Teck Jin (Pte) Ltd v Tan Kim Seng
[2007] SGHC 151

Case Number : Suit 602/2006

Decision Date : 17 September 2007

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Tan Kay Kheng and Melvin See (WongPartnership) for the plaintiff; Vincent Yeoh (Vincent Yeoh & Co) for the defendant

Parties : Teck Jin (Pte) Ltd — Tan Kim Seng

Companies – Shares – Shares held on Trust – Plaintiff sought declaration defendant was trustee for plaintiff of shares in different companies – Whether defendant held shares on trust for plaintiff – Whether plaintiff agreed to pay premium and administrative fee – Whether there was comprehensive final settlement – Whether plaintiff decided to forego rights issues

17 September 2007 Judgment reserved.

Judith Prakash J

Introduction

1 The plaintiff company, Teck Jin (Private) Limited, is an investment holding company incorporated in 1974 at the behest of the late Mr Tan Gim Huat ("TGH"), a businessman in Singapore. It is one of a number of companies started by TGH. Other companies in the group are Tan Gim Huat Holdings Pte Ltd ("TGH Holdings") and Tan Gim Huat Contractors Pte Ltd ("TGH Contractors").

2 At all material times, the two sons of TGH, Tan Tiow Jin @ Tan Ah Luy ("TTJ") and Tan Kim Seng ("TKS"), the defendant herein, were directors of the plaintiff. The defendant ceased to be a director and shareholder of the plaintiff in September 2005 but TTJ continues to be an officer of the plaintiff.

3 The action by the plaintiff against the defendant is for declarations that the defendant holds certain shares on trust for the plaintiff and for orders that he deliver up trust property to the plaintiff.

4 The shares to which the action relates are shares in a company called Solid Resources Limited ("Solid Resources") which was incorporated in Hong Kong in 1985 to invest in businesses in China, in particular, in property development and reprocessing and manufacturing of building materials. The defendant was a director of Solid Resources from 1987 up till 15 March 2004 when it was put into liquidation. In the meantime, Solid Resources had established a subsidiary company in Singapore, Solid Resources (S) Holding Limited ("SR Holding").

5 In about January 2004, Solid Resources and SR Holding were restructured. As a result of the restructuring, the defendant's shareholding of 12,196,720 shares in Solid Resources became a shareholding of 2,785,711 shares in SR Holding. This was achieved in two steps. First, SR Holding owed money to Solid Resources and Solid Resources assigned this debt to its own shareholders. Then, instead of SR Holding repaying the debt in cash, SR Holding repaid the debt by issuing new shares in itself to the shareholders of Solid Resources who thereby also became shareholders of SR Holding. As a result of this exercise, the defendant received 458,024 shares in SR Holding. The next step was that Solid Resources sold its shares in SR Holding to its own shareholders, in proportion to their

respective holdings in Solid Resources, at the price of $1 per share. As a result of the second part of the exercise, the defendant was entitled to buy 2,327,687 SR Holding shares. Solid Resources was then liquidated and the liquidator distributed its surplus assets to its shareholders. The defendant's share of the distribution was HK$11,830,995.25 (equivalent to S$2,327,687) and this distribution was applied in paying for the 2,327,687 SR Holding shares which he had purchased from Solid Resources.

6 Whilst Solid Resources was operating, the defendant was actively involved in its business in Hong Kong and China. From about January 1987, the defendant was a substantial shareholder in Solid Resources having been given one million shares in that company by his father and having acquired a further 680,000 shares from other shareholders in the company.

7 In 1988, Solid Resources declared a rights issue in order to raise capital. The defendant, because of his shareholding of 1.68m shares, was entitled to subscribe to 1.32m rights issue shares at a price of HK$1 each. At that time, however, the defendant did not have the financial resources to pay for these shares. In October 1988, therefore, it was agreed between the defendant and the plaintiff (represented by TTJ) that the plaintiff would pay for the 1.32m rights issue shares and the defendant would subscribe for them and hold them in his name but on trust for the plaintiff. The defendant does not dispute that from October 1988 onwards, he held 1.32m shares in Solid Resources on behalf of the plaintiff. Those shares were transferred to the plaintiff some time in 2004 and the dispute that has arisen is over further shares that the defendant acquired in the period between 1993 and 2000 as a result of both rights issue and bonus issue exercises carried out by Solid Resources.

8 The specific orders sought by the plaintiff are as follows:

(a) a declaration that the defendant was the trustee for the plaintiff of 3,298,249 shares of HK$1 each in the capital of Solid Resources;

(b) a declaration that the defendant is the trustee for the plaintiff of 753,314 shares of S$1 each in the capital of SR Holding;

(c) an order that the defendant do deliver up the 753,314 SR Holding shares to the plaintiff; and

(d) an order that the defendant pay the sum of $84,295.84 to the plaintiff.

The plaintiff accepts that if the defendant is ordered to deliver up the 753,314 SR Holding shares to the plaintiff, the plaintiff will have to reimburse the defendant with the amount that the defendant paid for subscribing to the rights issue shares in Solid Resources that eventually led to his holding of the 753,314 SR Holding shares. The aggregate cost of these shares was HK$1,379,838.

9 The defendant's case is that he was holding only the original 1.32m shares on trust for the plaintiff. First, he says that there was an agreement that the plaintiff would pay him a premium of HK$0.40 cents per share for the 1.32m shares through bonus issues and dividends that the plaintiff would receive from Solid Resources and that it would also pay him an administrative fee of two percent on the aggregate sum invested. Secondly, he says that there was a settlement in 2003 of the plaintiff's claims against him whereby it was agreed, *inter alia*, that the plaintiff would forego its right to the shares coming from bonus issues and rights issues of Solid Resources and that he would in turn transfer the 1.32m shares back to the plaintiff and forego his premium and administrative fee. The plaintiff denies that the initial agreement and the subsequent settlement were ever concluded. The plaintiff also contends that it was never told about the various rights issues whilst the defendant's story is that each time there was a rights issue, the plaintiff was made aware of the

same and decided that it did not want to take up the rights shares.

The evidence

10 As the disputes in this case are factual in nature, it is necessary to go into the evidence in some detail. There were three witnesses: TTJ gave evidence for the plaintiff whilst the defendant testified on his own behalf and was also supported by the testimony of one Mr Low Tin Kee ("LTK"), a certified public accountant, who was a long time associate of the late TGH and an old friend of both the plaintiff and the defendant. His firm, TK Low & Co ("TK Low"), was also the auditor of the plaintiff and other companies in the group.

The acquisition

11 TTJ stated that in September 1988, the defendant, who was then working in the premises at Kim Keat Lane occupied by the companies in the group, spoke to him and informed him that the directors of Solid Resources wanted to increase the paid up capital of Solid Resources by the allotment of 16.32m shares of HK$1 each fully paid in cash to the existing shareholders of the company. During this conversation, at which only TTJ and the defendant were present, the defendant told TTJ that he did not have the funds to subscribe for the 1.32m new shares attributable to him and that these shares could not be sold on the market. He also told TTJ that Solid Resources had good prospects in the Chinese market and it would be a waste to give up the opportunity to subscribe to these shares. The defendant said that each share, once issued, would be worth about HK$1.30 to HK$1.40 and would make a good long term investment. He proposed that the plaintiff pay for the shares and that he be appointed the plaintiff's trustee in respect of the 1.32m SR Holding shares. TTJ agreed and asked the defendant to proceed. On 31 October 1988, the plaintiff sent Solid Resources a draft for HK$1.32m to pay for the shares.

12 On 3 March 1989, the defendant instructed LTK to prepare a directors' resolution (backdated to 30 October 1988) concerning the purchase by the plaintiff of the 1.32m shares and the defendant's position. At that time, LTK's firm TK Low was providing secretarial and audit services to the plaintiff. A few days later, TK Low sent the defendant a draft resolution and this resolution was subsequently signed by all three directors of the plaintiff company namely, the defendant, TTJ and their cousin, one Tan Ah Phoo. The resolution read:

> We, the undersigned, being a majority of/all the Directors of TECK JIN (PRIVATE) LIMITED at this date, do pursuant to Article 93 of the Company's Articles of Association resolved *(sic)*:-
>
> 1. That the Company invest S$338,894.00 in 1,320,000 ordinary shares of HK$1.00 each in the share capital of Solid Resources Limited Hong Kong.
>
> 2. That the Company nominate the director, Mr Tan Kim Seng, to hold the said shares in his own name as trustee for the Company.

13 In October 1988, Solid Resources issued a share certificate in respect of the 1.32m shares which certificate certified that the defendant was the registered owner of the same. Subsequently (the exact date is not known), TK Low prepared a blank instrument of transfer in respect of the shares covered by the share certificate transferring the same from the defendant to the plaintiff and a declaration of trust in respect of the said shares. These documents were sent to the defendant but he did not execute either of them.

14 The defendant's version of the acquisition as explained in his affidavit of evidence-in-chief

was that there was a meeting at the plaintiff's office around October 1988 at which, apart from his brother and himself, LTK was present. At the meeting, it was agreed that the defendant would give his entitlement to the rights issue to the plaintiff. Secondly, based on LTK's computation, the parties agreed that at the time the estimated value of each Solid Resources' share was HK$1.40. Since the plaintiff would have to pay Solid Resources only HK$1 per share, TTJ agreed that the plaintiff would pay the defendant a premium of HK$0.40 cents (being the difference between the value of the share and its subscription price) ("the premium") through bonus issues and dividends that the plaintiff may receive thereafter from Solid Resources. He did not want to pay the defendant the premium immediately because he did not know whether the investment would be a profitable one. The premium for the 1.32m shares came to HK$528,000. The defendant said that as and when dividends or bonus issues were given, the plaintiff's share of the same would be used towards payment of the premium due to the defendant up to HK$528,000 and after that amount had been settled, further dividends and bonus shares would go to the plaintiff.

15 As regards the two percent administrative fee, the defendant explained that because Solid Resources' businesses and investments were in China, the company had to provide lavish entertainment and present gifts ("entertainment costs") to ensure that its activities proceeded smoothly. These entertainment costs were substantial and payment of the same was made directly by the shareholders and not reflected in Solid Resources' account. To cover the plaintiff's contribution towards the entertainment costs, the defendant asked TTJ for an administrative fee of two percent per annum on the aggregate sum invested from time to time. TTJ agreed that the plaintiff would pay him the two percent administrative fee as well.

16 The defendant's account of the acquisition was supported by LTK. He said in his affidavit that there was a meeting at the plaintiff's office between TTJ and the defendant at which he (LTK) was present. The defendant and TTJ decided that the plaintiff would take up the rights issue in the defendant's name. TTJ then asked LTK for an estimated valuation of the shares. LTK computed the estimated value of each share at that time to be about HK$1.40. This calculation he said could be verified from the 1989 accounts of Solid Resources. Accordingly, there was a HK$0.40 differential or premium to the advantage of the plaintiff. The parties then agreed that the plaintiff would pay the premium to the defendant in future through dividends and bonus issues and also that the plaintiff would pay a two percent administrative fee to the defendant.

Rights issues

17 According to the affidavits of the defendant and LTK, Solid Resources had two rights issues in 1993 and one rights issue in 1994. The defendant subscribed to all these rights issues and acquired further shares to wit, 1.5m shares in April 1993, 78,637 shares in July 1993 and 1,907,196 shares in September 1994.

18 The defendant said that in those days, he had an office next to the office occupied by TTJ at 14 Kim Keat Lane. Therefore, he saw his brother almost everyday if he was in Singapore. Each time Solid Resources had a rights issue, the defendant would tell TTJ about it and each time TTJ's response was that he did not want any more shares in Solid Resources. At that time TTJ did not want to put any more money in business or investments in China. The defendant would also tell LTK about the plaintiff's share of the rights issue on each relevant occasion. LTK was a family friend as well as the auditor and he would raise the issue with TTJ to ascertain whether the plaintiff wanted to take up the allotments. Each time after checking with TTJ, LTK would reconfirm to the defendant that the plaintiff would not be taking up the allotment and would tell the defendant to look for his own funding if he wanted to take it up personally. So each time the defendant went ahead to subscribe for the plaintiff's share of the rights issue allotment using his own funds and banking facilities.

19 In his affidavit of evidence-in-chief, LTK supported the defendant's version. He said that each time Solid Resources was going to make a rights issue, the defendant would inform him about it and he in turn would notify TTJ when they met for one of their monthly meetings to discuss matters relating to the various companies in the group. Each time a rights issue was brought up by LTK, TTJ told him clearly that the plaintiff would not subscribe for the plaintiff's share of the allotment. He said that it was not logical for the plaintiff to do so. At the material times, the main source of revenue for the plaintiff was rental income and this income barely covered the expenses. TTJ did not want to borrow money in order to subscribe for the plaintiff's share of the allotments and thereby increase the plaintiff's interest expenses because he considered that Solid Resources was not an attractive investment vehicle since it had not paid the plaintiff any dividend since 1988. TTJ also said that he did not want the plaintiff to invest in China. As for the September 1994 rights issue, LTK believed that the company had by that time already fully utilised its overdraft facilities.

20 The plaintiff's position was that it had never been informed about the various rights issues by either the defendant or LTK. First, TTJ denied that there were monthly meetings between him and LTK. He agreed that LTK visited the plaintiff's office as its auditor but asserted that such visits took place only once every two to four months. LTK did not tell him about the rights issues. He also considered that LTK's evidence was contrived. The defendant and TTJ worked in the same office at 14 Kim Keat Lane and LTK was not a messenger between the defendant and TTJ concerning the affairs of Solid Resources. The fact was that the defendant had never kept him or Mr Tan Ah Phoo informed about the affairs of Solid Resources although TTJ had frequently asked the defendant for information about that company.

21 TTJ also denied that he had considered that Solid Resources was not an attractive prospect for further investment. He stated that before the plaintiff purchased the 1.32m shares, he was well aware that Solid Resources was a Hong Kong company operating in China. Indeed, it was the fact that Solid Resources operated in China that gave it good prospects as the Chinese market was booming in 1992. He also asserted that it was not true that the plaintiff's rental income barely covered its expenses. During the period between 1993 and 1994 when Solid Resources had the rights issues, the plaintiff's rental income was more than sufficient for its expenses and the plaintiff had enough money to subscribe for the shares. The plaintiff also had an overdraft facility of $8.8m. The plaintiff's bank statement showed that the plaintiff had not fully utilised these facilities at any time when the rights issues were offered and the plaintiff therefore would have been able to use these facilities to subscribe for the rights issues had it known about them at the relevant times.

Bonus issues

22 In November 1994, the shareholders of Solid Resources approved the issue of bonus shares to its shareholders in the proportion of seven new shares for every ten shares then held by each shareholder. Consequently, the defendant was issued 5,262,032 bonus shares.

23 On 10 December 1994, the shareholders of Solid Resources approved a second issue of bonus shares to its shareholders, this time in the proportion of 21 new shares for every 3,379 shares held by a shareholder. The defendant was allotted 81,753 bonus shares.

The alleged settlement

24 The defendant's evidence was that in 2003, to avoid tax consequences, TTJ wanted to clear loans involving TGH Contractors. TTJ had taken loans from TGH Contractors whilst that company owed the defendant money for amounts he had paid on its behalf. TTJ needed money to repay the loans and wanted TGH Holdings to declare dividends to him to provide him with the necessary funds.

He also wanted the defendant to waive the debts that TGH Contractors owed the defendant. The defendant was not agreeable to this proposal unless the parties came to a comprehensive final settlement of all business interests between them.

25 The defendant said that the brothers asked LTK to help them work out a comprehensive final settlement and the latter came to their office for a meeting for this purpose on 31 March 2003. After discussion, TTJ (for the plaintiff) and the defendant agreed as follows:

(a) TGH Holdings would declare and pay dividends to TTJ (with the other shareholders of the company waiving their entitlement to dividend in favour of TTJ) and TTJ would use the money to pay back his loan to TGH Contractors;

(b) the defendant would waive the loans he had given to TGH Contractors;

(c) the plaintiff would forego any claim to any bonus issue or rights issue shares issued by Solid Resources;

(d) the defendant would transfer the 1.32m Solid Resources shares to the plaintiff; and

(e) the defendant would forego the premium and the two percent administrative fee.

26 Immediately after the settlement was reached, LTK prepared a transfer form in respect of the 1.32m shares. In his presence, TTJ signed the form on behalf of the plaintiff as transferee and the defendant signed it as transferor. They also signed a resolution for a declaration for dividends to TTJ. LTK subsequently did the accounts and worked out the sum that the defendant was to waive. A resolution for the waiver was passed in September 2003. Thereafter, the transfer form was sent to Solid Resources in Hong Kong and the 1.32m shares were registered in the name of the plaintiff.

27 LTK's evidence was that around the beginning of 2003, TTJ went to him and asked him to untie the business interests then existing between himself and the defendant. Also, TTJ wanted to clear the loan that he had taken from TGH Contractors because of the decision of the Income Tax Department to treat such loans as a taxable employment benefit.

28 It was in those circumstances that the meeting of 31 March 2003 took place. During the meeting, TTJ asked for the 1.32m Solid Resources shares to be transferred into the name of the plaintiff and enquired about the bonus issues and rights issues. The defendant then said that he wanted to be paid the HK$0.40 premium and the two percent administrative fee. According to LTK, the administrative fee was to compensate the defendant for his efforts and money expended over the years in safeguarding and promoting the interest of the plaintiff in the Solid Resources shares. He asserted that everyone knew that in order to do business in China, entertainment costs had to be paid and in this case, the costs were paid by the shareholders directly rather than by Solid Resources. As a matter of fact, TTJ had himself told LTK about the entertainment payments by the shareholders of Solid Resources. When the plaintiff decided to take up rights issue in 1988, it was not known exactly how much the entertainment costs would be in respect of the shares held for the plaintiff and that was why the brothers had agreed on two percent of the aggregate investment per annum.

29 At the meeting, TTJ wanted TGH Holdings to declare dividends to him so that he could use the same to pay off the loan from TGH Contractors. He asked the defendant to waive the amounts owed to him by TGH Contractors.

30 LTK confirmed that after some discussion, the comprehensive final settlement in the terms described by the defendant had been arrived at. There were no written resolutions for the plaintiff's agreement to forego the bonus issue shares and the rights issue shares as the plaintiff was, and operated as, a family company. He then prepared the transfer form for the 1.32m shares and it was executed in his presence. Thereafter, the shares were eventually registered in the name of the plaintiff. As for the defendant's waiver of the money owing to him by TGH Contractors, LTK stated that he took some time to prepare and finalise the accounts and to work out the sums owed to the defendant. This was completed by September 2003 and a formal resolution was done at that time. In the formal resolution, LTK used time bar as the reason to justify the waiver of the total debt owed to the defendant.

31 TTJ denied that any comprehensive final settlement was reached between him and the defendant, whether in the terms asserted by the defendant or otherwise. He recalled a meeting held some time in 2003 at the plaintiff's office between Mr and Mrs LTK, the defendant, Tan Ah Phoo and himself. The defendant had come to that meeting accompanied by LTK and the latter's wife, to execute the formal transfer document in respect of the 1.32m Solid Resources shares to the plaintiff company because this was something that TTJ had been pressing the defendant to do since 2000. After the transfer form was signed, TTJ asked the defendant to give him information about Solid Resources business and whether it had declared any dividends, rights and bonus issues or any other benefit. He also wanted those benefits, if any, to be transferred to the plaintiff. The defendant was very unhappy when questioned and responded that Solid Resources was a loss-making company and had nothing left. TTJ also asked the defendant about some cash kept in a safe deposit box and the defendant then flew into a rage and left with Mr and Mrs LTK, taking the transfer form with him. Although the transfer of the 1.32m Solid Resources shares was eventually effected, the plaintiff never received the scrip for those shares.

32 TTJ's version was that during the meeting, neither the defendant nor LTK mentioned the issue of the premium or the administrative fee. This was because those items were afterthoughts invented by the defendant to frustrate the plaintiff's claim. TTJ asserted that it could not have been agreed on 31 March 2003 that TGH Holdings would declare dividends because the directors' resolution in writing made by the directors of TGH Holdings on 25 March 2003 showed that they had resolved on that date to call an extraordinary general meeting on 31 March 2003 to approve the declaration of dividends. It was clear, asserted TTJ, that they did not have an agreement on 31 March 2003 that TGH Holdings would declare dividends as the decision to declare dividends had already been made on 25 March 2003 and approved on 31 March 2003.

Events subsequent to 31 March 2003

33 The plaintiff's position was that it was not until December 2005 that it discovered that Solid Resources had declared bonus issues and rights issues during the period when the defendant held shares on trust for it. TTJ's evidence was that the plaintiff only found out about these matters when TTJ himself found certain files in the defendant's office during the course of the plaintiff's change of office from Kim Keat Lane to a building in Cecil Street in December 2005. The documents contained in two files in the defendant's filing cabinet showed him that the defendant had been withholding information concerning the business of Solid Resources. The plaintiff then instructed solicitors to obtain more information and attempt to reconstruct the events. As a result, the plaintiff discovered that the defendant had kept bonus issues and rights issues for himself which should have been given to the plaintiff. This discovery led to the commencement of the present action.

34 The defendant, on the other hand, alleged in cross-examination that the plaintiff always had access to his files since they were in his cabinet in his room in the plaintiff's office and the plaintiff

must have known about the bonus issues and rights issues from the beginning. He also asserted that after the comprehensive final settlement in 2003, TTJ had not asked him any more questions about Solid Resources and this showed that the plaintiff had no further interest in that company, having taken back its 1.32m shares. On his part after March 2003, he no longer asked the plaintiff for payment of the premium or the administrative fee.

Analysis

35 In considering the submissions and the evidence, I must have regard to the undisputed facts. The most important of these is that from the beginning, the defendant accepted that the 1.32m Solid Resources shares which were allotted to him in October 1988 or thereabouts, were paid for by the plaintiff and were acquired on the basis that he would hold them on trust for the plaintiff. As trustee of the shares for the plaintiff, the defendant would, *prima facie*, be obliged to account to the plaintiff (or hold on trust for the plaintiff) for all benefits accruing to him as a result of that shareholding. Thus, unless the parties agreed otherwise, any bonus issue shares given to the defendant in connection with his holding of 1.32m shares would belong beneficially to the plaintiff and any rights issue shares to which the defendant would be entitled to subscribe as a result of such holding would also have to be offered to the plaintiff. The plaintiff having established (and the defendant not contesting) the defendant's position as trustee of the shares, the onus would lie on the defendant to establish the existence of any agreement between himself and the plaintiff that would detract from the plaintiff's natural rights as the beneficial owner of the shares. Thus, in assessing the evidence, I must always bear in mind that it is for the defendant to establish the special terms which he said existed rather than for the plaintiff to prove that no such special terms were agreed. The onus of proof is particularly important in a case such as the present where most of the evidence was oral and where all three witnesses were not always completely truthful.

The first issue: whether the plaintiff agreed to pay a premium and administrative fee

36 The defendant's case on this issue depends entirely on oral evidence. There was no document supporting the alleged agreement; on the contrary, those documents that were prepared around the time of the agreement did not disclose its existence. The defendant therefore spent much of his time attacking the credibility of TTJ and asserting that his version should be believed because it was supported by the evidence of an independent witness in the form of LTK. As, however, it is the defendant who has the burden of establishing the existence of the agreement, I must first consider the strength of his case on the issue.

37 In my view, there are a number of hurdles in the defendant's way. First is the fact that the defendant sought to convince me that although Solid Resources was issuing shares at HK$1 each, the plaintiff was willing to pay him a premium of 40% of the issue price. As the shares were being acquired as an investment, then an agreement to pay the premium and administrative fee made them a more expensive and less attractive investment. TTJ gave evidence that as the plaintiff was part of his family business, he would not have agreed to use the plaintiff's funds to buy shares worth about HK$1.40 per share at HK$1 per share on the basis that the entire profit of this investment (the premium) would be given to the defendant who was only one of the members of the family. This evidence made sense and highlighted the unlikelihood of the defendant's story. As the defendant could not afford in any case to take up the rights issue shares, there was no logical reason for the plaintiff to agree to pay him 40% of the value of the shares in order to take advantage of the opportunity. The defendant tried to justify the payment of the premium by saying that this was his reward for holding the 1.32m shares on trust for the plaintiff, because he would otherwise receive nothing for his labour. The defendant, however, did receive a salary for TGH Contractors and he also held shares in TGH Holdings, the holding company of the plaintiff so he stood to benefit (albeit

indirectly) by any increase in the value of the investment made by the plaintiff in Solid Resources.

38 Secondly, the defendant asserted that in 1988, Solid Resources' shares were actually worth HK$1.40 each and that was why he had been able to persuade the plaintiff to pay him the premium. Whilst this assertion was substantiated by the financial statements of Solid Resources for 1988 and 1989, those documents were not available to the plaintiff at the time that the investment was made and the plaintiff would not then have been certain as to the value of the shares. It was the defendant's case that he had calculated the net worth of the shares by reference to certain management accounts. Those management accounts were not, however, shown to the court: they were not exhibited in either the defendant's affidavit or in LTK's affidavit. What was attached to the latter affidavit was a set of the 1988/1989 financial statements. It may also be worth noting that the value of HK$1.40 per share could only be obtained by making a calculation based on the consolidated balance sheet of Solid Resources and its subsidiaries and not based on its own balance sheet alone. There was no evidence that the management accounts included such a consolidated balance sheet. Further, there was a discrepancy in the account of the circumstances in which the premium was calculated. The defendant claimed that the management accounts were given to LTK and that he had worked out the figures with LTK in the absence of TTJ. LTK also said that the premium was based on the management accounts but he then contradicted the defendant's account in that he said that the premium was calculated in the presence of TTJ. Whilst this may be a minor discrepancy caused by a natural failure in memory due to the lapse of time, it could also be an indication that the value of the shares was not worked out at the time the plaintiff was asked to invest but was calculated subsequently, on the basis of financial statements available subsequently, to support the story relating to the premium.

39 The third point presents the defendant with more difficulty. It was the defendant who gave LTK the instructions to prepare the directors' resolution to authorise the plaintiff's acquisition of the 1.32m shares. In his instruction to LTK, the defendant said:

> 1. Please prepare the required director resolution dated 30 Oct 1988 for the following:
>
> Share purchase by Teck Jin in Solid Resources Limited for H.K.$1,320,000.00 @ $1H.K. each (S$338,894-00)
>
> 2. Mr Tan Kim Seng is nominated to hold the above share in his name on behalf of the company.

Neither the defendant's instruction nor the resolutions that were drafted in accordance with that instruction (see [12] above) mentioned that in addition to paying Solid Resources HK$1.32m for the shares, the plaintiff was to pay the defendant the premium and administrative fee. In court, the defendant was asked why he did not mention the premium and the administrative fee in the note to LTK. His reply was: "During that time, everything is verbal." It was pointed out to him that not everything was verbal since he had written the note to obtain documentation of the investment and that he could have given a written instruction to LTK on the other terms. His response was "I didn't write it". He agreed that the plaintiff had to pass a resolution to authorise payment of the HK$1.32m to Solid Resources. He also agreed that the acceptance of the premium payment would have meant that the plaintiff had to pay him another HK$528,000 for the premium (although this would be paid through bonus shares). When asked again why he did not provide for the resolution to mention the plaintiff's payment of the additional premium, his answer was "Then maybe I overlooked for that particular item". The defendant thus could not explain why he did not take the opportunity to document the obligation of the plaintiff to pay him the premium and the administrative fee.

40 When LTK was on the stand, he was also asked to explain why a directors' resolution was prepared to say that the defendant was to hold shares on behalf of the plaintiff but did not mention the premium and administrative fee. He was not able to give a satisfactory response to this question. First, he tried to say that no resolution was required. When asked, however, why in that case the resolution had been prepared, he suggested that only a "bare bones" resolution was necessary. When pressed, he conceded that there had to be a resolution to state the amount of money that the plaintiff was going to invest so that there would be a record for audit purposes. That answer led to the next question as to why the premium was not mentioned in the resolution so that there would be a record of it for audit purposes. He then claimed that this was because the premium was not significant even though the cost of the investment was HK$1.32m (about S$338,000) and the premium came up to HK$528,000 (about S$100,000). That answer was not believable.

41 Connected with the third point was the draft trust deed. This was prepared some time after 1988 by a member of LTK's staff. The document was short. It was described as a declaration of trust made by the defendant who was called "the trustee". The preamble stated that the trustee was the registered owner of 1.32m shares in Solid Resources and that the said shares were purchased by the trustee with moneys provided by the plaintiff and were purchased by the trustee for the benefit of the plaintiff. The operative part of the deed had six clauses and for present purposes the relevant clauses are cll (a), (d) and (e) which read:

> (a) The Trustee hereby declares that the said shares are held by him in trust for the Beneficiary [the plaintiff].
>
> (d) The Beneficiary can at any time direct the Trustee to transfer the said shares in favour of the beneficiary himself or any other person or company.
>
> (e) All dividends, bonuses, right issues and all benefits of the shares shall belong exclusively to the Beneficiary.

It would be noted that cl (e) was in complete contradiction to the terms allegedly agreed between the plaintiff and the defendant.

42 The defendant never signed the trust deed. He was asked to explain why. He did not say that he did not sign it because of the presence of cl (e). He said that he did not sign it because after the plaintiff had paid for the 1.32m shares, TTJ had indicated that he was no longer very interested in investing in China. The defendant agreed that he was supposed to sign a trust deed since he held the shares in trust but was not able to explain why he did not sign it. His evidence on the trust deed was rather confused because, at one point, he was claiming that he could not recall whether he seen the trust deed previously, whereas, at another stage, he said that he had not seen the deed at all. At the same time, he maintained "I only see the two copy of that plus my hand note". It was not at all clear what he was referring to. When he was shown the copy of the draft trust deed in the agreed bundle and asked what it was, he was able to say "This is the trust agreement".

43 If the defendant's evidence on the trust deed was confusing, LTK's evidence was unbelievable. As I stated above, the document was prepared by a member of his staff. When LTK was asked whether he had prepared the trust deed or given instructions for it to be prepared, he asserted that it was a specimen which his office had in its working papers so that if a client wanted it, it could just be handed over to the client. I then asked him whether he had a specimen in the office which said "This declaration of trust is made blank day by Tan Kim Seng NRIC of 161 Eng Kong Garden" and his reply was "Yah, it's a specimen. We have it in our office". Subsequently, he said that his staffer would fill in the blanks in the specimen and send off the document to the client to be signed. Though

LTK was asked several times who gave the instructions to his staffer as to what particulars were to be put into the specimen, he did not give a direct reply. In response to the question "Who told the staff to prepare it?", he answered:

> You see Tan Kim Seng written a letter to me, … but my girl Ms Ho … there was an instruction given by Tan Kim Seng. It's sent to me, it's there. But Ms Ho reply his letter, er, I don't know what date, er, roughly, er, 8th of March. Ms Ho is the one who sent the papers to him, you see … and then after that we prepare the papers.

The defendant's letter of 8 March 1989, however, was the letter that I have quoted above asking LTK to prepare the resolution. It did not mention the preparation of a trust deed. LTK explained that nevertheless the trust deed was drafted because Ms Ho when she saw the instruction stating that the defendant was to hold the shares on behalf of the plaintiff, would have assumed that he wanted her to prepare a declaration of trust. LTK then claimed that Ms Ho went ahead of her own accord to prepare a draft and that he did not vet the draft. He also said that the draft was sent by facsimile transmission to the plaintiff company. He agreed that cl (e) of the draft was contrary to the alleged agreement between the parties but defended the presence of the clause on the basis that the draft was a specimen given to the plaintiff by his employee Ms Ho and that it was up to the plaintiff to follow up with him if it wanted the draft modified. He agreed that nobody came back to him with proposed changes to the draft.

44 In my opinion, the draft trust deed strongly supported the plaintiff's version of the agreement and undercut the defendant's version. LTK was, on his own account, a witness to the agreement and he was the one who must have given the instructions for the preparation of the draft trust deed. The draft was not prepared immediately after the shares were purchased but only after the shares had been registered in the name of the defendant because the draft included the details of the share certificate issued for the shares. In fact, the draft was not simply a specimen – it was a specimen that had been considerably modified in order to reflect the particulars of the trustee, the beneficiary and all details of the purchase and description of the shares. I do not believe that LTK did not see the draft before it was sent to the plaintiff. I think he must have seen it and found it to be satisfactory despite the presence of cl (e) because cl (e) reflected the normal situation which exists when a trustee hold shares for a beneficiary and there had been no other agreement in this case that required the deletion or modification of cl (e).

45 The fourth difficulty that the defendant has is that he himself did not act in accordance with the alleged agreement. He explained in court how the agreement was supposed to operate:

> Court: How was this supposed to work?
>
> Witness: Pardon?
>
> Court: What was supposed to happen? How was --- what was the operation of this arrangement, the intended operation of the arrangement, what was it?
>
> …
>
> Witness: You see, this 40 cent premium because no doubt I work up in 40 cents but I won't ask them --- ask the company to pay me upfront. I can only prove it that it would be worth so much and when there is a bond issue or dividend, I will offset it on dollar-to-dollar basis.
>
> Court: Okay. Now talking about bonus issues, how would you offset it?

Witness: Bonus issue, er, it will be --- if bonus issue, it will be count at par, at $1.

…

Court: Supposing you are offered 50,000 shares bonus issue, then what would happen?

Witness: I will use a ratio for Teck Jin. Let's say during that time, I have 1.68 million and Teck Jin have 1.32, altogether will be about 3 million. I will base on that ratio to distribute it.

Court: Okay, so based on that ratio, how many of the bonus shares are Teck Jin's?

Witness: It will be about 40% of the bonus, if there is.

Court: 40%?

Witness: That is, if every 10 share of the bonus share, I will give Teck Jin to offset this sum for four share, if every 10 share.

Court: Okay, so 50,000, that means 20,000 shares?

Witness: 20,000 will be offsetting of the 528.

…

Court: So since it's free, then you will add that 20,000 to your own ---

Witness: Yah.

Court: --- and you will reduce the 528,000 ---

Witness: Yah

Court: --- to 508,000?

Witness: It will reduce it gradually if there is bonus issue.

46 From the above account, it appeared that the defendant would have me believe that from the beginning, he had it clearly in his mind that any dividends and bonus shares coming from Solid Resources would have to be applied towards paying the premium. The defendant, however, did not act in accordance with such an understanding. He conceded that over the years, he did not track the dividends and the bonus shares so as to determine which of the same were attributable to the plaintiff's shares and therefore had to be offset against the premium. He admitted during cross-examination that he recorded only the total number of bonus shares he was entitled to in respect of shares registered under his name which included the shares he held on trust for the plaintiff.

47 Counsel for the plaintiff, Mr Tan Kay Kheng, submitted that the real reason why the defendant never kept proper track of dividends and bonus shares was that there was no agreement by the plaintiff to pay him the premium and the administrative fee. To me, this explanation is a plausible one given that the defendant also admitted that he never informed any other director in the plaintiff of the declaration of bonus shares by Solid Resources. If the agreement had been that the defendant would take his premium and fee out of the bonus shares, and the defendant was acting in good faith, there would have been every incentive for him to inform the plaintiff when such shares

were issued so that the necessary calculations could be made as to how many of those shares had to be given to him in order to pay off the premium and it could also be determined exactly how many shares he held on trust for the plaintiff once the bonus issue had been taken into account. The defendant could not explain why he had not kept track of the bonus issues in this way except to say that he overlooked doing so. That was a puerile explanation.

48 It is also worth noting that if the defendant had applied the agreement to the bonus issues, then he would have realised that the premium and administrative fee had been fully settled by the plaintiff by 25 November 1994. This is because on 5 November 1994, the defendant was allotted 5,262,032 bonus shares in Solid Resources pursuant to a shareholders' resolution on the same day to issue seven bonus shares for every ten shares held by a shareholder. As the plaintiff was, beneficially, the holder of 1.32m shares, it would have been entitled to, notionally, 924,000 new shares. Out of these 924,000 new shares, the defendant would have been entitled to keep 528,000 shares in payment of his premium and about another 26,400 shares in payment of his administrative fee. That would have meant that out of the 924,000 bonus shares, the plaintiff would have been entitled to 369,600 shares on this occasion and that thereafter, all bonus shares attributable to the plaintiff's holding should have been allocated by the defendant to the plaintiff. As it was, the defendant wanted me to believe that as of 2003 when the alleged comprehensive final settlement was reached, his premium and administrative fee were still outstanding.

49 Another discrepancy which I noted in the defendant's account related to the administrative fee alone. It had been pleaded in his defence that the plaintiff had agreed to pay him an administrative fee of two percent per annum of the value of the shares held for the plaintiff. The defendant had repeated this assertion in his affidavit of evidence-in-chief. When he was cross-examined, however, the defendant asserted that the agreement was that he be paid a one time administrative fee. Therefore, he agreed that he would only be entitled to HK$26,400 in administrative fees to be paid on a one-off basis.

50 Overall, I find that on the balance of probabilities, the plaintiff did not agree to pay the defendant the premium and the administrative fee. The defendant has not proved that defence. Accordingly, all bonus shares that were allotted to the defendant by reason of his holding of the 1.32m Solid Resources shares were held by the defendant on trust for the plaintiff.

The second issue: whether there was a comprehensive final settlement

51 As I have found that there was no agreement to pay premium and administrative fee, it follows that the defendant could not have responded to the plaintiff's request for the 1.32m shares to be transferred to the plaintiff's name by asserting that he would not do so unless he was paid his premium and fee. There cannot therefore have been a dispute between the plaintiff and the defendant that would have led to a comprehensive final settlement in the terms asserted by the defendant.

52 The defendant's evidence and that of LTK on the comprehensive final settlement were quite incredible. The defendant having agreed that by the time the alleged comprehensive final settlement was concluded (March 2003), he would have in fact been paid his administrative fee and premium by reason of the bonus shares issued by Solid Resources in 1994, even on the defendant's own case, he had no basis on which to dispute the plaintiff's entitlement to the transfer of the original shares and the subsequent shares arising from the bonus issues (minus of course those used for the payment of the administrative fee and the premium). Indeed, since the defendant had received full payment and had nothing to give up, there would have been no consideration moving from the defendant to support the settlement. Also, the terms of the alleged settlement involved other companies in the

TGH group and other shareholders of the group. TTJ could not have agreed to such terms since the other parties had not authorised him to agree to those terms on their behalf. Indeed, when LTK was cross-examined, he gave evidence that the various debts of the alleged comprehensive final settlement were in fact separate agreements and that for each step, an agreement would have to be reached between TTJ and the defendant.

53 Although the defendant had conceded during cross-examination that he had already been paid the premium and administrative fee by March 2003, LTK gave evidence that the defendant had not received anything from the plaintiff. LTK said that the defendant had told him that the defendant wanted his HK$0.40 and his two percent fee and, from that, LTK concluded that the defendant had not received anything from the plaintiff since the defendant would not have claimed the full premium and fee had he been paid any part of the same. LTK said that he knew nothing about the bonus shares received by the defendant between 1989 and 2003. The divergence in the evidence of LTK and the defendant on this question of payment was telling. LTK's partiality to the defendant was disclosed by his acceptance at face value of the defendant's claim without even questioning him if any bonus issues had been declared during the relevant period.

54 The defendant and LTK had alleged that the defendant, TTJ himself and other shareholders of TGH Contractors, had waived their dividends due from that company and also repayment of loans made to that company in order that TTJ could receive a sufficiently large dividend to meet certain income tax liabilities. They said that these steps were a *quid pro quo* for the defendant giving up the premium and the administrative fee. None of the other shareholders testified that they agreed to forego their dividends from TGH Contractors in order to facilitate a settlement of a dispute between the defendant and the plaintiff and, it is unlikely that they would have done so. Whilst I cannot determine what motivated the defendant to waive his entitlements, I do not believe that it had anything to do with the 1.32m shares. Quite apart from anything else, the dividend waiver was decided on 25 March 2003 whilst the alleged settlement agreement only took place on 31 March 2003 and under cross-examination, LTK admitted that the meeting of 31 March 2003 was only held to discuss the loans extended by TGH Contractors to TTJ and had nothing to do with the plaintiff.

Third issue: whether the plaintiff decided to forego the rights issues

55 In relation to the rights issues, as trustee for the plaintiff, the defendant had the obligation to inform it whenever Solid Resources proposed to allot shares to him on the basis of a rights issue so that the plaintiff could decide whether it wanted to take up its share of the rights issue shares or not. The defendant did not dispute that duty. His position was that he had carried it out faithfully on each relevant occasion and that each time the plaintiff had declined the opportunity.

56 The evidence from the defendant was that not only would he tell TTJ about an imminent rights issue but that he would also talk to LTK on each such occasion and LTK would then confirm with TTJ that the plaintiff did not wish to take up the same. In similar vein, LTK alleged that whenever there was such a rights issue, the defendant would inform him about it and he would then talk to TTJ about the same at their monthly meetings. LTK would then convey TTJ's decision on the rights issue to the defendant.

57 TTJ's evidence was that he did not meet LTK on a monthly basis. Instead, he met him only once every two to four months. He said it was Mrs LTK who visited the plaintiff's office more often in connection with the accounting work that LTK's firm did for the TGH group. In this regard, I must note that I think that TTJ down-played the closeness of his relationship with LTK. I accept that LTK had had working and social connections with the TGH group and TTJ and the defendant for many years. In fact, it was LTK who procured the incorporation of the plaintiff in 1974 at the request of TGH himself.

I accept that until the relationship between TTJ and the defendant soured, LTK would have seen TTJ frequently. Having said that, however, I find it difficult to believe the defendant's story in relation to the rights issues. The defendant was working in the same premises as TTJ. It was very easy for him to have access to TTJ and tell him each time a rights issue came up. It is possible that if a rights issue had come up when the defendant was out of Singapore, he may have used the good offices of LTK to bring this matter to TTJ's attention. That that actually happened seems to me to be remote for two reasons. First, the defendant could as easily have contacted TTJ from Hong Kong as he contacted LTK. Second, LTK himself testified that he saw TTJ only once a month or so and it was during those monthly meetings that he brought up the question of subscribing to the various rights issues. It seems unlikely to me that if there was a rights issue that had to be taken up and paid for and LTK had been asked to find out whether the plaintiff wanted the shares, he would have waited until the monthly meeting to broach the issue with TTJ. Surely if he had been tasked with this matter by the defendant, he would have made an attempt to see TTJ immediately. Yet, LTK never made such an allegation. He was content to affirm that he had not made any special effort to go and see TTJ in relation to the rights issues but had only spoken to him about them during the monthly meetings.

58 The defendant also attempted to support his assertion that the plaintiff had rejected the rights issue shares by asserting that the plaintiff did not have enough money at the material dates to subscribe for them. The evidence showed, however, that during the period in 1993 and 1994 when Solid Resources had its rights issues, the plaintiff's rental income was more than sufficient for expenses and the plaintiff had sufficient funds to consider subscribing for the shares. Although the accounts of the plaintiff showed that the total expenses for 1993 and 1994 were apparently less than the total income for those years, TTJ explained that in the accounts, items such as depreciation for equipment, furniture and fittings were included as expenses. These were notional expenses and if they were not taken into account, then the plaintiff's rental income exceeded its expenses. In any case, the plaintiff had credit facilities which it could have utilised to subscribe for the rights issue shares. LTK alleged that the plaintiff had fully utilised its overdraft facilities towards the end of 1993 but the documentary evidence showed that the plaintiff had not fully utilised its overdraft line (the credit limit was S$8.8m) at any time when the rights issue shares were available and that the plaintiff had sufficient funds which it could have utilised to buy these shares had it known about them and had it wanted to. Under cross-examination, LTK had to admit that it had been possible for the plaintiff to exercise its entitlement to the rights issue at the material times had it wanted to. I should state here that LTK did not appear to me, especially in relation to this portion of the evidence, to be an independent witness. He did his best to support the defendant's contention that the plaintiff could not afford to take up the rights issues and had to be pressed repeatedly with reference to what was shown by the documentary evidence before he finally conceded that, financially, the plaintiff would have been able to buy the rights issue shares had it known about them.

59 The defendant tried to convince me that the plaintiff knew everything that was material to the plaintiff's shareholding in Solid Resources. His evidence on this was, at times, incredible. When he was asked if he kept TTJ informed of the shares and bonus issues, he said that TTJ knew about them because the latter could gain access to the defendant's private files kept in a filing cabinet in the defendant's room in the plaintiff's premises. When further pressed on this point, the defendant claimed that he had specifically told TTJ that TTJ could have access to all his files especially those relating to Solid Resources. When asked whether apart from the fact that TTJ could have access to the files, he had informed TTJ about the bonus issues, the defendant replied that he was himself a director of the plaintiff. Presumably, by that rather evasive answer, he meant that if he knew about the bonus issues, the plaintiff had that knowledge as well. He was then asked whether he had informed any director or officer of the plaintiff about the bonus shares and he finally agreed that he had not told anyone about the bonus shares.

60 Having regard to the evidence before me, on the balance of probabilities, I find that the defendant did not tell the plaintiff about the rights issues. I should state here that the defendant's closing submissions contained a strong attack on the credibility of TTJ. Whilst I agree that TTJ did not appear to be telling the truth on all matters and that his evidence contained some discrepancies and inconsistencies, these did not have an adverse impact on the material elements of the plaintiff's case. As I have said, the onus of proving the defence lay on the defendant who was the acknowledged trustee of the 1.32m Solid Resources shares from October 1988 onwards. The defendant and his witness, LTK, made a number of untrue and exaggerated statements in support of that case and they were not able to establish it on the balance of probabilities.

Conclusion

61 In the circumstances, there must be judgment for the plaintiff and the declarations it asked for must be made. The defendant did not dispute the plaintiff's calculation that if from the beginning, the defendant had had to account for all bonus issue and rights issue shares attributable to the plaintiff's investment, at the end of the day, the defendant would have held 3,298,249 shares of HK$1 each in the capital of Solid Resources on behalf of the plaintiff and that, therefore, after the restructuring of Solid Resources, the defendant would have become the trustee for the plaintiff of 753,314 shares of S$1 each in the capital of SR Holdings that are registered in his name.

62 The plaintiff accepted that it would have to pay the defendant for these rights issue shares as it was not entitled to get them for free. The cost of the rights issue shares amounted to HK$660,000 (for the first rights issue), HK$34,600 (for the second rights issue) and HK$685,238 (for the third rights issue). The plaintiff should pay the defendant the equivalent of those sums in Singapore dollars on the basis of the exchange rates applicable at the time the respective rights issue shares were allotted. As against the amount payable by the plaintiff, the sum of S$84,295.84 which represents dividends received by the defendant from Solid Resources and attributable to the plaintiff's shares, should be set-off. No interest shall be payable by the plaintiff to the defendant as long as the balance amount due is paid within six weeks of the date hereof and in exchange for a transfer of the shares, as the defendant cannot be entitled to interest from the dates he paid Solid Resources for the shares since he was at that time acting in breach of trust. If payment is not made within the specified period and non-payment is due to the plaintiff's default, then interest on the sum shall accrue at the rate applicable to judgments from the due date hereunder until payment. There will be the appropriate declaration in respect of the ownership of the 753,314 shares in the capital of SR Holdings. The defendant shall pay the plaintiff the costs of this action. The parties shall have liberty to apply.

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