Sim Yong Kim v Evenstar Investments Pte Ltd
[2005] SGHC 236

Case Number : CWU 111/2005

Decision Date : 23 December 2005

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : Valerie Freda Ang Mei-Ling and N Sreenivasan (Straits Law Practice LLC) for the petitioner; Kelvin Tan Teck San (Drew and Napier LLC) for the respondent

Parties : Sim Yong Kim — Evenstar Investments Pte Ltd

Companies – Winding up – Petitioner seeking winding up of company on just and equitable grounds – Petitioner not active participant in running of company to be wound up – Petitioner's complaints about difficulties at work concerning company held through company to be wound up – Petitioner taking back seat in running company held through company to be wound up – Petitioner alleging loss of substratum of company – Whether just and equitable to wind up company – Section 254(1)(i) Companies Act (Cap 50, 1994 Rev Ed)

23 December 2005

Tay Yong Kwang J:

1 Sim Yong Kim ("the petitioner"), and Sim Yong Teng ("Mike Sim") are brothers. Mike Sim is the eldest sibling in the family while the petitioner, 43, is the youngest. They are 18 years apart in age. Both are directors and the only two shareholders of Evenstar Investments Pte Ltd ("the company") with Mike Sim holding 86.5% and the petitioner holding13.5% of the shares. The company was incorporated in December 1999 and is essentially a holding company authorised to invest in various businesses and properties.

2 In this Petition, the petitioner seeks the following relief:

(a) that the company be wound up on the "just and equitable" ground provided in s 254(1)(*i*) of the Companies Act (Cap 50, 1994 Rev Ed);

(b) that Tan Suah Pin be appointed the liquidator of the company;

(c) that the petitioner's costs in the proceedings be taxed on an indemnity basis and paid out of the assets of the company; and

(d) that such other orders may be made in the premises as shall be just.

The case for the petitioner

3 The petitioner's and Mike Sim's father started Sinwa Ship Supply Pte Ltd ("SSS") sometime in the late 1960s. When the second eldest brother in the family wanted to leave SSS, their father asked Mike Sim to manage SSS. Mike Sim took over management of SSS sometime in 1985. He wanted total control of the company and therefore bought over SSS from his father and his siblings in 1987.

4 Although the petitioner was not an employee of SSS, he went occasionally to help out in the family business. At the request of Mike Sim, the petitioner started working full-time in the sales department of SSS in 1987. At that time, Mike Sim and the petitioner were the only two shareholders in SSS with Mike Sim and either their father or their mother holding the directorships therein.

5 SSS's business performed very well. In July 2002, Sinwa KS Limited (now known as Sinwa Limited) was incorporated to acquire the entire capital of SSS and a company called KS Seafirst. SSS was acquired from Mike Sim and the petitioner and KS Seafirst was acquired from a company known as KS Tech Limited. In February 2003, Sinwa Limited was listed on the SESDAQ of the Singapore Exchange Limited ("SGX"). In April 2005, it was listed on the main board of SGX.

6 Before the listing of Sinwa Limited, Mike Sim told the petitioner that it would be in their interest to pool their shares in Sinwa Limited and hold those shares through a holding company. He assured the petitioner that if the petitioner wanted to pull his shares out of the pool, he would buy him out, that is to say, the petitioner would give Mike Sim the first right of refusal. The petitioner agreed and their shares in Sinwa Limited were transferred to the company before Sinwa Limited was listed. The petitioner was of the view that since he and Mike Sim were working as executive director and chief executive officer respectively in Sinwa Limited, the company would be like a partnership which had the sole purpose of holding their shares in Sinwa Limited. The two brothers did not discuss what the consequences would be should Mike Sim refuse to buy over the petitioner's shares or set unreasonable terms for the purchase thereof. Mike Sim had always taken the lead as the eldest sibling in the family and the petitioner trusted him.

7 Other than some dividends, the petitioner did not receive any income from the company. However, from the company's audited accounts, it appeared that Mike Sim received a director's salary and fees. They remained as the only two directors and shareholders of the company until 11 February 2005 when Mike Sim's son and daughter joined the company's board.

8 Mike Sim tried to get the petitioner to sign a resolution in which he (Mike Sim) would transfer 5% of his shares to each of his two children but the petitioner refused to agree to the same. The relationship between the two brothers had deteriorated at that time and the petitioner was concerned that, with the addition of shareholders, a general meeting could be convened without his presence and he could be outvoted in any event even if he attended.

9 Although the company declared dividends for 2003 and 2004 and the petitioner was supposed to have received $94,097 for 2003 and $94,140 for 2004 as his share, he only received $54,000 to date. Mike Sim claimed that he too had not received his entire share. The petitioner did not believe him as he (the petitioner) had, sometime in 2004, signed a cheque for an amount in excess of $500,000 drawn in favour of Mike Sim which he believed was for the payment of dividends.

10 Just before Sinwa Limited was listed in 2003, the petitioner suffered a heart attack while working. During the period of his recuperation, he had time to think about his family's future as he was the sole breadwinner. As he also faced various other problems in Sinwa Limited which could not be resolved amicably with Mike Sim, he suffered from very bad mood swings and insomnia and had to seek psychiatric help. In his view, those problems made it impossible for them to continue with the partnership in the company, the largest shareholder in Sinwa Limited.

11 The petitioner explained what those problems were. Mike Sim had a close friend ("Bettina") whom he employed to work in Sinwa Marine, a subsidiary of SSS, prior to the listing of Sinwa Limited. When Sinwa Limited was listed, Bettina was made its human resource manager even though she had no experience or qualifications for that job. In addition, Bettina's two sisters were appointed as executive director and finance director while their brother was employed in the central purchasing department. Bettina and one of her sisters made the petitioner the managing director of one of Sinwa Limited's subsidiaries, Sinwa Offshore Pte Ltd, when he returned to work after recovering from the heart attack. However, he was not given the power to carry out routine activities of that subsidiary.

12 After informing Mike Sim of his intention to pull out of the company, the petitioner was threatened by Mike Sim with dismissal should he not be in the office between 9.00am and 5.00pm on every working day. It seemed to the petitioner that Bettina and her siblings ("the Tan siblings"), instead of Mike Sim, were running Sinwa Limited and he found it increasingly difficult to work in the company. His discussions with Mike Sim did not change the situation. In fact, when the petitioner was still having discussions with his brother on how he could liquidate his shares in the company and after he had rejected an offer by Mike Sim for the shares, he was given a short time frame of one day to get ready a presentation to be made to the board of directors and to run it by one of the Tan siblings before the meeting. This, he believed, was part of a concerted move to pressurise him.

13 The petitioner's main asset was his 13.5% shareholding in the company, which he reckoned was worth more than $4.5m. By liquidating his shares, he would be able to take care of his family, comprising his homemaker wife and three children between the ages of six and 11. His mother also lives with him. As an executive director of Sinwa Limited, his salary was only $7,500 per month together with $1,000 as transport allowance. There was still an outstanding loan on his house and much of his savings was used to pay his medical bills.

14 Having been brought up in a traditional Chinese family, the petitioner accorded due respect to Mike Sim as the eldest sibling and approached him on a number of occasions to try to work out a solution on transferring his shares to Mike Sim. However, Mike Sim was not amenable to the petitioner's suggestions, which rested mainly on the assurance given by Mike Sim that he would buy the petitioner's shares if the latter wanted to pull out of the company. Mike Sim would instead make various proposals which were decidedly unfair and inequitable to the petitioner.

15 The petitioner claimed that he was unable to find a third-party buyer for his shares in the company as no one would wish to be a minority shareholder and be caught in the same predicament. The main assets of the company were shares in two listed companies, Sinwa Limited and KS Tech Limited. The shares in the latter, if sold, would be more than sufficient to pay the petitioner for his shares, thereby giving Mike Sim sole control over all Sinwa Limited shares. Alternatively, the petitioner was prepared to take the value of his shares in the company by a distribution of the Sinwa Limited and KS Tech Limited shares, with the proposal that an application be made for capital reduction to be effected. These proposals were rejected by Mike Sim although the petitioner took into consideration only the shares of the said two entities and was willing to forego any claim to the other assets of the company. Mike Sim's offer was to buy the petitioner's shares on the basis that the Sinwa Limited shares be valued at 20 cents per share, with the purchase price to be paid in instalments. This was in spite of the fact that the Sinwa Limited shares were trading at more than 30 cents a piece. The petitioner had also proposed through his solicitors that an independent accountant be appointed to value his shares in the company.

16 As the two brothers' relationship had broken down and as a result of the changed circumstances of the petitioner who needed to realise the value of his assets to provide for his family, the petitioner submitted that it would be just and equitable to wind up the company. He was prepared to take his portion of the Sinwa Limited shares from the company instead of having them sold and thereby affecting the value of the remaining shares.

The case for the company

17 Mike Sim, who filed two affidavits on behalf of the company as its managing director, agreed that the company was incorporated as an investment holding company but disputed that it was formed with the sole objective of holding the petitioner's and his shares in Sinwa Limited. While the petitioner's and his shareholding in the company were 13.5% and 86.5% respectively, mirroring their

shareholding in Sinwa Limited prior to its listing, the company, he said, was incorporated with the broader objective of holding investments beyond Sinwa Limited's shares and indeed beyond Singapore, as shown clearly in its memorandum of association. In fact, the petitioner's original shareholding was less than 8% before Mike Sim gave him an additional 6% at par value. The directors' remuneration and directors' fees mentioned by the petitioner were those paid by Sinwa Limited. Neither the petitioner nor Mike Sim was paid any salary or fees by the company.

18 The petitioner signed the resolution appointing Mike Sim's children as directors of the company. It was logical that Mike Sim wanted his children's help in running the company as he already had substantial responsibilities as chief executive officer of Sinwa Limited and the petitioner had lost interest in the company. As a result, Mike Sim wanted to give his children a stake in the company as well.

19 Mike Sim denied the allegation that dividends had been withheld from the petitioner. There were resolutions in July 2003 and March 2004 signed by the petitioner regarding dividend payment. A decision had to be made each year on the amount of profits to plough back into the company for further investments. In 2003, $712,428 out of the $908,724 of the profits available for distribution was paid out while the remainder was retained. In 2004, $400,000 out of $850,920 was paid out with the remaining amount again retained for investment. For 2005, an interim dividend of $787,066 would be declared. The company had significant investments in public-listed companies and had recently purchased an industrial property in Australia which was currently leased to a subsidiary of Sinwa Limited, earning rental income. The retention of profits was consistent with the company's objective as an investment company, something known to the petitioner from the beginning. As a result of the investments, the petitioner's shares increased in value. The petitioner, as a director and shareholder, approved the dividends, showing that he knew and agreed to the retention of profits for future investments.

20 While Mike Sim was sympathetic towards the petitioner because of his medical problems, he did not agree that that meant that the petitioner was automatically entitled to break his investment in the company. Mike Sim was quite happy to continue to take the lead in the company while allowing the petitioner to reduce his workload in Sinwa Limited, which was in marketing and which was not very demanding in the first place. Although the petitioner was an executive director in Sinwa Limited, he did not perform any executive function.

21 Mike Sim appointed the petitioner as managing director of Sinwa Offshore to allow him to prove himself but the petitioner was unable to manage or to command the respect of his subordinates. He also appeared to be distracted by his relationship with one of the staff members. In contrast, the Tan siblings were experienced employees performing important roles for Sinwa Limited. When the petitioner was asked to consult others before making his presentation to the board, it was done with a view to helping, rather than denigrating, him. As Sinwa Limited was a listed company, Mike Sim could not be indulgent towards the petitioner and therefore had to enforce rules on working hours.

22 The petitioner was not impecunious as he had built up substantial assets over the years. In any event, if he or his family were in financial difficulties, Mike Sim would help them in the same way that he was providing for some of his other siblings.

23 Mike Sim's major concerns related to the fact that Sinwa Limited was a public-listed company, in which both he and the petitioner were directors. The company held 69,733,300 shares in Sinwa Limited. He could not allow a situation where the petitioner received a large number of Sinwa Limited shares and disposed of them within a short space of time. As these shares were not traded

actively on the exchange, any sudden unloading of a large number of shares would have a negative impact on the share price and hurt the investing public. A drop in the share price would also hurt the company's standing with its business associates, customers and financiers. Further, any sale of a significant number of shares would surely invite queries and investigations by the regulators by virtue of Mike Sim's position in the company and the fact that he and the petitioner were related to each other. Mike Sim was also advised that the value of a minority shareholding would always be discounted from the absolute proportional value of the company's assets.

24 Mike Sim was offering to buy Sinwa Limited shares at a price lower than the prevailing market price as he was effectively buying "futures" in Sinwa Limited. He would only receive the shares after the completion of a mechanism for the company to transfer shares to the petitioner, such as a capital reduction. Further, he would be restricted by contract from selling the shares because of a three-year moratorium to be imposed and would thus be taking the risk of the market turning against him. In any case, the petitioner would not be able to realise anything more than a fraction of the current market price if he were to try to dispose of a block of 3m shares (which he was to sell to Mike Sim) at any one time. Mike Sim was willing to take care of the petitioner's financial requirements for at least the next seven years if the petitioner were to agree to a three-year moratorium.

25 As the company was still performing well and fulfilling its objectives, there was no reason to wind it up. The proper course of action, Mike Sim suggested, was for the petitioner to sell his shares in the company to either Mike Sim or some third party. There was no evidence that the petitioner had been unfairly or inequitably treated as a director or as a shareholder. The petitioner's difficulties at Sinwa Limited were the result of his own doing and his inability to adapt to Sinwa Limited becoming a public-listed company and were, in any event, irrelevant to the Petition.

The decision of the court

26 The petitioner's reasons for proceeding on the "just and equitable" ground for winding up were his health problems (causing him to decide to take a back seat in the management of Sinwa Limited and to spend more time with his family), his alleged difficulties in working with the management of Sinwa Limited and the need to realise his investment in order to provide for his family. He was not seeking relief from oppression pursuant to s 216 of the Companies Act.

27 Although the petitioner was effectively saying that the company was in reality an incorporated partnership and that he could no longer work with Mike Sim, it should be noted that the petitioner performed no executive function in the company. The company has been thriving with no deadlock in its management. This case therefore did not fall within the principle set out by the Court of Appeal in *Chua Kien How v Goodwealth Trading Pte Ltd* [1992] 2 SLR 296 (at 304, [25]), where the company in question was wound up because it was unable to function as a commercial entity by reason of a deadlock in its management, making it impossible for any board meeting or general meeting to be held:

> The principle can be simply expressed: if the only two directors of a company cannot agree with each other, and neither can overrule the other, there is a deadlock which, if it occurs in a partnership, justifies the court in winding up the partnership.

28 Where the main objects of a company are concerned, the Court of Appeal in that case also stated (at 307, [36]):

> In our view, the objects clause in a memorandum of association sets out all the objects that the company is authorized to carry on for the time being. The objects clause is subject to

amendment at any time. Within the limits of the objects clause, the business of a company may change from time to time. What was originally intended to be the main object of a company on its incorporation may have ceased to be so over the years if the company embarks on a different type of business authorized by its memorandum of association. It is therefore a question of construction of the memorandum, having regard to the intention and acts of the corporators or shareholders for the time being in relation to the actual business or businesses that is or are carried on from time to time. In some cases, the construction will be plain.

The court found that there was sufficient evidence that the main object of the company in that case was its restaurant business located at Shaw House specifically and no other place and that the company's substratum therefore disappeared with the termination of the lease of the premises. In the result, the facts justified the winding up of the company there on the "just and equitable" ground.

29 Although the impetus for setting up the company here may have been to pool the two brothers' shares in Sinwa Limited, its objects were certainly not so narrowly circumscribed. Its objects included investments in practically any lawful business here and abroad and its actual commercial activities over the last few years were entirely in line with its very broadly-defined objects. The petitioner's election to focus only on Sinwa Limited and KS Tech Limited could not change the fact that the company's business was not so confined. The position was also not altered simply because these two assets were the most valuable ones in the company.

30 *Re Iniaga Building Supplies (S) Pte Ltd* [1994] 3 SLR 359 was another case involving the "just and equitable" ground. There, L P Thean JA, sitting in the High Court, referred to the following oft-quoted passages from the speech of Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 (at 379), a case involving expulsion as a director:

> The words [just and equitable] are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. … The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.
>
> …The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence — this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be "sleeping" members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company — so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.

31 In that case, Thean JA found that the first two elements were established. The learned judge did not think the absence of any restrictions on transfer of shares material as, considering the matter from a practical point of view, it would be extremely difficult for the petitioners there (who claimed to have been ousted from management) to take their stakes out of the company at a fair and reasonable price. However, the judge found that the petitioners had considerable difficulty in showing

that they had been expelled or ousted from participation in the conduct of the company's business (which was the crux of their complaint). Accordingly, the petition to wind up the company on the "just and equitable" ground was dismissed. In deciding the question of costs (at 367, [24]), the judge observed that the petitioners there had become an unwilling minority in a company in which their shares were locked in for a long time and that it was unlikely that anyone would be prepared to buy their shares at a true value. Concluding that the petitioners were compelled to go to court to seek relief, the judge nevertheless thought that they had taken a drastic action by seeking the winding up of the company. Although he held that they were not entitled to that relief on the facts, he opined that had they resorted to s 216 of the Companies Act (the provision on oppression), a remedy under s 216(2)(*d*) (where the court could order a purchase of the petitioners' shares by other members of the company or by the company itself) might well have been available.

32 The above two cases involved deadlock in management, the collapse of the substratum of the company and allegations of ouster from the decision-making process of the company, none of which appeared to feature in this case. However, the "just and equitable" ground, by its very malleable nature, is capable of encompassing factual situations other than these. The present petitioner's situation was unique in that he had voluntarily chosen to take a back seat in management (in Sinwa Limited and not the company in issue) by reason of his poor health and now wanted to leave the company for good. It is interesting to note that in oppression cases (such as *Quek Hong Yap v Quek Bee Leng* [2005] SGHC 111 and *O'Neill v Phillips* [1999] 1 WLR 1092), the courts have held that there is no right on the part of a shareholder to exit a company at will. The company in the present case submitted that the same principle ought to apply to "just and equitable" ground cases and that a shareholder who had not been wrongfully dismissed or excluded should not be allowed to demand that the other members purchase his shares in the absence of a specific provision allowing him to do so as that would fundamentally contravene the sanctity of the contract binding the members and the company. I agree.

33 Even if Mike Sim had assured the petitioner from the inception of the company that he would buy over his shares if necessary, it did not appear that Mike Sim breached his promise, which, as claimed by the petitioner, was no more than a "first right of refusal". The brothers obviously had not agreed on the terms or the mechanism for a buy-out. Mike Sim's terms would naturally be seen as unacceptable to the petitioner just as the petitioner's terms would appear unreasonable to Mike Sim. Both had their own reasons for wanting such terms. Since they were unable to come to an agreement, it was open to the petitioner (and such a right was not denied by Mike Sim) to approach a third party (including his and Mike Sim's many siblings), to buy over his shares. The petitioner had not approached anyone because he was not optimistic about finding such a buyer. However, a third party, before agreeing to buy the petitioner's shares in the company, might well be able to reach some agreement with Mike Sim on the future conduct of the company and the disposal of its shares. It was, therefore, not a case of coercing the petitioner into a perpetual investment with Mike Sim.

34 In any event, on the facts of this case, the petitioner's complaints about his difficulties at work concerned Sinwa Limited and not the company that he was seeking to wind up. His complaints also appeared to be more the result of his inability to cope, perhaps as a result of his poor health, rather than the deliberate actions of the people working in Sinwa Limited. If he truly wanted to take a back seat, then perhaps he should permit the driver to determine the speed and the route the company should take. The company was still fulfilling its objectives admirably and was functioning without difficulty. The petitioner pointed out that in *In re Yenidje Tobacco Company, Limited* [1916] 2 Ch 426, the company was wound up although it was still making large profits. However, in that case, the two shareholders and directors had fallen out completely and ceased to communicate with each other except through the company secretary. Further, no substantial business was being transacted. That dire situation did not exist here. The petitioner was also not impecunious. He still

had income from the company's dividends although he would prefer to have much more.

35 I was therefore of the view that the petitioner had not made out a case for the court to wind up the company on the "just and equitable" ground. The Petition was dismissed with costs fixed at $10,000 to be paid by the petitioner to the company.