Lim Weng Kee v Public Prosecutor
[2002] SGHC 193

Case Number : MA 26/2002

Decision Date : 27 August 2002

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Gopalan Raman (G Raman & Partners) for the appellant; Lim Yew Jin (Deputy Public Prosecutor) for the respondent

Parties : Lim Weng Kee — Public Prosecutor

Criminal Law – Statutory offences – Criminal breach of duty – Directors – Duty to use reasonable diligence – Release of pawned items without cheque being cleared – Whether release in criminal breach of duty – Correct standard to apply – s 157(1) Companies Act (Cap 50, 1994 Ed)

Companies – Directors – Managing directors – Breach of director's duty – Duty to use reasonable diligence in discharge of duties – Whether test for criminal and civil liability for breach of duty similar – Standard of proof for criminal breach of director's duty – Whether standard static or variable – Whether to lower standard to accommodate individual's subjective knowledge or experience – Whether individual's lack of experience or knowledge relevant to conviction and sentencing – Whether appellant exercising reasonable diligence in discharge of duties – ss 157(1) & 157 (3)(b) Companies Act (Cap 50, 1994 Ed)

Criminal Procedure and Sentencing – Sentencing – Court imposing fine of $4,000 on each of appellant's three charges – Whether fines manifestly excessive – s 157(3)(b) Companies Act (Cap 50, 1994 Ed)

Words and Phrases – 'Honestly' – 'Reasonable diligence' – s 157(1)Companies Act (Cap 50, 1994 Ed)

Judgment

GROUNDS OF DECISION

The appellant faced three identical charges under s 157(1) of the Companies Act (Cap 50) ("CA"), namely, as Managing Director of Thai Shin Pawnshop Pte Ltd ("Thai Shin"), Thai Hong Pawnshop Pte Ltd ("Thai Hong") and Wang Wang Pawnshop Pte Ltd ("Wang Wang"), he failed to use reasonable diligence in the discharge of the duties of his office by permitting various jewellery items pawned to the three companies as pledges for loans from the companies to be released to one Kalimahton binte Md Samuri ("Samuri") without proper redemption and resulting in losses to the companies. The three charges were for the same offence committed at different premises, namely, at each of the three companies. The appellant was fined $4,000 on each of the charges in the district court under s 157(3)(b) CA.

2 The relevant sub-sections of s 157 CA read as follows:

> 157. —(1) A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.
>
> …
>
> (3) An officer or agent who commits a breach of any of the provisions of this section shall be —
>
> > (a) liable to the company for any profit made by him or for any damage suffered by the company as a result of the breach of any of those provisions; and

(b) guilty of an offence and shall be liable on conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding one year.

(4) This section is in addition to and not in derogation of any other written law or rule of law relating to the duty or liability of directors or officers of a company.

…

3 The appellant appealed against his conviction and sentence. I heard his appeals on 9 July 2002 and dismissed them. I now give my reasons.

The facts

4 The appellant is Lim Weng Kee, aged 62. At the date of the alleged incidents, on or around 28 October 1998, he had had 20 years of experience in running the business. He had been the managing director of Thai Shin and Thai Hong since 1978, and the *de facto* managing director of Wang Wang (which he founded) since 1996. The appellant admitted that he was the person-in-charge of the businesses of the three pawnshops at the time of the alleged incidents. The three pawn licenses were also issued in his name.

5 Chong Yok Yin ("Chong"), the appellant's sister-in-law, was a director of Thai Hong and Thai Shin. One of her sons, Lim Feok Loong ("Feok") started as an employee of the three pawnshops and was later appointed a director of Thai Shin and Thai Hong. Her other son, Lim Yeow Loong ("Yeow"), was a shareholder of all three pawnshops and had been working at Thai Shin for about two to three years before the alleged incidents. Sim Siew Ngoh ("Sim") and Ang Geok Eng ("Ang") were both employees at Thai Shin.

6 The appellant first came to know Samuri on 12 December 1997. In the appellant's words, Samuri struck him as "well dressed, wasn't ordinary, common people; of high society type". Samuri in turn perpetuated the impression by arriving at the pawnshops in a chauffeur-driven Mercedes and claiming to be married to the brother of the Sultan of Brunei. Her 'residence' at Punggol was two adjacent bungalows, 3-storeys high, bearing a single address. Between 1997 and 1998, she pawned $4m worth of jewellery items at the 3 pawnshops.

7 Samuri tried to buy the heart of the appellant by showering him with gifts, including a gold coin, 'blessed' Bruneian notes and a watch. That happened in May or June 1998. Samuri also developed a close relationship with Chong, addressing her as 'Mama'. All these were in fact a pretence. She was not a royal but an owner of a restaurant. The Punggol 'residence' did not belong to her and the jewellery items were conned from a diamond merchant. The appellant unfortunately failed to see through the facade.

8 On 12 October 1998, the appellant directed Feok to telephone Samuri regarding the outstanding interest due to the pawnshops. Feok did so and Samuri requested that they make a visit to her 'residence'. At her 'residence', Samuri informed them of her intention to redeem her jewellery items and asked the appellant to give an estimate. The appellant gave an estimate of between $4m to $5m. Samuri then instructed Feok to write out a $6m cheque in favour of Wang Wang pawnshop, with the balance to be refunded to her later.

9 Immediately afterwards, Samuri instructed Feok to write out four more cheques of $1m each as gifts to the appellant, Feok, Yeow and Chong. To prevent the appellant from discovering her ploy, Samuri told the appellant that she would be attending prayers for a deceased relative for the next 21 days and the cheques must not be deposited during that period of time. Meanwhile, the appellant kept all the five cheques.

10 On the morning of 28 October 1998, the appellant and Feok were at Thai Hong. They proceeded to Thai Shin upon receiving a call from Yeow that Samuri was there. Upon arriving at Thai Shin, the appellant immediately asked Samuri when he could deposit the five 12 October cheques. Samuri told him to wait and instead instructed Feok to write out a $15m cash cheque

which was meant for Chong to safe-keep for her, a $200,000 cheque in favour of Chong, a $50,000 cash cheque intended as a gift to the employees of the three companies; and a cash cheque of $3m intended as an anonymous gift to charity.

11 After about 15 to 20 minutes, Samuri told the appellant that she wanted the jewellery items back. The appellant responded that he could not release the items as the cheques had not been cleared. The appellant claimed that he told Chong the same thing in the Khek dialect but Chong assured him that Samuri would pay up and that the appellant should allow Samuri to take the items. Both Feok and Yeow were present but did not utter a word.

12 Before the court below, the appellant claimed that he did not permit the release of the items. He only relented because he could not oppose Chong and Feok as he had a heart problem. He claimed that he had done his best but could not do more to prevent the release of the items as both Feok and Chong were also directors. Even if he had tried to stop Chong and Feok, they would not have listened to him. The prosecution's submission was that the appellant did permit the release of the items. The district judge ruled in favour of the prosecution on this point.

13 Samuri chose some items at Thai Shin. Feok then drove Samuri and the appellant to Thai Hong and Wang Wang where the same process of choosing the items was repeated.

14 On 5 November 1998, the $6m cheque issued on 12 October 1998 was dishonoured. Samuri was also nowhere to be found. The appellant then made a police report. Samuri was later arrested and sentenced to serve six and a half years' imprisonment in Changi Women's Prison.

15 The losses to the pawnshops were very substantial. The appellant admitted that until the day of the trial, he did not know the actual value of the items taken away as he did not keep proper track of the exact list of jewellery taken away by Samuri. It was estimated by the appellant to amount to $4.136m, based on the total value of the pawn tickets. The shareholders of the three pawnshops suffered immense losses. At the date of the trial, Wang Wang was in the process of being sold, while Thai Shin and Thai Hong had to be injected with fresh capital to survive. In a separate civil suit, the appellant, Chong, Yeow and Feok were ordered to pay $300,000 in compensation each to Thai Shin and Thai Hong.

Decision below

16 The district judge made several findings of fact. Firstly, the appellant was in control of the companies at the relevant time. Secondly, the appellant permitted the release of the jewellery items to Samuri. The judge rejected the appellant's claim that he had done his best to object to the release of those items on three main grounds. Firstly, evidence given by Samuri, Ang and Sim showed that the appellant had released the items willingly. Evidence given by Chong, Feok and Yeow in favour of the prosecution was excluded for fear of unfair prejudice against the appellant as they were also the recipients of Samuri's gifts. Secondly, the appellant did not mention this claim to the investigating officer and only brought it up in court as an afterthought. Thirdly, if the appellant had objected strongly to the release of the items, he would not have followed Feok and Samuri to the second and third pawnshops.

17 The judge also held that the standard of 'reasonable diligence' under s157(1) CA is objective: the issue therefore was whether the appellant exercised such degree of care and skill as would amount to the reasonable care which an ordinary person might be expected to take in the circumstances on his own behalf. This objective test applies to both civil breaches of the duty to use reasonable diligence under s 157(3)(a); as well as criminal breaches of that duty under s 157(3)b.

18 The judge ruled that, on the totality of the evidence, the prosecution had proved beyond a reasonable doubt that the appellant had objectively failed to use reasonable diligence in the discharge of his duties as a director of the three pawnshops. The items were extremely valuable and no person of ordinary prudence would have permitted the release of the items without first having the cheques cleared and honoured.

19 The appellant was convicted and fined $4,000 on each of the charges. In awarding the sentence, the judge bore in mind sentencing precedents and the suffering the appellant had gone through in the form of loss of employment and control of the

pawnshops, as well as the substantial compensation he had to pay in settlement of the civil suits.

Issues Arising on Appeal

20 Four issues arose for the court's consideration. Firstly, what the test of 'reasonable diligence' to be applied for a criminal offence under s 157(3)(b) CA is. Secondly, what the standard of proof under s 157(3)(b) CA is. Thirdly, whether the appellant had used reasonable diligence on the facts of the case. Lastly, whether the fines imposed by the judge were manifestly excessive.

First ground of appeal: the test of 'reasonable diligence' under s 157 CA

21 The appellant did not deny that an objective test of 'reasonable diligence' applies for *civil* breaches of directors' duties under s 157(3)(a) but contended that a subjective test should apply for *criminal* breaches under s 157(3)(b). I did not think that the appellant was right. First of all, however it will be useful to survey the case law with respect to civil breaches. This is for two reasons. Firstly, most cases to date have focused on civil breaches and, hence, they provide a useful starting point in formulating the test for criminal breaches. Secondly, s 157(1) on its plain terms does not appear to set different tests for civil and criminal breaches of directors' duties. Hence, the test applied in one will obviously be relevant to the other.

(i) The test to be applied for civil breaches of directors' duties under s 157(3)(a) CA

22 Section 157(1) CA "mirrors a director's general fiduciary duty at common law": *Cheam Tat Pang & Anor v PP* [1996] 1 SLR 541 at 548. Hence, the common law is very persuasive in interpreting s157(1). According to *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407 at 428, the standard is measured "by the care an ordinary man might be expected to take in the circumstances on his own behalf". With due respect, this is a vague proposition which does not elaborate on the factors that go towards influencing this 'ordinary' man standard. In particular, should the courts take into account the subjective level of knowledge and experience of the particular defendant in deciding what an 'ordinary' director would do in the circumstances? The traditional approach answers the question in the affirmative. As stated by Lord Lindley M.R. in *Lagunas Nitrate Company v Lagunas Syndicate* [1899] 2 Ch 392 at 435:

> If directors act within their powers, if they act with such care as is reasonably to be expected from them, ***having regard to their knowledge and experience***, and if they act honestly for the benefit of the company they represent, they discharge both their equitable as well as their legal duty to the company. [Emphasis added]

This passage was cited with approval by Pidgeon J in *Australian Securities Commission v Gallagher* [1993] 10 ACSR 43, a decision of the Supreme Court of Western Australia at 53:

> …the test is ***basically*** an objective one in the sense that the question is what an ordinary person, ***with the knowledge and experience of the defendant***, might be expected to have done in the circumstances if he was acting on his own behalf. [Emphases added]

23 Under the traditional approach exemplified by these lines of cases, the standard of 'reasonable diligence' is essentially objective but it contains an important subjective qualification: it is measured against what an 'ordinary' director*, sharing the same level of knowledge and experience as the defendant*, would or would not have done on the facts of the case. This makes it possible for a defendant to escape liability by appealing to his own lack of knowledge or experience.

24 However, times have changed. Professor Paul Davis pointed out in *Gower's Principles of Modern Company Law* (6 ed.) at p 640, "those cases seem to have framed the directors' duties of skill and care with non-executive rather than executive directors in mind and, moreover, on the basis of a view that the non-executive director had no serious role to play within the company but was simply a piece of window-dressing aimed at promoting the company's image".

25 In *Daniels v Anderson* [1995] 16 ACSR 607 at 666-667, the Supreme Court of New South Wales indicated that it is no longer appropriate to judge a director's conduct by the traditional approach applied in cases such as *Lagunas Nitrate Company v Lagunas Syndicate*:

> The duties of a director are eloquently explained in the judgment of Pollock J, giving the opinion of the Supreme Court of New Jersey, in *Francis v United Jersey Bank* 432 A 2d 814 (1981)…..In our opinion, this has become what the law requires of directors. At 812-3 Pollock J said: " …..Because directors are bound to exercise ordinary care, ***they cannot set up as a defense lack of the knowledge needed to exercise the requisite degree of care***. If one feels that he has not had sufficient business experience to qualify him to perform the duties of a director, he should either acquire the knowledge by inquiry, or refuse to act…..A director is not an ornament, but an essential component of corporate governance. Consequently, a director cannot protect himself behind a paper shield bearing the motto "dummy director". [Emphasis added]

26 This passage was quoted with approval in the Chancery Division in *Re Barings plc and others* (No 5) [1999] 1 BCLC 433 at 488. The policy under this modern approach is clear: a person who accepts the office of director undertakes the responsibility that he understands the nature of the duty required of that office. That duty will vary depending on the circumstances, the size and the business of the particular company and the experience or skills that the director *held himself out* to possess in support of appointment to the office**.**

27 A similar view was held by Hoffman J in *Re D'Jan of London Ltd* [1994] 1 BCLC 561 (Chancery Division) where he decided that the duty of care owed by a director at common law is the conduct of a reasonably diligent person having both (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company, and (b) the general knowledge, skill and experience which that director has. As pointed out by Professor Davis in *Gower's Principles of Modern Company Law* (6 ed.) at p 642, the crucial difference with the traditional approach is that limb (b) adds a subjective standard which can operate only to increase, and not decrease the level of care and diligence required by the director.

28 In my opinion, the modern approach exemplified in *Daniels v Anderson* and *Re D'Jan of London Ltd* also represents the position here. The law hence stands as thus: the *civil* standard of care and diligence expected of a director is objective, namely, whether he has exercised the same degree of care and diligence as a reasonable director found in his position. This standard is not fixed but a continuum depending on various factors such as the individual's role in the company, the type of decision being made, the size and the business of the company. However, it is important to note that, unlike the traditional approach, this standard will not be lowered to accommodate any inadequacies in the individual's knowledge or experience. The standard will however be raised if he held himself out to possess or in fact possesses some special knowledge or experience.

29 This position is not just in line with recent developments in England and Australia but supported by two other reasons on principle: firstly, the traditional approach made it too easy for directors to escape responsibility for breaches of duty by relying on their personal lack of experience or knowledge. Surely the law cannot act as an excuse for directors to continue in their ignorant state. That is however exactly the effect of the traditional approach. This detracts from the protection to shareholders intended by s157. Secondly, most of the older cases predated the modern objective test of negligence propounded by the House of Lords in *Donoghue v Stevenson* [1932] AC 562 and should be read in the light of subsequent developments. Hence, the traditional position in *Lagunas Nitrate Co v Lagunas Syndicate* should no longer be followed.

(ii) The test to be applied for criminal breaches of directors' duties under s 157(3)(b) CA

30 The appellant did not deny that an objective test applies for civil cases but contended that a subjective test should apply for a criminal offence under s157(3)(b) because it is a fundamental principle of criminal law that a guilty mind must be proved before a charge can be sustained. Presumably, the subjective test means that, for a director to be criminally liable, he must at least be conscious of the risks involved but goes on to take the risks. In my opinion, the judge was justified in rejecting the subjective test because the language of s 157(1) CA supports an objective test. The term '*reasonable* diligence' in s157(1)

itself implies that the appellant's conduct must be measured against some objective standard of behaviour: how else could reasonableness be ascertained? Neither is an objective test alien in our criminal law. In *Lim Poh Eng v PP* [1999] 1 SLR 116 where the appellant was facing a charge of causing grievous hurt by doing an act so negligently as to endanger human life under s 338 Penal Code (Cap 224), I adopted an objective standard for negligence in both criminal and civil cases, namely, whether a person has omitted to do something which a reasonable man would do, or has done something which a prudent and reasonable man would not do.

31 It can be seen that the requirement of a subjective state of mind in our criminal law stands no higher than this: it is a general and important principle but it must yield to clear statutory language. Just as "negligently" under s 338 of the Penal Code is an instance of such clear language, likewise, "reasonable diligence" under s 157(1) CA is also such an instance.

32 It is important to note that the duty of a director to act with reasonable diligence is in turn conceptually distinct from the other limb in s157(1): the duty to act honestly. These are different aspects of a director's bundle of duties even though they may overlap on certain facts. "Honesty" has been interpreted to refer to the common law duty of a director to act bona fide in the interests of the company: *Marchesi v Barnes and Keogh* [1970] V.R. 434 at 438.

33 Given the conceptual difference between honesty and diligence, it is clear that adopting a subjective test for the duty to act honestly does not mean that the court must do likewise for the duty to act with reasonable diligence. Bearing this in mind, the following passage in *Cheam Tat Pang v PP* [1996] 1 SLR 541 at 545 relied upon by the appellant, although suggesting a subjective test, is clearly directed towards the 'honesty' limb in s 157(1) and does not support the appellant's submission:

> Counsel submitted that the concept of ***honesty*** bears different meanings under s157(1) CA, and under s 405 of the Penal Code. It was not disputed that the former term covers a wide spectrum of obligations relating to a director's fiduciary duties. The only *mens rea* required for a s157(3) CA offence ***is knowledge that what is being done is not in the interests of the company***, adopting Gowan J's views as expressed in *Marchesi v Barnes & Keogh* (1970) V.R. 434.[Emphases added]

34 Although the subjective test of 'reasonable diligence' is rightly rejected, a choice must still be made between two different variants of objective tests for the purpose of criminal liability, namely, the traditional approach under *Lagunas Nitrate Co v Lagunas Syndicate* or the modern approach under *Daniels v Anderson*. I have earlier adopted the modern approach for civil cases. I am convinced that the same should also apply to criminal cases for two reasons.

35 Firstly, the structure of s 157 shows that Parliament does not intend different tests of diligence for civil and criminal breaches. If different tests are indeed intended, then it would be natural for s 157 to have different sub-sections describing the respective tests in different terms. Instead, a single standard of 'reasonable diligence' is set in s 157(1) with s 157(3) indicating concurrent civil and criminal liability for breach of that standard. This was also the opinion of Sinnathuray J in the High Court decision of *Re Kie Hock Shipping (1971) Pte Ltd* [1985] 1 MLJ 411 at 417:

> …every director owes a duty to his company to use reasonable diligence in the discharge of his duties. Failure by a director to do so would be a breach of duty of his office. That breach of duty would give rise to an action by the company against the director for damages suffered by the company. The commission of ***that*** breach of duty by the director would ***also*** be a criminal offence. [Emphases added]

It is clear from the cited passage that Sinnathuray J did not distinguish between civil and criminal breaches of the duty to use reasonable diligence. Therefore, if the test in *Daniels v Anderson* applies for civil cases (and I have decided earlier that it does), then the same test should apply for criminal cases as well.

36 Secondly, one must keep in mind the aim of imposing criminal liability under s 157(3)(b). While the objective of civil liability is to compensate the company for losses caused by directors' negligence, the aim of criminal liability is to protect the wider public interests by deterring directors from acting negligently. It should be clear by now that corporate scandals,

especially in large listed companies, impact adversely not only on the company in question, but may also have a ripple effect on the wider stock market and the economy. Civil liability is however not intended to protect, and in many cases is ineffective in protecting, the wider public interests, simply because a civil action is not brought in many cases. For instance, the director may be bankrupt by then and will not have the resources to pay any damages. Sometimes, members of the company may not want to tarnish the reputation of the company due to the negative publicity generated by suing the errant director. There are many other reasons why a civil action may never see the light of day. However, in such cases, public interests, represented by the criminal law, demand that the errant director cannot go scot-free. Hence, any test of criminal liability must be sufficiently robust if it is to protect the public interests by deterring directors from acting negligently.

37 The traditional approach under *Lagunas Nitrate Co v Lagunas Syndicate*, in allowing an errant director to escape liability because of his inexperience and lack of knowledge, is certainly not robust enough. Often, losses are caused precisely because of the director's inexperience and ignorance: giving allowance to such failings will negate any intended protection of the public interests. Public interests demand that the law places a duty on directors to acquire the experience and knowledge required to run the company, which is well reflected in the modern approach under *Daniels v Anderson*.

38 Hence, in my opinion, the test in *Daniels v Anderson*, which I have adopted in the context of civil liability, also applies to criminal liability under s 157(3)(b). However, it is important to note that, even though the subjective lack of experience and knowledge of the defendant is irrelevant to conviction, it should be considered in sentencing. It is only fair that a director who is unable to meet the expected standard due to his lack of experience, should be given a lighter punishment than someone who is experienced enough to be able to exercise the required degree of care and diligence, but simply fails to do so.

Second ground of appeal: the standard of proof under s 157(3)(b) CA

39 The appellant contended that the district judge, in adopting an objective standard of 'reasonable diligence', erroneously adopted the civil standard of proof for a criminal action. This contention had no merit. The appellant unfortunately failed to distinguish between the standard of reasonable diligence and the standard of proof. An objective standard of reasonable diligence can co-exist with the criminal standard of proof beyond reasonable doubt. Under s 157(3)(b), like other criminal actions, the prosecution must *prove beyond a reasonable doubt* that on the totality of the evidence, the defendant has *objectively* failed to use reasonable diligence in the discharge of his duties as a director.

Third ground of appeal: whether the appellant had used reasonable diligence on the facts

40 Applying the standard for criminal liability adopted earlier, the issue here was whether a reasonable managing director having 20 years experience in operating three pawnshop businesses of similar scale would have done as the appellant did, namely, releasing such valuable jewellery items before the cheque had been cleared. If the appellant had been totally lacking in experience or knowledge, this *would not lower* the standard of care expected of him. Here, however, he had been running the business for 20 years – this certainly qualified as 'special experience' which *would raise* the expected standard. On the facts, there was certainly no doubt that he failed to use reasonable diligence. He was in control of the pawnshops then and no reasonable managing director found in his shoes would have done as he did.

41 The judge's findings of facts were challenged on several points, particularly that he should have found that the appellant was conscious of the risks involved in releasing the items and only authorised their release upon Chong's assurance that Samuri would pay up. It is unnecessary to list all the objections here, but suffice to say that none of them detract from the central fact that the appellant voluntarily authorised the release of those items although he knew the cheque had not been cleared. In my opinion, this fact alone was enough to sustain a conviction. Under an objective test, it did not matter whether the appellant was conscious of the risks involved in releasing the items. Further, neither would a reasonable director release the items upon the informal assurance of a fellow director that a customer would pay up. It was more than careless of the appellant to trust Chong's assurance of Samuri's credibility. In my opinion, the prosecution had proved the charges beyond a reasonable doubt.

Fourth Ground of Appeal: whether the fines imposed are manifestly excessive

42 In his judgment, the judge carefully considered all the mitigating factors: the appellant's loss of employment and control of the pawnshops, the fruits of his lifetime's hard work and efforts, as well as the sum of $300,000 he had to pay (together with Chong, Feok and Yeow) in settlement of the civil suits. On the other hand, one must not forget the substantial losses caused to the shareholders of the pawnshops and the glaring fact that the appellant, with his 20 years of experience in the business, should not have made such a mistake. On the facts of the case, the fines of $4,000 in respect of each of the charges were not excessive at all.

Conclusion

43 For the foregoing reasons, I dismissed the appeals against the appellant's conviction and sentence.

Appeals dismissed

Sgd:

YONG PUNG HOW

Chief Justice