Golden Village Multiplex Pte Ltd v Golden Harvest Films Distribution (Pte) Ltd and Another [2006] SGHC 110

Case Number : Suit 413/2005, RA 11/2006

Decision Date : 28 June 2006

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Ling Daw Hoang Philip and Low Wei Ling Wendy (Wong Tan & Molly Lim LLC) for the plaintiff; Chan Kia Pheng and Koh Kang Ming Shaun (KhattarWong) for the defendants

Parties : Golden Village Multiplex Pte Ltd — Golden Harvest Films Distribution (Pte) Ltd; Golden Harvest Entertainment (Holdings) Ltd

Companies – Directors – Meetings – Directors meeting of joint venture company held via telephone conference – Directors appointed by two parties to joint venture – Directors appointed by one party to joint venture hanging up on conference call due to disagreement with directors appointed by other party to joint venture over who should chair meeting – Remaining directors continuing to hold meeting and passing resolution – Whether resolution passed unanimously by remaining directors valid -Sections 392(1), 392(2) Companies Act (Cap 50, 1994 Rev Ed)

28 June 2006

Andrew Ang J:

1 This was the plaintiff's appeal against the decision of the assistant registrar ("the AR") in Summons in Chambers No 3346 of 2005 ("SIC 3346") ordering that the action herein be struck out as against the first defendant.

Background

2 The plaintiff is a company incorporated in Singapore and is in the business of owning and operating cinema complexes under the "Golden Village" name.

3 The first and second defendants are both part of the Golden Harvest cinema conglomerate in Hong Kong of which the second defendant is the listed holding company.

4 The plaintiff was incorporated to carry out the objectives of a joint venture ("JV") between the Golden Harvest conglomerate and the Village Roadshow conglomerate in Australia to acquire, hold, construct, develop, lease, operate, dispose of and exploit cinema complexes in Singapore.

5 The terms of the JV were set out in a shareholders' agreement dated 24 February 2000 ("the Shareholders' Agreement") entered into between the following parties:

(a) Village Cinemas Australia Pty Ltd ("Village") (part of the Village Roadshow conglomerate);

(b) Golden Screen Ltd ("Golden Screen") (part of the Golden Harvest conglomerate);

(c) the plaintiff; and

(d) Dartina Development Ltd, a Hong Kong company which owns all the shares of the plaintiff through its wholly-owned subsidiary, Golden Village Holdings Pte Ltd ("GVH").

6 The Shareholders' Agreement gave each of Village and Golden Screen the right to nominate three directors for appointment to the board of directors of the plaintiff. Thus, of the six directors who sit on the board of the plaintiff, three (namely, Graham William Burke, Peter Edwin Foo and Kirk Senior) are Village nominees while the others (namely, Raymond Chow, Phoon Chiong Kit and Roberta Chin Chow) are Golden Screen nominees. All three Golden Screen-nominated directors are also directors of both the first and second defendants.

7 The present action commenced by the plaintiff arose out of an agreement for lease dated 23 December 2002 ("the Agreement for Lease") executed with a Canadian corporation, IMAX Corporation ("IMAX"), for the lease of certain large-format projection equipment and technology ("the IMAX Lease") for use in the IMAX Theatre at the multiplex cinema complex owned and operated by the plaintiff at Great World City.

8 The original lessees under the Agreement for Lease were the first defendant and Village Roadshow (Singapore) Pte Ltd ("VRS") (a wholly-owned subsidiary of Village). Subsequently, with the consent of IMAX, the first defendant and VRS "assigned" all of their rights, duties and obligations under the Agreement for Lease to the plaintiff pursuant to an assignment agreement dated 17 October 2003.

9 By another agreement in writing dated 11 February 2004 ("the Transfer Agreement") made between Village, VRS, the defendants and GVH, it was agreed that on the happening of a specified event the first defendant (or a company within the second defendant's group of companies) would, upon receipt of a transfer notice issued by the first defendant at the request of Village, accept a transfer of the plaintiff's rights and obligations under the Agreement for Lease and the second defendant would accept a transfer of obligations as guarantor. It was further agreed that on the date of such transfer the first defendant would pay the plaintiff a transfer sum ("the Transfer Sum") being 50% of the amounts previously paid to IMAX by the plaintiff under the Agreement for Lease. That event would occur if the number of paid admissions to the IMAX Theatre in any period of 12 consecutive months was less than 212,000 paid admissions.

Issuance of notice of transfer

10 The plaintiff's case was that the specified event had taken place and that it had, accordingly, issued the notice of transfer "the Transfer Notice" to the first defendant on 23 November 2004 for the first defendant to take over the IMAX Lease, if so required by IMAX. A reminder was sent to the defendants on 25 April 2005. The first and second defendants disagreed with the position taken by the plaintiff and failed to comply with the Transfer Notice.

Meetings of plaintiff's board of directors to discuss performance of the IMAX Theatre

11 Prior to the issuance of the Transfer Notice, the performance of the IMAX Theatre had been discussed at length at meetings of the board of directors of the plaintiff on 6 October 2003 and 31 March 2004. Both those meetings were attended by Phoon Chiong Kit ("PCK").

12 It was decided by the board during the meeting on 31 March 2004 that the plaintiff would cease operation of the IMAX Theatre at the cinema complex with effect from 1 January 2005 and, in exercise of its rights under the Transfer Agreement, transfer its rights and obligations under the IMAX Lease to the first defendant. Pursuant to such decision of the board, the Transfer Notice was issued by the plaintiff to the first defendant and a copy was extended to PCK as a director of the plaintiff by way of an e-mail dated 14 December 2004.

13 At a subsequent board meeting of the plaintiff held on 15 February 2005 which PCK also attended, the following steps, *inter alia*, to be taken by the plaintiff were minuted pursuant to the decision to cease operation of the IMAX Theatre at the cinema complex and following the issuance of the Transfer Notice:

(a) to inform IMAX that the second defendant was still in the process of identifying the location to which the IMAX equipment would be transferred;

(b) to continue to pay IMAX the annual maintenance fee and minimum rent payable under the Agreement for Lease but to recharge to the first defendant all those and other costs with effect from 1 January 2005; and

(c) to bill the first defendant the Transfer Sum of $1.145m, this being its 50% share of the fixed rent paid to IMAX.

The minutes of this board meeting of 15 February 2005 showed that PCK gave instructions to proceed with the above steps.

Letters written by Phoon Chiong Kit on behalf of the first defendant

14 Notwithstanding the fact that PCK as a director of the plaintiff had knowledge of the operations of the IMAX Theatre and, being privy to internal communications between the staff of the plaintiff, had even put forward his own ideas and feedback as to how certain issues were to be addressed, and despite the fact that he had previously agreed to the transfer along with the other directors of the plaintiff, PCK subsequently wrote two letters on behalf of the first defendant, alleging that the plaintiff was in breach of its obligations under the Transfer Agreement in failing to properly promote and market the IMAX Theatre in Singapore and that the Transfer Notice had not been validly given.

15 By reason of the first and second defendants' failure to take and accept the transfer of rights and obligations and in particular, the first defendant's failure to pay the plaintiff the Transfer Sum, the plaintiff commenced this action against the defendants to enforce its rights under the Transfer Agreement.

Warrant to act

16 M/s KhattarWong ("KW"), the solicitors acting for the first defendant, wrote to Wong Tan & Molly Lim LLC ("WTL"), the solicitors for the plaintiff, requesting production of a warrant to act from the plaintiff. WTL obtained a warrant to act from the plaintiff executed by its managing partner, Kenneth Tan, on 27 June 2005. A copy of the same was forwarded to KW by WTL's fax dated 27 June 2005.

17 The first defendant took the position that the warrant to act was invalid as Kenneth Tan had not been authorised to sign the same on behalf of the plaintiff. The first defendant then took out an application to strike out the action. In support of the application, PCK filed two affidavits on behalf of and in his capacity as director of the first defendant.

18 PCK's inconsistent conduct in giving instructions as a director of the plaintiff for the latter to exercise its rights under the Transfer Agreement and to call for payment of the Transfer Sum on the one hand and, as a director of the first defendant, opposing such transfer on the other, was itself the subject of an action in Suit No 557 of 2005 ("Suit 557") by the plaintiff against PCK. In that suit, the

plaintiff sought a declaration that PCK was in breach of his fiduciary duties as a director of the plaintiff and an injunction to restrain PCK from acting in further breach.

19 Predictably, as the first defendant did in this action, likewise in Suit 557, PCK filed an application for the action against him to be struck out on the ground that the warrant to act authorising Suit 557 was invalid. That application by PCK was heard together with an application by the plaintiff for an interlocutory injunction to restrain PCK from, *inter alia*, acting in breach of his fiduciary duties towards the plaintiff.

20 As regards PCK's application, Lai Siu Chiu J ordered, *inter alia*, that the plaintiff was to obtain a resolution by its board of directors ratifying the warrant to act which had earlier been signed and that PCK was to abstain from voting as a director of the plaintiff for the purposes of that resolution.

21 As regards the plaintiff's application, the learned judge ordered, *inter alia*, that pending the resolution of the plaintiff's board of directors, PCK was to give an undertaking not to act against the interests of the plaintiff as its director and not to participate in any manner in Suit No 413 of 2005 ("Suit 413") (*ie*, the present suit) pending the outcome of SIC 3346, the hearing of which is before me on appeal. (On PCK's application, this order was later stayed pending appeal.)

22 Reverting to the present striking-out application, when it first came on for hearing before the AR on 3 October 2005, she ordered (a) that the action be stayed for the plaintiff's directors to convene a board meeting to pass a resolution by 5 December 2005 to ratify the commencement of the action in the present suit; and (b) that the parties have liberty to apply in respect of issues pertaining to the convening of the board meeting.

23 The deadline for procuring the passing of the directors' resolution was subsequently extended to 27 December 2005 upon the plaintiff's application. At the same hearing at which the extension of time was granted, it was also ordered that if the plaintiff failed to obtain the board resolution by 27 December 2005, the first defendant would be at liberty to restore SIC 3346 for hearing for a final order that the action in Suit 413 herein be struck out.

24 In the events which followed, the details of which I shall go into below, a dispute between the parties arose as to whether a valid board resolution had been passed ratifying the commencement of Suit 413.

25 Taking the view that no valid resolution had been passed by the deadline set by the AR, the first defendant applied to restore the hearing of SIC 3346 before the AR for an order to be made striking out Suit 413. The plaintiff similarly applied to restore the hearing but for the purpose of asking for an order that the first defendant's striking-out application be dismissed on the ground that the warrant to act had been duly ratified by resolution of the plaintiff's board of directors.

26 The AR agreed with the first defendant that the directors' resolution was invalid and, accordingly, allowed the first defendant's application to strike out the action in Suit 413.

27 This appeal hinges on whether the directors' resolution was valid. It is necessary therefore to examine the events pertaining to the passing of the resolution.

28 A member's resolution was first passed to amend the articles of association of the plaintiff ("the Articles of Association") permitting directors' meetings to be held via a conference telephone line or video-conference line or similar means so as to dispense with the need for the directors to be physically present before each other at such meetings.

29 Thereafter, on 20 December 2005, a meeting of the directors of the plaintiff by conference telephone was convened ("the Board meeting"). The Board meeting was attended by Raymond Chow, Roberta Chin Chow and PCK as the Golden Screen-nominated directors of the plaintiff, and by Simon Phillipson ("Phillipson") (alternate to Graham William Burke), Peter Edwin Foo and Kirk Senior as the Village-nominated directors. There was therefore more than the quorum of two under Art 116 of the Articles of Association when the Board meeting proceeded to business.

30 At the commencement of the meeting, the Golden Screen-nominated directors declared their interest in the matter for discussion in compliance with s 156 of the Companies Act (Cap 50, 1994 Rev Ed) ("the Act").

31 Phillipson then said that he was going to chair the meeting in accordance with past practice and as provided for under the Shareholders' Agreement. PCK countered that they (presumably meaning Golden Screen or its nominees on the board of the plaintiff) had "recently discovered" that the relevant provision in the Shareholders' Agreement giving Village the right to appoint the chairman had not been incorporated into the Articles of Association and that until then it could not be given effect to.

32 The Village-nominated directors then proposed Phillipson for the chair while the Golden Screen nominees voted against him and proposed Raymond Chow instead. This latter proposal was, likewise, opposed by the Village-nominated directors. In the result, there was a stalemate.

33 When Phillipson nevertheless sought to proceed with the Board meeting on the basis that he was in the chair, PCK threatened to call off the meeting to which Phillipson's response was that he (PCK) was not in a position so to do and that the meeting would continue even if he chose to hang up the phone.

34 PCK then declared that the Board meeting was invalid and hung up, thereby also cutting off Raymond Chow and Roberta Chin Chow who were with him. The remaining directors then passed a resolution ratifying Kenneth Tan's execution of the warrant to act.

35 Upon the conclusion of the Board meeting, the minutes thereof were signed by Phillipson as the chairman of the Board meeting and entered in the minute book of the plaintiff.

36 The plaintiff summarised its case as follows:

(a) The minutes of the Board meeting recording the resolution to ratify the commencement of Suit 413 was signed by the chairman of the meeting and entered in the minute book of the plaintiff in accordance with s 188 of the Act.

(b) The first and second defendants had no *locus standi* to question or challenge the validity of the Board meeting or any resolution(s) passed thereat.

(c) Even if (which was denied) the first and/or second defendants were entitled to question or challenge the validity of the Board meeting, the meeting and the resolution passed thereat to ratify the commencement of the action were in any event valid.

(d) Even if (which was denied) the Board meeting had not been properly convened or the said resolution was not properly passed, under s 392 of the Act, this was a mere procedural irregularity which did not invalidate either the Board meeting or the said resolution.

Whether the board resolution was valid

37 The plaintiff submitted that the Board meeting had been properly convened via telephone conference and proceeded to business with all six directors on the line. It further submitted, citing *In re Hartley Baird Ld* [1955] Ch 143, that the departure of the Golden Screen-nominated directors thereafter, even if it had the effect of reducing the directors present to less than the quorum, did not affect the validity of the resolution passed.

38 To begin with, before me, counsel for the first defendant made it quite clear that the latter's objection was not as to any lack of a quorum but rather to the alleged appointment of a chairman to which the plaintiff was not entitled as of right. This was understandable. Having taken the position that, notwithstanding cl 5.1(i) of the Shareholders' Agreement (which gave Village the right to appoint the chairman of the board of directors), Art 118 of the Articles of Association prevailed so that the chairman had to be elected by the directors, the first defendant could not very well then do a volte-face and insist on the quorum being that provided (if at all) in the Shareholders' Agreement instead of the quorum of two provided in Art 116. Besides, it was unclear whether cl 5.1(k)(ii) of the Shareholders' Agreement (which provides that a resolution of the directors requires the affirmative vote of at least one Golden Screen director and one Village director) applied to the plaintiff, the question not having been addressed by either party.

39 In short, therefore, the first defendant's stand was that the Articles of Association prevailed.

40 On that basis, the meeting remained quorate in compliance with Art 116 despite the Golden Screen directors hanging up the phone.

41 The board resolution passed by the three remaining directors was therefore valid. Whether or not Phillipson was properly in the chair was, to my mind, of no significance to the validity of the resolution passed unanimously by the three remaining directors; Phillipson did not purport to exercise any casting vote.

42 However, assuming *arguendo* that his taking on the role of chairman was an irregularity, the question that next required consideration was whether and, if so, how s 392(2) of the Act applied to the case before me.

43 Sections 392(1) and 392(2) of the Act provide:

> (1) In this section, unless the contrary intention appears a reference to a procedural irregularity includes a reference to —
>
> (*a*) the absence of a quorum at a meeting of a corporation, at a meeting of directors or creditors of a corporation or at a joint meeting of creditors and members of a corporation; and
>
> (*b*) a defect, irregularity or deficiency of notice or time.
>
> (2) A proceeding under this Act is not invalidated by reason of any procedural irregularity unless the Court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by any order of the Court and by order declares the proceeding to be invalid.

To my mind, s 392(1) is capable of including an irregularity in the appointment of a chairman, the

subsection not purporting to be exhaustive as to the procedural irregularities covered.

44 Although the first defendant described the irregularity as a "blatant contravention" of Art 118 of the Articles of Association, it did not contend that s 392 was inapplicable. In any case, in my view, to invoke s 392(2) it is not necessary that the irregularity arose from inadvertence: see *Re Pembury Pty Ltd* (1991) 9 ACLC 937 in which the court considered the Australian equivalent of our s 392.

45 In the event, while the plaintiff invoked s 392(2) to validate the Board meeting despite the alleged irregularity in the appointment of the chairman, the first defendant contended that such irregularity "caused or might cause substantial injustice that could not be remedied by any order of the Court" within the intendment of s 392(2).

46 The AR had concluded that substantial injustice had been caused in that the defendants and the Golden Screen-nominated directors had been placed in an invidious position once there was no chairman appointed for the Board meeting and it nevertheless proceeded.

47 I respectfully disagree. Section 392(2) requires that "the irregularity has caused or may cause substantial injustice". In other words, there must be a nexus between the irregularity and the substantial injustice. However, as I alluded to earlier, the first defendant failed to show that there was such a nexus. Parenthetically, it was not made clear to me what the "injustice" exactly was. Presumably, the alleged injustice was the passing of a resolution which the Golden Screen-nominated directors would have opposed had they not hung up the telephone.

48 Note, however, that the passing of the resolution was pursuant to the unanimous vote of all three Village-appointed directors; it did not depend on Phillipson being in the chair and he did not exercise any casting vote as chairman. The first defendant would have been on firmer ground if the Golden Screen-nominated directors had stayed on the line and voted against the resolution thereby creating an equality of votes for and against. In those circumstances, if Phillipson had purported to exercise a casting vote as chairman, it would then have been open to the first defendant to contend that the resultant resolution was obtained on the back of an irregularity. Such was not the case here.

49 By hanging up, the Golden Screen-nominees made it possible for the resolution to be passed without the need for the chairman's casting vote. There was therefore no nexus between the irregularity and the alleged injustice.

50 I would like to further consider what is meant by "injustice" on the off-chance that the first defendant might have meant that the injustice caused was the fact that the Board meeting continued with (or without) Phillipson in the chair despite the termination of the conference call by the three Golden Screen-nominees.

51 Firstly, was there an "injustice" in that the Board meeting continued after the Golden Screen-nominated directors hung up?

52 In *National Dwellings Society v Sykes* [1894] 3 Ch 159, the chairman at an ordinary general meeting of a company moved a formal motion. However, several members present wished to move an amendment to the motion. The chairman mistakenly refused to admit this amendment and put the original motion to the vote. However, when this was lost, he declared the result and purported to dissolve the meeting prematurely. In his absence, the remaining members elected another chairman to transact the business left unfinished. It was held by the court that the chairman had exceeded his powers in declaring the meeting at an end and that it was within the power of the meeting to resolve to go on with the business for which it had been convened and to appoint another chairman to

conduct the business which the other chairman had tried to stop.

53 Likewise, in *Catesby v Burnett* [1916] 2 Ch 325, a general meeting of a company was called for the transaction of ordinary business but owing to considerable opposition among the members present, the meeting was adjourned. At the adjourned meeting, there was much hostility towards the chairman who purported to declare the meeting closed and who then left when important business remained to be transacted. The remaining shareholders continued the business of the meeting, appointed another chairman and elected two directors. It was held by the court that the proceedings after the first chairman had left were regular and that the appointment of those two directors was valid.

54 Although the two cases cited concerned the holding of general meetings, the principle is applicable here as well. I would add that if the chairman of the meeting was not competent to terminate the meeting prematurely, *a fortiori*, the Golden Screen-nominated directors could not do so. Therefore, there was no "injustice" notwithstanding the continuation of the Board meeting.

55 Secondly, did the "injustice" consist in the Board meeting continuing with Phillipson in the chair?

5 6 *Re Compaction Systems Pty Ltd* [1976] 2 NSWLR 477 is instructive. The Australian court in that case had to deal with this question when construing s 366 of their Companies Act 1961 (NSW), their equivalent of s 392 of our Companies Act. It held at 492–493 as follows:

> In cases to which s. 366 (3) applies, the Court may, either of its own motion or on the application of any interested person, make such order as it thinks fit to rectify or cause to be rectified or to negative or modify or cause to be modified the consequences in law of any relevant omission, defect, error or irregularity or to validate or to make a validating order. The Court, however, is enjoined before making any such order to "satisfy itself that such an order would not do injustice to the company or to any member or creditor thereof". When this provision refers, for example, to injustice to a member, clearly it cannot mean that the member, having a right to notice of a meeting, has not received notice, so that the Court should not make an order because it would be unjust to that shareholder who has been deprived of his right to attend and vote. The whole purpose of the section is to empower the Court to make orders in such cases, where there has been an interference with or failure to observe the rights of members or creditors. Clearly by "injustice" the section means something more than this.

57 Likewise, in my view, the injustice referred to in s 392 of our Companies Act must refer to more than the irregularity itself. Otherwise, it would be impossible to say that the irregularity "caused or may cause" injustice. In any event, as found earlier, there was no nexus between the irregularity and the passing of the resolution.

58 I would go further than that. Even assuming for the sake of argument that there was a nexus, it would be a greater injustice to invalidate the directors' resolution and thereby prevent the plaintiff from pursuing its action against the defendants. It was clear beyond doubt to me that the striking-out application taken out by the first defendant was with the sole objective of preventing the plaintiffs' claim from being heard on its merits by the court. It was incumbent upon me to deny the defendants that outcome.

59 In view of the above, it is unnecessary for me to decide on the question of *locus standi* raised by the plaintiff.

60 In conclusion, in allowing the appeal, I reversed the decision of the AR and dismissed the first defendant's application in SIC 3346 of 2005 with costs here and below, such costs to be taxed unless agreed.

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