Neil John Ryan v Exploration Png (S) Pte Ltd and Another
[2000] SGHC 242

Case Number : OS 750/2000

Decision Date : 20 November 2000

Tribunal/Court : High Court

Coram : Lee Seiu Kin JC

Counsel Name(s) : Luna Yap Whye Tzu (Luna Yap & Co) for the plaintiff; Lee Teck Leng (Tan Peng Chin & Partners) for the 2nd defendant

Parties : Neil John Ryan — Exploration Png (S) Pte Ltd; Rosaline Berger

JUDGMENT:

Grounds of Decision

1 The 1st Defendants are a company registered in Singapore under the Companies Act. In this OS, the Plaintiff applied under section 216 of the Companies Act for the following orders in respect of the 1st Defendants:

> "that directions be given to the Company in the future conduct of its business, management and operations as follows, or as the Court may order:
>
> (1) That the present solicitors M/s Wee Swee Teow & Co continue to act for the Company;
>
> (2) That M/s Brumby & Co be appointed as the company secretary under section 171 of the Companies Act;
>
> (3) That the Plaintiff may approve, sign and lodge with the Registry of Companies and Businesses the annual accounts of the Company as a sole signatory if the 2nd Defendant refuses to approve the same;
>
> (4) That the Plaintiff be authorised to appoint the following:
>
> > i) Independent valuers, namely M/s Edmund Tie & Co, to value the company properties at Elizabeth Heights, Far East Shopping Centre, Orchard Plaza and United House;
> >
> > ii) Registered property agents, namely M/s Richard Ellis or M/s Jones Lang LaSalle, to handle the sale of the aforesaid properties by auction or private treaty within 6 months from the date of this order at a price not less than 10% above the valuation prices.
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> (5) That the Plaintiff be authorised to wind up the Company within one year from the date of this order."

2 The 2nd Defendant, who is the ex-wife of the Plaintiff, resisted the application. On 25 September 2000, after hearing counsel for the Plaintiff and the 2nd Defendant, I allowed the Plaintiff's application and ordered that:

(1) the present solicitors, M/s Wee Swee Teow & Co. continue to act for the 1st Defendants;

(2) M/s Brumby & Co be appointed as the company secretary under section 171 of the Companies Act;

(3) the Plaintiff may approve, sign and lodge with the Registrar of Companies and Businesses the annual accounts of the 1st Defendants as a sole signatory if the 2nd Defendant refuses to approve the same;

(4) prayers 4 and 5 of the OS be adjourned *sine die* with liberty to restore;

(5) costs in respect of prayers 1 to 3 of the application and SIC No.602597 of 2000 be paid by the 2nd Defendant and fixed at $2,000.

3 The 2nd Defendant has filed a notice of appeal against my orders and I now give my grounds of decision.

4 The Plaintiff is an Australian national while the 2nd Defendant is a United States national. They both reside in Singapore and hold employment passes issued by the Singapore Immigration and Registration Department. They were married in 1984 in Los Angeles, USA and they have a son who was born in 1990. Unfortunately the marriage deteriorated and broke down in September 1997 when the Plaintiff left the matrimonial home. Divorce proceedings followed and the decree nisi was granted on 25 August 1998.

5 After their marriage, the parties lived and worked in Papua New Guinea. They were employed by Exploration PNG Pty Ltd ("EPNG"), a Papuan company incorporated in 1983. However, with the birth of their son in 1990, the couple decided to live in Singapore and the 2nd Defendant ceased her employment with EPNG. They incorporated the 1st Defendants in 1991 as a holding company for the couple's shares in EPNG, which amounted to 76% of its total share capital. The Plaintiff and the 2nd Defendant each owns exactly 50% of the shares of the 1st Defendants. The 1st Defendants were also the holding company for the real properties in Singapore that the couple owned. The Plaintiff and 2nd Defendant were appointed directors of the 1st Defendants and the former was employed by the 1st Defendants as their managing director. The Plaintiff continued working with EPNG, and would shuttle between Singapore and Papua New Guinea for this purpose. The couple agreed that the 2nd Defendant would oversee and monitor the administrative functions of the 1st Defendants in Singapore. At the time of filing of this OS, the 1st Defendants owned, apart from shares in EPNG, 4 properties at Elizabeth Heights, Far East Shopping Centre, United House and Orchard Plaza.

6 On 15 December 1999, judgment on the ancillary issues was given by District Judge Tan May Tee. In respect of the 1st Defendants, the learned District Judge granted 50% of its value to each party to the divorce. In addition, the following order was made:

"14 In regard to companies which are owned by the parties as equal shareholders, the parties shall share equally in the costs of winding-up, any tax liabilities and costs of valuation of the shares of the companies and any other incidental expenses."

The Plaintiff contended that incorporated in this order was an order to wind up the 1st Defendants. The Plaintiff further said that he and the 2nd Defendant were agreeable to winding up the 1st Defendants and that their disagreement only related to the question of when it should be wound up. This was because the 2nd Defendant resided in Singapore by virtue of an employment

pass for employment with the 1st Defendants.

7 Both parties to the divorce appealed to the High Court in RAS 720007/2000 against various aspects of the order of the learned District Judge. This appeal was heard by Justice Lai Siu Chiu who ordered a stay of the winding up of the 1st Defendants on 6 April 2000. That order remained in force when this OS came up before me on 25 September 2000.

8 The divorce proceedings had become rather acrimonious, due probably to the circumstances of the breakdown. The Plaintiff and the 2nd Defendant could not see eye to eye on many matters pertaining to the divorce and there was a stand-off of sorts in respect of the 1st Defendants. On 1 April 2000, the company secretaries of the 1st Defendants resigned, along with their secretarial agent. On 25 April, the 2nd Defendant's solicitors wrote to M/s Wee Swee Teow & Co to say that she was withdrawing her mandate for them to act as solicitors for the 1st Defendants because they had not been able to achieve much results. The letter also stated that the 2nd Defendant maintained her position that the 1st Defendants should be wound up *"soonest possible to end the misery for everyone concerned"*.

9 Time, which has the inconvenient habit of moving inexorably forward, did not stand still for 1st Defendants and when the annual accounts which were due on 29 February 2000, nothing was filed. The Plaintiff says that should the Registrar of Companies issue a summons against the directors of the 1st Defendants, it would be his third offence under the Companies Act in 5 years and the consequences for him would be dire. That was the reason he needed the assistance of the court in respect of the first 3 prayers of this OS.

10 In her affidavits, the 2nd Defendant described the reasons for the breakdown of their marriage and detailed the subsequent events which resulted in her present distrust of the Plaintiff. It is the usual story of betrayal followed by rage and acrimony of 2 people who had been so close and who subsequently fall out. I do not think that it is worthwhile describing those matters here; suffice it to say that in respect of the 1st Defendants, they had attempted to negotiate a settlement by exploring possibilities ranging from a buy-out by one party to winding up. The 2nd Defendant had hoped that the Plaintiff would buy her shares in the 1st Defendants but after almost 2 years of negotiation this did not materialise. She then wanted to wind up the 1st Defendants as soon as possible. However the Plaintiff was of a different view. He felt that in order to fetch the best price, it would be necessary to carry out the winding up over a longer period. Hence in prayer 5 he had asked for a year to do it. However this prayer is out of the question because of the order of Justice Lai Siu Chiu granting a stay of the winding up in the District Court appeal. I therefore adjourned prayers 4 and 5 *sine die* with liberty to restore. The only prayers available to be decided by me were the first 3, respecting the conduct of the 1st Defendant's affairs and in particular the compliance with the requirements under the Companies Act to file accounts.

11 I had no doubt that, in view of the deadlock, those 3 prayers were necessary in order for the Company and its officers to remain on the right side of the law. The only question was whether the court had jurisdiction to grant those orders pursuant to this application which is one under section 216 of the Companies Act. The first 2 subsections of that provision state as follows:

> "(1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister 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 or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or
> >
> > (b) that some act of the company has been done or is threatened or that some resolution of the members, holders

> of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (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;
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> (b) regulate the conduct of the affairs of the company in future;
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> (c) authorise civil proceedings to be brought in the name of or on behalf of the company by such person or persons and on such terms as the Court may direct;
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> (d) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;
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> (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."

12 It is necessary to consider whether the circumstances of the present case bring it within the ambit of section 216(1)(a). The Privy Council in *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227 commented that English decisions are not very helpful in this regard. That case relates to section 181(1) and (2) of the Malaysian Companies Act which is *in pari materia* with section 216(1) and (2) of our Act. Lord Wilberforce, delivering the opinion of the Board, set out the provisions of section 181(1) and (2) of the Malaysian Act and said, at page 228:

> "... This section can trace its descent from section 210 of the United Kingdom Companies Act, 1948 which was introduced in that year in order to strengthen the position of minority shareholders in limited companies. It also resembles the rather wider section 186 of the Australian Companies Act, 1951. But section 181 is in important respects different from both its predecessors and is notably wider in scope than the United Kingdom section. In sub-section (1)(a) it adds disregard of the interests of members, etc to oppression as a ground for relief in this respect making explicit what was already inherent in the section **(see *In re HR Harmer Ltd*** [1959] 1 WLR 62, 75). It introduces a new ground in sub-s (1)(b) and, most importantly, in sub-section (2), which sets out the kinds of relief which may be granted, it provides for "remedying the matters complained of" and states as a specific type of relief that of winding-up of the company.
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> Section 210 is differently constructed. Under it, the court is required to find that the facts would justify the making of a winding-up order under the "just and

> equitable" provision in the Act, but also that to windup the company would unfairly prejudice the "oppressed" minority. The Malaysian section, on the other hand, requires (under sub-section 1(a)) a finding of "oppression" or "disregard", and then leaves to the court a wide discretion as to the relief which it may grant, including among the options that of winding the company up. That option ranks equally with the others, so that it is incorrect to say that the primary remedy is winding-up. That may have been so before 1948 and even after the enactment of section 210, but is not the case under section 181.
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> Their Lordships consider it important that courts applying section 181 should do so according to its terms and its purpose and should not regard themselves as necessarily bound by United Kingdom decisions, which are based upon a different section, and in some cases restrictive. The same applies, though with less force, to reliance upon Australian decisions upon section 186."

13 On a plain reading of section 216(1)(a), one can see that it contains the following elements:

> (i) there must be certain acts done, either related to the conduct of the affairs of the company or the exercise of the powers of the directors; and
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> (ii) these acts must be oppressive to one or more of the members of the company or its debenture holders in disregard of his or their interests as members, shareholders or debenture holders.

14 In respect of the first element, the Plaintiff's complaint was that the 2nd Defendant, by reason of her refusal to act as director in respect of the filing of the annual returns, had caused the company to contravene section 197 of the Companies Act and this was a continuing contravention. There was the question whether such refusal, which was an omission to act rather than a positive act, would satisfy the first limb. Section 216(1)(a) envisages the situation where the *"powers of the directors are being exercised"* in an oppressive manner or in disregard of the interests of certain members or debenture holders. This was a company in which 2 persons each owned exactly 50% of the company and they were the only 2 directors. Therefore each of them effectively held a power of veto over all the affairs of the company. In my view, a refusal to act by the 2nd Defendant under these circumstances is as much an exercise of her powers as director as a positive act because of her power of veto. Therefore the first element of section 216(1)(a) is satisfied.

15 In respect of the second element, counsel for the 2nd Defendant submitted that the present case fell outside its scope. He contended that section 216(1)(a) envisages a situation in which a minority is being oppressed by a majority, which is not the case here as both parties held exactly half the shares. With respect, I did not agree because there is nothing in that provision that states that it only applies to a minority shareholder. It only specifies that there must be oppression on one or more of the members or debenture holders or disregard of their interests. I understood counsel's argument to be based on the argument that the word "oppression" is only relevant to a majority-minority situation. However it is not my understanding that this term is only used to describe what can be inflicted by a majority over a minority. Certainly in the realm of politics, examples abound where a minority has oppressed a majority. The best recent examples are the former white supremacist regimes in South Africa and Rhodesia. Whether one group is capable of oppressing another is determined not by relative numbers but by the instruments of oppression available to it.

16 Returning to the corporate realm, there may well be situations where a person who, although holding a majority of the shares, is being oppressed on account of the conduct of the affairs of the company in a particular manner by the persons currently in control of its management. In this situation, while it may be possible for such a person to remedy the situation by other means such as removal of the opposing directors, there is no reason why he cannot resort to section 216 to remedy the situation because on a plain reading of the provision there is no requirement of a minority-majority situation. Indeed in *Re Kong Thai Sawmill (Miri) Sdn Bhd*, Lord Wilberforce alluded to this indirectly when he said, at p.229:

> "... it is claimed by the appellants that the section is not a substitute for a minority shareholders` action and, specifically, that many if not most of the matters complained of would properly form the subject of such an action. Their Lordships agree with this in part. Relief cannot be sought under s 181 merely because facts are established which would found a minority shareholders` action: the section requires (relevantly) "oppression" or "disregard" to be shown, and these are not necessary elements in the action referred to. But if a case of "oppression" or "disregard" is made out, the section applies and it is no answer to say that relief might also have been obtained in a minority `shareholders` action. To the extent that the appellants so contend their Lordships do not accept their argument."

17 In *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors* [1994] 2 MLJ 789, Anuar J examined Australian and Indian cases on similar provisions and held that (at p 808):

> "... relief under s 181 is available to majority shareholders who are not in control of the management of the company and who, for any given reason, are unable to control the board, eg because they have agreed to a management power sharing formula in a separate agreement among the shareholders."

This statement of the law was cited with approval by the Federal Court in *Owen Sim v Piasau Jaya Sdn Bhd* CSLR X[659].

18 The Supreme Court of the Australian Capital Territory took a similar view in respect of the corresponding provision in their Companies Ordinance 1962. Joske J held in *Re Associated Tool Industries Ltd* [1963] 5 FLR 55 that it was not necessary for the respondents in the application to constitute a majority. He said (at p. 66):

> "It was submitted on behalf of the respondents that s.186 can only be invoked against a controlling majority, that is, a majority which controls a general meeting of the Company. It was said that at no stage were the three individual respondents such a controlling majority. The submission was that the court's jurisdiction has invariably been invoked in similar matters against controlling majorities, and the rule in *Foss v Harbottle* (1843) 2 Ha.461 was cited, and *MacDougall v Gardiner* (1875) 1 Ch.D.13 relied on to the effect that although a shareholder had a right of action in his own name and was not required to sue in the company's name where there was something illegal, oppressive, fraudulent or ultra vires the company taking place, this applied only where the shareholder was in a minority.
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> In Gower's *Modern Company Law* (2nd ed.), at p. 542, the following passage appears: "The petition may be by any member, in other words, the rule in Foss v Harbottle has no application, and an individual member has a personal right to institute proceedings in a non-representative capacity. The section appears in the Act under the heading *Minorities*, but the section itself scrupulously avoids the use of the word and refers to 'oppression to some part of the members'. It seems clear, therefore, that the draftsman has rightly recognised that oppression may be exercised by those in control even though they lack a majority holding, and that the section affords protection in such a case. It has even been held that the remedy may be invoked notwithstanding that all the shareholders are equally damnified by what has been done". The case to which the learned author refers is *Meyer's Case* [1959] A.C.324. Gower's opinion applies

> *a fortiori* to s.186 since that section does not appear in the Ordinance under the heading "*Minorities*". As Jenkins L.J. has pointed out ([1959] 1 W.L.R., at p.75]) the section "is wide enough to cover oppression by anyone who is taking part in the conduct of the affairs of the company *de facto* or *de jure*". The fact that in *Harmer's Case* [1959] 1 W.L.R.62 the appellant had in fact a controlling power does not take away from this statement as to the width and meaning of the section.
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> A statutory provision is to be construed in accordance with the language used and a limitation or restriction upon any right of action given by the provision is not to be inferred by reason of what the prior law may have been, unless such limitation or restriction appears by necessary implication. Examination of the section shows no intention to include any such limitation or restriction as is relied on by the respondents. It is not to be found either expressly or by necessary implication. Indeed being a remedial measure and not to be construed narrowly (see *Meyer's Case*), it should be regarded as intended to terminate defects in the pre-existing law (see *Meyer's Case*)."

19 Accordingly, I did not accept that section 216(1)(a) requires a majority-minority situation on the basis of the word "oppressive" in the provision and held that once "oppression" or "disregard" in respect of a relevant party was made out, the second element was satisfied. Furthermore, in the present case, each of the 2 parties had exactly 50% of the votes and therefore none of them controlled the majority. This meant that both the Plaintiff and the 2nd Defendant were minority shareholders. There was therefore no reason why section 216 could not be invoked in the present case.

20 One further question with regard to the second element was whether the act complained of was oppressive to or in disregard of the interests of the Plaintiff as a member or shareholder of the company. The Plaintiff, as director, and the company are both liable to a fine of up to $5,000 if convicted of an offence under section 197. That section contains the requirement to file annual returns, including company accounts. Section 197(7) provides as follows:

> "(7) If a company fails to comply with this section, the company and every officer of the company who is in default shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $5,000 and also to a default penalty."

While it would certainly be against the Plaintiff's interests personally if he were convicted by virtue of his being a director of the company, it is not so clear that this would be against his interests as a member or shareholder. Unfortunately based on the submissions made by counsel I was not satisfied that I would be able to make a determination on this question. I would have sought the assistance of counsel to conduct further research on it if not for the fact that I need not do so in the present case because the company was also at risk of conviction and fine. This would result in a loss to the company of up to $5,000 or even more if a default penalty were imposed. In these circumstances, it would certainly be against the interest of the Plaintiff as a member or shareholder of the company as this would reduce the amount of profit of the company and in turn reduce the surplus available for declaration of dividends or the value of the company.

21 Having established that I had jurisdiction to grant the orders pursuant to an application under section 216, there was no question in my mind that I ought to grant the first 3 prayers in order for the company to comply with the requirements of the Companies Act. I was satisfied that the nature of those orders fell within the wide scope of powers available to me under section 216(2). I should add that the 2nd Defendant's resistance to the applications in these 3 prayers appeared to me to be unnecessarily vexatious. She was just as liable to prosecution under section 197 as the Plaintiff and 1st Defendants would be. There did not seem to be any prejudice to her in enabling the company to file the returns as requested in the first prayers. It seemed to me that she was intent on cutting off her nose to spite her face.

22 In respect of costs, as the application in respect of the first 3 prayers was vigorously opposed by the 2nd Defendant, it was appropriate that the order for costs should follow the event. In view of the number of affidavits filed and the submissions before me, I determined that it should be fixed at $2,000.

Lee Seiu Kin

Judicial Commissioner