Lee Seng Eder *v* Wee Kim Chwee and others
[2013] SGHC 287

Case Number : Originating Summons No 407 of 2013

Decision Date : 31 December 2013

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Ong Ying Ping and Tay Ting Lan Susan (OTP Law Corporation) for the plaintiff; Lai Swee Fung (UniLegal LLC) for the 1st and 2nd defendants; Goh Soon Chye Gavin (Tan & Lim) for the 3rd defendant.

Parties : Lee Seng Eder — Wee Kim Chwee and others

Companies – Directors – Duties

31 December 2013 Judgment reserved.

Andrew Ang J:

Introduction

1 The plaintiff, Lee Seng, Eder ("Lee"), sought leave in the present application to commence a derivative action in the name and on behalf of the third defendant, Neu-Movers Logistics Pte Ltd ("the Company"), against the first and second defendants, Wee Kim Chwee ("Wee") and Tien Shin ("Tien"), pursuant to s 216A of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act").

Facts

2 Wee and Tien are directors and shareholders of the Company, which is in the business of providing transportation and warehousing services. Lee is one of the founders of the Company and was its managing director until his resignation on 29 March 2012. After his resignation, Lee remained a shareholder of the Company.

3 Lee's complaint was that Wee and Tien had allowed certain other parties to appropriate the Company's assets and goodwill in the following ways:

(a) Wee and Tien allowed N M Solution Pte Ltd ("NMS"), a company incorporated by one Goh York Quee Bernard, a former employee of the Company, to "take over" the revenue to be earned from contracts with the Company's customers.

(b) The Company's employees "became" NMS' employees and donned the NMS uniform.

(c) NMS used the Company's vehicles. Two trucks (out of the 22 in the Company's name) were eventually bought by Sino-Freight Forwarding & Services Pte Ltd ("Sino-Freight"), a company controlled by Tien.

4 There were other allegations on both sides that need not be repeated because they were irrelevant for the purposes of this present application.

Discussion

Discussion

5 The requirements for leave to bring a derivative action under s 216A of the Act are as follows:

(a) 14 days' notice to the directors of the company ("Requirement 1");

(b) the action must be *prima facie* in the interests of the company ("Requirement 2"); and

(c) the complainant must be acting in good faith.

Has 14 days' notice been given to the directors of the Company?

6 Sections 216A(3)(*a*) and 216A(4) provide that:

> (3) No action may be brought and no intervention in an action may be made under subsection (2) unless the Court is satisfied that —
>
> (*a*) the complainant has given 14 days' notice to the directors of the company of his intention to apply to the Court under subsection (2) if the directors of the company do not bring, diligently prosecute or defend or discontinue the action;
>
> …
>
> (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*.
>
> [emphasis added]

7 Counsel for Lee, Mr Ong Ying Ping ("Mr Ong"), argued that it was not expedient to provide the 14 days' notice because Lee had reasonable concerns that Wee and Tien would destroy or tamper with the evidence of their conspiracy to deplete the assets of the Company while diverting its goodwill and customers to NMS. Mr Ong also contended that the present situation was similar to the facts of *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd* [2011] 3 SLR 980 ("*Fong Wai Lyn*"). In *Fong Wai Lyn*, the complainant only gave notice seven days *after* the leave application had been filed because she was afraid that the giving of 14 days' notice would have caused the concealment of assets and the destruction of evidence. Judith Prakash J held that the notice requirement had nonetheless been satisfied on the facts because it was impracticable to comply with the notice requirements in the circumstances of that case.

8 In my view, Mr Ong's reliance on *Fong Wai Lyn* was misplaced. The present facts are clearly distinguishable from those in *Fong Wai Lyn* because notice in that case had been given, albeit belatedly. On the present facts, Lee did not give notice at any point in time. Lee had expressed concern regarding the possible destruction or tampering with evidence by Wee and Tien if notice was given. However, in the absence of an Anton Piller order, the risk could have materialised at any time after the originating summons was served on them (*ie*, August 2013). In other words, from August 2013, the risk that Wee and Tien might destroy the evidence would have been in existence whether or not Lee gave notice to Wee and Tien. Therefore, Lee should have taken the simple step of complying with the statutory notice requirement because there was simply no prejudice to himself in so doing. Lee's failure to comply with this statutory requirement in spite of the ample time and opportunity to do so was inexcusable. I also note that Lee could have filed an application for an Anton Piller order while applying for leave to commence a derivative action under s 216A of the Act

but, for reasons known only to him, eventually chose not to do so.

9 Also, it should be noted that s 216A(4) of the Act does not altogether dispense with the requirement to provide notice under s 216A(3)(*a*). However, the following passage from *Walter Woon on Company Law* (Sweet & Maxwell, Rev 3rd Ed, 2009) ("*Walter Woon*") at para 9.76 seems to suggest otherwise:

> Section 216A(3)(a) states that 14 days' notice should be given to the directors. This is not an absolute rule. In cases where the giving of 14 days' notice is not practicable, the complainant may give less notice *or none at all* before the application is made: s 216A(4). It is presumably for the complainant to show why notice as required by this paragraph could not be given. Possibly, the danger of the defendant absconding or dissipating his assets to avoid judgment would be a good ground for not giving the requisite notice. An application for a Mareva injunction might perhaps be presented concurrently with an application for leave under s 216A in such a case. [emphasis added]

With due respect to the learned authors of *Walter Woon*, I do not think that s 216A(4) dispenses with the notice requirement altogether. Such an interpretation would not comport with a plain reading of the provision. The provision states that "the Court may make such *interim* order as it thinks fit *pending the complainant giving notice as required*" [emphasis added]. This means that notice will be required even if the court chooses to make an interim order.

10 I would add that strict compliance with the notice requirement accords with the intention of Parliament to prevent an abuse of s 216A of the Act (*Singapore Parliamentary Debates, Official Report* (14 September 1992) vol 60 at col 231) on the Second Reading of the Companies (Amendment) Bill:

> The clause would provide more effective remedies for minority shareholders than existed [*sic*] at common law at present. It would have the effect of overriding the obstacles put in the way of such actions by the common law. *To 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. [emphasis added]

The above passage was also cited recently by the Court of Appeal in *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340 at [21].

11 For the sake of completeness, I will give my brief observations on the Canadian equivalent of s 216A found in the Canada Business Corporations Act (RSC 1985, c C-44) ("the Canadian Act"). Section 216A of the Act is based on s 239(2) of the Canadian Act which provides as follows:

> (2) No action may be brought and no intervention in an action may be made under subsection (1) unless the court is satisfied that
>
> > (*a*) the complainant has given notice to the directors of the corporation or its subsidiary of the complainant's intention to apply to the court under subsection (1) not less than fourteen days before bringing the application, *or as otherwise ordered by the court*, if the directors of the corporation or its subsidiary do not bring, diligently prosecute or defend or discontinue the action;
> >
> > (*b*) the complainant is acting in good faith; and

(*c*) it appears to be in the interests of the corporation or its subsidiary that the action be brought, prosecuted, defended or discontinued.

[emphasis added]

There are two important differences between s 239(2) of the Canadian Act and s 216A of the Act. First, there is no equivalent of s 216A(4) in s 239 of the Canadian Act. A Canadian court may therefore dispense with the notice requirement without being fettered by anything similar to s 216A(4). Moreover, s 239(2)(*a*) of the Canadian Act contains the phrase "or as otherwise ordered by the court" which suggests that the Canadian court has the discretion to allow less notice or none at all.

12 In any case, parties before me did not submit on the Canadian Act or cases interpreting this statute and I would therefore leave these differences to be better addressed on a future occasion.

Is the action in the interests of the Company?

13 On the view that I have formed above on Requirement 1, there is strictly no need for me to proceed with an examination of Requirement 2. However, I am of the view that Lee would not have satisfied Requirement 2 even if Requirement 1 was satisfied.

14 The Company's financial position is in a precarious state. It seems unable to repay its creditors, including [note: 1] :

(a) Tat Petroleum Pte Ltd (which obtained judgment for $12,447.71 with interest in MC Suit No 16999 of 2013).

(b) Grid Communications Pte Ltd (which issued a letter of demand dated 11 June 2013 for $2,720.83).

(c) The Inland Revenue Authority of Singapore (which issued a demand note for payment of overdue Goods and Services Tax amounting to $12,495 dated 16 August 2013).

(d) Goldbell Leasing Pte Ltd (which has a pending action for approximately $214,355.35 in DC 210/2013).

(e) Sino-Freight (which issued a letter of demand for $46,880.89 and statutory notice of demand for winding up dated 15 August 2013).

Mr Ong's only response was that there had been no winding up application against the Company and that the Company was "not in such a bad shape".

15 Given the demands for payment made by various creditors of the Company (at [14]), I am of the view that liquidation of the Company is more than likely. Upon winding up, the liquidator will be vested with the authority to decide whether to bring any action against the directors. Even if I were to grant leave for Lee to commence the action against the directors, the liquidator may well choose to discontinue the action upon liquidation. It would thus not be in the interests of the Company to expend considerable sums of money to bring the action before liquidation. In my view, the issue of bringing an action against the directors should more appropriately be raised for the liquidator's consideration after the Company is in liquidation. Lee's offer to bear the Company's legal costs in the derivative action could then be made to the liquidator.

Conclusion

16 For the foregoing reasons, I dismiss Lee's application with costs to be taxed unless agreed.

[note: 1] Wee's 2nd affidavit dated 8 October 2013 at para 9.