Gabriel Peter & Partners (suing as a firm) *v* Wee Chong Jin and others
[1997] 3 SLR(R) 649; [1997] SGCA 53

Case Number : Civil Appeal No 70 of 1997

Decision Date : 12 November 1997

Tribunal/Court : Court of Appeal

Coram : Yong Pung How CJ; M Karthigesu JA; L P Thean JA

Counsel Name(s) : Suresh Damodara and Dixon Ng (Gabriel Peter & Partners) for the appellant; Harry Elias SC and Lawrence Quahe (Harry Elias & Partners) for the first, fourth and fifth respondents; Michael Hwang SC and Chan Hian Young (Allen & Gledhill) (on watching brief) for the second and third respondents.

Parties : Gabriel Peter & Partners (suing as a firm) — Wee Chong Jin and others

Civil Procedure – Pleadings – Striking out – Principles of striking out – Whether court precluded from relying on grounds of striking out not pleaded – "Reasonable cause of action" – "Abuse of process" – Order 18 r 19 The Rules of Court 1996

Companies – Capacity – Resolutions – Whether resolution of majority directors resolution of board – Whether act of board by resolution act of company

Companies – Directors – Tortious liability – Whether individual directors could be personally liable for tort committed by company

Tort – Defamation – Libel – Elements of libel – Company directors' phrasing of resolutions – Whether company directors personally liable for alleged libel contained in board resolution

Facts

The appellant law firm was appointed by Promenade Properties Pte Ltd ("PPPL") to represent it in the sale and purchase transaction of a building. The respondents were directors of PPPL at all material times. The appellant commenced a defamation action against the respondents, alleging that a board resolution passed by the respondents to dismiss the appellant as solicitors in the transaction contained defamatory remarks. The first, fourth and fifth respondents were unsuccessful before the assistant registrar in their application to strike out the appellant's claim. They also filed a defence, without prejudice to their application to have the action struck out and to their contention that the statement of claim disclosed no reasonable cause of action or was scandalous, frivolous and vexatious or was an abuse of process. They subsequently appealed successfully against the assistant registrar's decision and the judge ordered the writ of summons and statement of claim to be struck out.

The judge held that the appellant should have brought an action against PPPL and not the respondents since the passing of the resolution was an act of PPPL. In considering the present appeal against the judge's order, the court considered the following issues: (a) principles for striking out an action; (b) elements in the tort of

libel; (c) whether the resolution by the majority directors was a resolution of the board and hence an act of the company; (d) whether individual directors could be personally liable for a tortuous act committed by the company; and (e) whether the writ of summons and statement of claim should be struck out.

Held, allowing the appeal:

(1) The power of striking out should only be invoked in plain and obvious cases. The power of striking out should not be exercised by a minute and protracted examination of the documents and facts. Where an application for striking out involved a lengthy and serious argument, the court should decline to proceed with the argument unless, not only did it have doubts as to the soundness of the pleading but, it was satisfied that striking out would obviate the necessity for a trial or reduce the burden of preparing for trial: at [18].

(2) Although the respondents relied only on O 18 r 19(1)(*a*) of The Rules of Court 1996 in their application in the summons in chambers, they should not be prohibited from relying on the other three grounds in O 18 r 19(1). The appellant had acquiesced to the respondents' arguments on grounds not within the parameters of their pleading in the summons in chambers, and did not suffer any prejudice. The court should have the flexibility to consider grounds not raised by the applicant in a striking-out action: at [20].

(3) As long as the statement of claim disclosed some cause of action, or raised some question fit to be decided at the trial, the mere fact that the case was not likely to succeed was no ground for striking it out. The term "abuse of the process of the Court" in O 18 r 19(1)(*d*) was given a wide interpretation and prevented the judicial process from being used as a means of vexation and oppression: at [21] and [22].

(4) A resolution passed by the board acting within its sphere of competence should be taken as the company's decision. The act of the board in the form of a resolution was an act of the company. The resolution however had to be one which was within the scope of the board's powers to pass: at [27].

(5) The company was liable in tort for all the wrongful acts and omissions of the persons who controlled the management or operation of its business undertaking when they were acting within their scope of powers as such. However, a director, like an employee or servant of the company, could be personally liable for a tort committed by the company if he directed or procured the commission thereof. Whether he authorised, directed or procured the commission of the tort was a matter of degree which needed to be looked at in determining his level of involvement: at [31] and [35].

(6) The respondents were potentially personally liable for the alleged libel committed by the company, if the appellant's allegations were made out at a full trial. The respondents had passed and phrased the wording of the resolution which was the very gist of the alleged libel. The appellant therefore had the choice of who it wanted to bring the action against – the company or the respondents. The respondents were thus the proper defendants in the action: at [36] and [37].

(7) A reasonable cause of action had been disclosed and there were triable issues involved. As such a full hearing should be given for the parties to adduce evidence and to present their arguments before the court: at [38].

Case(s) referred to

Aron Salomon (pauper) v A Salomon and Company, Limited [1897] AC 22 (folld)

C Evans & Sons Ltd v Spritebrand Ltd [1985] 1 WLR 317; [1985] 2 All ER 415 (folld)

Cassidy v Daily Mirror Newspapers, Limited [1929] 2 KB 331 (refd)

Daimler Company, Limited v Continental Tyre and Rubber Company (Great Britain), Limited [1916] 2 AC 307 (folld)

Drummond-Jackson v British Medical Association [1970] 1 WLR 688; [1970] 1 All ER 1094 (folld)

Hubbuck & Sons, Limited v Wilkinson, Heywood & Clark, Limited [1899] 1 QB 86 (folld)

Lennard's Carrying Company, Limited v Asiatic Petroleum Company, Limited [1915] AC 705 (folld)

Lonrho plc v Fayed (No 5) [1993] 1 WLR 1489 (refd)

Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd [1983] Ch 258; [1983] 2 All ER 563 (folld)

Parmiter v Coupland (1840) 151 ER 340 (refd)

PLG Research Ltd v Ardon International Ltd [1993] FSR 197 (distd)

Pullman v Walter Hill & Co, Limited [1891] 1 QB 524 (refd)

Rainham Chemical Works, Limited (in liquidation) v Belvedere Fish Guano Company, Limited [1921] 2 AC 465 (folld)

Sim v Stretch [1936] 2 All ER 1237 (refd)

Wah Tat Bank Ltd v Chan Cheng Kum [1974–1976] SLR(R) 284; [1975–1977] SLR 1 (folld)

Legislation referred to

Rules of Court 1996, The O 18r 12, O 18r 19, O 18r 19(1), O 18r 19(1)(*a*), O 18r 19(1)(*b*), O 18r 19(1)(*c*), O 18r 19(1)(*d*), O 18r 19(2)

12 November 1997

Yong Pung How CJ (delivering the grounds of judgment of the court):

1 This appeal arises out of the decision of Lai Siu Chiu J on 2 April 1997 to strike out the appellants' claim for libel pursuant to O 18 r 19 Rules of Court 1996 against the first, fourth and fifth respondents.

2 The appellants are advocates and solicitors practising as a firm. They were initially appointed by Promenade Properties Pte Ltd ("the company") to represent the company in the sale and purchase transaction of a building owned by the company ("the Promenade"). The respondents were the directors of the company during the relevant period. The action for defamation initiated by the appellants centred around a board resolution passed by the respondents on 10 January 1997 to dismiss the appellants as solicitors in the transaction. The appellants alleged that the resolution contained defamatory remarks against them.

3 The appellants, being dissatisfied with Lai Siu Chiu J's decision, petitioned to this court to reverse the learned judge's finding and to restore the order made by the assistant registrar below to dismiss the first, fourth and fifth respondents' application to strike out the action.

4 The appeal came up for hearing before us on 20 October 1997. After hearing lengthy arguments by counsel on both sides, we allowed the appeal and dismissed the respondents' application to strike out the writ of summons and statement of claim. We will now set out the grounds of our decision.

The facts

5 On 20 February 1997, the appellants brought an action against the first to fifth respondents, directors of the company, by way of a writ of summons, alleging that the respondents had falsely and maliciously, jointly and/or severally, published and/or caused to be published, defamatory words which concerned the way the appellants conducted their affairs in their office and profession. The basis upon which the appellants founded their claim was a board resolution dated 10 January 1997.

6 Before going into the alleged defamatory words in question, some mention of the background to the passing of the resolution was required as it provided a clearer picture of the context in which the resolution was made. The first to fifth respondents, together with three others, (who were not parties to the action), were directors of the company. On 25 September 1996, the Promenade, a piece of property owned by the company, was sold for $270,865,000. By a shareholders' resolution dated 25 September 1996, the appellants, together with another firm, Wee Ramayah & Partners, were appointed to jointly and severally act and represent the company in the sale. The deposit, which amounted to 10% of the purchase price, was held by the appellants in a fixed deposit account, with two lawyers (one from the appellants and one from Lee & Lee, the purchaser's solicitors) as joint signatories to the moneys held under stakeholdership. The company wanted the appellants to confirm that the interest on the stakeholders' deposit would be paid to the company. The alleged defamatory statements were made in relation to the dismissal of the appellants as the company's solicitors in the transaction after unsatisfactory replies by the appellants as to the entitlement of the interest accrued from the 10% deposit.

7 The contents of the directors' resolution were as follows:

> Directors' Resolution in Writing
>
> Whereas the directors of the company were presented with the final form of sale and purchase agreement by Probo Pacific Ltd and required to sign the same on the basis that it had been negotiated and agreed with the purchaser.
>
> Whereas at the advice of Messrs Wee Ramayah, the company (or its authorised persons) wrote to Messrs Gabriel Peters as soon as practicable after the execution of the sale and purchase agreement with the purchaser, to require them to confirm that the interest on the stakeholders' deposit would be paid to the company.
>
> Whereas Messrs Gabriel Peters has persistently refused to reply to the same. Whereas Messrs Gabriel Peters failed to inform or advise the company with respect to the issue of stakeholders' interest.
>
> Whereas Messrs Gabriel Peters are claiming a right to stakeholders' interest without prior agreement despite the company's clear position that it has never authorised Messrs Gabriel Peters to retain such interest for their own account.
>
> It is hereby resolved as follows:
>
>> 1 The company do and hereby dismiss Messrs Gabriel Peters and terminate their appointment as joint and several solicitors for the sale of the company's property known as 'The Promenade', 300 Orchard Road.

2 The majority directors be and are hereby authorised to take the necessary to (i) to transfer the joint stakeholder from Messrs Gabriel Peters to Messrs Wee Ramayah. and (ii) seek to recover all stakeholders' interest from Messrs Gabriel Peters.

3 In connection but without limitation thereto, the majority directors be and are hereby authorised to:

i lodge a complaint in the name of the company against Messrs Gabriel Peters with the Law Society of Singapore; and

ii commence civil action in the name of the company against Messrs Gabriel Peters.

4 The majority directors be and are hereby authorised to take all necessary action in relation to the same.

5 That the majority directors be and are hereby authorised to (i) appoint such firm of lawyers to act for the company in respect of the aforedescribed actions as they shall deem fit and (ii) determine and agree their fees with them.

Dated 10 January 1997

8 In their statement of claim, the appellants contended that the above defamatory remarks were published and republished to a list of third parties, including the following:

(a) the person to whom it was dictated and/or was instructed to so dictate;

(b) the person who transcribed it onto the computer;

(c) the person or persons who filed or otherwise dealt with the said publication or copy thereof after it was signed by the respondents;

(d) Wee Ramayah & Partners;

(e) Lee & Lee;

(f) Drew & Napier;

(g) Thomas Enslow;

(h) Michael Chye; and

(i) Gosta Pjorkenstam.

The appellants said that the words, in the context in which they were published, in their natural and ordinary meaning and/or by way of innuendo, meant and were understood to mean, that:

(a) the appellants were not diligent in the handling of legal matters of their clients in that the appellants had failed to advise the company on the issue of interest on stakeholders' moneys;

(b) the appellants did not pay proper attention to their clients' interests in that the appellants had failed or had neglected to bring to the company's attention the issue of the interest on the stakeholders' moneys;

(c) the appellants' behaviour was unbefitting of that of advocates and solicitors;

(d) the appellants were unprofessional in the conduct and handling of their clients' matters;

(e) the appellants did not take proper care of their clients' interests;

(f) the appellants' conduct was improper, unethical and unbecoming in their practice as advocates and solicitors;

(g) the appellants' conduct was improper in that they refused to respond to the clients' correspondence;

(h) the appellants' conduct was motivated by self-interest, to the prejudice and detriment of their clients;

(i) the appellants had acted dishonestly and/or unlawfully in retaining the interest on stakeholders' moneys; and

(j) the appellants were dishonest, lacking in integrity and not of good character.

9 On 3 March 1997, the first, fourth and fifth respondents filed a summons in chambers to strike out the appellants' claim under O 18 r 19(1)(*a*) Rules of Court 1996. The second and third respondents were not parties to the application. The hearing came before the assistant registrar on 7 March 1997, who dismissed the application. The respondents relied broadly on three arguments. The first was that the respondents, being directors of the company, made the directors' resolution in the course of their duties as company directors and in the best interests of the company. Thus, they could not be sued personally for any alleged libel contained in the resolution. The second argument was that the appellants had brought this action for an unfair collateral purpose, namely, to apply pressure on the respondents to refrain from taking any action against the appellants as authorised by the resolution. The respondents' counsel, in support of this argument, pointed to several factors: the company had not been named in the action; the order in which the respondents had been named in the writ; the specific reference to the first respondent, the former Chief Justice, in the paragraphs in the statement of claim dealing with aggravated damages. Thirdly, there was no cause of action against the first respondent as there was no allegation that he committed the act of publication. With regard to the first argument, the assistant registrar felt that, if it was the respondents' case that they acted in the best interests of the company and in their capacity as directors of the company, then all this meant was that they might be able to raise the defence of qualified privilege. It did not mean that the respondents had no reasonable cause of action against them. As for the second argument, the assistant registrar was of the view that the factors were insufficient grounds on which to conclude that the respondents were proceeding against the appellants for unfair collateral purposes. The last argument was also rejected as para 2 of the statement of claim set out the allegation that all the respondents jointly and/or severally published the allegedly libellous resolution. The complaint put forward by the respondents was really that there were no particulars as to how the first respondent participated in the act of publication. This, the assistant registrar felt, could be made the subject of an application for further and better particulars.

10 The first, fourth and fifth respondents filed a defence on 17 March 1997, without prejudice to their application to have the action struck out and to their contention that the statement of claim disclosed no reasonable cause of action or was scandalous, frivolous and vexatious or was an abuse of process. They

averred that the appellants' claim was against the company and that there was no cause of action against the three respondents in their personal capacity as directors of the company in the signing of the board resolution on 10 January 1997.

11 The respondents filed a notice of appeal to the judge of the High Court in chambers on 10 March 1997 from the assistant registrar's decision. Lai Siu Chiu J allowed the appeal and ordered the writ of summons and statement of claim to be struck out.

The trial judge's decision

12 Lai Siu Chiu J based her decision essentially on the ground that the appellants had brought the action against the wrong defendants. The learned Judge was of the view that they should have brought an action against the company and not the respondents. This was so since the resolution passed was the act of the company. There was no question of *ultra vires* or that the directors had acted outside their scope of powers. There was also no evidence to suggest that the respondents had authorised, directed and procured the company to pass the resolution, thus subjecting them to personal liability under the test laid down in *C Evans & Sons Ltd v Spritebrand Ltd* [1985] 2 All ER 415. Besides, the requirements espoused in *C Evans & Sons Ltd v Spritebrand Ltd* to make the respondents personally liable for the company's acts were not pleaded in the statement of claim. The company was not even made a co-defendant.

13 Lai J was also of the opinion that the assistant registrar had erred in referring to the defence of the respondents filed subsequent to the statement of claim and in taking the view that any shortcomings in the statement of claim could be rectified by the filing of further and better particulars. This was contrary to O 18 r 19, which stipulated that no evidence was admissible under O 18 r 19(1)(*a*).

The appeal

14 The appellants submitted that Lai Siu Chiu J erred in law and in fact by striking out the writ of summons and statement of claim on the ground that it revealed no reasonable cause of action. They raised three main grounds of appeal. The first ground was that the learned judge should not have held that the appellants' claim was not actionable because the alleged defamatory words were published by the respondents in the course of acting as directors. It was submitted that a director could be personally liable for a tort committed by the company if he himself performed those acts constituting the tort, or if he authorised, directed or procured others to perform those acts on the company's behalf. A plaintiff could choose which of the joint tortfeasors he wished to sue. The appellants should thus not be faulted for bringing an action against the respondents and not the company or the other three directors. The second ground was that the learned judge was wrong in holding that the statement of claim did not disclose an arguable case that the respondents had published or caused the publication of the words complained of. The statement of claim revealed a *prima facie* case against the respondents. What was alleged was that the respondents committed the acts of defamation personally and were personally liable for the publication, not that the respondents procured the company to do those acts. The issue of *ultra vires* was thus irrelevant to the matter. The third ground of appeal was that the learned judge should not have taken into account, on an application under O 18 r 19(1)(*a*), matters extrinsic to the statement of claim. The question of ulterior or collateral motive was an irrelevant consideration as it was an aspect of abuse of process under O 18 r 19(1)(*d*), which was not relied on by the respondents in their summons in chambers application. Similarly, the defence filed by the respondents should not have been looked at.

15 The respondents rehashed their arguments put forth before the assistant registrar and Lai Siu Chiu J. A few salient points of their submissions were noted. First, it was submitted that the appellants had brought the action against the wrong party. It was not shown that the respondents instigated or procured the commission of the alleged defamation. Thus, they could not be personally liable. The right party to the action was the company itself. Besides, it was not pleaded in the statement of claim that the action was brought because the respondents had authorised, directed and procured the company to commit the alleged libel. It was further submitted that there was no reasonable cause of action against the respondents from a reading of the

pleadings in the statement of claim. In particular, there was no cause of action against the first respondent as the appellants had been unable to show that he had published or was responsible for the publication of the resolution.

16 In considering this appeal, the following issues in this area of law were, in our view, pertinent to the outcome of the petition:

(a) the principles for striking out an action under O 18 r 19 Rules of Court;

(b) the elements in the tort of libel;

(c) whether the resolution by the majority directors was a resolution of the board and hence an act of the company;

(d) whether individual directors can be personally liable for a tortious act committed by the company; and

(e) whether the writ of summons and statement of claim should be struck out under O 18 r 19.

We considered them in turn.

The principles for striking out an action under order 18 rule 19 Rules of Court

17 Under O 18 r 19, the court may strike out any pleading and order the action to be dismissed on any of the grounds in O 18 rr 19(1)(*a*)–(*d*). O 18 r 19 provides:

(1) The court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that —

(*a*) it discloses no reasonable cause of action or defence, as the case may be;

(*b*) it is scandalous, frivolous or vexatious;

(*c*) it may prejudice, embarrass or delay the fair trial of the action; or

(*d*) it is otherwise an abuse of the process of the Court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1)(*a*).

(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.

18 In general, it is only in plain and obvious cases that the power of striking out should be invoked. This was the view taken by Lindley MR in *Hubbuck & Sons, Limited v Wilkinson, Heywood & Clark, Limited* [1899] 1 QB 86 at 91. It should not be exercised by a minute and protracted examination of the documents and facts of the case in order to see if the plaintiff really has a cause of action. The practice of the courts has been that, where

an application for striking out involves a lengthy and serious argument, the court should decline to proceed with the argument unless, not only does it have doubts as to the soundness of the pleading but, in addition, it is satisfied that striking out will obviate the necessity for a trial or reduce the burden of preparing for a trial.

19 In their application for striking out, the respondents relied on O 18 r 19(1)(*a*) as the ground in support of their application – that the writ of summons and statement of claim disclosed no reasonable cause of action. According to O 18 r 19(2), no evidence shall be admissible on an application under O 18 r 19(1)(*a*). The only exception to this prohibition against adducing evidence is where there is an affidavit filed in support of the originating summons.

20 In the hearings both before the assistant registrar and Lai Siu Chiu J, the arguments raised dealt not only with O 18 r 19(1)(*a*), but also with O 18 r 19(1)(*d*). We were of the view that, despite the fact that the respondents cited only O 18 r 19(1)(*a*) in support of their application in the summons in chambers, they should not be prohibited from relying on the other three grounds in O 18 r 19(1). The appellants had two occasions, one before the assistant registrar, and the other before Lai Siu Chiu J, to object to the respondents' arguments based on the other grounds besides O 18 r 19(1)(*a*). This, they did not do. They should not now be able to raise this point before us as they had acquiesced to the respondents' arguments on grounds not within the parameters of their pleading in the summons in chambers. Besides, it was not shown that they had suffered any prejudice by reason of this. Ultimately, it was the decision of this court to determine, in the interests of efficacy and in ensuring that the parties were not subjected to a long and tedious trial on an obviously hopeless case, whether the action should be struck out. The court should not be confined to considering only the ground raised by the applicant for striking out. Instead, it should be given the flexibility to consider the other three grounds under O 19(1) [r 19(1)] should the case at hand merit such consideration. It should not be unduly hampered by some procedural irregularity. Frequently, an order for striking out can be based on more than one of the four grounds in O 18 r 19(1). In this regard, we found that the appellant's contention that the respondents should not be allowed to raise arguments based on O 18 r 19(1)(*d*) should be rejected.

21 The guiding principle in determining what a "reasonable cause of action" is under O 18 r 19(1)(*a*) was succinctly pronounced by Lord Pearson in *Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094. A reasonable cause of action, according to his lordship, connotes a cause of action which has some chance of success when only the allegations in the pleading are considered. As long as the statement of claim discloses some cause of action, or raises some question fit to be decided at the trial, the mere fact that the case is weak and is not likely to succeed is no ground for striking it out. Where a statement of claim is defective only in not containing particulars to which the defendant is entitled, the application should be made for particulars under O 18 r 12 and not for an order to strike out the statement.

22 The term, "abuse of the process of the Court", in O 18 r 19(1)(*d*), has been given a wide interpretation by the courts. It includes considerations of public policy and the interests of justice. This term signifies that the process of the court must be used *bona fide* and properly and must not be abused. The court will prevent the improper use of its machinery. It will prevent the judicial process from being used as a means of vexation and oppression in the process of litigation. The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed and will depend on all the relevant circumstances of the case. A type of conduct which has been judicially acknowledged as an abuse of process is the bringing of an action for a collateral purpose, as was raised by the respondents. In *Lonrho plc v Fayed (No 5)* [1993] 1 WLR 1489, Stuart-Smith LJ stated that, if an action was not brought *bona fide* for the purpose of obtaining relief but for some other ulterior or collateral purpose, it might be struck out as an abuse of the process of the court.

The elements in the tort of libel

23 The elements of libel were considered briefly as it impinged on the determination of the application for striking out. First and foremost, libel, as opposed to slander, is actionable *per se*. There is no need to prove special damage. Special damage here means material loss capable of estimation in money.

24 There are three elements of liability. The first element is that the allegation must be defamatory. What is defamatory depends largely on the circumstances of each case. We proposed a working definition of "defamatory": a defamatory statement is one which injures the reputation of another by exposing him to hatred, contempt or ridicule (*per* Parke B in *Parmiter v Coupland* (1840) 151 ER 340 at 342), or which tends to lower him in the estimation of right-thinking members of society generally (*per* Lord Atkin in *Sim v Stretch* [1936] 2 All ER 1237 at 1240). The defendant need not have ascertained beforehand the likely effect of his words as long as his writing was voluntary. What is relevant is that the words were understood by others in a defamatory sense. As Russell LJ stated in *Cassidy v Daily Mirror Newspapers, Limited* [1929] 2 KB 331 at 354, liability for libel does not depend on the intention of the defamer, but on the fact of defamation. The second element is that the defamatory statement must refer to the plaintiff. The identification of the plaintiff depends on whether reasonable persons would believe that the words complained of referred to him. The third element is that there must be publication of the statement. In *Pullman v Walter Hill & Co, Limited* [1891] 1 QB 524, Lord Esher MR described publication as the making known of the defamatory matter after it has been written to some person other than the person of whom it is written.

Whether the resolution by the majority directors was a resolution of the board and hence an act of the company

25 It is a fundamental concept in company law that the company acts through its organs. The two organs of the company are the board of directors and the members of the company in general meeting. The acts of the two organs are deemed to be acts by the company itself. The decisions of the members are expressed through resolutions passed in general meeting. Similarly, decisions of the board of directors are reflected in the resolutions of the board. A board resolution is passed by a simple majority of the directors present at the board meeting. Another basic concept is the separation of the company's powers between the two organs. Generally, the managerial powers are vested in the board. The memorandum and articles of association can, of course, expressly provide for managerial decisions to be made by the general meeting instead. When the organs of the company act within their scope of powers, they act as the company, not just on behalf of the company. There is no question of agency involved. Their acts are the acts of the company.

26 The question which arose was this: what acts of the board are the acts of the company? In particular, is a resolution passed by the majority of the board the resolution of the company and hence, an act of the company?

27 Any act of the board, for example, in commencing litigation proceedings, appointing of new directors, issue of new shares, is an act of the company. There is no doubt that, when members in general meeting pass a resolution, that resolution represents the decision of the company. This is because the company is made up of the shareholders. The shareholders in general meeting are the company. Similarly, the members, in approving by resolution, an irregular course of action by the directors which is outside the scope of the board's powers, will make that the act of the company, *per Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* [1983] 2 All ER 563. An act which has the unanimous, albeit informal, approval of the members, is a corporate act and is binding on the company. The resolution of the general meeting is a decision of the company which will lead to a course of action by the company. What of resolutions by the board? Are they decisions of the company? We took the view that a resolution passed by the board, acting within its sphere of competence, should be taken as the company's decision. Decisions of the board are made by the passing of resolutions. These resolutions in turn form the basis of the validity of any acts by the board in furtherance of the intentions reflected in the resolutions. The acts of the board are the acts of the company, if carried out within the board's constituent power. As an organ of the company, it is a logical conclusion that any resolution of the board is a decision of the company. Thus, in furtherance of a resolution of the board to that effect, the acts of the board of directors will be acts of the company. There is an important caveat to this: the resolution must be one which is within the scope of the board's powers to pass. A resolution of the board is a decision of the board and, so it follows, an "act" of the board. The "act" lies in the passing of the resolution itself in coming to a decision on a matter within its powers. The act of the board in the form of a resolution is an act of the company.

28 In the present situation, the resolution of the board was carried out pursuant to the powers of the board. The board made a managerial decision to dismiss the appellants as the company's solicitors in the sale and purchase transaction. This, the board had the power to do.

29 Lai Siu Chiu J accepted the respondents' argument that, since the word "company" was repeated ten times in the resolution, the resolution was that of the company's and that the company was the proper defendant, not the respondent directors. With great respect to the learned judge, we found that this conclusion was not warranted. The fact that the word "company" was used repeatedly did not in any way make it any less a board resolution. It was not a natural inference that the resolution was an act of the company simply because the word "company" was used. This would be reading too much into the resolution. Incidentally, the resolution was headed "directors' resolution in writing". The phrasing of the resolution should not be a basis for determining the point of law which arose as to whether a board resolution was an act of the company. We should rely, instead, on first principles of company law and not come to a view on a legal issue based solely on the wording of a resolution.

Whether individual directors can be personally liable for a tortious act committed by the company

30 In this case, the alleged tortious act committed by the company was the alleged libel contained in the board resolution on 10 January 1997. We held that the board resolution passed by the majority directors was an act of the company. That being the case, could the directors be personally liable for a tortious act of the company, even though they were acting within the scope of their powers as a board? If so, what were the requisite conditions before they could be made so liable?

31 It is clearly established in law that the company is liable in tort for all wrongful acts and omissions of the persons who control the management or operation of its business undertaking when they are acting within their scope of powers as such (*Lennard's Carrying Company, Limited v Asiatic Petroleum Company, Limited* [1915] AC 705 at 713–714). In the present case, the board resolution was an act of the company. It naturally followed that the company was liable for its own act since an act of the organ of the company was the act of the company itself. There was no agency or master-servant relationship involved and no issue of vicarious liability.

32 It is a fundamental principle of company law, as laid down in the landmark decision of *Aron Salomon (pauper) v A Salomon and Company, Limited* [1897] AC 22, that a company is a separate legal entity from its members or shareholders. As such, the members are not liable to be sued in respect of a breach of the company's obligations. If a company incurs legal liabilities, the company must be sued. The members cannot be sued in respect of the company's liabilities since they are not in law responsible for the company's acts, *per* Lord Parker in *Daimler Company, Limited v Continental Tyre and Rubber Company (Great Britain), Limited* [1916] 2 AC 307. The anxiety of the courts in preserving the separate legal personality can be seen from the fact that the protection of the corporate veil has been extended to the directors and the management. It has been held in the United Kingdom that proof of the commission of a tort by a company does not automatically prove that the directors who manage its affairs are guilty of the tort as well (*Rainham Chemical Works, Limited (in liquidation) v Belvedere Fish Guano Company, Limited* [1921] 2 AC 465, *Wah Tat Bank Ltd v Chan Cheng Kum* [1974–1976] SLR(R) 284, *C Evans & Sons Ltd v Spritebrand Ltd* [1985] 2 All ER 415).

33 There is, however, an exception to the general principles above. It has been judicially laid down that, where directors order an act by the company which amounts to a tort by the company, they may be liable as joint tortfeasors on the ground that they have procured or directed the wrong to be done. In *Wah Tat Bank Ltd v Chan Cheng Kum* [1974–1976] SLR(R) 284, Lord Salmon, delivering judgment on behalf of the Privy Council, opined at [8]:

> No doubt the fact that the respondent is chairman and managing director of HSC does not of itself make him personally liable in respect of that company's tortious acts. A tort may be committed through an officer or servant of a company without the chairman or managing director being in any way implicated. There are many such cases reported in the books. If, however, the chairman or managing director

> procures or directs the commission of the tort he may be personally liable for the tort and the damage flowing from it. *Performing Right Society Ltd v Ciryl Theatrical Syndicate Ltd* [1924] 1 KB 1 *per* Atkin LJ at 14 and 15. Each case depends upon its own particular facts.

In that case, the respondent was found jointly liable with the company for the tort of conversion as he, as chairman and managing director of the company, HSC, personally agreed with the directors of one of HSC's customers the terms on which HSC would continue to wrongfully convert goods consigned to the banks just as they had done in the past. In *Rainham Chemical Works Ltd (in liquidation) v Belvedere Fish Guano Co Ltd* [1921] 2 AC 465, Lord Buckmaster said of the issue of personal liability of the managing directors who were in sole control of the company for a company's tort:

> If the company was really trading independently on its own account, the fact that it was directed by Messrs Feldman and Partridge would not render them responsible for its tortious acts unless, indeed, they were acts expressly directed by them. If a company is formed for the express purpose of doing a wrongful act or if, when formed, those in control expressly direct that a wrongful thing be done, the individuals as well as the company are responsible for the consequences, but there is no evidence in the present case to establish liability under either of these heads.

More recently, in *C Evans & Sons Ltd v Spritebrand Ltd* [1985] 2 All ER 415, Slade LJ reiterated the principles set down in *Rainham Chemical Works Ltd (in liquidation) v Belvedere Fish Guano Co Ltd* (*supra*) and *Wah Tat Bank Ltd v Chan Cheng Kum* (*supra*). Slade LJ was of the opinion that it was not appropriate to attempt a comprehensive definition of the circumstances in which a director of a company who had authorised, directed and procured a tortious act to be done would be personally liable. Whether he should be so liable depended on the particular circumstances of the case. His lordship went on to say, *obiter*, that there was no general requirement that a director would only be liable for torts committed by a company where he had acted recklessly or where he knew that the company's acts were tortious. Slade LJ opined at 424:

> The authorities, as I have already indicated, clearly show that a director of a company is not automatically to be identified with his company for the purpose of the law of tort, however small the company may be and however powerful his control over its affairs. Commercial enterprise and adventure is not to be discouraged by subjecting a director to such onerous potential liabilities. In every case where it is sought to make him liable for his company's torts it is necessary to examine with care what part he played personally in regard to the act or acts complained of …
>
> I readily accept that (the statements of Lord Buckmaster and Atkin LJ in *Rainham Chemical Works Ltd (in liquidation) v Belvedere Fish Guano Co Ltd* [1921] 2 AC 465 and *Performing Right Society Ltd v Ciryl Theatrical Syndicate Ltd* [1924] 1 KB 1 respectively) … cannot be regarded as a precise and unqualified statement of the principles governing a director's personal liability for his company's torts; I do not think they were so intended. In particular, I would accept that, if the plaintiff has to prove a particular state of mind or knowledge on the part of the defendant as a necessary element of the particular tort alleged, the state of mind or knowledge of the director who authorised or directed it must be relevant if it is sought to impose personal liability on the director merely on account of such authorisation or procurement; the personal liability of the director in such circumstances cannot be more extensive than that of the individual who personally did the tortious act. If, however, the tort alleged is not one in respect of which it is incumbent on the plaintiff to prove a particular state of mind or knowledge (*eg* infringement of copyright) different considerations may well apply.

34 The issue of the personal liability of a director who is acting within his sphere of competence is a perplexed one, especially since the act which is done is an act of the company, for which the company should be wholly responsible. What is at stake is a very difficult question of policy. On the one hand, there is the principle that a company is separate and distinct in law from its shareholders and directors, and it is in the interests of the commercial purposes served by the incorporated enterprise that they should as a general rule enjoy the benefit of the limited liability afforded by incorporation. On the other hand, there is the principle that everyone should answer for his tortious acts. A cause of concern is that, if the directors are made liable too easily, many commercial decisions will be fraught with the danger of personal liability being imposed on the

directors, who might then become overcautious in making management decisions lest it render them vulnerable to legal suits. This will in turn be disadvantageous to the company commercially. On the other side of the coin, a director of a company should not be allowed to escape personal liability to third parties for torts which he personally committed by his own hand or mouth merely because he committed the tort in the course of carrying out his duties as a director of the company.

35 After giving much thought to the opposing considerations above, we came to the conclusion that the principles echoed in *C Evans & Sons Ltd v Spritebrand Ltd* and its predecessor cases represent the position as to the liability of directors for a tort committed by the company. It is an established principle of law that a director can, in certain circumstances, be liable for a tort committed by the company if he directed or procured the commission thereof. Employees or servants of the company can be potentially liable personally for torts committed in the course of employment, if it is found that responsibility can be fixed on the particular individual in question. A director should not be able to escape personal liability for such torts any more than can an employee acting in the course of his employment for a company, or an agent acting in the course of his agency for a company. In our judgment, it would offend common sense if the law of tort were to treat the director of the company any more kindly than the servant, who took his orders from the director. Of course, whether a director is so liable depends very much on the factual situation at hand. The level of his involvement needs to be looked at in determining if he did authorise, direct or procure the commission of the tort. This is a matter of degree. If a particular tort is one which requires the satisfaction of the proof of *mens rea* before personal liability can be founded, then the state of mind of the director when he authorised, directed or procured the act will be relevant. This is only logical as a director should not be more vulnerable to tortious liability than any other individual. However, if the tort is one for which liability can be imposed in the absence of any intention or state of mind of the tortfeasor, the knowledge or the recklessness of the director as to whether the act was tortious will not be relevant.

36 Applying the principles set out above, we had no problem in coming to the conclusion that the respondents could be potentially personally liable for the alleged libel committed by the company, if the appellants' allegations were made out at a full trial. The respondents were the ones who passed the board resolution. It was argued by the respondents and accepted by Lai Siu Chiu J that, since the names of the directors were not inserted in the resolution, it could not be said that the respondents were the ones who procured or directed the passing of the resolution. We rejected this contention. The resolution was stated to be a directors' resolution. It being so, it was not relevant that the names of the individual directors were not inserted therein. From a perusal of the resolution, it was a logical inference that the respondents were *prima facie* participants in the passing of the resolution. As a matter of fact, we found that the role played by the respondents went further than simply "directing or procuring" the commission of the tortious act, the threshold for imputing personal liability to a director. *Prima facie*, they were the ones who passed and phrased the wording of the resolution. The gist of the alleged libel lay in the wording of the resolution itself, not in any act pursuant to the resolution. The passing and the publication of the resolution and the words used therein were the very acts which gave rise to the action. The respondents' counsel dealt at length with the case of *PLG Research Ltd v Ardon International Ltd* [1993] FSR 197. We remarked that this case was irrelevant to the issue at hand as it dealt with a director who had facilitated, as opposed to procured, a tort. It was held in that case that a facilitator of a tort would not be liable as a joint tortfeasor. Here, there was no question of a facilitation of a tort. The respondents were *prima facie* the primary participants to the act. To establish liability for libel, there is no requirement of knowledge or intention on the part of the alleged defamer. As such, the state of mind of the respondents when passing the resolution necessitated no consideration. Counsel for the respondents submitted that it was not pleaded in the statement of claim that there had been publication by the first respondent, publication being an element which had to be shown before liability could be attached. From that, counsel argued, the first respondent should not have been made a defendant. Much reliance was placed on para 4 of the statement of claim in support of this argument, which read:

> The publication referred to in para 2 hereinabove was enclosed with a facsimile correspondence signed by the fourth and fifth defendants and addressed to Messrs Lee & Lee on 13 January 1997. Messrs Lee & Lee at all material times carry on the business of advocates and solicitors in Singapore.

We did not see how para 4 could be interpreted to suggest that the first respondent was not privy to the publication of the alleged defamatory remarks in the resolution. Paragraph 4 merely stated that the resolution was sent to Lee & Lee together with a facsimile correspondence signed by the fourth and fifth defendants. In no way could it be interpreted to mean that the publication was made only by the fourth and fifth defendants, as counsel tried valiantly to impress upon us. On the contrary, it was unequivocally pleaded in para 2 of the statement of claim that all the respondents, including the first respondent, published and/or caused to be published the defamatory words contained in the resolution. Paragraph 2 read as follows:

> On the 10th day of January 1997, the defendants falsely and maliciously jointly and/or severally *published and/or caused to be published* of and concerning the plaintiffs in the way of their said office and profession and in relation to their conduct therein, the following defamatory words as underlined — …

Whether the writ of summons and statement of claim should be struck out under order 18 rule 19

37 We found that the directors' resolution had been passed within the board's powers. Hence, it was an act of the company for which the respondents could be personally liable. Not only did the respondents direct and procure the passing of the resolution, *prima facie*, they were the primary participants in the commission of the alleged libel. The appellants had the choice as to who they wanted to bring the action against – the company or the respondents. The respondents were thus the proper defendants in this action.

38 The only issue which remained for us to consider was whether, from the statement of claim, there was a reasonable cause of action against the respondents. We came to the conclusion that a reasonable cause of action had been disclosed. There were triable issues involved. From a reading of the statement of claim, all the relevant facts giving rise to a claim of libel had been fully pleaded. The alleged defamatory words were particularised and their defamatory effect described. The alleged defamatory words clearly referred to the appellants. The particulars of the publication by the respondents to the various third parties were listed out. A *prima facie* case had been made out. We felt that the case against the respondents was not devoid of merit. A full hearing should be given for the parties to adduce evidence and to present their arguments before the court.

39 The court's power to strike out an action pursuant to O 18 r 19 is a draconian one. The discretion should not be exercised too readily unless the court is convinced it has been clearly shown that the plaintiff's case is wholly devoid of merit. This, the respondents failed to do.

40 For all the reasons above, we allowed this appeal and set aside Lai Siu Chiu J's order to strike out the action.

Headnoted by Chan Xiaohui Darius.

BACK TO TOP

Copyright Â© Singapore Academy of Law.