MAJUJAYA HOLDINGS SDN. BHD. v. PENS-TRANSTEEL SDN. BHD. & ANOR.
HIGH COURT, PULAU PINANG
DATO' ABDUL HAMID BIN HAJI MOHAMED, J
CIVIL SUIT NO. 22-73-93
19 MAY 1993
[1994] 1 CLJ 134

COMPANY LAW*: Interim order - Application for appointment of liquidator - Whether the appointment of a nominee company was properly made - Whether plaintiff has locus standi in suit -Whether a nominee may sue in its own name.*

The Plaintiff (P) applied for liquidators to be appointed for the First Defendant (D1). P claimed to be the nominee of one Transteel PTY Ltd., a company incorporated in Australia and a party to a joint venture agreement (the Agreement) with D2 Pens Holdings S/ B. D1 was formed pursuant to the Agreement.

Counsel for the Defendants argued that P had no locus standi in the matter. P contended that it brought the action on the basis that it is the nominee of the said Transteel PTY. Ltd. The Agreement was" between Transteel PTY Ltd. *or its nominee.."*. The director of Transteel PTY Ltd used the letterhead of one Transteel *Australia* PTY Ltd when writing to D2 saying it was appointing P as its nominee. In June 1991 Transteel PTY Ltd went into liquidation in Australia.

Held:

[1] P relied heavily on the minutes of the Board of Directors Meeting of D1 to give itself locus standi. However, those are the minutes of D1, the company formed by the parties to the Agreement under the Agreement. They are not the minutes of D2, the actual party *to* the Agreement. It is thus incorrect to say that D2 had accepted the appointment of P as a nominee of Transteel PTY Ltd. There was also no letter of authority enabling P's solitors to act on behalf of the liquidator of Transteel PTY Ltd.

P has not proved on the balance of probabilities that D2, the contracting party to the Agreement had accepted P as the nominee of Transteel PTY Ltd, the other contracting party. D2 must accept P as the nominee before P, if at all, can be a party to the contract and sue on it.

[2] The Agreement is one between Transteel PTY Ltd or *its nominee on one part* and D2 on the other. The "nominee" is not known at the time of the parties entering into the Agreement. A party whose identity is not known is entering into an agreement. This cannot be. The other contracting party on "the first part" is Transteel PTY Ltd. So it is this party who should sue or be sued. When it goes into liquidation it is the liquidator who should sue. In the present case there is no authorisation by the liquidators. Again therefore P has no locus standi to sue.

[3] Further the Court should also consider the balance of convenience. D1 is in a sound financial position. If P were to succeed eventually, the Defendants are in a position to satisfy

whatever judgment sum, damages and costs of P. The same cannot be said of P.

{Application dismissed with costs}.

Case(s) referred to:

Re Ismail bin Rentah (Deceased); Hj. Hussain v. Liah & Ors. [1939] 1 LNS 88

*[1940] MLJ Rep. 77 (**refd**)*

Counsel:

For the plaintiff - Rhina Bhar (Rumi Manecksha withher); M/s. Rhina Bhar & Associates

For the defendant - Wong Chong Wah (Leong Wai Hongwith him); M/s. Skrine & Co.

JUDGMENT

Abdul Hamid bin Haji Mohamed J:

By a writ of summons filed on 5 March 1993 the plaintiff claimed for injunctions, for the 1st defendant to be wound up, for an order that a liquidator be appointed, damages and costs.

On the following day the plaintiff filed a "Summons for Interlocutory Injunction". The injunctions prayed for were granted *ex parte* on the same day. However, on the application of the defendants, they were set aside on 15 March 1993. There was no appeal against that order.

On 24 March 1993 the plaintiff filed its statement of claim. Defence was filed on 12 April 1993.

On 13 April 1993 the plaintiff filed this application. The summons is entitled "Summons for appointment of Liquidator", praying for an order that two named persons be appointed liquidators of the 1st defendant and costs.

I heard the arguments on 27 April 1993 and reserved my judgment to 7 May 1993.

However, without leave of the Court and later objected to by Counsel for the defendants, Counsel for the plaintiff, Miss Rhina Bhar, herself affirmed and filed an affidavit. She also delivered a "Chart", which is actually a summary of facts, clearly in answer to the points raised during the argument. [This is not the first time she did this. Earlier on when I reserved my decision in respect of the application to set aside the *ex parte* injunction, she also delivered a "Summary of Points".]

I think that this is not proper. I disregard the affidavit and the "Chart".

I have some difficulty trying to understand the nature of this application. This is because the learned leading Counsel for the plaintiff, Mr. Rumi Manecksha, said that it was not an application for summary judgment, but at the same time it was also not an interlocutory application. If it is neither, what is it?

I accept that it is not an application for summary judgment because there are other prayers prayed for in the statement of claim. But the summons, which for all intents and purposes is a summons-in-chambers, does not pray for an interim order until the disposal of the suit. However, the affidavit in support of this application does say that the order prayed for is "pending the hearing of the action."

So I take it that this is an application for an interim order until the determination of the suit.

Plaintiff's application seems to me to be based on the following premises;

(a) Transteel PTY Ltd., a company incorporated in Victoria, Australia **or its nominee** entered into a joint venture agreement (the Agreement) with Pens Holdings (2nd defendant). (b) Pursuant to the agreement, a company called Pens-Transteel (1st defendant) was formed. (c) Transteel PTY Ltd. appointed the plaintiff as its nominee. (d) Clause 24 of the agreement provides for termination of the agreement. (e) Clause 25 of the agreement provides for the appointment of the liquidator to carry out the liquidation of the 1st defendant if the agreement is terminated. (f) 2nd defendant has terminated the agreement. (g) Therefore a liquidator must be appointed.

Put it that way, it appears that the facts are fairly straightforward. But the truth is that they are not.

Learned Counsel for the defendants argued that the plaintiff had no *locus standi* in this suit.

The plaintiff brought this action on the basis that it is the nominee of Transteel PTY Ltd., a party to the agreement - see paragraph 4 of the statement of claim.

Perhaps the relevant facts which can be gathered from the various affidavits and documents, which are undeniable, or as found by me, should be reproduced in order to appreciated the true position.

The agreement was entered between Transteel PTY Ltd. **or its nominee.**

In the minutes of the Third Board of Directors' Meeting of the 1st defendant (the company formed pursuant to the agreement) held on 14 March 1991, there appears the following items:

(d) The board accepted that Transteel **Australia** Pty Ltd (emphasis added) is the correct operative instrument in the original agreement. (e) The invoking of the nominee clause will be accepted as in the original agreement.

On 26 March 1991, one Andrew Pavloff, who signed as a Director of Transteel **Pty** Ltd but using the letterhead of Transteel **Australia** Pty Ltd wrote to the 2nd defendant saying it was

appointing the plaintiff as its nominee.

According to a document entitled "Company Extract" (Ex. A2 of Enclosure 18) a certain company (its previous name unknown) began to use the name of "Transteel **Australia** Pty. Ltd." from 3 May 1991. According to that document Andrew Pavloff who signed the letter dated 26 March as Director of Transteel **Pty** but using the letter-head of Transteel **Australia** Pty Ltd is also a director of Transteel **Australia** Pty Ltd.

On 26 June 1991 Transteel **Pty** Ltd went into voluntary winding-up. The defendants were not informed of this fact. The defendants only came to know about it on 15 February 1993 when they did a company search in Australia.

In the course of the argument I asked the leading Counsel for the plaintiff how Transteel **Australia** Pty Ltd came into the picture bearing in mind that Transteel **Pty** Ltd was the party to the agreement. He said that Transteel **Pty** Ltd changed its name to Transteel **Australia** Pty Ltd. However, he was interrupted by Miss Rhina Bhar who appeared with him for the plaintiff. She clarified that that was not so. It was another company by the name of Dramdon Pty Ltd which changed its name to Transteel **Australia**. I must note here that on evidence then before the Court then there was no evidence whatsoever of that fact. Later on I asked the question as to how Dramdon Pty Ltd which changed its name to Transteel **Australia** came into the picture. It is this gap which Miss Rhina Bhar sought to cover by filing her affidavit, without leave of the Court, after the hearing had completed which in my opinion is improper and I have excluded it.

The plaintiff relied heavily on the minutes of the Board of Directors' Meeting of the 1st defendant held on 14 March 1991 to give itself *locus standi.*

But it must be emphasized that those are minutes of the 1st defendant, the company formed by the parties to the agreement under the agreement. They are not minutes of the 2nd defendant, the party to the agreement. Therefore it is not correct to say that the 2nd defendant had accepted the appointment of the plaintiff as a nominee of Transteel **Pty** Ltd. Further, Transteel **Australia** Pty Ltd only came into existence **by that name** on 3 May 1991. How could it be "accepted... [as] the correct operative instrument in the original agreement" before it came into existence?

Regarding the letter dated 26 March 1991, why did Andrew Pavloff who signed the letter as a Director of Transteel **Pty** Ltd use the letter-head of Transteel **Australia** Pty Ltd? Indeed in his affidavit, the Chairman of the 1st defendant averred that when the Board of Directors of the 1st defendant adopted the resolutions on 14 March 1991, they believed that Transteel **Australia** Pty Ltd was Transteel**Pty** Ltd. In the circumstances, I do not think that they can be blamed for it.

In less than two months after Transteel Australia Pty Ltd adopted that name, Transteel **Pty** Ltd was put into voluntary winding-up. Why? And why were the defendants not told? The defendants only discovered it about 20 minutes later after making a search in Australia.

Transteel **Pty** Ltd was wound up on 26 June 1991. The defendants' solicitors had written to the plaintiffs' solicitors as to whether the latter had instructions to act for the liquidator of Transteel **Pty** Ltd. There was no reply. The defendants' solicitors had also not received any

reply from the liquidators of Transteel **Pty** Ltd.

In the circumstances, I am not satisfied on the evidence now before me that the plaintiff has proved on the balance of probabilities that the 2nd defendant, the contracting party to the agreement had accepted the plaintiff as the nominee of Transteel **Pty** Ltd, the other contracting party. The 2nd defendant must accept the plaintiff as a nominee before the plaintiff, if at all, can be a party to the contract and sue on it.

The next point, but still on *locus standi*, is whether a nominee, assuming that the plaintiff has been accepted as nominee, may sue in its own name. The plaintiff's case is that the agreement states that it was made between "Transteel **Pty** Ltd **or** its nominee" and the 2nd defendant. Therefore, the plaintiff can sue in its own name.

First, I find this agreement rather peculiar. The word "nominee" appears only once in the agreement, that is in that part which states who the parties to the agreement are. In brief it says that it is an agreement between Transteel **Pty** Ltd or its nominee on the one part and the 2nd defendant on the other part. Who are/ were the party/parties entering into the agreement on the first part? Only Transteel**Pty** Ltd is known. The "nominee" was not known. How could a party whose identity was not known enter into an agreement? With whom was the 2nd defendant entering into an agreement? Only Transteel**Pty** Ltd was known to the 2nd defendant. How could the 2nd defendant be entering into an agreement with a party (the nominee) whose identity was not then known?

Learned Counsel for the defendants argued that the plaintiff, as a nominee (assuming that it is) cannot sue in its own name. The principal should sue, he said. He referred me to the case of *Re Ismail bin Rentah (Deceased); Hj. Hussain v. Liah & Ors. [1939] 1 LNS 88*. [1940] MLJ Rep. 77.

Unfortunately I find that that case is of no assistance on this point. With limited time and books I am unable to get any guidance on the point.

In the circumstances I prefer to decide on the facts of this case, i.e. in accordance with the agreement. The contracting party is Transteel **Pty** Ltd. So it is Transteel **Pty** Ltd which should sue or be sued. Now that it is under liquidation, it is the liquidator who should sue. In the case, on evidence before me, there is not even an authorisation by the liquidators. Even the plaintiff's solicitors has chosen to remain silent to the query by the defendants' solicitors whether the former has authority to act from the liquidators of Transteel **Pty** Ltd.

On this ground too I am of the view that the plaintiff has no *locus standi* to commence this action in its own name.

As if to circumvent the question of liquidation of the Transteel **Pty** Ltd, it is was stressed that it was Transteel **Pty** Ltd that was liquidated, not Transteel **Australia** Pty Ltd. As I understand it, by so doing, the plaintiff is saying that Transteel **Australia** Pty Ltd is Transteel Pty Ltd. Plaintiff is Transteel **Australia's** nominee, therefore the question of authorisation by the liquidator of Transteel**Pty** Ltd. does not arise.

But, whose nominee is the plaintiff, even if it is a nominee? Transteel **Pty** Ltd? Or Transteel **Australia** Pty Ltd?

By its own pleading (see in particular paragraph 4 of the statement of claim) the plaintiff says that it is the nominee of the Transteel **Pty** Ltd. Further, Transteel **Australia** Pty Ltd is not a party to the agreement. How could it appoint a nominee pursuant to the agreement? Again, the letter of 26 March 1991 appointing the plaintiff as nominee was signed by Andrew Pavloff as a Director of Transteel **Pty** Ltd. Definitely the plaintiff cannot now say it is a nominee of Transteel **Australia** Pty Ltd.

So much on *locus standi*. Let me now turn to another point.

Learned Counsel for the plaintiff stressed that the right to appoint a liquidator is contractual. No other consideration should be given. Yet he went only to show that there was oppression.

I am of the view that as the order prayed for, being interlocutory in nature but with far-reaching effect, which would substantially satisfy the main order prayed for in the main suit, the Court should also consider the balance of convenience. On the one hand, we have the plaintiff, a $2 (Singapore) company which claims to be a nominee of an Australian Company which went into voluntary winding up about four months after entering into the agreement and less than two months after another company purported to have assumed its name. It is seeking to have a liquidator appoint for the joint venture company (1st defendant), which is in a sound financial position, with ongoing projects worth millions of ringgit and with 295 employees, without a trial.

I am also of the view that if the plaintiffs were to succeed eventually, the defendants are in a position to satisfy whatever judgment sum, damages and costs of the plaintiff. I do not think the same can be said about the plaintiff.

In the circumstances, besides the question of *locus standi,* I do not think it is just that the order prayed for should be made without even a trial.

The application is dismissed with costs.