

Pacrim Investments Pte Ltd v Tan Mui Keow Claire and Another
[2008] SGCA 16

Case Number : CA 70/2004
Decision Date : 28 March 2008
Tribunal/Court : Court of Appeal
Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s) : Lisa Chong Soo Chuan (Lisa Chong & Partners) for the appellant; Johnny Cheo (Cheo Yeoh & Associates LLC) for the respondents
Parties : Pacrim Investments Pte Ltd — Tan Mui Keow Claire; Mediastream Limited
Credit and Security – Mortgage of personal property – Stocks and shares – Covenant not to sell, assign or dispose of shares during moratorium period – Equitable mortgage of shares during moratorium period – Whether there was breach of moratorium
Words and Phrases – "Sell", "assign" and "dispose of"

28 March 2008

Chan Sek Keong CJ (delivering the grounds of decision of the court):

Introduction

1 This appeal raises a simple but important question as to the rights of shareholders to whom shares of a listed company ("listed shares") are issued but who agree not to sell, assign or dispose of the shares for a period of time. The question is whether such a restriction extends to the use of the shares as security.

2 The judge in the court below ("the Judge") dismissed the claim by the appellant, Pacrim Investments Pte Ltd ("Pacrim"), for damages and an order that the first respondent, as company secretary, register the transfer of 50 million shares in the second respondent, Mediastream Ltd ("MSL"), holding that the transfer had been made in breach of a restriction concerning those shares contained in an agreement between MSL and the shareholder who purported to transfer the shares to Pacrim (see *Pacrim Investments Pte Ltd v Tan Mui Keow Claire* [2005] 1 SLR 141 ("the GD")). The said shares, which were subject to a restriction on their sale, assignment or disposal for one year, had been mortgaged by the shareholder to Pacrim as an equitable mortgagee to secure a debt due from the shareholder. The Judge also held that MSL was entitled to decline to register the transfers of these shares as they were presented for registration after the shareholder had been declared a bankrupt.

3 At the conclusion of the hearing of Pacrim's appeal against the decision of the Judge, we allowed the appeal. We now give our reasons.

Background

4 The facts are straightforward. By an agreement dated 14 May 2002 ("the Acquisition Agreement"), MSL acquired the entire issued share capital of Allandes Corporation Pte Ltd ("Allandes"), which was held by Desmond Poh ("Poh") and his wife, Cho Wee Min ("Cho"), for a total consideration of \$13.8m. The consideration for the acquisition consisted of the allotment and issue by

MSL of 210 million fully paid-up shares at \$0.06 per share ("Consideration Shares"), and the issue of a \$1.2m interest-free credit note payable over 24 months ("the Credit Note"). The Acquisition Agreement was approved by the Singapore Exchange Securities Trading Limited ("SGX-ST"), which also gave approval for the listing and the quotation of the Consideration Shares on the Stock Exchange of Singapore Dealing and Automated Quotation System ("SESDAQ") upon their allotment and issue. On completion of the acquisition of Allandes, 55% of the Consideration Shares were issued to Poh, and the remaining 45%, to Cho.

5 The other provisions of the Acquisition Agreement which are relevant to the legal issues in this appeal are as follows:

(a) Under cl 7, Poh and Cho jointly and severally warranted (and also guaranteed) that a debt of \$1.3m then owing by Allandes Properties Pte Ltd ("Allandes Properties"), a subsidiary company of Allandes, would be recoverable and be recovered within 12 months from the date of the Acquisition Agreement.

(b) Under cl 8, Poh and Cho gave a joint and several profit guarantee to MSL that the minimum profit of Allandes for the financial years ended 2002 and 2003 would be in excess of \$2m for each year, but, if there was a shortfall in the guaranteed profits for any of these years, Poh and Cho would reimburse MSL the shortfall in cash (as a reduction of the consideration of \$13.8m) or, alternatively, MSL would be entitled to offset the shortfall against the said consideration.

(c) Clause 9 provided for a one-year restriction, or moratorium, as is often called in the securities market, on the sale, assignment or disposal of the Consideration Shares ("the Moratorium") from the completion date of the Acquisition Agreement (22 September 2002) in these terms:

[Poh and Cho] hereby jointly and severally undertake not to sell, assign or dispose of any of the Consideration Shares allotted and issued to them on Completion, for a period of one (1) year from Completion, unless the prior written consent of [MSL] has been obtained, such consent not to be unreasonably withheld.

(d) Clause 16 stated, *inter alia*, that the Acquisition Agreement embodied all the terms and conditions agreed upon among the parties as to the subject matter of the agreement and that the agreement was not to be altered, changed, supplemented or amended except in writing signed by the parties.

6 On 29 September 2002, Poh deposited the share certificates for 70 million Consideration Shares, together with blank transfers duly signed by him, with Pacrim as a "pledge" to secure the brokerage fee payable by Poh to Pacrim in respect of MSL's acquisition of Allandes. (Pacrim's managing director, Low Ee Chin ("Low"), had arranged for the acquisition of Allandes by MSL.) Low acknowledged the receipt of the share certificates and the blank transfer forms in a note dated 29 September 2002, which read as follows:

I, [Low] ... , hereby acknowledge having received from you, [Poh] ... , the amount of 7 x 10,000,000 shares in [MSL] (certificates numbers 000057 to 000063 inclusive) together with duly executed blank transfer forms as a pledge to secure the commission payable to [Pacrim] in the sum of \$2,400,000 ... arising from the brokerage and generally arranging for the sale of [Allandes] to [MSL].

7 In his affidavit dated 5 February 2004, Low deposed that Poh had asked Pacrim for time to pay the brokerage fee and it had been agreed that payment would be deferred "for one year which, in any event, was to be no later than 22 September 2003 (the last day of the moratorium period)", [\[note: 1\]](#) failing which Pacrim would thereafter be entitled to transfer the 70 million Consideration Shares to itself or its nominees and sell those shares to recover the brokerage fee. Subsequently, Pacrim released 20 million Consideration Shares to Poh to raise funds to pay part of the brokerage fee, leaving Pacrim with 50 million Consideration Shares. This statement has not been challenged by MSL.

8 By a letter dated 17 July 2003, MSL purported to rescind the Acquisition Agreement on the ground that Poh and Cho had made fraudulent misrepresentations concerning the financial affairs of Allandes, in reliance upon which MSL had been induced to enter into the Acquisition Agreement. MSL commenced actions against Poh and Cho seeking a declaration that the Acquisition Agreement had been validly rescinded and the delivery-up of the Consideration Shares.

9 On 29 August 2003, Poh was adjudged a bankrupt pursuant to a bankruptcy petition filed on 12 December 2002.

10 On 23 September 2003 and 24 September 2003, two transfers of 20 million Consideration Shares and 30 million Consideration Shares respectively ("the Transfers") were submitted by Pacrim to MSL for registration. MSL declined to register the Transfers as it took the position that the Transfers had to be referred to the Official Assignee. Subsequently, when Pacrim applied to register the Transfers a second time, MSL again declined to register them on the ground that it had rescinded the Acquisition Agreement on 17 July 2003. This led to Pacrim's action against, *inter alia*, MSL in the court below.

11 Pacrim relied on a number of grounds in support of its case that MSL was under a duty to register the Transfers as the Consideration Shares, being listed shares, were freely transferable. However, its main ground was that the "pledge" of the 70 million Consideration Shares was not in breach of the Moratorium.

12 The Judge, after analysing the terms of the "pledge" and the distinction between a pledge and an equitable mortgage, held that the "pledge" was in substance an equitable mortgage and, as such, its creation was a breach of the Moratorium (see the GD at [17] and [19]). The Judge did not explain why the creation of an equitable mortgage was a breach of the Moratorium, although it may be inferred from his analysis that a pledge is a possessory security and does not pass any interest in the secured asset, whereas an equitable mortgage passes an equitable interest in the security to the mortgagee. An equitable mortgage of shares would therefore amount to either an "assignment" or a "disposal" of the shares since the deposit of shares as security cannot amount to a "sale".

13 In the GD at [20], the Judge referred to a share as a legal chose in action which could be assigned or transferred subject to equities existing between the original parties at the date when notification of the assignment was given. He stated (at [21]–[24] of the GD) that if a contract contained a prohibition against the assignment of a chose in action, a purported "assignment" in breach of the prohibition would confer no interest on the assignee. It would therefore appear that the Judge also decided that the deposit of the share certificates for the 70 million Consideration Shares, together with the signed blank transfers (see [6] above), was, in law, an "assignment" of the shares.

14 The Judge gave a second reason for dismissing Pacrim's application. He held (at [25]–[27] of the GD) that even if there had been a pledge (as opposed to an equitable mortgage) of the Consideration Shares, the subsequent completion of the Transfers after the expiry of the Moratorium,

being a purported transfer of the beneficial interest in those shares, would have been ineffective since the bankruptcy petition against Poh was filed on 12 December 2002.

Our decision

Was the equitable mortgage of the Consideration Shares a "sale", an "assignment" or a "disposal" of those shares?

15 Counsel for Pacrim conceded that the deposit of the share certificates together with the signed blank transfers for the 70 million Consideration Shares created an equitable mortgage. We agree that, in law, a "pledge" of share certificates accompanied by duly signed transfers is an equitable mortgage. Accordingly, the only issue before us was whether the equitable mortgage in the present case was an assignment or a disposal of the shares, since it could not possibly have been a sale during the period of the Moratorium.

16 Counsel for Pacrim cited to us a number of cases, which have been collected and digested in law dictionaries, on the meanings of the words "assign" and "disposal". We do not propose to discuss these cases as the meanings of "assign" and "disposal" depend on the context in which these words are used. The issue is one of construction of the contractual terms containing those words in each case. Where, as here, there is a contractual restriction against a shareholder "selling", "assigning" or "disposing of" his freely transferable shares, we should consider, first, the principle of law applicable to property rights and then the intention of the parties with regard to such rights. It is a fundamental principle of law that all property rights are freely transferable unless there is some legal restriction preventing their transfer. In the case of a restriction on the transfer of shares, it is necessary to know why the restriction was imposed and why the shareholder agreed to it. In other words, the meaning of each of the terms "sell", "assign" and "dispose of" would be coloured by the purpose for which the restriction on the shareholder was agreed to or imposed.

17 In the present case, it was reasonably clear to us that the Judge held that the equitable mortgage of the Consideration Shares was a breach of the Moratorium because of the following statement made by Thia Peng Heok ("Thia"), a director of MSL, in para 24 of his affidavit dated 4 March 2004 ("Thia's affidavit"), which the Judge accepted at [3] of the GD. Paragraph 24 of Thia's affidavit read:

(1) A major part of the acquisition is the expertise and technical knowledge of [Poh] in the Modular Cabin Business of [Allandes]. Accordingly it was necessary to ensure that [Poh] and Cho would remain as substantial shareholders and be committed to MSL (and through it [Allandes]);

(2) It would take about 1 year to evaluate [Allandes'] performance as well as to ensure that the warranties given by [Poh] and Cho under the Acquisition Agreement were true. In particular this relates to [Allandes'] recovery of the monies owing by companies owned by [Poh] and Cho.

18 Thia did not explain the relevance of the above statement (which makes two different points) to the terms of the Moratorium, apart from stating that it demonstrated why the Moratorium was a "key condition"[\[note: 2\]](#) for MSL's acquisition of Allandes. Counsel for Pacrim did not challenge the first point in the statement, which is that the purpose of the Moratorium was to ensure that Poh and Cho would remain as shareholders of MSL for at least a year so as to secure their commitment to MSL. In our view, this was a legitimate reason for MSL to impose the Moratorium as Poh and Cho might no longer be committed to or care for the business of MSL if they were allowed to sell the Consideration Shares immediately after the allotment and issue of those shares. However, in our view, the use of the Consideration Shares as security would not be inconsistent with such a purpose.

Indeed, it could be argued that, in the event of Poh and Cho using the Consideration Shares as security, it was in their interest to work even harder for MSL to improve its business and thereby to increase the market value of MSL's shares.

19 The second point made in para 24 of Thia's affidavit seemed to be that it was in the interest of Poh and Cho to remain committed to the business of MSL as they could otherwise be in breach of their warranties relating to the recoverability of the \$1.3m debt owed by Allandes Properties to Allandes (see [5] above). Thia's statement also hinted at the possibility of MSL rescinding the Acquisition Agreement (which it eventually purported to do) and recovering the Consideration Shares from Poh and Cho if the guarantees and warranties given by them were not fulfilled. If this were indeed the purpose of the Moratorium, then the words "assign" and "dispose of" in cl 9 of the Acquisition Agreement should be given a broad meaning to protect MSL's rights in the event that MSL became entitled to rescind the Acquisition Agreement; otherwise, MSL's rights would be defeated by any dealing with the Consideration Shares, including using them as security. In our view, it was this consideration that coloured the interpretation which the Judge gave to cl 9. He decided that the equitable mortgage created by Poh in depositing the certificates of the 70 million Consideration Shares together with the signed blank transfers was a breach of the Moratorium. In his view, this justified MSL's refusal to register the Transfers even though they were presented for registration *after* the expiry of the Moratorium, *as they were meant to be*.

20 In our view, the Judge's decision is not correct as, whatever the objectives of the Moratorium were, the express terms of the Moratorium did not extend to restricting Poh and Cho from using the Consideration Shares as security for loans during the period of the Moratorium ("the Moratorium Period") provided that the shares were not sold in the market within that period. It is common knowledge in the securities market that when a listed company acquires an existing business and issues shares (to be listed as well) in exchange for the business, a moratorium on the trading of the new shares is intended to ensure that the market price of existing shares is not destabilised by the immediate or sudden influx of a large number of shares of that company in the market (here, Poh and Cho were issued with 210 million Consideration Shares in total). That would normally be the primary purpose of a moratorium on the trading of listed shares, although there could be other objectives as well, depending on the circumstances of the case, such as, as Thia had deposed (see [17] above), to ensure that the persons to whom the listed company issues new shares (in this case, Poh and Cho) would be committed to work for the welfare of that company for at least a specified period. A restriction on the *sale* of new shares issued in this context (*ie*, as consideration provided by a listed company for its acquisition of an existing business) would be consistent with such objectives. But, a restriction on their *use as security* would not promote the realisation of such objectives, but would instead merely prevent the shareholder from maximising the use of his own resources. As we have indicated earlier (at [18] above), if Poh and Cho mortgaged the Consideration Shares, they would have an incentive to work towards maintaining or improving the value of the mortgaged shares.

21 Counsel for MSL had argued that the Moratorium was intended to restrict the use of the Consideration Shares as security as MSL would otherwise not be able to have recourse to them in the event that Poh and Cho breached the profit guarantee concerning Allandes which they had given in cl 8 of the Acquisition Agreement (see [5] above). The rebuttal to this argument is found in the terms of cl 8 itself as the consequences of such a breach have already been expressly provided for therein. Clause 8 provides that upon a breach of the above profit guarantee, MSL would be entitled to reduce the consideration payable for its acquisition of Allandes by the amount of the shortfall in profit or to offset such shortfall against the Credit Note. In our view, there was no basis for Thia to attempt to broaden the scope of cl 9 of the Acquisition Agreement.

22 In our view, the meanings of the words "assign" and "dispose of" in cl 9 of the Acquisition

Agreement should be construed in the context of what a moratorium on transfers of shares in the securities market is normally intended to achieve, with particular regard to the specific context in which the Moratorium was given in the present case (*viz*, as part of the Acquisition Agreement). Looking at the scheme of the Acquisition Agreement and its express terms, we found nothing in cl 9 that was intended to prevent Poh and Cho from utilising their economic resources, *viz*, the Consideration Shares, so long as such use was not inconsistent with the objectives of cl 9. In our view, therefore, the equitable mortgage of the Consideration Shares could not be considered to be an "assignment" or a "disposal" for the purposes of cl 9 of the Acquisition Agreement. There was nothing in the agreement as a whole that justified giving such an unnecessarily broad interpretation to these words. As we identified earlier (at [20] above), the purpose of this clause was to restrict Poh and Cho from dealing with the Consideration Shares in such a way that they could be sold on SESDAQ within the Moratorium Period. Whilst a sale of the Consideration Shares within the Moratorium Period would clearly be a breach of cl 9 of the Acquisition Agreement, an assignment (whether legal or equitable) would not be a breach unless it amounted to a sale of those shares or unless it enabled the assignee to sell the shares in the market during the Moratorium Period. An assignment may be legal or equitable in form, according to the nature of the property involved, but it is the substance of the transaction that is relevant. The transaction may have the effect of either transferring all rights in the property in question absolutely or merely creating a security interest in such property. In our view, the term "assign" in cl 9 of the Acquisition Agreement bears the former meaning. Likewise, the words "dispose of" in this clause should be interpreted in the same way as "assign".

23 In considering the meaning to be given to the terms "sell", "assign" and "dispose of" in cl 9, we should also bear in mind that SGX-ST had given approval for the Consideration Shares to be listed and quoted on SESDAQ upon their allotment and issue (see [4] above). These shares were valuable property rights which Poh and Cho were entitled to deal with as they pleased, subject only to the Moratorium. The freedom of a shareholder to deal with his shares should generally be given a broad, rather than narrow, interpretation. As Robert R Pennington, *Company Law* (Butterworths, 8th Ed, 2001) states in relation to restrictions on the transferability of shares contained in a company's memorandum or articles of association (at p 402):

The court interprets restrictions on transferability strictly, and if there is an ambiguity or uncertainty, inclines to the interpretation which will give the shareholder the greatest freedom to transfer.

24 This principle was applied by this court in *Guan Soon Development Pte Ltd v Yeo Gek Lang Susie* [2006] 3 SLR 387 in the context of restrictions on the transfer of shares in a private family company. In that case, the following passage from Lord Greene MR's speech in *Greenhalgh v Mallard* [1943] 2 All ER 234 at 237 was cited with approval at [16]:

Questions of construction of this kind are always difficult, but in the case of the restriction of transfer of shares I think it is right for the court to remember that a share, being personal property, is *prima facie* transferable, although the conditions of the transfer are to be found in the terms laid down in the articles. If the right of transfer, which is inherent in property of this kind, is to be taken away or cut down, it seems to me that it should be done by language of sufficient clarity to make it apparent that that was the intention.

We see no reason why this principle should not apply even in relation to contracts between a company and its shareholders *dehors* the company's memorandum and articles of association, as in the instant case.

25 Here, Poh has deposed that cl 9 of the Acquisition Agreement was never intended to restrict

him from using the Consideration Shares to raise loans to pay his debts to Pacrim or to finance his performance of his covenants under that agreement.[\[note: 3\]](#) He stated that he needed to secure financing so that he could provide his companies with funds to repay the debts which these companies owed to Allandes.[\[note: 4\]](#) This statement, in our view, has greater credibility and also more commercial sense than Thia's suggestion (at [17] above) that the Moratorium was, *inter alia*, to ensure that any dealings in the Consideration Shares would be frozen absolutely for one year so as to allow MSL to determine whether Poh and Cho would be able to perform their obligations under the Acquisition Agreement.

The consequences of a breach of the Moratorium

26 There was another reason why MSL was not entitled to refuse to register the Transfers, which were submitted to MSL for registration *after* the expiry of the Moratorium Period. In our view, a breach of cl 9 of the Acquisition Agreement would only have the consequence that MSL would be entitled to refuse to register the Transfers *during, but not after the expiry of*, the Moratorium Period. There was no provision in the Acquisition Agreement that the Consideration Shares would be subject to immobilisation (in the sense of all transfers of and dealings in the shares being permanently frozen) in the event of a breach of cl 9. It should be remembered, as we have already highlighted at [4] and [23] above, that the Consideration Shares had already been approved by SGX-ST for listing on SESDAQ. Such a drastic consequence as that argued by MSL could not possibly have been within the contemplation of Poh and Cho. Such a consequence would also have been inconsistent with the purpose of the Moratorium. Unless the Consideration Shares were liable (contractually) to forfeiture upon a breach of cl 9, no commercial or economic purpose would be served by immobilising from trading 210 million fully paid-up MSL shares. If cl 9 had that effect, it is arguable that it is contrary to public policy.

The impact of Poh's bankruptcy on the Transfers

27 As the equitable mortgage of the 70 million Consideration Shares was effected by Poh about a year before he was made a bankrupt, the question of the transferee (*ie*, Pacrim) having acquired an interest in the shares after Poh's bankruptcy does not arise.

Conclusion

28 For the above reasons, we allowed the appeal with costs and the usual consequential orders. We made no order on the claim for damages as no evidence was adduced by Pacrim to show that it had suffered any loss.

[\[note: 1\]](#) See para 6 of Low's affidavit dated 5 February 2004.

[\[note: 2\]](#) See para 24 of Thia's affidavit dated 4 March 2004.

[\[note: 3\]](#) See Poh's affidavit dated 6 February 2004.

[\[note: 4\]](#) See para 7 of Poh's affidavit dated 6 February 2004.