Polybuilding (S) Pte Ltd v Lim Heng Lee and Others
[2001] SGHC 95

Case Number : OS 600259/2001, SIC 600436/2001

Decision Date : 16 May 2001

Tribunal/Court : High Court

Coram : G P Selvam J

Counsel Name(s) : Abigail Ang (Thio Su Mien & Partners) for the plaintiffs; Goh Phai Cheng SC (Ang & Partners) for the third, fourth and fifth defendants; Anna Oei (Lim Ang & Partners) for the first and second defendants

Parties : Polybuilding (S) Pte Ltd — Lim Heng Lee

Companies – Directors – Removal – Removal of director at extraordinary general meeting – Company seeking court declaration of removal – Whether shareholder properly represented at meeting – Whether removal of director lawful – Whether company coming to equity with clean hands

Companies – Directors – Resolutions – Articles allowing resolution in writing signed by majority of directors to be valid – Majority of directors signing resolution in writing without notice to minority – Whether good faith exists – Whether notice to minority necessary Whether resolution valid

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The application

This was an application by Polybuilding (S) Pte Ltd, the plaintiffs. There were five defendants: (1) Lim Heng Lee; (2) Koh Guan Poh; (3) Loh Song Huat [commat] Loh Sung Wat; (4) Lim Soo Chong [commat] Lim Soo Kong; and (5) Polymotor Pte Ltd.

The application sought remedies against the second defendant only. It asked for a declaration that the second defendant, Koh Guan Poh, ceased to be a director of the plaintiffs from 27 January 2001. It also asked for certain other consequential equitable remedies including an injunction. No remedy was sought against any of the other defendants.

The basis of the application was that the second defendant was removed from his office as director by an ordinary resolution passed at an extraordinary general meeting of the plaintiff company.

At the outset I suggested that it might be better if this matter were heard with oral evidence. The first and second defendants responded positively. The plaintiffs and other defendants were adamantly against it. So,I decided to hear the matter.

At the hearing, it was obvious that no remedy was sought against the first, third, fourth and fifth defendants. It was summarily dismissed as against those four defendants.

The second defendant contested the application. His ground was that the fifth defendant (Polymotor Pte Ltd) was not properly represented at the EGM of the plaintiffs (Polybuilding (S) Pte Ltd) on 27 January 2001 when a resolution was purportedly passed, voting him out of office. This ground was elaborated as follows.

Polymotor at the material time had five shareholders. Four of them were directors. They were:

Lim Soo San	-	Shareholder
Lim Soo Tiah	-	Shareholder and Director
Lim Soo Chong	-	Shareholder and Director
Koh Guan Poh	-	Shareholder and Director
Loh Song Huat	-	Shareholder and Director

On 13 December 2000 three of the four directors without notice to Koh Guan Poh signed a `written resolution` appointing one of them, Loh Song Huat, as the representative of Polymotor at any meeting of the plaintiffs. The written resolution, says the second defendant, was invalid because he, as a director, had no notice of it and accordingly it was unlawful in equity. Since some of those who signed the written resolution, with full knowledge of the invalidity, voted in concert to oust him from the board of Polybuilding, the removal was unlawful.

Article 92, pursuant to which the written resolution was procured, read as follows:

> *A resolution in writing signed by a majority of the Directors of the Company shall be as valid and effectual as if it had been passed at a Meeting of the Directors duly called and constituted.*

Chan Choon Ming v Low Poh Choon It is necessary to consider the law. The following propositions are settled law.

(1) Every director of a company, by reason of being vested with the power to act on behalf of the company becomes a fiduciary. That fiduciary office imposes on every director an equitable duty to act bona fide in the interest of the company as a whole and not for personal and ulterior reasons. Lack of bona fides of the directors is a good ground to invalidate the written resolution. The impropriety of individual directors will be imputed to the company which has notice of the impropriety through its directors. See **Chua Boon Chin v JM McCormack** [1978-1979] SLR 496 [1979] 2 MLJ 156 , **Howard Smith v Ampol Petroleum** [1974] AC 821[1974] 1 All ER 1126 and **Lee Tak Samuel v Chou Wen Hsien** [1984] HKC 409[1984] 1 WLR 1202.

(2) Since all directors collectively owe their duties to the company no director or group of directors can exclude one or more directors from their deliberations or exclude his input of his insight before a decision is taken. This is not a mere procedural propriety; it goes to the root of essential justice. See **Chan Choon Ming v Low Poh Choon** (Unreported) .

(3) Where the majority of directors abuse their voting powers by voting without good faith and for ulterior reasons and not for the good of the company, they commit a wrong which can be remedied under s 216 of the Companies Act (Cap 50, 1994 Ed) (oppression or injustice to minority interest).

(4) The directors are the primary organ of a company. They have powers conferred on them to manage the company. These powers are conferred upon the directors for their conscious and collective decision as a board. Prima facie, they can be exercised only at a board meeting of which due notice has been given and at which a quorum is present. And although majority decision prevails, a meeting of the majority without notice to the minority is ineffective - **Re Portuguese Consolidated Copper Mines** (Unreported) **Young v Ladies` Imperial Club** [1920] 2 KB 523 and (supra) at p 2,041.

In ***Chan Choon Ming v Low Poh Choon*** (supra), art 90 of a company provided as follows:

> *A resolution in writing signed by a majority of the directors present in Malaysia entitled to receive notice of a meeting of the directors, shall be as valid and effectual as if it had been resolved at the meeting of the directors duly convened and held.*

A majority of directors signed circular resolutions without consulting a minority director and deliberately excluding them from the minority director. The resolution was struck down on the ground that it was unlawful. In a short but salutary judgment, VC George J said at p 2,041:

> *Article 90 which is one of the articles under the general heading `Proceedings of Directors` has to be read in the context of the principle that the powers conferred upon directors are conferred on them collectively as a board. In that context it is inconceivable that notice of an intended resolution of the directors need not be given to every member of the board. If upon the majority signing such a resolution it is not necessary to pass it on to the others who are present in the country there could be a situation of a company being managed, not by the board, but by a clique, no doubt consisting of the majority of the board, using art 90 type of resolutions and leaving the minority completely in the dark as to what is happening in and to the company. It cannot then be said that the business of the company is managed by the directors (as provided by art 73).*
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> *In **Pulbrook v Richmond Consolidated Mining Co** [1878] 9 Ch D 610, what Jessel MR said, in dealing with the case of a director who was improperly and without cause excluded from meetings of the board, is I think applicable to a director kept in the dark in respect of an art 90 resolution. He said:*
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> *`He has been excluded. Now, it appears to me that this is an individual wrong, or a wrong that has been done to an individual. It is a deprivation of his legal rights for which the directors are personally and individually liable. He has a right by the constitution of the company to take a part in its management, to be present, and to vote at the meetings of the board of directors. He has a perfect right to know what is going on at these meetings. It may affect his individual interest as a shareholder as well as his liability as a director, because it has been sometimes held that even a director who does not attend board meetings is bound to know what is done in his absence.`*
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> *In my judgment to make art 73 meaningful and to give effect to the collective responsibility of the board, although all that is required for an effective art 90 resolution is that it be signed by the majority, it must be taken as implied that every member of the board has to have the resolution circulated to him or her before it can be accepted as a directors` resolution. Which is why in boardroom parlance, an art 90 type of resolution is usually referred to as a circular resolution. Each of the said resolutions, notice of which was not given to the plaintiff, is, in my judgment, ineffective.*

In this regard there is much merit in what is stated in ***Company Law (2nd Ed, 1997)*** by Walter Woon at p 216:

> *Even if the articles allow a circular resolution to be effective when signed by the*

majority, notice of the resolution must still be given to all directors. Otherwise a cabal of controlling directors could do things without the knowledge of the rest of the board, a situation fraught with danger for the company.

Mayson, French & Ryan on Company Law Having stated the substantive propositions I shall now state two peripheral propositions which bear on this case:

(1) he who comes to equity must come with clean hands;

(2) in a case where the court is exercising a judicial discretionary remedy, it is entitled to and obliged to lift the veil of incorporation and scrutinise the real motives of those who hide behind the corporate veil. See (17th Ed, 2000) para 5.2.2.7 and the cases cited there.

In this case, the act of the majority directors of Polymotor purporting to sign the written resolution of appointing one of them the corporate representative was a selfish and surreptitious act. It was to achieve their private agenda of discarding the second defendant as a director of Polybuilding.

The act of the majority directors might constitute an act of conspiracy if the second defendant suffered any damage. The second defendant has also asserted that it was an act of minority oppression or injustice. I am not concerned with these matters in this case.

They acted without giving notice to the second defendant who was also a substantial shareholder of Polymotor. He was away in Thailand at that time. Accordingly, the third defendant was not a true representative of Polymotor. The act of the majority directors was tantamount to substantial injustice because it was a selfish act lacking good faith. The plaintiffs had notice of the defect because those who voted to remove the second defendant had notice of the defect and unlawfulness of the written resolution.

Additionally, the plaintiffs sought the equitable remedies of declaration and injunction. In doing so they did not come with clean hands.

The fact that there was a procedural irregularity in addition to lack of good faith distinguishes this case from the facts of the ***Lee Tak*** Samuel case (supra).

Accordingly, the plaintiffs` application is dismissed against the second defendant. The plaintiffs shall pay the costs of the application.

Outcome:

Application dismissed.