Chong Hon Kuan Ivan and Another v Levy Maurice and Others
[2003] SGHC 302

Case Number : OS 347/2002, RA 346/2003

Decision Date : 04 December 2003

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Prakash Mulani and Aftab Khan (M and A Law Corporation) for appellants / 1st and 3rd defendants; Irving Choh and Alan Thio (Rajah and Tann) for respondents / plaintiffs

Parties : Chong Hon Kuan Ivan; Chang Hong Kaye Jimmy — Levy Maurice; Salomon Salto; Jean-Paul Morin; Publicis Worldwide BV; Publicis Group SA; Publicis Eureka Pte Ltd

Civil Procedure – Striking out – Minority shareholders alleging oppression – Whether defendant-directors properly joined when reliefs claimed had no application to them

Choo Han Teck J:

1 This originating summons is an oppression of minority shareholders action taken out by the plaintiffs who are the minority shareholders in the company known as Publicis.Eureka Pte Ltd (the sixth defendant). The first and third defendants (the appellants in this case) are directors but not shareholders of the company. The fourth and fifth defendants are shareholders of the company. The action against the second defendant was discontinued. The present appeal before me concerns a straightforward and narrow point. The appellants applied to strike out the claim against them on the ground that it disclosed no cause of action, alternatively, that the claim was an abuse of the process of court.

2 The reliefs sought by the plaintiffs in this action are, first, for a declaration that four written agreements (including a sale and purchase agreement) are binding on the defendants. It was not disputed that these agreements do not concern the first and third defendants or require them to perform or desist from performing any particular obligation. The allegation against them was based on the allegation that they exercised their voting powers as directors in such a way as to give rise to the oppressive conduct complained of. Secondly, the plaintiffs are seeking an order that the first plaintiff be reinstated as the managing director of the sixth defendant. Thirdly, that the first plaintiff be reinstated as a cheque signatory of the sixth defendant. Fourthly, that the fifth defendants agree to the appointment of a new auditor in place of Ernst & Young. Fifthly, for an account of profits and revenues of the fifth and sixth defendants and their associated companies.

3 Mr Choh, counsel for the plaintiffs conceded that the reliefs claimed have no application to the first and third defendants but he contended that s 216 permits an action to be commenced in respect of oppressive acts of directors. In effect, he submits that the words of s 216(1) and (2) do give rise to a cause of action against a director who is not a shareholder. The relevant provisions read as follows:

> "(1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister may apply to the Court for an order under this section on the ground –

(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or

(b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

(2) If on such application the Court is of the opinion that either of such grounds is established the Court may, with a view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and, without prejudice to the generality of the foregoing, the order may –

(a) direct or prohibit any act or cancel or vary any transaction or resolution;

(b) regulate the conduct of the affairs of the company in future;

(c) authorise civil proceedings to be brought in the name of or on behalf of the company by such person or persons and on such terms as the Court may direct;

(d) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;

(e) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or

(f) provide that the company be wound up."

4 In the narrow sense, subsection (1)(a) does give the plaintiffs a right to sue arising from the conduct of 'oppressive' directors, but a right to commence an action is not necessarily the same as having a cause of action. A right to sue includes, by implication, a cause of action which, in most cases, envisage a specific claim against an identified party. In the respect of the broader meaning of a cause of action, that is, a right to bring an action, no one need be joined as a party since a specific claim might yet have been made against an identified party. A man who is injured in an motor vehicle accident has a cause of action (in the broad sense) in the tort of negligence. At that level, the defendant may not have been specifically identified save for the general description 'the tortfeasor', and the cause of action remains an abstract one. When the plaintiff's claim becomes clearer and he is able to identify the person or persons against whom he wishes to claim, those persons become the likely parties to be joined as defendants since the plaintiff's cause of action would be against them specifically. So, generally, there is no basis or rationale to add that person as a defendant against a person from whom no relief is being sought. It is true that in the present case, the first and third defendants have no obligation to discharge nor any act to desist from, and this appears to be so from the prayers of the originating summons themselves, and these defendants, therefore, are persons against whom no relief is being sought.

5 Mr Mulani, counsel for the first and third defendants thus referred to *Ng Sing King & Others v PSA International Pte Ltd* [2003] SGHC 59 in support of his argument that the action against the first and third defendants ought accordingly be struck out. The third and fourth defendants in that case, were not members of the company. The question was whether any order against those two

defendants would be enforced against them. One of the prayers included an order that the other defendants buy over all the plaintiffs' shares in the company. An independent accountant was also to be appointed to determine the fair value of the plaintiffs' shares in the company. But the court found that there was nothing required of the third and fourth defendants, and accordingly, took the view that it would be an abuse of the process of court to allow them to remain as parties on record. The court thus reversed the decision below and allowed their application to have their names struck out as defendants. Two of the proper defendants in that case were the wholly owned subsidiaries of the third and fourth defendants respectively. Justice Tay Yong Kwang in the *Ng Sing King* case was of the view that the corporate veil sufficiently shielded the parent companies from any liability. In such a case, Justice Tay held that to name them as defendants would therefore be an abuse of the court's process. I agree with that view.

6 Justice Tay referred to various English authorities, now also cited before me, namely *Re a company* [1986] BCLC 68; *Re BSB Holdings Ltd* [1993] BCLC 246; *Lowe v Fahey* [1996] 1 BCLC 262; and *Re Little Olympian Each-Ways Ltd* [1994] 1 BCLC 420. Diverse propositions appear in these cases. It has been held that in an appropriate case, even a person who is not involved may be joined as a party. The court in *Olympian Each-Ways* case, on the other hand, held that the court could strike out the claim against a person who had been involved in the affair but against whom no remedy was sought. Justice Lindsay there was of the view that in cases where the prospects of an order being made against a defendant were hopeless, it would be an abuse of the process of court to join that defendant as a party. The judicial approach in *Ng Sing King*, in principle, is the same although I detect that Justice Lindsay was more concerned with the hopelessness of the case against the defendant in question than in the inconsequentiality of their being named as parties - as Justice Tay so found in the *Ng Sing King* case. However, it is implicit in Justice Tay's judgment that the application was an abuse of the process of court because no court would have made any order against the applicant directors on the facts as the learned judge there found. On the facts before me, however, the defendants in question, that is, Mr Mulani's clients, were alleged to be responsible for misconduct and breaches of the various agreements which amount to an oppression against the plaintiffs. This would be the sort of situation similar to the *BSB Holdings* case where Justice Vinelott held that B Sky B (the applicant party in question) was properly joined because it was an actor and played a major role in the transactions. Similarly, the court in the *Lowe-Fahey* refused to strike out the defendants on the grounds that the defendants there were relevant parties. Whether that is so is a matter that must be proved by the plaintiffs, but they should not be deprived of the opportunity of presenting their case. The first and third defendants will be entitled to costs should the plaintiffs fail. The balance of justice between shutting out a claimant and incurring the inconvenience of the first and third defendants weigh, in my view, in favour of allowing the plaintiffs to proceed.

7 Mr Mulani urged me to consider that, as in *Re Little Olympian Each-Ways*, no reliefs were being sought against the first and third defendants in the present case before me. What Lindsay J actually said there, was:

> 'That concludes a look at the authorities cited to me. Whilst I would be very willing to following a pattern that emerged from the earlier cases at first instance, I do not regard any clear pattern as having yet emerged, and I have certainly found nothing conclusive that suggests that the words of ss 459 and 461 should not be given their full effect. From the existing authorities cited it can be seen that in an appropriate case relief can be sought against a non-member other than the company itself, or against a person not involved in the acts complained of (at least if that person would be affected by the relief sought) and that ***a person against whom no relief is in terms sought cannot necessarily escape being a respondent, whilst, on other facts, it can be right to strike out a petition, even as against those whose acts are complained of, so long as no relief is sought against such a person***.' *Ibid*, page 429. (my emphasis)

8 It is true that the plaintiffs have not sought any specific prayer against the first and third defendants and so, 'no relief is sought against such a person' in that broad sense. But, if the plaintiffs are right and can persuade the court that they were compelled to commence the present proceedings because of the wilful act of the first and third defendants, they would be entitled to pray that costs be paid by the first and third defendants, whether in full or in part. The circumstances of this case is sufficiently different from that in *Ng Sing King* and I am of the view that the assistant registrar was correct in dismissing the application.

Accordingly, this appeal is dismissed with costs in the cause.