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Commercial Litigation in a Multi-Jurisdictional Context

Lessons from Beyonics Asia Pacific Ltd & ors v Goh Chan Peng & anor [2021] SGCA (I) 2

INTRODUCTION

The Court of Appeal ("**CA**") in *Beyonics Asia Pacific Ltd and others v Goh Chan Peng and another and another appeal* [2021] SGCA (I) 2 ("**CA#2**") has recently released a decision that underscores the importance of good organisational structure in a multi-jurisdictional business, and how considered planning as to which companies in the group should be the employer of key management personnel, or should appoint such personnel as director, can avoid unnecessary pitfalls in litigation.

There was an earlier CA decision arising from an earlier claim by other entities within the group of companies but against the same Defendants – *Goh Chan Peng and others v Beyonics Technology Ltd and another and another appeal* [2017] 2 SLR 592 ("**CA#1**"). CA#1 provides an important backdrop to CA#2.

KEY FACTS

The business in question was the manufacture of baseplates for the hard disk drive industry. It was organised across various corporate entities in the Beyonics Group, including:

a. Beyonics Technology Ltd ("**BTL**") (as it was then known) incorporated in Singapore – the parent company of the Beyonics Group;

b. Beyonics Technology Electronic (Changshu) Co., Ltd ("**BTEC**") incorporated in China – BTEC owned and operated a baseplate manufacturing facility in China;

c. Beyonics Precision (Malaysia) Sdn. Bhd. ("**BPM**") incorporated in Malaysia – BPM owned and operated a baseplate manufacturing facility in Malaysia; and

d. Beyonics Asia Pacific Limited ("**BAP**") incorporated in Mauritius – BAP did not own or operate manufacturing facilities, but was the sales company for the baseplates manufactured by BTEC and BPM.

The 1st Defendant, Mr Goh Chan Peng (**"Mr Goh**") was formerly the sole executive director of the Beyonics Group. He was an employee and/or director in some of the entities within the Beyonics Group. The 2nd Defendant was a British Virgin Islands entity formerly known as Wyser International Limited ("**Wyser**"), which was beneficially owned by Mr Goh.

First Suit leading to CA#1

In the first suit leading up to CA#1 ("**First Suit**"), BTL (the parent company) sued Mr Goh and Wyser on the basis that Mr Goh had breached various duties owed to BTL by diverting business to a competitor, receiving bribes from the competitor, and causing the loss of a key customer. The High Court entered judgment in favour of BTL: the bribes had to be disgorged and BTL was also awarded damages for the loss of profit from the diversion ("**Diversion Loss**") and the loss of future profit ("**Total Loss**") suffered by BTL.

The appeal lodged by Mr Goh and Wyser (collectively, the "**Defendants**") was partially allowed in CA #1. The CA upheld the order to disgorge bribes and the finding that Mr Goh had breached his duties to BTL. However, it disallowed the claims for the Diversion Loss and Total Loss on the basis that these losses were suffered by BAP, and not BTL – internally within the group, the baseplates manufactured by BPM and BTEC were sold to BAP, and BAP in turn sold them to and invoiced the key customer; accordingly, the entity that suffered the losses was in fact BAP.

> ***"The well-established doctrine that each incorporated entity is a separate legal entity with separate legal rights and liabilities applies as much to companies within an ownership group as it does to companies that are unrelated to each other."*** *CA#1* (at [71])

Second Suit leading to CA#2

Following CA#1, BAP filed the second suit against the same Defendants (i.e. Mr Goh and Wyser) to claim the Diversion Loss and the Total Loss but this time from BAP's perspective ("**Second Suit**"). In the alternative was a claim by BAP, BTEC and BPM (the latter two being the subsidiaries that manufactured the baseplates).

One of the key defences was that the Second Suit ought to be struck out for being an abuse of process pursuant to the extended doctrine of *res judicata* laid down in *Henderson v Henderson*. Essentially, the Plaintiffs in the First Suit and Second Suit were different but the Defendants were the same. The Defendants contended that the Second Suit was an attempt to re-litigate the First Suit and that BAP should have been party to the First Suit instead of starting the Second Suit.

The trial of the Second Suit was heard in the Singapore International Commercial Court. The trial judge struck out the Second Suit for being an abuse of process.

The appeal of the Plaintiffs in the Second Suit was partially allowed in CA#2. Notably, the CA held that the Second Suit was not an abuse of process and should not have been struck out. Amongst other things, the CA found that the various entities in the Beyonics Group that were the Plaintiffs in the First Suit and Second Suit respectively had conducted themselves reasonably; and that in any event, the Defendants' conduct of the proceedings in both the First Suit and the Second Suit was such that they could not show that it was oppressive for them to have to defend the Second Suit. Among other things, the Defendants had refused to identify who they considered to be the proper plaintiff that suffered loss, and even denied that BAP was the proper party notwithstanding CA#1 which held that BAP suffered the loss.

KEY TAKEAWAYS

Many lessons can be learnt from the decisions of the Court of Appeal in both CA#1 and CA#2. In short, how multi-jurisdictional businesses are organised both for external and internal purposes may give rise to challenges in bringing claims.

It is not uncommon for large businesses to organise themselves across subsidiaries in multiple jurisdictions, each with its own unique function (e.g. designing, manufacturing, sales and billing) in order to take advantage of the different labour laws and tax regimes that different jurisdictions offer. A key employee and director of the parent company may be tasked to oversee the operations of these subsidiaries, but the employment agreement and directorship may only be with the parent company. Various issues may arise if the organisation contemplates legal action against this employee/director.

1 The errant conduct of the employee/director may constitute a breach of his obligations to the parent company, but the loss may be suffered by another subsidiary (in which he is neither employee nor director on record), and whether liability can be pinned on another basis (for e.g., that he was a *de facto* director) may not be an easy task.

One cannot simply rely on the parent company to sue the employee where the loss is suffered by a subsidiary. The common law principle known as the "reflective loss rule" bars a parent company from bringing an action to recover from a defaulting third-party any loss equivalent to the diminution of share value or reduction in distribution (for e.g., dividends), which flows from loss suffered by the subsidiary.

Interestingly, the minority judges in the recent United Kingdom Supreme Court decision in *Marex Financial Ltd v Sevilleja (All Party Parliamentary Group on Fair Business Banking intervening)* [2020] UKSC 31 have advocated the abolition of the reflective loss rule. However, it will be left to be seen in a suitable case whether the Singapore Courts will find the minority position persuasive.

2 Assuming that this errant employee is a *de facto* director in various subsidiaries, a single act or transaction by him could give rise to various causes of action being available to each of these subsidiaries. Each of these causes of action could be governed by different laws (for e.g., the law of incorporation of the relevant subsidiary). Further issues of conflict of laws could arise, including questions on (i) which laws ought to govern the claims, (ii) whether the private international law rules of the putative governing law ought to be considered in determining the identity of substantive law and (iii) which limitation periods apply.

3 Any claims to be brought by one or more entities of a multi-jurisdictional organisation may be subject to the *Henderson v Henderson* abuse of process doctrine. One facet of this doctrine has required parties privy to each other to bring **in a single action** all related claims which arise out of the same transaction. In other words, if party A is aware of proceedings commenced by party B against party C for claims arising out of a transaction for which party A also has causes of action against party C, but party A declines to participate and is content to watch party B prosecute his action, party A may be found to be in abuse of process if he subsequently brings an action against party C for claims arising out of the same set of facts.

This is significant because it may place a burden on an organisation intending to commence an action against an employee/director to ensure that **all** the claims by the parent company and relevant subsidiaries are brought together in a single action; otherwise there is the risk of

being barred from bringing a second action subsequently to cover subsidiaries or other claims not dealt with in the earlier suit.

> ***"The threshold to find an abuse of process is high, and the court will be cautious so as not to shut out a genuine cause of action unless the later proceeding involves what the court regards as unjust harassment of a party."*** *CA#2* (at [69])

Whilst in *CA#2* the Court of Appeal agreed that the Second Suit was not an abuse of process, this is not invariably the case – each action is judged according to its specific facts and circumstances requiring a fine balance of private and public interests. Thus, the risk that a subsequent action may be barred under the abuse of process doctrine should not be understated. Companies within a group seeking redress against the same defendants should manage their litigation with particular care.

As demonstrated in CA#2, there is also a lesson to be had for defendants. If a defendant is content to adopt narrow defences (e.g. that loss is not suffered by the subsidiary named as plaintiff but without asserting who the proper party should be), then the defendant takes the risk that another subsidiary may subsequently bring a new suit against the defendant, and this new suit may not be an abuse of process.

To conclude, business organisations ought to be prudent in structuring their employment contracts and appointments of directorships to suit the multi-jurisdictional nature of the business operations. This could very well make the difference between a successful and an unsuccessful claim.

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The Plaintiffs in CA#1 and CA#2 were represented by TKQP, which team was led by Joint Managing Partner Marina Chin, and comprised Partners Alcina Chew and Siew Guo Wei.

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