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Proving Case Of Oppression Against Shareholders

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Malaysian courts are given wide discretionary powers to make orders to resolve situations where they recognise that shareholders are being oppressed. Section 346 of the Companies Act 2016 (CA 2016) is aimed towards providing a form of protection to shareholders facing oppressive acts by granting specific remedies for oppressed shareholders.

The Court of Appeal recently held in *Low Ean Nee v Low Cheng Teik & Ors* [2023] 2 CLJ 19 that the decisive factor in determining whether a case of oppression is made is the materiality and efficacy of the complaint.

Facts

The Appellant's claim of oppression is against the first to third Respondents who are directors and shareholders of SNE Marketing Sdn Bhd (i.e. fourth Respondent). The fourth Respondent is a multi-level direct marketing company, supplying food and nutritional supplements and dietetic substances for medicinal use. Although the Appellant (i.e. Low Ean Nee) was a majority shareholder of the fourth Respondent, she was not involved in the management of the company and was a passive director.

On 14 October 2019, the Appellant instituted an oppression action against the Respondents as her rights as a director and shareholder in the fourth Respondent had been disregarded by the first to third Respondents (i.e. Low Cheng Teik and another 2 individuals). At the High Court, the Appellant alleged various misdeeds and misconduct on the part of the Respondents. Specifically, the Appellant alleged that:

- (i) The 32 Board of Directors' resolutions of the fourth Respondent were executed using her forged signature.
- (ii) There was mismanagement and wrongful usage of the fourth Respondent's funds used for the purchase of luxury cars.

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- (iii) There was unsatisfactory book-keeping and tampering of the fourth Respondent's financial accounts between 2007 and 2017.
- (iv) The first to third Respondents had passed the directors' resolution to grant consent to SNE Global Sdn Bhd, which was also established as a multi-level direct marketing company in 2016 and controlled by an individual related to the first and second Respondents to use the fourth Respondent's trademark. Consequently, the fourth Respondent's trademark was assigned at a nominal consideration of RM10 to SNE Global Sdn Bhd in 2018.

The Appellant claimed that the first to third Respondents had acted in an oppressive manner to deprive her of her rights as a shareholder and sought for an order pursuant to Section 346(2)(c) of the CA 2016 that the first to third Respondents buy out her shares in the company. However, the High Court accepted the Respondent's rebuttals in defence and held that the Appellant had failed to satisfy the grounds of establishing oppression pursuant to Section 346(1) of the CA 2016.

Section 346(1) Of The CA 2016 - Remedy In Cases Of An Oppression

- (1) Any member or debenture holder of a company may apply to the Court for an order under this section on the ground:
 - (a) That the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or debenture holders including himself or in disregard of his or their interests as members, shareholders or debenture holders of the company.
 - (b) That some act of the company has been done or is threatened or that some resolution of the members, debenture holders or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or debenture holders, including himself.

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Court Of Appeal Decision

The Court of Appeal reviewed the High Court's grounds of judgment with respect to the Appellant's appeal and unanimously allowed the appeal.

The Court of Appeal was satisfied with the High Court Judge's findings in relation to the following:

- (i) In respect of the forgery of the Appellant's signature in the board of directors' resolutions, the Court of Appeal found that the Appellant failed to discharge her burden of proof of forgery on the balance of probabilities since the resolutions were deemed to have been circulated and received by the Respondent because she failed to prove her signature had been forged.
- (ii) The purchase of luxury vehicle was not oppressive because the vehicles were used in the course of operating the multi-levelling marketing business, as the Appellant chose to be a passive director, she cannot complain that she has been oppressed.
- (iii) In respect of the issue of unsatisfactory book-keeping as well as the tampering of the fourth Respondent's financial accounts between 2007 and 2017, the first to third Respondents have satisfactorily accounted for the fourth Respondent's turnover and profit.

In the case of the fourth Respondent's trademark, the Court of Appeal found that the High Court judge had committed a misdirection in ruling that there was no oppression on the Appellant due to the use of the trademark by SNE Global Sdn Bhd and the assignment of the trademark at a mere consideration of RM10 to SNE Global Sdn Bhd. As a result of granting consent to SNE Global Sdn Bhd to use the trademark, SNE Global Sdn Bhd started selling the same products as that marketed by the fourth Respondent.

It was held in *Izzap Ltd v. Sanmaru Overseas Marketing Sdn Bhd & Anor* [2011] 2 CLJ 220 that Section 181 of the Companies Act 1965 (predecessor of Section 346 of the CA 2016) may be invoked where there is an oppression of a member or where a member's interest disregarded. It may also be invoked where there is a resolution or act that unfairly discriminates against or is otherwise prejudicial to a member.

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The trademark was undoubtedly a valuable asset of the fourth Respondent, enabling substantial turnover over the years and the sale of the fourth Respondent's products. The assignment of the trademark to SNE Global Sdn Bhd at such a low price effectively side-lined and excluded the Appellant's interest as a shareholder and director of the fourth Respondent. This move benefitted the first to third Respondents who are indirectly related to SNE Global Sdn Bhd. This was seen as prejudicial by the Court of Appeal, and thus, the Court of Appeal concluded that the Appellant's claims of oppression had been substantiated and found in her favour.

Commentary

In its judgement, the Court of Appeal highlighted that it was irrelevant that the Appellant only successfully established a single complaint from the list of complaints that were advanced during the legal proceedings. The Court of Appeal held that:

"It is sufficient for the appellant to justify her case by having only established a singular complaint amongst a host of other complaints advanced by her. The critical factor that counts is the materiality and efficacy of the complaint."

Ultimately, the main criterion that will be considered is the materiality and efficacy of the complaint. A case of oppression can be proved provided the complaint is substantial and effective.

Although courts are usually reluctant to interfere with a company's internal affairs, the court may exercise its powers to remedy in circumstances where the shareholder is deemed powerless, against the oppressor.

Author by Mendy Ong from the firm's Capital Markets and M&A practice.

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