IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 46

Civil Appeal No 146 of 2017

Between

(1) THIO SYN KYM WENDY
(2) THIO SYN GHEE
(3) THIO SYN SAN SERENE

… *Appellants*

And

(1) THIO SYN PYN
(2) THIO SYN WEE
(3) THIO HOLDINGS PTE LTD
(4) UNITED REALTY LTD

… *Respondents*

Civil Appeal No 147 of 2017

Between

THIO SYN WEE

… *Appellant*

And

(1) THIO SYN KYM WENDY
(2) THIO SYN GHEE
(3) THIO SYN SAN SERENE
(4) MALAYSIA DAIRY INDUSTRIES PRIVATE LIMITED

… *Respondents*

Civil Appeal No 148 of 2017

Between

THIO SYN PYN

… *Appellant*

And

(1) THIO SYN KYM WENDY
(2) THIO SYN GHEE
(3) THIO SYN SAN SERENE
(4) MALAYSIA DAIRY INDUSTRIES PRIVATE LIMITED

… *Respondents*

Civil Appeal No 198 of 2017

Between

THIO SYN PYN

… *Appellant*

And

(1) THIO SYN KYM WENDY
(2) THIO SYN GHEE
(3) THIO SYN SAN SERENE
(4) MALAYSIA DAIRY INDUSTRIES PRIVATE LIMITED

… *Respondents*

Civil Appeal No 200 of 2017

Between

THIO SYN WEE

… Appellant

And

(1) THIO SYN KYM WENDY
(2) THIO SYN GHEE
(3) THIO SYN SAN SERENE
(4) MALAYSIA DAIRY INDUSTRIES PRIVATE LIMITED

… Respondents

Civil Appeal No 201 of 2017

Between

(1) THIO SYN KYM WENDY
(2) THIO SYN GHEE
(3) THIO SYN SAN SERENE

… Appellants

And

(1) THIO SYN PYN
(2) THIO SYN WEE
(3) THIO HOLDINGS PTE LTD
(4) UNITED REALTY LTD

… Respondents

ORAL JUDGMENT

[Companies] — [Oppression] — [Minority shareholders]
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v
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Court of Appeal — Civil Appeals Nos 146, 147, 148, 198, 200 and 201 of 2017
Andrew Phang Boon Leong JA, Tay Yong Kwang JA and Quentin Loh J
3 August 2018

8 August 2018 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the oral judgment of the court):

Introduction

1 These six appeals arise out of a series of suits between the members of the Thio family. In the previous suits in 2008, Mr Thio Keng Poon ("Mr Thio"), the patriarch of the family, commenced proceedings against the Thio siblings and their mother for minority oppression and for being irregularly removed from his directorships. Mr Thio was in turn sued for breaches of directors' duties.

2 In the aftermath of the previous suits, the relationship between the Thio siblings fell apart. Three of the Thio siblings, namely, Thio Syn Kym Wendy ("Wendy"), Thio Syn San Serene ("Serene") and Thio Syn Ghee ("Michael"), are the plaintiffs in this case. Their two brothers Thio Syn Pyn ("Ernest") and Thio Syn Wee ("Patrick"), along with their mother, Mdm Kwik Poh Leng

("Mdm Kwik"), are the defendants. The plaintiffs sought relief from minority oppression for acts committed by the defendants and asked for a buyout order in respect of their shares in three of the companies in the Thio family's group of businesses ("the Thio Group"), namely, Malaysia Dairy Industries Pte Ltd ("MDI"), Thio Holdings Pte Ltd ("THPL") and United Realty Pte Ltd ("URL").

3 The trial judge ("the Judge") found for the plaintiffs in part (see *Thio Syn Kym Wendy and others v Thio Syn Pyn and others* [2017] SGHC 169 ("the Judgment")). She first held that the parties were not in a quasi-partnership and did not have any other legitimate expectations independent of any quasi-partnership. She then held that some, but not all, of the acts complained of constituted minority oppression. However, she held that only Ernest and Patrick, and not Mdm Kwik, were involved in the acts of oppression. Hence, the Judge ordered Ernest and Patrick to buy out the plaintiffs' shares, but only in respect of one of the companies, MDI.

4 In these appeals, the plaintiffs appeal against the Judge's findings in respect of four acts that the Judge found did not constitute oppression. The plaintiffs also submit that they are entitled to a buyout order not only in respect of MDI, but also THPL and URL. Ernest and Patrick, on the other hand, appeal in respect of three other acts that the Judge found constituted acts of oppression.

5 Having carefully reviewed the parties' written and oral submissions, we now give our decision. We shall first deal with three issues that form the context against which we evaluate Ernest's and Patrick's conduct in order to ascertain whether their acts constituted oppression and, if so, the appropriate remedy that should be applied in this case. Together, these five issues correspond directly to the five issues that the Judge dealt with in the court below (see the Judgment at [41]).

Our decision on the first three issues

6 We first affirm the Judge's finding that the Thio Group was not run as a quasi-partnership. Mr Thio was a traditional patriarch who had selectively groomed his sons to take over the family business. Hence, while there could be said to be mutual trust and confidence between Mr Thio on the one hand and Ernest and Patrick on the other, at least up to the 2008 proceedings, there was no such relationship between Mr Thio and the plaintiffs. The evidence shows that the plaintiffs were only given shares by Mr Thio because Mdm Kwik had insisted that they be given financial provision and Mr Thio considered that the shares were a means of financial provision that the plaintiffs could not squander.

7 Second, we also affirm the Judge's finding that the plaintiffs did not have a legitimate expectation that they would remain directors of the companies in the Thio Group as long as they were shareholders. Apart from the reasons stated by the Judge, it is significant, in our view, that the parties had entered into the Deed of Settlement as a means of resolving the conflict between them by setting out their rights and obligations in concrete form. It is improbable that the plaintiffs would have been guaranteed directorships as a form of protection for their shares without this agreement being reflected clearly in the Deed of Settlement.

8 However, we allow the appeal against the Judge's finding that the separate legal personality of all of the companies in the Thio Group had to be strictly maintained. While we agree with the Judge that the acts in MDI cannot be considered in an oppression claim in respect of URL, we consider that the acts of MDI and URL are relevant in an oppression claim in respect of THPL. THPL's only assets are the shares of its subsidiaries, and its only roles appear to be to allow Ernest and Patrick to maintain majority shareholding of MDI and

to guarantee the banking facilities required for MDI's operations. Thus, the acts of MDI and URL would inevitably affect THPL, similar to how the business of the holding company in the decision of this Court in *Ng Kek Wee v Sim City Technology* [2014] 4 SLR 723 would invariably have been affected by the businesses of its subsidiaries because the only assets of the holding company were the shares of the subsidiaries. Accordingly, we allow the appeal against the Judge's finding on this ground to this limited extent.

Our decision on whether Ernest's and Patrick's acts constituted minority oppression

9 We turn now to the issue of whether Ernest's and Patrick's acts constituted oppression. We will first address the plaintiffs' appeals followed by Ernest's and Patrick's appeals.

10 The plaintiffs appeal against the Judge's findings that the following acts did not constitute oppression:

(a) the non re-election of Wendy and Serene to the boards of MDI and THPL respectively;

(b) the sale of Village Tower #07-03 ("Unit 07-03") by URL;

(c) the payment of the performance bonuses to Patrick and Ernest in 2010, which was used as a guise to repay them for legal fees incurred in the 2008 proceedings; and

(d) the delay in providing information that the plaintiffs requested.

11 We affirm the Judge's findings that all four of these acts did not constitute oppression. In respect of the non re-election of Wendy and Serene to

the boards of MDI and THPL respectively, since the plaintiffs could not expect that they would remain directors as long as they held shares, there was nothing in law that prevented their non re-election. Although counsel for the plaintiffs, Mr Alvin Yeo SC, pointed us to cl 13 of the Deed of Settlement, there was nothing in that clause that positively contributed to his clients' case that they were entitled to remain directors of MDI and THPL. Hence, Wendy's and Serene's non re-election could not, without more, constitute acts of oppression. Whilst it may be true that their non re-election might have also been *motivated* by personal reasons, that *alone* (*ie*, as mere personal motives) does *not* suffice to constitute an act of oppression *on the present facts*. Although, in the appropriate fact situation, personal reasons might possibly indicate oppression, this was not the case here. On the contrary, both Wendy and Serene did not, as we have just explained, have any legitimate expectation that they would be re-elected as directors.

12 We also affirm the Judge's findings in relation to the last three acts, namely, the sale of Unit 07-03, the performance bonuses in 2010 and the delay in providing information. We agree with the Judge that the plaintiffs were aware of, and had acquiesced in, the decision-making process in relation to the sale of Unit 07-03 by URL as well as the true reason for the performance bonuses in 2010. Hence, these acts cannot be considered commercially unfair. As for the delay in providing information, we also agree with the Judge that the plaintiffs have not demonstrated how the mere delay in providing information amounts to commercial unfairness.

13 We turn now to the appeals brought by Ernest and Patrick. They appeal against the Judge's findings that the following acts constituted oppression:

(a) their pursuit of Mr Thio;

(b) their selective application of the report released by the consultancy firm, Aon Hewitt ("the AH Report"), for their own benefit but to the detriment of Michael and Serene; and

(c) the backdated emoluments paid to them by the Malaysia-incorporated subsidiaries in the Thio Group ("the Malaysian Subsidiaries") in 2012.

14 We affirm the Judge's findings in relation to the first two acts. First, we agree with the Judge that the pursuit of Mr Thio was an act of oppression. In addition to the reasons stated by the Judge, we consider significant that the main reason raised by Ernest and Patrick during the trial for rejecting Serene's offer to repay, that they did not know how much was to be paid and to which company it should be paid, was never raised during the meeting of 11 November 2011. This suggests that this reason was merely an afterthought.

15 Second, we also affirm the Judge's finding in respect of the selective application of the AH Report for the reasons stated in the Judgment. We emphasise that this finding is not based on the denial of benefits to Michael and Serene or the reduction of Michael's remuneration *per se*. These acts must be seen in the context of how Ernest and Patrick cherry-picked the recommendations in the AH Report to benefit themselves while depriving Serene and Michael of their benefits.

16 However, we allow the appeal against the Judge's finding in respect of the backdated emoluments to be paid by the Malaysian Subsidiaries in 2012. The Judge noted that this issue was "not a live one" because Ernest and Patrick did not receive the payments. But she held that Ernest's and Patrick's conduct

was objectionable and showed a tendency to believe that they were entitled to special rewards (see the Judgment at [97]).

17 We respectfully disagree with the Judge that the act of declaring the backdated emoluments was so objectionable that it amounted to commercial unfairness. The plaintiffs' dissatisfaction stemmed not from the fact that backdated emoluments were declared but from the *manner* in which Ernest and Patrick sought to declare the payments: first, Ernest and Patrick only raised the issue to the boards of the Malaysian Subsidiaries and not to the board of MDI; and second, when the issue was eventually brought to the board of MDI, the backdated emoluments for Ernest and Patrick were voted on separately, allowing Ernest to vote on Patrick's payment and vice versa.

18 However, as the plaintiffs admitted during cross-examination, nothing in the Malaysian Subsidiaries' articles of association required the backdated emoluments to be placed before the MDI board. In fact, Mr Sin Boon Ann, MDI's legal adviser, explained during the MDI board meeting of 9 July 2012 that, as separate legal entities, the Malaysian Subsidiaries need not have surfaced the backdated emoluments at the holding company level. He suggested that if MDI had wanted such a practice, it could formalise a group policy or arrangement "going forward". In our view, this shows that the plaintiffs' complaint was centred on their subjective expectations that were not communicated to Ernest and Patrick, which cannot form the basis for a finding of commercial unfairness.

19 Similarly, in relation to the backdated emoluments for Ernest and Patrick being voted on separately, nothing in MDI's articles of association required the resolutions to be combined. Even if they were, the outcome would have remained the same. Michael had abstained from both votes because, as he

conceded during cross-examination, all he had wanted was for the issue to be brought to the MDI board and he had no views on whether Ernest and Patrick deserved the emoluments. As a result, both resolutions were passed with three votes for and two votes against. Therefore, even if the resolutions had been combined, the result would have been a tie, which Mr Lim Choo Peng would have broken in favour of Ernest and Patrick using his casting vote. Viewed in this light, the plaintiffs' real complaint was that no matter how the resolutions were structured, they would have been outvoted by the majority shareholders. But that is precisely the risk that a minority shareholder assumes; so even if the minority is consistently outvoted on the business affairs of the company, mere resentment on their part is not sufficient to constitute oppression: see the Singapore High Court decision of *Re Tri-Circle Investment Pte Ltd* [1993] 1 SLR(R) 441 at [4].

20 Furthermore, we note that even if the acts had constituted oppression, there would have been no real impact on the plaintiffs since Ernest and Patrick renounced the payments on account of family harmony. It is doubtful whether the *de minimis* threshold would have been crossed in such situations, where no injury has been caused at all.

21 For these reasons, while we affirm the Judge's findings in respect of the pursuit of Mr Thio and the selective application of the AH Report, we allow the appeal in respect of the backdated emoluments.

22 Finally, we briefly address an issue raised by the defendants pertaining to the impact of the oppressive acts on the plaintiffs *qua* shareholders. As we have noted thus far, the following acts were acts of oppression:

(a) the pursuit of Mr Thio; and

(b) the selective application of the AH Report.

23 Ernest and Patrick contend that these acts affected the plaintiffs as directors or in their personal capacities instead of as shareholders, and hence, a minority oppression claim was inappropriate. We are unable to accept this submission. In our recent decision in *Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters* [2018] SGCA 33, we held at [116] that in determining whether a claim was properly brought under the bulwark of minority oppression, the court should consider the real injury that the plaintiff seeks to vindicate and the essential remedy being sought to vindicate that injury.

24 In this case, although the direct injury suffered by the plaintiffs was in respect of their rights as directors or as members of the Thio family, the plaintiffs also had a right, as shareholders, to ensure that the companies were properly run and corporate resources were not used to pursue personal interests. Hence, the direct injury suffered by the plaintiffs in their capacities as directors or family members was *evidence* of the majority shareholders' mismanagement of the company. Further, the essential remedy that the plaintiffs sought in order to vindicate that injury was a buyout order and not, for instance, an order for their reinstatement as directors or an order to restore the benefits that had been stripped from them. Taken together, these factors indicate that the plaintiffs' focus was not on the direct loss that they had suffered, but rather their interest in ensuring that Ernest and Patrick ran the Thio Group according to corporate considerations and not for personal interests. We agree with the plaintiffs that this is an appropriate basis upon which to bring a minority oppression claim.

Our decision on the appropriate remedy

25 Given our findings, we now turn to the question of the appropriate remedy. We agree with the Judge that a buyout order is appropriate. Indeed, we consider a buyout order the only practical way to end the oppression because the relationship between the parties has been heavily fractured since November 2011, and Ernest and Patrick have also demonstrated a propensity to disregard the corporate form and use corporate resources to further their personal aims. Without a buyout order, there is a real and present risk that future disputes of the same nature would arise.

26 However, given our finding in respect of the issue of the separate legal personalities of the companies, we consider that the buyout order should not only be in respect of the plaintiffs' shares in MDI, but also their shares in THPL, the holding company. We therefore order Ernest and Patrick to buy out the plaintiffs' shares in both MDI and THPL on the terms that the Judge ordered at [114] of the Judgment.

Conclusion

27 For these reasons, we affirm the Judge's overall finding that the acts of Ernest and Patrick constituted oppression even though the parties did not manage the Thio Group as a quasi-partnership and the plaintiffs had no legitimate expectations independent of any quasi-partnership.

28 We observe, parenthetically, that this might be perceived by some as a widening conception of what constitutes minority oppression for traditional family companies where the family patriarch wields extreme amounts of control over the company and selectively grooms his successors. Such companies would not usually constitute quasi-partnerships because of a lack of *mutual* trust

and confidence, but even if the parties do not expressly set out their legitimate expectations, there may still be unwritten expectations that the family shareholders in management cannot expend corporate resources for personal reasons to punish other family members and that any benefits previously agreed upon between the family members should not be arbitrarily reduced or removed. We leave open the question of whether these expectations establish a new intermediate ***legal*** standard of conduct applicable to traditional family companies *or* merely constitute ***factual*** *instances* that do not carry any normative or legal significance as such (*cf* Wee Meng Seng and Dan W Puchniak, "Derivative actions in Singapore: mundanely non-Asian, intriguingly non-American and at the forefront of the Commonwealth" in Ch 8 of *The Derivative Action in Asia – A Comparative and Functional Approach* (Dan W Puchniak, Harald Baum and Michael Ewing-Chow gen eds) (Cambridge University Press, 2012) at pp 361−365).

29 Notwithstanding these observations, we emphasise that whether an act constitutes oppression is, in the final analysis, a *fact*-specific inquiry. The court must, in each case, examine the relationship between the specific parties and how they have dealt with each other in the past in order to determine whether their conduct constitutes commercial unfairness. Indeed, the parties in the present appeals were focused on the specific facts (as opposed to the larger legal principles) – and that is therefore also the basis upon which we have approached these appeals.

30 In the result, our decision on the first three appeals are as follows.

(a) The appeal in CA 146/2017 is allowed in part. We allow the appeal against the Judge's findings only to the extent that Ernest's and

Patrick's conduct in MDI can be taken into account in an oppression claim in relation to THPL.

(b) The appeals in CA 147/2017 and CA 148/2017 are allowed in part. We allow both appeals against the Judge's findings only to the extent that the declaration of backdated emoluments from the Malaysian Subsidiaries does not constitute an act of oppression (see the Judgment at [109(c)]).

(c) As a result, the plaintiffs are entitled to a buyout order in respect of their shares in both MDI and THPL.

31 The remaining three appeals, CA 198/2017, CA 200/2017 and CA 201/2017, are in respect of the costs orders made by the Judge. In the light of our decision in respect of the first three appeals, we are of the view that the costs orders made in the court below should stand. There will also be no order as to costs with regard to the present appeals. There will be the usual consequential orders.

Andrew Phang Boon Leong Judge of Appeal	Tay Yong Kwang Judge of Appeal	Quentin Loh Judge

Alvin Yeo SC, Tan Whei Mien Joy, Liew Yik Wee, Ho Wei Jie, Seet Tian Long, Rich and Jeremy Tan (WongPartnership LLP) for the appellants in Civil Appeal No 146 of 2017 and Civil Appeal No 201 of 2017 and the first to third respondents in Civil Appeals Nos 147, 148, 198 and 200 of 2017;
Chan Tai-Hui, Jason, Ong Min-Tse, Paul, Mak Sushan, Melissa and Afzal Ali (Allen & Gledhill LLP) for the appellant in Civil Appeal No 147 of 2017 and Civil Appeal No 200 of 2017 and the second

respondent in Civil Appeal No 146 of 2017 and Civil Appeal No 201 of 2017;
Cavinder Bull SC, Kong Man Er and Fiona Chew Yan Bei (Drew & Napier LLC) for the appellant in Civil Appeal No 148 of 2017 and Civil Appeal No 198 of 2017 and the first respondent in Civil Appeal No 146 of 2017 and Civil Appeal No 2017 of 2017;
Siraj Omar (Premier Law LLC) for the third and fourth respondents in Civil Appeal No 146 of 2017 and Civil Appeal No 201 of 2017 and the fourth respondent in Civil Appeals Nos, 147, 148, 198 and 200 of 2017.
