Lau Yu Man v Wellmix Organics (International) Pte Ltd
[2007] SGHC 96

Case Number : CWU 110/2006, SUM 4564/2006

Decision Date : 20 June 2007

Tribunal/Court : High Court

Coram : Lee Seiu Kin J

Counsel Name(s) : Philip Jeyaretnam SC, Ajinderpal Singh, Elizabeth Yeo, Zulkarnain Abdul Rahim (Rodyk & Davidson) for the plaintiff; Edwin Lee, Wong Tjen Wee (Rajah & Tann) for the parties opposing the winding up application

Parties : Lau Yu Man — Wellmix Organics (International) Pte Ltd

Companies – Winding up – Whether Company had suspended its business for one year – Whether just and equitable that Company be wound up – Sections 254(1)(c) and (i) of the Companies Act (Cap 50, 2006 Rev Ed)

20 June 2007

Lee Seiu Kin J:

1 On 23 August 2006 the plaintiff ("Lau") filed this application to wind up the defendant company ("the Company") pursuant to s 254(1)(c) and (i) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act"). The submissions were heard on 16 January, and on 2 and 5 February 2007. On 5 February 2007 I made the following orders:

(a) The application for winding up is adjourned with liberty to the plaintiff to apply for a winding up order after 5 June 2007 if the Company fails to rectify the breaches or fails to comply with the Companies Act (i.e. to file audited accounts of the Company within four months and to rectify all the Company's previous breaches and comply with the requirements of the Companies Act); and

(b) Costs of the winding up application be reserved.

2 On 27 February 2007 Lau filed an appeal against my decision and I now give my grounds of decision.

3 The Company was incorporated on 15 October 1998. Its authorised capital is $100,000 with 100 shares of $1 each issued and paid up. Lau owns 10% of the shares. According to Lau's affidavit, 65% of the shares are owned by one Lai Shit Har ("Lai") and the remaining 10% by one David Choo ("Choo").

4 Lau relies on two grounds:

(a) The Company has suspended its business for one year, under s 254(1)(c) of the Act; and

(b) It is just and equitable that the Company be wound up under s 254(1)(i) of the Act.

5 In his affidavit of 17 August 2006 filed in support of this application, Lau set out the following

background facts. The principal business of the Company is the sale of fertiliser. This is purchased from the Wellmix Group of Companies based in Hong Kong. The parent company of the Wellmix Group is Cheer Union Development Ltd ("CUDL") and Lau is the Chairman of its board of directors. Lau stated that there had been a breakdown of relationship between the Wellmix Group and the Company. The Company had not conducted any business after 31 December 2000 and no directors' or shareholders' meetings have been held. Furthermore no proper accounting and management records have been kept or maintained. Lau alleged that he was induced by one Raymond Wong ("Wong"), to invest $100,000 in the Company on the basis that Wong would procure a further investment of $500,000 from others, including himself. Lau claimed that Wong had not only failed to do this, but also to account for the $100,000 that Lau had injected into the Company. Lau explained that the majority shareholder, Lai, is the mother of Wong and that Wong is in effective control of the Company as Lai is an 85-year old lady. In 2000, the Company commenced an action in the High Court in Suit No 600041/2000 against CUDL. Lau did not set out the nature of this action but said that he reached an agreement with the Company whereby he would resign as director and transfer his shares in the Company to any person nominated by the Company and CUDL would pay the sum of $20,000 in consideration for which the Company would remove the word "Wellmix" from its name. But for reasons not disclosed by Lau, the Company filed a notice of discontinuance on 11 May 2000 but without removing either Lau as director or the word "Wellmix" from its name. As a result of this, the payment of $20,000 was never made. The last communication in respect of that action was in June 2000. Lau's affidavit then skips five years into October 2005, when his solicitors wrote to the Company's solicitors for permission to inspect the Company's records. When this was refused, Lau's solicitors applied to court for such access in Originating Summons No 2173/2005. This was granted on 4 July 2006 and Lau appointed an accountant to conduct the inspection on 2 August 2006. Lau alleged that results were shocking. There was no proper books or accounting records maintained by the Company and no annual returns have been filed with the Registry of Companies since incorporation. Further, there was no evidence that Wong had secured the $500,000 investment as he had represented.

6 Lau concluded his affidavit by stating that as no proper books or records had ever been maintained, the Company had not recorded the receipt or use of the sum of $100,000 invested by him and there is no evidence of the $500,000 investment or any other investment, it would be just and equitable for the court to order the Company to be wound up so that a liquidator could investigate into its affairs. Lau also alleged that Wong had misused the Company as a vehicle to commence various actions against him, in particular Suit No 642/2001. Lau stated that the Official Receiver would be able to continue this suit if he considered it in the best interest of the Company to do so. Lau said that there was no board resolution to authorise the commencement of that action and that the court had stayed that action until 28 September 2006 to permit the ratification to be obtained.

7 The reply affidavit of Lai filed on 25 September 2006 cast light on the gaps in Lau's narrative. She explained that the Company was formed for the purpose of obtaining from the Wellmix Group the sole agency for distribution of its fertiliser in Asean and the Indian sub-continent. However Lau breached this agreement and the Company commenced Suit No 642/2001 on 26 May 2001. This action had been ongoing for more than 5 years due to a large number of interlocutory applications and appeals from those decisions, including one that went to the Court of Appeal. On 1 March 2004 the court scheduled a one-week trial to commence from 30 August 2004, but this was vacated and rescheduled to 4 July 2005 for two weeks. However further interlocutory applications caused that trial date to be vacated and it was not until 15 June 2006 that the court set the date for trial on 21 August 2006. However on 31 July 2006 Lau filed Summons No 3450/2006 for security for costs, further discovery and proof of authority to commence the suit. This was heard by the Assistant Registrar on 10 August 2006 and she ordered that the action be stayed pending production by the Company of ratification of the action. The Company appealed against this order on 23 August 2006 and on 26 August 2006 Lau commenced this action to wind up the Company.

8 Lai alleged that for more than five years in the course of Suit No 642/2001, Lau had never raised the issue of winding up the Company and had done so just as the trial was due to begin. Lai said that Lau's purpose in this winding up application was to prevent the trial. Lai said that the Company had a reasonably good prospect of success in its claim against Lau and gave an outline of the Company's case. It is essentially a claim for breach of fiduciary duty by Lau as director. Lai also alleged that the present state of the Company was caused by Lau as he had been unwilling to attend meetings or resolve issues. Lai alleged that it was Lau's breach of fiduciary duty that caused the Company to be in financial straits. Lai claimed that all reasonable efforts had been made to ensure proper management of the Company. In addition, as Lau only controlled 10% whereas Lai and Choo controlled the other 90%, a large majority of shareholders intended to continue the business. Lai outlined potential business projects that had been lined up.

9 I should state that the controlling mind of the Company appears to be Wong, the son of the majority shareholder Lai. Wong also filed an affidavit on 28 September 2006 while Lau filed a reply affidavit on 2 October 2006. Both these affidavits add to the picture painted in the first two affidavits and I have taken them into account.

10 After hearing the submissions of counsel, I was satisfied that the main object, and therefore the substratum of the Company, was to distribute fertiliser from the Wellmix Group. It is clear from the affidavits that a dispute arose between Lau and Wong as to whether the distributorship agreement covered Malaysia and this had caused a breakdown of their relationship. This has resulted in the first suit (Suit No 600041/2000) being brought by the Company against CUDL for supply of defective goods and breach of contract by attempting to award the Malaysian distributorship to another company, which the parties refer to as MATTRA. There was a proposed compromise in that action, with CUDL paying $20,000 to the Company, and Lau withdrawing as director and transferring his shares. But the Company did not go through with this proposed compromise, although for some reason it discontinued that action. Suit No 642/2001 was filed on 26 May 2001. This was a claim against Lau himself, for breach of duties as director, in particular by getting MATTRA to deal directly with the Wellmix Group instead of through the Company. The Company claims substantial damages in its claim against Lau in that action. However it is hampered by a lack of resources as Lau was the main financier and, combined with the long interlocutory battles that have dragged the case over five years, the Company has reached breaking point in terms of its ability to continue the suit.

11 The other side of the coin is that the Company had transacted no business after December 2000. Clearly it has suspended business since 2001. The Company was being kept alive to sustain the action against Lau. Although Lai and Wong claim that the Company was active in that it received mail etc, it is clear that there is no intention to conduct business. Its only asset is the claim against Lau. Under these circumstances, the condition for ordering winding up under s 254(1)(c) has been met, i.e. the Company has suspended business for a whole year – in fact it has been more than five years as at the date of filing of this Originating Summons. However s 254(1) provides that the court "may" order winding up; the court has the discretion not to do so where appropriate. The issue before me is how I should exercise this discretion. The Company is in disarray. It is not operated as a company. But ordering its winding up will suppress a claim by an impecunious plaintiff (the Company in Suit No 642/2001). The parties have not submitted to me on the strength of the Company's claim against Lau. I therefore made my decision on the basis that there is a claim and there is a defence. In order to assuage my concerns as to whether winding up would suppress a meritorious claim, counsel for Lau gave the undertaking on behalf of Lau that he would seek from the Liquidator only costs going forward if the Liquidator decides to proceed with Suit No 642/2001. On the other hand, I was mindful that with a winding up an extra layer of costs would be added to the process: that of the Liquidator. This would in effect diminish the chance of the Company pursuing its claim against Lau, even if it is a good one.

12 This is a difficult case. On the one hand there is the interest of Lau as contributor. On the other hand there is the interest of Lai, as main shareholder of a company whose only asset is the claim. Counsel for the Company suggested that I could set a deadline for the Company to make good all defaults in compliance with the Companies Act and Regulations. This would substantially take care of Lau's interest in the winding up. Taking into account all the circumstances of the case, I was of the view that the appropriate order to make at this stage was what counsel for the Company had suggested, i.e. imposing a condition on the Company to file audited accounts within four months, to rectify all previous breaches and comply with the requirements of the Act. I accordingly ordered the application to be adjourned with liberty to Lau to apply for a winding up order after 5 June 2007, if the Company failed to rectify those breaches or failed to comply with the Act by that date, with costs reserved.

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