Federal Court maintains wide scope of Companies Act 1965 in oppression cases

02 February 2016 | Contributed by Gan Partnership

Litigation, Malaysia

Introduction

Section 181 of the Companies Act 1956 provides statutory relief for an aggrieved member of a company in case of oppression. While the courts have traditionally been reluctant to interfere in a company's internal affairs, an aggrieved member may succeed if he or she can establish that:

- the company's affairs are being conducted, or the powers of the directors are being exercised, in an oppressive manner or in disregard of the member's interests; or
- some unfairly discriminatory or prejudicial company act has been passed or threatened, or a prejudicial resolution has been passed or is proposed to be passed by the members, debenture holders or any class thereof, if the resolution or act was introduced to protect the position of minority shareholders in limited companies.

When granting relief, the court has discretion to make any order that it sees fit in order to end the company's oppressive conduct, including winding up the company. Compared to other countries, Malaysia has the widest provisions in this regard. This can be seen in the leading case of *Re Kong Thai Sawmill (Miri) Sdn Bhd*, in which Lord Wilberforce stated that the applicable test is whether there was "a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect".

This long-established test was recently challenged before the Federal Court in *Looh Siong Chee v Numix Engineering Sdn Bhd*, in which the court was invited to reconsider the applicable test for an oppression petition under Section 181 of the Companies Act 1965 in light of recent developments in the English law of oppression.

Facts

The cause of action stemmed from a breach of agreements between appellant Looh Siong Chee, respondent Numix Engineering Sdn Bhd and Magic Telecom Sdn Bhd (a subsidiary of the respondent). The agreements were entered into in order to secure investment from the appellant, as the respondent was facing financial crisis. As a result of the appellant's failure to discharge his obligations under the agreements, the respondent faced a financial dilemma. The appellant persuaded the respondent to issue 4 million shares in Magic to Sejahtera Saluran Sdn Bhd (an affiliate of the appellant) for the grant of a RM4 million loan to Magic. An extraordinary general meeting was subsequently requisitioned by Sejahtera in order to include two additional directors on Magic's board of directors. The respondent strongly objected to this request and filed an oppression petition under Section 181 of the Companies Act 1956 against the appellant and

Sejahtera, declaring that the allotment of the 4 million shares to Sejahtera was void and at the same time seeking an injunction to exclude the appellant and Sejahtera from the management of Magic. In turn, the appellant and Sejahtera filed a civil suit against the respondent for specific performance of the agreements. Both parties consented to try the actions jointly before the High Court.

Decisions

The High Court granted the oppression petition, but dismissed the civil suit. The court ruled that both the appellant and Magic were guilty of oppressive conduct and therefore nullified the allotment of the 4 million shares by Magic to Sejahtera. The court also ruled that the appointment of the two additional directors was prejudicial to the respondent and Magic. Further, Magic was ruled to be wound up.

The appellant's appeal to the Court of Appeal was dismissed. Subsequently, the appellant was granted leave to appeal to the Federal Court. The Federal Court similarly dismissed the appeal and held that there was no valid reason to redefine the test for oppression under Section 181, as Section 994 of the UK Companies Act 2006 – which formed part of the recent developments in the English law of oppression – was not *in pari materia* (ie, on the same subject)to Section 181 of the Companies Act 1956. Further, the purported development had previously been examined in full in the context of a Section 181 oppression petition in the Federal Court cases of *Pan-Pacifi c Construction Ltd v Ngiu Kee Corporation (M) Bhd* and *Jet-Tech Materials Sdn Bhd v Yushiro Chemical Industry Co Ltd*. The Federal Court further confirmed that, in accordance with the operative test set out *Re Kong Thai Sawmill Sdn Bhd,* the basis to determine fairness is that of "commercial fairness".

Comment

This decision maintained the wide scope of Section 181, which allows relief to be granted and damages to be awarded (including winding up the company) in order to end a company's oppressive conduct. Under this provision, the court must establish that the company acted oppressively and with disregard before granting relief. As such, winding-up is not considered to be a primary remedy. Conversely, the English law of oppression is much narrower. The court must establish that the facts would justify the winding-up order based on the 'just and equitable' principle, and that the winding up of the company would unfairly prejudice the oppressed minority. The liberal approach taken in Malaysia enables the courts to grant relief in a company's best interest.

For further information on this topic please contact Gan Khong Aik at Gan Partnership by telephone (+603 2201 1130) or email (khongaik@ganlaw.my). The Gan Partnership website can be accessed at www.ganlaw.my.

Gan Khong Aik