

Pang Yong Hock and Another v PKS Contracts Services Pte Ltd
[2003] SGHC 195

Case Number : OS 1597/2002

Decision Date : 02 September 2003

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Gregory Vijayendran and Linda Wee (Wong Partnership) for the plaintiffs; Hee Theng Fong and Benedict Tan (Hee Theng Fong & Co) for the defendants

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

Companies – Capacity – Derivative Action – Whether appropriate to grant leave to commence proceedings in the name of the company under s 216A of the Companies Act (Cap 50, 1999 Rev Ed).

1 This was an application by the plaintiffs under s 216A of the Companies Act, Ch 50 for leave to commence proceedings in the name of the defendant company PKS Contracts Services Pte Ltd ('the company') against Koh Hwee Meng and Tan Sok Khin. There are only four shareholders in the company and they are split evenly into two groups, the plaintiffs comprising the first and Koh and Tan the other. Although the two groups own the shares in the ratio of 50:50, the Koh-Tan group has an edge in the board of directors' meetings because they had the allegiance of one Lim Chong Huat who is also on the board of directors and thus Koh-Tan had the majority vote.

2 The plaintiffs issued a notice under s 216A(3)(a) of the Act on 7 October 2002 requiring the company to commence an action against the directors Koh and Tan. No action was taken by the board in that respect and, consequently the plaintiffs filed this application. The complaints against Koh and Tan were based on breaches of directors' duties of care and skill and also under s 157(1) of the Act. The thrust of the alleged misconduct concerned payments made by the company to a company called PK Summit Pte Ltd as well as transactions concerning other companies.

3 A preliminary order was made on 27 January 2003 and 27 February 2003 in which Chan Ket Teck of Pricewaterhousecoopers was appointed a Special Accountant to perform an independent review of the accounting records of PKS Contracts Services Pte Ltd ('the company'). The terms of reference were agreed by parties on 17 March 2003. The lengthy terms in three pages are set out in the Special Accountant's Report dated 14 April 2003. The special accountant's review under the terms of reference covered a number of transactions including transactions with PK Summit. The report is sufficiently detailed and indicates that there are strong *prima facie* grounds for a fuller inquiry but not necessarily against Koh and Tan only. The paper trail showed that contracts were signed with PK Summit which is only a shell company with no employees. The work under those contracts were, in fact, carried out by the company's own employees. Pang alleged that a sum of S\$385,086.90 was paid to PK Summit by the company. He claimed that no value was given by PK Summit and the payment ought to be accounted for.

4 The report also refers to unusual transactions between the company and a company called AA Pyrodor Development Pte Ltd ('AAP'). Koh and the company are shareholders of AAP and in the special accountant's view, the margin earned by AAP in work for PKS was 'unusually low' and the records of AAP would be required for examination.

5 There were also transactions with two suppliers called Noriwood Construction and Speedwise Construction that do not sufficiently account for an objective evaluation of the reasonableness of the price. The special accountant also listed a number of miscellaneous items such as payments to

relatives of the directors but not fully accounted for; various payments including a \$45,000 to Tan. It appears from the report that there may be documents in the possession of Koh or Tan, or the company that have not been disclosed. However, the report does not seem to have taken into account the explanations of Koh and Tan, which essentially was that the documents had been disclosed to the plaintiffs. This controversy cannot, in my view, be resolved by affidavit evidence alone.

6 The defendants' counsel, Mr Hee Theng Fong submitted that much of the allegations concerning the termination Pang Yong Hock, the first plaintiff, as the project controller are disputed. Counter-allegations as to the first plaintiff's own breaches of duty as a director have not been addressed. Mr Hee submitted that the plaintiffs are now complaining about transactions which he had himself approved when he was the project controller and that Pang had access to all the material documents. Counsel submitted that the sum of \$385,086.90 in respect of the payment to PK Summit have already been duly accounted for and explained. He argued that if anything, there is only a question of adjustment to the accounts but there is nothing sinister about that. Furthermore, he pointed out that Pang was at the material times also a director and shareholder of PK Summit and was fully aware of all related transactions.

7 Having perused the detailed disputes concerning the various payments and the alleged breaches of directors duties on the part of all four directors and shareholders I am of the view that the allegations and counter-allegations cannot be satisfactorily proved or disproved by affidavit evidence alone. I accept Mr Chan Ket Teck's report that there are aspects of the conduct of the company that requires a more thorough inquiry but that is, in the circumstances of this case, only evidence that a fuller inquiry is required. Granting leave to the plaintiffs to sue in the name of the company is not the best solution. If the plaintiffs were granted leave to sue the other directors in the name of the company, the counter-allegations of those other directors against the plaintiffs which also cannot be addressed unless they too are granted leave to sue the plaintiffs in the name of the company. But the other directors have not made such an application. Of course, the fact that they have not is insufficient reason to grant the plaintiffs the application sought. The court will only be burdened with a late application by the other directors be similarly allowed to sue in the name of the company. The prospect of two sets of directors each suing and counter-suing in the name of the company is inappropriate, if not farcical. The foremost question that an objective person may ask is how did the directors run the company such as to lead to such an end?

8 In view of the plaintiffs', especially Pang's, positions in the company as well as PK Summit, there is a duty on their part to inquire, if not investigate fully all reasonable suspicious of impropriety by other directors as soon as they had arisen. How soon, and what constitutes reasonable inquiry will naturally vary from case to case. In the present proceedings, it appears to me that the plaintiffs were slack in picking up the matters they now complain of. Although they may very well prove at any trial the reasons for this or even to show that they had, in fact, acted promptly, as it now stands, the sudden burst of allegations is something I have to take into account in the overall assessment as to whether the application ought to be granted. But there are more substantial matters that operate against the plaintiffs' application. It is not disputed that the company is not doing well, and that the four shareholders were very much like partners in a partnership. The inability of the two factions to co-exist itself portends no future for this partnership in a company's clothing. Given these significant facts, and the undesirability of having both sides suing each other in the name of the company – which will create all sorts of procedural and interlocutory problems – the parties should wind-up the company. A professional liquidator will undoubtedly take into account and investigate the company's affairs and take such action after perusal of the Chan Ket Teck report and the affidavits filed herein, including the commencement of action against such errant directors as he may see fit. Since winding up would be a much more sensible and, therefore, more desirable avenue in the circumstances of this

case, I dismissed the plaintiffs' application.

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