IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 52

Suit No 125 of 2014

Between

(1) Koh Keng Chew
(2) Koh Oon Bin
(3) Koh Hoon Lye

… *Plaintiffs*

And

(1) Liew Kit Fah
(2) Liew Chiew Woon
(3) Pang Kok Lian
(4) Soh Kim Seng
(5) Soh Soon Jooh
(6) Poh Teck Chuan
(7) Samwoh Corporation Pte Ltd
(8) Samwoh Resources Pte Ltd
(9) Samwoh Infrastructure Pte Ltd
(10) Samgreen Pte Ltd
(11) Samwoh Marine Pte Ltd
(12) Samwoh Shipping Pte Ltd
(13) Resource Development Holdings Pte Ltd
(14) Highway International Pte Ltd
(15) Sam Land Pte Ltd
(16) Sam Development Pte Ltd

… *Defendants*

GROUNDS OF DECISION

[Companies] — [Oppression] — [Minority shareholders] — [Valuation of shares] — [Reference date]

Koh Keng Chew and others
v
Liew Kit Fah and others

[2017] SGHC 52

High Court — Suit No 125 of 2014
Chua Lee Ming J
23 January 2017

13 March 2017

Chua Lee Ming J:

Introduction

1 This was an action commenced by the plaintiffs under s 216 of the Companies Act (Cap 50, 2006 Rev Ed). On 29 July 2016, I delivered my judgment in which I gave an order for the 1st to 6th defendants to purchase the shares of the plaintiffs in the 7th to 16th defendants (see *Koh Keng Chew and others v Liew Kit Fah and others* [2016] 4 SLR 1208). The plaintiffs filed an appeal against that decision but have since withdrawn the appeal.

2 As agreed between the plaintiffs and the 1st to 6th defendants, the price will be determined by an independent valuer to be appointed. It was also agreed that the valuer to be appointed, the reference date for the valuation and the costs of the valuation will be decided by this court if the parties cannot reach agreement on the same.

3 Ultimately, the parties could not agree on the following issues: (a) the reference date for the valuation of the shares, (b) the framework for the valuation process, and (c) whether the valuer should issue a reasoned valuation. Accordingly, I heard the parties on these issues on 23 January 2017. I decided on 17 February 2016 as the reference date, gave certain directions as to the valuation process, and also decided against a reasoned valuation.

4 The 1st to 6th defendants have appealed against my decision regarding the reference date for the valuation of the plaintiffs' shares in the 7th to 16th defendants. Before me, they had contended that the reference date should be either:

(a) 28 January 2014, *ie*, the date on which the writ in this action was filed; or

(b) 31 December 2014, *ie*, the date which the 1st to 6th defendants claimed was the reference date that the parties had agreed to in December 2015.

The law

5 It was common ground that the overriding principle governing share buyouts is that the price should be fair, just and equitable as between the parties. The court's discretion is otherwise unfettered.

6 There is no definite and immutable rule as to the appropriate date for determination of the valuation of shares. Cases have generally selected the date the action was commenced ("the Filing Date") or the date of the order ("the Buyout Order Date"). See Hans Tjio, Pearlie Koh & Lee Pey Woan,

Corporate Law (Academy Publishing, 2015) ("*Corporate Law*") at para 11.091. The use of the Filing Date has been justified on the ground that it reflects the date on which the applicant elects to treat the allegedly unfair conduct of the majority as destroying the basis on which he agreed to continue as a shareholder: *In re Cumana Ltd* [1986] BCLC 430 at 436. On the other hand, the use of the Buyout Order Date has been justified on the ground that it is the date closest to the actual sale and best reflects the value of what the shareholder is selling: *Re London School of Electronics Ltd* [1986] Ch 211 at 224. See also *Profinance Trust SA v Gladstone* [2002] 1 WLR 1024 ("*Profinance*") at [33]–[35].

7 In *Profinance*, the English Court of Appeal reviewed a number of English decisions and agreed (at [60]) with Nourse J's general proposition in *Re London School of Electronics Ltd* (at 224) that "[p]rima facie an interest in a going concern ought to be valued at the date on which it is ordered to be purchased".

8 I was referred to several Singapore cases. The choice of the reference date does not appear to have been a contested issue in these cases and the decisions have gone in both directions. The Filing Date was chosen as the reference date in *Lim Swee Khiang v Borden* [2006] 4 SLR(R) 745 at [92] and *Lim Chee Twang v Chan Shuk Kuen Helina and others* [2010] 2 SLR 209 at [150(a)]. However, the Buyout Order Date was chosen in *Over & Over Ltd v Bonvests Holdings Ltd and another* [2010] 2 SLR 776 at [132], *Eng Gee Seng v Quek Choon Teck and others* [2010] 1 SLR 241 at Annex A, *Sharikat Logistics Pte Ltd v Ong Boon Chuan and others* [2014] SGHC 224 at [243] and *Lim Seng Wah and another v Han Meng Siew and others* [2016] SGHC 177 at [176]. In *Tullio Planeta v Maoro Andrea G* [1994] 2 SLR(R) 501, there was some discussion of the general rule stated in *Re London School of*

Electronics Ltd but the court did not express any clear view on it (at [15]–[20]). In any event, the general rule was inapplicable in that case because the company in question was not a going concern.

9 The 1st to 6th defendants invited me to use the Filing Date as the reference date for the reason stated in *In re Cumana Ltd*. I declined the invitation. In my view, the general rule in *Re London School of Electronics Ltd* was to be preferred, *ie*, as *a starting point*, the Buyout Order Date should be the reference date. I agreed with the authors of *Corporate Law* (at para 11.091) that this "makes good sense as this is the value that best reflects what the shareholder is selling". Further, although a buyout order is common, it is only one of the possible orders that a court may make in an oppression action. There can no sale to speak of unless and until the court orders a buyout.

10 It bears emphasising that using the Buyout Order Date is but a starting point. If it can be shown that the Buyout Order Date would result in unfairness, the court may opt for some other date which would achieve a fairer result. One obvious example is where the majority shareholders have deliberately taken steps to depreciate the value of the company. In such a case, an earlier date than even the Filing Date may be appropriate: *In re Cumana Ltd* at 436. Some other examples can be found in *Profinance* at [61]. The onus would be on the party seeking to displace the Buyout Order Date to show that using the Buyout Order Date would result in unfairness.

Whether using the Buyout Order Date was unfair

11 The 1st to 6th defendants submitted that using the Buyout Order Date was unfair because the plaintiffs had not contributed to the Samwoh Group and had instead competed with the Samwoh Group after the 2nd plaintiff had set up a competing company in July 2013. It was not clear to me why this

made it unfair to use the Buyout Order Date as the reference date. Indeed, it seemed to me that, on the contrary, using the Buyout Order Date in these circumstances would be eminently fair as it would allow the valuation to take into account any adverse impact on Samwoh Group's business caused by the competition from the plaintiffs.

12 The 1st to 6th defendants next argued that the Buyout Order Date should not be used as the reference date because the parties had agreed in December 2015 that the reference date would be 31 December 2014 ("the Alleged Agreed Date"). The 1st to 6th defendants relied on the following events:

(a) In a letter from the plaintiffs' solicitors dated 23 November 2015, the plaintiffs made an open offer to purchase the 1st to 6th defendants' shares for $107m. Alternatively, the plaintiffs proposed the appointment of an independent valuer to value the shares on the basis that the reference date "shall be 31 December 2014 (which tallies with the last available audited financial statements for the Samwoh Group)" after which "[e]ither party may make an offer to buy the other's shares".[1]

(b) The 1st to 6th defendants' solicitors replied on 22 December 2015 reiterating that the 1st to 6th defendants did not wish to sell their shares and urging the plaintiffs to withdraw any proposal that involved a buyout of the 1st to 6th defendants.[2] The 1st to 6th defendants also maintained their initial offer made on 9 March 2015[3] to either purchase the plaintiffs' shares for $40m or at a value to be determined by an independent valuer, and expressed their willingness to use 31

December 2014 "as indicated in [the plaintiffs' solicitors' letter]" as the reference date.[4]

(c) On 22 January 2016, the 1st to 6th defendants issued a further open offer to the plaintiffs.[5] Although there were revisions to some of the terms previously offered, the key terms remained the same, *ie*, the 1st to 6th defendants offered to buy the plaintiffs' shares for $40m or at a value to be determined by an independent valuer based on 31 December 2014 as the reference date.

13 The 1st to 6th defendants referred me to *Lim Ah Sia v Tiong Tuang Yeong and others* [2014] 4 SLR 140 ("*Lim Ah Sia*"). In that case, the plaintiff and the 1st defendant reached an agreement under which the plaintiff would sell his shareholding to the 1st defendant at a valuation based on the net tangible assets of the company as at 31 December 2011 ("the 2011 Agreement") (at [20]). Subsequently, the 2011 Agreement was voided by mutual agreement as the parties apparently could not agree on the mode of payment (at [36]). The court found that the oppression claim had been made out (at [87]). The court also decided that since an agreement was reached before it was voided at the 11th hour, going back to the 2011 Agreement was the fairest way of valuing the plaintiff's shares (at [93]).

14 The 1st to 6th defendants argued that since the plaintiffs had previously proposed 31 December 2014 as the reference date and the 1st to 6th defendants had agreed to that date, the plaintiffs had no basis to complain and that date would be the fairest way of valuing the plaintiffs' shares. I disagreed with the 1st to 6th defendants.

15 The facts in the present case were far removed from those in *Lim Ah Sia*. In my view, no agreement had been reached between the plaintiffs and the 1st to 6th defendants on the reference date. The plaintiffs wanted to buy out the 1st to 6th defendants and the reference date of 30 December 2014 was merely one item in the terms of the plaintiffs' offer to the 1st to 6th defendants. The plaintiffs' offer was rejected by the 1st to 6th defendants who reiterated that they were not prepared to sell their shares. What the 1st to 6th defendants then did was to incorporate the reference date proposed by the plaintiffs into their own revised offer to buy out the plaintiffs. The 1st to 6th defendants' revised offer was never accepted by the plaintiffs. The exchange of correspondence between the parties' solicitors were made in the course of negotiations which clearly did not result in any agreement between the parties. In addition, whereas the 2011 Agreement in *Lim Ah Sia* was voided by mutual agreement because the parties could not agree on the mode of payment, the parties in the present case could not even reach agreement on who was to buy out whom.

16 In any event, I also agreed with the plaintiffs that the factual premise on which the previous reference date proposal had been made had changed. When the plaintiffs proposed 31 December 2014 as the reference date, the latest available audited financial statements for the Samwoh Group were for the year ended 31 December 2014. The plaintiffs' solicitors' letter dated 23 November 2015 expressly pointed out that the proposed date, *ie*, 31 December 2014, tallied with the last available audited financial statements (see [12(a)] above). However, the financial statements for the year ended 31 December 2015 are now available.

17 In my view, the facts relied on by the 1st to 6th defendants did not show that using the Buyout Order Date as the reference date would be unfair.

The appropriate Buyout Order date

18 In the present case, there were two different dates to consider. The plaintiffs had agreed with the 1st to 6th defendants, before the trial started, that the relationship of mutual trust and confidence between them had broken down and that a parting of ways had become inevitable. The parties agreed that the appropriate order was a buyout order and the question that I had to decide at the trial was whether the plaintiffs should buy out the 1st to 6th defendants or *vice versa*. This agreement was then encapsulated in an order of court dated 17 February 2016. Subsequently, in my judgment dated 29 July 2016, I decided that the 1st to 6th defendants were entitled to buy out the plaintiffs.

19 In my view, the date that the buyout order was first made, *ie*, 17 February 2016, was the more appropriate date to use as the reference date since it reflected the date on which it was decided that there will be a buyout.

Conclusion

20 For the above reasons, I decided on 17 February 2016 as the reference date for the valuation of the plaintiffs' shares.

Chua Lee Ming
Judge

Lim Wei Lee and Catherine Chan (WongPartnership LLP) for the plaintiffs;
Patrick Ang, Chong Kah Kheng and Daniel Gaw (Rajah & Tan

Singapore LLP) for the 1st to 6th defendants;
Nicholas Ngo (TSMP Law Corporation) for the 7th to 16th defendants.

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1 28 AB 296–298.
2 28 AB 313–314.
3 27 AB 239–246.
4 28 AB 313–314.
5 29 AB 104–109.