HSBC (Malaysia) Trustee Bhd and Others v Soon Cheong Pte Ltd
[2006] SGHC 193

Case Number : OS 1662/2005

Decision Date : 19 October 2006

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Tay Wei Loong Julian and Jiang Ke-Yue (Lee & Lee) for the plaintiffs; Chia Chor Leong (Citilegal LLC) for the defendant

Parties : HSBC (Malaysia) Trustee Bhd; Goh Seng Kee; Goh Kim Bock alias Goh Kim Bok; Goh Kong Teng; Goh Chai Har alias Goh Chye Har; Goh Chai Hoon; Goh Chai Hong alias Anna — Soon Cheong Pte Ltd

Companies – Shares – Transfer – Scope of director's power to refuse to register transfer of shares – Whether director properly exercising discretion not to register transfer of shares if decision made due to director's judgment that registration would cause company to lose status as private company – Sections 128(2), 194(1) Companies Act (Cap 50, 1994 Rev Ed)

19 October 2006

Judith Prakash J:

1 This originating summons concerned an application by the plaintiffs for an order to compel the defendant to rectify its register of members by striking out the name of Chua Chai Wu, deceased ("the deceased"), as the holder of 175 shares of the defendant ("the 175 shares") and by inserting in place thereof the names of the second to seventh plaintiffs as the holders of the 175 shares, and for all other consequential and incidental orders. I dismissed this application and now give my reasons for that decision.

Background

2 The second to seventh plaintiffs ("the beneficiaries") were the children of the deceased who passed away on 4 October 2003 and were also the beneficiaries of the deceased's estate. The first plaintiff, HSBC (Malaysia) Trustee Berhad, was the executor and trustee of the deceased's estate under a will dated 25 September 1998. Amongst the deceased's assets were the 175 shares which formed the subject matter of this application.

3 The defendant, Soon Cheong Private Limited, was incorporated in Singapore on 10 July 1947 as a private company limited by shares. The primary object of the defendant when it was incorporated was to acquire and take over the businesses then carried on by one Chua Toh Hua, in partnership with one Yeo Khye Sim. When the application was made, the defendant's issued share capital stood at 5,002 shares, with a total of 23 shareholders. Eight of these shareholders were executors, administrators or trustees holding shares in trust for the respective estates of shareholders who had already passed away ("the trustee shareholders"). All of the shareholders, including those whose shares were then held by the trustee shareholders but excluding the sole corporate shareholder, Kong Hua Realty Sdn Bhd, were the descendants or relatives of either Chua Toh Hua or Yeo Khye Sim. It is worth noting that all of the shareholders of Kong Hua Realty Sdn Bhd, except for one member, were also concurrently shareholders of the defendant. Thus the defendant was essentially a private family business which was owned by the families of the founding partners, Chua Toh Hua and Yeo Khye Sim.

4 A special feature of the defendant that should be highlighted is that, under its articles of

association, all powers, authorities and discretions vested in the directors by the Companies Act or the articles were vested in its first two directors, Chua Toh Hua and his son, Chua Hock Tat ("CHT"). The relevant portions of Art 58 of the defendant's articles of association state as follows:

> Chua Toh Hua and Chua Hock Tat also known as Chua Yat Chye shall be the first Directors of the company and each of them shall hold office until he dies, or resigns, or ceases to hold 100 shares in the company. While the said Chua Toh Hua and Chua Hock Tat also known as Chua Yat Chye or either of them holds office as directors, all powers, authorities and discretions vested in the directors by the Companies Act or these articles shall be vested in them or him alone, and all other directors (if any) for the time being of the company shall exercise such powers only as the said Chua Toh Hua and Chua Hock Tat also known as Chua Yat Chye or either of them may delegate to them and they shall be under their or his control and shall be bound to conform to their or his directions in regard to the company's business.

Accordingly, by virtue of Art 58, and with the death of Chua Toh Hua sometime in 1981, CHT had sole, absolute and unfettered power and authority over the defendant exercisable at his own discretion.

5 In discharge of its duty as the executor and trustee of the deceased's estate, the first plaintiff corresponded with the defendant and/or its representative on the registration of the transfers of the 175 shares from the deceased to the beneficiaries on various occasions between 17 June 2004 and the filing of the application.

6 The first plaintiff had first informed the directors of the defendant of its intention to transfer the 175 shares to the beneficiaries or alternatively, to sell the 175 shares to the existing shareholders at a suitable price on 17 June 2004. The defendant's company secretary, ACA Management Services (Pte) Ltd ("ACA"), replied on 7 July 2004, with instructions on the procedure for transferring the 175 shares to the beneficiaries. ACA also notified the first plaintiff that CHT was willing to purchase the 175 shares for $650 per share. As the beneficiaries were of the view that that offer was too low, a counter-offer of $2,000 per share was made by a letter of 30 July 2004. Neither CHT nor the defendant responded to the counter-offer and the negotiations on the sale of the 175 shares did not proceed any further.

7 The chain of correspondence between the first plaintiff and the defendant then focused on the option of transferring the 175 shares to the beneficiaries. It should be noted that it was only on 27 September 2004 that the first plaintiff disclosed the names and number of the beneficiaries and identified them as being the second to seventh plaintiffs. By a letter dated 11 October 2004, the first letter following the first plaintiff's disclosure, ACA informed the first plaintiff that CHT had advised that he would appreciate it if one of the beneficiaries was appointed to hold the 175 shares on trust for all the other beneficiaries of the estate in order to avoid the defendant losing its status as a private company, *ie*, because it would then have more than 50 members. As the plaintiffs were, however, not willing to accept such an arrangement, the defendant resorted to referring them to Art 20 of its articles of association which provided that the directors had the power to decline to register any transfers of shares to persons of whom they did not approve. While the defendant appears to have taken a rather strong stance against registering the transfers of the 175 shares to the beneficiaries, it did advise the plaintiffs that they could offer the shares to other members of the defendant and even attached a list of the members for their reference.

8 The parties were not able to resolve the issue amicably and solicitors were brought into the picture. Only after a further exchange of correspondence between the solicitors for the parties did the first plaintiff's solicitors, M/s Lee & Lee, by a letter dated 6 May 2005, send the duly executed

transfer forms in respect of the 175 shares, whereby the shares were transferred to the beneficiaries, together with a copy of the grant of probate dated 19 February 2004 appointing the first plaintiff as personal representative of the deceased's estate, to the defendant's solicitors, M/s Citilegal LLC, for registration. This was the first proper application made to the defendant to have the beneficiaries registered as its shareholders. The solicitors for the defendant replied on 7 June 2005 stating that the directors were rejecting the first plaintiff's application for the registration of the transfers of the 175 shares to the beneficiaries. The letter reiterated that the defendant was a private company whose members were limited under its memorandum of association to a total of 50 and gave the following reasons for the directors' rejection of the first plaintiff's application:

> If your clients' application is granted, the following consequences may ensue:
>
> (a) [The] trustee shareholders may make similar applications for the shares of the deceased members to be transferred to the beneficiaries of the respective estates of the deceased members; and
>
> (b) The executors/administrators of members who pass away after the date hereof may similarly apply for the shares of these members to be transferred to the beneficiaries of the respective estates of these members.
>
> If all of the aforesaid applications, including your clients' application, are granted, and if, pursuant thereto, all of the shares to which these applications relate are transferred to all of the beneficiaries to which these applications relate, the total resultant number of the members of the Company may exceed fifty, in breach of the Memorandum of Association.

The directors were, however, prepared to approve and register the transfers of the 175 shares to a maximum of two of the beneficiaries. I noted though, that it was only later, in CHT's first affidavit of 29 November 2005 ("CHT's first affidavit"), that he explained how he had arrived at this number of two beneficiaries. Starting from the basis that there could only be a maximum of 50 shareholders holding the 5,002 issued shares, and given that there were already seven shareholders holding 50 shares each, CHT had worked out the limit in the number of persons to whom the remaining 4,652 shares could be transferred. It was based on this "transferee limit" that he had refused to register the transfers of the 175 shares to all six of the beneficiaries.

9 The plaintiffs were of the view, as expressed in their solicitors' letter of 16 June 2005, that the reasons given by the defendant for its refusal to register the transfers of shares to the beneficiaries were invalid and/or without any proper basis as, amongst other things, it was speculative of the defendant to assert that similar applications might be made by existing trustee shareholders, and, further, there was no risk or danger that the defendant would have more than 50 members even if all six of the beneficiaries were registered as members as there were only 23 members at or around 16 June 2005. Accordingly, they filed this application.

The plaintiffs' arguments

The defendant's alleged failure to pass a board resolution rejecting the first plaintiff's application to transfer the 175 shares to the beneficiaries

10 The first line of argument raised by the plaintiffs was that the defendant had not formally exercised its discretion to refuse to register any transfer of shares to a person whom it did not approve, as CHT, the sole controlling director of the defendant, had failed to pass a board resolution rejecting the first plaintiff's application of 6 May 2005 to transfer the 175 shares to the beneficiaries.

Counsel for the plaintiffs, relying on the cases of *Moodie v W & J Shepherd (Bookbinders), Ltd* [1949] 2 All ER 1044 and *In re Swaledale Cleaners Ltd* [1968] 1 WLR 1710, contended that whilst directors may be empowered by the articles with an absolute discretion to refuse to register any transfer of shares, there must be a formal and active exercise of the power to refuse by way of a directors' resolution.

11 I was unable to see how those cases could be said to assist the plaintiffs in this case as the defendant's articles of association were unique and distinguished the case before me from the authorities cited. First, as I mentioned above at [4], all powers, authorities and discretions vested in the directors by the Companies Act (Cap 50, 1994 Rev Ed) ("the Act") and the articles of association were vested in CHT. Accordingly, the discretion to refuse to register any transfer of shares could be exercised by CHT alone. Apart from this, I also noted that Art 78 stipulated that Arts 79 to 86, which dealt with proceedings of directors, were to "be in abeyance so long as either the said Chua Toh Hua or [CHT] shall in accordance with these articles be sole director". There was thus no need for CHT to hold any directors' meetings or, consequently, to pass any directors' resolutions. Given that position, to me, there did not appear to be any requirement binding on CHT to formally and actively exercise his power to refuse the registration of the transfers of shares to the beneficiaries by way of a directors' resolution. Indeed, I was of the view that, under those special circumstances, any obligation to formally and actively exercise the power to refuse would be satisfied so long as the respondent company complied with s 128(2) of the Act (see [15] below), which the defendant had, in fact, done.

The sufficiency of the defendant's reasons for refusing registration

12 The plaintiffs next argued that even if the court were to accept that the defendant had properly exercised the power to refuse registration, there was serious doubt as to whether CHT, as the defendant's sole controlling director, had exercised his discretion on correct principles and in good faith.

1 3 It was contended by the plaintiffs that CHT's purported reason for refusing to register the transfers of the 175 shares to the beneficiaries, *viz*, that the defendant would lose its status as a private company if the number of members exceeded 50, was not legitimate or was based on wrong principles. Firstly, the defendant only had 23 members at the material time and that number was far short of the 50-member limit. Even if all the beneficiaries were registered as members, there would only be 29 members, with there being no danger of hitting the 50-member limit for private companies. Secondly, it was speculative of CHT to assume that the other trustee shareholders would make similar applications for the shares they held to be transferred to the persons on whose behalf they were held (being the beneficiaries of the estates of other deceased members) until such applications were actually made by the other trustee shareholders. The defendant should, rightly, be concerned with only the first plaintiff's application at this moment. Thirdly, the alleged formula and transferee limit appeared to be an afterthought by CHT, which was conceived in order to justify his wrongful actions. While there had previously been numerous exchanges of correspondence between the defendant and the first plaintiff, no mention was ever made of the transferee limit until CHT's first affidavit.

14 Apart from there being no valid or proper reasons for the defendant to refuse the registration of the beneficiaries as its shareholders, the plaintiffs also alleged that CHT, having failed to secure the purchase of the 175 shares at an unreasonably low price, was using his influence and power illegitimately to block the transfers of the 175 shares to the beneficiaries.

1 5 It is well known that the power given to the directors of a company by the articles of association to refuse, in their absolute discretion, to register any transfer of shares to a person of

whom they do not approve (see Art 20 of the defendant's articles of association mentioned above at [7]) is not in fact unfettered as it is subject to s 128(2) of the Act. This provides that a company shall not refuse to register a transfer of shares by virtue of any discretion conferred by the articles "unless it has served on the applicant, within one month beginning with the day on which the application was made, a notice in writing stating the facts which are considered to justify refusal in the exercise of that discretion". Following from this, as I had previously held in *Xiamen International Bank v Sing Eng (Pte) Ltd* [1993] 3 SLR 228 at 239, [55]:

> *It is established law that once reasons are given by a company for the manner in which the discretion has been exercised, the court may review the sufficiency of these reasons.* The position was clearly put in the Australian case of *Waters v Winmardun Pty Ltd* where Master Evans of the Supreme Court of Victoria had to consider the refusal by a Victorian company to register a transfer of shares from an insolvent shareholder to his trustee in bankruptcy. Under the relevant statute, the Victorian company was not bound to give its reasons for the refusal but in evidence a director of the company did disclose those reasons. Master Evans observed:
>
> > Although the directors, acting under such a power, are not bound, out of court, to assign reasons for refusing to register a transfer *if they do so the court must consider these reasons in order to ascertain whether they are legitimate or not, whether or not the directors have proceeded on proper principles*: *Re Bell Brothers Ltd*, [(1891) 65 LT 245], at p 246. …
>
> [emphasis added]

In this manner, the court has the opportunity to look at the reasoning behind the directors' refusal to register a transfer and to thus interfere with the directors' exercise of their discretion.

16 I note, however, that the court, in reviewing the sufficiency of the reasons, will only seek to ascertain if they are legitimate or not and whether or not the directors have proceeded on proper principles. If the reasons assigned are legitimate, the court will not interfere with the decision on the ground that it would have come to a different conclusion: see *Waters v Winmardun Pty Ltd* (1990) 3 ACSR 378. As was also stated in *Lim Ow Goik v Sungei Merah Bus Company Ltd* [1969] 2 MLJ 101 at 104:

> It is plain on the authorities that this court will not interfere with the exercise of discretion by the directors unless they have erred in principle or there is no material on which they could properly have arrived at their decision.

17 In the circumstances, I found myself unable to agree with the plaintiffs' contentions that CHT had exercised his discretion improperly in refusing to register the transfers of the 175 shares to the beneficiaries. Rather, I was satisfied that CHT's concern that allowing the registration of the transfers to the beneficiaries would cause the defendant to eventually have more than 50 members and to thus lose its status as a private company was not fanciful but *bona fide* and legitimate.

1 8 As I mentioned above, the defendant was a "private" company not only by reason of the fact that it had fewer than 50 members, but also in the sense that it was essentially a private family business which was owned by the families of the late Chua Toh Hua and the late Yeo Khye Sim. It was hence understandable that CHT would want to ensure that the defendant did not lose its status as a private company. Additionally, as was pointed out by CHT in his first affidavit, there were then eight trustee shareholders out of the 23 existing shareholders of the defendant and about half of the 14 living shareholders (excluding the sole corporate shareholder, Kong Hua Realty Sdn Bhd) were more

than 60 years old. If CHT had allowed the plaintiffs' application, there would be a real likelihood that one or more of the other trustee shareholders would similarly seek to transfer their shares to their beneficiaries and to have the transfers registered. And if, as asserted by the plaintiffs, such applications should be determined as and when they were actually made by the other shareholders and received by the defendant, there was a likelihood of a scramble by not only the existing trustee shareholders but also the living shareholders (who wished to pass on their shares to their prospective heirs) to be the first in time to submit their applications for fear that the 50-member limit would be reached. This hypothesis was not mere speculation on the part of CHT as he had, as recently as 10 July 2005, received another enquiry from a trustee shareholder regarding the transfer of his shares to the persons for whom the shares were held on trust. Accordingly, CHT could not be said to have exercised his discretion improperly in refusing to register the transfers of the 175 shares to the beneficiaries. He was entitled to adopt a long-term view as to what would be in the best interests of the defendant and the shareholders of the defendant as a whole. For these reasons, I was of the view that it would not be appropriate for me to interfere with CHT's decision and to rectify the register of members pursuant to s 194(1) of the Act.

1 9 At this juncture, I should reiterate that while CHT had refused to register the transfers of the 175 shares to all six of the beneficiaries, he was prepared to approve and register the transfers to a maximum of two of them. CHT, in refusing to register the transfers, was thus not seeking to deny the entitlement of the beneficiaries to the shares in the defendant. CHT was only requesting that they "consolidate" their share entitlement such that only two of them would hold the shares on trust for the others. In this manner, the beneficiaries would, through their trustees, still be able to exercise their rights as shareholders of the defendant and still be entitled to dividends of the defendant. The plaintiffs' concern that they would not be able to "be involved in the defendant as individual shareholders and protect his [or her] rights as shareholders against any abuse or mismanagement" was thus unfounded. It was also speculative as the beneficiaries did not put forward any reason why any of them would have an interest or right that was different from those of the other beneficiaries. In any case, so long as CHT remained a director, the defendant would continue to be run as he decided so the beneficiaries would not be deprived of any management rights by reason of not being individually registered as shareholders of the defendant.

2 0 Further, it did not appear to me that CHT had acted *mala fide* in refusing to register the transfers of the 175 shares to the beneficiaries. There was therefore no reason for me to interfere with CHT's exercise of his discretion. As was stated by the Supreme Court of Kuala Lumpur in *Kwality Textiles (Malaysia) Sdn Bhd v Arunachalam* [1990] 3 MLJ 361 at 363–364, "the court should be slow to question the exercise of discretion in the absence of evidence that the Board of Directors had acted mala fide". After all, provided that the directors exercise their discretion *bona fide*, it is what they consider, and not what a court may consider, to be in the interests of the company that is imperative: see *In re Smith and Fawcett, Limited* [1942] Ch 304 at 306. It was similarly observed by Sir W M James LJ in *Re Gresham Life Assurance Society* (1872) LR 8 Ch App 446 at 449 that in the absence of corrupt or arbitrary conduct, the court does not have "any jurisdiction whatever to sit as a Court of Appeal from the deliberate decision of the board of directors, to whom, by the constitution of the company, the question of determining the eligibility or non-eligibility of new members is committed".

2 1 Here, the beneficiaries had alleged that CHT was using his influence and power illegitimately to block the transfers as they had refused to sell him the 175 shares at an unreasonably low price. Yet, on the evidence before me, I found no basis whatsoever for their contention.

2 2 First, it did not appear that CHT was even interested in purchasing the 175 shares from the beneficiaries. I noted that it was the first plaintiff who had proposed to offer the 175 shares for sale

to the directors of the defendant and not CHT who had sought the beneficiaries out to buy their shares. And when the first plaintiff had counter-offered to sell the 175 shares at a higher price than that offered by CHT, there was no response from CHT and the negotiations did not proceed any further. If CHT were in fact interested in purchasing the shares, it appeared to me that he would have been more persistent in his negotiations for a better price. CHT had also advised the plaintiffs that they could offer the 175 shares to the other shareholders of the defendant and even attached a list of the defendant's members for the plaintiffs' reference: see [7] above. If CHT had been truly intent on obtaining the beneficiaries' shares at a low price, he would not have given them the contact details of the other people to whom they could offer to sell their shares.

23 Second, as mentioned above at [19], CHT was not seeking to block the transfers of the 175 shares to the beneficiaries. It was not his intention to deprive them of their entitlement to the shares, but rather, he was merely concerned that the shares would be held in the names of too many of them, which would thus cause the defendant to have more than 50 members. CHT had no objection to allowing a maximum of two of the beneficiaries to hold the shares on trust for the others. If CHT had any improper motives, why would he even have been agreeable to allowing the registration of the transfers to these two persons?

24 Third, CHT had given similar advice to another executor who had enquired about transferring shares to the beneficiaries of the estate he represented. He had suggested that the executor appoint one of the beneficiaries as the representative to hold the shares in trust for all the beneficiaries. This was an indication that CHT had treated all executors alike. The plaintiffs' assertion that CHT was using his influence and power illegitimately to block the transfers out of spite as he had failed to purchase their shares at a low price therefore did not stand.

Conclusion

25 For the foregoing reasons, I found that this was not a case which called for the court's intervention to rectify the defendant's register of shareholders and I dismissed the plaintiffs' application with costs.

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