

Foo Teow Keng v Ong Choo Guan and Others
[2005] SGHC 117

Case Number : Suit 625/2004
Decision Date : 30 June 2005
Tribunal/Court : High Court
Coram : Lai Kew Chai J
Counsel Name(s) : Goh Aik Chew (Goh Aik Chew and Co) and Mimi Ho (Mimi Oh and Associates) for the plaintiff; Leong Keng Kheong, Ang Bee Luan and Wong Lup Soon (Leong Chua and Wong) for the defendants
Parties : Foo Teow Keng — Ong Choo Guan; Johansson Bo Robert; Viking Engineering Pte Ltd

30 June 2005

Judgment reserved.

Lai Kew Chai J:

1 The plaintiff, a member of Viking Airtech Pte Ltd ("VA"), seeks reliefs against the defendants, two of whom are members of VA. He invokes s 216 of the Companies Act (Cap 50, 1994 Rev Ed) and alleges that he has been oppressed by the defendants or that his minority interests have been disregarded. He further alleges that the acts or conduct of the defendants unfairly discriminate against or are otherwise prejudicial to him.

2 Section 216 of the Companies Act, so far as is relevant for present purposes, provides:

(1) Any member ... may apply to the Court for an order under this section on the ground —

(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 ... including himself or in disregard of his or their interests as members, ... of the company; or

(b) that some act of the company has been done or is threatened or that some resolution of the members, ... has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members ... (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 —

(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;

(c) ...

(d) provide for the purchase of the shares ... of the company by other members ... of the company or by the company itself;

(e) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or

(f) provide that the company be wound up.

3 The plaintiff asserts that there has been 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" within the meaning of what constitutes "oppression" as elucidated by Lord Wilberforce in *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227.

4 He therefore seeks an order that the defendants buy over his shares in VA at a price to be agreed, failing which the same shall be determined by a valuer. The valuer is to be appointed by agreement, failing which the valuer will be appointed by the court. In relation to the valuation of the shares, he asks for directions regarding certain items in the accounts so that a fair value can be arrived at. In particular, he asks for the deletion of what is called "the impairment charge" item in the balance sheet.

5 Alternatively, he asks that VA be wound up by the court under the provisions of the Companies Act.

Agreed facts

6 The basic facts which are agreed are as follows. I shall dwell on the facts in issue later in this judgment. From July 1994 until the formation of VA, the plaintiff was employed as a manager of the heating, ventilation and air-conditioning ("HVAC") department of the third defendant, Viking Engineering Pte Ltd ("VE"). VE has since 1977 been in the business of shipbuilding and repairs. The first defendant, Mr Ong Choon Guan ("Mr Ong"), was managing its business. The division of labour was this: Mr Ong ran the business of VE and the plaintiff managed the HVAC business. The HVAC business involves the designing, packaging, engineering, sales, servicing, installation and commissioning of all kinds of heating, ventilation and air-conditioning systems for the shipping industry.

7 On 28 September 1994, the plaintiff and the second defendant ("Mr Bo"), representing the interests of VE, registered VA, each subscribing one share of \$1 face value. They were the appointed directors.

8 From 8 December 1994, the shareholders of VA have been as follows: (a) the plaintiff owns 30,000 shares, (b) VE owns 60,000 shares, (c) Mr Ong owns 14,000 shares, and (d) Mr Lui Guan owns 5,000 shares. Mr Bo represented the interests of VE. On the evidence, he acted in tandem with Mr Ong in relation to the affairs of VA.

9 From 1994 to March 2002, VA conducted its business and business operations in VE's premises. It was solely managed by the plaintiff. The plaintiff and the defendants had a good business relationship in different aspects of shipbuilding, repairs and HVAC activities within the shared premises.

10 Towards the end of 1999, M/s Jin Lian Marine & Engineering, headed by the plaintiff's wife, Mdm Yang Ling, was engaged as the in-house subcontractor of VA in the supervision of PRC workers for the installation of HVAC projects locally in Singapore. The supply of labour was essential for the business. That Mdm Yang Ling is from the PRC facilitated her role in recruiting and supervising those workers. This took place at the time VA was still a licensee of VE, using part of VE's premises. VE and Mr Ong were fully aware of the engagement of the subcontractor and there is no evidence that there

was anything unlawful or detrimental to the interest of VA. It was a mutually beneficial relationship, until, as it will become apparent, the events which will be unfolded later.

11 In March 2002, VA acquired its own premises at No 12 Gul Street, Singapore and moved out of VE's premises. The purchase price for the premises was about \$1.6m. The plaintiff, Mr Ong and VE signed guarantees in connection with the financial facilities granted to VA by the bankers.

12 Until the events, which later will feature as facts in dispute, VA's business was profitably managed by the plaintiff. For three years starting from 2000, the final annual dividends before tax which were declared were \$100,000, \$30,000 and \$130,000 respectively. The ISO system was put in place in 1999 and it was upgraded to IS 9001:2000 in April 2003.

13 By his letter of 6 November 2003, the plaintiff resigned following a series of actions taken by Mr Ong and Mr Bo for themselves or on behalf of VE.

Findings of fact

14 As it had happened, VE's business was not doing well. In contrast, VA was turning in good results and good returns on capital. In those circumstances, Mr Ong made his moves. From 2002, Mr Ong took steps to recruit and employ management staff in VA. In consequence, these personnel ended up reporting to him, rather than to the plaintiff who was the general manager. Mr Ong recommended one Mr Cheh Yong Seng who was seconded from VE to run the local project works of VA. It was obvious that he was Mr Ong's man. The plaintiff was then busy getting jobs and executing them for VA. He made the mistake of not being vigilant.

15 Next, Mr Ong interviewed a Mr Raymond Ong who was recruited as the commercial executive for VA. One Mr Jetna, a staff of VE, was recruited to complete the HVAC installations works in Batam, Indonesia, for a client of VA. By the recruitment of his ex-colleague, one Mr S J Ng, as the assistant general manager of VA, Mr Ong completed his obvious plan to neutralise VA's dependence on the plaintiff and to gain control over the senior management of VA. After the resignation of the plaintiff in November 2003, Mr S J Ng predictably took over as the general manager of VA.

16 At the end of August 2003, Mr Ong made his move against Jin Lian Marine & Engineering. Through VE he took over all the PRC workers and terminated Jin Lian Marine & Engineering's subcontract with VA. On the evidence, Mr Ong had been cultivating those workers. This made the position of the plaintiff untenable. There was no commercial reason why the subcontract could not continue.

17 Clearly, Mr Ong undermined the plaintiff's position as the general manager of VA. The plaintiff was not vigilant enough when he was systematically and progressively marginalised.

18 After the departure of the plaintiff from the management of VA, Mr Ong and the other defendants took a number of steps which were unfairly against the interest of the plaintiff as the shareholder. They convened an extraordinary general meeting to pass a resolution to allot 100,000 new shares, contending that VA had negative equity as at October 2003 and therefore needed to raise capital. The defendants knew that the effect would be to dilute the shareholdings of the plaintiff. The plaintiff had indicated at a directors' meeting on 17 November 2003 that he intended to sell his 30,000 shares in VA.

19 Mr Ong next attempted to reduce the net asset value of shares by making a provision of a sum of \$562,500.00, called "the impairment charge", in the accounts of VA for the year ended

December 2003. The defendants took the verbal valuation of VA's bankers on the value of its leasehold factory at 12 Gul Street and recorded it as the worth of the assets, with the result that VA suffered the loss of \$562,500.00. The impairment charge was not recognised by the Inland Revenue Authority of Singapore ("IRAS") as a deductible expense and it was written back as the income of VA for that year. Secondly, there was a substantial increase of \$300,000.00 in the payroll of VA for the same year. Mr Ong confirmed that he had placed staff's salaries amounting to \$286,868.94, which, or a part of which, should have been borne by VE, as the additional costs of VA for the year ended 2003. The upshot of these two accounting entries was that the net asset value of a share in VA dropped dramatically from \$9 per share to \$0.82 cents per share. This drop must be seen against the background that VA in 2002 and 2003 made a gross profit of about \$2m for both years even though the turnover dropped from about \$14m to just over \$10m for 2003.

20 Finally, I refer to the defendants' allegation that the plaintiff had diverted business of VA to a company known as Viking HVAC Co Pte Ltd ("Viking HVAC") which was beneficially owned by him. Viking HVAC was registered on 5 September 2003 before the plaintiff's departure from VA. It was engaged in the same line of business. On the evidence it was clear that he had formed Viking HVAC in preparation for his exit. Whether he had breached his duties under the Companies Act or in equity is another matter which VA may want to pursue separately.

Decision

21 In the circumstances, I order VA to buy the plaintiff's 30,000 shares in VA. Upon completion of the sale and purchase, the capital of VA shall be reduced by 30,000 shares. The sale and purchase shall be at a price based on a fresh valuation of the shares as proposed by the plaintiff's accountant, M/s Casey Lin & Company, to be fixed as a whole, after VA has disclosed to the valuers the following documents:

- (a) draft or audited accounts for the year ended December 2004;
- (b) a complete set of Goods and Services Tax Form 5 for the year ended 31 December 2004 filed with the IRAS; and
- (c) general ledgers for 2003 and 2004.

These and other directions shall be decided at the same hearing when the Order of Court is finalised. I will hear arguments on costs. I will also hear arguments if there shall be judgment for the plaintiff against VE in the sum of \$42,634.31 as claimed by the plaintiff.

Claim allowed.

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