Chan Tong Fan *v* Sloane Court Hotel Pte Ltd (Chiam Toon Tau and another, non-parties) [2013] SGHC 193

Case Number : Originating Summons No 935 of 2012

Decision Date : 27 September 2013

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Gregory Vijayendran, Rachel Chow and Benjamin Smith (Rajah & Tann LLP) for the plaintiff; Kong Man Er (Drew & Napier LLC) for the defendant; Nish Shetty and Jared Chen (Cavenagh Law LLP) for the non-parties.

Parties : Chan Tong Fan — Sloane Court Hotel Pte Ltd (Chiam Toon Tau and another, non-parties)

Companies – Directors – Duties

27 September 2013

Judith Prakash J:

Introduction

1 This application came before me as one of a pair of matters involving essentially the same parties. The relief sought in both applications was the same, *viz*, that the plaintiffs be allowed to commence derivative actions in the names of the defendant companies against the directors of the same for breach of various duties. There was only one plaintiff in this application but in the other application, he was joined as a plaintiff by his wife and daughter.

2 The company involved in this application is Sloane Court Hotel Pte Ltd ("SCH") and the company involved in the other application, Originating Summons No 933 of 2012 ("OS 933/2012"), is Chiam Heng Luan Realty Pte Ltd ("CHLR"). On 23 April 2013, I dismissed the plaintiff's application herein. On the same day, I allowed the application in OS 933/2012 but only in respect of one proposed cause of action, dismissing the prayers of the plaintiffs there to be allowed to pursue other proposed claims. The plaintiff is dissatisfied with the outcome in this application and has appealed. These are my grounds for the decision regarding SCH.

The background

3 The background to the application is set out in more detail in my grounds of decision in OS 933/2012. Suffice it to say here that the plaintiff in this action is the second child of Mr Chiam Heng Luan ("HL Chiam") and Mdm Lim Wee Leng ("Mdm Lim") who in 1971 set up both CHLR and SCH to take over their family business of the Sloane Court Hotel ("the hotel") which was being carried on at 17 Balmoral Road ("the Balmoral Property"). When the companies were incorporated, the ownership of the Balmoral Property was transferred to CHLR whilst the business of the hotel went to SCH. SCH then became the tenant of CHLR. Currently, the main business of SCH is to operate the hotel and a restaurant on the Balmoral Property.

4 SCH has a paid up capital of $270,002 comprising 270,002 ordinary shares of $1.00 each. In October 2012, when this action was commenced, the shareholders were the plaintiff, all his siblings

and the estates of their parents. The plaintiff held 15.56% of the shares. Three of the plaintiff's siblings were directors of SCH and together they held 37.42% of the shares.

5 When SCH was incorporated, HL Chiam and his wife were the sole directors and shareholders. In 1988, Ms Chiam Ai Thong ("Ai Thong") and Mr Chiam Toon Chew ("Toon Chew") were made directors of the company by HL Chiam and in 1989, another sibling, Mr Chiam Toon Tau ("Toon Tau") was also appointed a director. These three persons are still directors of SCH and they were named as the prospective defendants to the action which the plaintiff sought leave to begin.

The application

6 Prayer 1 of the originating summons ("OS") herein prayed that the plaintiff be granted leave to bring an action in the name and on behalf of SCH against Toon Tau, Ai Thong and Toon Chew (referred to collectively as "the Directors") for breaches of directors' duties to SCH in the manner itemised in Appendix 1 of the OS. To summarise Appendix 1, it stated that the breaches of duty related to:

(a) manifestly excessive remuneration paid by SCH to the Directors without the necessary approvals being obtained for such remuneration as required under Art 63 of SCH's articles and s 169 of the Companies Act (Cap 50, 1999 Rev Ed) ("the Act") and this included the sums of $221,189 paid to the Directors for the financial year 2009 and $142,849 paid to them for the financial year 2008;

(b) unexplained failure to obtain optimal usage of the Balmoral Property and its own property TS26 Lot 99899P, formerly known as 17D and 17E Balmoral Road ("the SCH land");

(c) unaccounted/unexplained/undisclosed payments made by SCH in respect of purported "Renovation" expenses incurred;

(d) unaccounted/unexplained/undisclosed self-dealing in the use by Toon Chew of the property owned by SCH at 16 Balmoral Road, #04-06, Balmoral Condominium ("the Unit") as his personal residence from 1992 to 1994;

(e) unaccounted/unexplained failure to use the Unit for SCH's commercial benefit by allowing Ms Chiam Ai Cheng ("Ai Cheng"), a shareholder of SCH, to occupy the Unit as her personal residence from 1993 or 1994 to 1995 and thereafter leaving the Unit vacant until late 1999; and

(f) unaccounted/unexplained failure to take action to arrest the accrual of unrealised exchange losses incurred on SCH's overseas investments.

7 In the course of the proceedings, I asked Mr Gregory Vijayendran, counsel for the plaintiff, to provide me with a proposed statement of claim. He duly submitted a document entitled "Points of Claim" containing details of the action which the plaintiff proposed that SCH should bring against the Directors. I will refer to the Points of Claim in the course of these grounds because I was guided by it in ascertaining the exact nature of the plaintiff's complaints and whether the same amounted to legitimate and arguable causes of action against the Directors. I should point out here that the plaintiff dropped the allegations relating to the alleged wrongful use of the Unit (set out in [6(d)] and [6(e)] above) from the Points of Claim.

8 The plaintiff here made general complaints that were similar to those made by the plaintiffs in OS 933/2012. For instance, he complained that the Directors had deliberately withheld information

regarding SCH, including the accounts of the company, and failed to call for regular Annual General Meetings ("AGM"). The Directors' response in this case was similar to that in OS 933/2012. They contended that AGMs had been called regularly but that formal notices had not been sent out. Instead, shareholders had been notified by informal methods such as the telephone and email correspondence. They also averred that the plaintiff had attended many meetings and had full access to the accounts. I do not think it is necessary in these grounds to go into detail about the various points of view. The flavour of the same can be obtained from my grounds in OS 933/2012.

9 This application was filed on 1 October 2010. On 15 October 2012, Ai Thong and Toon Tau ("the interveners") applied for leave to intervene in these proceedings so as to enable them to file affidavits and appear at the hearing of the application. Their application was granted.

The Extraordinary General Meeting ("EOGM")

10 On 7 November 2012, a Notice of EOGM of SCH was sent out to all its shareholders. The agenda for the meeting was to consider and pass, if thought fit, ordinary resolutions which would ratify the actions of the Directors and absolve them from any breaches of duty they had committed in relation to the subject matter of the plaintiff's complaints. The EOGM was duly held on 23 November 2012 and was attended by all living shareholders including the plaintiff.

11 The resolutions put before the meeting dealt with whether it would be in the interests of SCH for the company to bring an action against the Directors for the matters alleged in Appendix 1 of the OS. The motions were debated and generally the plaintiff was the only shareholder who spoke out against the same. The resolutions that it would not be in SCH's interests to take such action were then passed by a majority of the shareholders. The plaintiff was the only shareholder who voted against them. His sister, Ms Chiam Ai Fong, abstained from voting on resolution 1 (relating to the remuneration of the Directors) and resolution 4 (relating to renovation expenses). She voted in favour of all the other resolutions. Details of the resolutions tabled and passed at the EOGM can be found in Appendix 1 to these grounds (the appendix is taken from the submissions made on behalf of the interveners).

12 The 2012 AGM for SCH was held on 12 December 2012. A further resolution relating to the OS was tabled at this AGM. It read:

> That it be resolved that the shareholders of [SCH] waive and/or ratify any and all alleged breaches of directors' duties by the Directors of [SCH] and/or release the Directors of [SCH] from any liability arising from any or all alleged breaches of directors' duties as alleged at paragraphs (a) to (f) of Appendix 1 of Originating Summons No. 935 of 2012/X.

The above resolution was passed at the meeting. The plaintiff voted against it and Ms Chiam Ai Fong abstained but all other shareholders present at the meeting (including the Directors) voted in favour of the resolution.

The law

13 The plaintiff's application was made under the provisions of s 216A of the Act. This section has been considered in many local cases and I do not think it is necessary for me to give a long account of the law. Suffice it to say that, in order to obtain permission to commence a statutory derivative action, a complainant must establish the following:

(a) that he has given 14 days' notice to the directors of the company of his intention to apply

to the court under s 216A(2) of the Act for leave to bring an action in the name and on behalf of the company;

(b) that he is acting in good faith; and

(c) that it appears to be *prima facie* in the interests of the company that the action be brought.

It was common ground that the plaintiff had complied with condition (a) above. It was the other two conditions that were in dispute during the hearing of the application.

14 In considering whether a complainant has satisfied the conditions above, the following principles apply:

(a) The complainant has the two-fold burden of proving that: (i) there is a reasonable basis for his complaint and a legitimate or arguable action against the proposed defendants; and (ii) it is in the interests of the company for the proposed action to be pursued.

(b) This is not an easy burden for the complainant to fulfil. The court will be slow in granting leave when there is any doubt that the complainant has satisfied his initial burden.

(c) Even where the complainant has satisfied this burden, he must show that his action is brought in good faith. It is his burden to do so. The proposed action will still be rejected if the complainant does not seek to commence the action in good faith.

15 The Directors also sought to rely on some related principles. First, the courts do not grant leave for a derivative action to be brought if the directors and/or shareholders of the company in question, having considered the matter, honestly decide that it would not be in the company's interests to commence or defend the proposed action. This principle was followed by the Singapore High Court in *Panweld Trading Pte Ltd v Yong Kheng Leong and others (Loh Yong Lim, third party)* [2012] 2 SLR 672, where the court stated that shareholders may either prospectively or retrospectively pass a resolution to release a director from his fiduciary duty or exonerate him from the consequences of a breach he had committed (at [40]).

The complaints

Excessive directors' remuneration

16 In the Points of Claim, it was alleged that the Directors had breached their fiduciary duties and their duty to act honestly in that from 1988 to 2009, the Directors had approved their own directors' remuneration without the necessary approval of a general meeting as required under the Articles of Association of SCH and the Act. By reason of these breaches, SCH had suffered loss and would be entitled to an account of the remuneration received and/or recovery for losses. It would be noted that in the Points of Claim, the sums of $221,189 and $142,849 which had been mentioned in the Appendix 1 of the OS were not specified and the claim was cast in a more general fashion.

17 In his written submissions, Mr Vijayendran asserted that the Directors had been approving their own remuneration for close to 40 years and had continually failed to obtain approval from general meetings of the shareholders of SCH. This was because during the period from 1971 to 2009 only three AGMs had been called. In any case, the directors' remuneration stipulated and approved by the Directors themselves was "unjustifiably excessive" in relation to SCH's actual operating profit. Mr

Vijayendran gave one example, *viz*, the sum of $221,189 paid to the Directors and purportedly approved at the company's AGM for the financial year 2009 represented 215.8% of the company's actual operating profit of $102,499 for that year.

18 The interveners denied that the Directors had received fees for acting as directors or that the payments to them had been excessive. They asserted that all moneys paid to them had been salary. The interveners exhibited the minute sheets/attendance lists prepared for AGMs that were held in the years 1974 to 1978 (both years inclusive), 1980 to 1989 (both years inclusive), 1991 to 1998 (both years inclusive) and 2000 to 2011 (both years inclusive). According to the documentation, in some years, more than one AGM was held. The minute sheets of the AGMs showed that in some years (for example 1992, 1996 and 2010) the Directors' bonuses and salaries were specifically approved and that in other years, the audited accounts which included the details of the Directors' remuneration had been approved. The company was not consistent in its nomenclature: sometimes the minutes referred to "Salary and Bonuses" and at other times "Director's Remuneration" was mentioned. There was, however, no reason to doubt the interveners' assertion that the sums paid were in the nature of salary rather than directors' fees. The Directors themselves had held a meeting in April 1990 at which Toon Tau was appointed managing director, Ai Thong was appointed acting director and Toon Chew was appointed as working director. Their salaries at that time were approved at the same board meeting. The minutes were exhibited and supported the assertion that what had been approved was in the nature of salary and not in the nature of directors' fees.

19 As for the plaintiff's assertion that excessive remuneration of $221,189 was paid to the Directors for the financial year 2009, the Directors had explained at the 2011 AGM that the accounts contained a typographical error and that the actual remuneration which was paid out to the Directors for the financial year 2009 was $87,100 and not $221,189. The bigger figure included the salaries of the company's other employees. The plaintiff had without any basis refused to accept this clarification which was given at the AGM at which he was present and instead alleged wrongdoing.

20 During the oral arguments, Mr Vijayendran clarified that the plaintiff was not pursuing the "excessive" point in relation to the remuneration but was focussing on the "non-approval" point. I then asked him whether it was the plaintiff's case that if the remuneration was not approved, then it would have to be returned by the Directors whether or not it had been in a reasonable amount. Mr Vijayendran replied that that indeed was his case.

21 Mr Nish Shetty, counsel for the interveners, then submitted that this was a significant shift in the plaintiff's position and had been taken to avoid the consequences of the interveners' answer. According to Mr Shetty, the plaintiff's schedule of remuneration paid to the Directors was misleading. The plaintiff had lumped the Directors' salaries together with the salaries paid to the other 17 employees of SCH. The Directors had not paid themselves excessive amounts and in any case, their salaries had been approved by the shareholders in general meeting. Further, several shareholders had filed affidavits supporting the Directors and asserting that the amounts paid to them as salary were not excessive but rather less than they deserved. The plaintiff had received generous dividends by reason of the hard work of the Directors and it was not fair for him to complain about their salaries. In the financial years 2007 to 2009 (inclusive), the plaintiff had received dividends of $168,000 per year from SCH. A similar annual amount of dividends had been received by Toon Tau whilst Toon Chew had received $12,000 more and Ai Thong had only received $56,000.

22 I could see no reason why explanations given to the plaintiff at general meetings held before he started the proceedings were not accepted by him. Further, the documents showed that there had been general meetings and that some had specifically approved the Directors' remuneration whilst others had approved the accounts which included these amounts. The fact that the plaintiff may not

have attended the meetings did not mean that what was resolved was not properly resolved or supported by the majority of the shareholders. If the shareholders *bona fide* agree to a certain rate of pay, then the company would not have a cause of action to recover allegedly "excessive" remuneration from its directors. An aggrieved shareholder who does not accept the majority decision may, depending on the circumstances, have the right to bring an oppression action, but he cannot force the company itself to sue the directors.

23 In this case, even if the other shareholders of SCH (*ie*, apart from the plaintiff and the Directors) had not specifically approved the Directors' remuneration at the AGMs of SCH, they had resolved that it was not in the company's interest to sue the Directors for the return of any remuneration and in particular for: (a) the sum of $221,189 paid to them for the financial year 2009; and (b) the sum of $142,849 paid to the Directors as remuneration for the financial year 2008. The shareholders were entitled to take the view that the amounts paid to the Directors were in order even if the sums were high and it was not, in my view, for the court to gainsay this decision. In any case, the plaintiff had dropped his objection to the amounts and was only making a fuss about the approval point. Quite apart from the shareholders' resolution, I did not see how it would be in the company's interest to sue the Directors for the return of their remuneration for which they had given valuable consideration in the form of their hard work. In my judgment, SCH had no legitimate cause of action to recover salaries from its directors.

The SCH land

24 The allegation in the Points of Claim was that, in breach of their duty of diligence, the Directors had caused the company to leave the SCH land vacant for 20 years from 1993 onwards so that SCH had derived no income from it even though it was incurring substantial property tax annually. It was asserted that SCH had suffered loss by reason of such inactivity.

25 The SCH land has an area of 668.7 sq m or 7,197 sq ft and lies along Balmoral Road. It is adjacent to the Balmoral Property. Previously, there was a two-storey block of flats on the SCH land but this was demolished in early 1993. Since then the site has been left vacant. The plaintiff said that substantial property tax amounting to $26,000 annually (as of 2009) had been incurred in respect of the SCH land since 1993. The plaintiff also said that despite his numerous attempts by way of, *inter alia*, his solicitors' letter dated 23 March 2011 and a notice sent out in June 2011, seeking explanations in relation to the lack of development of the SCH land, the Directors had refused to provide him with information.

26 In her affidavit in reply, Ai Thong stated that the SCH land first became vacant when HL Chiam was still alive and the latter was fully aware thereafter that the land remained vacant. The plaintiff had not, however, taken this matter up with his father during the latter's lifetime. She also stated that in 1992, SCH had requested permission to develop the SCH land into service apartments. Permission was refused, however. In 1994, SCH had plans to build an addition to the hotel on the SCH land. In February 1996, an EOGM was held to decide on the use of the land but no conclusion was reached. Subsequently, it was realised that the two plots that make up the SCH land were zoned for different uses, *ie*, commercial and residential, and could not be amalgamated into one plot for one use. SCH decided to wait for the land to be re-zoned so that it could be more effectively redeveloped and used.

27 The plaintiff's response was that it was not correct that there was an EOGM in 1996 to decide on the use of the SCH land. This EOGM was for CHLR and what was discussed was the Balmoral Property. In any event, there was no evidence that any discussion took place regarding the actual usage of the SCH land. No effort was made on the part of SCH to redevelop the land or to consider

options to achieve the optimal usage (or any usage of the land). The interveners had stated that the Directors were waiting for the land to be re-zoned and this was a stand that no honest and intelligent person in the position of the Directors could take. They showed a definite lack of care and diligence in relation to the assets of SCH.

28 I found this claim the most difficult one to assess. On the one hand it did appear as if the SCH land had been subjected to a policy of benign neglect even though expense in the form of property tax was being incurred for it. On the other hand, how a company's assets are to be exploited is one of those commercial matters for the directors to decide on and it is not for the court to second-guess their decisions. It should also be noted that any development activity would have involved SCH in a great deal of expense and it was pre-eminently the province of the Directors to assess whether SCH was able to undertake such expense and what the profit therefrom would be. In this case, there was the added factor that the plaintiff did not commence complaining about the non-development of the SCH land until after his father died even though he must have known long before 2008 that the land was not being utilised. I therefore had some doubts about the *bona fides* of this complaint.

29 Further, the other shareholders of SCH had accepted the Directors' inaction and had resolved that it would not be in the interests of the company to sue them in respect of the SCH land. I came to the conclusion that the only period about which the plaintiff could complain was the period that had elapsed since his father's death and that was a relatively short period. On balance, I took the view that up to the date of the filing of the OS in October 2012, there was no arguable cause of action against the Directors. Having been alerted to the plaintiff's complaints, however, it would be wise for them to look into what possible uses the SCH land could be put to for the benefit of the company. Passively waiting for re-zoning does not seem a viable option in the long term.

Payments made by SCH for "renovation" expenses

30 In the Points of Claim, the plaintiff alleged that the Directors had failed to account for a total of $804,467.92 which had purportedly been expended on "renovation expenses" during the financial years from 1995 to 1996 (both inclusive) and from 1999 to 2010 (both inclusive). They were thus in breach of their fiduciary duty in relation to these expenses.

31 The plaintiff submitted that during the periods in question, SCH had spent a total of $804,467.92 on expenses that were described as "*Renovation*", "*Furniture & Fitting*", and "*Electrical Equipment*" and "*Air-Con*" in the company's accounts. He complained that there was no credible evidence that the purported works actually took place and that the evidence provided by the Directors to show that the company had carried out significant renovations was inadequate and misleading because:

(a) the interveners had not exhibited a single bill or invoice to support the substantial amount spent in 1995;

(b) they had not provided invoices in respect of the $240,177 spent by SCH on renovation expenses in 2000;

(c) invoices for other years had been shown but no receipts to prove that payment had actually been made;

(d) many of the documents exhibited were merely quotations, not invoices, and many of these were not signed by SCH and were therefore inconclusive as evidence that renovations had taken place; and

(e) the 15 invoices exhibited by the Directors for the periods in question accounted for only a small fraction of the total amount spent and indicated that only minor renovations had been undertaken.

32 The plaintiff submitted that in the absence of any evidence of renovation and any credible explanation for the absence of evidence, the payments were not legitimate expenses incurred in the ordinary course of business of SCH and were therefore *prima facie* not in the interests of company.

33 I agreed with the interveners that the plaintiff's allegations were frivolous. The interveners had explained that the sums involved included expenditure for renovation, furniture and fittings for the hotel, electrical equipment and the hotel's air-conditioning system over a long period of time. The plaintiff's allegation was that $805,069.21 was spent over a period of about 12 years and that this was an unreasonable figure. However, the works were done in respect of a building that was more than 40 years old and was being run as a hotel which meant that it had to be kept in good condition and that the electrical fittings had to be kept in order. In that context and considering the period of time, the sum involved was entirely reasonable. Although the Directors had only been able to provide documentary proof of some of the work, that did not mean that these expenses which were reflected in various sets of accounts were not properly incurred. The plaintiff was being unreasonable in insisting that all documents had to be invoices and that there had to be written proof of acceptance of quotations. There was no reason for me to disbelieve the evidence of Mr Chiam Toon Hai, Ms Chiam Ai Cheng and Ms Chiam Ai Peng (who had all worked in the hotel) given in OS 933/2012 that the renovations carried out at the hotel over the years were necessary and properly accounted for.

34 The plaintiff was, in my view, making speculative points in relation to the accounts because the Directors were not able to produce all the documents that he thought should be produced. He could not make any positive point about work not having been done. What he was doing was nit-picking on documentation and not on substance.

SCH's overseas investments

35 The Points of Claim alleged that the Directors had breached their duty of due diligence in that they had "caused [SCH's] substantial overseas investments to incur substantial unrealised exchange losses" for the seven and a half financial years from the financial year ending 31 December 2003 to the financial year ending 31 December 2010. These losses totalled $1,082,445.

36 The plaintiff noted that SCH had substantial overseas investments in the United Kingdom, the Hong Kong SAR and Malaysia. SCH had bank accounts in each of these jurisdictions and, according to the plaintiff, SCH had incurred substantial unrealised exchange losses in respect of the deposits in these accounts. These losses were "disproportionately excessive" relative to the company's actual operating profits or to the foreign cash and cash equivalents it held. Counsel explained that these unrealised exchange losses arose from the translation of SCH's overseas assets to Singapore Dollars so that they could be reported in SCH's accounts. The underlying complaint obviously was that the Directors had failed to repatriate the moneys when the exchange rates were favourable in relation to the Singapore dollar.

37 I could not understand this complaint. It was a commercial decision for the Directors to make as to whether SCH's money should be kept abroad or brought back to Singapore. The Directors would have had a reason for keeping the money in the foreign jurisdictions and whilst it may have been unfortunate that exchange rates moved against the Singapore Dollar, that in itself did not make it a breach of duty to maintain the foreign deposits.

38 The interveners emphasised that the alleged forex losses were unrealised and so far were only paper losses. It was quite possible that the situation would change in the future in respect of some or all of the foreign currencies. Further, the plaintiff's calculation of the alleged loss was incorrect. The sum of unrealised losses from year to year had been incorrectly represented as an aggregate total when it was a year to year fluctuation. The interveners also maintained that it was against SCH's commercial interests at present to repatriate the sums. This would force SCH to realise its losses. Instead, since there was no urgency to create liquidity for SCH, the approach the Directors had taken was to wait until there was a more positive return on the investments rather than to rush in and realise the current losses. The overseas investments were in any event meant to be long-term in nature.

39 I accepted the interveners' explanation. In my view, how SCH's excess cash should be deposited/invested and where it should be invested were decisions to be made by the board. The board was entitled to take a view on whether repatriation was necessary in the light of exchange rate fluctuations and it was also entitled to decide to keep the money abroad until the exchange rates improved. Whether losses should be cut at one point or another is primarily a judgment call. It is not for the court to make that judgment and even if it turns out that the Directors had made a wrong call in this respect, that does not put them in breach of duty.

40 In my judgment, SCH had no arguable or legitimate claim against the Directors in this respect.

Would the proposed action be in the interests of SCH?

41 The plaintiff had the burden of establishing that the proposed action would be in the interests of SCH. For the reasons that I have given in relation to the individual complaints, I concluded that it would not be in SCH's interests to pursue any claim against the Directors.

Good faith

42 I have dealt with this topic in some detail in my grounds in OS 933/2012. What I said there applies in this case as well. In fact, the plaintiff's lack of reasonable grounds for his complaints was even more noticeable in the case of SCH than they were in the case of CHLR. The plaintiff made frivolous points about the cost of renovations and fittings and about exchange losses. He seemed determined to find fault with the Directors. There were other matters which were raised in the OS which the plaintiff dropped in the course of the proceedings but the fact that he brought them up in the first place simply added to my impressions regarding his good faith. In my judgment, the plaintiff failed to establish good faith in this case.