Re Winpac Paper Products Pte Ltd
[2000] SGHC 33

Case Number : OS 1090/1999

Decision Date : 08 March 2000

Tribunal/Court : High Court

Coram : Goh Joon Seng J

Counsel Name(s) : Michael Low Wan Kwong (JS Yeh & Co) for the plaintiff; Lek Siang Pheng (Helen Yeo & Partners) for the defendants; Chng Bee Peng (Colin Ng & Partners) on watching brief for the liquidator

Parties : —

Companies – Directors – Director bringing action in name of company – Whether director acting in good faith – Whether in interests of company that action be brought – s 216A Companies Act (Cap 50)

Companies – Members – Rights – Right of derivative action – Whether director acting in good faith – Whether in interests of company that action be brought – s 216A Companies Act (Cap 50)

: This was an application by the plaintiff made under s 216A of the Companies Act (Cap 50) for leave to bring actions in the name of the third defendant against various parties. I dismissed the application. The plaintiff has appealed to the Court of Appeal. I now give my reasons. [The appeal was withdrawn - Ed.]

The background

The plaintiff, first and second defendants are directors of the third defendant. The first defendant is the managing director. One Foo Sea Keng is an alternate director for the second defendant.

The third defendant is a wholly-owned subsidiary of Everbright Global Investments Pte Ltd (`Everbright`). Everbright is currently in a members` voluntary liquidation. The liquidator is Ong Yew Huat of Ernst & Young. The issued share capital of Everbright is $11,860,000 at $1 per share. Of the total issued shares of Everbright, the plaintiff holds 4,628,000 shares or 39. 02%. The first defendant holds 2,109,000 or 17. 78% and the second defendant holds 1,186,000 or 10%. They were also directors of Everbright, the first defendant being the managing director.

The third defendant`s business was mainly in cartons, papers merchanting and letting of industrial premises. It owns a commercial building at 156, Gul Circle, Singapore (`the Gul Circle property`) under a lease from the Jurong Town Corporation (`JTC`).

To facilitate the liquidation of Everbright, the third defendant would have to cease business. Accordingly, members of Everbright convened an extraordinary general meeting on 14 November 1997 and agreed that the plaintiff through his nominee company, Focus Industries Pte Ltd (`Focus Industries`), would take over the carton stocks of the third defendant. The first defendant through his nominee company Winpac Paper Pte Ltd (`Winpac Paper`) would take over the paper stocks of the third defendant. It was also agreed that out of the third defendant`s banking facilities of $16m, $7m would be transferred to Winpac Paper. The Gul Circle property was to be sold. After the sale, the third defendant would also go into voluntary liquidation. To date, Gul Circle property has not been sold because of lack of an acceptable offer.

These proceedings

On 17 July 1999, the plaintiff commenced these proceedings against the first and second defendant. On 2 September 1999, the third defendant was joined as a party. By this originating summons, the plaintiff applied for leave to commence proceedings in the name of the third defendant against:

(i) ABCPacking&CarriageCo PteLtd(`ABC`) for the sum of $13,500 for rental arrears;

(ii) New Horizon Logistics Pte Ltd (`New Horizon`) for damages for breach of a lorry sale;

(iii) New Horizon Logistics Pte Ltd for $130,818. 86 under a Logistics Service Agreement;

(iv) Winpac Paper for an estimated sum of $1,216,847. 90 being price for assets taken over; and

(v) first and second defendant for breach of directors` duties.

The law

This application was made under s 216A of the Companies Act. The relevant provisions are ss 216(2) and (3). They read:

> *(2) Subject to subsection (3), a complainant may apply to the Court for leave to bring an action in the name and on behalf of the company or intervene in an action to which the company is a party for the purpose of prosecuting, defending or discontinuing the action on behalf of the company.*
>
> *(3) No action may be brought and no intervention in an action may be made under subsection (2) unless the Court is satisfied that -*
>
> *(a) the complainant has given 14 days` notice to the directors of the company of his intention to apply to the Court under subsection (2) if the directors of the company do not bring, diligently prosecute or defend or discontinue the action;*
>
> *(b) the complainant is acting in good faith; and*
>
> *(c) it appears to be prima facie in the interests of the company that the action be brought, prosecuted, defended or discontinued.*

It was not disputed that the plaintiff had served the requisite 14 days` notices under s 216(3)(a). The only question before me was whether the plaintiff had satisfied ss 216(3)(b) and (c).

In matters of management, the attitude of the court is that expressed by Lord Wilberforce in **Howard Smith Ltd v Ampol Petroleum Ltd & Ors** [1974] AC 821 at 832:

> *Their Lordships accept that such a matter as the raising of finance is one of management, within the responsibility of the directors: they accept that it would be wrong for the court to substitute its opinion for that of the management, or indeed to question the correctness of the management`s decision, on such a question, if bona fide arrived at. There is no appeal on merits from management decisions to courts of law: nor will courts of law*

> *assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at.*

The dicta of Lai Kew Chai J in **Teo Gek Luang v Ng Ai Tiong & Ors** [1999] 1 SLR 434 at p 438 [para] 14 is to the same effect:

> *... Management decisions should generally be left to the Board of Directors. Members generally cannot sue in the name of his company. A minority shareholder could attempt to abuse the new procedure, which would be as undesirable as the tyranny of the majority directors who unreasonably refuse to act. The Canadian appellate court, however, at the same page went on to say that `[b]efore granting leave, the court should be satisfied that there is a reasonable basis for the complaint and that the action sought to be instituted is a legitimate or arguable one. ` I agreed with this latter formulation and adopted that approach. The same principle was put in another way by O`leary J in **Re Marc-Jay Investments** [1974] 5 QR (2d) 235, where at p 237 the judge said: `I believe it is my function to deny the application if it appears that the intended action is frivolous or vexatious or is bound to be unsuccessful. `*

My decision on the reliefs sought

The claim against ABC

ABC was the tenant of the third defendant. It occupied part of the Gul Circle property on a two-year tenancy ending 31 May 1998 at amonthly rent of $5,000. According to the plaintiff, there was an agreement between ABC and the third defendant to revise the monthly rent to $7,500. This agreement, if any, was in a letter of 3 July 1997 in which ABC requested that the revised rent should begin from 1 October 1997. In its reply of 4 July 1997 , the third defendant stated that rent revision would take effect from 1 September 1997 to 31 August 1999. There was no acceptance by ABC. But ABC paid the revised rent at $7,500 on the understanding that it was on a temporary basis pending the expiry of the tenancy when JTC`s approval for the renewal would be required. At that point, the parties would negotiate again on the rent. On 29 May 1998 ABC, by letter, requested a reduction of the rent to $6,000 per month from 1 June 1998. This was rejected by the third defendant. But ABC went on to pay $6,000 from June 1998. This proposed action against ABC is for the difference of $1,500 per month for the period June 1998 to February 1999 amounting to $13,500.

The plaintiff without the knowledge of the Board had instructed his lawyers JS Yeh & Co to recover this sum by action in the subordinate courts. This was followed by a writ of distress in which the third defendant`s seal was affixed to the Authority to Distrain without a Board resolution. When the Board came to know of the proceedings against ABC, it withdrew JS Yeh & Co`s authority.

On 5 April 1999, JS Yeh & Co acting on behalf of the plaintiff requested the third defendant to commence action to recover the alleged rental arrears from ABC

On 14 April 1999, the third defendant on the authority of the Board wrote to the plaintiff setting out the reasons against such action:

(1) Although you had, on behalf of the company, reached an informal agreement with Mr Foo Sea Keng of ABC regarding the rental, your follow-up letter recording the verbal agreement was not acknowledged or confirmed by Mr Foo Sea Keng.

(2) As the JTC`s subletting consent had expired, ABC can always rely on this to terminate the tenancy if they`re unhappy. This would result in the company not having a tenant and suffering a loss of rental income. In this regard, we would place on record that we had verbally on various occasions asked that you proceed to obtain JTC`s consent but to-date, we understand that it has not been obtained.

(3) In today`s rental market, it may be a considerable period of time before the company can find a new tenant and even then, it would probably be at a much lower rent in accordance with the prevailing market rental now.

(4) At the time of dispute, the market rental rate was about $0. 90 to $1. 30 psf and even then, tenants were difficult to come by. Today, the market is clearly worse as shown by our failure to obtain a tenant for our floor space on the third floor, even at $0. 70 psf.

(5) Further, as you are well aware, until the company obtains JTC`s consent, it is not in the interests of the company to publicize this matter and attract possible adverse action from JTC. You have failed to initiate action to obtaining JTC`s consent since May 1998. We have recently received a warning from JTC that we did not comply with the covenant of the leasehold. The company regrets your failure in your duty, and L Kwok is taking over this matter now to deal with JTC.

(6) The present action could well cause the company to lose a valuable tenant like ABC, who is paying rent at the rate of $1. 20 psf promptly. To look for a replacement tenant would probably take several months in today`s market. This would result in a loss of rental income during this period and the new tenant would probably be paying a lower rate of rental than what ABC is currently paying.

In addition, the company would have to incur substantial legal fees to pursue the dispute with ABC. Therefore, the action is clearly not in the company`s interest.

(7) In any case, the difference in quantum between the old rate of rental (which the company is charging) and the new rate of rental (which ABC has been paying) being quite small (about $1,500 per month), the adverse consequences of the action commenced by you (as mentioned above) clearly outweighs any benefit which the company may be able to recover.

It could thus be seen that besides the dispute on the revised rent, the Board had decided against taking action against ABC for commercial reasons. The plaintiff however contended that the Board`s decision was motivated by the desire to shield Foo Sea Keng who is an alternate director of the third

defendant and a director of ABC. Foo Sea Keng did not become an alternate director of the third defendant until 23 June 1999, well after the Board made the decision against taking action against ABC. In fact, the plaintiff`s own motivation is suspect. The relationship between him and the first defendant is acrimonious. Further, Foo Sea Keng was formerly in his camp in Everbright in which he holds 589,000 shares. He has since sided with the first defendant in the disputes among the shareholders of Everbright. I therefore refused the application for leave to commence action for this claim.

The claim against New Horizon for breach of agreement of sale of a lorry YH 8667K by the third defendant to New Horizon for $40,000

New Horizon was incorporated by a group of paper merchants, including the third defendant, to tap common resources. Part of the concept was to bring on board as shareholders logistics companies so that their expertise could be tapped. It was intended that shareholders with assets in the form of heavy vehicles would subscribe for and pay for their shares in the form of such heavy vehicles. For this purpose, the third defendant transferred its lorry YH 8667K to New Horizon. But there was disagreement on the value to be attributed to vehicles to be transferred to New Horizon by the shareholders. In the end, it was agreed that the shareholders subscribe for their shares in New Horizon in cash instead. The said lorry was eventually returned by New Horizon to the third defendant. New Horizon has since become a dormant company.

On these facts, the third defendant, through its solicitors, correctly rejected the plaintiff`s notice under s 216A (3)(a) stating:

> *As there is clearly no merit to the present action against NHL and taking into account the fact that our clients are themselves shareholders of NHL itself, our clients are of the considered opinion that it could not possibly be in the interests of our clients to commence an action against NHL.*

I therefore refused the application for leave to commence action for this claim.

Claim against New Horizon for damages for breach of the Logistics Service Agreement for $130,818. 86

The third defendant had sued New Horizon and obtained judgment in DC Suit 50845/99 for $117,054. 35 plus $1,000 costs made up as follows:

Description	Amount S$
Monthly logistics fee(2[half] months x $41,200. 00 per month)	103,000. 00
Management & corporation charges	9,187. 60
Legal fees	2,394. 75
Electricity charges	2,472. 00
Total	117,054. 35

The plaintiff contended that the third defendant should have claimed a sum of $130,818. 86 instead

of $117,054. 35. The difference of $13,764. 51 is due to the alleged overstaying in Gul Circle property by New Horizon. As far as the first and second defendant are aware, there was no overstaying by New Horizon except for a few things left behind which were cleared subsequently.

There was no valid reason to grant leave to commence action for $13,764. 51 against a dormant company with the third defendant incurring further legal costs. I therefore refused the plaintiff`s application.

Claim against Winpac Paper for payment of $1,216,847. 90 for assets taken over from the third defendant

According to the plaintiff, on parties taking over the assets of the third defendant as set out in [para] 5 supra, payment was to be made by setting-off the same against moneys coming from the liquidation of Everbright. In the interim, the first and second defendant were to furnish their personal guarantees in respect of the payment for the assets taken over by Winpac Paper. This was disputed by the first and second defendant. According to them, payment was not deferred to be set-off against the liquidation proceeds of Everbright. Payment was to be made upon transfer of the goods. Winpac Paper has been making payment for such goods since the transferreducing the outstanding sum of $4,758,397. 13 to $1,061,117. 99 as at 9 November 1999. They expect to pay up fully within 12 months therefrom.

On the other hand, Focus Industries have not made any payment towards liquidation of the debt due to the third defendant. The first and second defendant also contended that the issue of security for taking over of the assets was never discussed. As Winpac Paper is financially healthy and has been making payments regularly towards liquidation of its debt with interest to the third defendant, the first and second defendant felt there was no reason to commence action against Winpac Paper. If anything, action should be taken against Focus Industries for the sum of $938,313,39 being value of the assets taken over by it as part of the liquidation process of Everbright. No such proceedings have been taken.

In the light of the payment record of Winpac Paper as opposed to that of Focus Industries, I saw little merit in the plaintiff`s application and I dismissed it.

Claim against the first and second defendants for breach of directors` duties

This claim is largely premised upon the alleged failure of the first and second defendant to prosecute the above claims thereby causing loss to the third defendant. The first and second defendant had sought legal advice on the merits of those claims. On the basis of the legal advice and in some of them, for commercial reasons, they decided against pursuing the claims. It has not been shown that their decisions were not honestly made.

If any of the above claims merit pursuing, no doubt the liquidator of Everbright will do so. For this and the other reasons given above, I dismissed the plaintiff`s application with costs fixed at $4,000.

Outcome:

Plaintiff`s application dismissed.