second defendants since the employee was closely connected to them. Leave was refused in the case of the fourth to sixth defendants. Not only were they financially capable of representing themselves, the employee for whom leave was sought owed no duties to the fourth to sixth defendants.

48 At the time *Tracto* was decided, the English rules of civil procedure had already been amended to allow permission to be granted to an employee to represent the company without an express requirement for exceptional circumstances. Nevertheless, the English High Court in granting leave to the first and second defendants took into account a range of considerations (aside from financial constraint) at [12] : (a) the complexity of the issues, (b) the layperson's experience, (c) the position of the companies which he sought to represent (the position when the companies were *in extremis* may be different from cases when they are not), (d) the amount of work necessary and the layperson's ability to do that work, and (e) whether the layperson appeared in principle capable of understanding and discharging any obligations of disclosure. This was so notwithstanding that the amendments to the English Civil Procedure Rules resulted in a "complete reversal" (per Chong J in *Bulk Trading* at [55]) of the default position.

49 Leave was granted in *Tracto* since the employee was closely connected to the first and second defendants. Further, there was no doubt these companies were in a poor financial position: indeed one balance sheet of "some antiquity" (see [2]) indicated that the second defendant was balance sheet insolvent. The position was quite different in the case of the other defendants. Not only were they financially sound (as indicated by the annual returns produced), they raised independent issues of joint tortfeasance and innocent infringement. Those matters were said to give rise to complex issues of disclosure. The employee for whom leave was sought had merely been employed for £1 a year to provide legal advice. No duties were owed under any contract of employment. The employee in question was closely connected with the first and second defendants and the burden placed upon him in representing these companies was such that he was in no position to represent the other defendants as well.

50 Given that financial constraint will likely be at least a major plank behind the application for leave, it behoves the applicant to provide a sufficient basis for the court to make an informed decision on the degree of the financial constraint. As was said by Pumfrey J in *Tracto* case: there is a difference when a company is *in extremis*, at death's door, and when it is not. In the *Tracto* case, the annual returns indicated that the fourth to sixth defendants were financially sound. On the other hand, the last return of the second defendant indicated that it was balance sheet insolvent. On the evidence such as it was, Pumfrey J had no doubt that the first and second defendants were in a poor financial state.

51 While there may be a range of reasons behind a company's application for leave, it seems probable that in most cases it will be related to or at least include financial impecuniosity. After all, proof of financial constraint or impecuniosity appears to be, if not essential, at least an important, albeit not necessarily always sufficient, condition. Financial impecuniosity, however, is a broad concept. At one end of the spectrum, the company may be facing temporary cash flow problems, but is otherwise financially stable. At the other end of the spectrum, the company may be close to insolvency *in extremis*.

52 It stands to reason that where financial impecuniosity is the sole or main reason for the application, the court must take account of the extent of the financial constraints on the company and the ability of the company to engage counsel. Even where the court is satisfied that the

company is facing financial difficulties such as to impede its ability to engage counsel, the court must still have regard to all other relevant factors in deciding whether it is appropriate to grant leave.

53 Apart from financial impecuniosity, Chong J in *Bulk Trading* identified a range of factors relevant to the exercise of the court's discretion pursuant to O 1 r 9(2). The list is not exhaustive and includes:

(a) whether the application for leave has been properly made pursuant to the Rules of Court;

(b) the financial position of the corporate applicant and/or its shareholders;

(c) the *bona fides* of the application;

(d) the role of the company in the proceedings;

(e) the structure of the company;

(f) the complexity of the factual and legal issues;

(g) the merits of the company's case;

(h) the amount of the claim;

(i) the competence and creditability of the proposed representative; and

(j) the stage of the proceedings.

54 It is not necessary to set out in detail Chong J's exposition rendered on each of the above factors. Instead, I will confine myself to a brief discussion of some of the factors which I find to be especially relevant on the present facts.

Analysis of the factors relevant to the present application

The financial position of the defendant

55 The three affidavits which were filed in support of the defendant's O 1 r 9(2) application reveal that this is the sole basis of the defendant's application for leave.

56 The First Affidavit does not set out any explanation as to why the defendant is unable to obtain legal representation. Indeed, it offers no reasons at all why leave should be granted. The First Affidavit is confusing and appears to be a strenuous, if somewhat garbled, denial of the merits of the plaintiffs' claim for trade mark infringement, passing off and injurious falsehood.

57 The Second Affidavit which was made by Ms Lee makes a bare statement that Mr Lee has vast experience in pharmaceutical companies and therefore the necessary knowledge to act for the defendant. It also asserts, without any supporting documents, that the defendant's financial resources have been depleted by heavy legal expenses. The only exhibit is the UOB bank statement referred to at [13] above.

58 The Third Affidavit which was made by Mr Lee repeats that the defendant has depleted its financial resources and exhibits several letters from the defendant's former solicitors requesting payment of fee deposits. There are no audited financial statements or other evidence supporting the

claim that the defendant's resources have been depleted. Indeed the letters from the defendant's solicitors to the defendant merely showed that the defendant had not been paying its bills timeously. There was nothing in the letters exhibited that suggests the *reason* for these lapses was the dire financial straits that the defendant was purportedly in.

59 In these circumstances, I am left with what is essentially a bare assertion that the defendant's financial resources are so heavily depleted in meeting their previous legal expenses that it is unable to engage further legal representation. I recognise that the exhibits support the view that a fair amount of work and time had been spent in preparing the matter for trial by the defendant's former solicitors. In a letter dated 24 July 2014 that Mr Lee heavily redacted, the defendant's former solicitors requested a further deposit of $120,000. The letter made reference to the effort of the law firm to accommodate the defendant's cash flow and referred briefly to the flexibility already exercised on provision of fee deposits.

60 This is the entirety of the evidence placed before me in the application. On it, I must make my decision of whether to grant leave for Mr Lee to represent the defendant. The only reason in support of the application is the assertion of financial impecuniosity on the part of the defendant. Even that assertion is supported by thin evidence, if any at all. The UOB bank balance does not prove anything about the defendant's overall financial position, its financial commitments and resources. While I accept that the defendant's former solicitors discharged themselves on account of the defendant's failure to provide the requisite fee deposits, I note again that there is very little information as to why this was so. While I do accept that the defendant may have had a problem with cash flow, I am unable to form any broader view on the overall financial state of the defendant.

Whether the application has been properly made pursuant to the Rules of Court

61 The application in the present case was not initially supported by an affidavit from another officer of the defendant company. But the defect was cured when the Second Affidavit was filed by Ms Lee, the defendant's corporate secretary. This is therefore a neutral factor.

The financial position of Mr Lee

62 Leaving aside the financial position of the defendant company, there was no information provided at all on the financial position of Mr Lee, the sole director and shareholder, for whom leave was being sought.

63 In *Bulk Trading*, Chong J observed at [96] that he was reluctant to have regard to the financial status of the shareholders of the company unless the shareholders stood to benefit (as where the company was the claimant) or where a claim to lift the corporate veil was in issue. I agree that where there is a live issue relating to the lifting of the corporate veil, the financial position of the relevant shareholders may be an important consideration. As in *Bulk Trading*, there is no suggestion in the material before me that an attempt will be made to lift the corporate veil. That said, it is clear that the defendant company is wholly-owned by Mr Lee who is the sole director and shareholder. It is also clear that Mr Lee is the sole person responsible for the day-to-day management and operations of the defendant. It follows that Mr Lee has a direct interest in the claim against the defendant. For this reason, I am of the view that the absence of any information from Mr Lee as to his own financial resources is a relevant consideration. It is not conclusive, but in my view it is one of the considerations.

64 Indeed, I note that in *Bulk Trading*, Chong J stated at [103] that the fact that the proposed representative is the sole shareholder or is effectively the embodiment of the company is a relevant

consideration. This suggests that in such cases, the corporate litigant is similar to an individual litigant. But on the other hand, where the director is the *alter ego* of the company, he will also be the main witness for the company. If so, this may militate against the grant of leave. In the present case, it appears that Mr Lee will be the main witness for the defendant. While I accept that Mr Lee is well acquainted with the facts underlying the dispute and the defendant's business, I am of the view that this factor tends against the grant of leave.

The competence of Mr Lee and the complexity of the legal issues

65 The Suit turns on a range of issues in trade mark law, passing off and injurious falsehood. Some of the issues of law engaged are technical, and include the question of similarity and likelihood of confusion, the principles to be applied when comparing trade marks, tarnishment and injury by association, defences based on comparative advertising, malice and injurious falsehood. These are not insignificant issues as is demonstrated by the number of contested trade mark cases involving similar questions in recent years.

66 On the material before me, Mr Lee does not appear to have legal training. He does not stand in the position of, for example, an in-house legal counsel. Further, notwithstanding the clear direction to Mr Lee that an affidavit was required which sets out a proper explanation with supporting material as to why leave was needed and the financial position of the defendant, the Third Affidavit comprised a good deal of irrelevant material on discovery and reports of a private investigator. The Third Affidavit was long on irrelevant material and short on why leave should be granted. While I accept that the letters from the defendant's former solicitors offer some support for the view that the defendant experienced a cash flow problem, there is little else on the defendant's or Mr Lee's financial position. The fact that Mr Lee also appeared to be unsure of the defendant's obligation to appoint a corporate secretary is also a cause for some concern.

67 In making these comments, I agree with Chong J's statement at [112] that although a lay representative will lack familiarity with law and procedure – and that delay and some inconvenience is a natural consequence of allowing litigation to be conducted in person – this does not mean that leave should not be granted. I also recognise that many of the pre-trial preparations such as the pleadings, the affidavits of evidence-in-chief, as well as a few interlocutory applications were made under the carriage of the defendant's former solicitors.

68 Nevertheless, the apparent competence of the lay person to conduct the trial, and to present the case and assist the court is a factor of some relevance bearing in mind all the other circumstances, including the complexity of the matters raised and the stage of the proceedings.

Conclusion

69 In the present case, I am unable to come to any assessment as to the defendant's overall financial ability to engage counsel for the trial. The exhibition of a single bank account as supporting evidence, without more, is unhelpful. There are no audited accounts, no financial statements or tax statements. There is not even a letter from the defendant to its former solicitors as to why the defendant is unable to meet the fee deposits.

70 Financial impecuniosity is the sole reason for the defendant's application. The defendant has not even made out a sufficiently clear case of it. That, coupled with the other factors touched on earlier, lead me to the conclusion that this is not an appropriate case to grant leave. The defendant's application is dismissed. I will hear parties on costs unless an agreement is reached.

71 All that remains is for the court to record its appreciation to learned counsel for the plaintiffs whose written submissions on the applicable legal principles were helpful and framed in a clear and balanced manner.

[note: 1] Lee Boon Guan's affidavit dated 8 October 2014, Exhibit LBG-5.

[note: 2] Lee Lay Hong's affidavit dated 31 October 2014, paragraph 6.

[note: 3] Lee Lay Hong's affidavit dated 31 October 2014, Exhibit LBG-1.

[note: 4] Lee Boon Guan's affidavit dated 14 November 2014, Exhibit LBG-1.

[note: 5] Lee Boon Guan's affidavit dated 14 November 2014, Exhibit LBG-2.

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