Pang Yong Hock and Another v PKS Contracts Services Pte Ltd
[2004] SGCA 18

Case Number : CA 103/2003

Decision Date : 19 April 2004

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Tay Yong Kwang J; Yong Pung How CJ

Counsel Name(s) : Gregory Vijayendran and Linda Wee (Wong Partnership) for appellants; Hee Theng Fong and Yu Siew Fun (Hee Theng Fong and Co) for respondent

Parties : Pang Yong Hock; Lee Kim Swee — PKS Contracts Services Pte Ltd

Companies – Oppression – Derivative action – Shareholders owning 50% of company's shares wanting to commence proceedings in name and on behalf of company – Whether appropriate to grant leave under s 216A of Companies Act – Legislative intention behind s 216A Companies Act (Cap 50, 1994 Rev Ed)

19 April 2004

Tay Yong Kwang J:

1 This appeal arose out of Originating Summons No 1597 of 2002 which was an application by the appellants, Pang Yong Hock ("Pang") and Lee Kim Swee ("Lee"), under s 216A of the Companies Act (Cap 50, 1994 Rev Ed) for leave to commence proceedings in the name of the respondent ("the company") against two of its directors, Koh Hwee Meng ("Koh") and his wife, Tan Sok Khin ("Tan"), for alleged breaches of their duties as directors of the company. The originating summons was heard by Choo Han Teck J who delivered an oral judgment dismissing it. We dismissed the appeal by Pang and Lee for the reasons that follow.

The factual background

2 The company was registered in Singapore in August 1996. It is involved in the business of building construction, specialising in interior decoration, repair and redecoration, as well as additions and alteration works. The shareholders and their respective shareholdings are as follows:

(a) Pang 22%

(b) Lee 28%

(c) Koh 20%

(d) Tan 30%.

Each of the two factions therefore holds 50% of the shares of the company.

3 The four shareholders are also directors of the company. However, there is no deadlock at the board of directors' level as there is a fifth director, Lim Chong Huat, the husband of Tan's niece, whose allegiance is naturally with the Koh-Tan faction.

4 The Pang-Lee faction alleged that in March 2002, Pang stumbled upon a series of payment records documenting payments made to various parties including the company's subsidiary, PK Summit Pte Ltd ("PK Summit"). Pang and Lee alleged that they were not aware of such payments. Pang and Koh are directors of PK Summit. Until March 2003, Koh also held 77.5% of the shares of PK Summit.

Pang and Lee therefore began to suspect that Koh and Tan were abusing their powers as directors of the company although they did not have evidence of any wrongdoing.

5 Pang questioned Koh and Tan about the said payments and asked that he be allowed to inspect the company's documents but was denied this request. Koh, purporting to act on behalf of the company, then terminated Pang's employment as Project Controller of the company. Subsequently, Pang was also removed as a signatory for the company's bank account. Pang and Lee alleged that all this was done in bad faith to prevent Pang from making further inquiries into the company's affairs.

6 In August 2002, Pang and Lee obtained an order of court pursuant to ss 199(3) and 396(2) of the Companies Act to inspect the accounting and other records of the company and of PK Summit. The court authorised the appointment of Mr Chee Yoh Chuang, an auditor, to act on behalf of Pang to inspect the said records. After his inspection, Mr Chee prepared a report on the nature of the transactions undertaken by the company and by PK Summit and the completeness of the records supporting those transactions.

7 On 7 October 2002, Pang and Lee gave 14 days' notice to the directors of the company, as required by s 216A(3)(a) of the Companies Act, to bring an action against Koh and Tan in respect of payments made by the company to PK Summit and of transactions concerning other companies. On 24 October 2002, a reminder was sent to the directors. However, the company did not convene a directors' meeting to discuss the same. On 6 November 2002, Pang and Lee commenced their originating summons, the subject of this appeal.

The decision of the trial judge

8 On 27 January and 27 February 2003, Choo J made preliminary orders appointing Mr Chan Ket Teck of PricewaterhouseCoopers as a special accountant to perform an independent review of the accounting records of the company on terms of reference subsequently agreed between the parties. The special accountant prepared a report on 14 April 2003.

9 On 2 September 2003, Choo J dismissed the originating summons. He found the special accountant's report to be sufficiently detailed and that it indicated there were strong *prima facie* grounds for a fuller inquiry but not necessarily against Koh and Tan only.

10 The paper trail showed that contracts were signed with PK Summit, a shell company with no employees, and the work under those contracts was carried out by the company's own employees. Pang alleged a sum of $385,086.90 was paid by the company to PK Summit without any value having been given by PK Summit. The report referred to unusual transactions between the company and AA Pyrodor Development Pte Ltd ("AAP"), an entity in which the company and Koh are shareholders. The special accountant was of the view that the margin earned by AAP in the works carried out under a sub-contract from the company was unusually low. There were also payments made to two suppliers of labour where the description in the invoices lacked the details necessary to enable the special accountant to determine the reasonableness of the amounts paid. Further, there were payments made to relatives of the directors and to Tan which were not fully accounted for.

11 Choo J opined, having perused the detailed disputes concerning the various payments and the alleged breaches of directors' duties on the part of Pang, Lee, Koh and Tan, that the allegations and counter-allegations could not be satisfactorily proved or disproved by affidavit evidence alone. He accepted from the report that there were aspects of the conduct of the company that required a more thorough inquiry but was of the view that that was only evidence that a fuller inquiry was

required. The parties before us referred to this ground compendiously as the "affidavit evidence reason".

12 The judge next dealt with what was termed the "counter-suits reason". He held that granting leave to Pang and Lee to sue in the name of the company was not the best solution as the court would also have to grant leave to Koh and Tan to pursue their counter-allegations against them. Although Koh and Tan had not made an application under s 216A of the Companies Act, the court would only be burdened with a late application by them. The judge was of the view that "the prospect of two sets of directors each suing and counter-suing in the name of the company is inappropriate, if not farcical".

13 Pang was at the material times also a director and shareholder of PK Summit. In view of Pang's and Lee's positions in the company and Pang's position in PK Summit, there was a duty on their part to inquire, if not investigate fully, all reasonable suspicions of impropriety by other directors as soon as they arose. The judge felt that Pang and Lee were slack in picking up the matters they were complaining about and he took into account their "sudden burst of allegations" in his overall assessment on whether their application ought to be granted. The parties referred to this ground as the "delay reason".

14 Finally, the judge held that winding up the company was a much more sensible and desirable solution since the company was not doing well and "the inability of the two factions to co-exist itself portends no future for this partnership in a company's clothing". A professional liquidator would be able to investigate the company's affairs and take the appropriate action after studying the special accountant's report and the affidavits filed in the originating summons. This was the "winding up reason".

The appeal

15 The thrust of the appellants' case was that Choo J erred in concluding that Pang and Lee failed to satisfy the requirements of s 216A of the Companies Act. Subsections (2) and (3) of that section provide:

> (2) Subject to subsection (3), a complainant may apply to the Court for leave to bring an action in the name and on behalf of the company or intervene in an action to which the company is a party for the purpose of prosecuting, defending or discontinuing the action on behalf of the company.
>
> (3) No action may be brought and no intervention in an action may be made under subsection (2) unless the Court is satisfied that —
>
> > (a) the complainant has given 14 days' notice to the directors of the company of his intention to apply to the Court under subsection (2) if the directors of the company do not bring, diligently prosecute or defend or discontinue the action;
> >
> > (b) the complainant is acting in good faith; and
> >
> > (c) it appears to be prima facie in the interests of the company that the action be brought, prosecuted, defended or discontinued.

It was not in dispute that sub-s (3)(a) was complied with. The contentions centred on the conditions specified by sub-ss (3)(b) and (3)(c).

16 In *Teo Gek Luang v Ng Ai Tiong* [1999] 1 SLR 434, a director holding 25% of the issued and paid-up capital of a company applied under s 216A of the Companies Act for leave to commence a representative action, in the name and on behalf of the company, against its managing director to recover a sum of money allegedly withdrawn unlawfully by him. Lai Kew Chai J held that the plaintiff's delay in making the application, the less than happy circumstances under which she left the employ of the company, and her personal disputes with the managing director, were not sufficient to evidence bad faith on her part. The judge adopted the approach stated by the Ontario Court of Appeal in *Richardson Greenshields of Canada Ltd v Kalmacoff* (1995) 123 DLR (4th) 628 that before granting leave, the court should be satisfied that there was a reasonable basis for the complaint and that the action sought to be instituted was a legitimate or arguable one. He also held that the court at the leave stage was not called upon to adjudicate on the disputes of facts and inferences but was to rely merely on affidavit evidence. As he concluded that there was "some substance in her complaint", Lai J granted the plaintiff leave to commence the action for a reduced amount subject to certain terms.

17 *Agus Irawan v Toh Teck Chye* [2002] 2 SLR 198 involved a director of a company applying for leave under s 216A of the Companies Act to commence an action against two other directors of the company for alleged breach of fiduciary duties. Choo Han Teck JC (as he then was) dismissed the application. In responding to an application to file a further affidavit and to have the plaintiff there cross-examined, the judge said (at [6]):

> I do not see any need to expand or broaden the case at this stage. At this stage the court need not and ought not be drawn into an adjudication on the disputed facts. This is what a *prima facie* legitimate or arguable case is all about. Leave to cross-examine in such situations ought to be sparingly granted. I need only consider the grounds and points of challenge raised by the defendants to see if they are sufficient in themselves to destroy the credibility of the plaintiff's propounded case without a full scale hearing to determine who was truthful and who was not.

Agreeing with the approach taken by Lai J in the earlier case of *Teo Gek Luang v Ng Ai Tiong*, Choo JC went on to say (at [8]) that the terms "legitimate" and "arguable" must be given their common and natural meaning, which was that the claim must have a reasonable semblance of merit, "not that it is bound to succeed or likely to succeed, but that if proved the company will stand to gain substantially in money or money's worth".

18 Addressing the company's argument that the burden was on the plaintiff to prove that he acted in good faith, Choo JC said (at [9]):

> If at all, the burden would be on the opponent to show that the applicant did not act in good faith; for I am entitled, am I not, to assume that every party who comes to court with a reasonable and legitimate claim is acting in good faith – until proven otherwise. ... It would appear, in my view, that this requirement overlaps in no small way with the requirement that the claim must be in the interests of the company. Beyond that, whether malice or vindictiveness of the applicant ought to be taken into account must be left to the touch and feel of the court in each individual case ...

This decision proceeded on appeal (Civil Appeal No 30 of 2002) and was dismissed by the Court of Appeal on 13 September 2002 with no written grounds of decision rendered.

19 In our opinion, the approach taken in the two cases above is generally beyond reproach. It is consonant with the legislative intention of providing a procedure for the protection of genuinely aggrieved minority interests and for doing justice to a company while ensuring that the company's

directors are not unduly hampered in their management decisions by loud but unreasonable dissidents attempting to drive the corporate vehicle from the back seat.

20 The best way of demonstrating good faith is to show a legitimate claim which the directors are unreasonably reluctant to pursue with the appropriate vigour or at all. Naturally, the parties opposing a s 216A application will seek to show that the application is motivated by an ulterior purpose, such as dislike, ill-feeling or other personal reasons, rather than by the applicant's concern for the company. Hostility between the factions involved is bound to be present in most of such applications. It is therefore generally insufficient evidence of lack of good faith on the part of the applicant. However, if the opposing parties are able to show that the applicant is so motivated by vendetta, perceived or real, that his judgment will be clouded by purely personal considerations, that may be sufficient for the court to find a lack of good faith on his part. An applicant's good faith would also be in doubt if he appears set on damaging or destroying the company out of sheer spite or worse, for the benefit of a competitor. It will also raise the question whether the intended action is going to be in the interests of the company at all. To this extent, there is an interplay of the requirements in s 216A(3)(b) and (c).

21 Having established that an applicant is acting in good faith and that a claim appears genuine, the court must nevertheless weigh all the circumstances and decide whether the claim ought to be pursued. Whether the company stands "to gain substantially in money or in money's worth" (*per* Choo JC in *Agus Irawan*) relates more to the issue of whether it is in the interests of the company to pursue the claim rather than whether the claim is meritorious or not. A $100 claim may be meritorious but it may not be expedient to commence an action for it. The company may have genuine commercial considerations for not wanting to pursue certain claims. Perhaps it does not want to damage a good, long-term, profitable relationship. It could also be that it does not wish to generate bad publicity for itself because of some important negotiations which are underway.

22 In considering the requirement in s 216A(3)(c), the court should also consider whether there is another adequate remedy available, such as the winding up of the company (*Barrett v Duckett* [1995] 1 BCLC 243). We shall return to this case later when we consider the arguments on the "winding up reason".

23 On the facts of the present appeal, Choo J appears to have been satisfied that there was no lack of good faith on the part of the applicants, Pang and Lee. We were not persuaded that the judge applied the wrong test or standard of proof in determining whether it was *prima facie* in the interests of the company that the derivative action be brought against Koh and Tan. While the judge did not refer to his earlier decision in *Agus Irawan* in his grounds of judgment, it was clear that he was acutely conscious of the principles he had to apply in coming to the conclusion that he did. He did not attempt to determine conclusively the disputed facts. He was correct in concluding that the allegations and counter-allegations from the two factions could not be determined on affidavit evidence alone. No legitimate or arguable case had been made out by Pang and Lee against Koh and Tan. If there was such a case made out by the special accountant's report, it was against all the four shareholder-directors.

24 Following from the above, if leave had been granted to Pang and Lee to pursue an action against Koh and Tan, it would only be natural that leave should be granted to Koh and Tan as well to pursue their allegations against Pang and Lee, if they in turn made an application under s 216A. Of course, Koh and Tan, with the concurrence of the fifth director, may not even need to make such an application before commencing action, as they would be in a position to pass board resolutions. At any rate, the prospect of the company suing each faction with the respective suits being driven by the opposing faction was a real possibility.

25 The "delay reason" did not feature prominently in the judge's consideration. This reason was overshadowed by what the judge termed the "more substantial matters that operate against the plaintiffs' application". Those matters were the fact that the company was not performing well and the deadlock that the factions were in. It followed that liquidation of the company would be a much more sensible and desirable solution. We agree with Choo J.

26 We now return to the decision in *Barrett v Duckett*. The facts of that case were somewhat unique in that "the circumstances in which the action [was] brought and pursued include[d] a bitter matrimonial dispute between the plaintiff's daughter and the primary defendant" (*per* Peter Gibson LJ at 245, who delivered the first judgment in the English Court of Appeal). The plaintiff in that case, Mrs Barrett, was a 50% shareholder in Nightingale Travel Ltd. The primary defendant, her former son-in-law, was the other 50% shareholder and the sole director of the company. He was also one of two shareholders in Nightingale Coaches Ltd. His present wife was a director of the second company.

27 On 13 November 1992, the primary defendant petitioned for the compulsory winding up of the first company on the ground that it was insolvent and on the "just and equitable" ground because of the deadlock position that the company was in. On 11 March 1993, Mrs Barrett commenced proceedings on behalf of the first company and/or herself alleging, among other things, that the primary defendant and his present wife had diverted business from the first company to the second company. On 9 June 1993, the defendants applied to strike out Mrs Barrett's action or to stay it until after the hearing of the winding up petition. They did so on the basis that an alternative remedy to the derivative action existed and that Mrs Barrett was an inappropriate person to conduct such litigation on behalf of the first company. The judge at first instance dismissed the application to strike out the action but directed that the action be set down to be heard with the winding up petition.

28 The arguments in the Court of Appeal centred on the applicability of the following proposition of law as stated by Peter Gibson LJ at 250:

> The shareholder will be allowed to sue on behalf of the company if he is bringing the action bona fide for the benefit of the company for wrongs to the company for which no other remedy is available. Conversely if the action is brought for an ulterior purpose or if another adequate remedy is available, the court will not allow the derivative action to proceed.

Peter Gibson LJ, with whom Russell LJ agreed, concluded that Mrs Barrett, upset at the matrimonial problems between her erstwhile son-in-law and her daughter, and indignant at the supplanting of her daughter by the present wife, was driven by personal rather than financial considerations in pursuing the action and was therefore not pursuing it *bona fide* on behalf of the company. He repeated and agreed (at 256) with what Hoffmann LJ said in giving leave to appeal to the Court of Appeal:

> As a matter of common sense, it seems arguable that the parties should not be subjected to lengthy and costly proceedings exacerbated by family hostilities when an independent liquidator might decide that the action could be settled on reasonable terms.

In the result, the Court of Appeal unanimously allowed the appeal and ordered that Mrs Barrett's action be struck out.

29 The appellants before us sought to distinguish the above case on four points. Firstly, there was no pending winding up petition here up to the time Choo J pronounced his decision. It was only after the respondent's Case had been filed on 2 January 2004, in which *Barrett v Duckett* was cited for the first time, that Koh and Tan filed a winding up petition on 19 January 2004. In late February 2004, Koh and Tan applied for a provisional liquidator to be appointed but the High Court adjourned

that application pending the present appeal. The company was therefore not in liquidation nor would it be imminently.

30 Secondly, the appellants argued, *Barrett v Duckett* was an exceptional case on the facts. There was a matrimonial dispute and the two individual defendants there were legally aided persons. The litigation was ruinous to the plaintiff and also caused heavy costs to be incurred by the public purse.

31 The third argument was that the application in the English case was in substance a *locus standi* issue taken out at an early stage of the proceedings. In the present case, considerable time and costs have been spent in court attendance and in the extensive investigation undertaken by the special accountant.

32 The fourth ground propounded by the appellants was that the true rationale in the English case was that the wrongdoers would no longer be in control. In the present case, the contested winding up petition could be dismissed and the alleged wrongdoers would continue to be in control. Alternatively, the rationale in that case was that it was more appropriate for the liquidator rather than the shareholders to take the decision whether to sue. In the present case, it was not a certainty that a liquidator would be appointed.

33 It is true that the winding up petition in *Barrett v Duckett* preceded the derivative action whereas the petition here came about only after the hearing of the application for leave. However, we do not think that would make a crucial difference. In any event, Koh and Tan had, through their solicitors' letter of 26 September 2002, proposed to Pang and Lee that both the company and PK Summit be wound up since there was an impasse in the management of both companies. It was after that letter that Pang and Lee served notice under s 216A(3)(a) on 7 October 2002. The winding up option was therefore not an afterthought.

34 Similarly, the unusual circumstances of the English case do not detract from the principle that a person wishing to sue in the name of the company should be doing so in good faith for the benefit of the company.

35 We now deal with the third and fourth contentions. The arguments whether Pang and Lee should be allowed to sue in the name of the company were canvassed at the very threshold stage of leave. The fact that the case became drawn out merely showed the depth of the problems between the two factions of shareholder-directors. The winding up petition in *Barrett v Duckett* was advertised and was transferred from the Leicester County Court to the High Court in London but it had not been dealt with at the time of the hearing. The petition was going to be contested. In fact, one of the arguments put forward by counsel for Mrs Barrett was that it was not certain that the company in issue would be wound up and that possibility was acknowledged by the court there. If the winding up petition in the present case is dismissed on account of the opposition by Pang and Lee, they have only themselves to blame.

36 The English Court of Appeal also acknowledged that there was no certainty that the liquidator would sue. However, it held that the fact that a liquidator had a discretion in relation to the bringing of an action was no answer to the objection based on the availability of an alternative remedy. It also noted that although Mrs Barrett was not a minority shareholder but a person holding the same number of shares as the other shareholder, she could be treated as being under the same disability as a minority shareholder in that it would not have been possible for her to set the company in motion to bring the action. We respectfully agree with these observations. They are equally apt in the present case.

37 Koh and Tan, as contributories, have taken out a petition (Companies Winding Up Petition No 15 of 2004) on 19 January 2004 to wind up the company. They pleaded that it would be just and equitable to have the company wound up due to the inability of the two factions to co-exist and the resulting deadlock in the company. They also claimed that the company was unable to pay its debts when they fell due and had not filed its statutory accounts nor held the statutory meetings. It appears to us eminently sensible for the parties to bring to an end a business relationship which had unfortunately evolved into a very unproductive and acrimonious one over the years.

38 While an appellate court would be able to form its own conclusions on the affidavit evidence adduced below, we see no reason to disagree with Choo J's views. We therefore dismissed the appeal with costs.

Appeal dismissed with costs.