VisionHealthOne Corp Pte Ltd v Vision Corp Holdings Pte Ltd
[2008] SGHC 132

Case Number : Suit 759/2007, RA 213/2008

Decision Date : 13 August 2008

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : William Ong and Lim Dao Kai (Allen & Gledhill LLP) for the plaintiff; Chew Swee Leng (ComLaw LLC) for the defendant

Parties : VisionHealthOne Corp Pte Ltd — Vision Corp Holdings Pte Ltd

Debt and Recovery – Counterclaim

13 August 2008

Judith Prakash J

1 The plaintiff and the defendant are both companies incorporated in Singapore and they are related to each other in that the plaintiff is a majority shareholder of the defendant in that it holds 60% of the issued share capital of the defendant. The other shareholder in the defendant is another Singapore company, HD Holdings Pte Ltd ("HD Holdings").

2 The plaintiff started this action to recover the total sum of $263,000 which it had advanced to the defendant in varying amounts between January 2004 and December 2005. In due course, the plaintiff applied for summary judgment. On 21 May 2008, the Assistant Registrar made the following orders:

(a) that judgment be entered against the defendant in favour of the plaintiff in the sum of $190,000 together with interest;

(b) that the defendant be given conditional leave to defend in respect of the sum of $73,000;

(c) that the defendant pay $30,000 into court in order to defend the said claim; and

(d) that the defendant pay the plaintiff costs of $5,000 plus reasonable disbursements.

3 The defendant appealed against the Assistant Registrar's decision. I heard the appeal on 30 June 2008 and dismissed it with costs. The defendant has appealed.

The plaintiff's case

4 The defendant has three directors: Mr Chan Wai Chuen, Mr Chan Siang Khing and Mr Liu ChunLin. The first two directors are the plaintiff's representatives on the board of the defendant and they are also directors of the plaintiff itself. The third director, Mr Liu, is HD Holdings' representative on the board. In the O14 proceedings, Mr Chan Wai Chuen affirmed the affidavits in support of the plaintiff's case whilst Mr Liu was the main deponent on behalf of the defendant.

5 The plaintiff's case was that from January 2004 to December 2005, it made advances totalling the sum of $190,000 to the defendant as follows:

Date of Advance	Amount (S$)
27 January 2004	120,000
7 April 2004	50,000
11 November 2005	10,000
8 December 2005	10,000

In support of this assertion, the plaintiff produced a copy of the defendant's G/L Transactions Listing for Account No. 2010 for the year 2005, the plaintiff's United Overseas Bank Limited ("OUB") Statements of Account for one of its accounts and the UOB cheque deposit slips which evidenced the advances. The advances were also reflected in the defendant's Annual Financial Statements for the year ended 31 December 2005 as unsecured, interest free advances that were repayable on demand to the plaintiff.

6 Between January 2006 and October 2006, the plaintiff made further advances totalling $73,000 to the defendant as set out below:

Date of Advance	Amount (S$)
16 January 2006	5,000
9 February 2006	1,000
9 February 2006	5,000
25 February 2006	3,000
10 March 2006	5,000
10 April 2006	5,000
19 May 2006	6,000
20 June 2006	8,000
11 July 2006	11,000
20 July 2006	3,000
10 August 2006	10,000

9 October 2006	5,000
23 October 2006	6,000

In support of this assertion, the plaintiff produced a copy of the defendant's G/L Transactions Listing for Account No. 2010 for the year 2006, the defendant's UOB Statements of Account, UOB Cash Deposit slips and the plaintiff's cheques to the defendant evidencing the advances.

7 By way of letters dated 1 November 2007 and 23 November 2007 from its solicitors, the plaintiff demanded repayment of the sum of $263,000 being the total amount advanced to the defendant. The defendant did not repay that amount or any part of the same.

8 The defendant did not deny that the advances had been made on the dates and in the amounts specified by the plaintiff. Its position was that for various reasons these advances were not repayable on demand as asserted by the plaintiff.

The defendant's arguments and my decision

Advances totalling $190,000

9 In respect of the sums advanced between 2004 and 2005 totalling $190,000, the defendant agreed that this sum formed part of a larger sum of $1.2m that was reported in the defendant's 2005 financial statements as being advances made by the plaintiff to the defendant as at 31 December 2005. Although the advances were reported as being unsecured, interest free and repayable on demand, this statement had to be considered in the light of the undertaking of the plaintiff to provide financial support to the defendant.

10 The defendant pointed out that in the Auditor's Report attached to its financial statements, the auditors stated:

> Without qualifying our opinion, we draw attention to Note 2.2 of the financial statements. The Group and the Company incurred a net loss of $2,237,580 and $2,160,951 respectively for the financial year ended 31 December 2005 and as of that date, the Group and the Company's total liabilities exceeded its total assets by S$159,607 and S$34,300 respectively. The financial statements have been prepared on a going concern concept as the holding company have (sic) confirmed that it will provide the necessary continuing financial support to the Company.

11 In the same financial statements, the "Statement by Directors", which was signed by both the directors appointed by the plaintiff, acknowledged that the plaintiff as the holding company had given an undertaking "to provide the necessary continuing support to the [defendant]" and that therefore "there [were] reasonable grounds to believe that [the defendant would] be able to pay its debts as and when they fell due". The defendant submitted that in this assertion, the word "debts" must have included the advances totalling $190,000. Further, in the Notes to the Financial Statements, it was reported that these statements had "been prepared on a going concern basis as the Group has obtained a commitment for continuing financial support from the holding company".

12 The defendant asserted that without this undertaking from the plaintiff to provide continuing financial support, the defendant would clearly have been insolvent and would not have been able to continue its business without the directors breaking the law. The auditors were induced to prepare

the audited accounts of the defendant as a going concern because of this undertaking. Further, HD Holdings, the other shareholder, was induced into accepted the audited accounts. Consequently, the plaintiff was estopped from suing on those advances.

13 I was unable to accept that there was any issue of estoppel with regards to the total amount of $190,000. The plaintiff denied that it had given an undertaking to provide continuing financial support to the defendant. As it submitted, however, even if it had given such an undertaking, it was not precluded from demanding repayment of the advances made to the defendant. The undertaking was contained in the defendant's 2005 Audited Accounts. These documents also stated clearly that the advances were repayable on demand. It was clear therefore that although the plaintiff may have agreed to give financial support to the defendant, it had not agreed that this financial support would go on forever. There was nothing in the financial statements for 2005 that precluded the plaintiff from demanding repayment of its money some two years later. By stating in the Audited Accounts that the advances were "repayable on demand", the directors of the defendant had recognised the nature of the advances and that the plaintiff was not obliged to keep the funds in the defendant company indefinitely. Under ss 199(1) and 201(15) of the Companies Act (Cap 50 2006 Rev Ed), the financial statements of a company are the responsibility of its directors. (See also *JSI Shipping (S) Pte Ltd v Teofoongwonglcloong (a firm)* [2007] 4 SLR 460).

14 The defendant also argued that if there had been no undertaking to provide continuing financial support, the defendant would have been insolvent and would not have been able to continue its business without the directors breaking the law. Because of the undertaking, the auditors were induced to prepare the Audited Accounts of the defendant on the basis that the defendant was a going concern and HD Holdings, the other shareholder, was induced into accepting the Audited Accounts. As a result, the plaintiff was estopped from suing on the advances.

15 I did not see any basis for an estoppel argument. Any reliance by HD Holdings and the auditors on the alleged undertaking would not change the nature of the advances as being repayable on demand. An estoppel would, perhaps, have been constituted had there been a change in position by the defendant itself in reliance on the undertaking. There was no evidence of such change in position after the publication of the 2005 Audited Accounts.

Claim for $73,000

16 The defendant argued that these advances in 2006 were made without any board resolution or shareholders' resolution and that Mr Liu was not aware of them until the action started. In law, it argued, a creditor cannot be his own debtor and therefore Mr Chan Wai Chuen and Mr Chan Siang Khing could not lend money to themselves. The Chans had breached their fiduciary duty as directors by accepting advances that were repayable on demand when they knew or ought to have known that the defendant would not be in a position to repay the same unless they had formed the view or intended that the advances should not be repayable on demand.

17 I did not understand that argument. As a director of the defendant, Mr Liu had access to the books of the company and it was always open to him to find out how the defendant was financing its business. If it was indeed a breach of duty on the part of the Chans, as directors of the defendant, to procure loans from the plaintiff, then the defendant would have to sue the Chans for breach of duty. Such an assertion would not justify a refusal to repay money borrowed from the plaintiff. Perhaps what the defendant was arguing was that the advances in 2006 constituted a gift from the plaintiff as they were made without the request of the defendant as evidenced by the passing of a board resolution. This seemed a tenuous argument to me as advances of money by one commercial corporation to another to assist it in carrying on its business are commercial payments and not

generally in the nature of gifts especially where the paying party is a shareholder of the recipient and there is a history of advances being made to help the recipient operate.

Agreement to treat advances as investment

18 The defendant asserted that it was not in dispute that the advances were made to meet the working capital needs of the defendant. It contended that the plaintiff was obliged to convert the alleged advances into shares and give 40% of those shares to HD Holdings. This obligation arose pursuant to an agreement between the plaintiff and HD Holdings some time in February 2005. The plaintiff had invited HD Holdings to join it in the healthcare business which the plaintiff had intended to develop and pursue in China through the defendant as its investment vehicle. It was agreed that HD Holdings would provide its strong and wide business network in China whilst the plaintiff would provide working capital and operational expertise. The plaintiff would also bear all the expenses incurred by HD Holdings. The defendant asserted that this agreement was supported by the fact that the plaintiff did convert advances of $1,030,000 to the defendant into 4,120,000 shares and then transferred 1,648,000 ordinary shares (which represent 40%) to HD Holdings in February 2005.

19 The plaintiff did not admit that the advances were made as working capital for the defendant. Even if they had been, however, it did not follow that they were not repayable by the defendant on demand. The fact that the advances were intended for working capital would not be inconsistent with the defendant's obligation to repay the same when the plaintiff required repayment. Consequently, this argument did not raise a triable issue.

20 The assertion that the advances should be converted into shares and 40% of the same issued in the name of HD Holdings did not provide a defence either. Even if there had been an agreement to such effect, a matter I do not have to determine, that agreement would have been one made between HD Holdings and the plaintiff. There was no agreement between the plaintiff and the defendant that the plaintiff would ask for its loans to be converted into share capital and that such shares would be allocated in part to HD Holdings. The defendant was not party to any contract between the plaintiff and HD Holdings and therefore the terms of such contract could not affect the defendant's obligations to repay the advances to the plaintiff.

The defendant's counterclaim

21 The defendant contended in the alternative that it had a valid set off and counterclaim which exceeded the plaintiff's claim. This arose from serious mismanagement by the plaintiff's Chan Siang Khing and/or Chan Wai Chuen of the defendant's investment in China.

22 The defendant said that all the advances made by the plaintiff to the defendant had been expended on the defendant's business in China. This business consisted of investments in two subsidiary companies in China. The plaintiff who controlled the management of the defendant through Chan Siang Khing and Chan Wai Chuen, also managed the businesses of the subsidiaries through them and the two had mismanaged the affairs of the subsidiaries to such an extent that the investment appeared to have been totally lost. The defendant also asserted that there were strong grounds to pursue recovery action against Chan Siang Khing. Yet, Chan Wai Chuen as the chairman of both the defendant and the subsidiary company had refused to do anything. As a result of the wrongful actions of the two men, the defendant had a claim of $2.79m against the plaintiff.

23 I agreed with the plaintiff that it was not necessary to go into the substantial merits of the defendant's counterclaim. There was no connection between the plaintiff's claim and the defendant's counterclaim as the latter arose out of transactions that were entirely separate and distinct from the

advances made by the plaintiff to the defendant. There could not be, therefore, a set off which would entitle the defendant to resist summary judgment. In any case, the defendant's counterclaim could not serve as a defence to the plaintiff's claim because it was an allegation that the two directors in managing the affairs of the defendant had caused it to suffer loss in various subsidiary companies. Such claims would have to be brought against the directors themselves and not against the plaintiff which could not be regarded as the alter ego of the two men.

Conclusion

24 In the result, I saw no reason to interfere with the orders made by the Assistant Registrar. If anything, the Assistant Registrar was generous in giving the defendant leave to defend in respect of the 2006 advances. As the plaintiff had not appealed against that order, however, I did not alter it.