International Connex Holdings Pte Ltd v Chan Shing On and Others
[2007] SGHC 228

Case Number : Suit 315/2006

Decision Date : 31 December 2007

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : K Muralitherapany and Kenneth Ho (Joseph Tan Jude Benny) for the plaintiff; Tan Kok Heng, Leroy Soloman and Ramesh Chandra (Tan Leroy & Chandra) for the defendants

Parties : International Connex Holdings Pte Ltd — Chan Shing On; Tan Suat Yanh; Wealth Resource Enterprise Ltd

Companies – Directors – Breach of duties – Joint-venture company issuing dividends and new shares – Director of joint-venture company also director of investing company – Failing to provide information on joint-venture company – Participating in removal of another director – Whether there was breach of duty to investing company

31 December 2007

Kan Ting Chiu J:

1 This action arose from the antipathy between two director-shareholders of a company. One of them obtained the leave of court to commence proceedings in the name of the company against the other for breaches of directors' duties. There are other defendants and issues in the action, but they are secondary and consequential to the issue between those two adversaries.

2 I will refer to the companies and persons involved in the dispute, and the claims.

International Connex Holdings Pte Ltd, the plaintiff

3 International Connex Holdings Pte Ltd ("ICH") was incorporated in Singapore in 1968 under its original name International Polymers Pte Ltd. Two persons, Tan Eng Toh ("TET") and Chen Chiang Su ("CCS") built up the company in its early days, and they and their families effectively ran and own the company. In 1979, TET's son Chan Shing On ("CSO"), the first defendant, and CCS's son Tan Koh Young ("TKY"), were appointed directors of the company. TET and CCS have passed away in 2003, and TKY and CSO are the dominant members of their respective families in the company.

4 At the present time, the board of four directors of ICH is filled by the children of TET and CCS. Two directors, namely CSO and his sister Tan Suat Yanh ("TSY"), the second defendant, are the children of TET. Two other directors, TKY and his sister, are the children of CCS. TKY and CSO were more actively engaged in the company than their respective siblings. There were differences over the running of the company, as a result of which TKY stopped going to ICH's office from 1998 except to chair meetings of the company's board of directors, and did not play an active part in the affairs of the company. In September 2001, he even proposed to wind up the company, but that was not taken up.

5 On 24 September 2004, a resolution was passed at an Extraordinary General Meeting of ICH to remove TKY as a director of the company. TKY obtained an order of court on 9 November 2004 that

the resolution was not to be acted on pending the trial of this action. On 17 May 2005, he obtained leave in OS No 1245 of 2004 to commence proceedings against the defendants in the originating summons, including CSO, Tan Suat Yanh as the Administrator of the Estate of Tan Eng Toh, Deceased, and Wealth Resources Enterprises Ltd ("WRE").

Weifang Fuyuan Turbochargers Co Ltd ("WFT")

6 In 1993, ICH, on the recommendation of CSO, made an investment in a joint venture in Weifang, China, to manufacture turbochargers. The resultant joint venture company was named Weifang Fuyuan Turbochargers Co Ltd.

7 The original shareholders of WFT were ICH and two Chinese entities, namely Weifang Huaxing Machinery Group Co and Dingming Investments Co Ltd, with ICH as the largest shareholder.

Tan Koh Young

8 TKY was appointed chairman of WFT. He did not play an active role in the affairs of WFT. By his own account, he had no involvement in the running of the company, while CSO was closely involved in its management.

9 WFT is a commercial success and ICH's investment in WFT is now its most valuable asset. In 2001, there was a proposal for WFT to raise RMB 10m in capital to increase and improve its production capacity. WFT's board held a meeting in Singapore on 17 August2001 to discuss the matter with several directors coming from China. In the course of the meeting chaired by TKY, a disagreement broke out between him and CSO, and TKY left the meeting abruptly despite pleas from the other directors to him to return. The meeting carried on in his absence, and a decision was reached that RMB10m was to be raised from the existing and new shareholders.

10 The directors of WFT held another meeting on 30 October 2001 in China to confirm the increase of capital and the issuance of new shares. TKY did not attend the meeting although he was notified. The meeting confirmed that injection of RMB 10m from CSO and TET and the staff of WFT into the company's capital by the issuance of new shares to them. The allotment to CSO and TET was subsequently subscribed by WRE, a company controlled by CSO and his siblings.

11 The directors of WFT were unhappy with TKY as chairman, and decided to remove him from office. At a board meeting held on 12 January 2002, the directors resolved to terminate TKY's appointment as chairman in his absence, and appointed CSO as chairman in his place.

Chan Shing On, the first defendant

12 His background and roles in the plaintiff and WRE have been described in the foregoing paragraphs. He was director and deputy general manager of WFT, and has been the chairman of the company since TKY's removal.

Tan Suat Yanh, the second defendant

13 She is the sister of CSO, and daughter of TET. She became a director of ICH on 20 January 2004. TKY acknowledged that she has a smaller involvement in the matter than CSO and that most of the wrongdoings complained of took place before her appointment as director. Nevertheless, he felt that she should have taken action on his complaints, and that she should not have participated in his removal as director.

14 There is a serious problem with the proceedings against her because TKY did not obtain leave of court to sue her *personally* in ICH's name. TKY had obtained leave of court to commence proceedings against her *as the administrator of TET's estate.* This defect goes to the root of this action against her.

Wealth Resources Enterprises Ltd, the third defendant

15 This is the company which was allotted the new shares issued by WFT, and it is owned and controlled by CSO and his siblings.

The claims and the defences

16 The claims against the first and second defendants are for breaches of their duties as directors of ICH. The breaches pleaded relate to four matters, firstly, the dividends alleged to have been declared and paid by WFT for the financial years 2000 and 2001; secondly, the issue of the new shares by WFT; thirdly, CSO's failure to provide ICH with information on the activities of WFT, and fourthly, CSO and TSY's participation in the removal of TKY as a director of ICH.

17 Counsel for ICH went at some length into the principles and cases on the duties of a company director. It was submitted that a director is under a duty:

(a) to safeguard and act bona fide in the best interests of the company;

(b) to act honestly and for the proper purposes of the company in relation to its affairs;

(c) not to pursue his own interests and/or act to the detriment of the company or the interests of the company; and

(d) not to place himself in a position where his interests would conflict with his duties and the interests of the company;

and as a director is a trustee of the assets of the company, and he may not:

(e) exercise his powers for his own benefit or gain without clearly disclosing his interests to and obtaining the necessary consent from the company's board of directors;

(f) enter into engagements in which he has, or have a personal interest conflicting, or which may conflict, with the interests of the company; or

(g) divert any business opportunity in which the company is interested away from the company to himself.

and if he breaches these duties, he is liable to account to the company for any profit he makes.

18 These are settled principles. They apply most clearly in where a person is, in his own right, a director of one company. When a director serves as a director to more than one company, or where a person is nominated by one company to serve on the board of another company, the different duties and interests that arise have to be taken into account in defining his obligations to the company.

19 In respect of the dividend payments, ICH pleaded that WFT had declared and paid dividends to its shareholders for the financial years 2000 and 2001, but ICH was not informed of the payments and

did not receive them. ICH alleged that CSO had without its authority, agreed that the dividends be kept by WFT as loans, and had not informed it of the loan.

20 The defence was that although WFT declared dividends, the company was in need of funds. Its directors decided to retain the dividends as loans, and also to increase the capital of the company. It was also pleaded that CSO had informed TKY of these matters, and that TKY had not raise any objections. ICH's reply was that TKY was not informed, and that the accounts of ICH did not reflect the loans of the dividend payments.

21 ICH also alleged that WFT's decision to increase its capital and to issue new shares was contrary to the terms of the joint venture agreement and WFT's articles, and that CSO had agreed to them without its knowledge or approval.

22 TKY stated in his affidavit of evidence-in-chief that he neither agreed nor disagreed with the proposal, and was of the view that no decision could be taken until a valuation report of the assets and net worth of WFT, as well as its past accounts, and the basis for the subscription of the new shares are available.

23 The defendants pleaded that WFT's board discussed the proposal at the meeting of 17 August2001 after TKY left the meeting, and had agreed to the issuance of the new shares. At a subsequent meeting of the directors on 30 October 2001, it was resolved that a portion of the new shares was to be issued to WRE.

24 On the third head of claim, ICH alleged that CSO had failed to provide ICH with information and documents regarding WFT and ICH's shareholding in WFT and the value thereof. The defence to that was that TKY, being the chairman and director of WFT, could have obtained information from WFT directly, but he did not do that. Nevertheless, CSO had made all reasonable efforts to inform ICH and TKY of all the ongoings of WFT. ICH in its reply stated that TKF had in 2001, 2002 and 2004 written to WFT and CSO for financial documents and information, but had not received them.

25 On the removal of TKY as a director, ICH pleaded that the removal TKY as a director of ICH by CSO and TSY was not done honestly or in good faith but with ulterior motives to gain control of ICH's board of directors and avoid scrutiny and questions by TKY as a director, and that his removal as a director was not interest of ICH.

26 The defence to that was that the removal of TKY as a director was not done dishonestly or in bad faith but was necessary because TKY refused to sign the audited accounts of ICH and that resulted in a summons being issued by the Inland Revenue Authority of Singapore ("IRAS") for not filing the accounts. The company's previous lawyers had advised CSO and TSY to remove TKY as a director, and the matter with the IRAS was resolved after TKY was removed.

27 Against WRE, ICH alleged that it held the new shares issued to it as its constructive trustee on the ground that it knew of CSO's breaches of duties when the shares were issued. WRE's defence was a general denial.

The remedies sought

28 ICH seeks to obtain in these proceedings:

(1) Damages;

(2) A declaration that WRE holds the WFT shares as constructive trustees for ICH;

(3) An account of the profits made by WRE from the WFT shares;

(4) An order that WRE, subject to payment to it by ICH of the purchase price thereof, transfer to ICH the WFT shares and pay to ICH the profits found to have been made by WRE on the taking of the account together with interest thereon;

(5) An order that CSO provide and hand over to ICH, and do and concur in doing all acts and things necessary to enable ICH to obtain, all the monthly financial reports issued by WFT since January 1994; and

(6) A declaration that the resolution passed on 24 September 2004 is null and void and an order that TKY be reinstated as a director of ICH.

Evaluation of the evidence

29 As this action is filed because of TKY's dissatisfaction with the affairs of WFT, it is pertinent to consider his account on the management of the company. He deposed in his affidavit of evidence-in-chief:

30. Although I was appointed Chairman of WFT, this was a nominal appointment and I had no involvement in the running of WFT. The 1st Defendant was the representative of the Plaintiffs on the Board of Directors of WFT and was closely involved in WFT's business.

34. Pursuant to the understanding between the 1st Defendant and myself, I was not asked to and did not attend any of the Board Meetings or General Meetings of WFT. This was known and accepted by the Board from the outset. I did not receive any notices or information regarding such meetings until 2001.

37. From around 1998, there were a number of disagreements between the CCS family and the TET family over various issues relating to the Plaintiffs. While the details of these disagreements are not relevant to this case, they resulted in a breakdown of the relationship between myself, TET and the 1st Defendant.

38. As parties were unable to agree on how to part ways, the association through the Plaintiffs continued. However, the working atmosphere was no longer cordial and I stopped going to the office of the Plaintiffs around late 1998. Despite this, I continued to perform my duties as a director of the Plaintiffs in other ways.

30 The narration reveals that TKY and CSO had arrived at an understanding on the division of responsibilities between themselves. Secondly, although TKY said that he did not receive notices or information on the meetings of WFT, he did not take action for years. Thirdly, it is not ICH's case that CSO was derelict in his role in the management of WFT. Fourthly, after the disagreement between TKY and CSO came to a head, TKY did not rescind the understanding and take a more active part in WFT, and he allowed things to carry on as before.

The retained dividends

31 On the dividends declared for the financial year 2001, TKY affirmed that CSO sent him a note in

January 2001 which indicated that WFT made a profit of RMB 3.85m and declared a dividend to be paid to its shareholders, with ICH's portion to be rolled over as a loan to the company.

32 TKY deposed that:

> 50. At no time did the Plaintiffs agree to the retention of these dividends by WFT or to grant any loan to WFT. No resolution was ever passed by the Plaintiffs or its Board of Directors in respect thereof neither was it ever raised at a Board Meeting or General Meeting of the Plaintiffs.

33 TKY must be taken to mean that CSO was not authorised by ICH to agree to the retention of the dividends, and not that ICH had not agreed with the other shareholders of WFT that WFT was to retain the dividends as loans.

34 CSO's defence is that the board of directors of WFT decided to retain the dividends because it was in need of funds, and that TKY had been informed on that. CSO also alleged that the dividends were not remitted to ICH for a second reason, that the company's auditor had advised that it was better for the dividends to remain with WFT pending the resolution of the internal disputes of the company. ICH's auditor, Siew Tin Gin, however, denies having rendered such advice to CSO.

The new shares issued

35 By the time WFT's need for further capitalisation and the issuance of new shares arose, TKY had little interest in WFT. His evidence was that he did not have sufficient information to decide whether to support or reject the proposal. After leaving the meeting of 17 August2001, he did not enquire of ICH or CSO whether it was agreed that new shares were to be issued, and to whom they were to be issued. It was not contended that the shares allotted to WRE should be reserved for ICH instead. As TKY was of the view that ICH was not in a financial position to take up new shares without further capital injections by its shareholders and as he had during that period proposed that the company be wound up, he cannot complain that CSO did not commit ICH to subscribe for the new shares. TKY did not show that by supporting the proposal to issue the new shares and the allotment of some of the new shares to WRE, CSO acted against the interests of ICH.

My assessment of the evidence

36 After reading the affidavits of evidence-in-chief, observing and hearing TKY and CSO while they were in the witness box, I am drawn to the conclusion that the underlying problem is more personal than legal.

37 While their fathers had been able to work together effectively, it is clear that TKY and CSO do not get along, although they are both experienced businessmen.

38 From the evidence, I find that while CSO was diligent in attending to the affairs of WFT, his conduct was not beyond reproach as he has been less attentive in reporting to and seeking approval from ICH on his and WFT's activities.

39 Having said that, I will deal with each of ICH's complaints. First, there are the dividends for the financial years 2000 and 2001. (Those were the years referred to in the statement of claim. ICH's case at the hearing went beyond those two years, but I shall confine ICH to its pleaded case.)

40 There is disagreement and uncertainty whether WFT paid the dividends. There is the note from CSO to TKY which stated that WFT made a profit of RMB 3.85m and declared a dividend of RMB 1m to

its shareholders and CSO's explanation that the dividend was not paid out, and was retained by WFT. This dispute could have been resolved quite readily. Any declaration, payment or retention of dividends by WFT will be regulated by Chinese law. A report by a Chinese lawyer or accountant who has examined the corporate records and financial returns of WFT would have brought clarity on these matters. In the absence of such evidence, it is not prudent for me to make any finding on the facts. In any event, there is no evidence or allegation that dividends due to ICH have been misappropriated by CSO or WFT.

41 On the complaint over the agreement to raise the capital of WFT and the issue of new shares to WRE, it must be remembered that these are decisions of WFT, not of ICH. Though ICH has a say in these matters through its nominee directors on the board of WFT, WFT's directors made the decisions to issue new shares and to offer shares to WRE.

42 CSO participated in those decisions in his capacity as a director of WFT. At that time, ICH had not come to a decision whether to support or oppose the proposals. On the other hand, CSO and the Chinese parties were in favour of increasing the company's capital by issuing new shares.

43 The allotment of the new shares to WRE was also a decision of WFT. When ICH did not take up the allotment it was entitled to, the directors were empowered to offer the shares to other parties who were interested. The shares were offered to CSO and TET, and were subsequently taken up by WRE, a company controlled by CSO and his siblings. When an existing shareholder elects not to take up its allotment, it is reasonable for the shares to be offered to other parties already involved with the company which the directors were comfortable with. WRE was a proper alternative allottee of the new shares.

44 ICH also argued that under the joint venture agreement on the setting up of WFT, any decision on the increase of the share capital required has to be passed unanimously by the directors, and made the point that TKY had not agreed to it since TKY was absent and did not vote when those decisions were taken. Two questions arise from this argument. The first is whether the requirement for unanimity referred to unanimity of the directors present and voting, or all the directors, including absent directors like TKY. TKY exhibited in his affidavit of evidence-in-chief an opinion from a Chinese lawyer that unanimity meant consent by all the directors, but the lawyer was not called as a witness to justify and defend his opinion, and that diminished its weight. Secondly, even assuming that there was a breach of agreement, that was a breach committed by the joint venture parties, and not by CSO.

45 In any event, was CSO duty-bound to oppose the proposals? He was a director of ICH as well as WFT. When he served on the board of directors of WFT, he was a nominee of ICH. The duties as a nominee director were examined by the Court of Appeal in *Oversea-Chinese Banking Corp Ltd and Another v Justlogin Pte Ltd and Another* [2004] 2 SLR 675 at [31]:

> 31 [I]t is settled law that every director owes the same responsibility to the company as a whole. It is no different where a director is the nominee of a group of shareholders or creditors. He should not regard himself as a "watchdog" for those who put him on the board. A nominee director should exercise his judgment in the best interest of the company and should not be bound to act in accordance with the direction or instruction of his appointor: see *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606 at 626. He must not put the appointor's interests before those of the company: see *Scottish Co-operative* [[1959] AC 324]. However, the duty is a subjective one and it is fulfilled provided it is exercised *bona fide* in the interest of the company and not for any collateral purpose. But that is not to say that a nominee director must act against the interest of his appointor. A nominee director may take into

account the interest of his appointor if such interest does not conflict with the interest of the company: see *Kumagai Gumi Co Ltd v Zenecon Pte Ltd* [1995] 2 SLR 297 at 315, [58]. The court will only interfere if it is of the view that no reasonable director would consider the action taken to be in the interest of the company.

46 ICH's case was that CSO should not have acted without the approval of ICH. That did not take into account CSO's duties to WFT. CSO had duties towards ICH and WFT, and he had discharged his duties to both companies when he supported the proposals.

47 On the complaint that CSO had not provided ICH with information and documents, the evidence showed that CSO was not enthusiastic or meticulous about reporting to ICH on the affairs of WFT. This might have arisen from the antipathy between him and TKY, or the feeling that TKY should obtain the necessary information himself since he was the chairman, but these reasons do not release CSO from his duty to ICH to keep the company informed on the affairs of WFT.

48 On the final issue of the removal of TKY as a director of ICH, it was not disputed that TKY had refused to signed the audited accounts of the company, and that had resulted in action being taken by the tax authorities. The defence was that the termination was effected to bring an end to the difficulties. When a director refuses to sign the audited accounts of a company, and does nothing to have them rectified to his satisfaction, he cannot complain of bad faith when he is removed from office.

Conclusion

49 I find that ICH has not proved its case in respect of the dividends, WFT's issuance of the new shares, the allotment of the shares to WRE, and the removal of TKY as a director of ICH, and I dismiss these claims.

50 On the remaining claim, I order CSO to exercise his powers as a director to assist ICH to obtain the monthly financial reports issued by WFT since January 1994.

51 ICH will pay CSO and WRE costs in respect of all the issues on which it had not succeeded. TKY shall pay to TSY the costs as he had instituted the proceedings in ICH's name against her in her personal capacity without the leave of court. CSO is to pay ICH the costs relating to the order made in the preceding paragraph.

52 A concluding comment may be appropriate, and I hope, helpful. The outcome of these proceedings is not likely to satisfy the parties, or to lay the foundation for improved relationship between them. It would be to the advantage to all parties that a buy-out be affected on reasonable commercial terms, and for the parties to go their separate ways.

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