Teo Lay Swee and Others v Teo Siew Eng and Others
[2001] SGHC 29

Case Number : OS 600078/2001, SIC 600168/2001

Decision Date : 14 February 2001

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Winston Quek (B T Tan & Co) for the plaintiffs; Eddee Ng (Tan Kok Quan Partnership) for the defendants

Parties : Teo Lay Swee; Yeo Gek Lang, Susie; Teo Ah Ghek — Teo Siew Eng; Teo Lee Hwa alias Teo Siew Luan; Teo Siew Poh; Teo Siew Peng; Guan Soon Development Pte Ltd

JUDGMENT:

Grounds of Decision

1. The plaintiffs and the first four defendants are shareholders in the fifth defendant company, Guan Soon Development Pte Ltd (the company). The application before me was for an order that the defendants be restrained at the intended general meeting of the company scheduled for 31 January 2001 or at any adjournment of this meeting and/or at any other general meeting from passing any resolution to receive, consider and/or adopt the Directors Report and the audited accounts for the financial year ended 31 December 1999 until further order by the court.

2. The application was made in an originating summons filed on 18 January 2001 to invoke the powers of the court under s 216 of the Companies Act, Cap 50 (the Act). The interlocutory injunction application was filed four days later. In the originating summons itself, the plaintiffs seek two reliefs:

> (a) an injunction in similar terms to that asked for by the summons-in-chambers; and
>
> (b) an order that the company should be at liberty to declare the sum of $86,941,345 as an extraordinary gain in its audited accounts for the financial year ended 31 December 1999.

3. Although the summons-in-chambers was filed on an ex-parte basis, it was served on the fourth defendant on 26 January and, on 30 January, appearance was entered on behalf of the first four defendants. The summons was argued before me on a contested basis and both parties filed affidavits. I dismissed the application with costs but granted the plaintiffs an *Erinford* injunction pending the filing of a notice of appeal and an application for an expedited appeal.

4. The question at issue was whether the minority shareholders of the company would be oppressed, unfairly discriminated against, prejudiced or have their interests disregarded if the company passed a set of audited accounts which described the profit made on a sale of land by the company as a trading profit rather than an extraordinary gain.

Background

5. The company was incorporated in 1949 by Mr Teo Cheong Guan for the purpose of running and operating a fleet of lorries. In 1953, the company purchased land in Upper Changi Road for its long-term purposes. At that time the land was zoned agricultural. In 1971, the company changed its business and its name and became a developer.

6. The plaintiffs and the first four defendants are all related to each other. Apart from the second plaintiff, who is the wife of the first plaintiff, they are all children of Mr Teo Cheong Guan, the first plaintiff being his only son. They are also shareholders in the company. Collectively, the plaintiffs own 3,097 shares or 38.7% of the issued share capital of the company whilst the defendants collectively own 4,889 shares or 61.1% of the share capital. The board of the company comprises the first plaintiff who is the chairman and managing director, and the second and fourth defendants.

7. The land in Upper Changi Road was sold in 1999 by the company for the sum of $90 million. According to the fourth defendant, this was not the entire land parcel purchased in 1953. Thereafter, pieces of this land had been utilised by Mr Teo for property development and sold off and other portions had been developed and sold by the company in 1993 at a time when the first plaintiff was the managing director of the company. Another portion had been sold in 1995 for some $82 million. The sale in 1999 was of the remaining land at Upper Changi Road belonging to the company.

The dispute

8. The dispute related to the accounting treatment to be given to the profit realised by the company from the 1999 land sale. That this was a bone of contention became clear in about September or October 2000 when the fourth defendant was given draft financial statements of the company for review. By this time, the company was in default of the Acts requirements in relation to the holding of the annual general meeting in that it had been advised by its corporate secretary that the annual general meeting for the year 2000 should have been held no later than 30 June 2000.

9. The draft financial statements of the company had been prepared on the basis that the gain from the land sale was an extraordinary item. The fourth defendant disputed this view. Her opinion was that the gain should be treated as a normal trading gain. The first plaintiff, however, took the view that it should be reflected as an extraordinary gain. The dispute between the parties delayed the completion of the companys accounts.

10. On 5 December 2000, the fourth defendant as a director of the company was given notice by the Registry of Companies and Businesses to file the companys annual accounts for the year 2000 by 5 February 2001 or face possible prosecution under the Act.

11. On 29 December 2000, the company gave notice of an extraordinary general meeting to be held on 16 January 2001. The agenda of the extraordinary general meeting was stated as follows:

> To discuss and authorise the Directors of the Company to treat the gain of $86,941,345.00 on the sale of the land at Upper Changi Road as an extraordinary item.

Attached to the notice of the meeting was a letter from the first plaintiff dated 28 December 2000 stating that it was he who had specifically requested the auditors to treat the land sale gain as an extraordinary item in the companys draft profit and loss statement. He further stated that the fourth defendant had insisted that this gain be treated as a normal profit and be taxed by the Inland Revenue Department which would mean that the company would have to pay $22,604,749 as tax and each shareholder would stand to lose $2,825 per share. Attached to this letter was a report dated 11 October 2000 from Messrs Deloitte & Touche. This firm of accountants had been commissioned by the first plaintiff to give their views as to the proper accounting treatment for the gain on the land sale.

12. The extraordinary general meeting took place as scheduled. The result of the voting on the proposed resolution to authorise the Directors of the Company to treat the gain of $86,941,345.00 on the sale of the land at Upper Changi Road as an extraordinary item was as follows:

For the resolution 3,097 votes

Against the resolution 4,889 vote

The resolution was, therefore, not carried.

13. The draft financial statements were accordingly amended to reflect the treatment of the land sale gain as normal profit.

14. By a notice of annual general meeting dated 16 January 2001, notice was given of an annual general meeting to be held on 19 January 2001 (with consent to shorter notice) by the shareholders to approve and adopt the accounts. This meeting was subsequently adjourned to 31 January 2001. Due to the filing of the plaintiffs application, the meeting was further adjourned to await the outcome of the application.

The Deloitte & Touche letter

15. The plaintiffs relied heavily on the letter from Deloitte & Touche. The material parts of this letter read as follows:

> If an item is held for long-term purposes and the disposal takes place in the financial year, then such disposal would normally be treated as an EOI [extraordinary income]. For tax purposes, such gains would be considered as capital gains and not subject to tax. On the other hand, if the item is considered as a usual item, i.e. incurred or carried on in the normal course of business, then the gains arising therefrom will be considered as normal trading gains and subject to the prevailing corporate tax (for Year of Assessment 2000) of 26%.
>
> In the case of your Company, the issue is rather complex in that the land was acquired more than 30 years *(sic)* and was designated as agricultural land.
>
> The complication arises because of the fact that the Company also carried on developmental activities. In such a case, most of the time, the Singapore Tax Authorities (STA) will take the position that any unsold property left with the Company or any land still held by the Company would be considered as trading stock. Therefore on its disposal any gain arising therefrom will be considered normal trading gains and subject to corporate tax.
>
> If the Company has other pieces of land owned and these other pieces of land were subsequently developed and sold, an argument can still be put forward that the agricultural land was held for long- term investment purposes as nothing was done to this piece of land and no application was made for a change of use and if the contention that this piece of agricultural land was held for long-term purposes, then since this piece of land was held for more than 30 years, on its disposal, the gains should be considered as capital gains and therefore not subject to tax. In this regard, the gains should be regarded as EOI for accounting purposes.
>
> A position could be put forward that this piece of land was held for long-term purposes as agricultural land. The first step that should be taken is to reflect the gains as an EOI and this position be put forward (for tax purposes) to treat the gains as capital gains. However, if for accounting purposes, the treatment is

that the gains arose from a normal trading transaction and the gains reflected as normal trading profits, then when negotiating with the STA, the Company would have an uphill task trying to argue that these gains are in fact capital gains and not normal trading gains.

The plaintiffs argument

16. The plaintiffs accepted that by seeking relief under s 216 of the Act, they had to prove one of the four grounds set out in the Act ie that there had been oppression, disregard of interests, unfair discrimination or prejudice. Their position was that the facts of this case established that their interests as shareholders had been disregarded and/or prejudiced.

17. The submission was that the defendants insistence on reflecting the lands sale gain as a normal trading profit in the audited accounts and thereby rendering the gain subject to corporate tax without giving a chance for the company to submit to the income tax authorities that the gain should be treated as extraordinary income was an act which was done without regard to the plaintiffs interests and/or was prejudicial to them. This was because once the gain had been reflected as a normal trading profit in the audited accounts and those accounts had been adopted at the annual general meeting, the company would have no ground whatsoever to make any submission that no tax should be payable on the gain.

18. Citing the dictum of LP Thean JA in *Kumagai Gumi Co Ltd. v Zenecon Pte Ltd* [1995] 2 SLR 297 to the effect that the court is entitled to question the soundness of commercial decisions when the same make absolutely no commercial sense on any objective basis, the plaintiffs submitted that the defendants decision to treat the land sale gain as a normal trading profit made no commercial sense on an objective basis. They submitted that such a course of action was devoid of logic and went against the legitimate expectation of a right thinking shareholder. The plaintiffs said they had a legitimate expectation that the majority shareholders would act prudently in the treatment of the land sale gain and not in a manner that would lead the company to pay substantial taxes without any recourse.

19. The plaintiffs recognised that the first to the fourth defendants would themselves suffer loss in the form of reduced dividends by reason of the categorisation of the gain as a normal profit. They submitted that this suffering did not detract from the fact that their conduct was unfair or oppressive or in total disregard to the plaintiffs interests. In this respect they relied on *Re Sam Weller & Sons Ltd* [1990] 1 Ch 682.

20. Finally, the plaintiffs reiterated that they would be prejudiced by the defendants action which would result in the company having to pay some $22 million in tax which would in turn affect the amount of dividend to be paid to the plaintiffs. The prejudice was that once the land sale gain was officially adopted as a normal trading profit, there would be no turning back as far as tax was concerned and the company would face an uphill task in trying to convince the tax authorities that the gain should be considered an extraordinary gain.

The decision

21. Although there are four alternative grounds for establishing a case under s 216 of the Act, as counsel for the defendants submitted, the common thread that runs through them is that there must be some element of unfairness in relation to the treatment of the minority shareholder that must be established in order to obtain relief from the court. The present case did not, in my opinion, disclose any element of unfairness in the way that the plaintiffs were being treated or in the loss that they would sustain if the course adopted was that proposed by the defendants.

22. The dispute was over the manner in which the company should be run. An extraordinary general meeting was held to discuss this. The majority disagreed with the course proposed by the first plaintiff and therefore voted against the resolution

that he had prepared. The first plaintiff not being satisfied with this, wants to impose his wishes on the company and cause it to take the course he thinks is best. It is established that the court does not interfere with management decisions or second-guess them. That is a matter for the company. It is only where those management decisions have no commercial basis and/or would unfairly prejudice minority shareholders that the court may become involved.

23. In the present case, the evidence was that the course that the defendants wished to adopt was a rational one that had been adopted previously by the company. Although the land in question had been bought many years previously, parts of it had been developed and/or sold for development over the years and the profits gained from these transactions had been declared as normal trading profits. Such declarations were in line with the companys main business since 1971 ie that of development. These earlier gains had not been insubstantial. In 1993, the company had earned in excess of $16 million on the sale of land and in 1995, it had earned a profit of almost $83 million from a similar transaction. Both these profits had been classified as normal trading profits and the first plaintiff had, as managing director, signed the audited accounts containing this classification. The first plaintiffs response to that disclosure was that previously the company had not had tax consultants and had not realised that it could claim such income as extraordinary gains. I found that to be an inadequate response in view of the amounts involved and the easy availability of tax advice in modern Singapore. More likely, no issue was then perceived to arise since the company was a fairly active developer.

24. The fourth defendant had written various letters to the first plaintiff explaining why she considered that the proper categorisation of the gain was as a normal trading profit. She had pointed out that his actions in attempting to treat the gain as an extraordinary item were delaying the filing of the companys audited accounts. Further, if the gain was to be treated as extraordinary income, it could not be distributed to the shareholders as dividends. It would have to be kept in a separate account. The first plaintiffs reply was that there was some other form of capital return whereby the gain could be distributed to the shareholders. He did not, however, give details of how such a scheme could be effected. There was no question of effecting a return of capital by a reduction of paid-up capital since the companys paid-up capital is only $800,000. If the profits cannot be returned as dividend, then it would seem the only way to distribute them to the shareholders would be by winding up the company.

25. The defendants had rational grounds for their desire to treat the gains as normal profits. They were following established precedent. They were also considering the needs and interests of the shareholders by taking a course that would definitely allow them to distribute such profits, after payment of tax, to the shareholders as dividends. They were also not willing to put forward to the tax authorities a stand on the profits that they considered could not be justified in the light of the previous history of the company and its activities. Their stand could not, in my view, be impugned as making no commercial sense whatsoever.

26. I also noted that Deloitte & Touche had not by any means advised the first plaintiff that the company had a good chance of persuading the tax authorities that the gain on the 1999 sale should be treated any differently from the gains from the 1993 and 1995 sales. They had noted that the companys case was a complicated one since it had also carried on developmental activities and the Singapore tax authorities would therefore take the position that any land still held by the company would be considered as trading stock. Thus, gain arising from disposal of this stock would be considered normal trading gains and subject to tax. Whilst Deloitte & Touche did suggest that the position could be put forward that the piece of land was held for long-term purposes as agricultural land, they did not give any estimate of the chances of such a position being accepted by the tax authorities. They were simply concerned to see that the company did not make its negotiations with the tax authorities more difficult by categorising the gains as trading profits. What they were doing was suggesting a course of negotiations with the tax authorities not advising on a clear cut situation.

27. The first plaintiff himself changed his position in relation to the meaning of the Deloitte & Touche letter. In the first affidavit which he filed in these proceedings, he asserted in para 7 that Deloitte & Touche had advised him that the company should treat the gain from the sale of the land as a capital gain and should reflect such gain extraordinary income so that it would not be subject to corporate tax. In his second affidavit, he said at para 8 that the advice was that it would be prudent for the company to first treat the gain as an extraordinary item and to reflect it as such in the audited accounts. It is clear that the directors may differ from Deloitte & Touche in their assessment of what would be a prudent course on the part of the company and that their

decision in this respect would have been assisted by their knowledge of the companys activities. Deloitte & Touche would not have such wide knowledge of what had been done previously. Their advice would be based only on what they had been told. The defendants in adopting a different course from that advocated by Deloitte & Touche were not per se acting unreasonably or illogically especially as the advice had not been categorical but was more in the nature of a suggestion.

28. I also noted that there was no evidence of any bad faith or vindictiveness on the part of the defendants. They did not have any collateral purpose or murky motive in adopting the course that they proposed. The first to fourth defendants will suffer the same detriment as the plaintiffs if the gain is treated as normal profit. There was nothing in the affidavit that suggested that they were prepared to suffer this detriment because they had an ulterior motive or would be deriving some benefit that was not available to the plaintiffs. Nor was there any evidence that they were acting in disregard of any of the shareholders interests. The first plaintiff did not accuse the defendants of mala fides. His stand was that they were not acting reasonably. The evidence, however, did not support the allegation of irrationality.

29. If the gain from the land sale is not subject to tax, the company will save some $22 million and the first plaintiff himself will gain an extra $6 million if the gain is distributed as dividends. Whilst I could understand that the plaintiffs were loath to give up the extra money they could gain if there is no corporate tax, I could not find in this case any reason to hold that they had been oppressed, unfairly discriminated against, unfairly prejudiced or that their interests had been disregarded by reason of the decision of the majority to treat the gain as normal profit. That was a decision they were entitled to make based on the companys business and previous dealings.

Judith Prakash

Judge

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