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1. *Ng Boon Teik v Chang Tong Lee [2020] MLJU 1455*

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NG BOON TEIK v CHANG TONG LEE

CaseAnalysis
[2020] MLJU 1455

Ng Boon Teik v Chang Tong Lee [2020] MLJU 1455

Malayan Law Journal Unreported

COURT OF APPEAL (PUTRAJAYA)

MOHAMAD ZABIDIN BIN MOHD DIAH, VAZEER ALAM BIN MYDIN MEERA AND DARRYL GOON SIEW CHYE JJCA

RAYUAN CIVIL NO.: P-02(IM)(NCC)-1997-11/2019

14 September 2020

Gan Khong Aik (Kang Mei Yee with him) (Gan Partnership) for the Appellant.
Nicholas Tan (Foo May Yee with him) (Lim Huck Aik & Co) for the Respondent.

Khoo

Darryl Goon Siew Chye JJCA:

JUDGMENT

[1] This is a brief judgment in short form (see for example the abridged grounds of judgment of Nallini Pathmanathan FCJ (see *Lim Boon Chuan @ Lim Ban Huat v Wonderful Castle Sdn Bhd & Anor* [2018] MLJU 628; *Hong Leong Bank Bhd v Ong Moon Huat and Another Appeal* [2018] MLJU 1576; [2018] 1 LNS 1612; and *Yeoh Jin Aik & Anor v HSBC Bank (Malaysia) Bhd* [2019] 1 MLJ 117).

[2] The work load of the judiciary has grown in an unprecedented fashion and continues to do so. Set against an infrastructure that caters for and consists of a limited number of its members, particularly so at the appellate level, one consequence is that shorter grounds of judgments have often been encouraged. This is not a phenomenon peculiar to our country. It is a form that appears to be similarly encouraged of the Court of Appeal of England and Wales in appropriate cases and referred to as 'short form' judgments (see *BS (Congo) v Secretary of State for the Home Department* [2017] EWCA Civ 53 and *Cheyne Capital (Management) UK (LLP) v Deutsche Trustee Company Limited* [2016] EWCA Civ 743. In fact there is evidence that this form was already in use in the UK in 2015 (see for example *R (on the application of Smith) v Secretary of State For the Home Department (2015)* [2015] EWHC 2909).

[3] Clearly this form of judgment cannot be used for every case. In *Cheyne Capital (Management) UK (LLP)* for example, the Chancellor, Sir Terence Etherton observed of the short form judgment as follows:

'It is used here because this appeal raises no issue of law, precedent or other matters of general significance, and the relevant facts and documentary material are set out in the judgment under appeal and are not in dispute on the appeal.'

[4] Even if there exist disputes of fact or law, if their resolution is demonstrably plain and obvious, a brief, to the point, judgment would in my view be warranted and would suffice. This is one such case.

The Appeal

[5] The Appellant, the 1st Defendant in the High Court, applied to strike out the Respondent's pleadings, and consequently the action against him, invoking Order 18 Rule 19 of the Rules of Court 2012 and the Court's inherent jurisdiction.

[6] In his application the Appellant also sought, consequentially, to set aside an Anton Piller Order that had been

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granted on 9th April 2019, the return of documents and things seized pursuant to the Anton Piller Order and for the loss and damage suffered by reason thereof to be assessed and paid, pursuant to the undertaking given by the Respondent in the Anton Piller Order.

[7] The Appellant's application was dismissed by the High Court below. Hence the appeal herein.

[8] The crux of the Appellant's contention was that the Respondent's action was in fact a derivative action brought for and on behalf of the 6th Defendant. However, the action was initiated without leave of Court and was not brought in the name of the 6th Defendant, contrary to section 347 subsections (1) and (2) of the *Companies Act 2016* ('CA') respectively and which subsections state as follows:

'Derivative proceedings

347. (1) A complainant may, with the leave of the court initiate, intervene in or defend a proceeding on behalf of the company.

(2) Proceedings brought under this section shall be brought in the company's name.'

[9] The Appellant and the Respondent were both directors of the 6th Defendant, Ocentrax Engineering Sdn Bhd.

[10] On 5th July 2018, the Respondent obtained an order in a separate action against the 6th Defendant in the High Court in Penang, the relevant parts of which are set out below:

'DALAM MAHKAMAH TINGGI MALAYA DI PULAU PINANG

SAMAN PEMULA NO. PA-24NCC-13-06/2018

Dalam Perkara Seksyen 347, 348, 349, 350, 351 dan 582(4) Akta Syarikat 2016

Dan

Dalam Perkara Aturan 29 dan 29 dan 88 Kaedah-kaedah Mahkamah 2012

Dan

Dalam Perkara Oceantrax Engineering Sdn Bhd (No. Syarikat 541733-X)

ANTARA

CHANG TONG LEE (NO. KIP 671101-08-6593) ...PEMOHON

DAN

OCEANTRAX ENGINEERING SDN BHD (NO. SYARIKAT 541733-X) ...RESPONDEN

DI HADAPAN HAKIM HADHARIAH BINTI SYED PADA 5 JULAI 2018 MAHKAMAH TERBUKA

PERINTAH

ATAS PERMOHONAN Pemohon melalui Saman Pemula bertarikh 5.6.2018 (Lampiran 1) yang difailkan oleh Pemohon DAN SETELAH MEMBACA Affidavit Sokongan Pemohon yang dikirakan oleh Chang Tong Lee pada 5.6.2018, berserta dengan Hujahan Bertulis dan Ikatan Otoriti, DAN SETELAH MENDENGAR Nicholas Tan Soon Teik kaunsel bagi pihak pemohon MAKA ADALAH DENGAN INI DIPERINTAH bahawa:-

a) Kebenaran diberikan kepada Pemohon untuk memulakan satu tindakan terhadap Responden yang dinamakan di atas;

...

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d) Pemohon diberikuasa sepenuhnya bagi kesemua tindakan-tindakan presiding kelak;

e) ...

...

Bertarikh pada 5 haribulan Julai 2018'

(Emphasis added)

[11] In paragraphs 10 and 11 of the Amended Statement of Claim, relying on the order of the Court of 5th July 2018, the Respondent pleaded as follows:

'10. On 5.7.2018, CTL obtained leave of Court to initiate proceedings under s. 347 of the *Companies Act 2016* for the benefit of Oceantrax.

11. Wherefore the present suit herein.'

[12] The Respondent's Amended Statement of Claim then sets out a series of allegations against *inter alios* the Appellant, all of which were wrongs allegedly committed by the Appellant against the 6th Defendant. Among the alleged wrongdoings were that the Appellant:

- (i) conspired to achieve the purpose of destroying the 6th Defendant;
- (ii) caused and conspired to cause irreparable harm, damage and loss to the 6th Defendant;
- (iii) colluded to divert business away from the 6th Defendant;
- (iv) caused the 6th Defendant's operations to be disrupted;
- (v) conspired with the intention and/or predominant purpose of causing harm to the 6th Defendant; and
- (vi) breached duties owed to the 6th Defendant including his fiduciary duties.

[13] In the concluding paragraphs of the Amended Statement of Claim, the Respondent pleaded as follows:

'89. The *plaintiff therefore for and on behalf of Oceantrax will claim* against each and/or all the other named defendants jointly and severally save for the 6th Defendant the damage and loss suffered and in addition, any further expense directly resulting to Oceantrax from the said wrongdoings.

90. The plaintiff will *contend that Oceantrax* through the direct and/or indirect action of the named defendants, save for the 6th defendant *has been put to damages, injury to its reputation and losses.*

91. By reason of the aforesaid, *Oceantrax has been put to losses and damages due to the defendants'*, save for the 6th Defendant, wrongdoings.

92. *Wherefore the plaintiff claims, for and on behalf of Oceantrax against the defendants, save for the 6th Defendant joint and several liability in respect of all the matter complained herein as follows:'*

(Emphasis added)

[14] The prayers that followed were also related to the 6th Defendant with no personal claim by the Plaintiff.

[15] Having heard submissions from learned counsel for the parties and having considered the pleadings including, in particular, the order of the Court of 5th July 2018, the Court agreed with the Appellant.

[16] It was clear beyond peradventure that the Respondent's pleaded claim was expressed, and intended, to be an action brought for and on behalf of the 6th Defendant.

[17] However, the order of 5th July 2018 when examined did not grant leave to the Respondent to initiate any action on behalf of the 6th Defendant. What was granted was leave for the Respondent to initiate an action *against* the 6th Defendant. Contrary to the Respondent's contention, paragraph a) of the order cannot be read to the opposite effect of granting leave to initiate an action '*on behalf of*' the 6th Defendant.

[18] Likewise, and again contrary to the Respondent's contention, paragraph 'd)' in the order of 5th July 2018, also cannot be read as leave of Court granted to initiate legal action '*on behalf of*' the 6th Defendant.

[19] Unless there is ambiguity, the language used in an order of the Court must be read and given its ordinary meaning (see *Tiew Kun v Tneu Seng Bee & Anor Appeal* [2010] 2 CLJ 68, at p74).

[20] Contrary to section 347(2) of the CA which is couched in mandatory terms, the action was also *not* brought in the name of the 6th Defendant. Rather, it was brought *against* the 6th Defendant.

[21] In this regard, the attempt to rely on the procedure developed by the common law was to no avail as the common law right to bring an action on behalf of a company, also known as a derivative action, has been abrogated by section 347(3) of the CA.

[22] Learned counsel for the Respondent sought to suggest that the objections raised were merely procedural. With respect, this cannot be right. Section 347(1) and (2) are express provisions in a statute, requiring leave of Court to be obtained before any action may be initiated on behalf of a company and that any such action be brought in the name of the company. They are clearly substantive law and not merely procedural.

[23] In the circumstances, it was plain and obvious that the action initiated by the Respondent purportedly for and on behalf of the 6th Defendant, without leave of Court, was not maintainable.

[24] By reason of the foregoing, the Appellant's appeal was unanimously allowed by the Court with costs here and below. The order of the learned judge below of 18th October 2019 was set aside. The Appellant's application to strike out the Respondent's pleadings and action as against the Appellant was allowed together with the consequential orders referred to above granted.

[25] Justices Mohamad Zabidin bin Mohd Diah and Vazeer Alam bin Mydin Meera have had the opportunity to peruse the draft of this judgment and have expressed their concurrence with it.