Malayan Law Journal Unreported/2017/Volume/Low Chee Kwong v Low Cheong & Sons Sdn Bhd & Ors - [2017] MLJU 1982 - 19 December 2017

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Low Chee Kwong v Low Cheong & Sons Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR)
MOHAMED ZAINI MAZLAN J
ORIGINATING SUMMONS NO WA-24NCC-341-08 OF 2016
19 December 2017

*Yip Huen Weng (Simon Hong Cheong King with him) (**Josephine, L K Chow** & Co) for the plaintiff.*

Joginder Singh (Joginder Singh) for the defendant.

Mohamed Zaini Mazlan J:

JUDGMENT

Introduction

[1] The plaintiff had through this originating summons, sought for reliefs pursuant to s. 181 Companies Act 1965 ("CA 1965[#8223]), claiming oppression by the defendants.

[2] I had given judgment in favour of the plaintiff, for the reasons set out in this judgment.

Brief facts

[3] The plaintiff held 50,046 out of the first defendant[#8223]s 801,220 issued shares. The plaintiff also claims to represent six other individual shareholders. I shall refer to these six other shareholders as the "supporters[#8223]. Together with the plaintiff, they own 578,011 shares in the first defendant. The second to sixth defendants owned a total of 223,209 shares.

[4] The first defendant ("the company[#8223]) was established in 1975 by the late Low Cheong, the supporters and the second to six defendants. It is a family owned company, as the plaintiff, the supporters, and the second to six defendants are all immediate family members of the Low Cheong clan. The company[#8223]s shares were also distributed amongst them. The company earned its revenue through letting and renting properties.

[5] According to the plaintiff, Low Cheong was the governing director of the company during his lifetime, and that he had the discretionary power to appoint or dismiss directors from the board of directors. This was provided for under Article 99 of the company[#8223]s Memorandum and Articles of Association.

[6] The said article too provides that the other directors may hold a general meeting to appoint a new board of directors, in the event that Low Cheong[#8223]s will or codicil makes no provision for it. If a general meeting was not called within fourteen days, any shareholder has a right to call for a meeting to appoint members of the board.

[7] The plaintiff contended that the late Low Cheong did not make any will naming anyone as the governing director upon his demise on the 19 May 1990. Nevertheless, before his demise, the late Low Cheong, Low Lai Kui, Low Lee Hung, and the second defendant, had by way of a special resolution dated 18 April 1985, appointed themselves as the second defendant[#8223]s governing directors.

[8] Subsequent to that, two other resolutions were passed. During an extraordinary general meeting ("EGM[#8223]) held on the 19 May 1988, the second defendant had appointed herself as the sole governing

director. Two years later on the 3 May 1990, the second defendant then appointed her late husband, Lim Teck Chong @ Lim Kiew, and her younger brother, the fourth defendant, as fellow governing directors. The executor for the estate of Lim Tech Chong @ Lim Kiew has been named as the third defendant in this suit.

[9] Up to the date that this suit was filed, the second to fourth defendants were the only members of the first defendant[#8223]s board of directors.

[10] A Receiver and Manager had also been appointed on the 15 December 2016 pursuant to the plaintiff[#8223]s application.

The plaintiff's case

[11] Although the plaintiff has commenced this suit alone, he claimed to represent the supporters. Incidentally, the plaintiff and the six other shareholders form the majority, although the plaintiff contended that an oppression petition could still be commenced by an oppressed majority; see *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors and another application* [1994] 2 MLJ 789.

[12] As the norm in an oppression suit, the plaintiff has levelled numerous complaints against the defendants. I shall attempt to digest them.

[13] The plaintiff claimed that the second to fourth defendants, being members of the board of directors, have mismanaged the company. Of the many complaints made, these are the pertinent ones:-

(a) Refusing to call for the Annual General Meeting ("AGM[#8223]) for six consecutive years from 1987 to 1993, and for five consecutive years from 2007 to 2012;
(b) Failing to provide satisfactory explanation for the company[#8223]s expenditure as set out in the audited accounts;
(c) Spending RM200,000 on the medical expenses for the second and third defendant and failing to justify them;
(d) Failure or refusal to declare any dividends and giving the directors high remunerations fees while the company is running at a loss;
(e) Failing or refusing to give notice of AGMs for the years from 1994 to 2006 to the plaintiff;
(f) Permanently entrenching themselves as members of the board of directors, and refusing to appoint any new directors, including the plaintiff and the supporters;
(g) Failing to file audited accounts from 1988 until 1993, resulting in the company being fined by the Companies Commission of Malaysia ("CCM[#8223]);
(h) Failing to submit income tax returns to the Inland Revenue Board ("IRB[#8223]); and
(i) Failing to make quit rent payments for the years 2014 to 2016, and assessment taxes from the years 2012 to 2016, for the company[#8223]s properties, putting the properties at risk of being seized by the relevant authorities.

[14] The plaintiff also claimed that the appointment of the governing directors were inconsistent with the company[#8223]s memorandum and articles of association, and are highly prejudicial to his rights and that of the supporters

[15] In respect of the failure to convene an AGM, the plaintiff had in August 2013, filed an Originating Summons at the Kuala Lumpur High Court, and obtained an order compelling the company to hold an AGM from the years 2007 to 2012, and for the audited accounts to be prepared for the following years. The company had pursuant to the order, held an AGM in January 2014. However, the company[#8223]s audited accounts for the years 2007 to 2012 were not approved, as there numerous inconsistencies in the prepared account that the board of directors were not able to explain nor justify satisfactorily. Apparently, the directors when pressed for explanation kept evading and stated that the questions should be directed to the company[#8223]s accountants.

[16] The plaintiff contended that he was unable to take any action all these years, as the defendants have denied him and the supporters access to any information and documents, and were very uncooperative. The petitioner also averred that he and the supporters had also over the years attempted numerous times to

settle their grievances amicably, being family members, but to no avail.

The defendants' response

[17] The defendants[#8223] response was uncharacteristic with that of a contested oppression suit. There were only three short affidavits, with one being a corrective affidavit, which does not take long to digest.

[18] I was also alerted to the fact, that the deponent of the defendants[#8223] affidavits was the fifth defendant, who was only a shareholder of the company, but does not sit on the board of directors.

[19] The defendants had in their affidavits, asserted that they had run the company legitimately and in line with the expected corporate governance, but did not specifically address the numerous allegations thrown.

[20] As for the other allegations, the defendants had merely denied them. For instance, they denied not giving the plaintiff notice of the EGM held on the 19 May 1998, but stop short of giving proof or substantiating their denial. They also denied that the audited accounts were not in order, and merely stated that the company[#8223]s accountant could only submit their report after being satisfied with the documents and receipts of the company.

[21] As for the losses suffered by the company in 2010, the defendants claimed that the losses were due to the medical expenses of RM246,354.00 incurred by the company[#8223]s directors. This was a rather queer admission, seeing that it was one of the plaintiff[#8223]s grouse.

[22] As for refusing to appoint the plaintiff or his supporters, the defendants justified it by stating that there are already a sufficient number of directors for a small company.

[23] The defendants also claimed that the quit rent and assessment had already been paid, and that the "Reports and Financial Statement of the year ended 31 December 2010 and 2013[#8223] had already been submitted to the IRB. They also contended that the company[#8223]s audited accounts for the period of 1987 to 1997 had already been submitted to CCM.

[24] In conclusion, the defendants claimed that the plaintiff and his supporters had never made any efforts to know more about the company or its documents, and that they had never made any attempts to resolve the issues or problems with the IRB. Their final salvo was to accuse the plaintiff of laches.

[25] The defendants[#8223] solicitors[#8223] submissions were equally brief and bereft of any reference to case laws. In gist, it was submitted that the plaintiff and his supporters were irked with the fact that the company was run by, and I quote the exact words: "other family members to their exclusion". This seemed quite like an admission to me.

[26] Nevertheless it was also submitted that the plaintiff and his supporters had chose to bring this suit in order to discredit the defendant, so as to pave the way for the plaintiff to move in and take full control of the company and exclude the defendants, instead of talking it over.

[27] It was finally submitted that the plaintiff and his supporters, being the majority shareholders, could have easily called for an AGM and pass the requisite resolution to take control of the company, but did not do so. Those were in essence the defendants[#8223] response.

Findings

[28] For the plaintiff to succeed, he must be able to prove that there was a visible departure from the expected standards of fair dealing and a violation of the conditions of fair play, that amounted to disregarding his interest that the defendants were aware of; *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd v Ling Beng Sung* [1978] 2 MLJ 227.

[29] An action for oppression under s. 181 CA 1965 is contested by way of affidavits. There are of course certain circumstances where the court would need to consider oral evidence, such as where parties have

successfully obtained leave to cross-examine the deponents. Any allegations made in the affidavits must be countered, save where there is consensus on the facts, failing which, the allegations must be taken as the truth; *Ng Hee Thoong v Public Bank Bhd* [1995] 1 MLJ 281.

[30] Lord Templeman[#8223]s opinion for the Privy Council in *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433 (PC) is edifying:-

> "The Company's (Winding Up) Rules 1972 provide for a winding up petition to be verified by affidavits and for affidavits in opposition and reply to be sworn and filed. This procedure was followed in the present case. In civil proceedings the trial judge has no power to dictate to a litigant what evidence he should tender. In winding up proceedings the trial judge cannot refuse to read affidavits which have been properly sworn, filed and produced to him unless some opposing party has applied for the attendance for cross-examination of the deponent and that application has been granted and the deponent does not attend. The Court cannot give a direction about evidence unless one of the litigants desires such direction to be made. Of course a judge may indicate to a petitioner that unless he calls oral evidence or applies to cross-examine the deponents of the opposition so as to prove a disputed fact, his petition is likely to fail. The judge may equally indicate to a respondent that unless he calls oral evidence or applies to cross-examine the petitioner's deponents for the purposes of disproving an allegation made by the petitioner, then the petitioner is likely to succeed. At the end of the day the judge must decide the petition on the evidence before him. If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavits, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations. The judge must then decide the fate of the petition by consideration of the undisputed facts." (p 436)

[31] In an adversarial system such as ours, it is the duty of litigants to advocate their case. This is done by putting their case forward by adducing facts, evidence and submissions for the court to adjudicate. Litigants could not expect the court to embark on its own fact finding, such as that in an inquisitorial system.

[32] In *Tan Kim Ho v PP* [2009] 3 MLJ 151 (FC), former Chief Justice Zaki Azmi, stated that *"In an adversarial system of justice, the duty of each party is to show that his case is the truth".* In *Dato' Tan Chin Who v Dato' Valumallai @ M. Ramalingam s/o Muthusamy* [2016] 8 CLJ 293*, another former Chief Justice, Ariffin Zakaria, stated "In an adversarial system, parties must be given the right of hearing, by that we mean the right to present his before the court. This is to assist the court in coming to its decision"*.

[33] The defendants have not provided any credible response to the allegations levelled by the plaintiff. The plaintiff had in their voluminous affidavits set out in great detail the acts that they claimed were oppressive, supported by numerous documents. I have considered them carefully. Alas, without the benefit of any positive challenge or evidence by the defendant, the plaintiff[#8223]s allegations must be taken to be truth.

[34] The defendants were given ample opportunities to counter the plaintiff[#8223]s allegation. A reading of their affidavits gave me the impressions that they either had no answers, or chose not answer the allegations.

[35] Furthermore, all three of the defendants[#8223] affidavits were affirmed by the fifth defendant, who was not a member of the board of directors. He had in all three affidavits averred that he had personal knowledge. Firstly, he did not state that he was authorised to affirm the affidavits on behalf of all the defendants. Secondly, he did not declare his source of information. This is crucial as he was not a director. The allegations made by the plaintiff were particularly aimed the directors. As such, it is incumbent for the fifth defendant to state that he had obtained information from the directors themselves, or at least from the records provided by the directors. How else could he have obtained personal information. The only matter where he had information was the quit rent and assessment, as the receipts for the payments were exhibited in the defendant[#8223]s final affidavit. This was the only allegation that the defendants had attempted to address positively.

[36] As for the quit rent and assessments, the defendant had in their first affidavit in reply affirmed on the 13 October 2016, claimed that they have already been paid. The receipts however, were only exhibited in their subsequent affidavit affirmed on the 20 October 2016.

[37] I observed that these payments were only made on the 14 and 17 October 2016. Clearly payments have not been made yet, contrary to what was averred in their first affidavit that was affirmed on the 13 October

2016.

[38] Be that as it may, what is material is that the quit rent and assessments were not paid when the plaintiff commenced this suit. That is material. Correcting a wrong after the event does not take away the fact that a wrong had already been committed.

[39] All the allegations levelled against the defendants connote oppression, as established by settled authorities, such as: Failure to satisfactorily account for the company[#8223]s assets or proceeds and lacking frankness - *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors and another application* [1994] 2 MLJ 789; Misusing the company[#8223]s money for personal benefits - *Re Elgindata Ltd* [1991] BCLC 959; Not paying dividends - *Re Gee Hoe Chan Trading Co Pte Ltd* [1991] 3 MLJ 137; Not running the company in accordance with its articles of association - *Re Chi Liung & Son Ltd: Tong Chong Fah v Tong Lee Hwa & Ors* [1968] 1 MLJ 97; Failure to submit the company[#8223]s accounts - *Chiew Sze Sun & Anor v Cast Iron Products Sdn Bhd & Ors* [1994] 1 CLJ 157; Failure to pay quit rent for the company[#8223]s properties - *Ng Chee Keong v Ng Teong Kiat Highlands Plantations Limited* [1980] 1 MLJ 45.

Conclusion

[40] Devoid of any credible challenge to the plaintiff[#8223]s allegations of oppression, it is my finding that the plaintiff has proven his case. The plaintiff had prior to the decision being delivered, stated that he will not pursue prayers (v), (vi) and (vii).

[41] I am however disinclined to allow all of the other reliefs sought by the plaintiff. Firstly, some of the reliefs sought are for the plaintiff and also the supporters. For instance, the plaintiff had under prayer (ii) sought for him and the supporters to be appointed to the board of directors. The supporters are not parties to this suit, and could not be granted reliefs even if they had duly authorised the plaintiff to act for their benefit. They should have participated in this suit.

[42] I took cognisance of the fact that the plaintiff and the supporters are the majority shareholders. Being the majority, they would be able to take steps to take control of the company. The only hindrance was the resolutions passed which seemed to have entrenched the second to fourth defendants in the board of directors.

[43] I therefore gave the following orders:-

(i) That the resolutions dated 16 March 1985, 19 May 1988 and 3 May 1990 appointing the first defendant[#8223]s board of directors as the governing directors be cancelled,

(ii) That a meeting be immediately held to appoint a board of directors for the first defendant,

(iii) That the appointment of the Receiver & Manager, and the powers given under the Order dated 15 December 2016, be extended until:-

  (a) a new board of directors for the first defendant has been appointed, and

  (b) the new board of directors for the first defendant holds its first board meeting

(iv) That the second, third, fourth, fifth and sixth defendants jointly and severally pay the sum of RM50,000.00 as costs to the plaintiff, without utilising the capital or assets of the first defendant, with interests at the rate of 5% per annum on this amount, from the date of this order until full settlement.