Ting Sing Ning (alias Malcolm Ding) v Ting Chek Swee (alias Ting Chik Sui) and Others [2006] SGHC 192

Case Number : OS 424/2000

Decision Date : 27 October 2006

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Kannan Ramesh, Marina Chin, See Chern Yang and Paul Seah (Tan Kok Quan Partnership) for the plaintiff; Francis Xavier, Melvin Lum and Dawn Wee (Rajah & Tann) for the first and fourth defendants; Tang King Suong (Tang & Partners) for the third defendant; Andy Cheok and Cleophas Pfang (Michael Khoo & Partners) for the sixth defendant

Parties : Ting Sing Ning (alias Malcolm Ding) — Ting Chek Swee (alias Ting Chik Sui); Borindo Woods Pte Ltd; Havilland Ltd; Gerhard Tesan Binti; Sia Cheng Yong

Companies – Members – Representative action – Plaintiff shareholder in company – Plaintiff alleging fraud by shareholders holding 42% of shares in company – Whether plaintiff imbued with locus standi to bring action – Whether defendants' non-majority shareholding presenting bar to proof of "fraud on the minority" exception to rule in Foss v Harbottle

27 October 2006 *Judgment reserved.*

Choo Han Teck J:

1 This began as an originating summons commenced by the plaintiff on 20 March 2000 against the first ("Ting"), fifth ("Binti"), and sixth ("Sia") defendants for damages for breach of fiduciary duties as directors of the third defendant ("Havilland"), and for a declaration for an account to be taken in respect of the three directors, and, similarly, for an account to be taken against the fourth defendant ("Merit"), a company in which Ting, Binti and Sia each have interests as a shareholder. The plaintiff holds 10% of Havilland's shares and Ting, Binti and Sia hold 15.5%, 12% and 14.5% respectively. These directors, therefore, hold a total of 42% of the shares in Havilland, and 52% when the plaintiff's shareholding is included in the count. The remaining 48% belongs to various other parties. The composition of the holders of this 48% is important in the present application, which was an application by the parties for the determination of a preliminary point, namely, whether the plaintiff had the *locus standi* to commence the present proceedings, or whether he was prevented by the rule in *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189 ("*Foss*") from doing so if the right of action rests with the company and not an individual shareholder – this has been known in company law as the "proper plaintiff rule". This rule was borne from commercial expediency and good sense, and is underpinned by the concept of the company as a separate legal entity. The rule is a useful one because it avoids the multiplicity of actions by individual members by giving the right of action to the company itself; and thus, and in many instances, prevents a minority from oppressing the majority by inflicting vexatious and unwarranted legal action. The plaintiff does not dispute the principle in *Foss*, but argues that he had brought himself within the exceptions to the *Foss* rule. The preliminary issues as agreed between the parties for the determination of this court are as follows:

(a) Whether the plaintiff can establish a *prima facie* case that Havilland is entitled to the relief claimed;

(b) Whether the plaintiff can show that he qualifies to bring an action under the "fraud on the minority" exception to the rule in *Foss*; and

(c) Whether the "justice of the case" exception to the rule in *Foss* should apply.

2 The rule in *Foss* is subject to the well-known exception known as the "fraud on the minority" exception. Generally, this exception may be called in aid when the majority have obtained some sort of benefit at the expense of the company, and, on account of their controlling power, have prevented any action from being brought against them by the company. The normal burden of proof in law is founded on the basis that "he who asserts must prove". Hence, it was not remarkable that the Court of Appeal in England in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 held that the plaintiff carried the burden of proving *prima facie* that there had been some form of wrongdoing on the part of the majority and that the case was within the exception.

3 The plaintiff's claim in this case was based essentially on a forensic accounting report from one Don Ho exhibited in his affidavit filed on 26 January 2006. Various instances of wrongdoing were recorded, for example, unauthorised payments out of Havilland into Merit's account, and payments into other companies such as Pacific Talent Industries Ltd and Aspac Reforest Pte Ltd in which Ting and Sia have direct or indirect interests. However, it is not necessary for me to discuss the allegations of wrongdoing because for the purposes of the preliminary issue, the court is only concerned with whether the plaintiff has made out a *prima facie* case of wrongdoing. In the instant case, the defendants have not engaged the plaintiff in dispute on the point regarding a *prima facie* case of wrongdoing. They must have accepted that the evidence of the forensic expert would have taken the plaintiff's case past the *prima facie* threshold. I would think so too. The focus of the preliminary issue, therefore, concerned the two remaining questions, namely, whether the plaintiff was entitled to commence a derivative action on the ground that the failure of the company to do so was part of the fraud on the plaintiff as a minority in the company, and secondly, whether the interests of justice is an additional ground for relief and whether it applies in this case.

4 The defendants contended that the plaintiff's argument based on his minority status was unfounded because he was not in the minority. The shareholding of the members is the best indicia of control. Therefore, the combined shareholding of Ting, Binti and Sia of 42% clearly did not constitute the controlling block. But fraud being what it is, and no one can tell in what form it appears, the courts have learnt to cast a searching eye over other means of manipulating control. The shareholding of the parties may only indicate ostensible control whereas *de facto* control may lie elsewhere. In searching for fraud, the court is obliged to discern the true seat of power. The plaintiff's first argument was that Ting's sister's 10% stake in Havilland should be added to the 42% of the defendants' group on the ground that the sister was likely to vote in favour of her brother by reason of their blood relation. However, I was unable to find any indication in counsel's submission that explained why the sister would likely vote for Ting's group. In any case, and this is even more so because the plaintiff is himself a nephew of Ting, bias or influence cannot be readily inferred by consanguinity alone. I am of the opinion that there is no basis to add Ting's sister's shareholding to the defendants' block.

5 The plaintiff, however, also submitted that even if Ting, Binti and Sia did not have the majority shareholding, they nonetheless had *de facto* control. As the court said in *Waddington Limited v Chan Chun Hoo Thomas* [2005] HKCFI 1010 at [94]:

> [I]n the light of [the approach in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)*] to control, it is legitimate to take into account the likely effect of a failure on the part of certain shareholders to vote, just as much as it would be appropriate to take account of the fact that some shareholders will vote with the majority out of apathy, if not influence.

In this regard, it was not disputed that Merit had 14 shareholders who were common shareholders of

Havilland. The shareholding of the common shareholders would have increased Ting's, Sia's and Binti's voting block to 72%, thereby making the plaintiff a minority shareholder. That being the case, the plaintiff's counsel contended that the common shareholders could be expected to vote with Ting, Sia and Binti. There is some merit in this argument since it was conceded that Merit had received commercial benefits at Havilland's expense. However, I do not think that the idea of a reason to infer bias in voting should be confused with the discharge of one's burden of proof. The common shareholders might be expected to vote with Ting, Sia and Binti only if they were implicated in the wrongdoing. There was some *prima facie* proof of that by reason of the payouts from Havilland to Merit. So the question was whether, in the light of this, there was any reason to suggest that Ting, Sia and Binti would use their influence to block Havilland from taking legal action. The answer seemed to be none. But it was not a straightforward solution to the legal issue before me. That was because the plaintiff did not put the matter into the hands of the board of directors or the shareholders and did not raise it at Havilland's annual general meeting on 10 March 2000, ten days before he commenced this present action. How does one evaluate the plaintiff's omission in making a formal request that Havilland inquire into the alleged wrongdoing? Was this a situation in which it would be akin to asking the wrongdoer himself to check on the allegations? If it was, then one might say that the plaintiff had no reason to ask all the shareholders of Havilland whether the action ought to proceed. Subsequent to the commencement of this action, Havilland's directors wrote a letter dated 31 July 2000 to the shareholders asking if they were in favour of the action. They voted against continuing the action. On 12 February 2006, five of the shareholders convened an extraordinary general meeting, which was held on 13 March 2006, to consider whether to continue the proceedings. The plaintiff had the opportunity of presenting his reasons at the meeting but chose not to attend. The meeting, with the exception of the plaintiff, thereafter voted against the continuation of the proceedings since it had been commenced without the shareholders' approval. In the circumstances, I am not of the view that the plaintiff has proved sufficiently that the majority had used their influence to oppress him. I am of the opinion that a party in such circumstances was bound to be at the meeting and to present his case to the meeting of shareholders. The fact that the meeting was convened indicated that there was an opportunity for the shareholders in general meeting to address the plaintiff's grievances favourably. I am not convinced that I should draw an adverse inference just by reason of the fact that Merit had shareholders in common with Havilland. Those shareholders might not want to be implicated if misconduct had been involved in the transactions between Havilland and Merit, and they might have agreed with the plaintiff's course of action. In any case, this is a matter of speculation since the plaintiff chose not to attend the meeting and put the matter before the shareholders.

6 The plaintiff having put the matter out of the shareholders' consideration and having purchased this action prematurely, as it appeared, I am of the opinion that there is no basis to consider whether there is a fifth exception to *Foss* based on the concept of the "justice of the case". That exception found favour with the courts in *Hawkesbury Development Co Ltd v Landmark Finance Pty Ltd* [1969] 2 NSWR 782 ("*Hawkesbury*"), *Biala Pty Ltd v Mallina Holdings Limited (No 2)* (1993) 11 ACLC 1082 ("*Biala*"), and *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd* [1995] 3 MLJ 417. Ipp J in *Bialia* expressed the spirit of this "fifth exception" to *Foss* when he held at 1102:

> Equity is concerned with substance and not form, and it seems to me to be contrary to principle to require wronged minority shareholders to bring themselves within the boundaries of the well-recognised exceptions and to deny jurisdiction to a court of equity even where an unjust or unconscionable result may otherwise ensue.

He was giving support to Street J's determination in *Hawkesbury* where he held at 789 that he would be "prepared to accept the existence of a further exception to the rule in *Foss v. Harbottle …* where

justice so requires". In any event, I do not think that this exception would have been helpful to the plaintiff in this case. How often have we heard the name of Equity, and that of her sister, Justice, raised in defiance of the law? Among all the good that Equity and Justice (whatever they might truly mean) have performed in service of the law, one will find dreadful mistakes, silenced and ignored, and vanquished causes on account of some suspicion that they were advanced by villains who happened to have the law on their side. One might ask, is not the law for all – the virtuous and the villainous alike? Judges never appear more judicious than when they are in the company of Equity and Justice. What they should endeavour to avoid is a reliance on vague notions and undefined forms resulting in the perception that Equity (and Justice) is still being measured according to "the length of the Chancellor's foot". If Justice here means that a single, isolated shareholder, like the plaintiff here, should find redress through the courts against errant shareholders where the majority have used their influence to prevent the company, as the proper plaintiff, from taking action, then I would lend the full weight of the court to the plaintiff in the instant case.

7 But justice is a more complex concept than that. It is also about fairness (which can also be difficult to achieve at times). In some cases, it is all about fairness. Fairness in circumstances such as the present involves the balancing of the rights of competing parties. In such a case, the rights and positions of all the other shareholders cannot be ignored. So if the opposing side were the majority, fairness would have required the plaintiff to give all shareholders the opportunity of considering and voting on the action. Shareholders who have not been tainted by any wrongdoing would also have been entitled to express their views. The mechanism of the extraordinary general meeting would have permitted all relevant parties – the plaintiff, the defendants, and other shareholders not named in this litigation – to decide what would be best in the interests of the company. Only when the independent shareholders have spoken would the justice of the case appear more lucidly. From the record, the shareholders voted twice – once in 2000 and once in 2006 – against litigation. The relevant defendants abstained from voting. That was an important fact, but it would not be fatal to the plaintiff's case if he were able to show that the relevant defendants could and did influence the other shareholders even though they themselves did not vote. The plaintiff has not shown that this was the case. Unless the plaintiff had attended the extraordinary general meeting and made his case out before it, it could not be known whether the other shareholders would have voted for or against taking action. As I mentioned above (at [5]), we may assume that innocent shareholders would not wish to be parties to misconduct by the directors. Although it was not a critical factor, nonetheless, I think that the plaintiff's failure to pursue this action with diligence, after having commenced it in 2000, was a factor that could have been considered by the general meeting in assessing the overall fairness of the plaintiff's case. And it was, obviously, also a factor that I have taken into account.

8 On some other occasions, "justice" may mean "deserts". On the present facts, I am reluctant to make pronouncements as to who was more deserving, and of what. Any conclusion that I draw as to deserts in favour of the plaintiff might be an indictment of the other shareholders who either might not have agreed with the impugned defendants or might not have been persuaded by the arguments of the plaintiff as to misconduct that would, in their view, warrant legal action. That being the case, and for the foregoing reasons, I am of the view that the plaintiff has not discharged his obligations at law to satisfy the court that *prima facie*, Ting, Binti and Sia had unduly influenced the majority shareholders from taking legal action through Havilland. Accordingly, I am of the view that the preliminary issue must be ruled in the defendants' favour. I rule, therefore, that the plaintiff has no standing to proceed with this action, and the action is accordingly dismissed with costs to follow the event and to be taxed if not agreed.