Ang Kong Meng v Lim Teck Boon and Another
[2000] SGHC 115

Case Number : Suit 2/1997, RA 600058 & 600062/2000

Decision Date : 23 June 2000

Tribunal/Court : High Court

Coram : Chan Seng Onn JC

Counsel Name(s) : Tan Cheng Yew (Tan Cheng Yew & Partners) for the plaintiff; Ronald Choo (Allen & Gledhill) for both defendants

Parties : Ang Kong Meng — Lim Teck Boon; Choo Ah Yeow

JUDGMENT:

Grounds of Decision

Background

1. At the conclusion of the trial on 13 February 1998, I found that the defendants had breached their written agreement whereby they agreed to vote at all directors and shareholders meetings in accordance with the plaintiffs vote unless the resolution was against the defendants interest or against the interest of Way Company Pte Ltd (the company). Consequently, I ordered damages to be assessed by the registrar from the date of the plaintiffs removal as the chairman of the company to the date of his reinstatement.

2. The plaintiff was reappointed to the board of directors and made its chairman on 8 June 1998. Counsel for the plaintiff informed me that the plaintiff was wrongly kept out of the management of the company for a period of 21 months.

Assessment by the Registrar

3. The learned assistant registrar assessed the damages under 3 heads as follows:

(a) Loss of income as chairman and director of the company

For loss of income, he fixed the directors fee for the plaintiff at $10,000 p.m. and multiplied it by 21.5 months. After deducting 20% for income tax, transport expenses and the plaintiffs mitigation of his loss, he awarded $172,000 for this item.

(b) Loss of a chance to sell the factory premises before the property downturn in late 1997.

The loss here was assessed on the basis that had the plaintiff not been removed as the chairman and director, the company would have sold the factory premises in Singapore (held on a 30 year lease from 1984 with an option for a further term of 30 years) before the downturn in the property market sometime in late 1997. The assistant registrar assessed this loss to the plaintiff at $50,000 to compensate him for his loss of the chance to sell the factory premises at the market price then prevailing before the property market softened.

(c) Loss in the value of the plaintiffs shareholding because he was not allowed to control and manage the company for 21.5 months

The plaintiff alleged that he had suffered loss because he was prevented from putting into operation his business plans which would have enabled the company to be more profitable. The assistant registrar disallowed this head of claim.

4. The total amount awarded by him was thus $220,000. The plaintiff and defendants appealed. Both appeals came before me.

The defendants counsel argued that the award of $172,000 for loss of directors fees was excessive. He further contended that the claim for loss of a chance (a) to improve the operations of the company and (b) to sell the factory should be disallowed for lack of evidence and for being too speculative and uncertain in nature.

My Decision

5. I varied the assistant registrars order and substantially reduced the damages payable to $104,000. As the defendants have not appealed, I do not think it is necessary to explain in detail why I allowed all 3 heads of claim as prayed for by the plaintiff. The central issue then is the quantum of damages, which I presume is considered too low by the plaintiff who has since appealed. I now give my reasons.

(A) Loss of income as chairman and director of the company

6. Plaintiffs counsel submitted that the plaintiff invested some $801,000 to become the largest shareholder in the company. As the chairman of the board of directors, he would shoulder the heaviest responsibility. Accordingly, counsel supported the learned assistant registrars assessment of $10,000 p.m. as the plaintiffs loss of income. By comparison, the 1st defendants remuneration was $11,000 p.m. as the managing director at that time.

7. I do not think that it is right to assess the plaintiffs remuneration as the chairman and director purely on the basis of the size of his shareholding or his seniority on the board of directors. Size of shareholding is neither an indication of a persons ability to add value nor of his actual contribution to the companys management. In my opinion, the fee paid to a director must generally be commensurate with his overall contribution to the company as a director. As an example, the 1st defendant should have his total remuneration assessed on the value of his work, the time spent and his contribution as a full time managing director with the added responsibilities of the day to day management of the company.

8. In principle, a director with a very large shareholding but who hardly makes any contribution to the company as a director should be paid a correspondingly lower directors fee than one who makes a substantial contribution as a director, but who may only have a nominal shareholding in the company. A shareholders proper return is through dividends and capital appreciation of the shares. The fact that no dividends are declared does not mean that shareholders do not get any return because undistributed profits do increase the net tangible asset value of the shares. Using directors fees as the mechanism to distribute returns to shareholders is therefore improper. It will create distortions in the financial remuneration for directors, particularly where there are non-shareholding directors. What is more intolerable is the fact that minority shareholders who are non-directors will also be unfairly treated and short-changed as profits meant for distribution to all shareholders by way of dividends in accordance with their respective shareholding will be siphoned out by directors should directors fees be allowed as the principal means by which to distribute profits to the shareholders, in which case only shareholders who are directors will benefit to the exclusion of those shareholders who are not directors.

9. I will thus assess the directors fee that the plaintiff ought to have earned on the assumption that he would have run the company on a proper footing i.e. he will not misuse directors fees to reward himself for his large shareholding but that he will declare dividends when he desires to reward the shareholders. In determining the appropriate quantum, I need to take account of (a) the amount of time and effort spent by the plaintiff on the company; and more importantly, (b) the real worth of his contribution to the company as a director. Directors drawing excessive or inflated fees not commensurate with their contribution will need to have their fees shaved down in the interest of the company and its body of shareholders. Review of directors fees will fall within the plaintiffs scope of responsibility once the company is under his control. But I still have to assume that the plaintiff will act in good faith when assessing the appropriate amount to pay himself so as to be fair to other directors and the shareholders at the same time. If these assumptions are not made, assessment of the appropriate amount to fix as his directors fee will be near impossible as there can be many ways to milk the company and other minority shareholders, one of which is to

confer extravagant benefits (e.g. very high housing and children educational allowances, unlimited entertainment allowances etc) or pay grossly inflated fees or salaries to themselves as directors.

10. I will now examine the plaintiffs role and responsibility as a director and chairman of the company. His role is envisaged to be more at a strategic, planning and advisory level, where he sets goals and directions for the company, leaving the implementation and the daily running of the company to the managing director and other executive directors of the company. He has admitted that his role is to steer the company and oversee its operations but not to perform managing directors duties. Although the voting agreement gives the plaintiff full management control, it is not envisaged by the parties that he would have any direct responsibility for the day to day management of the company which would still remain under the 1st defendants charge as the managing director. At the trial proper, the plaintiff even said that he would like the 1st defendant to continue as the managing director.

11. Essentially, the plaintiff would not be playing an active role in the operations of the company. The plaintiff admitted that the 1st defendant has more experience in the line of business that the company is in. He did not know the details of the hair care products manufactured by the company. The plaintiffs own expertise is generally on accounts and budgeting as he is a practising accountant and a certified auditor.

12. Unlike the 1st defendant, the plaintiff would not be working full time in the company. The plaintiff has his other business commitments. According to the affidavit of the 1st defendant, when the plaintiff was a director of the company from 6 June 1996 to 22 August 1996, he only visited the company about twice a week, each time for a period of about one or two hours. He was thus very much a non-executive director. I must emphasise that in my written grounds of judgment for the trial, I made no finding that the plaintiff was to be responsible for the day to day management of the company. I found that he intended to have overall control and management when he bought into the company and signed the voting agreement with the defendants. But this did not mean that he was to be saddled with the day to day business of managing the company at the same time.

13. I cannot imagine this relatively small company paying two persons to manage its daily operations. With the 1st defendant already doing that for about $11,000 p.m., the company can hardly afford to duplicate that function by having the plaintiff do more of the same thing and be paid say another $11,000 p.m. by the company. Manpower costs will increase drastically. Furthermore, duplicating administrative and daily management functions is grossly inefficient from the point of view of workflow. Precious manpower resources will be wasted in the process.

14. Without the evidence to show that the plaintiff was to take over the entire management of the daily operations of the company from the 1st defendant, and that the plaintiff was going to give up his other businesses and work full time in this company, I am not prepared to assess the plaintiffs contribution even at $10,000 p.m. to be nearly on par with the 1st defendant, which was what the learned assistant registrar had done.

15. In any event, if the plaintiff were to remove the 1st defendant as the managing director, reduce the 1st defendants $11,000 p.m. remuneration to almost nil and basically take over all of the 1st defendants functions so as to pay himself what the 1st defendant was getting previously, then plaintiff would in turn be acting in breach of the voting agreement. Surely, my assessment cannot be on this basis.

16. In fact, when the plaintiff first joined the company, he himself recognised his limited contribution both in time and effort when he agreed to his directors fee of $3,664.12 p.m. plus employers CPF contribution of $734 per month, making a total of some **<u>$4,400 p.m.</u>** This is considerably less than the 1st defendants of some $11,000 per month. Plaintiffs counsel showed me his salary slip for July 1996 which showed a gross amount paid of $3,664.12 for that month, and he said that reflected the plaintiffs actual monthly remuneration. As defendants counsel did not dispute it, I took that to be correct despite the plaintiffs declaration in his own IR8A income tax form which stated his remuneration as $3,664.12 for 2 months from 1 June 1996 to 31 July 1996, thereby suggesting that his directors fees was only $1,800 p.m. The plaintiff also accepted at the assessment hearing that his transport allowance was $1,000 and his director fees was $800 p.m., which appear to be at odds again with the salary slip. The 1st

defendant testified to the same at page 24 of the notes of evidence and at paragraph 11 of his affidavit affirmed on 17 July 1999. The written submissions of plaintiffs counsel at paragraph 33 also adopted the figure of $1800 p.m. If indeed the plaintiffs agreed total directors fee per month previously was actually $1,800 and not $3,664.12, have I then overprovisioned for this head of loss? I think not. $1,800 p.m. in my view is on the low side. A figure around $4,000 p.m. is more reasonable. Hence, my assessment based on $3,664.12 p.m. will still not change.

17. With the agreed 20% provision for income tax and transport expenses, his net directors fee p.m. inclusive of employers CPF contribution would come to about $3,660 p.m. I do not think the parties would have contemplated that this agreed directors fee would suddenly balloon to $10,000 p.m. on the 3rd month following the plaintiffs appointment as a director. It is far more likely for the plaintiff to continue on his agreed directors fee for the next 10 months perhaps (i.e. making a total of 12 months before a review is carried out the following year). Accordingly, I assess the plaintiffs loss for this first 10 months at **$36,600**.

18. For the following year, I factor in an increase of $1,000 p.m. In my view, a 27% increase over the directors fee for the previous year is not unreasonable. I assume that the status quo remains in that he would continue as a non-executive director and chairman, not spending more than a few hours a week on matters of the company. New management will usually introduce some changes to the company. As soon as the initial teething problems arising from the changes get resolved in due course, things will settle down and run smoothly. Thereafter, upper level management will not need to spend as much time as before unless further strategic changes are made. Thus it is reasonable to assume that the time spent on the company by the plaintiff in his second year as the chairman and director is not likely to exceed that in his first year.

19. In any event, it is improbable in my view that the other directors would support any request from the plaintiff to double or triple his own directors fee after merely a year in office. The voting agreement will not apply here if the defendants decide to vote against it on the basis that it is not in the interest of the company and the body of shareholders to reward a non-executive director so extravagantly. Hence, applying the same calculations and adopting the 20 % deduction as agreed by the parties, I estimate the plaintiffs gross directors fee inclusive of employers CPF contribution at about $4,660 per month for the 2nd year. This will continue for the next 11.5 months. Total amount is therefore **$53,590**.

20. After adding up the two amounts (underlined in bold above), the total loss of income suffered by the plaintiff for the entire period of 21.5 months is about $90,190, which I then rounded down to $90,000. Plaintiffs counsel made an issue of the fact that his investment of $801,000 in the company is not getting him any returns. If I were to treat this $90,000 as his return on his investment, then he would be getting a respectable return of 6.27% p.a. on his investment which I believe is more than most bank interest rates on saving deposits at that time.

21. I conclude that the assistant registrar used a figure of $10,000 p.m. to assess the plaintiffs loss because he was unduly influenced by the fact that the 1st defendant as the managing director was paid $11,000 p.m. The error in assessment is to give almost equal weight to both the plaintiffs contribution on a part-time basis and the full time contribution of the 1st defendant as the managing director, without regard to what the plaintiff himself had initially agreed as the fair amount he was to be paid as a non-executive director and chairman.

22. I have not deducted any loss that the plaintiff may suffer if he is already occupied full-time in his other business activities. When he has to devote some time to this company as its director and chairman, it may have to be at the expense of the time that he would otherwise spend on his other business activities. As such, I think my award of $90,000 under this head of claim without any deduction for loss elsewhere is fair and reasonable.

(B) Loss of a chance to sell the factory premises before the property downturn in late 1997.

23. It is clear from the evidence that the plaintiff and the other directors signed a memorandum of understanding dated 26 March 1996 which indicated an intention to sell the factory at 4 Joo Koon Road Singapore, and that part of the sale proceeds would be

distributed among the shareholders once the factory was sold. This memorandum was signed contemporaneously with the voting agreement. According to the plaintiff, he wanted to sell the factory in Singapore as it was underutilised. He wanted to use the cash proceeds to generate more sales.

24. On a balance of probability, it is more likely that he favoured a sale but there is insufficient evidence to show that he was adamant that the factory must be sold as soon as possible at the highest offer obtained, even if that offer was well below the valuation. During the short period that he was the chairman (i.e. between 18 June 1996 and 8 August 1996), the plaintiff said that there were discussions on the sale and everyone agreed that the factory should be sold. Nevertheless he agreed with counsel for the defendants that after he was removed as a director, he did not bring to the boards attention that the property should be sold. He certainly could have written to the board of directors as a concerned shareholder if he was so keen to have the premises sold urgently, but he did not.

25. According to the 1st defendant, all production had moved to Johore Bahru by July 1997. However the defendants, who were then in the control of the company, made no attempts to sell the factory although the production had completely shifted out leaving behind only the administration in Singapore. Plaintiffs counsel attributed that to the defendants secret agreement with the other directors not to sell out their shares prior to the sale of the factory. To prevent the plaintiff from gaining control of the company by buying over the shares of the other directors, counsel submitted that the defendants refused to take steps to sell the factory.

26. Since the plaintiff regained control of the company on 8 June 1998, he still has not sold the factory premises in Singapore. He blames the depressed market. The plaintiff said that reasonable offers have not been received but he is still contemplating selling it. In his view, why should be sell at a low price when he can sell at a higher price although he did not need to sell at the highest price.

27. To evaluate the value of the loss of his chance to sell the property before the property downturn, I have to consider the interplay of various contingencies, the complexity of human behaviour and the probable outcome of interactions of people within a group, and in this case, it will be the board of directors.

28. The timeframe available to advertise, get interested buyers to view, bid for the property in a tender, negotiate the terms of sale and finally to obtain the boards approval for the terms of sale and more particularly the sale price is only about 6 to 7 months from about April 1997 to September or October 1997 before the financial crisis erupted, prices became depressed and the chance of selling the factory at a good price was lost. If the window of opportunity to sell is large, then the probability of finding a buyer is high. When the time given to sell is short, the probability of getting a sale through is lower. For the sale of a factory, a window of 6 to 7 months is not exactly a relaxed timeframe within which to clinch a sale.

29. A factory is very different from commodities like oil, rubber, sugar and cocoa for instance where there is a large market of buyers and sellers. For these commodities, selling at the then prevailing market price in the international market is easy and can be done almost immediately. A factory is unique and is not as readily saleable as the examples I have given. Interested buyers will be limited in number. Further these buyers will have to assess, inter alia, the duration of the lease, its particular locality, its size, the factory layout, the suitability for their own specific purposes, and last but not least the price.

30. If the factory is priced substantially below its open market valuation, e.g. in a forced sale situation, it will obviously be much easier and quicker to find a willing buyer. If the sale price is pitched at the valuation price or worse above the valuation price, it will be correspondingly more difficult to find a willing buyer. In other words, the cheaper the price, the better is the chance of getting the factory sold within the limited timeframe before the financial crisis descended. The higher the price, the more difficult it will be to achieve a sale within the time period available.

31. In this case, I do not think that the directors including the plaintiff are offering to sell their priced asset cheaply or at a forced sale price. I therefore assume that they want to sell at a price close to or even above its valuation price if they can. The open market value as at 31 October 1996 was estimated to be $3,950,000 by M/s Edmund Tie & Company. See their valuation report dated 24 September 1998. Given the relative short period of 6 to 7 months, the probability of finding a buyer willing to pay the

full valuation price of $3,950,000, is in my judgment in the region of 20% i.e. a **1/5 chance** of that contingency happening within that limited timeframe.

32. There is also the chance that not all the directors will agree to sell even at that price. Some may be undecided and may want to wait for an even better price as it is only natural to think that perhaps another better offer will turn up later. I cannot rule out greed. One cannot evaluate on the basis that all of them will readily agree to sell at any price offered at that time because they can foretell that the market is going to drop drastically. That will be a wrong assessment with the benefit of perfect hindsight. By waiting for a better offer to come by, they may just miss the chance of selling before the unexpected financial crisis in late 1997. The probability of missing the chance of selling due to greed is very real and must be considered. Once the market downturn sets in, potential buyers for the factory can withdraw very quickly to the sidelines. These acts of third parties are not within the control of the defendants or the plaintiff.

33. As the factory is the major asset of the company, the board must give its approval before that factory can be sold. If the plaintiff wants to push through the sale at a particular price, he must convince the other directors that the price offered by the interested buyer is the best price obtainable. I cannot ignore the possibility that the other directors might in turn succeed in persuading the plaintiff to defer selling in anticipation of even higher prices. To say that greed only affects the other directors but not the plaintiff is unrealistic. I do not think that the plaintiff has ever taken the position that he will sell the factory at any price to the 1st buyer that comes along and that he will use his voting agreement to bulldoze the board into selling the factory without taking into account the views of the other directors. It is not improbable to have differing and conflicting views on whether the price offered is the best price. Having regard to these probabilities, I reckon that there is an **even chance** that the board of directors as a whole might decide to wait for a better offer and not sell within the window period referred to earlier. It is not uncommon for persons with an intention to sell to miss selling at the right time because they want to hold on a bit longer to get a better price before selling. Such are the dynamics of human behaviour.

34. With the 1/5 chance of a buyer coming along to offer to buy at the valuation price and coupled with the even chance that the offer might still not be accepted by all the directors as some might want to defer the sale in the hope of getting an even better price, the resulting probability of an actual sale going through will be 10%.

35. Based on M/s Edmund Ties valuation of $3,950,000 as at 31 October 1996 and the valuation of $3,300,000 as at 2 June 1998 for the factory, the difference in valuation is $650,000. The plaintiffs shareholding is 21.3%. If the probability of a sale is 100% (meaning an absolute certainty), then the plaintiffs loss would be 0.213x $650,000 i.e. $138,450. Since I assessed the probability of a sale to be only 10%, the value of the chance lost by the plaintiff to sell the factory at $3,950,000 before the market softened is computed at $13,845, which I rounded upwards to $14,000.

(C) Loss in the value of the plaintiffs shareholding because he was not allowed to control and manage the company for 21.5 months

36. If the defendants had abided by the voting agreement and had not removed the plaintiff from the board of directors, the plaintiff will have effective control and management of the company, but only in so far as his intended action plans and directions are not against the companys interest or against the personal interest of the defendants. This is expressly provided for in the voting agreement.

37. The defendants are entitled to exercise their independent judgment to decide in good faith if any proposal is against the interest of the company or against their own interest. If so, they are not bound to vote with the plaintiff. Thus, the defendants can still defeat the plaintiffs proposed resolutions even though the plaintiff might have honestly believed that his proposed plans are for the benefit of the company.

38. Apparently what the plaintiff would have done differently from the defendants had he been in charge, is to introduce a series of cost-cutting measures to raise the intrinsic value of the shares of the company. See pages 11 and 12 of the affidavit of

evidence-in-chief of Ms Reggie Thein. In my opinion, the cost-cutting measure involving the reduction of the defendants salaries is not likely to be approved by the board of directors because the defendants will in all probability vote against it, being a measure directed against their personal interest. Similarly, given the negative feelings of the other directors and the defendants towards the plaintiff at that time, it is more probable for the two defendants to vote against the plaintiffs proposal to dismiss the rest of the other executive directors (i.e. Ong Tiong Guan, Tan Seng Teng and Teo Cher Hoon) and certain staff (i.e. Adeline Loy Liang Sin, Teng Yew Nghee and Tee Mong Ling) just for cost-saving purposes without showing how and why these 6 persons are redundant and not contributing. Are their functions now totally unnecessary? If not, then how are their functions to be redistributed? Is the plaintiff assuming those functions by himself? Will he later reward himself with a very generous salary for performing those functions, which in turn will off-set the benefits intended by the cost-cutting measures in the first place? Or will someone else be recruited to replace these 6 persons? These questions are left unanswered. Without knowing the basis, I am not able to assess whether the cost-cutting measures are indeed realistic and viable. I am more inclined to believe that they are mere computations to jack up the damages claimed.

39. Without more details provided by the plaintiff, whose burden it is to prove the damages sustained, I am not prepared to accept that the relatively small company is not going to suffer by such a massive staff cut. If the defendants were to vote against this massive staff cut on the basis that it is against the companys interest, I do not think that they have breached their voting agreement. For this reason, I doubt that the mass dismissals can be carried through by the plaintiff as the rest of the directors will probably vote against these draconian measures.

40. The other cost-cutting measures appear to be the reduction in commissions paid to sales representatives and the reduction in the entertainment, travelling and advertising expenses. I accept the submission of defendants counsel that it is unrealistic to expect the level of sales to remain the same after commissions are cut. Cutting costs by reducing commissions and advertising expenses will likely result in a decrease in sales revenue, which is not provided for in the plaintiffs projections.

41. In my judgment, the plaintiffs cost-cutting measures are on the whole overly simplistic and unrealistic, with insufficient attention paid to lowering of employees morale, motivation and the likely problem of retention of experienced staff. All this will in turn affect the companys performance and profitability over the longer term. Further, I doubt that any of these cost-cutting measures can be carried through because I accept the affidavit evidence of both defendants that they would not have agreed to these measures, which would not have been in the interest of the company in their opinion.

42. In fact, when the defendants were in charge, the total sales generated for the year ending 31 December 1997 was $5,701,314. But after the plaintiff took over, the total sales generated for 5 months of 1999 from 1 January to 31 May 1999 was only $1,672,623.71. After annualising it, the sales would be about $4,014,296.90 representing a reduction of some 30%. It is also useful to compare the net earnings generated (without any deduction for directors fees) to have some indication of the relative performance of the two managements. I note that the net earnings (with the directors fees added back) for the year ending 31 December 1997 is $83,184 plus $443,358, which amounts to $526,542, and this is for 1997 when the defendants were managing the company. Contrast that with the 5 months ending on 3 May 1999 when the plaintiff was in charge. The figures are $94,975.02 plus $82,750 totalling $177,725. On an annualised basis, it is $426,540, which represents a drop of 19 % in real net earnings generated. It appears that the company did better overall in 1997 under the defendants management than in the year 1999 when the plaintiff was in charge.

43. However, I am not prepared to conclude merely on the basis of one years comparison that the defendants are more capable at managing the company than the plaintiff. There are just too many imponderables. Generally, the more contingencies there are, the lower is the value of the loss of that chance simply because the probability of two or more independent contingencies happening is a multiplication or a product of the individual probability of each event happening. As such, the more contingencies there are, the likelihood of a particular event happening, which is dependent on all those contingencies, becomes more and more remote.

44. Nevertheless, I will be generous towards the plaintiff and assess his contribution to the company to be at least equal to the amount to be paid to him as directors fees for the 21.5 months. In other words, I have assessed his contribution to the company to be $90,000 for the purpose of this assessment. The net effect is that his joining the management of the company is neutral in

that there is no loss nor gain to the net tangible asset value (NTA) of the shares over the 21.5 months period.

45. I will elaborate. With the plaintiffs draw down of $90,000 in directors fees, the companys NTA must fall by the same amount $90,000, unless the plaintiff is able to generate for the company additional net earnings of $90,000 to off-set the amount of fees drawn down by him as a director. I believe that an assessment on the basis that the plaintiff will at least contribute enough to earn his own keep in the company so to speak is reasonable.

Total award

46. For the reasons stated, I varied the order of the learned assistant registrar and assessed the total damage at a global sum of $104,000 (i.e. $90,000 plus $14,000). I fixed the cost at $8,000 to be paid by the plaintiff as the defendants had succeeded substantially in both appeals.

Chan Seng Onn

Judicial Commissioner