# Ling Mang Khong Stanley *v* Teo Chee Siong and others (Yeo Boon Hwa, third party) [2011] SGHC 18

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| **Case Number** | : Suit No 752 of 2007 (Registrar's Appeal No 165 of 2010) (Summons No 4214 of 2010) |
| **Decision Date** | : 20 January 2011 |
| **Tribunal/Court** | : High Court |
| **Coram** | : Philip Pillai J |
| **Counsel Name(s)** | : Mark Goh (Mark Goh & Co) for the plaintiff; Deepak Natverlal (Maximus Law LLC) for the defendants; Lim Ker Sheon (Characterist Law LLC) for the third party. |
| **Parties** | : Ling Mang Khong Stanley — Teo Chee Siong and others (Yeo Boon Hwa, third party) |

*Civil Procedure*

*Contract*

*Companies*

20 January 2011

**Philip Pillai J:**

1 Registrar's Appeal No 165 of 2010 is an appeal against the Assistant Registrar's ("AR") decision to dismiss Summons No 423 of 2010, which is the defendants' application to strike out the plaintiff's entire statement of claim. This is pursuant to O 18 r 19 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("Rules of Court") on the basis that it discloses no reasonable cause of action. The guiding considerations for the purposes of a striking out action were succinctly restated in *Gabriel Peters & Partners (Suing as a Firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649 at [21]:

> The guiding principle in determining what a "reasonable cause of action" is under O18 r19(1)(*a*) was succinctly pronounced by Lord Pearson in *Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094. A reasonable cause of action, according to his lordship, connotes a cause of action which has some chance of success when only the allegations in the pleading are considered. As long as the statement of claim discloses some cause of action, or raises some question fit to be decided at the trial, the mere fact that the case is weak and is not likely to succeed is no ground for striking it out.

A striking out is warranted in such circumstances for several larger policy reasons including, "to allow the case to go further for trial would be to compel the defendants to expend time and money in defending a case which obviously had no merit whatsoever" (*per* Chao Hick Tin JA, in *Bandung Shipping Pte Ltd v Keppel Tat Lee Bank Ltd* [2003] 1 SLR(R) 295 at [34]) and in order not to clog up the courts with such cases.

2 The plaintiff in his Statement of Claim (Amendment No 3), *inter alia*, seeks:

(a) a declaration that the first and second defendants have breached the terms and conditions of clauses 10, 11, 2.7 and 4.5 of Points of Agreement for Shareholders and Operation

("POA") of the third defendant;

(b) a declaration that the first and second defendants have breached the memorandum and articles of the third defendant, in particular Article 43;

(c) an order that the third defendant be wound up under s 216 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Companies Act");

(d) a declaration that the first and second defendants hold on constructive trust for the plaintiff all movable and immovable properties described in the Statement of Claim (Amendment No 3);

(e) a declaration that the defendants are liable to pay loss and damages to the plaintiff to be assessed;

(f) alternatively, an order for the defendants to account to the plaintiff all monies and profits received by the defendants;

(g) an order that the defendants give the plaintiff access to all books, vouchers and other documents relating to the said accounts; and

(h) the cancelling of the Contract pertaining to the plaintiff's sale of 30,000 shares in the third defendant to the second defendant.

3 The plaintiff, formerly sales manager of the company, had subscribed for 21,000 shares at S$1.52 and received 9000 bonus shares at S$1.00. He agreed to sell all his shares in the company in April 2007 to the second defendant, for S$2.80.The first and second defendants were directors and shareholders of the third defendant company. At the material time of his sale, the plaintiff held 10% of the company's issued shares, the first defendant 60%, the second defendant 20% and the third party 10%. The first and second defendants had entered an agreement on 2 April 2007 to sell 160,000 shares (40% of the outstanding and issued shares of the company) to a new party at S$10 per share to be completed on 15 May 2007. The foundation of the plaintiff's complaint is that the first and second defendants had not then disclosed or obtained his consent to this new agreement prior to his sale.

4 The plaintiff first claims that he had a contractual right of disclosure and consent with the first and second defendants. The primary contractual rights claimed by the plaintiff relate to rights of pre-emption/anti-dilution (cl 2.7) and the right of consent to the entry of new shareholders whether by transfer or allotment (cl 11) as provided in the POA. However, he has been unable to produce any POA in which he is a named signatory with them. Instead he relies on an unsigned POA dated 1 September 2005 in which he is named as one of the parties. He next relies on a POA dated 1 March 2006, signed by the named parties. This POA however does not contain his name or signature.

Nevertheless, the plaintiff insists that he had signed a POA with the defendants which he has been unable to produce. The plaintiff had obtained an Anton Piller/Search order ("Search order") against the defendants and to date has not been able to produce a copy of the POA with the defendants in which he is named and is a signatory. All the plaintiff has been able to produce is a draft in which he is named but which is unsigned by any of the named persons including himself. The only signed POA in evidence is that of the POA signed by three other named parties to which the plaintiff is neither named nor a signatory. There is accordingly no evidence of a POA to which the plaintiff is a named party and signatory.

5 In lieu of producing a POA to which he is a named party and signatory, the plaintiff relies on the defendants' affidavit verifying the list of documents which refers in Item 125 to "1 March 2006 Points of Agreement for Share Holders and Operations of Anewtech Systems Ptd Ltd" to assert that this affidavit constitutes an admission of a POA to which he is a named party and signatory. The plaintiff submits that by reason only of the reference in an affidavit verifying the list of documents by description that "there is no reason for the Court or anybody to challenge either the authenticity nor that it purports to have been written and executed by the parties named therein". That he does so even in the face of the POA being produced thereunder revealing no signature of the plaintiff, is a remarkable proposition. The plaintiff relies on *Koh Teck Hee (trading as Mui Teck Heng Garments & Trading Co) v Leow Swee Lim (trading as Meyoung Trading)* [1991] 2 SLR(R) 328 at [18]–[20] for this proposition. A reading of the case discloses that it provides no such support as suggested by the plaintiff. Secondly, the plaintiff argues that the fact that the first and second defendants subsequently entered into a fresh POA with a new party on 6 May 2007 signifies that an earlier one would have existed between the first and second defendants and the plaintiff. However, the subsequent entry of a POA between the defendants and a new party to which the plaintiff was not a party similarly carries no compelling or necessary implication that the plaintiff was thereby a party to an earlier POA with the first and second defendants.

6 The defendants explained the unsigned and signed POA s. All the named signatories in the unsigned POA s were also required to sign personal and several bank guarantee for banking facilities to the company and the plaintiff not being prepared to sign such bank guarantees had then declined to sign the POA. Accordingly, the POA was signed only by those who had signed the personal and several bank guarantees and the plaintiff had signed neither. It would be strange that the plaintiff making an investment of this magnitude in a start up company would not himself have retained in his possession a copy of the POA duly signed by all parties, including himself, if one exists. It is even stranger that having had the benefit of and having conducted a Search order against the defendants, that no such agreement appears to exist in the hands of the defendants either. Accordingly, the foundation of the plaintiff's claim on contractual POA rights against the first and second defendants is *in limine* unsupportable as there is no evidence of the existence of any such agreement to which he was a party.

7 The plaintiff next seeks to nullify the sale of his shares to the defendants on the basis of it having been a breach of article 43 of the company's Memorandum and Articles of Association, which he says required the consent of all shareholders. The plaintiff admits that there has been no breach of article 43, after he had ceased to be a shareholder arising from the subsequent issue and allotment of new shares, as these were duly approved by shareholders at the time of issue. What the plaintiff avers is focussed on the first and second defendants' conduct, that they should not have entered an agreement with the new party whilst he was a shareholder without prior disclosure to him and his consent.

8 Most crucially however, article 43 reads as follows:

> Subject to any direction to the contrary that may be given by the company in general meeting, all new shares shall, before issue, be offered to such persons as at the date of the offer are entitled to receive notices from the company of general meeting in proportion, as nearly as the circumstances admit, to the amount of the existing shares to which they are entitled. The offer shall be made by notice specifying the number of shares offered, and limiting a time within which the offer, if not accepted, will be deemed to be declined and after the expiration of that time, or on the receipt of an intimation from the person to whom the offer is made that he declines to accept the shares offered, the directors may dispose of those shares in such manner as they think most beneficial to the company. The directors may likewise so dispose of any new shares which (by reason of the ratio which the new shares bear to shares held by persons entitled to an offer of new shares) cannot, in the opinion of the directors, be conveniently offered under this article.

Article 43 does not confer a veto right or require the consent of all shareholders including the plaintiff to the issue of new shares. It is in the nature of an anti-dilution provision. It provides a *pro rata* right of first refusal to existing shareholders to subscribe *pro rata* to any new shares issued by the company. Where the shareholder declines his right of first refusal, the directors may dispose of such shares in the matter they think most beneficial to the company. The plaintiff avers that article 43 further imposes a positive duty on the defendants to first notify and disclose to him as shareholder, the terms of any agreement for the sale of shares in the company. Article 43 by its terms does no such thing. There is accordingly *ex facie*, no breach of article 43 of the company's Articles of Association.

9 Finally and in the alternative, the plaintiff seeks an order to wind up the company under s 216 of the Companies Act, on grounds of oppression of minority shareholders. Section 216 of the Companies Act provides a statutory remedial process for shareholder disputes. It is a statutorily prescribed precondition that a person invoking s 216 of the Companies Act must first have the *locus standi* of being a member of the company, *ie*, registered in the company's register of members, which is quite apart from satisfying the substantive conditions set out therein. It was conceded by the plaintiff that by reason of his prior sale of his shares, he had ceased to be a member of the company at the time he filed this action. The plaintiff, however, seeks to rely on *Kitnasamy s/o Marudapan v Nagatheran s/o Manogar* [2000] 1 SLR(R) 542 ("*Kitnasamy*") to overcome this obstacle. In *Kitnasamy*, the Court of Appeal noted on the facts that although a Registry of Companies search did not show that the appellant was a registered shareholder of the company, that was not conclusive as the company auditor confirmed that the appellant was a registered shareholder and that the Registry records would be updated after the annual returns were filed. The court found that there was some evidence that he was the registered shareholder. The Court of Appeal further observed at [27]:

> On the facts as pleaded by the appellant, even if he was not a registered shareholder, it seemed to us that this was an instance where the appellant had agreed to become a shareholder of the company and had rendered invaluable services to it and due to the default of those responsible for the administration of the company, including the respondents, the appellant's name as a shareholder was not entered in the register of the company. The belief of the appellant that he was a member was reinforced by the fact that the notice of an EGM scheduled for 14 January 2000, together with a proxy form, were despatched to him. Such documents are only despatched to members. The respondents were thus estopped from asserting that the appellant was not a member.

In short, in *Kitnasamy*, there was found to be other evidence (apart from the company's register of members) and emanating from the company which confirmed that the plaintiff was a member of the company. The plaintiff here however, was unable to adduce any unequivocal evidence so as to

satisfy the s 216, Companies Act precondition of *locus standi*.

10 The plaintiff next sought to rely on the Malaysian case of *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113 ("*Owen*") which was cited in *Kitnasamy*, where the company having exercised its lien over the plaintiff's shares for debts owing by him to the company pursuant to its articles of association, had thereby caused the plaintiff to cease to be a member of the company. In the factual circumstances, the Malaysian court concluded such conduct to have been "unconscionable or inequitable" and did not permit the company to use the statute as an engine of fraud. The plaintiff here submitted that this court should similarly not allow an expropriation of the shares of a member to deny an action under s 216 of the Companies Act. *Owen* is limited to its facts and distinguishable. Apart from anything else, there was a voluntary sale of shares by the plaintiff and no expropriation by the company. The plaintiff avers that having sold his shares without the defendants' disclosure to him of their prior agreement to sell shares to a new party, he had been deceived and accordingly the defendants should to be estopped from raising his lack of *locus standi* required under s 216 of the Companies Act. Absent any contractual obligation or prescription in the memorandum and articles of association of the company or any unequivocal conduct on the part of the defendants or the company set out in the statement of claim which would evince any estoppel, he does not have the locus standi to invoke the intra shareholder remedies under s 216 of the Companies Act.

11 On the substantive requirements of s 216 of the Companies Act, the question was put to the plaintiff as to what exactly were the pleaded fiduciary duties owed and breached by the defendants *qua* directors to the plaintiff shareholder, or by the defendants *qua* shareholders to the plaintiff *qua* shareholder. The plaintiff averred that there was nothing more than the breach of the POA and article 43 of the articles of association of the company. These, without more, do not disclose any reasonable cause of action.

12 On the declaration sought by the plaintiff with respect to a breach of the POA, no reasonable cause of action is disclosed because he is not a party to POA. On the declaration relating to article 43 of the company's articles of association, since there is similarly no breach of article 43 *ex facie*, his statement of claim on this count discloses no reasonable cause of action. His alternative claim to wind up the company on the grounds of oppression again discloses no reasonable cause of action insofar as it relates to the issue of *locus standi* and also further on the substantive grounds, as these are pleaded and conceded to be founded only on the POA and a breach of article 43.

13 In order to afford the plaintiff a further opportunity to demonstrate a reasonable cause of action in his statement of claim, I invited the plaintiff to apply for leave to amend his statement of claim. If his draft amended statement of claim disclosed a reasonable cause of action, I would have been prepared to grant leave to amend and make appropriate consequential orders with respect to costs thrown away to date.

14 The plaintiff filed Summons No 4214 of 2010 for leave to amend and submitted a draft amendment to the statement of claim which discloses the following new grounds:

(i) the plaintiff now avers that there was an bonus share allotment in which all parties including the plaintiff signed a Dividend Shareholders Agreement under which they agreed, *inter alia*, that "All shareholders are not allowed to sell this share to any 3rd parties without the approval or consent of the company directors and respective shareholders."; and

(ii) the plaintiff now avers that the plaintiff, defendants and 3rd party had conducted themselves as partners and the terms of the partnership are evidenced in the POAs, Dividend Shareholders Agreement, article 43 and the Zhong Eng POA.

15 The plaintiff conceded however that the Dividend Shareholders Agreement had not been breached whilst he was shareholder of the company. The plaintiff further concedes that had it been the intention of the parties under the Dividend Shareholders Agreement or indeed under the POA to prevent any shareholder from granting any option or any interest in his shares to third parties without granting the same right to existing shareholders, or without their prior disclosure or consent, they could have so provided. However, they did not so provide and confined themselves to stating only that they would not sell to third parties without the approval or consent of the directors and respective shareholders. The plaintiff concedes that these had not been breached whilst he was a shareholder of the company. Hence, no reasonable contractual cause of action appears from the draft amendment to the statement of claim.

16 With respect to his second draft amendment to the statement of claim, no further particulars were pleaded with respect to any unequivocal conduct of the defendants or the company that would amount to estoppel so as to overcome the *locus standi* precondition (quite apart from the substantive requirements) under s 216 of the Companies Act. In the light of this, I declined leave to amend the statement of claim further.

17 In these circumstances, I would grant the application to strike out the Plaintiff's Statement of Claim (Amendment No 3) under O 18 r 19 of the Rules of Court as it discloses no reasonable cause of action.

18 Registrar's Appeal No 165 of 2010 is allowed. Costs of the Appeal and hearing below before AR fixed at $12,000, inclusive of disbursements. Costs of dismissal of the action to be agreed or taxed.

19 Summons No 4214 of 2010 for leave to amend Statement of Claim is not granted. Costs included in costs of appeal awarded above.

20 Leave is granted to withdraw notice of appeal filed earlier and to file fresh notice of appeal from 11 January 2011 onwards.