Kwee Lee Fung Ivon *v* Gordon Lim Clinic Pte Ltd and another [2013] SGHC 65

Case Number : Originating Summons No 654 of 2012

Decision Date : 20 March 2013

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : Christopher de Souza, Lionel Leo and Joel Chng (WongPartnership LLP) for the plaintiff; Alvin Tan (Wong Thomas & Leong) for the first defendant; and Loh Wai Mooi and Lee En En Joanna (Bih Li & Lee) for the second defendant.

Parties : Kwee Lee Fung Ivon — Gordon Lim Clinic Pte Ltd and another

Companies – Directors – Duties

20 March 2013

Tan Lee Meng J:

1 The plaintiff, Dr Ivon Kwee Lee Fung ("Dr Kwee"), a doctor, and her former husband, Dr Gordon Lim Boon Hui ("Dr Lim"), a gynaecologist and obstetrician, are the only shareholders of Gordon Lim Clinic Pte Ltd ("the company"). Dr Kwee accused Dr Lim of breaching his fiduciary duties to the company by, *inter alia*, operating a rival clinic in the company's premises without disclosing this to the company's board of directors. She applied pursuant to s 216A of the Companies Act (Cap 50, 2006 Rev Ed) ("s 216A") for leave to commence an action on behalf of the company against Dr Lim with respect to his alleged breach of fiduciary duties. I granted the leave sought and now give the reasons for my decision.

Background

2 Dr Kwee and Dr Lim were married on 3 June 1985. They have five children. Three of their children are graduates while the remaining two are undergraduates.

3 In 1988, the company was incorporated. It issued two shares, one each to Dr Lim and Dr Kwee. Both of them and Dr Lim's mother, Mdm Irene Goh ("Mdm Goh"), are the company's directors.

4 The company ran a medical practice called "Gordon Lim Clinic for Women" ("the clinic") at its registered address at No 6 Napier Road #10-07 Gleneagles Medical Centre, Singapore 258499 ("the Gleneagles property"). At all material times, Dr Lim, but not Dr Kwee, practised at the clinic. The annual income of the clinic exceeded a million dollars in 2008 and 2009.

5 On 21 January 2010, Dr Kwee commenced divorce proceedings against Dr Lim. A few months later, Dr Lim incorporated another company, named "Gordon Lim Clinic and Surgery for Women Pte Ltd" ("the rival company") in July 2010. He is the sole shareholder of the rival company, which, like the company, uses the Gleneagles property as its registered address. Dr Lim ceased to work under the company's banner in order to helm the rival company's medical practice. From 1 October 2010 onwards, the rival company took over the company's Gleneagles property as its place of business and paid the company an allegedly low monthly rental of $8,000 for the use of the said premises.

6 Dr Kwee alleged that Dr Lim had breached his fiduciary duties to the company as he did not disclose his conflict of interest in relation to the rival company to the company's board of directors. She asserted that without the knowledge of the company's board, Dr Lim converted the company's business from that of running a successful clinic to that of a landlord collecting a below market monthly rental. She sought the following orders:

(a) that she be granted leave to bring an action in the name and on behalf of the company against Dr Lim for breach of directors' duties owed to the company;

(b) that she be authorised to control the conduct of the action and any execution proceedings thereafter;

(c) that she be granted access to the company's books, records and documentation to ascertain the full nature and consequences of the breach of directors' duties and fiduciary duties by Dr Lim, whether committed solely or in conjunction with any other person(s), for the purpose of prosecuting the company's claim in the action; and

(d) that the company pay her costs of these proceedings to be funded out of the company's funds on an indemnity basis.

Whether leave should be granted

7 Section 216A(3) of the Companies Act, which deals with applications for leave to bring an action in the name and on behalf of a company, provides as follows:

(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.

8 Although Dr Kwee holds 50% of the company's shares, she is entitled to rely on s 216A because she is in no position to get the company to sue Dr Lim for breach of fiduciary duties as the latter also holds 50% of the company's shares and the company's two other directors, Dr Lim and his mother, Mdm Ng, are directors of the rival company.

9 Dr Lim resisted Dr Kwee's action on the following grounds:

(a) there was a lack of good faith on Dr Kwee's part;

(b) it was *prima facie* not in the interests of the company that the action be brought against him; and

(c) there was an appropriate alternative remedy.

Whether the complainant acted in good faith

10 It is for Dr Kwee to establish that she acted in good faith in making the present application. It is worth noting that the rule that it is for the applicant for leave to establish the presence of good faith was recently confirmed by the Court of Appeal in *Ang Thiam Swee v Low Hian Chor* [2013] SGCA 11 after my decision to allow Dr Kwee's application.

11 Admittedly, the relationship between Dr Kwee and Dr Lim is a hostile one. However, it is clear from the decision of the Court of Appeal in *Pang Yong Hock and another v PKS Contracts Services Pte Ltd* [2004] 3 SLR(R) 1 ("*Pang Yong Hock*") that the presence of hostility does not, without more, mean that there is bad faith on the part of the party applying for leave to commence a derivative action. As for when the presence of hostility may justify a finding of bad faith, the Court of Appeal explained in *Pang Yong Hock* (at [20]) as follows:

> [I]f the opposing parties are able to show that the applicant is so motivated by vendetta, perceived or real, that his judgment will be clouded by purely personal considerations, that may be sufficient for the court to find a lack of good faith on his part. An applicant's good faith would also be in doubt if he appears set on damaging or destroying the company out of sheer spite or worse, for the benefit of a competitor. It will also raise the question whether the intended action is going to be in the interests of the company at all. To this extent, there is an interplay of the requirements in s 216A(3)(b) and (c).

12 Dr Kwee contended that the present proceedings had nothing to do with the animosity between her and Dr Lim and were motivated by her own financial interest and that of the company. She asserted that Dr Lim must answer to the company for wrongfully transforming it from a profitable medical practice into a rent collecting company as a result of his alleged breach of fiduciary duties. In 2009, the company's revenue was $1,257,271 while its revenue for the first 9 months of 2010 was $1,102,019. After Dr Lim set up the rival clinic in the company's premises in October 2010, the company's revenue in the last quarter of 2010 fell to only $24,000. In her view, based on the company's revenue in 2009 and in the first 9 months of 2010, the company had suffered a huge loss as a result of Dr Lim's alleged breach of his fiduciary duties. If Dr Kwee, who owns half the shares in the company, succeeds in proving a breach by Dr Lim of his fiduciary duties, the company's financial position will be substantially improved and the worth of her share of the company will be increased. The fact that Dr Kwee's self-interest in the recovery of the company's losses resulting from Dr Lim's alleged wrongdoing coincided with the company's own interest in recovering lost profits does not, without more, mean that her application for leave was made in bad faith.

13 Dr Lim claimed that Dr Kwee acted in bad faith because she had commenced the present proceedings for the sole purpose of pressurising him into giving in to her demands. However, this assertion was not substantiated.

14 In opposing Dr Kwee's application, Dr Lim relied on an English case, *Barrett v Duckett* [1995] 1 BCLC 243 ("*Barrett*"). In that case, B and her former son-in-law, D, were equal shareholders of Nightingale Travel Ltd ("Travel"). D, Travel's sole director, was also one of two shareholders of Nightingale Coaches Ltd ("Coaches"). B commenced proceedings on behalf of Travel and alleged that D and his new wife diverted Travel's business to Coaches and misappropriated Travel's money. Admittedly, the English Court of Appeal struck out the action but it should not be overlooked that there was ample evidence that B was not concerned with Travel's interests and that she was motivated by her vendetta against D. By the time B commenced her action, D had, on the advice of insolvency experts from a reputable firm, presented a petition to wind up Travel. B's only prospect of receiving any benefit from her shares in Travel lay in the winding up of Travel. Despite this, she opposed the winding up and declared through her accountant and proxy that she had written off her

interest in Travel. Furthermore, B had exhausted her funds in the litigation against D, who had to rely on legal aid funding to defend himself in the action. As it was quite evident that B was not really concerned with Travel's interests, it was not surprising that Peter Gibson LJ said that there had been "a notable lack of realism on [B's] part". He stated (at 245) as follows:

> On its face it is an action brought by a shareholder to right grievous wrongs done to the company of which she is a shareholder. But unfortunately the circumstances in which the action is brought and pursued include a bitter matrimonial dispute between the plaintiff's daughter and the primary defendant. That bitterness appears to have infected decisions taken in relation to these proceedings, *added to which there has been a notable lack of realism on the part of the plaintiff and her advisers*. The litigation, even though it has not progressed beyond certain interlocutory steps, appears to have exhausted the finances of the plaintiff and, while *the amounts claimed for the company are large, to an objective observer the likelihood of significant recoveries seems very small indeed*. The two individual defendants who have been served with the proceedings are on legal aid. *The result so far is that this litigation has been ruinous to the plaintiff and has caused heavy costs to be incurred by the public purse.* [emphasis added]

15 *Barrett* is distinguishable from the present case. In *Barrett*, the plaintiff, B, preferred to sue D rather than realise her benefit in Travel's shares through a winding up of that company. The litigation was ruinous to both the plaintiff and the defendant, who were fighting over a probably insolvent company. Furthermore, there was no real prospect of the defendant being able to pay damages to Travel.

16 In contrast, in the present case, Dr Kwee took the path that would, in her view, obtain for her the best price for her shares in the company. If Dr Lim has to pay damages to the company for breaching his fiduciary duties, the company's coffers will be filled and the value of its shares will be increased. Significantly, unlike the defendant in *Barrett*, Dr Lim is in a position to pay damages if he is ordered to do so. In my view, *Barrett* did not stand in the way of Dr Kwee's application.

Whether the action is duplicitous

17 Dr Lim also asserted that Dr Kwee's application for leave was made in bad faith as it is duplicitous in view of the forthcoming division of matrimonial assets. This assertion is misconceived. The judge who is dealing with the division of those assets is in no position to rule while splitting the parties' matrimonial assets that there has been a breach of fiduciary duties. Evidently, the value of each spouse's assets is a factor to be taken into account in the division of matrimonial property and if Dr Kwee is denied leave to commence a derivative action, Dr Lim will be able to contend that the profits from the rival company are part of the assets in his name. This will give the court a misleading picture of the matrimonial assets in the hands of the respective parties at the time the division is made. Dr Kwee explained (in para 62 of the Plaintiff's Submissions) as follows:

> *[I]f the derivative actions are not commenced, ... the value of the Company, which the Plaintiff has contributed substantially to and in which she is both a director and 50% shareholder, would have a diminished value by virtue of the transfer of its business to [the rival company] by Gordon Lim.* In contrast, the value of [the rival company], in which the Plaintiff has not contributed to and in which Gordon Lim is the sole shareholder, would be enhanced. This could lead the court to give Gordon Lim a greater share in the matrimonial assets than he would otherwise have been given. This would be plainly unjust. [emphasis added]

18 Far from being duplicitous, the proposed derivative action should be commenced as soon as possible so that the question of whether Dr Lim had breached his fiduciary duties to the company can

be determined. Only then can the true worth of Dr Kwee's stake in the company be ascertained for the purpose of division of matrimonial assets.

Conclusion on whether there was bad faith

19 For the reasons stated, I found that Dr Kwee did not act in bad faith when she commenced the present proceedings.

Whether the action is prima facie in the interests of the company

20 As mentioned, apart from the question of bad faith, another relevant factor for determining whether leave should be granted for a s 216A derivative action is whether the action is *prima facie* in the interests of the company. For this purpose, the court may examine whether a company has a legitimate and arguable claim against the allegedly errant director and whether it would be in the practical and commercial interests of a company for the action to be brought.

Whether the company has a legitimate and arguable case against Dr Lim

21 For the purpose of determining whether the company has a legitimate and arguable case against Dr Lim, it may be noted that in *Teo Gek Luang v Ng Ai Tiong and another* [1998] 2 SLR(R) 426, Lai Kew Chai J pointed out (at [15]) that at the leave stage, the court "is not called upon to adjudicate on the disputes of facts and inferences" and that those matters should be decided at the trial. As such, the threshold for Dr Kwee to succeed in her application for leave to commence proceedings against Dr Lim is not high.

22 Admittedly, a doctor is, without more, entitled to set up his own clinic or join other doctors in another clinic. However, a doctor who is practising in a clinic owned by a company of which he is a director must tread carefully as he must fulfil his fiduciary duties to that company even when he is in the course of setting up or joining another clinic.

23 Dr Kwee contended that the evidence adduced by her showed that there is merit in her application as Dr Lim had breached his fiduciary duties to the company by failing to act in the company's interest, by placing himself in a position where his duty to the company conflicted with his personal interests and by failing to disclose the potential conflict of interest. Whether Dr Lim had, as Dr Kwee maintained, acted improperly is a matter for the court hearing the company's action against him to decide.

24 In *Tam Tak Chuen v Eden Aesthetics Pte Ltd and another* [2010] 2 SLR 667, the plaintiff, Dr T, and Dr K were partners in a medical clinic from 1998. That clinic's profits were booked into two holding companies ("the holding companies"), of which they were equal shareholders and directors. Dr T discovered that in April 2007, Dr K transferred the business of that clinic from the holding companies to another company set up by the latter. This resulted in the other company receiving $1,109,129 and $1,492,864 in revenue in 2007 and 2008 respectively. As a result, the holding companies' revenue, which had been $1,796,104 in 2005 and $1,415,908 in 2006, plummeted to $71,695 in 2007. Dr T applied for leave to commence derivative proceedings on behalf of the holding companies against Dr K and the latter's company. His application was allowed by Judith Prakash J.

25 In the present case, Dr Lim admitted that he had set up a rival clinic that began its operations at, of all places, the Gleneagles property, which was occupied by the company's clinic. It will be recalled that Dr Kwee alleged that Dr Lim caused the company's medical practice to cease and turned the company into a landlord collecting allegedly non-market rental from the rival clinic for occupying

the Gleneagles property, without disclosing any of these steps taken by him to the company's board. These allegations concerning Dr Lim's breach of fiduciary duties and his systematic diversion of business to the rival clinic that he set up surreptitiously in the company's Gleneagles property certainly merit a hearing. I thus found that the proposed suit by the company is legitimate and arguable.

The practical and commercial interests of the company

26 It cannot be said that it would not be in the practical or commercial interests of the company to recover profits lost if Dr Lim, who is clearly in a position to pay damages to the company, has indeed breached his fiduciary duties. I thus found that it was in the company's practical and commercial interests to commence the action against Dr Lim.

Whether there is an appropriate alternative remedy

27 As for whether there are alternative remedies to a derivative action, Dr Lim asserted that the parties should leave it to the court hearing the outstanding ancillary matters to determine the issues pertaining to the company and the rival company. This issue has already been discussed earlier on. In view of this, the matter need not be further discussed.

Conclusion

28 For the reasons stated, I found that Dr Kwee met the threshold required for the granting of leave to commence an action against Dr Lim on behalf of the company.

29 Apart from allowing her application for leave, I ordered that Dr Kwee is to have conduct of the proceedings. Dr Lim cannot have conduct of proceedings against himself and the only other director of the company is Dr Lim's mother, Mdm Goh. Furthermore, both Dr Lim and Mdm Goh are directors of the rival company. I also ordered that the costs of this application and the company's action against Dr Lim for breach of fiduciary duties be borne by the company on an indemnity basis.

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