Kiyue Company Limited v Aquagen International Pte Ltd
[2003] SGHC 156

Case Number : OS 561/2003

Decision Date : 18 July 2003

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Kenneth Tan SC with Wang Wei Chi (Kenneth Tan Partnership) for the plaintiff; Gregory Vijayendran with Melvin See (Wong Partnership) for the defendant

Parties : Kiyue Company Limited — Aquagen International Pte Ltd

Arbitration – Conduct of arbitration – Parties – Whether a complainant may bring an action in the name and on behalf of a company that is involved in arbitration proceedings – s 216A(2) Companies Act (Cap 50, 1994 Rev Ed)

Words and Phrases – 'Action' – ss 216A(2), 366(2)(a) Companies Act (Cap 50, 1994 Rev Ed)

1 An arbitration has commenced in which PG Seraya Investment Pte Ltd ('PGSI') is the claimant. One of the respondents is Aquagen International Pte Ltd ('AIPL'). Kiyue Company Ltd ('Kiyue') is another respondent. AIPL resolved not to contest the claim in the arbitration. Kiyue, which is a minority shareholder in AIPL applied to this court under s 216A of the Companies Act, Ch 50 for leave to intervene in the arbitration 'for the purposes of defending and counter-claiming in the name and on behalf of AIPL', and that it (Kiyue) be authorised to have control of the conduct of the arbitration including the appointment of counsel for AIPL. Mr Kenneth Tan SC and Miss Wang Wei Chi appeared for Kiyue while Mr Gregory Vijayendran and Mr Melvin See appeared for AIPL.

2 There is very little dispute of the facts. Various parties, namely PGSI, ST Engineering Services Pte Ltd ('STE'), 15 other minor parties, including Kiyue, joined in a project to create a showcase power plant harnessing thermal power to create de-salinated potable water. The intention was to use this showcase plant to sell the thermal de-salination technology (known as the 'VTE-SME technology') to overseas clients. AIPL was the company through which the project was to be undertaken. PGSI held 42% of the shares in AIPL, and nominated three of the seven members of the Board of Directors. STE had 25% of the shareholding and nominated two directors to AIPL. Kiyue held 7% of the shareholding and together with the other smaller shareholders, nominated two directors to AIPL. The rights and obligations are set out in the Shareholders Agreement dated 28 May 1999. It was decided by the parties that a separate company be incorporated to carry out the building of the plant. That company was incorporated as Anchorville Pte Ltd ('Anchorville'). There are only three shareholders in Anchorville and they are PGSI, AIPL and STE. Kiyue and the other minority shareholders in AIPL are not shareholders in Anchorville. The rights and obligations of the shareholders are set out in this second shareholders' agreement. The two agreements will be referred to as the AIPL Shareholders Agreement and the Anchorville Shareholders Agreement respectively.

3 At the time when these agreements were made, PGSI was a subsidiary of Power Seraya Ltd which was, in turn, a subsidiary of Singapore Power Ltd. Sometime after, Singapore Power Ltd's group of companies was restructured with the result that PGSI became a direct subsidiary of Singapore Power Ltd. Power Seraya Ltd, which held a power generation licence from the government, left the Singapore Power Ltd's group. Attempts were made to obtain a fresh licence in the name of PGSI failed. This point is relevant in the submission of Mr Tan, SC because he says that it was due to the failure to obtain the fresh power generation licence that Power Singapore Ltd lost interest in its investment in AIPL and Anchorville. He argued that that was the real reason, not the alleged frustration of contract that its subsidiary PGSI put up in its claim in the arbitration, that prompted

PGSI to commence arbitration proceedings.

4 PGSI asserts that the AIPL and Anchorville shareholders agreements have been frustrated and PGSI is, accordingly, released from all its obligations under those agreements; and that included its obligation to contribute towards the building of the showcase power plant. AIPL sought legal advice when it was served with the notice of arbitration. Mr Foo Maw Shen of Ang & Partners rendered his advice in writing on 14 June 2002 and 10 February 2003. He advised that, in view of AIPL's substantial interest in the project, it was imperative that AIPL refutes PGSI's claim and counterclaims against PGSI in the arbitration. However, the majority of the Board of Directors of AIPL were not persuaded. Ang & Partners were subsequently discharged. The majority in the AIPL Board decided not to contest PGSI's claims in the arbitration.

5 Kiyue was named as a respondent in the arbitration, but because it was not a signatory to the Anchorville Shareholders Agreement, it has no legal standing to challenge PGSI's claims in respect of the Anchorville Shareholders' Agreement except through AIPL. It will be recalled that only PGSI, STE and AIPL are parties and signatories to that agreement. That is why Kiyue needed to appear in the name of AIPL to challenge PGSI's claims, in particular, the dispute concerning the Anchorville Shareholders' Agreement. The majority of the directors in AIPL who voted against active participation in the arbitration were alternates of PGSI, the claimant.

6 This application before me was made in reliance of s 216A of the Companies Act, Ch 50. Section 216A reads as follows:

> 'Derivative or representative actions.
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> 216A. – (1) In this section and section 216B –
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> "company" means a company other than a company that is listed on the securities exchange in Singapore;
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> "complainant" means –
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> (a) any member of a company;
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> (b) the Minister, in the case of a declared company under Part IX; or
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> (c) any other person who, in the discretion of the Court, is a proper person to make an application under this section.
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> (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 action may be made under subsection (2) unless the Court is satisfied that –
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> (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;
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> (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.

(4) Where a complainant on an application can establish to the satisfaction of the Court that it is not expedient to give notice as required in subsection (3)(a), the Court may make such interim order as it thinks fit pending the complainant giving notice as required.

(5) In granting leave under this section, the Court may make such orders or interim orders as it thinks fit in the interests of justice, including (but not limited to) the following:

(a) an order authorising the complainant or any other person to control the conduct of the action;

(b) an order giving directions for the conduct of the action; and

(c) an order requiring the company to pay reasonable legal fees and disbursements incurred by the complainant in connection with the action.

(6) Where an action has been commenced or is to be brought in the subordinate courts, an application for leave under subsection (2) shall be made in a District Court.'

The relevant portions are in subsections (2) and (5). The key issue before me was whether the word *action* in s 216A(2) includes an arbitration proceeding. The word *action* used in the usual legal sense means a lawsuit brought in a court. Mr Vijayendran submitted that s 11(1) of the Arbitration Act, Ch 10 and s 8A(1) of the International Arbitration Act which provide that the Limitation Act, Ch 163 applies to arbitration proceedings use these words: '… a reference in [the Limitation] Act to the commencement of any action shall be construed as a reference to the commencement of arbitration proceedings'. In the context, I accept that the word *action* is ordinarily a reference to proceedings commenced in court unless specifically legislated otherwise. Judicial decisions have not enlarged upon the normal understanding and use of that word, and there is no judicial decision to the effect that the word *action* in s 216A of the Companies Act must be read to include arbitration proceedings. Mr Vijayendran also relied on the Canadian decision in *Re Provinces & Central Properties Ltd and City of Halifax*, 5 DLR (3rd) 28 where the question arose as to whether a party who invoked arbitration proceedings was out of time. The issue there arose because s 569(2) of the Halifax City Charter provided that 'no action shall be brought against the City or any such Committee, commission or board, or any such person or persons, after six months next after the act or omission for which the action is brought'. The judgment of the court was delivered by Coffin JA who referred to various authorities including the judgments of Dennistoun JA and Middleton JA in *Dorosh v Bentwood Chair & Table Mfg Co* [1939] 3 DLR 344, 34 and *Re Cairns and McNairn* [1927] 2 DLR 444, 449 respectively, in which the word *action* was expressed to mean 'a civil proceeding commenced by writ, or in such other manner as is prescribed by Rules of Court'. Coffin JA held (at page 42) that 'these authorities support the conclusion that the arbitrator was not a court and that proceedings before him did not constitute an action.' Well known dictionaries of legal lexicon such as Stroud's Judicial Dictionary and Black's Law Dictionary also seem to regard *action* only as an 'invocation of the jurisdiction of a court'. Mr Kenneth Tan SC, however, referred me to the New Shorter Oxford Dictionary which has a more generous definition of the word *action*. It is there described as the 'taking of legal steps to establish a claim or obtain remedy'. The court is, of course, not bound to adopt the definition of legal terms in any dictionary since the court is itself a principal source and expounder of legal terms.

7 Mr Tan submitted that the *Re Provinces* case should be narrowly construed, and, in particular, the word *action* 'in its current use, should be accorded an ordinary meaning within the context of the particular statute'. However, as Mr Vijayendran pointed out, the Companies Act has

clearly shown a discrimination between action and an arbitration proceeding. In s 366(2)(a) it provides as follows:

> 'Notwithstanding subsection (1), a foreign company shall not be regarding as carrying on business in Singapore for the reason only that in Singapore it is or becomes a party to any ***action or suit*** or any ***administrative or arbitration proceeding*** or effects settlement of an action, suit or proceeding or of any claim or dispute' (my emphasis)

I agree with counsel that words must be given a consistent meaning within the same statute.

8 Mr Tan referred to some speeches made by members of Parliament in the course of the second reading of the Bill that introduced s 216A. One of the speeches made by Dr Richard Hu explains the purpose of introducing s 216A. The Minister said:

> "it provides a new regime that will enable representative or derivative actions to be brought on behalf of a corporation to enforce the rights of a corporation where the directors, for example, refuse to enforce those rights. … Such actions would be brought, for example, where the directors of a corporation refuse to enforce rights belonging tot he company. The clause would provide more effective remedies for minority shareholders than existed at common law at present. It would have the effect of overriding the obstacles put in the way of such actions at common law. The ensure that the remedies that would be open to shareholders are not abused and give rise to unjustified court actions, section 216A contains strict conditions that must be satisfied before any action can be brought against corporations."

Section 216A, it was emphasised, would overcome the obstacles placed upon the minority at common law. That would be the rule in *Foss v Harbottle*, 67 ER 189. Section 216A was enacted to enable members of a company to commence or take part in court proceedings in a derivative action in the name of the company under statutory conditions as set out in that section. That is stating the broad intention of the legislature so far as this provision is concerned. The narrower the scope of examination, and the more specific a statutory provision, the greater the care must be to avoid substituting the intention of Parliament with the intention of the court, whose function is not to make law, but to find the meaning that appears from the statutory text. It is in the statutory text that the will of Parliament is manifest. In this regard, it may be wise to eschew a strict construction as well as a liberal construction, and lean towards a *reasonable* construction, for the hermeneutic art as practised by the courts has a more specific, social objective, and thus differs from that of a literary critic. We tend to assume that a statute will, or at least ought to, say what the legislature intended. But the intention of the legislature and the meaning that appears from the text may not always be synonymous. The duty of the court is to ascertain the reasonable meaning from the statutory text; to ask what the text means rather than what it ought to mean. The more unusual the detail, the greater the possibility that the legislature may have preferred to keep the rule within narrow limits. Any endeavour, in such circumstances, to guess what kind of result Parliament would have intended can reap a harvest of misunderstanding, for there is no undertaking more speculative and obscure than thinking what others think. And where the Parliamentary intent cannot be reasonably ascertained from the legislation itself, additions, expansions, as well as deletions to it through judicial opinions is plainly judicial law making or, the imposition of judicial will in the name of interpretation. - that is not the function of the courts.

9 Mr. Tan urged me to adopt the 'purposive approach' in the interpretation and brought my attention to the view of the Law Commission in England in their review of statutory interpretation. Mr Tan says that the Law Commission was critical of the 'tendency of some judges to over-emphasize a narrow version of the literal rule and refuse to go beyond the meaning of a statutory provision in the

light of its immediate and obvious context.' Whether the purposive approach is appropriate depends on the subject of interpretation. If, for example, the legislature provides that the first ten houses at Main Road are to be preserved as historic buildings, the court may not declare that the 11th house on that street to be similarly preserved because the purpose of the statute was to preserve historic buildings even though that 11th house is identical to the other ten. On the other hand, if the statute says that historic houses must be preserved, the court is entitled to resort to the purposive approach and determine whether a hut is a house within the meaning of the statute. Thus, I have no disagreement with the application of the purposive approach of the court in *Re C* [1993] 3 All ER 313 because in the context of the legislation in question, the court was entitled to define whether the natural father is a 'parent with parental responsibility' within the meaning of s 10(4) of the English Children Act 1989. If he was, he could apply as a matter of right for a residence order, otherwise he needed the leave of court. The Court Of Appeal there held that the word 'parent' in the Act did not intend to include a natural father who had been 'freed' of his responsibilities when a court order freed his children for adoption. The definition was directly connected with the need to ascertain whether a parent who has been freed of his responsibilities is nonetheless a 'parent' within the meaning of the Act.

10 The purpose of s 216A is to alleviate the hardship caused by the rule in *Foss v Harbottle*. How much of the *Foss v Harbottle* reins is to be loosened must be understood from the text itself. The court must not assume that the reins are to be cut entirely. If Parliament intended the section to apply to arbitration proceedings it will say that the word *action* in the context of s 216A means and includes arbitration proceedings, a provision similar in terms of s 11 of the Limitation Act, Ch 163 would be inserted to ensure that *action* includes arbitration proceedings. Otherwise, judicial prudence will assume that the word action means court action as that term is generally understood. There has been no known instance where the precision of courtly language has been relaxed to have the word *action* include arbitration. So, the principle of 'purposive interpretation' will be of no assistance if the facts do not warrant it. Of course, an ambiguity in the text can sometimes be resolved by reference to Parliamentary comments made directly on point. In the present case, it will be noted that the comments of Dr Richard Hu expressly refers to 'court action' with no reference to arbitration. Furthermore, s 216A(6) provides that 'where an action has been commenced or is to be brought in the Subordinate Courts, an application for leave under subsection (2) shall be made in a District Court.' This is a significant qualification. 'Court' is defined in the Companies Act to mean the High Court. Thus, without subsection (6) all applications under s 216A must be made to the High Court. By expressly stating that applications to intervene in Subordinate Courts actions must be made in a District Court, the word *action* seems restricted, in context, to court actions only. Hence if arbitration is not expressly included in s 216A the courts should not insert it in the name of legislative interpretation. I accept that there may be good reasons to enlarge the powers of the court by a wider interpretation of s 216A, especially when there is an increasing use of arbitration as an alternative dispute resolution. Without it, shareholders like the present plaintiff may be deprived of a reasonable means of asserting their rights. But if arbitration proceedings have been excluded by the obvious contextual implication then the only reasonable assumptions are that either Parliament had decided not to include it, or that it had not considered the matter on this point at all. In either case, Parliament is the proper institution to effect any necessary redress for the omission. However, as it is, the present plaintiff is not entirely without relief. It may still have a cause of action against the directors concerned for breach of fiduciary duty. Furthermore, an arbitration award obtained in the present circumstances may even be tainted and thereby be liable to be set aside. But that is another story.

11 I have no hesitation in saying that the merits on the facts are strongly in favour of the plaintiff. It is manifestly wrong for a controlling shareholder to sue its subsidiary and then order it not

to defend. On this fact alone equity is against it. And that is not all. It appears that the company had received legal advice to the effect that the claim ought to be resisted. Mr Vijayendran argued that the plaintiff had not proved that the directors of PGSI did not exercise the vote in the interests of the company (AIPL). I do not think that that burden lay on the plaintiff. On the facts that I had just set out, the onus is entirely on PGSI to show otherwise. It has failed to do so. The main point of claim in the arbitration is of dubious merit. I am sceptical that a decision to change the material for the proposed power plant from concrete to steel amounts to a frustration of the contract. It may be a reach of term but 'frustration' does not seem right. All the more when it was not disputed that the PGSI directors voted in favour of the change from concrete to steel. I hasten to add that I am not making a finding or lean towards that finding of fact since the evidence has not been fully placed before me, but on the alleged complaints by the plaintiff seems to form a reasonable basis for the claim to be resisted. It is for this that I would hold that on the merits I would have granted the leave sought. However, for reasons given above, this application will have to be dismissed. I will hear the parties on the question of costs at a later date.