IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 97

HC/Companies Winding Up No 30 of 2019

In the Matter of Section 254(1)(i) of the Companies Act (Cap 50)

And

In the Matter of the Companies Act (Cap 50)

And

In the Matter of KSE Technology (Int'l) Pte Ltd

Between

Wong Kit Kee

… *Plaintiff*

And

KSE Technology (Int'l) Pte Ltd

… *Defendant*

JUDGMENT

[Companies] — [Winding up] — [Just and equitable winding up]

Wong Kit Kee
v
KSE Technology (Int'l) Pte Ltd

[2019] SGHC 97

High Court — Companies Winding Up No 30 of 2019
Choo Han Teck J
22 March; 5 April 2019.

18 April 2019 Judgment reserved.

Choo Han Teck J:

1 Mr Wong Kit Kee ("the Plaintiff") and Mr Chng Hup Huat ("Chng") are equal shareholders and the only directors of KSE Technology (Int'l) Pte Ltd (the "Defendant"). This is the Plaintiff's application to wind up the Defendant on just and equitable grounds pursuant to s 254(1)(i) of the Companies Act (Cap 50, 2006 Rev Ed) ("CA").

2 The Defendant was incorporated on 12 October 2010 with food and beverage being its main business. It ceased operations from the end of 2011 and became dormant because of a management deadlock between the Plaintiff and Chng. The shareholder problems began after an investment in Pao Xiang Singapore Pte Ltd ("Pao Xiang"). On 9 November 2010, the Defendant paid $100,000 to one Mr Lau Beng Wei in exchange for 10% shares in Pao Xiang ("the Shares"), which Chng registered under his name. The Plaintiff claimed that the Shares should have been registered in the Defendant's name. In the

accounting report dated 2 July 2013 for financial period 20 October 2010 to 30 September 2011 ("the Accounting Report") by L W Ong & Associates LLP, it was recorded that Chng owed the Defendant $100,000 for the Shares registered in his name. Chng claimed that this was inaccurate as he held the Shares on trust for the Defendant. The Plaintiff refused to amend the financial records and in defiance, Chng refused to participate in any of the Defendant's affairs which resulted in the management deadlock.

3 With its management crippled, the Defendant faced three additional problems. First, there were unresolved accounting irregularities flagged out in the Accounting Report:

(a) The Defendant's financial records recorded a debt of $12,513 owed to Hilltop Contractor Pte Ltd ("Hilltop"). Hilltop claimed that the debt was in the sum of $29,225, of which $10,000 was paid on 4 January 2012 and the remaining $19,225 offset with a credit note dated 27 December 2011 issued by Hilltop. However, this credit note did not tally with a sum of $15,000 paid by the Defendant to Hilltop on 30 September 2011.

(b) The defendant's sales volume and receivables reported to the Goods & Services Tax division of the Inland Revenue Authority of Singapore ("IRAS") were understated by $798,506 and $287,041 respectively. As a result, the additional assessment payable to IRAS was $52,101. Further, there was also a discrepancy of $35,802 between the figure submitted to IRAS and the GST payable account of the Defendant.

Secondly, the Defendant was informed on 24 March 2014 by IRAS that it owed overdue corporate tax of $33,415.55 along with a penalty of $1,591.21. Both the corporate tax and the penalty were subsequently paid. Thirdly, on 23 February 2018, the Plaintiff was reminded by the Accounting and Corporate Regulatory Authority ("ACRA") to hold an annual general meeting ("AGM"), present up to date financial statements at the AGM and file up to date annual returns in order to avoid enforcement action by ACRA.

4 The Plaintiff's attempts to resolve these problems failed because Chng, aggrieved that the Shares were not reflected to be held by him on trust for the Defendant, refused to participate in any meetings and refused to cooperate or approve any financial statements required for compliance purposes. Parties' attempts at mediation failed as well. This resulted in a management deadlock as the quorum for a director and shareholder meeting is two, and no cheque could be issued without the signature of both the Plaintiff and Chng. The Plaintiff claims that he has exhausted all options, and on 25 February 2019 filed this application to wind up the Defendant. On 11 March 2019, 11 days before the hearing of this application, Chng informed the Plaintiff that he wished to buy over the Plaintiff's share in the Defendant.

5 The notion of unfairness is the foundation of the court's jurisdiction to wind up any company on just and equitable grounds (see *Chow Kwok Chuen v Chow Kwok Chi and another* [2008] 4 SLR(R) 362 ("*Chow Kwok Chuen*") at [14]). This involves two steps. First, the court will consider whether the statutory grounds for winding up a company have been established. If so, the court will then consider the appropriate relief (see *Perennial (Capitol) Pte Ltd*

and another v Capitol Investment Holdings Pte Ltd and other appeals [2018] 1 SLR 763 ("*Perennial*") at [58], [77] and [82]).

6 Ms Lisa Sam, counsel for the Plaintiff, urged the court to wind up the Defendant on two grounds. First, Ms Sam submitted that there is a management deadlock and this was undisputed. The Plaintiff and Chng, being the only two directors and equal shareholders of the Defendant, could not work together and Chng could at every instance, frustrate the Plaintiff's efforts to run the Defendant (see for example, *Chua Kien How v Goodwealth Trading Pte Ltd and another* [1992] 1 SLR(R) 870 ("*Goodwealth*") at [25]–[26]). Mr Harry Zheng, counsel for Chng, submitted that the Plaintiff did not come to court with clean hands as his refusal to amend the financial records to reflect that Chng held the Shares on trust for the Defendant was the cause of the management deadlock.

7 Ever since *Ebrahimi v Westborne Galleries Ltd & Ors* [1973] 1 A.C. 360 at 387, the courts have accepted that a shareholder, such as this Plaintiff, cannot seek winding up relief if the management breakdown was caused by his own misconduct. Mr Zheng averred that the Plaintiff's misconduct stemmed from the fact that he knew the Shares were intended to be held by Chng on trust for the Defendant. However, the documents relied upon by Mr Zheng in support of his submission made no mention of any trust. The Plaintiff wanted the Shares to be registered in the Defendant's name, while Chng insisted that the financial records should reflect that he held the Shares on trust for the Defendant. The effect is the same – the Defendant is the beneficial owner of the Shares. If either party had appreciated this, the management breakdown could have been avoided.

8 Nevertheless, the Plaintiff made efforts to resolve the parties' dispute in the Shares by arranging an AGM and an extraordinary general meeting on the 10 April 2018 and 13 July 2018 respectively to discuss, among other issues, how the Shares were to be dealt with. Chng however, extinguished any possibility of resolution when he refused to participate in the meetings. Therefore, I find that the management deadlock was mainly contributed by Chng in his obstinate refusal to approve any financial statements and participate in the meetings. Furthermore, the Plaintiff's insistence on having the Shares registered in the Defendant's name did not constitute the level of misconduct necessary for the court to reject the Plaintiff's application for winding up relief.

9 On the face of it, the quarrel between the two equal shareholders seem petty and unnecessary since both agree that the Defendant is the beneficial owner, but a winding up order can still be made if all the conditions are met, as in this case, although the initial dispute was a silly one. The parties' animosity has gone so deep and the knot they had tied themselves is so tight it is best left to a liquidator to unravel it.

10 Mr Zheng also submitted that the buy-out mechanism provided in the Defendant's articles of association ("the Articles") ameliorated any unfairness engendered by the management deadlock. The relevant provisions in the Articles are as follows:

> Shares to be offered to members
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> 28. Shares may be freely transferred by a member or other person entitled to transfer to any existing member selected by the transferor; …
>
> Notice of desire to sell
>
> 29. … [T]he person proposing to transfer any shares (hereinafter called "the proposing transferor") shall give notice

> in writing (hereinafter called "the transfer notice") to the [Defendant] that he desires to transfer the same. Such notice shall specify the sum he fixes as the fair value … or at the option of the purchaser, at the fair value to be fixed by the auditor in accordance with these articles …
>
> Company to find purchaser
>
> 30. If the [Defendant] shall within three months after service of a sale notice find a member willing to purchase any share comprised therein (hereinafter described as a "purchasing member") and shall give notice thereof to the retiring member, the retiring member shall be bound upon payment of the fair value to transfer the share to such purchasing member …
>
> Sale price to be fixed by [Defendant]'s Auditors
>
> 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 …

The unfairness emanating from a management deadlock is not the impasse between the shareholders themselves, but the inability to exit from the crippled company (See *Perennial* at [45]). Therefore, if the articles of association or the constitution of a company provides an exit mechanism for a disgruntled shareholder to exit the company, this would typically ameliorate any unfairness arising from the management deadlock, unless such exit mechanism was "arbitrary, artificial or contrary to the legitimate expectations of the parties" (see *Perennial* at [67] and [84]). I do not see this company being salvaged in this way.

11 In *Ma Wai Fong Kathryn v Trillion Investment Pte Ltd and others and another appeal* [2019] SGCA 18 ("*Ma Wai Fong*"), the Court of Appeal held that where the exit mechanism provided in the articles of association will not ameliorate the unfairness arising from being locked into a company that had lost its substratum because a "fair and proper valuation of [the company] could not

be done without a thorough investigation into [the company]'s financial records and activities", the court may appoint a liquidator with the appropriate powers under the CA to do what is necessary (see *Ma Wai Fong* at [78]–[81]). Similarly, I am of the view that the Defendant's financial records here are in such an unsatisfactory state of affairs that it would be best to have a liquidator examine the Defendant's financial records and resolve any outstanding accounting irregularities and regulatory issues.

12 Furthermore, the viability of the buy-out mechanism provided in the Articles hinges on at least a minimal level of cooperation between the Plaintiff and Chng (being the only shareholders and directors of the Defendant), to appoint an auditor, provide the auditor with the relevant documents and resolve any outstanding accounting irregularities and regulatory issues before a fair and proper valuation of the Defendant can be done. Mr Zheng argued that parties could simply have accepted the fair value of the Defendant to be at $0.13104 per share as stated in the Accounting Report. However, even if the Defendant had ceased trading, an updated valuation has to be obtained as the previous valuation of $0.13104 per share was done more than five years' ago and may not have taken into account the impact of subsequent regulatory issues or any administrative expenses incurred by the Defendant. Furthermore, given Chng's refusal to cooperate for the past six years, it is clear that the parties will not have the cooperation required to utilise the buy-out mechanism provided in the Articles — notwithstanding Chng's late and sudden interest in purchasing the Plaintiff's shares. Therefore, the buy-out mechanism here is unlikely to ameliorate the unfairness emanating from the management deadlock between the parties.

13 Ms Sam's second ground is that the company has lost is substratum. This ground is usually invoked when the company's original purpose was frustrated or no longer practicable (see *Foo Peow Yong Douglas v ERC Prime II Pte Ltd and another appeal and other matters* [2018] 2 SLR 1337 at [63]), or if it pursued a diametrically different objective than was originally intended (see for example, *Goodwealth* at [38]–[40]). The substratum of a company is a loose description for the foundation or main purpose of the company. A management deadlock does not necessarily mean that the foundation or the main purpose of the company is gone, but in some cases, such as the present, they overlap.

14 The concept of a just and equitable winding up is a dynamic one and has to be applied to the unique circumstances of each case (see *Chow Kwok Chuen* at [17]–[19]). Although an exit mechanism provides a route for the aggrieved shareholder to escape the predicament he finds himself in, the court should always evaluate the viability of the exit mechanism in the light of the circumstances of each case (see for example, *Ting Shwu Ping (administrator of the estate of Chng Koon Seng, deceased) v Scanone Pte Ltd and another appeal* [2017] 1 SLR 95 at [112]–[113]). For the reasons above, I find that the buy-out mechanism provided in the Articles is not viable and it is unlikely to ameliorate any unfairness emanating from the management deadlock between the parties. And further, the hopelessness of the future of the company is evident from its utter dormancy in the past six years. Chng's last minute effort to revive it is far too little, too late. The appropriate relief is to wind up the Defendant; and have a liquidator conduct a thorough investigation into the Defendant's financial records and activities to resolve all outstanding accounting irregularities and regulatory issues, including the dispute in the Shares.

15 The Plaintiff's application to wind up the Defendant pursuant to s 254(1) of the CA is allowed as the Official Receiver has confirmed that the papers are in order. Parties are to endeavour to agree on a private liquidator to be appointed. In the event that parties are unable to reach an agreement, the court will appoint the liquidator. I will hear arguments on costs at a later date.

- Sgd -
Choo Han Teck
Judge

Sam Hui Min Lisa (Lisa Sam & Company) for the plaintiff;
The defendant is unrepresented;
Harry Zheng, Satinder Pal Singh and Gabriel Lee (Selvam LLC) for Non-Party, Chng Hup Huat;
Lim Yew Jin and Wileeza A Gapar for Official Receiver.