IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1993] SGHC 126

OS 936/1992

Between

Xiamen International Bank

… Plaintiff

And

Sing Eng (Pte) Ltd

… Defendant

GROUNDS OF DECISION

Res Judicata — Issue estoppel; Companies — Shares — Registration; Companies — Directors — Powers; Companies — Shares — Transfer

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Xiamen International Bank and Others v Sing Eng (Pte) Ltd

[1993] SGHC 126

OS 936/1992
Judith Prakash JC
07 June 1993

1 In this case I made the following orders:

> (1) That the register of members of the defendants be rectified by striking out the names of Lie Mo Meng also known as Lie Moeng Kieng also known as Mu`Min Ali Gunawan and George MK Lee also known as Lie Mo Kwang also known as Gunadi Gunawan therefrom as the holders of the following shares of the defendants:

2 Particulars

3 Distinctive Nos

4 Certificate Number of From To

5 Number shares

6 22 113,450 75,431 188,880

7 (Registered owner:161,480 455,581 614,060

8 Lie Mo Kwang) 225,000 1,104,273 1,329,272

9 15,000 1,854,279 1,869,278

10 23 113,450 188,881 302,330

11 (Registered owner:161,480 614,061 775,540

12 Li Moeng Kieng) 225,000 1,329,273 1,554,272

13 15,000 1,869,279 1,884,278

14 1,029,860

15 and by inserting in lieu thereof the name of the third plaintiffs, XIB (Nominees) Ltd, as holder of the said shares, and that notice of such rectification be given to the Registrar of Companies.

> (2) The defendants do forthwith deliver to the third plaintiffs the share certificates for the said 1,029,860 shares of $1 each in the capital of the defendants, Sing Eng (Pte) Ltd, issued in the name of XIB (Nominees) Ltd.
>
> (3) The defendants do pay the plaintiffs` costs of and incidental to this application.

16 The defendants have appealed against all of the above orders.

17 **The facts: Background**

18 This application was the third proceeding instituted in the legal battle between the plaintiffs and defendants which has been running since May 1987. The basic details are set out below. More particulars will be given, where necessary, later in this judgment.

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19 The defendant company (`the company`) was incorporated in Singapore in 1971. It has an authorized share capital of 2,500,000 ordinary shares of $1 each out of which 1,894,278 shares have been issued and paid up in full. At all material times Lie Mo Meng also known as Lie Moeng Kieng also known as Mu`Min Ali Gunawan (`Mo Meng`) and George MK Lee also known as Lie Mo Kwang also known as Gunadi Gunawan (`Mo Kwang`) each held 514,930 shares in the company. Together they held a total of 1,029,860 shares or approximately 54.4% of the paid-up capital. Until March 1992, both Mo Meng and Mo Kwang (together `the Lies`) were also directors of the company.

20 The first plaintiff (`Xiamen Bank`) is a bank established in China and 36.75% of its shares are owned by the second plaintiff (`PIC`) which is a company listed on the Hong Kong Stock Exchange with a paid-up capital of HK$243m. It is an investment holding company. The third plaintiff (`XIB Nominees`) is another Hong Kong company and is partly owned by a principal operating subsidiary of Xiamen Bank.

21 This saga began on 16 March 1986 when Mo Meng executed a guarantee in favour of Xiamen Bank. By a memorandum of charge bearing the same date, he charged all the shares held by him in the company to Xiamen Bank as security for the due payment and discharge of his obligations under the guarantee. On 21 March 1986, Mo Kwang executed an identical guarantee in favour of Xiamen Bank and, similarly, on the same date secured his obligations under his guarantee by a memorandum of charge over all his shares in the company. The terms of the two guarantees are identical and so are the terms of the two memoranda of charge. Subsequently, each of the Lies deposited with Xiamen Bank the certificates relating to the shares held by him, and also executed and delivered to Xiamen Bank blank transfers of such shares.

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22 In February 1987, Xiamen Bank wanted to register all the shares charged to them by the Lies (`the shares`) in the name of its nominee, XIB Nominees. It completed the blank transfers and, on 9 May 1987, its solicitors forwarded the two transfers and the share certificates to the company for registration. They requested that new share certificates be issued in favour of XIB Nominees. The company did not respond to this notice.

23 On 26 May 1987 Xiamen Bank sent a written demand to each of the Lies demanding payment by them of the amounts due under the guarantees. No payment was received and Xiamen Bank proceeded to enforce the charges over the shares. On 22 June 1987 its solicitors served on the company a transfer notice under art 34 of the articles of association of the company (`the articles`). By this notice Xiamen Bank, which was described as a person entitled to transfer the shares, gave notice of its desire to transfer the shares.

24 No reply was received from the company. On 31 July 1987 Xiamen Bank, pursuant to the power of sale contained in the guarantees and the memoranda of charge, entered into a sale agreement with PIC whereby it sold all the shares to PIC. The solicitors for Xiamen Bank then wrote to the company notifying it of the sale and forwarding two transfers, each of 514,930 shares, for registration. The letter requested the company to register the transfer and to issue new certificates in the name of XIB Nominees. The company refused to do so.

25 In November 1987 PIC made, by way of originating summons, an application in this court under s 194 of the Companies Act (Cap 50) (`the Act`) for an order that the share register of the company be rectified by striking out the names of Mo Meng and Mo Kwang respectively and substituting therefor the name of XIB Nominees as holder of the shares as nominee of PIC and further

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for an order for the delivery of the share certificates. The parties to the originating summons were PIC as the plaintiff and the company as defendant. PIC was successful in the High Court. On appeal by the company to the Court of Appeal, however, the orders made by the High Court were set aside and PIC`s application was dismissed. These proceedings are hereinafter called `the first proceedings`.

26 **Seventh attempt to register**

27 After the decision of the Court of Appeal in the first proceedings, the plaintiffs made five further unsuccessful attempts to procure the registration of the shares in the name of XIB Nominees. To overcome some of the obstacles they faced, an originating summons was taken out by PIC and Xiamen Bank as the plaintiffs against the Lies as the defendants (OS No 1305 of 1990). On 24 April 1992, a declaration was made in that application that the Lies held the shares on trust for PIC. Thereafter, the plaintiffs tried for the seventh time to procure the desired registration of the shares.

28 To understand the actions the plaintiffs took to accomplish this, it was necessary to examine the pre-emption provisions of the articles. Articles 33 to 36 establish the procedure to be followed when a member or other person entitled to do so wishes to transfer any of the shares which he holds in the company. Basically the procedure is that the person proposing to transfer a share must give notice in writing (the transfer notice) to the company of his desire to transfer the same and specify in the notice the sum fixed as the fair value of the share. The transfer notice constitutes the company the agent of the proposed transferor for the sale of the share to any member of the company at the price so fixed.

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29 If, within 14 days after being served with the transfer notice, the company finds a member willing to purchase the share and gives the proposed transferor notice of this, the latter must, upon payment, transfer the share to that member. If, however, within the 14 days there is no member willing to purchase the share, the proposed transferor is at liberty to, at any time within the ensuing two months, sell and transfer the share to anyone at all.

30 On 3 June 1992, the plaintiffs` present solicitors, M/s Wong Meng Meng & Partners, sent the company a transfer notice in respect of the shares. By the transfer notice the company was constituted the agents of the Lies for the sale of their shares to any of its members. The notice stated that Xiamen Bank was the lawful attorney of the Lies with powers to do all acts in their names to sell, realize, transfer or otherwise dispose of their shares. It went on to say that, on behalf of the Lies, Xiamen Bank gave notice to the company, pursuant to its articles, that they as attorney of the Lies desired to transfer the shares.

31 The company refused to offer the shares to its members for sale on the basis (as set out in their letter of 15 June 1992) that neither Mo Meng or Mo Kwang had informed the company that he had appointed an attorney to act for him in respect of the shares. In their reply of 10 July 1992, Xiamen Bank and PIC by their solicitors stated:

> (a) that Xiamen Bank was the lawful chargee of the shares;
>
> (b) that the shares had been sold by Xiamen Bank to PIC in lawful exercise of their power of sale as chargee of the shares;
>
> (c) that by the terms of the guarantees, the Lies had each appointed Xiamen Bank as their `lawful attorney at any time to do all the acts and deeds in [their names] ... to sell, realize, transfer or otherwise dispose of [the shares]`;

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> (d) that by the order of court made in OS No 1305 of 1990 the court had declared that the shares were held on trust for PIC by the Lies.

32 The company was given a further 14 days to offer the shares for resale to their members.

33 On 23 July 1992 the company wrote again. It said categorically that it did not intend to circulate M/s Wong Meng Meng & Partners` letter to the other shareholders on the basis that PIC`s claim for registration of the shares had been rejected by the court in the first proceedings, unless the plaintiffs could obtain confirmation from the Lies, being the registered shareholders, of their intention to sell the shares.

34 On 19 August 1992 the plaintiffs` solicitors wrote to the company, inter alia, in the following terms:

> *As 14 days have passed from our letter dated 10 July 1992 and you have not been able to find a member willing to purchase the shares, we enclose herewith two share certificates together with the respective transfer forms duly executed for registration. Please let us have new share certificates for the shares registered in the name of XIB (Nominees) Ltd as soon as possible.*

35 The share certificates forwarded to the company were the two certificates issued in favour of Mo Kwang and Mo Meng in respect of the shares.

36 The relevant portion of each transfer form furnished to the company on 19 August 1992 provided as follows:

> *I [followed by the name and full address of the relevant Lie] by my attorney Xiamen International Bank in consideration of and pursuant to the order of the High Court of the Republic of Singapore made on 24 April 1992 in Originating Summons No 1305 of 1990 declaring that I, the said [here again the name of the relevant Lie appeared] hold 514,930 shares in the capital of Sing Eng (Pte) Ltd registered in my name upon trust for PIC Property Ltd, now acting by its nominees, XIB Nominees*

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> *(hereinafter called `the said transferee`) do hereby bargain, sell, assign and transfer to the said transferee five hundred and fourteen thousand nine hundred and thirty (514,930) shares.*
>
> *of and in the undertaking called Sing Eng (Pte) Ltd ...*

37 Each transfer form was signed by the transferor by `his attorney Xiamen International Bank`.

38 The company responded by informing the plaintiffs` solicitors in writing on 31 August 1992 that its board of directors had refused to register the shares in the name of XIB Nominees upon trust for PIC. The plaintiffs` attention was drawn to art 37 of the articles which gave the directors power `in their absolute discretion without assigning any reason [to] refuse to register any transfer of shares to a person of whom they [do] not approve`.

39 Subsequently, however, on 10 September 1992, the company in writing cited the following reasons for its directors having declined the plaintiffs` request in respect of the transfer of the shares:

> (1) that the Lies were the registered owners of the shares and that by letter dated 12 December 1990 addressed to the plaintiffs (and copied to the company) the Lies had denied that the documents signed by them were valid and had requested the cancellation of those documents including the power of attorney;
>
> (2) the shares were allegedly sold by Xiamen Bank to PIC in 1987 and accordingly it was not proper to appoint the company for the sale of the shares when they had already been sold;
>
> (3) the attempt by PIC in the first proceedings to register the same shares in favour of XIB Nominees had been rejected;
>
> (4) it would be against the interest of the company to transfer the shares to persons who were unknown to its existing shareholders.

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40 Having failed to persuade the company to grant their request, the plaintiffs filed these proceedings on 22 October 1992.

41 **The issues: (1) Estoppel**

42 The first issue I had to deal with was whether the plaintiffs were estopped by reason of the first proceedings from making this application. The relevant heads of estoppel adverted to in argument were res judicata and issue estoppel.

43 As stated in 16 ***Halsbury`s Laws of England*** (4th Ed) para 1527, where res judicata is raised by way of estoppel to an entire cause of action, it amounts to an assertion that the whole legal rights and obligations of the parties have been finally determined by an earlier judgment which may have involved the determination of questions of law as well as findings of fact. For such a plea to succeed, it must be established that:

> (1) the question in issue in the proceedings is precisely the same as the question in issue in the prior proceedings;
>
> (2) the parties to the proceedings are precisely the same parties as the parties to the prior proceedings; and
>
> (3) the issue had been finally determined by a court of competent jurisdiction.

44 See 16 ***Halsbury`s Laws of England*** (4th Ed) para 1526 and ***Re Manly`s Will Trusts (No 2)*** .

45 In the present case, as was submitted by the plaintiffs, no question of res judicata could arise. First, the parties to the first proceedings and the parties to this application were not precisely the same: Xiamen Bank and XIB Nominees were not parties to the first proceedings. Secondly, as set out below in more

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detail, the issues in question were not precisely the same as the issues in the first proceedings.

46 The second type of estoppel which was relied on was issue estoppel. This form of estoppel precludes a party from contending the contrary of any precise point which, having once been distinctively put in issue, has been finally determined against him. To determine whether issue estoppel was applicable I had to consider the issues which arose both in the first proceedings and in the present application.

47 The issues that were argued and decided in the first proceedings are clearly disclosed in the judgment of the Court of Appeal delivered by LP Thean J in ***Sing Eng (Pte) Ltd v PIC Property Ltd*** . The first issue was whether PIC, the only plaintiff before the court, was a `person aggrieved` within the meaning of that term as used in s 194(1) of the Act and thus entitled to maintain the application brought under that section for rectification of the company`s register. It was decided that PIC was not such a person.

48 The second issue was whether the pre-emption provisions of the articles had been observed which in turn raised the issue whether the transfer notice given under art 34 by Xiamen Bank on 22 June 1987 was a valid notice. The determination of this question depended on whether Xiamen Bank was a person who was `entitled to transfer` shares in the company within the meaning of those words as used in art 33. The court held that the word `transfer` in art 33 meant a transfer of a share and the transfer of a share in turn meant a transfer of the legal title to that share. Since Xiamen Bank was an equitable mortgagee of the shares in question with the legal titles remaining vested in Mo Meng and Mo Kwang respectively, Xiamen Bank was not a person entitled to transfer the

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shares. Accordingly, the June 1987 transfer notice was not in compliance with the terms of the articles.

49 Neither of the above issues arose in precisely the same form in the present case. The issues which fell to be determined by me were:

> (1) whether XIB Nominees was a person aggrieved within the meaning of s 194 of the Act and thus entitled to apply for rectification of the company`s register of shareholders;
>
> (2) whether the pre-emption provisions of the articles had been complied with; and
>
> (3) whether the directors of the company had properly exercised their discretion under art 37.

50 Whilst, superficially, the second issue might have appeared to be the very same issue that was decided in the first proceedings, in fact it was not as it was grounded in an entirely different transfer notice and set of transfer forms from those that had been before the court in the first proceedings. Accordingly issue estoppel did not operate to bar the plaintiffs from proceeding with their application.

51 **(2) Was XIB Nominees the `person aggrieved`?**

52 In dealing with the issue of who the `person aggrieved` was in the first proceedings, LP Thean J said:

> *In this connection it is necessary to examine the contents of the two transfers submitted to the company for registration. Each was expressed to be a transfer by [Xiamen Bank] of 514,930 shares of the company to XIB Nominees as nominee of PIC, the owner of the shares, and for consideration paid by PIC; each was executed by [Xiamen Bank] as the transferor and XIB Nominees as the transferee. Hence, it is XIB Nominees whose name the company has refused to enter in the share register. XIB Nominees, therefore, falls squarely within the words, `the person aggrieved`, in s 194(1) of the Act.*

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53 Examining the transfer forms which were sent to the company for registration under cover of the plaintiffs` solicitors` letter of 19 August 1992, I saw the following. Each was expressed to be a transfer of 514,930 shares in the company by the legal owner of those shares (Mo Meng or Mo Kwang as appropriate) to XIB Nominees, pursuant to the order of the High Court in OS No 1305 of 1990 declaring that the legal owner held the shares in trust for PIC; and each was executed by the legal owner as the transferor by his attorney, Xiamen Bank, and XIB Nominees as the transferee.

54 It was manifest from the transfer forms that XIB Nominees was the person to whom the legal interest in the shares was purportedly transferred and it was XIB Nominees whose name the company had refused to enter into the share register. In this case, as in the first proceedings as held by LP Thean J, XIB Nominees was definitely `the person aggrieved`. XIB Nominees was therefore entitled to maintain this application for an order of rectification of the share register of the company.

55 **(3) Compliance with the articles**

56 The company contended that the plaintiffs had not complied with the provisions of the articles in various respects. Its first objection related to the transfer notice of 15 June 1992. Defence counsel submitted that any transfer notice given under art 34 must necessarily precede the sale of the shares concerned and that in this case because the shares were sold to PIC prior to the transfer notice of 15 June 1992, that notice was an infringement of the articles and had no legal effect for the transfer of the shares. Secondly, although the shares were sold to PIC for HK$10m, in the transfer notice the sum of HK$31,946,991 had been specified as the fair value of the shares. Accordingly

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the pre-emption price was exorbitant and this also invalidated the transfer notice.

57 This submission centred around the agreement dated 31 July 1987 whereby Xiamen Bank agreed to sell the shares to PIC. The provisions of the agreement (in which Xiamen Bank was called `XIB` and PIC was called `the purchaser`) relevant to the argument were cll 1, 3 and 9 which read as follows:

> (1) In exercise of the power conferred by the first guarantee, the second guarantee, the first and second memorandum [sic] and all other powers enabling it XIB shall sell and the purchaser shall purchase the shares, free from all options, charges, liens, encumbrances, equities and other adverse claims and interest (other than those contained in the articles of association of the company in favour of other existing members of the company) and with interests and with all rights now and hereafter attaching thereto including the right to dividends hereafter paid, declared or made in respect of for the sum of HK$10m payable in one lump sum upon completion.
>
> (3) XIB and the purchaser both acknowledge and confirm that they are fully aware of the provisions of the articles of association of the company. XIB hereby warrants and confirms that it had on 22 June 1987 through its solicitors Messrs Shook Lin & Bok Singapore given notice to the company pursuant to art 34 of the articles of association of the company and that up to the date hereof the company has not notified XIB that the company has found a purchaser for the shares.
>
> (9) Anything herein contained to the contrary notwithstanding, in the event that any of the existing member/s of the company shall exercise the right conferred by the articles of association of the company and successfully require XIB to sell the shares to it/them, this agreement shall be rescinded and whereupon the parties agree that Messrs Woo & Woo shall return the purchase price to the purchaser with all accrued interests and save as aforesaid neither party shall have any claim against the others.

58 As the Court of Appeal decided, legal title to the shares remained with the Lies when the shares were charged to Xiamen Bank and the latter obtained only an equitable interest in the shares. The recitals to the agreement made it

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clear that Xiamen Bank was selling the shares pursuant to its rights as chargor under the memoranda of charge. In these circumstances, the agreement was not capable of transferring to PIC any greater right in or title to the shares than Xiamen Bank itself had.

59 As stated earlier, the Court of Appeal held in the first proceedings that the transfer of a share referred to in arts 33 and 34 meant the transfer of the legal title to that share. Since Xiamen Bank had not sold the legal title to the shares it was able as attorney for the Lies, the legal owners of the shares, to offer to transfer that legal title to another member of the company pursuant to art 34. It would be recalled that the sale by Xiamen Bank to PIC was expressly made subject to the encumbrance (ie the pre-emption rights) contained in the articles in favour of existing members of the company and that in the event any existing member of the company exercised such pre-emption right, the agreement would be forthwith rescinded. The consequence of a rescission would be that Xiamen Bank would be able to transfer both the legal and the equitable interest in the shares to such member.

60 In my opinion, therefore, the fact of a sale of the equitable interest in the shares to PIC prior to the transfer notice of 15 June 1992 did not invalidate that notice. If any member had taken up the offer in the transfer notice, Xiamen Bank would have been able to sell the shares to that member free of any interest of PIC.

61 I was not persuaded either that the price specified in the transfer notice invalidated it. Xiamen Bank was entitled to specify such price as it considered, on a reasonable basis, to be the fair value of the shares at the time the transfer notice was issued. It was not bound by the price at which it had sold the shares to PIC five years previously. Xiamen Bank had not plucked a figure out of the

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air when specifying the price of the shares. It had, instead, asked a valuer to value the shares and had used that value as the price. This was a reasonable way of ascertaining the fair value of the shares at the appropriate time.

62 The next set of objections raised by the company related to the transfer forms themselves. In this regard the company relied on art 9 which provided:

> *No person shall be recognized by the company as holding any share upon trust and the company shall not be bound by or recognize any equitable contingent future or partial interest in any share or unit of a share or (except only as by these articles or by law otherwise provided) any other right in respect of any share except an absolute right to the entirety thereof in the registered holder.*

63 It also laid emphasis on the following passage from LP Thean J`s judgment:

> *PIC was clearly in error in seeking to have the name of XIB Nominees as its nominee entered in the register of the company in respect of the shares comprised in the two transfers. It seems to us that on this ground alone, the company would be justified in rejecting the transfers for registration.*

64 The company therefore argued that as XIB Nominees was acting as a nominee for PIC it was not entitled to be registered as a shareholder in the company and to allow such registration would be to blatantly contravene art 9.

65 Whilst I was of course bound by the decision of the Court of Appeal (with which I entirely agreed) I was of the view that the observation quoted above did not apply to the particular facts before me. In the first proceedings, the transfer forms submitted to the company expressly stated that the shares were transferred `to the said transferee XIB (Nominees) Ltd of ... as nominees of [PIC]` and further PIC`s application in the first proceedings had been for the

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names of the Lies to be struck out of the share register and be substituted by XIB Nominees as holder ***as nominee of PIC, the owner of the shares*** .

66 In the present case the application was for XIB Nominees to be inserted in the share register as the holder of the shares. Whilst in the consideration portion of the transfer forms, PIC was stated to be acting by its nominees XIB Nominees, the actual transfer was made to XIB Nominees Ltd without any further descriptive or limiting words about the status of XIB Nominees. As far as the company would have been concerned, after registration of the transfer forms the shareholder on record would have been XIB Nominees and the company would have been entitled to deal with XIB Nominees as the legal and beneficial owner of the shares in all respects. The company need not have paid any attention to the relationship between PIC and XIB Nominees which would have been a private matter between the two of them. As LP Thean J himself said: `Where a person`s shares are registered in the name of his nominee, his nominee vis-a-vis the company holds the shares as the absolute owner in his own right and not in a representative capacity, such as a nominee or trustee.`

67 It was clear from the judgment of the Court of Appeal that the court was cognisant of the common phenomenon of a beneficial owner of shares preferring to have those shares held by a nominee rather than having himself registered as the shareholder in the share register of the company concerned. It was also apparent from that judgment that the court did not see any legal obstacle to that practice as long as the beneficial owner of the shares did not attempt to have his beneficial interest noted by the company in any way and was content for the company to treat his nominee, the registered shareholder, as the absolute owner of the shares.

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68 In the present instance, unlike the situation which had obtained previously, PIC had not requested the company to take note of its interest in the shares. The plaintiffs` solicitors had made a straightforward request for the share certificates to be issued in XIB Nominees` name. It was therefore my view that there would be no contravention of art 9 to allow XIB Nominees to become a member of the company.

69 Next, the company pointed out that the transferors in the transfer forms were Mo Meng and Mo Kwang acting by Xiamen Bank as their attorneys. It contended that this was `purely fictitious` since both the purported transferors had given notice to the company that they had not appointed attorneys and had warned the company not to transfer the shares without their consent.

70 In my opinion this argument was, on the facts, a non-starter. Clause 7 of each of the guarantees provided that:

> *... XIB may at its option take any action at any time in relation to the above securities (including but not limited to depositing or pledging the same by security for loans or advances to XIB or for other third parties or otherwise parting with the possession thereof for any purpose whatsoever) or to transfer the same to the name of XIB or that of any nominee of XIB.* ***For the purpose of enabling XIB to exercise its rights under this clause, the guarantor hereby appoints XIB to be the guarantor`s lawful attorney at any time to do all the acts and deeds in the name of the guarantor or in the name of XIB to sell, realize, transfer or otherwise dispose of the above securities****. (Emphasis added.)*

71 On the face of the matter therefore Xiamen Bank was fully entitled to act as attorney for the Lies in the transfer and sale of the shares. Nothing that happened after the execution of the guarantees changed that position.

72 Neither of the Lies ever went to court to challenge the validity of the powers of attorney contained in the guarantees though they had had ample

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opportunity to do so from the time the first proceedings commenced. Even though they had not chosen to take independent action, they could have put the validity of the documents in issue in OS No 1305 of 1990 in which they themselves were the defendants. Instead of entering an appearance in that action and contesting the assertions of the plaintiffs therein, each Lie confined himself to writing a letter to the High Court stating that the documents which he had signed in connection with the transactions were in English and had never been explained to him. They both asked the court to reject the plaintiffs` application. Obviously neither of these letters constituted an answer to the plaintiffs` claim.

73 Since the Lies themselves had not successfully challenged the validity of the powers of attorney the company had no basis to reject the transfers because they had been executed by Xiamen Bank as the Lies` attorney.

74 **(4) Exercise of the directors` discretion**

75 As mentioned above, art 37 gave the directors of the company the power in their absolute discretion to refuse to register any transfer of shares to a person of whom they did not approve. This power was, however, subject to s 128(2) of the Act which provides that a company shall not refuse to register a transfer of shares by virtue of any discretion in that behalf conferred by the articles `unless it has served on the applicant, within one month beginning on the day on which the application was made, a notice in writing stating the facts which are considered to justify refusal in the exercise of that discretion`.

76 It is established law that once reasons are given by a company for the manner in which the discretion has been exercised, the court may review the sufficiency of these reasons. The position was clearly put in the Australian case of ***Waters v Winmardun Pty Ltd***

77 3 where Master Evans of the Supreme Court of Victoria had to consider the refusal by a Victorian company to register a transfer of shares from an insolvent shareholder to his trustee in bankruptcy. Under the relevant statute, the Victorian company was not bound to give its reasons for the refusal but in evidence a director of the company did disclose those reasons. Master Evans observed:

> *Although the directors, acting under such a power, are not bound, out of court, to assign reasons for refusing to register a transfer if they do so the court must consider these reasons in order to ascertain whether they are legitimate or not, whether or not the directors have proceeded on proper principles:* ***Re Bell Brothers****, supra at p 246. If the reasons assigned are legitimate the court will not interfere with the decision on the ground that it would have come to a different conclusion: ibid;* ***Manning River*** *case, supra, at pp 718, 723. The court will, where a reason is assigned, assume that no other reason influenced the exercise of the directors` discretion.*

78 Similar principles are enunciated in ***Lim Ow Giok & Anor v Sungei Merah Bus Co Ltd*** , and ***Tett v Phoenix Property and Investment Co Ltd*** .

79 The company, however, relied on the proposition established in the Malaysian case of ***Kesar Singh v Sepang Omnibus Co Ltd*** . There it was held that where directors of a company are given by the articles an absolute and uncontrolled discretion with regard to registering a transfer of shares, the only limitation on the directors` discretion is that it should be exercised bona fide in the interest of the company. Further, once the directors have taken an oath that they had exercised their discretion in the interest of the company it must be assumed that they had so exercised their discretion unless the contrary is established.

80 Counsel for the company contended, on the basis of this case, that once reasons have been given, the court and the parties must accept those reasons

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unless it can be established that the reasons are not bona fide. In my view, however, ***Kesar Singh*** `s case6 was distinguishable. In that case the directors did not give reasons for their refusal to register the relevant share transfer at the time that their decision was made. Further, it appeared from the case that there was no provision in the Malaysian Companies Act applicable at that time which would have required reasons to be given. I doubted that that case could be considered authority for the proposition that in a legal regime which requires the directors to give reasons for their decision, a statement on oath by the directors that they had exercised their discretion in the interests of the company would prevent the court from reviewing the reasons given. In any event, in the present case there was no such statement on oath by the directors of the defendants. ***Kesar Singh*** , therefore did not persuade me that I should not examine the legitimacy of the reasons given for the company`s refusal.

81 As mentioned above, the first reason given was that the Lies were the registered owners of the shares concerned and that each of them had by a letter dated 12 December 1990 addressed to the plaintiffs (and copied to the company) denied that the documents signed by them were valid and requested the cancellation of those documents including the power of attorney. In my opinion this was not a valid reason. In the first place, it was not for the company to challenge the plaintiffs` title and in the affidavit filed by the company in this application, they had in fact admitted that this was a matter between the plaintiffs and the Lies. Secondly, the plaintiffs had commenced action against the Lies in order to establish their title and had obtained a judgment against the Lies, based on the various documents which the Lies had signed. This judgment had specifically declared that the Lies held the shares on trust for PIC. The judgment came after the letter of 12 December 1990 and that letter was before the court at the time of judgment. In any event, the power of attorney had been

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given for valuable consideration and to effectuate the security and was therefore irrevocable: see ***Boustead on Agency*** (15th Ed, 1985) pp 509-513, art 125.

82 The second reason given was that the shares had been sold by Xiamen Bank to PIC in 1987 and accordingly it was not proper to appoint the company for the sale of those shares when Xiamen Bank had already sold them. This argument had no merit for the reasons set out in an earlier portion of this judgment.

83 Thirdly, the defendants contended that the attempt by PIC in the first proceedings to register the same shares in favour of XIB Nominees had been rejected. This reason was irrelevant and misconceived. The decision in the first proceedings was based on different sets of transfer forms and on the fact that the application had been made by the wrong party. It could not be said that simply because one attempt to have XIB Nominees registered as the shareholder had failed, the plaintiffs were perpetually barred from remedying the errors in the first proceedings and thereafter trying again to procure registration.

84 The final reason given was that it would be against the interests of the company to transfer shares to persons who were unknown to the existing shareholders. This reason was capable of being given two interpretations. One interpretation was that XIB Nominees was not known to the company because it was not an existing member of the company. If that was the meaning of the directors` statement, then it would not be a legitimate reason under s 128(2) of the Act as it would mean that only existing members of the company could hold shares in the company.

85 The second possible interpretation was that factually the company knew nothing about XIB Nominees. As a matter of fact this was incorrect. On 28

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March 1991, the company had identified the specific information it lacked about XIB Nominees and all these information had subsequently been supplied to it by the plaintiffs. In argument, counsel for the defendants said that the company was unhappy because the transferee of the shares was a large conglomerate (ie through its connections with Xiamen Bank and PIC). This was not a reason given by the directors and even if it had been, it would not have been a legitimate reason as the existing shareholders of the company included entities which were either substantial in themselves or which were related to substantial concerns.

86 Finally, I should state that, having considered the facts of the various attempts that were made by the plaintiffs to have XIB Nominees registered as a shareholder of the company and the way in which the company had continually stymied these efforts and the company`s own effort to dilute the value of the shares by a rights issue, I was left with the clear impression that up to their resignation as directors in March 1992, and even beyond that time, the Lies had used their influence and powers in the company in order to prevent Xiamen Bank from realizing the fruits of the security which the Lies had voluntarily furnished. The Lies appeared to have been acting in their own interests and not in the interests of the company. No plausible reason was ever given as to why it would be against the interests of the company to have XIB Nominees as a shareholder. There was no rational basis on which the transfer terms could have been rejected and, accordingly, the decision of the directors had to be overruled.

87 Plaintiffs` application allowed

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Judith Prakash JC

Sundaresh Menon with Chong Yee Leong and Sim Bock Eng (Wong Meng Meng & Partners) for the plaintiffs
Tan Jing Quee (Jing Quee Chin Joo & Teck Hui) for the defendants

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