Ho Soo Fong and another *v* Ho Pak Kim Realty Co Pte Ltd (in liquidation)
[2021] SGCA 35

Case Number : Civil Appeal No 166 of 2020
Decision Date : 07 April 2021
Tribunal/Court : Court of Appeal
Coram : Andrew Phang Boon Leong JCA; Chao Hick Tin SJ; Woo Bih Li JAD
Counsel Name(s) : Choh Thian Chee Irving, Kor Wan Wen Melissa and Chen Sixue (Optimus Chambers LLC) for the appellants; Lee Ming Hui Kelvin, Ong Xin Ying Samantha and Kikki Tan (WNLEX LLC) for the respondent.
Parties : Ho Soo Fong — Ho Soo Kheng — Ho Pak Kim Realty Co Pte Ltd (in liquidation)

Companies – Directors – Duties

Civil Procedure – Pleadings

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2020] SGHC 193.]

7 April 2021

Andrew Phang Boon Leong JCA (delivering the judgment of the court *ex tempore*):

Introduction

1 The respondent, Ho Pak Kim Realty Co Pte Ltd, was the plaintiff in High Court Suit No 1012 of 2018 ("Suit 1012") and is presently in liquidation. The appellants, Ho Soo Fong and Ho Soo Kheng, were directors of the respondent and were the defendants below. The liquidator of the respondent, Mr Don Ho ("the Liquidator"), brought Suit 1012 against the appellants for their alleged misconduct as directors of the respondent. The question at trial was whether the appellants had breached various directors' duties owed to the respondent by failing to submit a proper statement of affairs, destroying the books of the respondent, and preventing the respondent from claiming debts from related companies prior to winding up.

2 The judge below ("the Judge") found in favour of the respondent. The Judge held, principally, that the appellants had breached their directors' duties by failing to attempt to recover a debt of about $3.59m owed to the respondent. The said debt had been owed to the respondent by related companies, and the appellants were directors of these companies. The appellants had also taken steps to prevent the Liquidator from recovering the sum, namely, by destroying the books of the respondent and by failing to file a proper statement of affairs. The Judge found the appellants jointly and severally liable for $3,590,587.

3 The appellants have appealed against the Judge's decision. Having considered the arguments of the parties, we are unable to agree with the appellants, and find that the Judge had arrived at the correct conclusion.

Our decision

4 The Judge in the court below had examined all the relevant evidence with a fine-toothed comb

before arriving at her decision. One central motif in the present case consists of the appellants' deliberate as well as systematic actions in stymying in every possible way the efforts by the Liquidator in arriving at a true picture of the respondent's state of affairs which would enable it to recover moneys owed to it for the benefit of its creditor. The three factual components of the appellants' obstructive efforts, as correctly identified by the Judge, are as follows.

5 First, the appellants knew of the existence of a $3.59m debt owed to the respondent and failed to pursue recovery of this debt. This resulted in the respondent being unable to pay a $1.6m judgment debt owed to another company, Revitech Pte Ltd ("Revitech"). The debtors owing the respondent the $3.59m sum were two companies related to the respondent, namely, Invest Ho Properties Pte Ltd ("IH") and Ho Tong Seng Eng Pte Ltd ("HTS"). While the appellants repeatedly asserted, at trial and on appeal, that the debtors were three *other* entities, the evidence overwhelmingly rebuts their bare allegation, and fully bears out the fact that IH and HTS were the actual entities that owed the $3.59m sum to the respondent.

6 Despite being aware of the existence of the $3.59m debt, which they admit, the appellants failed to take any steps to pursue recovery of this sum, to the detriment of the respondent. It also bears mention that the appellants were, at the material times, shareholders and directors of IH and HTS. Viewed in context, it becomes clear that the appellants' failure to pursue recovery of the debt for the respondent was motivated by personal gain. They failed to ensure that the $3.59m sum was paid to the respondent, and thereby prevented part of that sum from being paid to Revitech in satisfaction of the $1.6m debt owed to it. The monies remained with IH and HTS, and the appellants, as shareholders and directors of these entities, stood to benefit.

7 Second, the appellants destroyed the books of the respondent. The Judge found the first appellant's testimony at trial in respect of this issue to be a "*blatant lie*" riddled with inconsistencies, and, in our view, rightly so. The first appellant could not keep a consistent story and offered no fewer than four dissonant explanations. At one point, he even attempted, incredibly, to shift the blame to his employees, claiming that they destroyed the documents after he had told them to "tidy up" the office. The Judge thus inferred that the appellants had *deliberately* destroyed the respondent's books, and we see no reason to disturb this finding in light of the evidence. Their actions in this regard impeded the Liquidator's attempts to recover, *inter alia*, the $3.59m sum.

8 Third, the appellants failed to submit proper Statements of Affairs to the Liquidator. Three statements were submitted by the first appellant, all of which were defective, wrongly dated, or comprised bald assertions unsubstantiated by any financial documents. The appellants' failings in this regard again impeded the Liquidator's efforts at recovering the assets of the respondent.

9 In the round, it was apparent to the Judge, and apparent to us, that the appellants had made a concerted and sustained effort to obstruct any and all attempts by the Liquidator to inquire into the affairs of the respondent.

10 The Judge rounded up her factual findings by concluding (correctly, in our view) that the second appellant was not, as he alleged, a "sleeping" director of the respondent. We do not, in any event, see how such an allegation can assist the second appellant. There is a minimum standard that the law requires of directors, executive or otherwise. These principles are uncontentious and well-entrenched in local jurisprudence. Directors are not (and should not be) allowed to shirk responsibility on the basis of apathy and non-involvement.

11 The Judge found that the appellants' actions, as just discussed, constituted breaches of fiduciary duties by the appellants in *every* conceivable aspect. What is also notable is the Judge's

rejection of the many patently untrue submissions as well as evidence which were proffered on behalf of the appellants (indeed, the word "disbelieve" occurs in the Judgment no fewer than 16 times). We hasten to add that the Judge did not base her decision solely or even mainly on the credibility of the appellants but also on the relevant documentary evidence (or, more accurately, the absence thereof). The remedy awarded by the Judge was also wholly appropriate in light of the $3.59m sum that the respondent was deprived of, whilst the defences raised by the appellants were (as the Judge found) wholly without basis.

12 Indeed, this is one of those cases where the appellate court may, with complete justification, state that it bases its decision entirely on the reasoning as well as decision of the trial judge (which, as we have just observed, was meticulous as well as rigorous in every sense of the word). Put simply, given the patently unmeritorious nature of the appeal, the trial judge's decision becomes – in substance and effect – that of the appellate court as well.

13 For completeness, we make a single point of clarification as regards the Judge's findings on the appellants' breaches of directors' duties – specifically, on the issue of conflict of interests. Our clarification arises from the premise that, as a starting point, there is nothing in law prohibiting persons from being directors in related companies (as the appellants were *vis-à-vis* the respondent, IH and HTS). Stemming from this, it is an open (and, we stress, inherently fact-sensitive) question as to what steps a director ought to take when a situation such as the present one arises, *ie*, when a debt owing from one related company to another falls due. Such steps could range from stepping down as a director of one entity, to recusing oneself from making decisions on the relevant transaction. Everything depends on the precise factual matrix at hand. The openness of the factual inquiry, however, does little to aid the appellants in the present case. The steps the appellants *did take* left no room for doubt that they had breached their duties in this regard. They *deliberately* took steps to obstruct and impede the Liquidator's attempts at recovering sums due from IH and HTS to the respondent, and, in so doing, acted *antithetically* to the no-conflict rule. They did not seek to avoid or resolve the conflict, but caused the conflict of interests to materialise in full. Their actions benefitted IH and HTS (and by extension, themselves), to the detriment of the respondent. This is the quintessential heart of a breach of the no-conflict rule: derogating the interests of one's principal in furtherance of a separate set of interests. It was on this premise that the Judge found that the appellants breached the no-conflict rule (see [92] of the Judgment), and we see no reason to disturb that finding.

New arguments raised on appeal

14 We pause to note, parenthetically, that the new arguments raised on appeal by the appellants are, as we have already alluded to, wholly without merit. Two such arguments were raised: first, that HTS, one of the respondent's debtors, had no funds to pay the $3.59m sum, and hence the respondent could not be said to have suffered a loss. Second, that there was no guarantee that the respondent could have recovered the $3.59m sum in litigation, and hence the appellants cannot be said to have *caused* the respondent's loss. These are issues that the appellants should have pleaded and explored in depth at trial. The arguments premised on these issues are therefore ostensibly opportunistic, and self-evidently prejudicial to the respondent.

15 In any event, these belatedly raised arguments lack merit. The argument on HTS' financial predicament lacks any evidential basis. The Judge found that the document relied on by the appellants was neither signed nor verified, and that it is "unclear" how the document "was derived". We agree, as this is borne out on the face of the document itself. The argument pertaining to causation is a suggestion that choses in action are worthless because of the uncertainty inherent in litigation – this is self-evidently an untenable proposition.

16 In these circumstances, we dismiss the appeal.

The $2,734,928.66 sum owed to the appellants

17 We make a final clarification on a sum that was, in our view, *not in issue* in Suit 1012. This pertains to the sum of $2,734,928.66 allegedly owed to the appellants by the respondent. The appellants have made it clear in the Defence (Amendment No 1) that they are *not* pursuing a counterclaim against the respondent for the said sum. They expressly reserve their rights in relation to the sum and state that they will file their claim in due course. The existence of the debt was therefore *not in issue* in Suit 1012 (and likewise on appeal).

18 The appellants also state, in the Defence (Amendment No 1), that *if they are found liable*, the $2,734,928.66 sum should be *set off* against the sums due and owing to the respondent. But the appellants cannot have it both ways. They have committed to the position that they will file a formal claim for the sum and are so bound.

19 We accordingly make *no finding* in relation to the alleged $2,734,928.66 sum owed to the appellants. We also clarify that [111] and [112] of the Judge's decision do *not* create any cause of action, issue and/or subject matter estoppel in relation to the sum. If the appellants subsequently file a proof of debt or commence a claim against the respondent for the said sum, they are *not* precluded by virtue of *res judicata*. The Judge's observations on this issue are, strictly speaking, only *obiter*, because the appellants expressly reserved their position on the issue in their pleadings. We emphasise that it is *only open to the appellants to litigate* ***the existence of the alleged debt owed to them*** . At the risk of stating the obvious, the appellants are precluded from re-litigating any of the issues pertaining to *their* liability for breach of directors' duties, as ventilated in Suit 1012 and in this appeal, even if these may be characterised as related or linked to the issue of the debt owed to the appellants.

Costs

20 Having regard to the respective parties' costs schedules, we award the respondent costs in the amount of $37,534.10 (all-in). There will be the usual consequential orders.

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