

Hiap Seng & Co Pte Ltd v Lau Chin Hu and others
[2011] SGHC 143

Case Number : Suit No. 133 of 2010/S (Registrar's Appeal No. 386 of 2010/W)
Decision Date : 02 June 2011
Tribunal/Court : High Court
Coram : Kan Ting Chiu J
Counsel Name(s) : Audrey Chiang Ju Hua and Calvin Lim (Rodyk & Davidson LLP) for the plaintiffs; Jiang Ke-Yue and Yee Swee Yoong Esther (Lee & Lee) for the first and third defendants; Foo Soon Yien (Bernard & Rada Law Corporation) for the second defendant.
Parties : Hiap Seng & Co Pte Ltd — Lau Chin Hu and others

Civil Procedure

2 June 2011

Kan Ting Chiu J:

1 The main issues under consideration in this decision are (i) the right of a party having the control of a derivative action filed on behalf of a company to the documents of the company, and (ii) the duty of the parties who have possession and control over the documents to give the party in control of the action access to the documents.

2 The company in question is Hiap Seng & Co Pte Ltd ("the company") a family-run company. It was established by the family patriarch, and subsequently, the running of the company devolved to members of the two following generations. Disharmony and disagreement arose over the running of the company, which led to litigation. The first set of litigation was Originating Summons No. 372 of 2008, an application under s 216A of the Companies Act (Cap 50, 2006 Rev Ed) by Law Chin Eng and Lau Chin Whatt (the "first plaintiff" and "second plaintiff" respectively, collectively "the plaintiffs"), who are shareholders and directors of the company, but are not involved in its day-to-day running, to bring an action in the name of the company against three directors of the company, namely Lau Chin Hu, Lew Kiat Beng and Law Chin Chai (the "first defendant", "second defendant" and "third defendant" respectively, collectively "the defendants") for breaches of their directors' duties to the company.

3 The application was strenuously opposed by the defendants. The first and third defendants were represented by one firm of solicitors and the second defendant was represented by another. After hearing counsel, I allowed the application on 30 September 2009 (see *Law Chin Eng and another v Hiap Seng & Co Pte Ltd*, [2009] SGHC 223). However, I did not grant the plaintiffs *carte blanche* authority to sue in the name of the company. I went through the plaintiffs' complaints against the defendants, and I granted the plaintiffs leave to bring an action in the name of and on behalf of the company for breaches of their directors' duties in five out of the list of complaints put up by the plaintiffs and to facilitate the exercise of the power, I ordered that the plaintiffs are to have control of the action. The defendants appealed against the order, but the second defendant's appeal was dismissed by the Court of Appeal, and the first and third defendants withdrew their appeal.

4 With the disposal of the appeals, the present derivative suit was filed against the defendants,

but progress in the action was slow. There was persistent non-operation on the part of the defendants, and eventually the company filed a summons (SUM No. 4129 of 2010) for orders that:

1. the Defendants allow Mr Law Chin Eng and Mr Lau Chin Whatt, together with their solicitors and/or other representatives, to enter into the Plaintiff's office premises at 113 King George's Avenue #01-02 Singapore 208560 (or such other place as the records may be kept) to inspect and take copies of the following documents within three (3) days from the date of the Order to be made herein:
 - a. the accounting and other records which explain the transactions and financial position of the Plaintiff company; and
 - b. all documents relevant to the issues in these proceedings and/or such documents which ought to be disclosed pursuant to the Plaintiff company's discovery obligations,including but not limited to the documents specified at Schedule 1 attached hereto;
2. that the Defendants do release to Mr Law Chin Eng and Mr Lau Chin Whatt and/or give to them access to such documents which the Defendants have within their possession, custody or power, which are documents belonging to the Plaintiff company or which ought to be documents within the possession, custody and power of the Plaintiff company and which ought to be disclosed pursuant to the Plaintiff company's discovery obligations in this Suit;[.]

5 The application was made on the grounds that:

- (a) the defendants refused to allow the plaintiffs to enter into the company's office premises in order that they may fulfill the company's discovery obligations; and
- (b) the plaintiffs, as directors of the company, were entitled under section 199(3) of the Companies Act to inspect the accounting and other records which explain the transactions and financial position of the company.

6 In his affidavit filed in support of the application, the first plaintiff deposed that an order had been made in the course of pre-trial hearings in the present action for the parties to file and serve their respective lists of documents and affidavits verifying the lists. The first plaintiff deposed that as he and the second plaintiff were granted leave to bring the action in the name of the company, they had to ensure that the company compiled a list of the documents in the possession, custody and power of the company in relation to the action, and to verify the list by affidavit. For that purpose, the company needed to have access to the company's documents, but the efforts to inspect the documents in the company's office premises were thwarted.

7 The defendants opposed the application. They made their arguments before the Assistant Registrar ("AR") and maintained the same arguments before me. The main arguments of the first defendant and third defendant were:

- (a) the plaintiffs did not "step into the shoes" of the company when they obtained leave to bring the derivative action; [\[note: 1\]](#)

- (b) the plaintiffs are the true plaintiffs in the derivative action, not the company; [\[note: 2\]](#) and
- (c) the scope of the application is oppressive. [\[note: 3\]](#)

8 The arguments for the second defendant were:

- (a) the application was procedurally flawed. An application made under s 199(3) should be made by way of an originating summons by the plaintiffs as directors of the company, and not by the company; [\[note: 4\]](#)
- (b) the application, which appeared to the second defendant to be for specific discovery, was flawed because there could not be an application for specific discovery before general discovery was completed; [\[note: 5\]](#) and
- (c) some of the documents referred to in the application were not in the possession of the company. [\[note: 6\]](#)

9 The AR dismissed the plaintiffs' application on the ground that:

- (a) the leave to commence the derivative action in the name of the company did not enable the plaintiffs to "step into the shoes" of the company;
- (b) the application was procedurally flawed; and
- (c) the application was oppressive.

10 The application and the parties' positions on the plaintiffs' right of access to the documents have to be considered against the plaintiffs' and the defendants' rights and obligations under the Order of Court of 30 September 2009. The order gave leave to the plaintiffs to bring an action in the name of and on behalf of the company against the defendants for breaches of their directors' duties to the company, and the plaintiffs were put in control over the conduct of the action. When the plaintiffs caused the action to be filed in exercise of those powers, they were not suing in their capacities as shareholders or directors of the plaintiffs. As shareholders or directors they did not have the *locus standi* to sue the defendants for breaches of their directors' duties as those duties were owed to the company, and not the shareholders or directors. (By the same analysis, the plaintiffs' reliance on s 199(3) was misplaced as they were not seeking access to the documents for themselves *qua* directors.)

11 Having been granted leave to institute the derivative action and to have control thereof, the plaintiffs have a duty to exercise the power responsibly and reasonably in the interests of the

company and ensure that the action is to be prosecuted properly and diligently. Towards that end, it is necessary for the plaintiffs to review all the documents relevant to the action so that the best case can be pleaded and presented on behalf of the company. The duty is not confined to reviewing documents in their possession, and extends to the company's documents which are not in their possession. They would be in dereliction of their duty if they neglected to have access to such documents and to review them.

12 Conversely, the defendants must recognise the plaintiffs' right to pursue the action on behalf of the company. If there are such documents in their possession and control as directors of the company, then the defendants must allow the plaintiffs to have access to the documents. The defendants have had their say on the plaintiffs' entitlement to prosecute the action on behalf of the company. Having raised their objections and failed, they must acknowledge the plaintiffs' status and rights. They cannot withhold the relevant documents of the company from the plaintiffs who have the control of the case on behalf of the company, and their refusal to give access was, *prima facie*, a breach of their directors' duties to act in the interests of the company, and that includes giving assistance to the company to prosecute the action effectively, and not to hinder its efforts.

13 It is important to bear in mind that the application under consideration is not the usual application for discovery and inspection under O 24, Rules of Court (Cap 322, R5, 2006 Rev Ed). This application is made in the context of the leave to institute the derivative action. The right of access to the relevant documents of the company flows from the authority to institute the action, and it is not to be confused with the right of discovery between adversarial parties in an action or the right of a company director to the records of a company.

14 Counsel for the first and third defendants argued that the plaintiffs did not, as he put it, "step into the shoes of the company", but that did not add anything to the examination and understanding of the application. Counsel did not make clear what he intended by "step into the shoes" of the company. While it is clear that the Order of Court did not put the plaintiffs in control of the operations of the company; the Order did put the plaintiffs in control of the action on behalf of the company, and thereby to seek access to the documents on behalf of the company.

15 The AR had more to say about stepping into the shoes of the company. She noted:

[It cannot be that in all derivative actions where there is usually acrimony between those who have been granted leave of court to bring suit and those who are in actual control of the company, those who bring suit step into the shoes of the company in the sense that their discovery obligation extends to producing *all* the documents in the [possession, custody and power] of the company which they do not have control of.

[emphasis added]

The observation is not quite apt and it did not take the issue any further because the application was not for the discovery of *all* the documents, and was limited to the company's documents which related to the derivative action.

16 Counsel and the AR had overlooked the fact that the application was the company's application, not the plaintiffs' application. The plaintiffs were named in the application as the persons to be given access to the documents as representatives of the company. For this reason, the fact that the plaintiffs did not "step into the shoes" of the company cannot be a ground for refusing the company's request for access to the documents.

17 On the defendants' complaint that the application was procedurally flawed, the AR noted that:

[A]s submitted by [counsel], this method of applying for inspection by way of SUM in the derivative action at the stage of general discovery is procedurally flawed.

and she appeared to agree with the argument that the application should be made by way of an originating summons.

18 As I have explained, the application was made by the company pursuant to the Order of Court of 30 September 2009. The right of access asserted is a right arising out of the right to institute the action, and is distinct from the right of discovery between adversarial parties in an action, or the right of company directors to the company records. When the derivative action has been instituted in the name of the company, it was procedurally regular and unexceptional that the application be made by a summons as part of the ongoing action.

19 In her decision to dismiss the application, the AR also agreed with the defendants' argument that the application was oppressive. She stated:

I take the view that granting this application would be oppressive to the Defendants. If the Plaintiff takes the view that certain documents have not been produced after the completion of the general discovery process, it can avail itself of the specific discovery process in order to ensure that all relevant documents are before the court.

20 Oppressiveness in discovery applications usually relates to matters such as the scope of discovery or the time for compliance, but the AR was not referring to that as her reference to general discovery and specific discovery points to the form of the application, rather than its content. I have dealt with the issue of form in the preceding paragraph, and as for the content of the application, an application confined to documents related to the derivative action cannot be oppressive.

21 The AR did not address the second defendant's submission that some of the documents are not in the possession of the company. She may have considered that this was not a material issue, and if she did, she was right. The application did not refer to specific documents, but to documents in the company's possession. The defendants' obligation when the application is granted is to give access to such documents that are in the company's possession; even if some relevant documents are not in the company's possession, the obligation extends over those documents which are in the company's possession. (Which documents are relevant, and whether they are in the possession of the company, may bring on further disputes if the state of non-cooperation continues.)

22 Having examined the issues and reviewed the AR's decision, I allowed the appeal and ordered the defendants to give access to such documents that are in their possession, control and power.

[\[note: 1\]](#) First and Third Defendants' Written Submissions, para 7

[\[note: 2\]](#) First and Third Defendants' Written Submissions, para 12

[\[note: 3\]](#) First and Third Defendants' Written Submissions, para 19

[\[note: 4\]](#) Written Submissions of Second Defendant, para 3

[\[note: 5\]](#) Written Submissions of Second Defendant, para 8

[\[note: 6\]](#) Written Submissions of Second Defendant, para 20

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