Luk Yue Hong Yvonne v Lim Seng Leong and Another
[2005] SGHC 89

Case Number : OS 1383/2003

Decision Date : 06 May 2005

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Leonard Loo (Leonard Loo and Co) for the plaintiff; N Kanagavijayan (Kana and Co) for the defendants

Parties : Luk Yue Hong Yvonne — Lim Seng Leong; Png Raymond

Companies – Oppression – Plaintiff and defendants shareholders in company – Defendants passing resolution to cease company's business – Plaintiff shareholder in prison when resolution passed – Defendants incorporating new company to take over business – Whether conduct of defendants amounting to minority oppression under s 216(2) of the Companies Act (Cap 50, 1994 Rev Ed) – Section 216 Companies Act (Cap 50, 1994 Rev Ed)

6 May 2005 *Judgment reserved.*

Lai Siu Chiu J:

The background

1 Yvonne Luk (the plaintiff) commenced these Originating Summons proceedings ("the OS") under s 216 of the Companies Act (Cap 50, 1994 Rev Ed) ("the CA"), on the ground that she had been oppressed as a shareholder by her fellow shareholders, Lim Seng Leong and Raymond Png (the first and second defendants respectively) in a company called Restaurant Swiss Culture Pte Ltd ("the Company"). The Company operated a restaurant at Suntec City Mall #03-006 ("the premises") under the name "Restaurant Swiss Culture" ("the restaurant"). As its name suggested, the restaurant offered Swiss cuisine which was, and still is, quite a novelty in Singapore.

2 The Company was incorporated in September 1996 under its former name "Swiss Inn Pte Ltd". It had a paid-up capital of $100,000 and its original shareholders were Christine Soh Mei Yee ("Christine") and her Swiss husband Martin Sahli ("Martin"). The plaintiff became a shareholder of the Company in May/June 2000 by buying over 45,000 shares of $1.00 each from Christine and Martin. At the same time, all three shareholders were also directors of the Company. The restaurant commenced operations in May 2000.

3 The defendants became shareholders on 1 April 2002 by buying over all of Christine's shares (54,999) as well as the one share held by Martin. The defendants became equal shareholders each owning 27,500 shares.

4 On 23 October 2002, Swiss Culture Restaurant (2000) Pte Ltd ("the new company") was incorporated with a paid-up capital of $100,000 and with the two defendants as directors and equal shareholders. The new company took over the running of the restaurant from the Company after the defendants called for an extraordinary general meeting ("the EGM") of the Company on 31 October 2002, to cease its operations. The plaintiff did not attend and was unaware of the EGM. The notice of the EGM sent to her address at 71A Kovan Road by registered post was returned to the company secretary by the postal authorities with the remark "unclaimed"; the plaintiff was incarcerated at the time.

5 The plaintiff commenced this OS on 24 September 2003 praying, *inter alia*, for the court's determination of the following matters:

(a) the profit and loss accounts of the Company for the years 2000, 2001 and 2003 be prepared by an accountant to be appointed by the plaintiff;

(b) the plaintiff be paid her 45% share of the dividends from the profit and loss accounts of the Company;

(c) the notice and resolution by the defendants to wind up the Company on or about 31 October 2002 be deemed null and void;

(d) an inquiry as to what would be reasonable remuneration for the plaintiff for her contributions to the Company and such remuneration be paid by the Company within 14 days;

(e) the plaintiff's 45,000 shares be valued by an accountant to be appointed by the plaintiff, such valuation to be on the basis of the assets, profitability and future prospects of the Company, as at such date as the Court deems fit without discounting for the fact that the plaintiff is a minority shareholder;

(f) thereafter the plaintiff's shares be purchased by the defendants within 14 days of its valuation; alternatively, the plaintiff to be at liberty to sell her shares by private arrangement.

6 By an order of court dated 21 April 2004 granted pursuant to the plaintiff's application in Summons in Chamber No 1951 of 2004, the OS was converted to a writ. No pleadings were filed thereafter as the plaintiff applied, and was granted, an order that her two affidavits then filed as well as the defendants' affidavits, be treated as pleadings.

The plaintiff's case

7 In her (brief) affidavit filed on 23 September 2003 in support of the OS, the plaintiff deposed to the following facts and/or allegations:

(a) She had paid a sum of $67,500 to Christine for her 45,000 shares. Although she was tempted to join Christine and Martin in selling her shares to the defendants for a collective consideration of $63,356.20 (as evidenced in a draft sale and purchase agreement), she changed her mind.

(b) In September 2002, she was sentenced to seven months' imprisonment after being convicted under the Immigration Act (Cap 133, 1997 Rev Ed) for employing an illegal worker (a Myanmar national) who was arrested at the premises on 4 April 2002. The defendants were aware of this fact as they attended court when she was prosecuted in District Arrest Case No 33490 of 2002. (The plaintiff's actual term of imprisonment was from 10 September 2002 to 30 January 2003 followed by home-tagging for one month.

(c) The new company usurped the customer base and business concept of the Company and started operating at the premises.

(d) Without her knowledge or consent, the new company kept the refund of the security deposit paid by the Company for the premises.

(e) She was denied entry to the premises and was not allowed to peruse the accounts of the Company. As a result she had no information about the financial position of the Company and did not receive any dividend in 2001.

(f) She was owed wages by the Company of $2,300 to $3,900 per month (depending on the profits) for the period January to December 2001 when she oversaw the operations of the Company.

(g) She was ousted as a director without her knowledge and consent on 24 December 2001.

(h) She was not given notice of the EGM and only came to know about it when her solicitors wrote to the defendants.

(i) The defendants used the Company's name and set-up to operate the restaurant which business, judging from photographs she had taken at the premises, was still thriving.

8 The plaintiff surmised that the defendants' actions (in ceasing the operations of the Company and operating the restaurant under the new company) were designed to divert the profitable business of the Company to the new company to benefit themselves without having to buy over her remaining shares in the Company. Their conduct was detrimental to her as well as to the Company. She accused the defendants of trying to wind up the Company without just cause by passing the resolution to cease operations on 31 October 2002. The plaintiff claimed she was oppressed as a minority shareholder by the defendants who were the major shareholders.

9 Cross-examined, the plaintiff explained that had she changed her mind about selling her shares to the defendants because of a letter she had then received from Christine – the letter stated she would only be paid for her shares after everything had been settled. That could result in her not receiving a single cent. She was vindicated in her decision as Christine and Martin left for Switzerland after selling off their shares to the defendants.

10 Questioned by the defendants' counsel, the plaintiff agreed that her payment of $67,500 to Christine for her 45,000 shares included $22,500 for goodwill. The cost price of her shares was $1.00 per share. She revealed she did not attend the annual general meetings of the Company in 2000 and 2001 because she was not informed of the dates. In 2000, she received dividends of $4,000 to $5,000 but nothing for 2001. By June 2001, she and Christine were not on talking terms. She was not told, and was not aware, that the defendants were her fellow shareholders of the Company until she was told by Ministry of Manpower officials.

11 The plaintiff further clarified that her complaint in sub-para (e) of [7] above related to 2001 and was directed at Christine, since the defendants only became shareholders of the Company in April 2001. As for her claim for her outstanding salary for 2001, the plaintiff explained she had tried to approach the defendants regarding her claim after her release from prison but they were not interested. She conceded she had no contract of employment with the Company. She claimed the restaurant was profitable when she managed the Company for six months in 2001.

The defendants' case

12 As at the date they filed their (first) joint affidavit on 23 October 2003, the first and second defendants were aged 26 and 24 years old respectively. After serving their national service, both defendants worked as chefs in the same restaurant between August 2000 and February 2002. The defendants deposed to the following facts in their joint affidavit:

(a) The second defendant had gone to the premises in March 2002 in response to an advertisement by the restaurant for the position of a chef. He spoke to Christine who inquired whether he was interested to take over the whole restaurant. The second defendant called the first defendant and after their discussions with one another and their families, the defendants jointly agreed to take over the restaurant from Christine.

(b) Christine informed the defendants the Company had three shareholders and she proposed that the defendants buy over all the shares from the three shareholders for $63.356.20, to which the defendants agreed, with financial support from their families.

(c) On the day of the signing of the sale and purchase agreement, the plaintiff changed her mind and declined to sell her shares. The defendants paid $16,297.50 each or a total of $32,595.91 to buy 55,000 shares from Christine.

(d) On the first few days after becoming shareholders and directors of the Company on 1 April 2002, the defendants concentrated on learning the ropes of running the restaurant from Christine. They noted that the plaintiff remained extremely aloof and showed no interest in running the restaurant or in discussing with them its operations.

(e) They were told by Christine that the plaintiff had not contributed to the business of the restaurant and had not been performing to expected standards. Christine supported her statement regarding the plaintiff's lackadaisical attitude by showing them minutes relating to the plaintiff's removal as a director on 24 December 2001.

(f) At about 6.00pm on 4 April 2002, seven to eight plainclothes policemen rushed into the restaurant and arrested a part-time waiter, a Myanmar national, who was subsequently found to be an illegal immigrant. When they queried Christine, she said the part-time waiter was employed by the plaintiff. This was later confirmed by the Myanmar national during investigations by the authorities. The defendants were themselves interrogated by the Immigration authorities.

(g) Although upset by the turn of events, the defendants concentrated on running the restaurant, making no profit for the month of April 2002.

(h) In May 2002, the restaurant was served with a writ of seizure and sale in the sum of $5,457 by one Yeo Hung Song ("Yeo") who, the defendants later learnt, was an ex-member of the restaurant staff. The sum of $5,457 represented arrears of salary due to Yeo while he was employed before 1 April 2002. As the Company had insufficient funds, the defendants were obliged to dip into their own pockets and contributed $2,000 each to help the Company pay Yeo's salary but they refused to pay his claim for overtime work.

(i) In June 2002, a letter was received from the Central Provident Fund ("CPF") Board stating that the Company had not paid CPF contributions for Yeo and one Tan Soy Tee ("Tan"). As the Company again had insufficient funds, the defendants requested the CPF Board (which agreed) that they be allowed to pay the outstanding contributions by four monthly instalments;

(j) On 4 July 2002, the defendants were hauled to court (as directors) to face a charge of employing an illegal immigrant. They were each fined $7,200.

(k) The plaintiff was charged with employing an illegal immigrant under s 57(1)(e) of the Immigration Act to which she claimed trial. Although the defendants attended court as prosecution witnesses, they did not testify. That was the last they heard of the plaintiff.

(l) In August 2002, Tan (who was an ex-chef) went to the premises accompanied by the plaintiff, showed the defendants a form and claimed he would be taking legal action against the restaurant soon. That was the last straw for the defendants.

(m) After discussing the Company's and their own losses, the defendants consulted the Company's accountant, Sri Murali s/o S Renganathan ("Murali"). He advised them that the value of their shares in the Company was almost nil.

(n) By then, the defendants had already incurred personal losses totalling $31,097.96 each made up as follows:

(i)	Subordinate courts' fine	$7,200.00
(ii)	Payment of Yeo's salary	$2,000.00
(iii)	Loss of salary for September 2002	$2,800.00
(iv)	Loss of salary for October 2002	$2,800.00
(v)	Loss of value of shares in the company	$16,297.96
		$31,097.96

(I should point out in the course of their testimony, both defendants amended and reduced the above figure to $10,870 and $10,780 respectively for the second and first defendants, as they had deducted the loss in value of the shares in the Company and had taken into account the part payment of their salaries for the months of September and October 2002.)

(o) Murali advised the defendants either to cease the operations of the Company and leave it in a dormant state or to go into voluntary liquidation. As the latter alternative was more expensive, the defendants decided to cease the operations of the Company.

(p) Accordingly, the company secretary, Nithya Kalyani ("Kalyani"), wrote to all three shareholders, including the plaintiff, giving notice of the EGM which was called to decide whether the operations of the Company should cease. Kalyani subsequently informed the defendants that her letter to the plaintiff was returned by the postal authorities with the remark "unclaimed".

(q) Contrary to her contention, the defendants were unaware that the plaintiff was in jail during the period. Even if she was, her family members should have received the company secretary's letter and informed her. The defendants assumed the plaintiff was no longer interested in the business of the Company. Neither did she appoint a proxy to represent her interests while she was serving her prison sentence. The defendants proceeded to hold the EGM at which they passed a resolution ceasing the business of the company as at 31 October 2002 and authorising the directors to dispose of the assets and utilise the sale proceeds to settle the liabilities of the Company.

13 In accordance with their instructions, Murali then incorporated the new company for the defendants. The defendants were advised by Murali that the fixed assets and the rental deposit of the Company could be transferred to the new company to offset the loans the defendants had advanced to the Company for the payment of court fines, salary and/or CPF contributions. The new company operated the restaurant with effect from 1 November 2002. To date the new company has

not made profits from operating the restaurant.

14 The defendants refuted the plaintiff's claim that they had set up the new company surreptitiously. If indeed that was the defendants' intention, they would have moved to a new location.

15 The defendants deposed they had not denied the plaintiff entry to the restaurant as she had alleged and for which she gave no particulars. They could only recall one occasion in February 2003 when the plaintiff came to the premises. Gesticulating wildly, the plaintiff asked the defendants to come out of the restaurant saying she wanted to know the financial status of the Company. Since the defendants were not directors or shareholders of the Company in 2001, they were not responsible for her claim for wages. Why did it take her so long to make her claim, which was against the former management? The defendants were in any case not aware that the plaintiff had an employment contract with the Company. If the plaintiff had lost money in her investment in the Company, so too had the defendants; indeed they had lost more than her. The principle of equal misery should apply. The defendants blamed the plaintiff for denting the profits of the Company and for the cessation of the Company's operations.

16 The defendants denied they had oppressed the plaintiff as a minority shareholder and asked for her application to be dismissed with costs.

17 The defendants filed a second affidavit on 22 November 2004 wherein they exhibited a set of accounts of the new company as at 31 March 2004. As at that date, the new company had incurred losses totalling $26,261. Even though the first and second defendants worked daily from 11.00am to 11.00pm at the restaurant (as head chef and manager respectively), did not pay themselves directors' fees but only a salary of $2,800, the new company was still not profitable; the restaurant barely broke even. What heartened them however was that from the new company's inception, the defendants did not encounter the sort of problems they faced while they were operating under the Company.

18 In the course of his cross-examination, the second defendant[1] revealed that although he and the first defendant each had two years or more of experience as chefs, neither had any experience in running a restaurant. It was, however, his dream to own a restaurant one day and he thought that the offer from Christine was an opportunity to make his dream come true. Both wanted to make something of their careers. In the first few days or weeks after becoming shareholders and directors, he and the first defendant had to learn everything from scratch including how to operate the cash register, getting to know the restaurant's suppliers, how to communicate and serve customers and familiarising themselves with Swiss cuisine.

19 The second defendant's incredible naïvety came across in the course of his cross-examination. He himself admitted he was very naïve at the time. Questioned by the court on how he arrived at the price of $32,595.91 with Christine to buy over her shares, the second defendant said it was Christine who gave the figure. He had no idea that the share price of a company should normally be pegged to the profitability of the company. He was not told by Christine whether the Company was profitable nor did he ask. What the second defendant was told was that liabilities (which he understood to include suppliers, loans and staff salaries) before 1 April 2002 would be borne by Christine and Martin. This term was incorporated into the sale and purchase agreement dated 1 April 2002 ("the Agreement") as cl 5. The second defendant agreed that pursuant to cl 5, Christine and Martin, and not the Company, should have paid the CPF and salary claims respectively of Yeo and Tan.

20 Questioned why he (and the first defendant) had not approached let alone sued Christine and Martin for reimbursement of the claims they had paid on the couple's behalf, the second defendant explained that the various claims were made after the couple had left Singapore; presumably it would be pointless.

21 The second defendant revealed that sometimes the defendants had to delay payment of rent (due on the first of every month) to the end of the month or to the following month, with the result that they were charged interest by the landlord for late payment. Often, the restaurant did not make enough to cover overheads but the defendants ensured that staff and suppliers were paid first; they would pay their own salaries last and even then, only partially if funds were insufficient. Monthly wages (for eight to ten staff) totalled $12,000, supplies cost $8,000 to $10,000, while the profit margin was low. Nevertheless the defendants (who are to be commended) were prepared to work hard to make the restaurant a success. They had built up their own customer base from students of the Singapore Management University and had changed the menu, moving away from the very authentic Swiss cuisine the restaurant previously offered, which was not popular with locals. They did not have the funds to renovate the restaurant as they would have liked to do.

22 As for the plaintiff's conviction and imprisonment, the second defendant testified that he and the first defendant were unaware because they only attended court briefly for the first day of her trial. After waiting outside the court-room for half an hour, they were told they would not be required as witnesses, so they left.

23 In re-examination, the second defendant explained why he and the first defendant did not want to have anything more to do with the plaintiff, let alone buy over her shares in the Company. She had caused so much trouble, *viz* the former staff's outstanding salary, CPF and overtime claims; the hiring of the illegal worker and his arrest; and the fines the defendants had paid as a result. In earlier cross-examination, the second defendant admitted he did not verify with the plaintiff what Christine had told the defendants about the plaintiff. He thought there was no need to do so, as a director of a company would not be removed without good reason.

24 Nothing turns on the first defendant's oral testimony. Instead, I move on to the evidence of Murali[2] which is more relevant. Murali has been the Company's accountant since 2000. Murali confirmed the defendants' evidence in sub-para (m) of [12] and in [13] above. In his written testimony, Murali exhibited the audited accounts of the Company for the year ending 31 December 2002. The accounts confirmed the defendants' testimony that the Company was unprofitable. The accounts showed that the Company had accumulated losses of $142,352 for the year 2001 which figure increased to $221,104 for 2002. As the accumulated losses exceeded its paid-up capital of $100,000, the Company was in negative equity and was insolvent. As at 31 December 2002, the value of the Company's shares was nil.

25 In his affidavit, Murali also exhibited the accounts of the new company for the period 23 October 2002 to 31 March 2004. The figures corroborated the defendants' testimony that the new company was not profitable as it sustained losses of $16,261 for those five months and nine days of operations. He estimated that the book value of the new company's shares was $0.84 each as at 31 March 2004, representing a loss of $0.16 on its original value of $1.00 per share.

26 Murali further exhibited to his affidavit the complete sales records of the Company for the period 1 January 2002 until 31 October 2002. The records comprised of total gross sales, cash sales and credit cards (American Express and Visa) gross and net (of commission) sales. Murali also produced similar sales records of the new company from 1 November 2002 right through to 31 March 2004.

27 The last set of documents exhibited in Murali's affidavit was the bank statements of the Company for the months of January to November 2002 with United Overseas Bank Limited ("UOB"). The plaintiff had relied on the UOB bank statements in her second affidavit[3] for her assertion that the Company or the restaurant was profitable. She had specifically referred to deposits (cash and credit card payments) made into the said account from 5 July to 11 July 2002 totalling $7,056.56. The plaintiff then extrapolated that figure, multiplied it four times and argued that the sales revenue for a month would approximate $28,226.32 or more, since not all deposits on 11 July 2002 (save for one cash deposit of $287.32) had been taken into consideration.

28 The plaintiff's counsel went one step further. Whilst cross-examining the second defendant, he produced exhibit P1 which he had prepared comprising of his calculations of the Company's bank statements between January and November 2002; it showed a total of $182,439.44 or an average monthly balance of $16,585.40. He then showed comparative figures for the new company which revealed that for November to December 2002 the new company had an average bank balance (also maintained with UOB) of $15,856.93. For the whole of 2003, the new company's bank balance averaged $16,996.34 per month and from February to September 2004 (excluding June 2004), the average figure was $10,363.12 per month.

29 In exhibit P2, counsel repeated the above exercise for gross sales of the Company as well as of the new company. He arrived at an average monthly sales figure of $32,607.87 for the Company for the period January to October 2002. For the new company, counsel's calculations showed an average of $40,565.09 sales for November and December 2002, an average of $33,376.33 sales per month for year 2003 and an average of $37,584.04 for the first three months of 2004.

30 When he was cross-examined, Murali said the restaurant was unprofitable even during the time Christine and Martin were in charge because expenses exceeded income. He corrected this statement in the course of cross-examination. After checking the books of accounts, he found that the Company did make a profit of about $11,550 for the year ended 31 December 2000. Murali testified the Company's main liability was the advances Christine had made for its day-to-day expenses and which were reflected in the audited accounts. For 2001, the accounts showed loans of $113,671 and for 2002, the figure was $116,560 (part of which came from the defendants). Whenever Christine withdrew funds from the Company, Murali would deduct the amounts from her loans. Christine left the Company without claiming back her loans.

31 Murali pointed out that an improvement in sales for the new company from its inception up to the first quarter of 2003 as reflected in exhibit P2, did not mean that the restaurant was profitable. The figures did not show the true picture as expenses had to be considered; what was important was the net profit.

32 Murali confirmed that the fines of $14,400 paid by the defendants were the Company's expenses as the defendants were fined in their capacity as directors of the Company. He disagreed with counsel for the plaintiff that the fines should be borne by the defendants personally, pointing out that the previous management, and not the defendants, had employed the illegal worker. Therefore, the fines and the sums paid by the defendants as salaries and CPF contributions for Yeo and Tan were treated as loans to the Company. He was not aware and was not told that Christine and Martin had agreed with the defendants that the couple would be responsible for the Company's liabilities before 1 April 2002.

33 Murali testified it was incorrect for counsel to assert that the defendants took over the assets (kitchen equipment, fixtures and fittings) of the Company without payment. He had checked the general ledgers of the Company for 2002[4] and they showed that on 31 October 2002, the

defendants paid $25,000 to take over the fixed assets even though the same had nil value in the books of the Company.

34 Similarly the defendants did not appropriate the rent, fitting-out, PUB and Boncafe deposits (totalling $31,346.20) of the Company for the new company as the plaintiff had alleged. Murali pointed to an entry on 30 October 2002 in the general ledgers of the Company. The various deposits were set off against debts owing to trade creditors of $35,890.51 to leave a balance of $4,544.31 owed to trade creditors which the defendants still had to pay. Therefore, even after setting off all the deposits, the Company still owed money to the defendants. Finally, contrary to the plaintiff's allegation, Murali deposed that the Company was not wound up; it was still a live company albeit dormant.

35 The defendants' only other witness besides Murali was Kalyani,[5] who has been the company secretary since 18 October 2001. Her written testimony related to the sending of the notice of the EGM to the plaintiff. Kalyani deposed she had sent the notice on or about 15 October 2002 to the plaintiff by registered post but the same was returned to her by the postal authorities on 21 October 2002. She disagreed with counsel for the plaintiff that the resolution to cease the business of the Company had to be passed by way of a special resolution (for which Art 47 of the Company's Articles of Association required at least 14 days' notice).

The law

36 Before proceeding to make my findings, I shall deal first with the law. The *locus classicus* on miniority oppression is the Privy Council decision in *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227 ("the *Kong Thai* case"). The appeal there related to ss 181(1) and 181(2) of the Malaysian Companies Act 1965 which provisions are *in pari materia* with ss 216(1) and 216(2) of the CA. The genesis of s 216 was s 210 of the UK Companies Act 1948 (c 38). Section 216(1) of the CA states:

> (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 ¾
>
> > (*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 ¾
>
> > (*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;

…

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

37 Next, I turn my attention to the *Kong Thai* case. For our purpose, the facts in the case are not relevant. What is relevant are the ingredients to succeed in an action under s 216, as spelt out by Lord Wilberforce (who delivered the judgment on behalf of the Board); he said (at 229):

> Secondly, for the case to be brought within section 181(1)(a) at all, the complaint must identify and prove "oppression" or "disregard". The mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions, with which the complainant does not agree, is not enough. Those who take interests in companies limited by shares have to accept majority rule. It is only when majority rule passes over into rule oppressive of the minority, or in disregard of their interests, that the section can be invoked. As was said in a decision upon the United Kingdom section there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case oppression can be made out (*Elder v. Elder & Watson Ltd* 1952 SC 49); their Lordships would place the emphasis on "visible". And similarly "disregard" involves something more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure (per Lord Clyde in *Thompson v. Drysdale* 1925 SC 311, 315) …
>
> Thirdly, in a number of United Kingdom decisions it has been held that for section 210 to apply the complainant must show oppression continuing up to the date of proceedings (e.g. *In re Jermyn Street Turkish Baths Ltd* [1971] 1 WLR 1042); …

38 It was unclear from the plaintiff's affidavit(s) whether she was relying on sub-s (a) of s 216(1) or sub-s (b) or both for her OS. If she was also relying on sub-s (b), she would have to show that some act on the part of the defendants "unfairly discriminated" or was otherwise prejudicial to her.

39 At p 162 of Walter Woon, *Company Law* (FT Law & Tax Asia Pacific, 2nd Ed, 1997) the author had this to say on sub-s (b):

> The term used is 'unfairly discriminates'. This suggests that some discrimination can be fair, eg where a class of members is conferred a benefit because of their membership of that class. The test, it is submitted, is whether as between the 'haves' and the 'have-nots' the discrimination can be justified in terms of benefit to the company as a whole.

40 As for the words "unfair prejudice" the approach of the English courts to their equivalent section has been spelt out by Peter Gibson J in *Re a company (No 005134), ex parte Harries* [1989] BCLC 383 at 389 where he said:

> (1) The test of unfair prejudice is objective. (2) It is not necessary for the petitioner to show bad faith. (3) It is not necessary for the petitioner to show a conscious intention to prejudice the petitioner. (4) The test is one of unfairness, not unlawfulness.

41 Peter Gibson J expanded on his above test in *Re Ringtower Holdings plc* (1989) 5 BCC 82 where he said (at 90):

(1) the relevant conduct (of commission or omission) must relate to the affairs of the company of which the petitioners are members;

(2) the conduct must be both prejudicial (in the sense of causing prejudice or harm) to the relevant interests and also unfairly so: conduct may be unfair without being prejudicial or prejudicial without being unfair and in neither case would the section be satisfied;

(3) the test is of unfair prejudice, not of unlawfulness, and conduct may be lawful but unfairly prejudicial;

(4) the relevant interests are the interests of members (including the petitioners) as members, but such interests are not necessarily limited to strict legal rights under the company's constitution, and the court may take into account wider equitable considerations such as any legitimate expectation which a member has which go beyond his legal rights.

42 The Australian courts' approach to s 320 (of the Companies (NSW) Code), which is their equivalent of our s 216, can be seen in *Wayde v New South Wales Rugby League Ltd* (1985) 10 ACLR 87. There, the High Court of Australia held (as reported in the headnote of the case):

> Section 320 required proof of oppression or unfairness. If the directors exercised a power, albeit in good faith and for a purpose within the power, so as to impose a disadvantage, disability or burden on a member that, according to ordinary standards of reasonableness and fair dealing was unfair, the court could intervene under s 320.

43 As the marginal note to s 216 of the CA states "personal remedies in cases of oppression or injustice", the author of *Company Law* ([39] *supra*) suggested (at p 164) that s 216 is even wider than s 459 of the UK Companies Act 1965 and s 320 of the Australian Companies Act 1981 (Cth).

The findings

44 Having looked at the applicable law, I now have to determine whether the plaintiff has made out her case under s 216 of the CA.

45 To recapitulate, the plaintiff's grievances against the defendants were as follows:

(a) The defendants usurped the Company's customer base and business concept.

(b) The new company kept the refund of the rental and other deposits.

(c) She was owed wages of between $2,300 and $3,900 per month from January to December 2001.

(d) She was ousted as a director without prior and proper notice.

(e) The defendants held the EGM on 31 October 2002 and passed a resolution to wind up the Company without just cause, taking unfair advantage of the fact that she was in prison.

(f) The defendants' actions were prompted not by business considerations for the welfare of the Company but to divert its profitable business to the new company.

46 Based on the evidence presented before the court including the plaintiff's, it is my view that

the plaintiff has not made out her case for reasons which I will now set out.

Usurping the Company's customers and business concept

47 I do not believe that the defendants intentionally set out to usurp the Company's customers and/or business concept. Granted, they took over the operations of the restaurant lock, stock and barrel on behalf of the new company from the Company effectively from 31 October 2002 onwards. However, it was by force of circumstances and not by choice. The defendants were beset with problems, as set out in [12] above, in running the restaurant under the umbrella of the Company. They took over the restaurant and have since moved away from the original Swiss cuisine conceived no doubt by Martin. The customer profile of the restaurant has also changed. I have no reason to disbelieve the defendants' testimony, particularly the second defendant's evidence, in this regard.

48 I would add that it was obvious both defendants were novices in the food and beverage industry (admitted by the plaintiff herself in para 17 of her second affidavit) and were absolute greenhorns when it came to business. The plaintiff, on the other hand, is a businesswoman. Neither defendant had any clue what they were letting themselves in for when they accepted Christine's offer to buy out her interest in the Company. What they failed to realise was that Christine had decided to cut her losses by selling off her shares and attempting to recoup part of her losses (and loans) by selling out to the defendants.

49 The plaintiff had laboured under the (mistaken) impression that the restaurant, and correspondingly the Company, was profitable before 1 April 2002. She relied on the Company's bank balances with UOB to support her statement. Nothing could be further from the truth. The Company and the restaurant operated consistently at a loss save for the year 2000; this was clearly seen from the audited accounts of the Company for years 2001 and 2002 ([24] above) prepared by Murali and exhibited to his Affidavit of Evidence-in-Chief. As Murali had testified, bank balances do not give a full picture. Expenses of operating the restaurant had to be taken into account (which the plaintiff did not) in order to determine whether the Company was profitable. I have no reason to disbelieve Murali who was an independent witness. Neither do I doubt the accuracy of the audited accounts that he had prepared for the Company and the new company. In any case, the plaintiff made no effort to challenge those accounts. I would add that the evidence showed that when the plaintiff managed the restaurant for six months in 2001, it was an unmitigated disaster.

Retaining the rental and other deposits of the Company

50 The allegation that the new company retained the rental and other deposits of the Company was clearly rebutted by Murali's testimony, supported by the general ledgers he produced in court.[6]

Non-payment of the plaintiff's salary between January and December 2001

51 The allegation that the plaintiff was not paid her salary between January and December 2001 was unfounded. First, the plaintiff herself admitted she had no contract of employment with the Company. Second, it was Murali's unchallenged testimony (which the plaintiff confirmed) that the plaintiff only received one-off dividends from the Company, and no salaries. Third, even if her claim was legitimate, the plaintiff should have brought it against the previous management or shareholders, *viz* Christine and Martin, as it arose *before* the defendants became shareholders. As the defendants had questioned in their written testimony, why did the plaintiff wait so long to make her claim?

The plaintiff's ouster as a director

52 From documents which she herself produced in court, it was plain that the plaintiff was removed on 24 December 2001 as a director. This was before the defendants came into the Company. Consequently, they were not responsible for her removal.

The EGM of 31 October 2002

53 The plaintiff made several allegations regarding the EGM. First, she asserted that the defendants passed a resolution to wind-up the Company. This allegation is incorrect. Murali testified (supported by the resolution produced in court) that the resolution was only to cease business; the Company is alive but dormant.

54 The second allegation of the plaintiff was that the defendants took advantage of the fact that she was incarcerated to hold the EGM. This allegation hinged on the plaintiff's claim that the defendants knew she was imprisoned after her conviction for employing an illegal immigrant. Again, this allegation was not borne out by the evidence. The defendants did not know the plaintiff was convicted, let alone that she had been sentenced to seven months' imprisonment. They were supposed to be the prosecution witnesses at her trial but on the first day of the hearing, they were told their testimony would not be needed. I would have thought it was incumbent on the plaintiff to notify the defendants of her sentence and the fact she would not be participating in the Company's affairs for the duration of her sentence. She was not deprived of managing the Company if that was her complaint. Even if she had been present at the EGM, I doubt the outcome would have been any different. The defendants simply did not want to have anything more to do with the Company. At best, they would have let her take over the running of the Company or the restaurant and started the new company and a new restaurant elsewhere. That did not mean the restaurant would have been profitable, judging by its past record and the plaintiff's dismal performance as its manager for six months in 2001.

The motive for the defendants' actions

55 Not only is there not one iota of evidence to support the allegation that the motive for the defendants' actions was to divert business from the Company to the new company, but the evidence adduced pointed to the contrary. The only motive of the defendants in starting the new company and using it to operate the restaurant was to save themselves from incurring more losses personally. Their goal was not to divert business from the Company as explained in [47] above.

56 The law is very clear. The plaintiff must prove the following factors in order to succeed on s 216 of the CA:

(a) that there was oppression on the part of the defendants which continued up to the date of these proceedings;

(b) alternatively, that the defendants had disregarded her interests;

(c) in the further alternative, that the defendants had unfairly discriminated against her or there had been unfair prejudice or injustice against her in the manner in which they conducted the affairs of the Company.

The plaintiff has failed to discharge the burden of proof. Granted, she had lost money in her investment in the Company but so too had the defendants. As they pointed out in their joint affidavit, the principle of equal misery should apply. All three made a bad investment in the Company. Why should the defendants be responsible for the plaintiff's losses?

57 Consequently, I dismiss the prayers in the OS with costs to the defendants. I note that of their own accord, the defendants have furnished the plaintiff with the profit and loss accounts of the Company for 2001 and 2002 as prayed for in prayer (a) of the OS (see [5] above). Like the defendants' shares, the plaintiff's shares in the Company are worthless due to its insolvency. There is no reason for me to order the defendants to buy over her 45,000 shares.

---

[1]DW1.

[2]DW3.

[3]Para 10.

[4]See exhibit D4.

[5]DW2.

[6]Exhibit D4.