Ting Shwu Ping and another
v
Autopack Pte Ltd and another matter

[2016] SGHC 07

High Court — Companies Winding Up Nos 178 and 179 of 2015
Edmund Leow JC
14, 28 October; 4 November 2015

Companies — Winding up

22 January 2016 Judgment reserved.

Edmund Leow JC:

Introduction

1 It used to be a somewhat curious anomaly that the court was able to order a buy-out in cases of minority oppression, but not under a winding-up application, especially in light of the drastic effect of granting an order to wind up a company. In 2011, the Steering Committee appointed by the Ministry of Finance, in its report entitled *Report of the Steering Committee for Review of the Companies Act* (June 2011) ("Steering Committee Report") recommended that the Companies Act (Cap 50, 2006 Rev Ed) should be amended to allow a court hearing a winding-up application to order a buy-out where it is just and equitable to do so, instead of ordering that the company be wound up. This recommendation was accepted and enacted by Parliament by way of the Companies (Amendment) Act 2014 (No 36 of 2014). With effect from 1 July

2015, courts have the power, in the context of a winding up application commenced on the just and equitable ground (under s 254(1)(*i*) of the Companies Act), or a winding-up application commenced on the basis that the directors have acted in a manner that is unfair or unjust to the other members (under s 254(1)(*f*) of the Companies Act), to order the interests in shares of one or more members to be purchased by the company or one or more of the company's members under s 254(2A) of the Companies Act, if it is just and equitable to do so (hereafter referred to as the "Buy-out Provision").

2 The present case concerns two separate applications to wind up two companies (hereafter referred to as the "Defendants") owned and managed by Chng Koon Seng ("Mr Chng") and Chan Key Siang ("Mr Chan"), on the just and equitable ground. As this case involved a recent amendment to the Companies Act, I write this judgment to explain how the provisions apply to the present case and my reasons for dismissing the application.

Facts

3 The first plaintiff is the administrator of the estate of Mr Chng. At the time of his demise on 7 April 2014, Mr Chng and the first plaintiff were husband and wife. Prior to that date, Mr Chng was a shareholder of Autopack (Pte) Ltd ("Autopack"), a limited exempt private company incorporated on 1 September 1989 and in the business of the wholesale of computer accessories and other machinery. Mr Chng, Mr Chan, and Yeo Seng Poh ("Mr Yeo") were the sole directors and shareholders of Autopack at the time of its incorporation. The Memorandum of Understanding ("MOU") signed by Mr Chng, Mr Chan and Mr Yeo states that the number of partners in Autopack will not be increased, and should a partner decide to sell his shares, the remaining two partners are to decide whether a new partner is to take over the shares of the withdrawing

partner. If no agreement is reached on the admission of a new partner, none will be admitted, and the withdrawing partner must offer his shares to be bought by the remaining two partners. Autopack's Articles of Association ("Articles") also provide that existing members of the company have a right of pre-emption to purchase the shares of other shareholders who wish to withdraw from the company. The relevant articles which govern the valuation of the shares are material to the dispute and set out below:

> Article 29 … the person proposing to transfer any shares … shall specify the sum he fixes as the fair value and shall constitute the Company his agents for the sale of the share to any member of the Company … at the price so fixed or at the option of the purchaser, at the fair value *to be fixed by the auditor* in accordance with these articles …
>
> Article 31 In case any difference arises between the proposing transferor and the purchasing member as to the fair value of a share, the *auditor* shall, on the application of either party certify in writing the sum which in his opinion is the fair value, and such sum shall be deemed to be the fair value …
>
> [Emphasis added]

4 It is apparent from the Articles that in the event that a dispute arises as to the value of the shares for a share transfer, the fair value of the shares is to be fixed by the auditor. The MOU and the Articles also do not give the first plaintiff an automatic right to become a partner or even a director of the Defendants on her husband's death. Following from Mr Yeo's departure from the company on 1 April 1996, Mr Chng and Mr Chan bought Mr Yeo's shares and became the only directors and shareholders in Autopack with equal shareholdings. It is undisputed that Mr Chng and Mr Chan decided sometime in 1999 that salaries would be paid to their wives, which would be deducted from their own salaries, even though their wives were not involved in the business of Autopack. On 28 May 2001, Mr Chng and Mr Chan each transferred 20% of his shareholding to

his respective spouse, and continued to hold 30% of the shares in Autopack respectively.

5 Scanone (Pte) Ltd ("Scanone") is a limited exempt private company incorporated on 11 November 1997 with Mr Chng and Mr Chan as its only directors and shareholders with equal shareholdings. It was incorporated with the objective of representing agencies which were in competition with the agencies which Autopack held, but as the market became more receptive to Autopack carrying competing products in the mid-2000s, Scanone has become a dormant company. At present, its main revenue comes from rent which it collects from property held in its name. Scanone's Articles of Association which are relevant to the issues in this dispute are the same as Autopack's.

6 Following from Mr Chng's demise on 7 April 2014, the first plaintiff became a director of the Defendants, the reasons for which were initially disputed. According to the first plaintiff, she wished to become a director to learn about the company to ascertain whether she would be able to carry on the "partnership", and to earn a living. According to the Defendants (through their representative, Mr Chan), however, it was with the aim of allowing the first plaintiff to make a proper offer on the shares owned by herself and Mr Chng (hereafter referred to as the "Shares") that Mr Chan had agreed to appoint the first plaintiff as director of the Defendants. Becoming a director would allow the first plaintiff to be able to access confidential and sensitive financial information to make a proper offer for the sale of the Shares. After the first plaintiff was appointed as director of the Defendants, Mr Chan agreed to the first plaintiff's request for her brother-in-law, Chng Koon Beng, to assist the first plaintiff in her review of the documents of the Defendants to arrive at a fair value for the sale of the Shares.

7 It is undisputed that Mr Chan and the first plaintiff entered into negotiations on the buy-out of the Shares from as early as August 2014, but have not been able to come to an agreement on the value of the shares since. Negotiations between parties continued up to the commencement of winding-up proceedings on 23 August 2015. For example, on 3 July 2015, the first plaintiff stated in a letter to the Defendants that she was prepared to sell the Shares to the Defendants at a "value to be determined by a valuer" agreed to by both parties. The first plaintiff also proposed that cost of such valuation would be borne by both parties equally. Mr Chan responded by stating that the Articles state that the company auditor is to value the shares and this would be a more expeditious and less costly process. The first plaintiff has continued to express doubts, however, about the impartiality of the company auditor and refuses to submit to the buy-out mechanism set out in the Articles. The first plaintiff was subsequently removed as a director of the Defendants.

8 The first plaintiff then proceeded to issue a statutory demand on 21 July 2015 against the Defendants, demanding immediate payment of certain shareholder loans, failing which she expressed her intention that she may commence winding-up applications against the Defendants. Consequently, on 23 August 2015, the first plaintiff applied for the winding-up of the Defendants on the just and equitable ground, bringing an action against Autopack in her own name, and as an administrator of the estate of Mr Chng, and against Scanone as an administrator of the estate of Mr Chng (collectively referred to as the "Plaintiffs").

The Plaintiffs' arguments

9 The Plaintiffs' application to wind up Autopack on the just and equitable ground is premised on its submission that the nature of the company was that of

a partnership. The death of Mr Chng should thus lead to the dissolution of the partnership (pursuant to s 33(1) of the Partnership Act (Cap 391, 1994 Rev Ed)) and *even the Defendants which were the vehicles through which the partnership did its business*. Since what would happen in the event of the death of a partner was not covered within the MOU, "the law should step in and the partnership should be dissolved". The Plaintiffs further submit that Mr Chan has acted unfairly as the first plaintiff's brother-in-law and herself had not been given sufficient opportunity to inspect the documents even though she had been appointed as a director of the Defendants, and that the first plaintiff had not been paid her salary even though Mr Chan's wife continued to receive hers. But the primary relief which the Plaintiffs seek in the closing submissions is not the winding-up of the Defendants, but for the court to order a buy-out under s 254(2A) of the Companies Act. As the Plaintiffs are seeking a buy-out, they further assert that this should be carried out by an independent valuer, and cast doubt on the impartiality of the auditor of the Defendants, claiming that he "may be pressed to favour his long-time friend, [Mr] Chan or to back up what is stated in the financial statements."

The Defendants' arguments

10 The Defendants submit that the companies should not be wound up because the present applications have been commenced for the collateral purpose of allowing the first plaintiff to exit at will and circumvent the buy-out mechanism under the Defendants' MOU and Articles. The Defendants also argue that the first plaintiff's claim (in her affidavit) that she intended to carry on a partnership with Mr Chan to manage the Defendants has clearly been manufactured to support the present applications, as it is contrary to her own admission that her objective is to sell the Shares to Mr Chan. The first plaintiff had no right or expectation to be appointed as a director of the Defendants and

involved in them, as evinced by the MOU which shows that the founding partners of the Defendants did not intend for anyone else to join in the management of Autopack. The reason why the first plaintiff was appointed as a director was merely to understand the company's business and make an offer for the Shares. The Defendants further submit that the first plaintiff had been given reasonable access to documents but was the one who made no offers subsequent to her inspection of them. As a result of the first plaintiff's assertions regarding *inter alia*, her alleged right to be paid the directors' salary and her accusations against Mr Chan, which she has now admitted are false, the Defendants submit that the first plaintiff has come to court with unclean hands.

The law on s 254(2A) of the Companies Act

11 Given that the Buy-out Provision has been introduced in the context of a winding-up application, it is useful to bear in mind the effect of a winding-up application and the context in which it is usually commenced. Even though the making of a winding-up application does not result in the immediate liquidation of the company from that date, during the period in time between the time of application and the time it is heard, "the company is in limbo, hovering as it were between life and death" (Tan Cheng Han, *SC* gen ed, *Walter Woon on Company Law* (Sweet & Maxwell, 3rd Ed Revised) at para 17.11). Improper proceedings to wind up a solvent company may cause considerable damage in the period before an application is heard and courts should be wary of winding-up applications brought as an abuse of the process, which applicants may have a greater tendency and incentive to do in light of the new Buy-out Provision which has come into effect. By leveraging on the potential disruption and consequential disabilities that a winding-up application may bring to a company, applications may be commenced as a tactical manoeuvre to exert pressure on and force the other party's hand in acceding to their requests or

proposals, no matter how unreasonable the request or proposal may be. A clear line has to be drawn between *bona fide* and bad faith winding up applications, to sieve out potential vexatious applications. Such concerns should shape the court's assessment of the limits of its own remedial discretion in the context of assessing winding-up applications. An overly broad view of the court's discretion may further tilt the delicate balance which the Companies Act seeks to maintain between *de facto* majority rule and the protection of minority shareholders' rights. This would effectively undermine the objective of the amendments to the Companies Act, which sought to improve Singapore's international reputation and standing as a conducive business environment for companies to operate in.

12 The Steering Committee Report should be considered in the above context to ascertain the reasons behind the recommendation to introduce the Buy-out Provision into the Companies Act. The Steering Committee Report states "[t]his additional remedy would allow a court to order a buy-out instead of winding-up in cases where the company is still viable and it would be a more efficient solution for the majority to buy out the minority (or vice versa)." The Steering Committee also took the view that:

> [A]n application under the amended section 254(1)(*i*) is not really a question of the applicant seeking a buy-out remedy, because the applicant would still have to apply for a winding-up. Therefore, when an application for a winding-up is made, the usual consequences follow. The court would have to form the view that it is just and equitable to wind up the company. The buy-out is merely an alternative remedy.

It is clear that the court has to be satisfied that the requirements for winding-up are met in the present case before the remedy for a buy-out can be considered. What is even more telling is the fact that the Steering Committee recommended that the Companies Act should *not* be amended to introduce a minority buy-out

right or minority appraisal right in Singapore where such rights would enable a dissenting minority shareholder who merely *disagreed* with certain fundamental changes to an enterprise or certain alterations to shareholders' rights, to require the company to buy him out at a fair value. The Steering Committee had specifically considered whether to adopt a minority buy-out right or appraisal right as an alternative remedy for minority shareholders and stated the following after reviewing the relevant legislation from other countries:

> The Steering Committee is not in favour of introducing such a remedy. It is noted that generally all the triggering circumstances in the New Zealand, US and Canadian legislation involve corporate actions that require approval of the shareholders by special resolution. In contrast, shareholders of Singapore incorporated companies have *far more limited rights*. A Singapore company is able to enter into major transactions without shareholder approval. *It would therefore be illogical for a shareholder to have a buy-out right in circumstances where he does not even have a right to vote to approve the corporate action.* As for the alteration of shareholder rights, the Steering Committee took the view that *majority rule is part of the bargain that minority shareholders entered into*, which includes the fact that their shareholder rights could be altered by special resolution. Therefore, the minority shareholders should not be able to require a buy-out on the ground that their rights had been altered or removed by special resolution. There is also concern that the introduction of such a remedy *might lower the attractiveness of Singapore as a place for the setting up of businesses*, and make it more difficult for entrepreneurs to change the course of their business.
>
> (Emphasis added)

There is thus no provision in the Companies Act which allows a minority shareholder to exit at will merely because it disagrees with certain changes made in an enterprise or alterations made to shareholder rights and force the company to buy him out at will and at a fair value.

13 The Ministry of Finance accepted both recommendations of the Steering Committee in this regard, deciding not to introduce a minority buy-out right or

appraisal right, and deciding to introduce a new buy-out remedy where the court finds it just and equitable to make such an order in winding-up applications. As stated by the Ministry of Finance, "[a]s the court will have control over the situations under which such an order will be made, and there are legal costs involved in bringing the application to court, it will help safeguard against speculative litigation and prevent the abuse by minority shareholders."

14 Reading s 254(2A) of the Companies Act in light of parliamentary intention and the recommendations of the Steering Committee, it becomes clear that the introduction of the Buy-out Provision was not meant as a back-door approach for disgruntled shareholders to apply for a buy-out at will. The Steering Committee had in fact considered and rejected the introduction of such a minority buy-out right. In light of the fact that Parliament chose not to enact a minority buy-out right or appraisal right, and merely introduced a more limited buy-out remedy under an application for winding-up, it is clear that the court's discretion to order a buy-out in winding-up applications should be tightly circumscribed. Given that the court's discretion should be exercised in a manner which acts as a safeguard against speculative litigation, I would suggest that the test to meet in an application for buy-out under a winding-up application is as follows:

> (a) The court must first determine whether the winding-up application is an abuse of process, *ie*, if the applicant appears to be merely commencing a winding-up application for the collateral purpose of being able to exit at will (which was a specific right *not* recommended by the Steering Committee), the application should be dismissed. If the court is of the view that had the new provision not been enacted, the applicant would not have commenced a winding-up application, this

would be an indication, though not necessarily conclusive, that the application is an abuse of process and not genuine.

(b) If the court is of the view that there is no abuse of process, the court must then determine, based on the facts of the present case, whether the application qualifies for an order of winding-up, either under s 254(1)(*f*) or s 254(1)(*i*) of the Companies Act.

(c) Only if both requirements are met, will the court then go on to consider an order for buy-out in the context of its remedial discretion.

Application to the facts of the present case

Is the application an abuse of process?

15 The first plaintiff has admitted on multiple occasions that her intention was not to become a director and participate in the day-to-day running of the Companies, but merely to sell her shares and those which she held on behalf of her husband's estate. In her third affidavit dated 23 September 2015, she stated that at a meeting with Mr Chan on 16 April 2014, she proposed that the shares be bought at a discount by staff of the Defendants who had been loyal to Mr Chng. Mr Chan, on the other hand, wished to sell the shares to a third party and their differing views gave both pause for thought in the matter. There was no indication that at the meeting on 16 April 2014, she had any intention to manage or participate in the management of the Defendants. This continued to be the case at trial, when the first plaintiff admitted that she was not interested in a partnership with Mr Chan to run the company, and merely wanted to sell her shares. The excerpts in which she has made such admissions are reproduced as follows:

> Q Okay. Now, if you succeed in winding up these companies, what do you get?

A I get a fair price.

Q You will get a fair price based on a liquidation value, is that correct?

A Yes.

Q So you are happy with a liquidation value for your shares.

A It's not I'm happy, it's just that I---I do not know about business. *I just want to get out.*

…

Q Okay. So, basically, at the time you became a director in April you had no plans to run the business.

A I come in---since I'm a director, the company also need two signature to---to---to run the---the company. That's how I come and then to see how I can do and then to get the salary paid.

Q But do you agree that also around this time your main plan was also to sell your shares.

A *Yah, I'm here to tell him that I want to sell* then he also have that interest to buy.

…

Q Okay can. But at least right now, we've established some common ground. Basically that your main interest is really to sell your shares and to get a fair value for them, correct?

A Yes.

Q That's been your intention all the while.

A Yes.

Q You never wanted to run the company?

A No.

…

Q So, Madam, I put it to you that this is further evidence that you had no intention of having a partnership with Chan to run Autopack. That it was either you and consortium buy him out or you liquidate your shares in Autopack.

A No, it wasn't---*I just want to sell my share, that's it.*

Q You just want to sell you shares?

A Yah.

Q Right? You never wanted to have a partnership with Chan?

A Yes.

(Emphasis added)

16 It is clear from the extract above that the first plaintiff's objective was never to participate in the management of the Defendants in a partnership with Mr Chan, but it was merely for the purpose of allowing the first plaintiff to be able to inspect the financial documents of Autopack and make the necessary requests for further information so as to arrive at a fair valuation of the Shares. The first plaintiff did not have any right as such to be appointed as a director, and it is clear that she had been appointed merely for the purposes of facilitating her exit from the company. The Plaintiffs have not provided sufficient evidence to show that the appointment of the first plaintiff as a director of the Defendants was to give her any legitimate expectation to be treated as a director in relation to participating in the management of the Defendants in matters beyond the access of documents to give an offer on the Shares. She had no knowledge or interest in the business of the Defendants all along. The dispute is thus merely on the value of the Shares and not as to whether the company should be wound up over and above allowing a share transfer to take place.

17 Further, a winding-up application is not in the interests of either side, and certainly not in the Plaintiffs' interests. If a winding-up is ordered, the break-up value would be much lower than if the company was valued as a going concern. The first plaintiff clearly knows this, which explains why she prefers the buy-out remedy, rather than a winding up. In fact, if a buyout is not ordered, I think she would prefer the application to be dismissed, because she knows that the normal remedy of a winding up would not be in her interests. It appears to me that the first plaintiff commenced this application in the hope that it would

pressurise the Defendants into acceding to the price she had offered. Having regard to the circumstances of the case, I am of the view that the Plaintiffs appear to be merely commencing the winding-up application for the collateral purpose of being able to exit at will. I also note that this application was commenced very shortly after s 254(2A) came into force, and this is not a coincidence. Had the new provision not been enacted under an application for winding-up, I think the Plaintiffs would not have commenced the present application, and thus conclude that the commencement of the winding-up application in these circumstances amounts to an abuse of process.

Do the present facts qualify for a winding-up application?

18 There is also no merit to the Plaintiffs' application for winding up of the Defendants on the just and equitable ground. The businesses of the Defendants are viable and profitable ones which continue to be so, and there is no reason why the Defendants should be wound up. The argument advanced by the Plaintiffs is that the partnership should be dissolved because of the death of Mr Chng. But s 1(2) of the Partnership Act clearly states that it does not govern companies registered under the Companies Act. Section 33(1) of the Partnership Act, which the Plaintiffs rely on to argue that the partnership dissolves on the death of any partner, thus does not apply. Mr Chng and Mr Chan had chosen to use the vehicle of an incorporated company and not a partnership to carry out their business affairs. Further, there is no provision in the MOU or the Articles that upon the death of one of the founding members, the company would be wound up.

19 In any event, the grounds advanced by the first plaintiff are not recognised as just and equitable grounds for winding-up. The grounds common to such winding-up applications include loss of the company's substratum,

fraudulent manner of business, oppression of minority members resulting in loss of confidence in the management, deadlock in management of a company incorporated on mutual trust and the deliberate exclusion of the applicant from management in contravention of a prior understanding. None of these grounds apply in this case. There is clearly no loss of substratum or fraud in the way the business has been conducted. The Plaintiffs have not shown any oppression of the minority members sufficient to justify loss of confidence in the management. Though the Defendants were incorporated with an expectation of co-operation and mutual trust amongst the founding members, this was between Mr Chng and Mr Chan, not the first plaintiff and Mr Chan. There is no mutual trust that has ever subsisted between the first plaintiff and Mr Chan, and there is thus no basis for the first plaintiff to assert that she has a prior understanding that she would be allowed to participate in managing the company, or some legitimate expectation to that effect, and that the Defendants have breached this legitimate expectation so proved. I thus find that the facts surrounding the Plaintiffs' present application for winding-up of the Defendants do not disclose any merit to justify a winding-up on just and equitable grounds, and the application should be dismissed.

20 Further, contrary to the Plaintiffs' assertions that she and her brother-in-law were prevented from viewing documents, it is not disputed that from April 2014 to November 2014, the first plaintiff's brother-in-law had in fact taken out copies of financial documents relevant to the valuation of the Shares: these included the financial reports for Autopack from 2009 to 2011 and Scanone from 2009 to 2012, the management account, the salaries paid, the summary sales report, *etc*. Stone Forest, the auditors appointed by the first plaintiff to aid in the valuation of the Shares, had conducted an inspection on 7 April 2015 of a significant number of documents of the Defendants over and above what had

been inspected in 2014: these included documents detailing the profit and loss of the Defendants and the balance sheets of the years 2013 and 2014, inventory valuation, fixed asset list, bank statements, *etc*. Under cross-examination, the first plaintiff admitted to as much:

> Q Okay. I put it to you that Mr Chan had actually not obstructed your access to documents, that you---he had been cooperating as much as he could while trying to maintain confidentiality. And in fact, at the last exchange, you did not take up his offer to inspect.
>
> A You can say that.

21 In my assessment, it is clear that the Plaintiffs were given access to the documents, and the Plaintiffs' claim that they were not permitted to access documents belonging to the Defendants are merely bare allegations that are unsupported by evidence.

Conclusion

22 Therefore, for the above reasons, I dismiss the Plaintiffs' application. The first plaintiff has of course been placed in a difficult position by her husband's sudden and unfortunate demise. But that does not enable her to circumvent the clear provisions of the Articles. The Plaintiffs are required to comply with the Defendants' Articles in the transfer and valuation of the shares, which will be carried out by the auditor of the Defendants in the event of a dispute as to the price. I find no reason to doubt or question the impartiality of the auditor of the Defendants. Given that I have not granted the application to wind up the Defendants however, the valuation of shares is not to be done on a liquidation basis. Costs are awarded to the Defendants in both applications, to be taxed if not agreed.

Edmund Leow
Judicial Commissioner

N Sreenivasan, *SC,* Ang Mei-Ling Valerie Freda and Tan Xin Ya (Straits Law Practice LLC) for the plaintiffs;
Vikram Nair, Seow Wai Peng Amy and Tan Ruo Yu (Rajah & Tann Singapore LLP) for the defendants.
