Fan Juan Fen v Crocodile Holdings Pte Ltd and Another and Another Suit [2005] SGHC 152

Case Number : Suit 518/2004, DC Suit 4011/2003

Decision Date : 26 August 2005

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Thio Shen Yi, Adrian Tan and Dean Cher (TSMP Law Corporation) for the plaintiff; Michael Khoo SC, Josephine Low and Andy Chiok (Michael Khoo and Partners) for the defendants

Parties : Fan Juan Fen — Crocodile Holdings Pte Ltd; Crocodile International Pte Ltd

Companies – Shares – Dividends – Whether letter authorising defendant company to pay dividends to co-defendant fraudulently backdated

Companies – Shares – Transfer – Whether payment due from plaintiff for shares – Whether cancellation of plaintiff's shares by defendant company valid – Whether defendant company could claim vendor's lien

Evidence – Witnesses – Defendants' failure to call key witnesses – Whether adverse inference should be drawn against defendants – Section 116 Evidence Act (Cap 97, 1997 Rev Ed)

Limitation of Actions – Particular causes of action – Contract – When time begins to run – Whether plaintiff's claims time-barred – Exception where defendants' acts fraudulent – Section 29(1) Limitation Act (Cap 163, 1996 Rev Ed)

26 August 2005 *Judgment reserved.*

Kan Ting Chiu J:

The actions

1 Two actions were consolidated and came on for hearing together. There is a strong commonality of parties and issues in these two actions. The plaintiff in both actions, Fan Juan Fen, is a Chinese national. Her claims in the two actions are against two companies and one individual. The corporate defendants are Crocodile International Pte Ltd ("CI") and Crocodile Holdings Pte Ltd ("CH"). Both companies are incorporated in Singapore. CI is a majority shareholder in CH, which was known as Singapore Crocodile Pte Ltd ("Singapore Crocodile") up till 8 April 1998. The other defendant is Dato Dr Tan Hian Tsin ("Dato Tan") whose name is also spelt "Chen Xianjin". He is a director of CI and CH. More than a director, he is the founder and guiding force behind the companies.

2 In DC Suit No 4011 of 2003 ("DC Suit 4011/2003"), the plaintiff asserted that she was the registered shareholder of 400,000 shares in CH which share certificates were issued to her on 20 March 1996. When CH declared a one-for-one share bonus issue, she obtained another share certificate for 400,000 shares on 27 July 1998. CH had declared dividends in 1996 and 1997 for which a total of $215,794.57 would have been paid on a shareholding of 400,000 shares. These dividend payments were not made to the plaintiff.

3 The plaintiff alleged that on 25 September 1998, Dato Tan asked her to sign a letter authorising CH to pay share dividends due to her to him to hold on her behalf. The plaintiff claimed that when she signed the letter, she did not realise that it was backdated to 20 March 1996.

4 The plaintiff claimed against CH for the $215,794.57 in dividends and against Dato Tan for an account of the dividends he had received on her behalf, and for payment of the same to her.

5 Suit No 518 of 2004 ("Suit 518/2004") is a follow-up on DC Suit 4011/2003. The plaintiff discovered that on 8 May 2000, the share certificates in her name were cancelled by CH at the request of CI, and CI was registered as the new owner of the 800,000 shares.

6 The plaintiff claimed that the transfer of the shares was not in accordance with CH's articles of association in that no transfer was executed, and the original share certificates were not returned. She joined CI as the second defendant in these proceedings on the basis that it had procured CH's breach of contract.

7 The plaintiff sought a declaration that she was the legal and beneficial owner of the 800,000 shares, as well as for orders that CH's register of transfers and register of members be rectified, and that CH should account to her for the profits in respect of those shares.

The co-operation

8 The plaintiff came to know Dato Tan in 1993 when the latter visited Shanghai. Subsequently, they agreed to co-operate to distribute Crocodile brand merchandise in Shanghai.

9 A company called Shanghai Eastern Crocodile Apparels Company ("SEAC") was incorporated in Shanghai for this purpose. The plaintiff claimed that SEAC was her company.

10 In 1994, an associate company of Singapore Crocodile, Cartelo Singapore Pte Ltd ("Cartelo") incorporated a wholly-owned subsidiary company in Shanghai named Shanghai Eastern Crocodile Apparels Co Ltd ("SEC").

11 The plaintiff was appointed the general manager of SEC. SEC took charge of the business of promoting Crocodile merchandise and SEAC ceased to deal with the merchandise.

12 The plaintiff's appointment as the general manager of SEC was abruptly terminated on 26 September 1998.

The transfer of the first 400,000 shares

13 The plaintiff claimed that the business of SEAC was transferred to SEC on Dato Tan's promise to give her a 10% stake in Cartelo. She did not receive any Cartelo shares, but on 20 March 1996, she received 400,000 CH shares in consideration of her transferring SEAC's business to SEC.

14 The defendants accepted that the CH shares were issued and delivered to the plaintiff, but they denied that the shares were given to her in exchange for the SEAC business.

15 They contended that in a letter dated on 11 November 1994, CI issued to her an option to purchase 150,000 Cartelo shares on the following terms:[note: 1]

(1) that we give you option to buy from us 150,000 fully paid ordinary shares of S$1.00 each in Cartelo International Pte Ltd at the price of S$1.50 each;

(2) that you may exercise the option herein given on or before the 10th day of November 1997.

(3) that before you exercise this option, all benefits deriving from the said shares will be belonged to us.

16 Their case was that the option was not exercised and was followed by an agreement made on 19 March 1996 for CI to sell 400,000 Singapore Crocodile shares to the plaintiff on condition:[note: 2]

(1) that payments shall be made in 4 equal instalments with each instalment of S$56,250.00 payable on or before:

1st Instalment - April 30, 1996

2nd Instalment - April 30, 1997

3rd Instalment - April 30, 1998

4th Instalment - April 30, 1999

(2) that the said shares shall be registered in your name and you have to sign a Declaration of Trust and also a share transfer form and both these documents are to be held with us until full payment of the said shares is made.

(3) that for the time being, whatsoever interests such as dividends, rights issues, bonuses, warrants, etc in the said shares shall belong to us until full payment of the said shares is made.

(4) that each instalment you pay, we shall release the equal quantum of the said shares together with the related transfer deed and declaration of trust.

17 The nub of the defence case is that the plaintiff did not make any of the instalment payments and CI invoked its vendor's lien and took the shares back.

18 The plaintiff denied that she was given the option of 11 November 1994 to buy 150,000 Cartelo shares, and she also denied receiving the letter of 19 March 1996 which set out the terms for her to purchase the 400,000 shares. Despite these denials, the defendants produced no evidence to show that the option and the letter had been posted or delivered to her.

19 In support of her contention that the 400,000 shares were not issued to her under the terms of the disputed letter of 19 March 1996, she emphasised that the defendants admitted that:

(a) she had not signed any declarations of trust or share transfer forms required by term (2) of the letter; and

(b) the shares were delivered to her without the payment of the instalments, contrary to term (4) of the letter.

20 In support of their contention that the shares were sold to the plaintiff, the defendants produced evidence that two other persons had each purchased 400,000 CH shares on the same terms offered to the plaintiff. The two persons were Kee Swee Ann ("Kee") and Ang Boon Tian ("Ang"), the former managing director and the group managing director of CH, respectively.[note: 3]

21 However, the reference to the purchases by Kee and Ang raised other questions on the defence. When they purchased their shares, Kee and Ang signed and delivered the declarations of trust contemplated by term (2), and the share certificates were not issued to them until they had made payment, as provided by term (4).

22 How did the plaintiff have possession of the shares without making payment, and without executing the declarations of trust if she had acquired her shares on the same terms as Kee and Ang? It was submitted on behalf of the defendants in their closing submissions that:[note: 4]

> Dato' Tan also testified under cross-examination that he discussed the offer of sale of the Crocodile Holdings shares with the Plaintiff, who accepted the offer. It is submitted that this is a very cogent reason why the Crocodile International had no hesitation to register 400,000 shares in the Plaintiff's name on 20 March 1996.

23 This did not explain the delivery of the shares to the plaintiff, nor the failure to obtain any declarations of trust from her in disregard of the alleged terms of sale. It was also submitted that "Dato' Tan candidly admitted that it might be due to the negligence of his staff"[note: 5] that the share certificates were sent to the plaintiff, but there was no disclosure of the identity of the negligent person or persons, or the nature of the negligence.

24 In the course of the trial, a member of the staff, Teri Koh, was mentioned. Ang gave evidence that sometime in 1998, when his share certificates were released to him by Teri Koh, she also handed him the plaintiff's share certificates to deliver to her as he was going to Shanghai.

25 Two questions arose from Ang's input. First, by his own evidence, he had paid for his shares by September 1996, so he should have received the share certificates in 1996, and not in 1998.[note: 6] Second, the plaintiff had pleaded at para 8(b) of her Statement of Claim in Suit 518/2004 that the share certificates were handed to her in September 1996. There was no specific denial of that assertion, and no plea that those share certificates were delivered in 1998.

26 Teri Koh was not called as a witness for the defendants, even though she was present in court during the trial. In view of the uncertainties in the evidence of Dato Tan and Ang, she could have given evidence that would have been helpful to the defendants. When she was not called, the plaintiff was justified in submitting that an adverse inference should be drawn against the defendants under s 116 of the Evidence Act (Cap 97, 1997 Rev Ed) which empowers a court to presume that evidence which could be and is not produced would, if produced, be unfavourable to the party which withholds it.

27 It was also argued by the defendants in their reply submissions that:[note: 7]

> With regard to the Plaintiff's submissions that she was treated differently, while a different procedure may have been adopted in respect of the Plaintiff, the fact remains that *the main intent and objective of Crocodile International's actions were consistent for Ang Boon Tian, Kee Swee Ann and the Plaintiff* i.e. for Crocodile International to retain the benefits under the shares pending payment for the shares allotted in their names. With Ang Boon Tian and Kee Swee Ann it was through the machinery of Declaration of Trusts, while for the Plaintiff it was the letter of 20 March 1996 whereby she directed Crocodile Holdings to pay her dividends to Dato' Tan. All three individuals i.e. Ang Boon Tian, Kee Swee Ann and the Plaintiff were allotted shares on 20 March 1996 when none of them had accepted the offer of shares nor made any payment towards the purchase thereof. [emphasis added]

28 This argument raised further questions. If the main intent and objective were consistent for the plaintiff, Ang and Kee, why were they not treated consistently? As they were treated differently, what was the reason for that? While the plaintiff offered a reasonable explanation that in her case no payment had to be made, it cannot be said the defendants have done as much.

29 Another interesting point came out in the defendants' closing submissions that:[note: 8]

> Putting the Defendants' case simply, it is that the Plaintiff did not pay for the Crocodile Holdings shares under the offer of sale to her. She was thus not entitled to those shares.

If it was the defendants' position that the plaintiff was not entitled to the shares because she did not pay for them, then her right to the shares was weaker than Kee's and Ang's, but she was treated better than them in that she was not required to execute any declarations of trust whereas they were. The difference in treatment indicated that the plaintiff had greater rights to the shares than Kee and Ang, and not the other way around.

30 There were other issues raised by the defendants in the course of the case which should be addressed.

Ownership of SEAC

31 It was argued in the defendants' closing submissions that the plaintiff was not the sole owner of SEAC as she had claimed because SEAC was registered by two companies, Shanghai Nan Choo Trading Company and Shanghai Eastern Sports Equipment Company. The argument was that the plaintiff therefore "would not have been in any position to agree to a transfer of the business of SEAC to SEC".[note: 9]

32 Counsel for the plaintiff pointed out that although the plaintiff had asserted her ownership of SEAC in the pleadings and her Affidavit of Evidence-in-Chief, that was not specifically disputed in the Defences filed or in Dato Tan's Affidavit of Evidence-in-Chief.[note: 10]

33 The plaintiff explained that at that time, individuals were not allowed to incorporate companies in China, but they could get companies to do that on their behalf. This was not disputed by the defendants. She had arranged with the two companies to register SEAC, and had reimbursed them for their expenditure after the company was incorporated.[note: 11]

34 In any event, it was not the defendants' case that they could not have agreed to take over SEAC's business as they knew that SEAC was not registered in the plaintiff's name. Counsel for the defendants acknowledged that SEAC's registration records were obtained only in the course of the hearing on 29 January 2005.[note: 12] When the plaintiff claimed to be the owner of SEAC, Dato Tan did not have reason to doubt that. It was common ground that SEC did take over from SEAC its inventory, some members of its staff,[note: 13] as well as a lease of a retail outlet. There was no evidence that there were any claims or complaints from the two companies that registered SEAC about the takeovers.

The Cartelo shares

35 The defendants also sought to cast doubts on the plaintiff's claims by discrediting her claim that before she received the CH shares, Dato Tan had in May 1994 promised her a 10% stake in Cartelo, and had told her that the shares of Cartelo were held in the proportion of 40% by CI, 40% by CH, and 20% by Dr Michael Lam (son-in-law of Dato Tan), and that the 10% promised to her would

come from CI's holdings.[note: 14]

36 The defendants argued that the promise could not be true because in May 1994 (and up to September 1994) Cartelo had only issued two $1 shares, although there must have been plans to vary the share structure of Cartelo because the defence case was that in November 1994, options were given to the plaintiff, Kee and Ang to purchase 150,000 Cartelo shares each, none of which were exercised.[note: 15]

37 This argument overlooked two points, firstly, that the plaintiff was saying that Dato Tan had told and promised her that she would receive 10% of the Cartelo shares, and secondly, that the proposal was not implemented and 400,000 CH shares were issued to her instead. She did not claim any knowledge of the share structure of Cartelo. Her case was that she trusted Dato Tan and believed what he told her, and was contented with the CH shares she received in place of the Cartelo shares.

The letter dated 20 March 1996

38 There was a letter signed by the plaintiff dated 20 March 1996, which was the subject of controversy. The plaintiff admitted that she signed the letter, but claimed that she signed it on 25 September 1998 (the day before her dismissal as the general manager of SEC) at a dinner party with Dato Tan. Dato Tan produced the letter while they were in a restaurant and informed her that if she signed it, he could collect and deliver to her the dividend payments CH was about to pay, and she signed it without noticing the date of the letter. She made a copy of it and returned the signed original to Dato Tan.

39 The English translation of the letter reads:[note: 16]

> 20 March 1996
>
> The Company Secretary
> Singapore Crocodile (Private) Limited
> Crocodile House #07-00
> No. 3 Ubi Avenue 3
> Singapore 408857
>
> Mr Company Secretary,
>
> From today onwards, please pay the dividend, if any, for my 400,000 shares in Singapore Crocodile (Private) Limited to Mr. Chen Xianjin [Dato Tan] who will receive the same on my behalf until further notice.
>
> Fan Juan Fen

40 Before I go into the dispute, I should point out that this letter does not affect the plaintiff's claim to the dividends. The letter authorised CH to pay any dividends to Dato Tan on the plaintiff's behalf, and any dividends that Dato Tan received under this authorisation would be held by him as her trustee. Nevertheless, the date of execution of the letter has an impact on her claims against CH. If it was signed on 20 March 1996, CH was entitled to release all dividends paid after that date to Dato Tan. If it was signed on 25 September 1998, CH would be liable to the plaintiff for dividend payments released to Dato Tan before that date.

41 There were three dividend payments made on 24 April 1997, 31 May 1997 and 8 April 1998. The cheque for the first payment was issued in the name of the plaintiff. Koh Chor Ngim, also known as Jaslyn Koh, the company secretary of CH who was in charge of issuing the dividend cheques, deposed that a cheque was first made out in the name of the plaintiff and was sent to CI. After it was returned to CH, she then remembered the letter dated 20 March 1996 and altered the payee's name to Dato Tan. She then sent the amended cheque to him.[note: 17]

42 This cheque was issued on 24 April 1997. The defendants' case was that the letter dated 20 March 1996 was in CH's possession when the cheque was issued. If that was so, why was the cheque made out to the plaintiff and sent out to CI? Jaslyn Koh explained that the cheque was made payable to the plaintiff in the first instance because all the cheques were made out in accordance with the company's register of members.

43 Jaslyn Koh did not amend the cheque immediately after it was issued. Her evidence was that it was sent to CI, after which it was returned to CH. This meant that she and CH did not act on the instructions in the letter dated 20 March 1996 at that stage although she claimed that she had received the letter from an employee of CI sometime in 1996 or 1997 and had kept it in her safe.[note: 18]

44 Jaslyn Koh was drawn into, and was aware of, the dispute over the date of execution of the letter even before these actions were filed. After the plaintiff's employment with SEC was terminated on 26 September 1998, the plaintiff wrote to CH on 18 November 1998, the English translation of which reads:[note: 19]

> Singapore Crocodile Pte Ltd
> [The name was changed to CH on 8 April 1998]
>
> To the Company Secretary:
>
> I am holding 400,000 Singapore Crocodile Pte Ltd shares, and hereby make this solemn declaration and notice as follows:
>
> 1. I was cheated when I signed the document with the statement "With immediate effect and until further notice, please allow Mr Chen Xianjin to collect on my behalf any dividends paid to me for my 400,000 Singapore Crocodile Pte Ltd shares." The actual execution date of the said document was 25 September 1998, I hereby declare the said document to be invalid with immediate effect.
>
> 2. With immediate effect, please deposit any dividends for my 400,000 Singapore Crocodile Pte Ltd shares into my bank account in Singapore. Standard Chartered Bank, Battery Road Branch, Account No.: xxx.
>
> 3. Within 3 days upon receipt of this declaration and notice, please send me a detail [*sic*] list with regard to the dividends given to me by Singapore Crocodile Company Pte Ltd but collected by Mr Chen Xianjin on my behalf since 20 March 1996.
>
> Fan Juanfen
>
> 18 November 1998

45 This letter indicated that the plaintiff was in possession of a copy of the letter dated

20 March 1996 when she wrote to CH on 18 November 1998. She explained that she made a copy of the letter when she signed it.[note: 20] After she was dismissed from SEC, she found the copy when she went through her documents,[note: 21] and that led her to write to the company on 18 November 1998.

46 Jaslyn Koh replied to the plaintiff on 2 December 1998 stating, "We are surprised by your statement of 'cheated' [the Chinese word used by the plaintiff was repeated here] and would appreciate it if you will let us have your clarification."

47 CH received a reply dated 10 December 1998:[note: 22]

> Received your letter of 2 December 98. Thank you! The replies are now given as follows:
>
> 1 I hereby declare that the co-operation between Mr Chen Xianjin and myself has now come to an end. Therefore, Mr Chen is no longer authorised to receive your company's share dividends on my behalf.
>
> 2 The letter of "receiving dividends on behalf" was handed over to Mr Chen after I signed it on 25 September of this year. There was no such an authorisation prior to that. I wish to say that recently I found out that the date of the letter of "receiving dividends on behalf" did not tally with the date when I actually signed it. It should be 25 September 98 instead of 20 March 96.
>
> 3 Mr Chen took the above letter of "receiving dividends on behalf" after he asked me to sign it on 25 September (I do not understand English). I believe your company received it only this year. If confirmation is required, I am willing to allow the police to give expert evidence on the signature. May I ask whether your company had received this letter? When was it received? Had the dividends been paid? If they had been paid, please provide the relevant payment documents.
>
> Being a shareholder of your company, I hope that you will give the replies to the above questions based on the facts. Thank you.

48 When Jaslyn Koh read the letter, her reaction was "That is ridiculous. I have the original in my safe and she made this statement".[note: 23] But instead of confronting the plaintiff with that, she chose not to respond to her queries.

49 Two questions arise from Jaslyn Koh's evidence. First, if she had the letter with her all the time, why did she not act on it when she issued and sent out the first cheque, and second, why did she not inform the plaintiff that she had her written instructions when she made the payments? She was a well-qualified chartered secretary. If she took her job and her duties seriously, she would have taken care to comply with the letter dated 20 March 1996, particularly when it involved Dato Tan, and she would have answered the plaintiff's queries and put an end to the "ridiculous" allegation, which also involved Dato Tan, unless she did not have the letter when the dividends were paid.

50 The amendment of the payee in the second cheque dated 31 May 1997 was countersigned by Kee, and that in the third cheque dated 8 April 1998 by Chew Heng Ching ("Chew"), another director of CH. Jaslyn Koh said that they saw the letter dated 20 March 1996 when they countersigned the amendments.[note: 24]

51 When Kee gave evidence, he recalled that Jaslyn Koh informed him that Dato Tan was

receiving the payment on behalf of the plaintiff, but he could not remember if she showed him the letter of authority.[note: 25] Chew was not called as a witness by the defendants to corroborate Jaslyn Koh's evidence that she had shown him the letter dated 20 March 1996 when he countersigned the amendment on the cheque of 8 April 1998. As in the case of Teri Koh, counsel for the plaintiff submitted, with justification, that an adverse inference should be drawn against the defendants.

52 There were questions over both parties' contentions on this issue. On the one hand, one would wonder whether anyone would attempt to deceive the plaintiff over the date of the letter in the manner alleged. There was a real risk that the attempt might be uncovered. "20 March 1996" was clearly typed out, and she could have noticed the "1996" even if she did not read English, or she could have asked for an explanation, or got someone who could read English to read it to her. Furthermore, on 25 September 1998, she had already received the bonus shares, and was holding 800,000 shares in the company, not 400,000 as stated in the letter, and the reference to 400,000 shares may have lead her to seek clarification on the whole letter.

53 On the other hand, if the letter was signed on 20 March 1996, why was it not acted on by CH when the first dividend cheque was issued? Why did Jaslyn Koh not inform the plaintiff that she had the letter with her since 1996 or 1997? Kee could not remember seeing the letter which Jaslyn Koh said was shown to him, and Chew was not called to confirm her evidence.

54 The defendants also argued that the plaintiff's signature on the letter dated 20 March 1996 was consistent with her signatures of that time, and not with that of 1998. They submitted that:[note: 26]

> [I]f your Honour compare any document in the various Bundles of Documents signed by the Plaintiff between 1993 to 2000, the same characteristics will be evident to your Honour. In particular, the down-stroke for the third character "*Fen*" of the Plaintiff's name evolved from a stroke shaped like a "3" to a less wavy stroke over the years. This is immediately apparent on a visual inspection.

55 Seven signatures were reproduced in the submissions, including the signature in the letter dated 20 March 1996. The other six were signatures from 1993, 1994, 1996, 1998 (two signatures) and 2000. In all, seven signatures were shown to represent the plaintiff's signatures over a period of eight years.

56 This did not appear to be an organised and prepared exercise. The issue of a variation in her signatures was not raised in the defences, nor the defendants' affidavits of evidence-in-chief or opening statement. There was no collation of all or a reasonable representative number of her signatures that were available to demonstrate the alleged evolution of her signature through the years, and no expert opinion was produced that the signature in question was more likely to have been affixed in 1996 than 1998 on a study of her known signatures.

57 The defendants contended:[note: 27]

> [A]s part of your Honour's assessment of the evidence, your Honour is entitled to conduct a visual comparison of the Plaintiff's signatures from 1994 to 2000 to determine whether the Plaintiff's signature on [the letter dated 20 March 1996] is more consistent with her signatures in 1998 or 1996. It is a visual comparison that is well within your Honour's abilities without the assistance of any expert.

58 I am not able to accept those submissions because:

(a) I am not persuaded that a sample of seven signatures over eight years is a sufficient basis to support any conclusion;

(b) this is a matter in which specialised knowledge and methodology have to be applied; and

(c) from my untrained observation, there was no significant difference between downward strokes in the signature in the letter dated 20 March 1996:

and another of May 2000:

which suggests that the first signature was of an earlier period than 1998 or 2000.

59 In the end, I find the plaintiff's account more likely on a balance of probabilities. The balance was tilted in her favour by CH's omission to issue and send the first dividend cheque as directed by the letter the first time, the failure to face the plaintiff down with the letter, and the failure to produce confirmations from the persons who were alleged to have seen the letter when the cheques were amended. These deficiencies not only raised doubts over the defendants' account of the events, but also lent weight to the plaintiff's evidence that the letter was not in existence before 25 September 1998.

60 The plaintiff has, therefore, proved her case against the defendants that she did not have to pay for the CH shares, and that she only authorised Dato Tan to collect her dividends on her behalf on 25 September 1998.

61 There are two other matters raised that have to be decided in connection to the remedies claimed. One was that CH did not follow the proper procedure in cancelling the plaintiff's shares. The second was that even if the plaintiff had failed to pay the purchase price for the shares, CI had exceeded its rights as unpaid vendor.

The cancellation of the plaintiff's shares

62 On 28 March 2000, CI wrote to the plaintiff and informed her that as she had failed to make the instalment payments for the 400,000 shares allotted to her, she was taken to have repudiated the sale and purchase agreement, and the company was exercising its lien over the shares as unpaid sellers.

63 On 28 April 2000, CI wrote to CH stating:[note: 28]

1,600,000 SHARES IN CROCODILE HOLDINGS PTE LTD

We refer to our letter of March 19, 1996, wherein we requested you to register our entitlement of 400,000 of the above 1,600,000 shares in the name of Ms Fan Juan Fen.

As Ms Fan has todate not paid us for the said shares, we have exercised our lien over the said shares as unpaid seller.

We therefore request that you cancel the shares issued in the name of Ms Fan bearing

certification numbers 594 to 597 (4 x 100,000 shares) and register them in our name.

We also request that you cancel the bonus shares issued in the name of Ms Fan bearing certification number 617 (400,000 shares) and register them in our name.

We hereby indemnify you against all claims which may be made against you as a result of your acceding to our request.

64 On 5 May 2000, CH passed a directors' resolution:[note: 29]

1 that in consideration of the letter of indemnity … from Crocodile International Pte Ltd dated 28 April 2000, the 400,000 ordinary shares issued on 20th March 1996 in the name of Ms Fan Juan Fen bearing share certificate numbers 594, 595, 596 & 597 (4 x 100,000 shares) be and are hereby cancelled and the said shares be registered in the name of Crocodile International Pte Ltd;

2 that in consideration of the aforesaid letter of indemnity, the 400,000 ordinary shares (Bonus Issue) issued on 20th July 1998 in the name of Ms Fan Juan Fen bearing share certificate number 0617 be and are hereby cancelled and the said shares be registered in the name of Crocodile International Pte Ltd;

3 that new share certificates bearing numbers 0655, 0656, 0657 & 0658 (4 x 100,000 shares) for the 400,000 ordinary shares mentioned in (1) above and certificate bearing number 0659 for the 400,000 ordinary shares (Bonus Issue) mentioned in (2) above be issued in the name of Crocodile International Pte Ltd.

65 Subsequently, all 800,000 of the plaintiff's shares were transferred and registered in the name of CI.

66 The plaintiff submitted that the transfer was invalid. Her counsel referred to Art 32 of CH's articles of association that:[note: 30]

Every transfer must be in writing and in the usual common form and must be left at the office of the Company, accompanied by the certificates of the shares to be transferred, and such other evidence (if any) as the Directors may require to prove the title of the intending transferor, and such transfer shall be executed both by the transferor, and such transfer shall be executed both by the transferor and the transferee, and the transferor shall be deemed to remain the holder of the share until the name of the transferee is entered in the Register of Members in respect thereof.

and s 126(1) of the Companies Act (Cap 50, 1994 Rev Ed) that:

Notwithstanding anything in its articles, a company shall not register a transfer of shares or debentures unless a proper instrument of transfer has been delivered to the company, but this subsection shall not prejudice any power to register as a shareholder or debenture holder any person to whom the right to any shares in or debentures of the company has been transmitted by operation of law.

67 The defendants' pleaded response to the complaint was:

[T]he Defendants deny that the transfer of the 800,000 shares in the 1st Defendant that were

registered in the Plaintiff's name to the 2nd Defendants were in breach of the 1st Defendants' Articles of Association or in breach of any alleged representation as alleged or at all.[note: 31]

68 When these matters were raised with Jaslyn Koh she conceded that:

(a) when CH cancelled and transferred the plaintiff's shares, it did not comply with Art 32;[note: 32]

(b) there was no power to cancel shares on the instructions of another shareholder;[note: 33]

(c) the articles did not authorise CH to cancel shares on the strength of the resolution of 5 May 2000;[note: 34] and

(d) she was not aware of any provisions in the Companies Act that allowed CH to cancel the shares in that manner.[note: 35]

69 Nevertheless, the defendants held firm and submitted:[note: 36]

[T]he cancellation of the share certificates in the Plaintiff's name was not wrongful on the following grounds:

a. While there may be no specific article of association providing for the cancellation of the shares registered in her name. under the circumstances of the case, there is conversely no article of association or any provision of the Companies Act that prohibits the cancellation of these shares in the manner carried out by Crocodile International and Crocodile Holdings.

b. The fact remains that the Plaintiff did not pay for the Crocodile Holdings shares registered in her name, and that there was no consideration for these shares.

c. It is submitted that where the articles of association are silent, the rights and obligations of the member and the company are governed by other terms of contract between them (if any) and if not, by common law. In this regard, it is submitted that there is no prohibition on the cancellation of the shares registered in the Plaintiff's name in the context of the facts of the Defendants' case.

d. Finally, the Plaintiff did not even pay for the shares that were registered in her name. It would be abuse of process, and would tantamount to the Plaintiff relying on the articles and the provisions of the Companies Act as instruments of fraud if she could derive benefits and rights which she would not have acquired but for the registration of the shares in her name, which was procured in good faith by Crocodile International.

e. It is submitted that while a member may genuinely rely on the articles for protection, it is difficult to envisage how in the circumstances and given the Plaintiff's non-payment for the shares, the Plaintiff could be deemed as a "member" entitled to the protection of the articles and the Companies Act.

70 Surely the defendants do not believe that a board resolution of CH and an indemnity from CI are sufficient authority for CH to cancel the plaintiff's shares irrespective of the provisions of CH's memorandum and articles of association and the Companies Act. If that is really the defendants' position, it is without merit.

71 Consequently, CH had breached the contract between a company and its shareholders in cancelling and transferring the plaintiff's shares, and CI had induced the breach by making the request and offering the indemnity that led CH to do that.

The lien

72 The defendants did not refer to any lien in their pleadings as the justification for the cancellation of the plaintiff's shares. It was pleaded:[note: 37]

> As the Plaintiff had failed to make payment of the $225,000 for the 400,000 shares allotted to her by 30th April 1999 or at all, Crocodile International Pte Ltd exercised their rights over the 400,000 and bonus shares and instructed the 1st Defendant to cancel. The share certificates in respect of the 400,000 shares and the bonus shares which had been registered in her name.

73 They declared in their opening statement that, "The Defendants' case is that the 400,000 Crocodile Holdings shares were offered for sale to the Plaintiff but she did not purchase them."[note: 38] If that assertion were to be taken to its conclusion, no lien could arise because when there was no purchase, there could be no vendor or unpaid vendor's lien.

74 A lien was expressly mentioned in CH's letters to the plaintiff of 28 March 2000 and 28 April 2000 which have been referred to at [62] and [63] above. At the close of the case, the defendants abandoned the position that there was no purchase, and reverted to the vendor's lien. If there was an obligation on the plaintiff to pay for the shares, there could still be a lien even after title and possession of the shares had been transferred to the plaintiff. CI could claim an equitable unpaid vendor's lien, which would subsist until the vendor received the price payable: see *Re Caveat No CV/21366D* [1996] 2 SLR 196 at 200. The plaintiff submitted that CI was not entitled to enforce its purported vendor's lien by having the 800,000 CH shares transferred to itself, and then claim beneficial ownership of them.

75 The defendants did not agree with that. They submitted:[note: 39]

> It is clear that the object of the equitable lien is to "achieve substantial justice between the parties". Given this object, it is difficult to see how the Plaintiff's position that the equitable lien only allowed the unpaid vendor the right to secure the payment of an unpaid purchase price. It is submitted that the use of lien as security would only be viable where the unpaid vendor wanted to proceed with the sale of the property, and looks to the property as security to realise the purchase price. It is further submitted that however, such a remedy does not preclude the other remedies available to an unpaid vendor. To do [so] would not only do justice to the parties, but it would compel the unpaid vendor to take a course that might result in injustice. For example, in the present case it would compel Crocodile International to sell shares that it never intended to sell to anyone except selected persons.
>
> The question then arises as to the remedies available to Crocodile International when the Plaintiff failed to pay for the shares registered to her name and repudiated the agreement to purchase. It is submitted that like any innocent party to a contract, Crocodile International could either affirm the contract or accept the Plaintiff's repudiation. It adopted the latter course of action, hence giving the Plaintiff notice of acceptance of her repudiation of the agreement by the letter dated 8 March 2000.

76 If they were right, equity would intervene to constitute CI the owner of 800,000 shares on the non-payment for 400,000 shares, even though no payment was due for the other 400,000 bonus

shares. No authority was cited in support of their submission. I do not see any justification for such an enlargement of this equitable remedy. In any event, my finding is that there was no payment due from the plaintiff for the shares, and that there was no lien.

Limitation

77 Limitation was also raised in the defence by CH in answer to the plaintiff's claim for the three dividend payments CH made to Dato Tan.[note: 40]

78 The plaintiff's claim was founded on the contract between CH and its shareholders constituted by the memorandum and articles of association. The limitation period for contract-based claims is six years under s 6 of the Limitation Act (Cap 163, 1996 Rev Ed). If the limitation defence applied, it would defeat the first two payments made on 24 April 1997 and 31 May 1997 which were time-barred by 1 September 2003 when the plaintiff filed her claim.

79 But there are exceptions to the rule. Section 29(1) of the Limitation Act provides that:

> Where, in the case of any action for which a period of limitation is prescribed by this Act —
>
> (*a*) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent;
>
> (*b*) the right of action is concealed by the fraud of any such person as aforesaid; or
>
> (*c*) the action is for relief from the consequences of a mistake,
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it.

80 CH purported to have paid the dividends to Dato Tan on the plaintiff's instructions in the letter dated 20 March 1996. When I accepted the plaintiff's evidence that the letter was not signed till 25 September 1998, it meant that CH could not have relied on the letter, and it did not divert those payments in good faith with the authorisation of the plaintiff. Furthermore, when the payments were made, CH did not notify the plaintiff that they were paid to Dato Tan pursuant to her instructions. As the shareholder, she should have been informed, and she needed to be informed for tax purposes.

81 "Fraud" for the purpose of s 29 of the Limitation Act is given a broad meaning. In *King v Victor Parsons & Co* [1973] 1 WLR 29, the English Court of Appeal considered the effect of s 26 of the Limitation Act 1939 (c 21) which is worded similarly to our s 29(1). Lord Denning MR held at 33–34:

> The word "fraud" here is not used in the common law sense. It is used in the equitable sense to denote conduct by the defendant or his agent such that it would be "against conscience" for him to avail himself of the lapse of time. The cases show that, if a man *knowingly* commits a wrong (such as digging underground another man's coal); or a breach of contract (such as putting in bad foundations to a house), in such circumstances that it is unlikely to be found out for many a long day, he cannot rely on the Statute of Limitations as a bar to the claim: see *Bulli Coal Mining Co. v. Osborne* [1899] A.C. 351 and *Applegate v. Moss* [1971] 1 Q.B. 406. In order to show that he "concealed" the right of action "by fraud," it is not necessary to show that he took active steps to conceal his wrong-doing or breach of contract. It is sufficient that he *knowingly* committed it and did not tell the owner anything about it. He did the wrong or committed the

> breach secretly. By saying nothing he keeps it secret. He conceals the right of action. He conceals it by "fraud" as those words have been interpreted in the cases. [emphasis in original]

This passage was referred to with approval by the Court of Appeal in *Bank of America National Trust and Savings Association v Herman Iskandar* [1998] 2 SLR 265 at [73].

82 In the circumstances, the requisite fraud and concealment were present, and time did not run until the plaintiff had notice of the diverted payments. There was no dispute that when she wrote to CH on 18 November 1998, she did not know of the three payments. Even if she was informed of the payments immediately (which was not the case), time started running from that day and the claims were not time-barred.

83 Having considered the issues, I find that the plaintiff has proved her case against the defendants and I order that judgment be entered in her favour against them.

[note: 1]DB1

[note: 2]DB2

[note: 3]Defendants Closing Submissions para 104

[note: 4]Defendants' Closing Submissions para 105

[note: 5]Defendants' Reply submissions para 22(e)

[note: 6]Notes of Evidence page 451

[note: 7]Defendants' Reply Submissions para 23

[note: 8]Defendants' Closing Submissions para 20

[note: 9]Defendants' Closing Submissions para 70

[note: 10]Plaintiff's Closing Submissions paras 3.16-3.18

[note: 11]Notes of Evidence pages 49-52

[note: 12]Notes of Evidence page 44

[note: 13]Notes of Evidence pages 308-309

[note: 14]Affidavit of plaintiff, para 24 and para 5 of Amended Statement of Claim in Suit 518/2004

[note: 15]Defendants' Opening Statement para 14(c), (d) and (e)

[note: 16]DB4

[note: 17]Affidavit of evidence-in-chief of Koh Chor Ngim para 9

[note: 18]Notes of Evidence pages 536-537

[note: 19]AB49-50

[note: 20]Notes of Evidence page 150

[note: 21]Notes of Evidence page 152

[note: 22]AB 54–55

[note: 23]Notes of Evidence page 537

[note: 24]Notes of Evidence pages 644-645

[note: 25]Notes of Evidence page 239

[note: 26]Defendants' Closing Submissions para 153

[note: 27]Defendants' Closing Submissions para 151

[note: 28]AB76

[note: 29]AB77

[note: 30]Plaintiff's Closing Submissions page 37

[note: 31]Defence of the First and Second Defendants in Suit No 518/2004, para 12

[note: 32]Notes of Evidence page 633

[note: 33]Notes of Evidence page 634

[note: 34]Notes of Evidence page 635

[note: 35]Notes of Evidence page 636

[note: 36]Defendants' Closing Submissions para 197

[note: 37]Amended Defence of the First Defendant in DC Suit No DC4011/2003 para 13

[note: 38]Defendants' Opening Statement para 14

[note: 39]Defendants' Closing Submissions paras 190 and 191

[note: 40]In the Plaintiff's Closing Submissions, the plaintiff has wrongly taken Dato Tan to have raised this defence as well.

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