Choi Chi Hong v Kim Dong Bae & Anor

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO MT1–22–390 OF 1999
NORAINI ABDUL RAHMAN JC
10 JULY 2009

Civil Procedure — Judgments and orders — Foreign judgment — Whether Malaysian court bound by decision of foreign court — Judgment from Korean court tendered in local court — Korean judgment dealing with same subject matter as in present suit — Pleadings from Korean court not tendered — Whether court bound by decision of Korean court

Companies and Corporations — Inspection of documents — Member of company denied access to accounts and documents — Whether member of company entitled to inspect accounts, documents, register or minute book — Companies Act 1965 s 362(1)

Companies and Corporations — Meetings — Resolutions — Resolution to remove directors — Whether director must be given right to be heard — Whether removal of director null and void — Companies Act 1965 s 128

The plaintiff and the first defendant were Korean nationals residing in Malaysia. Both of them established the second defendant as a locally incorporated company. A shareholders agreement was executed providing, inter alia, that the shareholdings in the second defendant shall at all times be maintained at a ratio of 55%:45% for the first defendant and the plaintiff respectively. The first defendant was the sole signatory to all the company cheques. The plaintiff alleged that towards the middle of 1998, contrary to the common conduct and implied term, the first defendant refused to provide the plaintiff with the monthly accounts of the company and had refused to pay to the plaintiff his portion of the agreed profits. The plaintiff was also removed as a director of the company and his shares were forfeited by the company. The plaintiff therefore commenced this suit claiming for the accounts and other documents of the company and assessment of damages for breach of contract. The first defendant had given evidence of judgments obtained in the Suwon District Court and the Seoul High Court and claimed that the subject matter of the present suit was the same as that already decided in the Seoul High Court. Counsel for the defendants argued that if this court allowed the plaintiff's claim this would encourage duplicity of proceedings.

Held, allowing the plaintiff's claim with costs:

(1) The plaintiff was a shareholder of the company. As such, he was entitled as a member of the company to a full and frank disclosure of the company's accounts and other documents. Based on s 362(1) of the Companies Act 1965 ('Act'), the court could compel the company to allow plaintiff an immediate inspection of the register, minute book, or documents (see para 8).

(2) Section 128(2) of the Act makes it mandatory for the director who is to be removed be given the right to be heard. The word 'shall' in s 128(2) is mandatory in nature. The removal of a director is not something to be taken lightly. Even though the plaintiff was late by ten minutes, he did attend the EGM in which he was removed as a director and since the law gave him the right to be heard, he should have been given that right. Since that right to be heard was not given, his removal as a director was null and void. He therefore was still a director of the second defendant company (see para 9.3).

(3) The first defendant only submitted the judgments of the courts in Korea. No pleadings was tendered in court. The court was not bound by the decision of the Seoul High Court and most importantly the court did not have the benefit of reading and comparing the pleadings of the case in Korea and the present case (see para 15).

[Bahasa Malaysia summary

Plaintif dan defendan pertama adalah warganegara Korea yang menetap di Malaysia. Mereka telah menubuhkan defendan kedua sebagai syarikat perbadanan tempatan. Satu perjanjian pemegang saham yang disempurnakan memperuntukkan, antara lain, bahawa pegangan saham dalam defendan kedua perlu dikekalkan pada nisbah 55%:45% untuk defendan pertama dan plaintif pada setiap masa. Defendan pertama merupakan satu-satunya orang yang menandatangani semua cek syarikat. Plaintif mendakwa bahawa menjelang pertengahan 1998, bercanggah dengan tindakan kebiasaan dan terma tersirat, defendan pertama enggan memberikan akaun bulanan kepada plaintif dan enggan membayar kepada plaintif bahagian keuntungan yang dipersetujui. Plaintif juga disingkirkan sebagai pengarah syarikat dan saham-sahamnya dirampas oleh syarikat. Oleh itu, plaintif memulakan guaman ini menuntut akaun-akaun dan dokumen-dokumen syarikat yang lain dan penilaian ganti rugi untuk pelanggaran kontrak. Defendan pertama memberikan keterangan penghakiman yang didapatkan di Mahkamah Daerah Suwon dan Mahkamah Tinggi Seoul dan mendakwa bahawa isu guaman ini sama dengan apa yang diputuskan di Mahkamah Tinggi Seoul. Peguam untuk defendan-defendan mempertikaikan bahawa sekiranya

A mahkamah ini membenarkan tuntutan plaintif maka ini akan menggalakkan kependuaan prosiding.

B **Diputuskan,** membenarkan tuntutan plaintif dengan kos:

(1) Plaintif merupakan pemegang saham syarikat. Oleh itu, dia berhak sebagai ahli syarikat untuk mendapatkan penzahiran yang penuh dan terbuka mengenai akaun syarikat dan dokumen-dokumen lainnya. Berdasarkan s 362(1) Akta Syarikat 1965 ('Akta'), mahkamah boleh
C memaksa syarikat untuk membenarkan plaintif membuat pemeriksaan segera ke atas daftar, buku minit, atau dokumen-dokumen (lihat perenggan 8).

(2) Seksyen 128(2) Akta memperuntukkan bahawa adalah mandatori untuk pengarah yang disingkirkan diberi hak untuk didengar.
D Perkataan 'shall' dalam s 128(2) bersifat mandatori. Penyingkiran pengarah bukanlah sesuatu yang boleh diambil mudah. Walaupun plaintif lewat selama sepuluh minit, dia menghadiri EGM yang mana dia disingkirkan sebagai pengarah dan memandangkan undang-undang
E memberikannya hak untuk didengar, dia seharusnya diberikan hak tersebut. Memandangkan hak untuk didengar tidak diberikan, maka penyingkirannya sebagai pengarah adalah batal dan tidak sah. Oleh itu dia masih merupakan pengarah syarikat defendan kedua (lihat perenggan 9.3).

F (3) Defendan pertama hanya mengemukakan penghakiman mahkamah di Korea. Tiada pliding yang ditender di mahkamah. Mahkamah tidak terikat dengan keputusan Mahkamah Tinggi Seoul dan yang lebih penting lagi, mahkamah tidak berpeluang untuk membaca dan membandingkan pliding-pliding kes di Korea dengan kes ini (lihat
G perenggan 15).]

Notes

For a case on resolutions, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 484.

H For cases on companies and corporations in general, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1–1586.

For cases on foreign judgment, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4134–4139.

I **Cases referred to**

Tay Choo Foo v Harrisons Holdings (M) Bhd [2001] MLJU 105, HC (refd)

Legislation referred to

Companies Act 1965 ss 100(1), 128(2), 362(1)

David Gurupatham (David Gurupatham & Koay) for the plaintiff.
Priscilla Raj (Michael Chai & Co) for the defendant.

Noraini Abdul Rahman JC:

FACTS

[1] The plaintiff and the first defendant are Korean nationals residing in Malaysia. Both had agreed and established a locally incorporated company named APM Corporation Sdn Bhd which is the second defendant in this suit. A shareholders agreement in simple form in the Korean language was executed between the plaintiff and first defendant on 3 July 1997. Amongst the essential terms of the agreement is that the shareholdings in APM Corporation Sdn Bhd shall at all times be maintained at a ratio of 55%:45% for the first defendant and the plaintiff, respectively. The first defendant was the sole signatory to all the company cheques, ie APM Corporation Sdn Bhd (the second defendant). The second defendant is in the business of marketing, designing and fabricating machinery. By common conduct and implied term, the plaintiff alleges that the first defendant would supply the plaintiff with monthly statement as to the profits, losses and investments in the company. The plaintiff alleges that the paid up capital of the company was increased by payment from the company's profits according to the ratio above. The plaintiff also alleges that he had paid a total of RM225,000 towards the paid up capital of the company. The plaintiff also alleges that towards the middle of the year 1998, contrary to the common conduct and implied term, the first defendant refused to provide the plaintiff with the monthly accounts of the company stated above and had refused to pay to the plaintiff his portion of the agreed profits. The plaintiff then sent to the first defendant demands on 8 October 1998, 29 October 1998 and 25 November 1998. On 16 October 1998, the first defendant gave an undertaking to provide the company's accounts but failed to do so. The plaintiff then commenced this civil suit. In the meantime, the plaintiff was removed as a director of the company and his shares were forfeited by the company.

[2] The first defendant denies all of the above and asserts that the plaintiff has no right to the accounts and that the plaintiff's removal as the director and the forfeiture of his shares in the company was lawful.

[3] The plaintiff claims for the accounts and other documents of the defendant company, assessment of damages for breach of term of contract between the plaintiff and the defendants and interests at the rate of 8% from the date of filing to the date of the final disposal of the case. This is at paras (a)–(k) of the statement of claim.

[4] The defendants denied the claims of the plaintiff and counterclaimed for the return of all confidential documents and materials of the defendant company that the plaintiff is in possession and for an order that the plaintiff stop using the confidential information that belong to the defendant company and damages as in para 33(a)–(i) of the defence.

[5] Both parties had agreed on the issues to be tried. They are:

(1) to identify the terms and effect of the agreement dated 3 July 1997;

(2) whether or not the plaintiff has paid for his 45% shareholding in the company;

(3) whether the plaintiff is entitled to be given full and frank disclosure of all the company accounts;

(4) whether the plaintiff's removal as director of the company by this defendant is valid;

(5) whether the forfeiture of the plaintiff's shares in the company is valid; and

(6) whether the plaintiff is entitled to the remedy claimed in paras 10(a)–(k).

ISSUES

[6] To identify the terms and effect of the agreement dated 3 July 1997:

(6.1) After having perused the agreement dated 3 July 1997 (translated text at p 146 of bundle C — agreed bundle of documents), the court is of the view that it is a valid agreement. The English translated version does not bear the signatures of both the plaintiff and the first defendant. For this, the court rely on the Korean text as at p 147 of bundle C. That text bears the signature of both parties ie the plaintiff and the first defendant. The agreement is dated 3 July 1997 and the terms are clearly set out in the said agreement.

[7] Whether or not the plaintiff has paid for his 45% shareholding in the company:

(7.1) The court had perused documents at pp 136, 139, 140 and 144 of bundle C. In total, the shares that was allotted for the plaintiff is RM225,000. Those documents also stated that the amount for the shares had been paid for in cash. These documentary evidence had been agreed by both parties. As such, the court finds that the allotted shares had been paid in full by the plaintiff. The certificate numbers and the number of shares owned by the plaintiff is at p 156 of bundle C

(exh D18). Although this is a letter bearing the letterhead of the second defendant and is a letter of forfeiture of the plaintiff's shares, it tells of the number of shares and the certificate number. Therefore, as at 25 August 1999 which is the date of the letter D18, the defendant company had recognised and treated the plaintiff as a shareholder.

(7.2) Following from the finding that the plaintiff had paid for the shares and was given the certificate numbers, and following the finding that the agreement dated 3 July 1997 is valid in its terms, the court find that the plaintiff had paid his 45% share of the company. Therefore, the plaintiff has now become the owner of shares issued to him. Section 100(1) of the Companies Act 1965 provides:

100

(1) A certificate under the common or official seal of a company specifying any shares held by any member of the company shall be prima facie evidence of the title of the member to the shares.

Therefore, the plaintiff is still a shareholder of the company. As such, the court is of the opinion that there is no necessity to consider on the issues of call for allotted shares which was said to be unpaid by the plaintiff.

[8] Whether the plaintiff is entitled to be given a full and frank disclosure of the company accounts.

(8.1) Since the court has made a finding that the plaintiff is still a shareholder of the defendant company, he is entitled as a member of the company to a full and frank disclosure of the company's accounts and other documents. Section 362(1) of the Companies Act 1965 provide the following:

362

(1) If any person in contravention of this Act refuses or fails to permit the inspection of any register minute book or document or to supply a copy of any register minute book or document the Court may by order compel an immediate inspection of the register minute book or document or order the copy to be supplied

Based on the abovesaid section, this court can by order compel the defendant company to allow the plaintiff an immediate inspection of the register, minute book, or documents and this court now orders that the plaintiff be allowed to inspect immediately the abovesaid register, minute book or documents.

[9] Whether the plaintiff's removal as director of the company by the defendants is valid.

(9.1) Both DW1 and DW2 confirmed that the registered address of the plaintiff was at W4–03–04 Goodyear Court 9, Subang Perdana. According to PW1, he received a letter from the defendants, dated 5 November 1998 giving him notice that they intend to remove him as a director. The meeting was to be held on 30 November 1998 at 11am. He wanted to attend the meeting but was late by ten minutes. By the time he arrived, the meeting had already passed a resolution to terminate him as a director. He was therefore not given the opportunity to present his case. On the same date ie 30 November 1998, he received a letter informing him of his termination as a director (p 100, bundle C).

(9.2) Much was argued by both sides as to the letters and notices sent to the two addresses ie The Riana Green address and the Subang Perdana address. The court is of the view that the plaintiff did receive the notice of that fateful EGM and he did attend the meeting. The purpose of Article 108 of the Article of Association of the company is to inform the members (in this case, the plaintiff) that there would a meeting and he admitted that he attended the meeting but was late by ten minutes by which time the resolution to remove him had been passed. Section 128(2) of the Companies Act 1965 provides:

> 128 Removal of directors
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> (2) Notwithstanding anything to the contrary in the memorandum or articles of the company, special notice shall be required of any resolution to remove a director or to appoint some person in place of a director so removed at the meeting at which he is removed, and on receipt of notice of an intended resolution to remove a director the company shall forthwith send a copy thereof to the director concerned, and the director (whether or not he is a member of the company) *shall be entitled to be heard on the resolution at the meeting*. (Emphasis added.)

(9.3) The law makes it mandatory for the director who is to be removed be given the right to be heard. The word 'shall' in s 128(2) of the Companies Act 1965 is mandatory in nature. The removal of a director is not something to be taken lightly. It is a serious matter. In this case, the court is of the opinion that even though he was late by ten minutes, he did attend the EGM and since the law has given him the right to be heard, he should be given that right. Since that right to be heard was not given, the court is of the opinion that his removal as a director is null and void. He therefore is still a director of the defendant company.

[10] Whether the forfeiture of the plaintiff's shares in the company is valid.

(10.1) This issue had been dealt with in para (7.2) above.

[11] Whether the plaintiff is entitled to the remedy claimed in para 10(a)–(k).

(11.1) After having heard the evidence of the plaintiff and the defendants and after perusing the documents in the agreed bundle and after having heard submissions of both parties, the court is of the opinion that the plaintiff is entitled to the remedies claimed. Thus the plaintiff's claim in para 10(a)–(k) is allowed with costs.

COUNTERCLAIM BY THE DEFENDANTS

[12] I will now deal with the counterclaim of the defendants. The defendants had not adduced evidence on the counterclaim. Even though the first defendant alleged that plaintiff was involved or had set up a rival company called Tech World (see para of 'Butir-Butir' in the defence) there was no evidence adduced at all on this matter. In fact, there was hardly any evidence to support the defendants' counterclaim.

[13] As such I dismiss the counterclaim with costs.

[14] It is to be noted that the first defendant had given evidence of the judgments of the Suwon District Court, Civil Division 10 and the judgment of the Seoul High Court. The defendants argued that the subject matter of this case in Malaysia is the same as that already decided in the Seoul High Court. Counsel for the defendants cited the case of *Tay Choo Foo v Harrisons Holdings (M) Bhd* [2001] MLJU 105. Counsel for the defendants argued that if this court allows the plaintiff's claim, this would encourage duplicity of proceedings. It would be prejudicial to the defendants as the exact facts has been finalised and adjudicated in Korean courts. It would also tantamount to unjust enrichment.

[15] This court had read the case cited above and is of the view that in this case before the court, the defendants cannot claim duplicity of proceedings and an abuse of process. In that case, Ramly Hj Ali JC (as he then was) had come to the conclusion that there is duplicity of proceedings and an abuse of the court process after he had made comparisons of the pleadings in both cases. In this case, the first defendant only submitted the judgments of the courts in Korea. No pleadings was tendered in this court. This court is not

bound by the decision of the Seoul High Court and most importantly, this court does not have the benefit of reading and comparing the pleadings of the case in Korea and our present case.

Plaintiff's claim allowed with costs.

Reported by Kanesh Sundrum