IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1988] SGHC 56

Suit 3092/1987

Between

Tong Kok Chai

… *Plaintiff*

And

Ocean Front Pte Ltd
Anor

… *Defendant*

GROUNDS OF DECISION

Civil Procedure — Injunctions; Companies — Memorandum and articles of association

Version No 1: 11 Sep 2026 (01:05 hrs)

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Tong Kok Chai v Ocean Front Pte Ltd and Another

[1988] SGHC 56

Suit 3092/1987
L P Thean J
15 July 1988

1 Cur Adv Vult

2 At the hearing of the application by way of notice of motion filed by the plaintiff, I granted to him an interlocutory injunction restraining the first defendant from altering art 26 of its articles of association until the hearing of this action or until further order. The material facts that led to the application before me are as follows. The plaintiff is a shareholder of Ocean Front Pte Ltd (the company), the first defendant, holding 1,458,500 shares of $1 each (the shares) in the capital of the company. The company was incorporated in Singapore and has an authorized capital of $100m divided into 100 million shares of $1 each, of which 59 million shares have been issued and are fully paid up. In May 1984, the plaintiff deposited the shares with the Ka Wah Bank Ltd (the bank), the second defendant, which is a bank incorporated and carrying on business in Hong Kong, as security for banking facilities. On 6 August 1986, the bank commenced legal proceedings against the plaintiff in Suit No 4468 of 1986 in the High Court claiming the sum of HK$37,467,280.98 together with interest and costs. The claim was resisted, and is still being resisted, by the plaintiff and his defence is briefly as follows:

> (i) the loan or overdraft granted to the plaintiff was not due for repayment until 24 June 1990; and
>
> (ii) the second defendant in any event had violated the Banking Act of Singapore in that it conducted banking business in Singapore without a banking licence and therefore the loan or overdraft granted to the plaintiff was illegal, void and irrecoverable.

3 The plaintiff also counterclaims for the return of the shares on the ground that they had been released to him on 12 June 1985, as evidenced by a document which he called the memorandum of release. The bank applied for summary judgment against the plaintiff, but in view of the defences raised, obviously, there are triable issues, and according to the plaintiff and not denied by the bank the application was withdrawn and the action is still pending.

4 On 3 October 1986, the bank initiated proceedings against the company in Originating Summons No 1176 of 1986 in the High Court claiming for an order that in respect of the shares the register of the company be rectified by striking out the name of the plaintiff and inserting in lieu thereof the name of the bank as the holder of the shares. In support of the application, one Mr Phoon Chiong Kit, an officer in the special accounts department of the bank, deposed to the fact that the bank was holding the shares as an equitable mortgagee and that the bank was entitled to perfect it as a legal mortgage. The plaintiff applied for an order to be joined in those proceedings, and on 9 February 1987 an order was made joining the plaintiff as the second defendant therein. About seven months later, on 30 September 1987, the solicitors for the bank wrote to the plaintiff`s solicitors suggesting that the originating summons be adjourned sine die with liberty to restore pending the resolution of the disputes in Suit No 4468 of 1986, as that would `serve to preserve the status quo between all the parties`. That suggestion appeared to have been acceded to by the plaintiff`s solicitors.

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5 On 7 October 1987, however, the bank, in exercise of what it presumably considered to be its rights as mortgagee, sold the shares to `a majority shareholder of the company`. Notice of such sale was subsequently given to the plaintiff who disputed the right of the bank to sell the shares. Soon thereafter, on 10 November 1987, the company issued a notice of an extraordinary general meeting to be convened for 8 December 1987 for the purpose of passing, inter alia, a special resolution for altering the articles of association of the company. The proposed alterations, so far as relevant to the present proceedings, include the deletion of the existing art 26, which restricts the transfer of shares and confers on the members a right of pre-emption in the event of a transfer of shares to a person who is not a member of the company, and the substitution of new articles, which in effect gives to a member a right to transfer all or any of his shares to any person (except an infant, bankrupt or person of unsound mind).

6 The plaintiff thereupon commenced this action against the company, claiming for an injunction to restrain the company from altering art 26 of the articles of association as proposed and a declaration that the proposed alteration to art 26, if passed, is null and void and also claiming damages. On or immediately after the issue of the writ the plaintiff applied ex parte and obtained an interim injunction restraining the company by their directors, officers, servants or agents or otherwise howsoever from altering art 26 of its articles of association by deleting art 26 and substituting therefor the proposed new articles at an extraordinary general meeting convened for 8 December 1987 or at any adjournment thereof until after the hearing of a motion returnable on 22 January 1988. Before the motion could be heard, the bank applied for and obtained an order allowing itself to be joined as a second defendant in this action. The motion eventually came before me; it was a motion for an injunction in terms identical with the injunction obtained ex parte save that it is to continue until

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the hearing of this action or until further order. In effect, it is a motion for a continuation of the injunction granted ex parte. At the conclusion of the hearing I allowed the motion and made an order in terms thereof.

7 The facts which I have recited were collected and collated from the affidavit affirmed by the plaintiff on 1 December 1987 and filed in support of his application for the ex parte interim injunction, and, so far as I can see, they were not disputed or challenged by the company or the bank. That was the only affidavit filed relative to the application before me. Surprisingly, no affidavit was filed on behalf of the company to give any reason or explanation for the proposed alteration of the company`s articles of association and the necessity for such alteration at this stage. The reasonable inference to my mind is that probably the company could not really give any cogent reason or explanation for the proposed alteration.

8 On behalf of the bank there was an affidavit filed which was affirmed by Mr Phoon Chiong Kit on 1 March 1988, but that affidavit was filed in support of an application by the bank to be joined as a party; it was not filed for the purpose of opposing the grant or the continuation of the injunction. However, it has some bearing on the application before me, and certain material facts emerged therefrom. First, the purchaser of the shares is one Yap Sing Hock (the purchaser), and according to a copy of the instant information search exhibited in the plaintiff`s affidavit, the purchaser is a director but not a shareholder of the company. Presumably, he is the person referred to in the bank`s solicitors` notice to the plaintiff in which they said that the bank had sold the shares to `a majority shareholder` and presumably also, though he does not hold any shares, he controls either the majority of the shares or a major or substantial portion of the shares in the company. There is, however, no evidence specifically on this point. Secondly, according to Mr Phoon, the sale agreement made with the

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purchaser by implication imposes on the purchaser an obligation to procure the company to effect an alteration to its articles of association and to have shares registered in his name. On the other hand, it is an express term of the agreement that the purchaser is entitled to rescind the agreement if `any third party` takes any legal proceedings to restrain the alteration of the articles of association of the company, unless the bank has before the expiry of six months from the date of completion of sale of the shares obtained a discharge of any injunction obtained by such third party or a discontinuance of those proceedings. The circumstances of such sale and why the bank chose to sell the shares to the purchaser who is not a member of the company were not explained. I note, however, in passing a rather curious and inexplicable statement in Mr Phoon`s affidavit that `in order to preserve its (the bank`s) security over the shares` the bank entered into the sale agreement with the purchaser for the sale of the shares. That sale surely was to enforce and realize the security over the shares and certainly could not be said `to preserve the security`. At this stage I refrain from expressing any view on the propriety or legality of such a sale; suffice here to say that that statement was confusing and wrong.

9 It is abundantly clear to me that the bank and the purchaser were working in collaboration towards attaining the common objective - completion of the sale of the shares to the purchaser irrevocably. Principally, it is the purchaser who was instrumental in initiating the proposed exercise by the company for the alteration of its articles of association - this of course is an inference and, it seems to me, an irresistible inference. On the facts before me, which I have said were not in dispute, and on the inference which I can reasonably draw, there is clearly a serious question to be tried, namely: Whether the proposed alteration of art 26 of the articles of association is bona fide for the benefit of the company

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as a whole. Neither counsel for the company nor counsel for the bank seriously contended that there was no such issue to be tried.

10 Counsel for the company argued that the statement of claim did not disclose any reasonable cause of action and therefore no injunction should be granted and the ex parte injunction granted should be discharged. I rejected this argument. I do not agree that the statement of claim is fundamentally defective in that it discloses no reasonable cause of action. In my view it contains sufficient averment of facts to found an action against the company claiming that the proposed alteration to art 26 is not bona fide for the benefit of the company. Surely on the facts pleaded the plaintiff has a right of complaint. It is significant that since the service of the statement of claim, the company has not taken any application to strike out the statement of claim and dismiss the action on that ground, which it could have done. At any rate, as the bank has been joined as a party, it would be necessary for the plaintiff to amend the statement of claim accordingly.

11 I now turn to the next question relevant to the grant of an interlocutory injunction, that is, the balance of convenience. Here again, I find that the balance of convenience is in favour of granting the injunction. If the injunction was not granted and it is found at the trial that the alteration was not bona fide for the benefit of the company as a whole, the court may have difficulty in declaring the alteration null and void and set it aside so as to revert to the position before the passing of the special resolution, as shares of the company may have been transferred and registered on the basis of the articles as altered; the position, so far as the plaintiff is concerned, is irreversible, and as between the plaintiff and the company, the impairment of the former`s right as a shareholder in such an event is not really a matter that could be adequately compensated by payment of damages. If the injunction was granted, as I did grant it, and it is found at the

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trial that the company is justified in altering its art 26 as proposed, the consequence would be that its exercise of its right of alteration of articles of association has been delayed, it has been inconvenienced by the injunction. I do not think that it would suffer irreparable damage. As between the plaintiff and the bank, the latter`s right of sale of the shares is disputed, and they have accepted that in Suit No 4468 of 1986 there were triable issues. Plainly in the circumstances the status quo should be preserved.

12 Counsel for the company suggested that in lieu of the injunction applied for, an injunction restraining the company from registering the transfer of the shares be granted. That injunction is entirely different. I declined to grant such an injunction; it was not asked for on behalf of the plaintiff, though it occurred to me that, from his point of view, such an injunction was or might be necessary in addition to that asked for in the notice of motion. Further, such an injunction as suggested by the company did not appear to me acceptable to the bank; it would indeed be a surprise if it was. I think the reason for this Unusual stance taken by the company is this, and this again is a matter of inference, since no explanation has been furnished. There was also fixed for hearing before me at the same time as this motion, originating petition no 141 of 1987 filed by another shareholder of the company, namely, Jo Hui Teck (JHT) who held 3,000,000 shares in the company. There was a similar dispute between JHT and the bank with regard to the 3,000,000 shares, and the bank also entered into an agreement for the sale thereof to the purchaser. JHT instituted proceedings against the company in originating petition no 141 of 1987 under s 216 of the Companies Act (Cap 50). On the finding of the petition, JHT also applied for and obtained an ex parte injunction restraining the company from passing the special resolution for the alteration of its articles of association and also an injunction restraining the company from registering the transfer of these shares.

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That dispute was subsequently settled, and at the hearing before me the parties asked for and I made an order, by consent, that the ex parte injunctions be discharged and leave to be granted for withdrawal of the petition with no order as to costs. It seems to me that if the ex parte injunction granted in this action is discharged and, as suggested by the company, an injunction restraining the registration of the transfer of the shares is granted, the company would be at liberty to pass the special resolution and proceed with the registration of the transfer of the 3,000,000 shares sold to the purchaser; the company would then be content to leave the transfer of the shares held up until the outcome of the trial. If this inference is correct, then this precisely is the position which the injunction in this case seeks to prevent. The plaintiff as a member of the company is entitled to have the benefit of the pre-emptive right under art 26 in respect of those 3,000,000 shares which were to be transferred to a person who is not a member of the company.

13 For all these reasons I have come to the conclusion that the interlocutory injunction ought to be granted and I made the order accordingly.

14 ***Order accordingly.***

L P Thean J

James Chia (ST Kay & Co) for the plaintiff
Ng Khai Ming (PK Wong & Co) for the first defendant
Johnny Cheo (Shook Lin & Bok) for the second defendant

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