TONG CHOR SAY & ORS v. BATANG MALAKA RUBBER ESTATE SDN BHD & ORS
[2009] 5 CLJ 672
HIGH COURT MALAYA, KUALA LUMPUR
AZAHAR MOHAMED J
[ORIGINATING PETITION NO: D9 (D3)-26-47-2003]
6 MAY 2009

JUDGMENT

Azahar Mohamed J:

[1] Cases have arisen from time to time where minority shareholders have found it hard to refuse to go along with oppression by the majority. The present action is one of such cases. This is a petition (encl. 1) pursuant to s. 181 of the Companies Act 1965 (the Act) presented on 17 September 2003 by Mr. Tong Chor Say and 19 others (petitioners). They are the minority shareholders in the 1st respondent (the company). They claimed that the affairs of the company had been conducted oppressively in a manner which was unfairly prejudicial to their interest.

[2] Therefore, in this petition, the petitioners sought for the following prayers:-

(a) an order that the shares of the petitioners in the company be purchased by the 2nd to 8th respondents at the fair value price taking into consideration of the oppressive acts of the 2nd to 8th respondents; and

(b) an order that such purchase shall be completed within two months from the date of the order; or

(c) alternatively, an order that the company be wound up by this Honourable Court; and

(d) an order that a liquidator be appointed to manage the affairs of the company;

(e) such further and other order as this Honourable Court deems fit; and

(f) That the costs of and occasioned by this petition.

Section 181 Of The Act

[3] To begin with, it is important to consider the law on oppression as covered by s. 181 of the Act. This section provides that where the affairs of a company are being conducted in a manner oppressive to some members, the court may, with the view to bringing to an end the matters complained of, make such order as it thinks fit to remedy the situation. One of the order the court can make is to direct one side should buy the shares of the other. To sustain a successful application under s. 181 it is necessary for the petitioner to prove that the conduct must relate to the petitioner in his capacity as a member of the company and it must relate to the conduct of the affairs of the company. Section 181 is in the following terms:-

181. Remedy in cases of an oppression

(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 those grounds is established the Court may, with the 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;

(b) Regulate the conduct of the affairs of the company in future;

(c) 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;

(d) In the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or

(e) Provide that the company be wound up.

(3) Where an order that the company be wound up is made pursuant to paragraph (2) (e) the provisions of this Act relating to winding up of a company shall, with such adaptations as are necessary, apply as if the order had been made upon a petition duly presented to the Court by the company.

(4) Where an order under this section makes any alteration in or addition to any company's memorandum or articles, then, notwithstanding anything in any other provision of this Act, but subject to the order, the company concerned shall not have power without the leave of the Court to make any further alteration in or addition to the memorandum or articles inconsistent with the order; but subject to the foregoing provisions of this subsection the alterations or additions made by the order shall be of the same effect as if duly made by resolution of the company.

(5) An office copy of any order made under this section shall be lodged by the applicant with the Registrar within fourteen days after the making of the order.

Penalty: One thousand ringgit. Default penalty.

[4] The authoritative statement of law on this subject matter is to be found in the Privy Council's decision in Re Kong Thai Sawmill (Miri) Sdn Bhd [1978] 1 LNS 170; [1978] 2 MLJ 227 where the following most important principles are set out:-

For the case to be brought within section 181(1) (a) at all, the complaint must identify and prove "oppression" or "disregard". The mere fact that one or more, of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions, with which the complainant does not agree, is not enough. Those who take interests in companies limited by shares have to accept majority rule. It is only when majority rule passes over into rule oppressive of the minority, or in disregard of their interests, that the section can be invoked, As was said in a decision upon the United Kingdom section there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made (Elder v. Elder & Watson Ltd.): their Lordships would place the emphasis on "visible". And similarly "disregard" involves something more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure (per Lord Clyde in Thompson v. Drysdale). Neither "oppression" nor "disregard" need be shown by a use of the majority's voting power to vote down the minority: either may be demonstrated by a course of conduct which in some identifiable respect, or at an identifiable point in time, can be held to have crossed the line.

Thirdly, in a number of United Kingdom decisions it has been held that for section 210 to apply the complainant must show oppression continuing up to the date of proceedings (eg, In Re Jermyn Street Turkish Baths Ltd); where there has been oppression in the past the section does not bite. Their Lordships agree that the wording of the section (and the same is true of section 181(1)(a)) relates to a present state of affairs: "are being conducted", powers "are being exercised" are grammatically clear: the language may be contrasted with that of section 181(1)(b) which refers to an act of the company which has been done or threatened. But this argument must not be taken too far. What is attacked by sub-section (l) (a)) is not particular acts but the manner in which the affairs of the company are being conducted or the powers of the directors exercised. And these may be held to be "oppressive" or "in disregard" even though a particular objectionable act may have been remedied. A last minute correction by the majority may well leave open a finding that as shown by its conduct over a period, a firm tendency or propensity still exists at the time of the proceedings to oppress the minority or to disregard its interests so calling for a remedy under the section. This point is well brought out in Re Bright Pine Mills Pty. Ltd.

[5] In the case of Re Jermyn Street Turkish Baths Ltd [1971] 3 All ER 184, the Court of Appeal observed that the affairs of a company only be said to have been being conducted in a manner oppressive to some part of the members of the company where shareholders, having a dominant power in the company, either exercised that power to procure that something was or was not done in the conduct of the company's affairs or procured by an express or implied threat of an exercise of that power that something was not done in the conduct of the company's affairs. The Court of Appeal added that to amount to oppression such conduct must be unfair of 'burdensome, harsh and wrongful'

to the other members of the company or some of them and lack that degree of probity which they were entitled to expect in the conduct of the company's affairs. Thus, oppression must import that the oppressed were being constrained to submit to something which was unfair to them as the result of some overbearing act or attitude on the part of the oppressor.

[6] In this regard the case of Ngiu-Kee Corporation (M) Bhd & Anor v. Pan-Pacific Construction Holdings Sdn Bhd [2008] 3 CLJ 335 is instructive. There, our Court of Appeal said that there are four broad classes of conduct that would justify judicial remedy under s. 181 of the Act, namely: (a) oppressive conduct; (b) conduct in disregard of interests; (c) unfairly discriminatory conduct; or (d) prejudicial conduct. The question whether there is oppression, disregard of interest, unfair discrimination, or whether the act complained of is prejudicial is one that must be determined according to the facts of each particular case. In addition, our Court of Appeal observed that in Malaysia the authorities show that it is the minority shareholders who should sell their shares to the majority shareholders when they have shown that they have been oppressed or the majority shareholders have disregarded the minority shareholders. Finally, the Court of Appeal held that for the petitioner to succeed in his application for the said reliefs, he must show that it was the affairs of the company which were being conducted in an oppressive manner, and that the respondent company had oppressed the minority shareholders which in this case is the petitioner.

The Background Facts

[7] The company was incorporated on 1 April 1959 as a private limited company. The principal businesses of the company are cultivation of oil palm and investment holding. The registered address of the company is at Suite 6-01, Level 6, Wisma Technip, No. 241, Jalan Tun Razak 50400 Kuala Lumpur.

[8] It has an authorized share capital of 1,000,000 divided into 1,000 ordinary shares of RM1000 each. The company has a paid-up capital of RM420,000. The petitioners are the minority shareholders. The company has 26 shareholders; the total percentage of shares held by the petitioners are 44.3% and the total percentage shares held by the 2nd to 7th respondents are 55.7%. None of the petitioners is on the Board of Directors of Batang Malaka.

[9] The 2nd respondent is a shareholder, director and chairman of the company. The 3rd, 4th, and 5th respondents are also the shareholders and directors of the company. The 6th and 7th respondents are private limited companies and are also shareholders of the company. The 8th respondent is an alternate director of the company.

[10] In relation to the above, it is important to take note of the fact that the 2nd to 5th and 8th respondents are from the same family, that is to say the Soon Family. It is also pertinent to make a note that the 6th and 7th are companies, which are controlled by the Soon Family.

The Petitioners' Case

[11] Non-subscription of the right issues in Ace Agricultural Sdn Bhd (ACE).

[12] The company is a shareholder of a company known as ACE incorporated on 7 June1968 as a private limited company. The shareholdings of ACE before 2 July 2001 are as follows. The Soon Family holds 62%; the company holds 20%; and other shareholders hold 18%.

[13] The board of directors of ACE consists of the 2nd respondent, the 3rd respondent, the 4th respondent, Pauline Soon Siew Hwa and Sulaiman bin Ninam.

[14] There were two rights issue exercise carried out by ACE on 2 July 2001 and 28 May 2002. Both rights issue were subscribed, inter alia, by the 2nd, 3rd, 4th, 5th, 6th and 8th respondents herein, which as I have stated earlier is controlled by the Soon Family. It is owned by the Soon Family and its board of directors consists of the 2nd respondent, the 3rd respondent, the 4th respondent, the 8th respondent, Soon Boon Seng, and Soon Lay Teong. On the other hand, the board of directors of the company decided not to take up the rights issue offered by ACE.

[15] It is not disputed that as a result of the non-subscription of the rights issue by the company in ACE, the equity interest of the 1st respondent in ACE has been reduced from the initial 20% to 13% thereafter 10.67% respectively.

[16] Next, during the 45th Annual General Meeting of the 1st respondent on 30 June 2003 (the AGM), the proxy of the 15th petitioner, Mr. Tan Tin Leong questioned the board of directors of the reasons for not:-

(i) Taking up the two rights issue offered by ACE; and

(ii) Having a shareholders meeting to discuss the matter of rights issue offered by ACE.

[17] The board of directors did not answer to the above questions at the AGM but merely stated that they would seek legal opinion on the matter.

[18] Then after that on 21 July 2003, the 1st respondent called for an extraordinary general meeting to be held on 5 August 2003 (the EGM), to ratify and approve the following:-

(a) That the directors of the 1st respondent has acted bona fide in the best interest of the company for non-subscription of the rights issue on 2 July 2001 offered by ACE ("Resolution No. 1");

(b) That the directors of the 1st respondent has acted bona fide in the best interest of the company for non-subscription of the rights issue on 28 May 2002 offered by ACE ("Resolution No. 2"); and

(c) That authority is given to 2 directors to acquire 2,187,850 ordinary shares in ACE from the 6th respondent at a cost not in access of RM2,187,850 ("Resolution No. 3").

[19] Subsequently, the 3rd respondent, as the managing director of the company, had on 30 July 2003 sent a letter to all the shareholders explaining the reasons for non-subscription of the rights issue. According to him the reasons are as follows:-

(a) in order to take up the rights issue in ACE, the company would have to pay RM1,250,200 immediately from its limited cash reserves;

(b) ACE created the rights issue for long term purposes of purchasing an estate and replanting the trees (for the next five years);

(c) such long term plans would in all likelihood take years to provide meaningful returns in income and this would in turn affect the company's ability to pass on the returns to the shareholders;

(d) A long term investment such as this is not in the interest of the company and its shareholders since it has its plans to expand and improve its estates;

(e) If the company acquires more shares in the authorized rights issue, it would seriously hamper the company plans to expand or meet future contingencies. The board of directors thought it was in the best interest of the company to accumulate its reserves for its own expansion and replanting expenditure;

(f) There is no market value for the shares in ACE as it is not tradable in the stock market and the Articles of Association of ACE restrict transfers; and

(g) The board of directors was mindful of the minority shareholders expressed preference to plough profits back and invest in the company as opposed to further investing in ACE.

[20] Before the EGM, the petitioners had vide their letter dated 5 August 2003 rejected the reasons given by the board of directors of the company. The gist of their grievances is as follows:

(a) The company had more than RM5.6 million cash reserve at the material time;

(b) The board of directors of the 6th respondent which was almost identical to the board of directors of the company, had decided to take up the two rights issue evidencing that it was commercially viable to do so, whilst the same person sitting at the board of directors of the company had a whole different opinion; and

(c) The company's net tangible assets had been greatly reduced by reason of the non-subscription of the rights issue.

[21] Hence according to the petitioners, Resolutions No. 1 and No. 2 were to be rejected; and Resolution No. 3 should be duly carried out by the board of directors for the benefits of the company.

[22] During the EGM on 5 August 2003, despite the strong opposition of the petitioners in respect of Resolutions No. 1 and No. 2, the 2nd respondent insisted that all the shareholders of the company should vote to ascertain the position of the shareholders. The petitioners knowing full well that they are only the minority shareholders refused to vote. The EGM was forced through. Resolutions No. 1 and No. 2 were passed and Resolution No. 3 was declined.

[23] According to the petitioners, it is clear and obvious that the conduct of the respondents were oppressive as the reason given by the respondents for not subscribing the rights issue were clearly unsustainable and unsubstantiated as on one hand the respondents claimed that the shares in ACE had no commercial value and was a long term investment but on the other hand the same people sitting on the board of the 6th respondent were of the view that it was commercially viable to subscribe the rights issue. It is the case of the petitioner that it is apparent that the respondents did not take into consideration the interest of the company and its minority shareholders and did so to willfully dilute the company's shareholding in ACE. The petitioners maintain that the respondents have further oppressed the petitioners by calling the EGM and forcing it through knowing full well that the petitioners' votes were unable to contest the passing of Resolutions No. 1 and 2 and declining Resolutions No. 3. By reasons of the aforesaid, the petitioners assert that their interests have been unfairly and unjustly prejudiced.

The Respondents' Case

[24] The respondents' decisions to renounce both the rights issue offered by ACE were made bona fide in the interests of the company. According to the respondents, the company's decision to renounce the rights issue of ACE was fully disclosed in Note 4 to the Financial Statements set out in the Audited Account ended 31 December 2002 which was received by the shareholders in the 45th AGM held on 30 June 2003 and approved with no votes against by any shareholders. The 6th respondent's decision to take up the rights issue of ACE was made based on the 6th respondent's own corporate objectives which did not involve any immediate plans for expansion and/or replanting. Moreover, the respondents said that the 2nd, 3rd, 4th, 5th and 8th respondents had put much effort into ensuring that the company's plantation produced good results and were constantly seeking ways to improve the company's plantation operation by seeking various experts' opinion on the company's plantation. The 2nd, 3rd, 4th, 5th and 8th respondents had also made efforts to locate suitable lands for the company's expansion and replanting in accordance with the company's plan for expansion. According to the respondents that based on the above, the petitioners' allegations that the respondents did not take into consideration the interests of the company and its minority shareholders and willfully diluted the company's shareholding in ACE are baseless.

[25] By the reasons of the aforesaid, it is submitted by learned counsel for the respondents that the board of directors of the company and the respondents did not in anyway whatsoever had willfully oppressed the interest of the petitioners as miniority shareholders. On the contrary, he argued that the decisions made by the board of directors were made in the best interest of the company and such decision was made honestly and also bona fide.

Findings Of The Court

[26] Having regard to the circumstances of this case and on the totality of the facts presented, the question that I have to decide is this: Is there any justification for this court to find that the company's affairs had been conducted in a manner oppressive to the petitioners as members of the company in a manner which was unfairly prejudicial to the petitioners' interest? I answer this in the affirmative for the following reasons.

[27] First and foremost, s. 181 of the Act warrants this court in looking and considering at the business realities of the state of affairs and circumstances of the company and not confine to a narrow and restricted legalistic scrutiny. The word 'oppressive' must be given its ordinary meaning. It means draconian, iron fisted, high-handed, domineering, harsh and unjust.

[28] Now, it is true that the petitioners' only complaint in this action relates to the non-subscription of the two rights issue offered by ACE to the company. Admittedly, prior to this the petitioners had no complaints concerning the performance and the management of the company. On that note, the important point to note here is that the petitioners are complaining about the high-handed, domineering and unjust conduct of the respondents in disregarding the petitioners' interests as members of the company when they took up the rights issue offered by ACE themselves for their own personal interests.

[29] In this context the authority that I would like to refer is Re Bright Pine Mills Pty Ltd [1969] VR 1002 where the Supreme Court of Victoria held that where the directors ignored business opportunities that the company could have taken up so that another business in which they were interested could take advantage of them is oppressive.

[30] The facts which cannot be disputed in the case at hand are that there were 2 rights issue exercise carried out by ACE for the purpose of obtaining funds to acquire more palm oil estates. The right issues were offered to its shareholders with RM1 a share. The company, being one of the shareholders of ACE was also offered with the 2 rights issue. The board of directors of the company then decided for the company not to subscribe for the rights issue although at the material time there were surplus money of RM5.6 million in the accounts of the company which could be utilized to subscribe for the rights issue which costs about RM2 million. In the respondents' affidavit in reply affirmed by the 2nd respondent on 11 March 2004 (encl. 6) at para. 35, the 2nd respondent in essence averred that the decisions to renounce both the rights issues of ACE were made bona fide in the interests of the company. Significantly, in making this statement the 2nd respondent does not provide details. For one thing, he conveniently does not substantiate his assertion by, for example, exhibiting the relevant board of directors' minutes on the decision to renounce the right issues of ACE. On this critical matter, the 2nd respondent's affidavit is bereft of cogent and convincing explanation. At this point I should mention that there is also no credible documentary evidence to substantiate the contention of the respondents that the board of directors decided not to utilize the company's funds to take up the rights issue because of the plan to expand the company's existing oil palm plantation. It is also important to point out that the purchase by the company of Batu Tinggi Estate only came much later in the year 2005.

[31] The petitioners are minority shareholders and do not have control of the company and have no representation in the board of directors. The management and control of the company effectively vest in the board of directors who mainly consisted of the respondents. One important fact that requires to be kept in mind is that the respondents are from the Soon family which controls both ACE and the company. They themselves went behind the company's back and subscribed for the rights issue of ACE in which they have personal interest in it. In my view, the act of the board of directors of the company (mainly consisting of the 2nd-5th and the 8th respondents) turning down the 2 rights issue offered by ACE in which the company was one of the shareholders but at the same time they

themselves took up the rights issue directly and indirectly for their own personal interests were indeed oppressive. It was a high-handed, domineering and unjust conduct. In short, the directors acted in their own interests when they decided to turn down the rights issue for the company.

[32] It is a general principle of law that conduct can be oppressive within the s. 180 of the Act even where it is not aimed at gaining a pecuniary advantage (see: Re H.R. Harmer Ltd [1958] 3 All ER 689). But in this case it was made worse as the evidence points to this: the directors gained pecuniary advantage when they themselves subscribed the rights issue offered by ACE.

[33] As a matter of fact, the directors did not do it once but twice to deprive the minority shareholders the benefits of the 2 right issues and advanced their own personal interests. In this sense the respondents put their personal interests above their duty to the company. They were wrong. By subordinating their personal interests to those of the company, they conducted the affairs of the company in a manner which was oppressive to the minority shareholders. What has happened in this case is not merely a decision by the directors on a matter of business policy to which the court cannot interfere. I accept the principle of law that 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 (see: Howard Smith Ltd v. Ampol Petroleum Ltd [1974] AC 821). Undoubtedly, it is not the business of this court to manage the affairs of the company, that is for the shareholders and board of directors (see: Shuttleworth v. Cox Brothers & Co (Maidenhead Ltd) [1927] 2 KB 9). But in the present case the affairs of the company had been conducted in a manner which was oppressive to the petitioners as members of the company. Section 180 of the Act empowers the court where the affairs of a company are being conducted in a manner oppressive to some members, to bring to an end the matters complained of, and make such order as it thinks fit to remedy the situation.

[34] In addition to that, the board of directors after being questioned of such dealings convened an EGM in an attempt to ratify their decisions and successfully did so despite strong objections by the petitioners who were overwhelmed by the respondents by virtue of their positions and majority shareholdings. The respondents forced through resolutions at EGM on 5 August 2003. This proved that the petitioners had been subjected to a continuing process of oppression as members of the company. It is important to bear in mind that as the wording of section 180 implies, there must be a continuing course of conduct, not only an isolated act of misconduct or irregularity. In my view the majority had neglected to use their voting power to curtail the actions of the directors of the company and thereby had permitted and condoned their oppressive conduct. To my mind, this clearly is an oppressive act committed in the affairs of the company against the minority shareholders.

[35] The effect of the oppressive acts is detrimental to the petitioners. ACE is a palm oil cultivation and investment company owning a lot of lands. The non-subscription of the rights issue resulted in dilution of shareholdings of the company in ACE and causing an acute impact to the minority shareholders and thereby substantially reduced the net tangible assets of the company. Furthermore, the petitioners have also lost out on any potential returns or profits derived from the business of ACE, where the price of palm oil has escalated. The reduction of the company's interests in ACE from 20% to 10.67% had material impact as the company's entitlement to the dividends issued by ACE would strictly depend on its shareholdings in it. In this regard it is relevant to note that ACE's

revenue had doubled from RM11.03 million in year 2002 to RM22.94 in year 2006 and its profits after taxation had increased from approximately RM3.86 million in year 2002 to approximately RM9.24 million in year 2006.

[36] In the end, this petition is a bona fide attempt to obtain relief under s. 181 of the Act. In my judgment, the petitioners have made out their case that the company's affairs had been conducted in a manner which was oppressive to them as the members of the company. To put an end to this particular form of oppression I see no alternative but to make an order that one side should buy the shares of the other. For these reasons I make the following orders:-

i) I grant an order in terms of encl. 1 prayer (a) of para 31, that is to say an order that the shares of the petitioners in the 1st respondent be purchased by the 2nd to 8th respondents at the fair value price taking into consideration of the oppressive acts of the 2nd to 8th respondents;

ii) I also grant an order in terms of encl. 1 prayer (b) of para 31, that is to say an order that such purchase shall be completed within two months from the date of the order; and

iii) I also order that the respondents to pay the costs to be taxed to the petitioners.

[2009] 1 LNS 297