Ng Heng Liat and Others v Kiyue Co Ltd and Another
[2003] SGHC 62

Case Number	: OS 1115/2002, RA 267/2002
Decision Date	: 22 March 2003
Tribunal/Court	: High Court
Coram	: Kan Ting Chiu J
Counsel Name(s)	: Harish Kumar (Engelin Teh Practice LLC) for plaintiffs; Wang Wei Chi (Kenneth Tan Partnership) for defendants
Parties	: Ng Heng Liat; Hey Bong koi; Lau Kim Yang — Kiyue Co Ltd; Aquagen International Pte Ltd

Companies – Directors – Duties – Breaches of fiduciary duties as directors of the company – Application by directors for declaration that they had not breached fiduciary duties to company – Counterclaim by defendant for contrary declaration – Whether defendant as shareholder of company has locus standi under rule in Foss v Harbottle to bring counterclaim – Whether counterclaim should be struck out

The background

1 The plaintiffs are directors of Aquagen International Pte Ltd ("AIPL"), the second defendant. The first defendant Kiyue Company Ltd ("Kiyue") is a minority shareholder of AIPL.

2 AIPL was involved in a project to develop a desalination plant with a special concrete evaporator. The development of the concrete evaporator ran into difficulties, and a proposal to change to a steel evaporator was made and rejected. Differences arose between the parties in the project over whether they were to continue with it. The disputes lead to the commencement of arbitration proceedings over the parties' obligations in connection with the project.

3 An issue arose whether AIPL should take part in the arbitration proceedings. Legal advice was sought and a recommendation was made that the company participate in the proceedings. The proposal met with objections from the plaintiffs. When efforts were made to have this resolved by the board of directors of AIPL the plaintiffs repeatedly failed to confirm if they will attend a board meeting to discuss the proposal. As a result of that, no quorate meeting of the board could be convened, and the matter was not discussed.

4 Kiyue was in favour of AIPL's participation in the arbitration proceedings and was not prepared to let the matter rest there. It issued a notice on 29 July 2002 under s 216A of the Companies Act to the directors of AIPL to request it to commence action against the plaintiffs for breaches of their fiduciary duties as directors to AIPL. It also gave notice that if the directors did not comply with the request, it intended to apply to court under s 216A for leave to bring the action in the name and on behalf of the company.

5 Kiyue did not receive a reply from the AIPL board. The plaintiffs responded instead by filing these originating summons naming Kiyue as the defendant. They applied for a declaration that they had not acted, and are not acting in breach of their directors' or fiduciary duties to AIPL in not supporting any initiative for AIPL to participate in the arbitration proceedings. There was no real need for them to do this. Kiyue had not taken the next step of applying to court under s 216A, and may not obtain leave to sue them. They could have waited till Kiyue files its action, then they can defend it.

6 In the event, Kiyue did not object to the proceedings, and it filed a counterclaim for a

declaration that the plaintiffs had breached and are in breach of their fiduciary duties to AIPL, and had not acted, and are not acting bona fide in the best interests of AIPL in rejecting the steel evaporator option and preventing AIPL from participating in the arbitration proceedings.

7 When the action was commenced, the plaintiffs named Kiyue as defendant because Kiyue complained about the breaches of duty. Kiyue made its counterclaim and brought AIPL in as an additional defendant after that. The plaintiffs then applied to strike out the counterclaim.

8 The application was dismissed at the first instance. The plaintiffs' appeal against the dismissal came before me. After hearing counsel I allowed the appeal and struck out the counterclaim.

The arguments

9 Counsel for the plaintiffs argued that the counterclaim must be struck out because Kiyue did not have the *locus standi* to bring it. He argued that the plaintiffs as directors of AIPL owed fiduciary duties to AIPL and not its shareholders such as Kiyue. The proper party to seek redress from the plaintiffs for any breach of directors' duties was AIPL, on its own initiative or in its name by a derivative action commenced under s 216A.

10 He was invoking the proper plaintiff rule, or the rule in *Foss v Harbottle* (1843) 2 Hare 189. As Jenkins LJ explained in *Edwards v Halliwell* [1950] 2 All ER 1064 at p 1065

> The rule in *Foss v Harbottle*, as I understand it, comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to company or association of persons is *prima facie* the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then *cadit quaestio*.

There are exceptions to the rule. There is the *ultra vires* exception where the wrong complained of is *ultra vires* the company, and the fraud on the minority exception where the wrong complained of is a fraud perpetuated by persons who are in control of the company.

11 Counsel for Kiyue argued that the counterclaim should not be struck off because

(i) there is no clear authority that the rule in *Foss v Harbottle* extends to bar a defendant from raising a counterclaim,

(ii) the rule is largely abrogated by statutory inroads in sections 216 and 216A of the Companies Act,

(iii) the plaintiffs had waived the rule,

(iv) the claim and counterclaim are so closely and intricately related that it would be absurd to strike out the counterclaim,

(v) Order 28 r 7(1) of the Rules of Court is wide enough to allow Kiyue to bring the counterclaim,

(vi) it is procedurally convenient for the claim and counterclaim to be determined in the same action, and

(vii) the justice of the case demands that Kiyue be permitted to proceed with the counterclaim.[1]

It was not Kiyue's case that the counterclaim came within the exceptions to the rule in *Foss v Harbottle*.

12 I shall first deal with the issues connected to the rule in *Foss v Harbottle*. The proper plaintiff rule is grounded on the plaintiff-claimant's right to the redress it seeks. When there is a breach of an obligation to a company, the company is the wronged party which is entitled to redress and is the proper plaintiff to sue the wrongdoers. The foundation for this rule is the connection between the claimant and the relief sought. In most cases, the claimant for relief is the plaintiff. But a defendant can be a claimant when he makes a counterclaim. When he does that, there is no reason why his claim should not have to satisfy the same requirement. Even if counsel is right that there is no clear authority for this, reason and logic dictate that the rule applies to counterclaims with equal force.

13 The Companies Act allows for the rule to be relaxed in some circumstances. Section 216 allows a shareholder to apply to court to seek personal remedies in cases of oppression or injustice. Section 216A enables a shareholder to apply to court for leave to bring a derivative or representative action in the name of the company. Counsel is right in saying that they are statutory inroads to the proper plaintiff rule. However that falls short of substantiating her contention that the rule is largely abrogated by these inroads. The legislature did not abrogate the rule, and there is no justification for saying that the inroads are longer or broader than those enacted. A shareholder can in proper circumstances avoid the full force of the proper plaintiff rule with the court's approval; a shareholder cannot take the rule to have been annulled.

14 Counsel also contended that the plaintiffs had waived the rule when they sued Kiyue. She submitted that "in suing Kiyue, the Plaintiffs have acknowledged a dispute with Kiyue pertaining to such breaches of fiduciary duties, and they cannot now bar Kiyue from raising all relevant and material facts, and all instances and allegations of their breach of fiduciary duties."[2]

15 That is correct. The plaintiffs must allow Kiyue to raise all the facts in its defence to show that they were in breach of their duties. However, that does not mean that the plaintiffs have accepted Kiyue as the proper party to bring the counterclaim. Furthermore as the proper party to make the counterclaim is AIPL, the submission implied that Kiyue can acquire *locus standi* by a deemed waiver of the rule by the plaintiffs. That is saying that where leave is required, it can be waived if no objection is raised. This goes against the provisions of s 216A. It is for the court to grant or refuse leave, and not for the parties to give or waive it.

16 There is no doubt that the declarations sought in the claim and counterclaim cover substantially the same grounds. The scope of the duties the plaintiffs owe to AIPL, and whether they have discharged the duties will be considered. It is also reasonable for Kiyue to say that it may be more convenient for these issues to be determined together in the same action.

17 However, these considerations do not displace the need for Kiyue to show that it is the proper party to seek the counter- declaration. *Prima facie* AIPL is the proper party to do that. When Kiyue issued the notice on 29 July 2002 under s 216A, it accepted that and it acknowledge that it would apply to court for leave to act in the company's name.

18 Having taken the position that it needed leave to seek relief from the plaintiffs, it is difficult to understand why it feels that it can proceed with the counterclaim on its own now.

19 Counsel relied on O 28 r 7(1) as authority for Kiyue to make the counterclaim, but it does not provide the answer. The rule that

> A defendant to an action begun by originating summons who has entered an appearance to the summons and who alleges that he has any claim or is entitled to any relief or remedy against the plaintiff in respect of any matter (whenever and however arising) may make a counterclaim in the action in respect of that matter instead of bringing a separate action.

allows a defendant to make a counterclaim instead of bringing a separate action. It does not remove the need for the defendant to be the proper party to seek the redress sought in the counterclaim. When it provides that a defendant may make a counterclaim **instead of bringing a separate action** that assumes that the defendant could bring a separate action. If the defendant cannot bring a separate action, it cannot make a counterclaim under this rule.

20 I was not persuaded that Kiyue should be allowed to proceed with its counterclaim because the reliefs it sought should be determined together with the plaintiffs' action. It proceeded on the basis that the counter-declaration could be sought at Kiyue's initiative in the first place. It did not justify Kiyue's attempt to seek the counter-declaration in its own name.

21 Section 216A requires Kiyue to obtain the leave of court to proceed in AIPL's name. Section 216A (2) and (3) provide that

> (2) ... a complainant may apply to the Court for leave to bring an action in the name and on behalf of the company or intervene in an action to which the company is a party for the purpose of prosecuting, defending or discontinuing the action on behalf of the company.
>
> (3) No action may be brought and no intervention in an action may be made under subsection (2) unless the Court is satisfied that -
>
> > (a) the complainant has given 14 days' notice to the directors of the company of his intention to apply to the Court under subsection (2) if the directors of the company do not bring, diligently prosecute or defend or discontinue the action;
> >
> > (b) the complainant is acting in good faith; and
> >
> > (c) it appears to be prima facie in the interests of the company that the action be brought, prosecuted, defended or discontinued.

22 In an application under s 216A the main questions to be considered are whether Kiyue is acting in good faith and whether the proposed action is in the interests of AIPL. There are distinct issues from the issues in the plaintiffs' action, i.e. the duties they owe to AIPL, and whether they are in breach. AIPL will be the defendant in such an application and will be heard.

23 If Kiyue is allowed to bring the counterclaim in the present form, these issues will be bypassed, and will not be brought up when the claim and the counterclaim are heard.

24 It is evident that Kiyue believes that the plaintiffs have breached their fiduciary duties to AIPL, and wants that to be established in court. However, Kiyue needs to obtain the leave of court

to do that. That is not a procedural formality; it may run into opposition from the company and the other shareholders of the company and the court shall have to be satisfied that there is a proper case for leave to be granted.

25 In these circumstances, it would be wrong to allow Kiyue to seek the declaration in its counterclaim without leave. That being the case the counterclaim must be struck out.

[1] Respondents' Submissions paras 28, 30, 55

[2] Respondents' Submissions para 31

Copyright © Government of Singapore.