Tavica Design Pte Ltd (now known as Crescendas Pte Ltd) *v* Win-Win Aluminium Systems Pte Ltd
[2014] SGHC 85

Case Number : Companies Winding-up No 94 of 2010; Summons No 607 of 2014

Decision Date : 23 April 2014

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : Chin Li Yuen Marina and Kang Zhi Ni (Tan Kok Quan Partnership) for the plaintiff; Irving Choh and Lim Bee Li (Optimus Chambers LLC) for the defendant.

Parties : Tavica Design Pte Ltd (now known as Crescendas Pte Ltd) — Win-Win Aluminium Systems Pte Ltd

Companies – Winding-up

23 April 2014

Tay Yong Kwang J:

Procedural History

1 The Plaintiff is Tavica Design Pte Ltd (now known as Crescendas Ptd Ltd) ("Tavica"). It was the Main Contractor for an industrial building project located at Ubi Avenue 1 ("the project"). The Developer of the project was Excalibur Land (S) Pte Ltd ("Excalibur Land"), a company closely related to Tavica. Excalibur Land and Tavica are managed and controlled by 2 brothers, Michael Leow and Lawrence Leow. The defendant is Win-Win Aluminium Systems Pte Ltd ("Win-Win"). It was engaged as a subcontractor for the design, supply and installation of aluminium cladding, glazing and curtain walls for the building. It is now a dormant company.

2 Win-Win claimed that throughout the course of the project, its claims were underpaid and there were numerous delays from extensive variation works. Win-Win commenced arbitration proceedings against Tavica on 12 February 2001 claiming some $1.813 million from Tavica. In October 2008, Tavica applied to bifurcate the proceedings to deal with some distinct issues. In an attempt to move the proceedings forward, the arbitrator issued directions on 17 October 2008 to bifurcate the proceedings.

3 On 19 May 2009, more than 8 years after the arbitration commenced, an Interim Award on the bifurcated issues was issued in favour of Tavica ("the Interim Award"). [note: 1] The arbitrator attributed the delay to the following reasons:

(a) In the 8 years since the commencement of the arbitration, Win-Win changed solicitors five times, often shortly before the hearing was scheduled to commence and with a request to vacate the hearing dates.

(b) From October 2002 to November 2003, arbitration proceedings were adjourned at Win-Win's request so that parties could have an opportunity to reach a settlement. Then between March 2004 and March 2007, the proceedings were again adjourned at Win-Win's request to give the parties another opportunity to narrow the issues with a view to reaching a settlement.

4 After issuing the Interim Award in favour of Tavica, the arbitrator invited the parties to make submissions on whether there were any reasons why costs should not follow the event. In its submissions dated 30 June 2009, Win-Win argued that the issue of costs should be dealt with at the conclusion of the whole arbitration. [note: 2] The arbitrator was not persuaded by Win-Win's submissions. He issued a Costs Award in favour of Tavica on 30 July 2009 ("the Costs Award"). [note: 3]

5 Win-Win was dissatisfied with the arbitrator's decisions. It filed Originating Summons No 687 of 2009/T and Originating Summons No 940 of 2009/L seeking leave to appeal against the Interim Award and the Costs Award respectively. The applications were dismissed with costs on 2 October 2009 and 30 November 2009 by Judicial Commissioner Quentin Loh (as he then was) and Justice Belinda Ang ("Ang J") respectively. Win-Win persisted in challenging the Costs Award and sought leave to appeal against Ang J's order. On 10 February 2010, Ang J dismissed with costs Win-Win's application for leave to file an appeal. On 19 February 2010, Win-Win filed an application to the Court of Appeal for leave to appeal against Ang J's order. On 31 March 2010, Win-Win gave notice to withdraw this application. The Court of Appeal ordered costs against Win-Win.

6 With the Costs Award upheld, Tavica proceeded to tax a bill of costs in the High Court on 6 April 2010 and was awarded S$240,650.95 ("the Debt"). Win-Win sought a review of the taxation. Its application for a review was dismissed with costs by Judicial Commissioner Philip Pillai (as he then was) on 6 May 2010.

7 On 7 April 2010, Tavica served a statutory demand on Win-Win demanding payment of the Debt. Win-Win did not make any payment. On 4 June 2010, Tavica filed Companies Winding-up No 94 of 2010/D seeking to wind-up Win-Win ("the Winding-up Application").

8 On 4 August 2010, Win-Win filed Originating Summons No 803 of 2010/N pursuant to section 210 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Companies Act") seeking an order to convene a meeting of creditors for the purposes of considering and approving, with or without modifications, a proposed scheme of arrangement ("Scheme Application"). It also sought a consequential order that "all present, pending or contingent actions or proceedings at the date of the order made herein, including but not limited to winding up proceedings…be restrained or stayed except with leave of court". I heard the Scheme Application on 17 August 2010 and ordered the Scheme Application to be adjourned to be heard together with the Winding-up Application subject to the condition that Win-Win provide security to the satisfaction of Tavica or pay Tavica the amount in issue in the Winding-up Application. [note: 4] Win-Win appealed against this condition but subsequently allowed the appeal to be deemed withdrawn. [note: 5]

9 The Scheme Application was scheduled to be heard together with the Winding-up Application on 23 February 2011. At the said hearing, Win-Win withdrew the Scheme Application. It was ordered to pay costs. At the same hearing, Win-Win sought an adjournment of the Winding-up Application pending the outcome of Suit No 13 of 2006/E (which was subsequently transferred to the then Subordinate Courts as DC Suit No 829 of 2011/X) ("DC Suit 829") and the outcome of Civil Appeal No 57 of 2010/Y ("CA 57/2010"). In DC Suit 829, Win-Win sued Loh Kum Yin (also known as William Loh ("Loh")), its ex-general manager, for breach of fiduciary duties relating to a matter that was closely related to the bifurcated issues determined by the arbitrator. CA 57/2010 involved an appeal by Win-Win against a judgment entered without trial on 17 March 2010 by Excalibur Land against Win-Win and Leck Kim Koon (a director and the main shareholder of Win-Win who stood as guarantor for amounts due from Win-Win to Excalibur under a sale and purchase agreement) in Suit No 538 of 2001

("Suit 538"). In that suit, Justice Kan Ting Chiu ("Kan J") accepted the findings of fact of the arbitrator in the Interim Award and gave judgment for Excalibur Land. Win-Win's position was that the judgment should be set aside and a trial ordered.

10 Win-Win argued that the outcome of DC Suit 829 would have an impact on the Interim Award and hence an impact on the Winding-up Application. It argued that Loh had committed perjury in his affidavit dated 6 November 2001 that he filed in Suit 538. Win-Win argued that the perjury became evident after Loh filed an affidavit dated 24 January 2007 in DC Suit 829 which contradicted his earlier position. Win-Win further alleged that the affidavits filed by Lawrence Leow and Michael Leow in Suit 538, both dated 12 November 2001, were based on Loh's affidavit and repeated *verbatim* the paragraph where Loh allegedly perjured. Win-Win pointed out that the affidavits that Lawrence Leow and Michael Leow filed in the arbitration proceedings were premised on the affidavits that they had filed in Suit 538 and hence also contained false evidence. Win-Win highlighted that the arbitrator referred to these affidavits in coming to his decision concerning the bifurcated issues. Win-Win maintained that DC Suit 829 would expose Loh's perjury which would then form a basis to set aside the Interim Award and the Costs Award. Win-Win also argued that if it was wound-up, its appeal in CA 57/2010 on the ground, among others, that judgement should not have been entered without trial because Excalibur Land had relied on perjured evidence in Suit 538 would be stymied. Therefore it sought an adjournment of the Winding-up Application pending the outcome of DC Suit 829 as well as CA 57/2010.

11 I ordered the Winding-up Application to be adjourned pending the outcome of DC Suit 829. On 1 June 2011, the Court ordered that the Winding-up Application be stayed pending the outcome of DC Suit 829 as well as CA 57/2010. [note: 6]

12 On 28 July 2011, CA 57/2010 was allowed. Kan J's judgment was set aside and the case proceeded to trial. On 18 May 2012, Win-Win's claim against William Loh in DC Suit 829 was dismissed. Win-Win filed a Notice of Appeal on 25 May 2012. [note: 7]

13 In a letter to the Court dated 10 September 2012, Tavica's solicitors requested that the Winding-up Application be heard notwithstanding the Notice of Appeal filed against the decision in DC Suit 829. [note: 8] By a letter dated 13 September 2012, the Court fixed the hearing of the Winding-up Application for 9 October 2012. However, Win-Win's solicitors wrote to the Court in a letter dated 27 September 2012 requesting the Winding-up Application to be adjourned again pending the outcome of the appeal in DC Suit 829 (eventually, Win-Win did not proceed with this appeal) and the outcome of Suit 538. [note: 9] By a letter dated 2 October 2012, the Court adjourned the Winding-up Application to be heard after the trial in Suit 538 was disposed of. [note: 10]

14 The trial in Suit 538 was conducted over a number of days in October to December 2012 before Justice Lai Siu Chiu ("Lai J"). Win-Win called Loh as a witness. The issue of the inconsistency in Loh's affidavits was canvassed before Lai J. Judgment was delivered on 22 May 2013. Excalibur's claim against Win-Win and Leck Kim Koon was allowed. In her judgment, Lai J noted that on cross-examination by counsel for Excalibur Land, Loh stated that the first affidavit that he filed in that suit wherein he had allegedly perjured was "correct" and that it "did not differ much from his affidavit filed in [DC Suit 829]": *Excalibur Land (S) Pte Ltd v Win-Win Aluminium Systems Pte Ltd and another* [2013] SGHC 112 at [85]. The Judge observed that Loh came across as "truthful and candid" (at [124]) and that based on the principle in *Browne v Dunn* (1893) 6 R 67, the evidence Loh had given in cross-examination remained intact because he had not been re-examined by Win-Win's counsel (at [127]). Notwithstanding the allegations that Tavica had relied on false evidence in the arbitration proceedings, Lai J also held that Win-Win was bound by Interim Award (at [121]). In essence it

appears that Lai J accepted Loh's position that he had not given contradictory evidence in the two proceedings.

15 Win-Win filed Civil Appeal No 62 of 2013 ("CA 62/2013") against Lai J's judgment. One of its grounds of appeal was that Lai J should not have relied on Loh's testimony because it was tainted by perjury. Win-Win further argued that Lai J should not have relied on the arbitrator's findings of fact in the Interim Award since that decision was procured through perjury as well.

16 In the interim, Win-Win's solicitors wrote a letter dated 3 June 2013 to the Court requesting yet another adjournment of the Winding-up Application pending the outcome of CA 62/2013. [note: 11] The court acceded to the request on 18 June 2013. [note: 12]

17 On 29 November 2013, the appeal against Lai J's judgment was dismissed with costs. No written judgment was issued by the Court of Appeal. Tavica's solicitors then wrote to the Court on 3 December 2013 to restore the Winding-up Application. The hearing was fixed for 29 January 2014 [note: 13] and subsequently re-fixed for 7 February 2014 [note: 14]. On 29 January 2014, Win-Win filed Originating Summons No 87 of 2014 ("OS 87/2014") seeking to have the Interim Award "set aside pursuant to Section 48(1)(a)(vi) of the Arbitration Act (Cap 10) on the grounds that the Interim Award was induced and/or affected by fraud".

18 On 3 February 2014, Win-Win changed its solicitors. [note: 15] Win-Win's newly appointed solicitors wrote to the Court on 3 and 4 February 2014 seeking another adjournment of the Winding-up Application on the grounds that they were seeking in OS 87/2014 to set aside the Interim Award that formed the basis of the Winding-up Application and that they had just been instructed on the matter and needed time to study the matter. [note: 16] The Court responded on 4 February 2014 refusing to accede to Win-Win's request. [note: 17] On the same day, Win-Win filed Summons No 607 of 2014 (Sum 607/2014) to stay the Winding-up Application pending the hearing of OS 87/2014.

19 The Winding-up Application and Sum 607/2014 came before me on 7 February 2014. Win-Win's solicitors requested another adjournment. I granted a two-week adjournment as a final indulgence to Win-Win's newly appointed solicitors.

20 On 21 February 2014, I heard the parties on the merits of the Winding-up Application and Sum 607/2014. I dismissed Sum 607/2014 and granted the orders sought in the Winding-up Application.

Parties' Submissions

21 Tavica argued that the Court should exercise its discretion pursuant to section 254(1)(e) of the Companies Act to wind-up Win-Win. It argued that Win-Win had exhausted all avenues of avoiding and challenging the Debt. [note: 18] It pointed out that Win-Win is presumed insolvent under section 254(2)(a) of the Companies Act (Cap 50, Rev Ed 2006) because it had neglected to pay the Debt or to secure or compound for it to the reasonable satisfaction of Tavica after being served the Statutory Demand on 7 April 2010. [note: 19] Tavica acknowledged that the Court had the discretion not to order winding-up. [note: 20] However, it argued that Win-Win should be wound-up because it was a dormant company and no prejudice would be caused by the winding-up order. [note: 21] Additionally, since Win-Win was dormant, there was no other way that Tavica could enforce payment of the Debt. [note: 22]

22 Win-Win argued that the Winding-up Application should be stayed because the Debt was disputed on substantial grounds. It argued that the Interim Award that formed the basis of the Debt was "induced and/or affected by fraud" (*ie* the alleged perjury of Loh). [note: 23] It contended that this raised triable issues of fact and that it would not be possible to determine these issues on affidavit evidence alone without cross-examination. It pointed out that it had commenced OS 87/2014 in order to challenge the Interim Award. [note: 24] It contended that given the circumstances, the Winding-up Application was in fact an attempt to enforce payment of a disputed debt which amounted to an abuse of the process of the court. [note: 25] Therefore it argued that the Winding-up Application should be stayed.

The Court's Decision

23 The issue of the alleged perjury by Loh, which forms the basis for Win-Win's allegation that the Debt is disputed, has been ventilated thoroughly in the trial in Suit 538 and in the subsequent appeal against Lai J's decision. It was alleged at trial that Loh had committed perjury in his affidavit dated 6 November 2001 that he filed in Suit 538. Win-Win had argued that the evidence that he gave in DC Suit 829 contradicted his earlier evidence and that this showed that he had falsified his earlier evidence (that purportedly formed the basis for the arbitrator's Interim Award). Win-Win had also argued that the Interim Award was therefore procured through perjury. However, as mentioned at [14] above, Lai J accepted Loh's testimony that the evidence that he had given in the two proceedings was not contradictory and she also held that Win-Win was bound by the Interim Award. Win-Win's appeal against Lai J's decision on the ground that she should not have relied on Loh's testimony because it was tainted with perjury as well as the contention that she should not have relied on the arbitrator's findings of fact in the Interim Award since that decision was equally procured through perjury has already been dismissed. Therefore it is clear that Win-Win has been unsuccessful in its allegations that Loh committed perjury. This issue is now *res judicata* and Win-Win is precluded from raising it again, even though it is now being raised against a different party (that is, Tavica instead of Excalibur Land).

24 In *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453, the Court observed:

> (a) The umbrella doctrine of *res judicata* encompasses three conceptually different though interrelated principles:
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> (i) Cause of action estoppel which prevents a party from asserting or denying as against the other party, the existence of a particular cause of action, the non-existence or existence of which had been determined by a court of competent jurisdiction in previous litigation between the same parties: at [17]
>
> (ii) Issue estoppel which prevents a party from inviting further consideration of an issue that had been determined as an essential step in the reasoning of a previous decision. To establish issue estoppel, there must be a final and conclusive judgment on merits from a court of competent jurisdiction; there must be identity between the parties to the two actions that are being compared; and there must be an identity of subject matter in the two proceedings: at [18] and [26]
>
> (iii) Defence of abuse of process (also known as the extended doctrine of *res judicata*) which does not operate as an absolute bar to re-litigation but rather when it is invoked, requires the court to draw the balance between the competing claims of one party to put his case before the court and of the other not to be unjustly hounded given the earlier history

of the matter. A party can rely on the abuse of process defence even when the parties involved in the proceedings are not identical: at [19] to [24]

(b) Where the issue had in fact been directly covered by the earlier decision, it would be caught either by cause of action estoppel or issue estoppel. As one moves further away from what was directly covered by the earlier decision, then the defence of abuse of process is the relevant doctrine rather than issue estoppel. Thus where the issue ought to have been raised and was not, it could nonetheless amount to an abuse of process subsequently to litigate that same issue: at [41]

(c) Whether there was an abuse of process depended on all the circumstances of the case, including: (a) whether the later proceedings in substance was nothing more than a collateral attack upon the previous decision; (b) whether there was fresh evidence that warranted re-litigation; (c) whether there were *bona fide* reasons why an issue that ought to have been raised in the earlier action was not; and (d) whether there were some other special circumstances that justified allowing the case to proceed: at [53].

As noted by the Court in the above case, the extended doctrine of *res judicata* has been accepted by the Court of Appeal in *Lee Hiok Tng v Lee Hiok Tng* [2001] 1 SLR(R) 771 and in *Lai Swee Lin Linda v AG* [2006] 2 SLR(R) 565.

25 The extended doctrine of *res judicata* was recently applied by Justice Vinodh Coomaraswamy in *Then Khek Koon and another v Arjun Permanand Samtani and another and other suits* [2014] 1 SLR 245. The Judge said (at [99] to [100]):

99 The extended doctrine of *res judicata* precludes, as an abuse of process, a party from pursuing a claim or a defence for the purpose of mounting a collateral attack upon a final decision made by a court of competent jurisdiction in earlier proceedings when that party had the full opportunity to contest the decision in the earlier proceedings…

100 The extended doctrine of *res judicata* does not require that the parties to both suits be the same. That must be so: the whole point of the extended doctrine of *res judicata* is to avoid an unnecessary and undesirable proliferation of proceedings relating to the same subject matter… To hold otherwise would allow a plaintiff with a cause of action against a number of severally-liable defendants to bring successive separate actions against each defendant until he got the desired result. To permit that would lead to a multiplicity of proceedings, the possibility of inconsistent findings of fact and would fail to achieve finality in litigation.

26 In my view, the extended doctrine of *res judicata* operates to prevent Win-Win from raising the issue of the alleged perjury by Loh again in the present proceedings. It is clear that this issue has been thoroughly canvassed before both the High Court and Court of Appeal. I accept Tavica's submissions that the issue of perjury has been laid to rest. [note: 26] Win-Win's present reliance on the alleged perjury to establish its case that the Debt is disputed is an attempt to resurrect what is already no longer alive and to thwart Tavica's efforts to recover the Debt which has been due and owing since 6 April 2010. It also amounts to a collateral attack on the Interim Award which was explicitly accepted by the High Court (in Suit 538) and by implication by the Court of Appeal (in CA 62/2013).

27 Win-Win's long war over the Debt is baffling. It must have expended costs close to or even exceeding the amount of the Debt (of about $240,000) in its many legal battles to avoid paying the Debt. It professes that it still wants to pursue its claim of about $1.8m in arbitration and that the

Winding-up Application is an attempt to stifle its claim. Yet it is adamant about not paying the Debt thereby stalling the arbitration proceedings by its own conduct. Win-Win has also not alleged that Tavica would be unable to pay back the amount of the Debt should Win-Win finally succeed in the arbitration. As counsel for Win-Win candidly accepted, it is not a case of being unable to pay but one of being unwilling or "not happy" to pay. Such unwillingness to pay a debt that is due, long after service of a statutory demand (see [7] above), satisfies the requirement in s 254(2)(a) of the Companies Act that Win-Win "has for 3 weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor". Win-Win is therefore deemed to unable to pay its debts within s 254(1)(e) of the Companies Act.

28 For completeness, I should also mention that there was another application placed before the Court on 21 February 2014. This was Summons No. 918 of 2014 filed one day before the hearing by Acme Tech Design Pte Ltd ("Acme"), a purported creditor and related party of Win-Win, for two other persons to be appointed as joint and several liquidators (in addition to the two proposed by Tavica) in the event that a winding-up order was made by the Court. No solicitors were appointed by Acme to make the application in Court. There was also no objection made against the liquidators proposed by Tavica and I therefore saw no reason to appoint another two liquidators. I dismissed Acme's application.

29 Accordingly, I dismissed Sum 607/2014 (for stay of winding-up) and ordered Win-Win to be wound-up. The two liquidators proposed by Tavica were appointed. I also ordered Win-Win to pay Tavica costs of $15,000 for the Winding-up Application up to the present stage of proceedings.

[note: 1] Plaintiff's Bundle of Document ("PBD"), 192 – 233

[note: 2] PBD, 258 – 263

[note: 3] PBD, 279 – 283

[note: 4] PBD, 297 – 304

[note: 5] PBD, 305 – 308

[note: 6] PBD, 407

[note: 7] PBD, 410

[note: 8] PBD, 411 – 412

[note: 9] PBD, 414 – 415

[note: 10] PBD, 420

[note: 11] PBD, 422 - 423

[note: 12] PBD, 430 – 431

[note: 13] PBD, 433 – 434

[note: 14] PBD, 435 - 436

[note: 15] Plaintiff's 2nd Bundle of Documents, 3 – 4

[note: 16] Plaintiff's 2nd Bundle of Documents, 2 and 9

[note: 17] Plaintiff's 2nd Bundle of Documents, 5 – 6

[note: 18] Plaintiff's Written Submissions dated 5 February 2014, paras 24 – 28

[note: 19] Plaintiff's Written Submissions dated 5 February 2014, para 99

[note: 20] Plaintiff's Written Submissions dated 5 February 2014, para 101

[note: 21] Plaintiff's Written Submissions dated 5 February 2014, paras 109 – 110

[note: 22] Plaintiff's Written Submissions dated 5 February 2014, para 108

[note: 23] Defendant's Written Submissions dated 20February 2014, para 17

[note: 24] Defendant's Written Submissions dated 20February 2014, para 20

[note: 25] Defendant's Written Submissions dated 20February 2014, para 25

[note: 26] Plaintiff's Written Submissions dated 5 February 2014, paras 20 and 23