Australia and New Zealand Banking Group Ltd v Ding Pei Chai and Others [2004] SGHC 140

Case Number : OS 902/2002

Decision Date : 30 June 2004

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Carrie Ho Nyuk Tsien (JC Ho and Kang LLC) for first and second claimants; J Balachandran and S Selvam (Ramdas and Wong) for third claimant

Parties : Australia and New Zealand Banking Group Ltd — Ding Pei Chai; Phua Swee Khiang; Cheng Wai Yong

Civil Procedure – Interpleader – Exercise of power of court under O 17 r 8 Rules of Court (Cap 322, R 5, 1997 Rev Ed)

Civil Procedure – Interpleader – Nature of interpleader proceedings

30 June 2004

Belinda Ang Saw Ean J:

1 Gracedale Technology Limited ("Gracedale"), a British Virgin Islands company, is the account holder of an Asian Currency Unit deposit account no 468488 ("ACU account") placed with the Australia and New Zealand Banking Group Limited, Singapore branch ("ANZ Bank"). ANZ Bank sought interpleader relief after it received from the claimants, conflicting instructions in relation to the operation of the ACU account. The first claimant is Ding Pei Chai ("Ding"). The second claimant is Phua Swee Khiang ("Phua") and the third claimant is Cheng Wai Yong ("Cheng"). Lee Wan Hoi ("Lee") is Cheng's husband.

2 On 2 August 2002, the Deputy Registrar framed the interpleader issue as follows:

> [W]hich of the first to third claimants has the authority to act for, and on behalf of, [Gracedale] in operating the [ACU] account.

He further directed that the interpleader issue be tried with Ding and Phua in the position of plaintiffs, and Cheng in the position of defendant. Ding and Phua are not plaintiffs in the technical sense of the word, but are in the position of plaintiffs as they are the claimants who are required to make out their case against the other claimant, Cheng.

3 It is desirable to mention that an interpleader issue directed under O 17 of the Rules of Court (Cap 322, R 5 1997 Rev Ed), is a means for the court to decide the claims as between the persons present at the proceedings in order that the person interpleading may get the relief to which he is entitled (see *De La Rue v Hernu, Peron & Stockwell, Limited* [1936] 2 KB 164 at 173). Seen in this light, the single question for determination from the point of view of ANZ Bank is: who is lawfully authorised to give instructions to the bank on behalf of Gracedale? In answering this single question, I have to consider whether or not Lee agreed to cede control of Gracedale and the ACU account to Ding and Phua. If the answer is yes, then there is the question of whether or not the issuing of additional bearer shares and the resolution dated 1 May 2002, contravened the articles of association of Gracedale or the laws of the British Virgin Islands or both. If the answer is no, it follows that the original mandate to ANZ Bank continues to apply.

Background facts

4 Prior to the events of 7 March 2002, Lee, Ding and Phua were business associates and friends. In 1993 and 1994, all three collaborated to invest in and develop some properties in Melbourne, Australia. Seaa Enterprises Pty Limited is the trustee company ("trustee company") for both Seaa Enterprises Pty Limited Trust ("SEPLT") and Seaa Properties Trust ("SPT"). SEPLT held the properties at 167–173 Collins Street and SPT held the property at 180 Flinders Lane. Nearby was Lush Lane, which the trustee company acquired in 1998 on behalf of the two trusts. I shall hereon refer to all the properties collectively as "the Melbourne properties".

5 The unitholders of SEPLT and SPT are companies incorporated in the British Virgin Islands. They are Jade Tower Limited (representing Lee's interests) which holds 60% of the units issued in the respective trusts, Winlong Holdings Limited (representing Ding's interests) which holds 20% of the units and Hsuante Investment Limited (representing Phua's interests) which holds the balance 20% of the units.

6 The Melbourne properties were sold for A$15m. After the sale was completed in September 2000, Lee transferred A$8.4m from the sale proceeds, to accounts under his control outside Australia. From this A$8.4m, a sum of approximately A$5.25m was eventually paid as return of equity to Lee, Ding and Phua in the proportion of 60:20:20 respectively. Although there is disagreement as to whether or not that transfer was with the approval of Ding and Phua, I am not required to make findings of fact on this peripheral point to resolve the interpleader issue.

7 Lee is the chairman and managing director of the trustee company. He was involved in the day-to-day management of the trustee company whilst Ding and Phua were passive investors. The collaboration was not as problem free as the investors would have liked it to be. According to Lee, at the time he agreed to set up the ACU account in December 2000, his relationship with Ding and Phua was still "very good". It appeared that their hitherto amicable relationship began to deteriorate to its present state as a result of friction that developed between Lee on one side, and Ding and Phua on the other. The reasons for the end of the relationship that are material to the interpleader proceedings are evident from the events narrated below.

8 Ding was one of the initial directors of the trustee company. Phua nominated his sister as director. On 7 March 2002, Lee and Cheng passed a resolution removing the entire board of directors and appointing themselves directors of the trustee company. I gather from Cheng's evidence that this dispute is not yet resolved. Ding and Phua had earlier opposed the extraordinary general meeting convened by Lee and Cheng. One of the grounds of opposition was that the appointment of Cheng was contrary to the relevant Unitholders Agreement, which prescribes that each unitholder is allowed to nominate only one director to the board. In short, Jade Tower Limited could nominate either Lee or Cheng, not both.

9 On 7 March 2002, Ding and Phua decided to remove Cheng as a director of Gracedale and withdraw Lee and Cheng as authorised signatories of the ACU account. On 1 May 2002, a resolution was passed to ratify and adopt their decision of 7 March 2002. At this meeting of members, Soh Yoke Moi (Ding's wife) retired as director of Gracedale and Ding and Choo Cheng Tong Wilfred ("Choo") were appointed directors. On 4 June 2002, Ding and Phua handed to ANZ Bank a copy of the May resolution with instructions to observe the change of signatories on its record to Ding and Phua, as stated in the May resolution. ANZ Bank was also given instructions to remit A$820,000 to M/s Mei Leong Lam & Co, a firm of solicitors in Hong Kong and another A$150,000 to Choo. Upon learning from ANZ Bank of the May resolution and transfers, Cheng countermanded those instructions and, at the same time, advised ANZ Bank of her majority shareholding in the company. It was after this point that ANZ Bank took out interpleader proceedings. The interpleader proceedings came on for trial on

16 February 2004 and lasted for five days.

The dispute

10 The plaintiffs' case is that Lee had agreed to relinquish to Ding and Phua, control of Gracedale and the ACU account. For Ding and Phua to have control, Lee agreed to the issue of additional bearer shares to Ding and Phua. As such, they had authority to act for and on behalf of Gracedale in operating the ACU account. Moreover, they also had authority to pay A$820,000 out of the moneys in the ACU account as Lee previously had agreed to this payment.

11 Cheng's case, supported by evidence from Lee, is that she and her husband never agreed to cede control of Gracedale and the ACU account to Ding and Phua. The purported issue of additional shares without her knowledge was unlawful. Lee too had no knowledge of the issue of additional shares. The joint signatories of the ACU account remained the same. Prior to the events with which this case is concerned, the authorised signatories on the bank's record were two signatories, one person from each group. For Group A, the signatories were Cheng or Lee. Group B signatories were Soh Yoke Mui or Phua.

The evidence

Ding's evidence

12 Ding is a professional engineer. He is also the group managing director of DKLS Industries, a public company listed on the main board of the Kuala Lumpur Stock Exchange. He estimates the group's annual turnover to be in the region of RM500m. Ding also sits on the board of several companies in various countries. He travels frequently on business and most of the time, communicates with Lee and Phua over the telephone.

13 Ding testified to the circumstances leading to Lee's consent to Ding and Phua taking over control of Gracedale and the ACU account. As far as Ding and Phua were concerned, Lee's transfer of A$8.4m was not authorised by the board of the trustee company. Even after capital repayment of A$5.25m, there were still moneys under Lee's control despite their complaints and efforts over two months to persuade Lee to remit the moneys to the trustee company. Lee cited potential tax liabilities and ongoing litigation in Australia as reasons for keeping the funds outside Australia.

14 Faced with Lee's resistance and as an alternative to getting Lee to return part of the balance of the sale proceeds, if not all of the moneys under his control, Ding and Phua proposed to Lee to set aside and transfer A$1.8m to the joint custody of the three of them. This was agreed to on 8 December 2000 as can be seen from the statement entitled "Estimates of the outstanding amount arising from the sales of Collins and Flinders". The amount of A$1.8m was transferred in January 2001 to the ACU account. It was set aside as a provision to meet and satisfy three identified potential claims: a call on a letter of guarantee/indemnity dated 8 July 1999 signed by Phua in relation to shares in Atech Holdings Limited ("Atech"), capital gains and related taxes, and other miscellaneous expenses like foreign exchange losses and legal costs.

15 As agreed on 8 December 2000, Lee was to make available to Ding and Phua, the accounts of SEPLT and SPT with a view to determining any free funds that might be available for distribution, as soon as possible, to the respective unitholders. On 29 December 2000, Ding and Phua wrote to Lee envisaging receipt of the accounts by 12 January 2001.

16 Between January and April 2001, there were numerous conference calls involving Ding, Phua

and Lee, including meetings in Kuala Lumpur or Singapore, to try to settle the accounts of SEPLT and SPT. Ding and Phua were repeatedly told by Lee that the final accounts were not ready because he was having difficulties with the imprest account, interest expenses, provisions for litigation expenses and was seeking legal advice on capital gains tax. However, putting aside the final figures for the imprest account and capital gains tax, Lee agreed with Ding's calculation that the profit before tax of both SPELT and SPT from the sale of the Melbourne properties was conservatively A$4.3m. This figure was close to the paper profit of A$4.56m quoted to Ding on 3 October 2001 by Suzanne Borelli, the company secretary and accountant of the trustee company.

17 During the same period, Lee was also requested to account for A$2.5m of the sale proceeds transferred out of Australia to an account or accounts under Lee's control. Lee promised to work out the imprest account and expenses. He assured Ding and Phua that he would have the final accounts of SEPLT and SPT ready by the next meeting, to account for the A$2.5m.

18 However, no accounts were forthcoming and Ding and Phua became concerned. Ding reminded Lee on many occasions that if anything untoward should happen to Lee, he (Ding) and Phua might face difficulties establishing their share of the sale proceeds of the A$2.5m still with Lee. As a trade-off for the risk they were exposed to whilst waiting for the accounts of SEPLT and SPT that would account for the A$2.5m, Ding reasoned with Lee that he should allow them to control the moneys in the ACU account through the issue of new bearer shares in Gracedale. The new bearer shares would be held in trust for SEPLT and SPT. Ding said he explained to Lee that the new bearer shares in Gracedale would not affect the respective beneficial interests of the unitholders as the moneys in the ACU account were held separately, on trust for SEPLT and SPT. It would be only after the accounts of the trusts had been settled that any free funds available would be distributed to the unitholders in accordance to their shareholdings.

19 Compared to the A$2.5m under Lee's control, there was little downside to Lee acceding to Ding's proposal given the provision amounted to A$1.8m. Besides, Phua and Ding had extended assistance of a financial nature to Lee on two previous occasions and it was time for Lee to reciprocate and return the favour and trust extended in the past.

20 Ding said that he assured Lee that as long as he was serious and sincere about finalising the accounts of SEPLT and SPT, he did not see any need to change the authorised signatories of the ACU account on the record. It was also pointed out to Lee that the alternative to the proposal was the production of the final accounts by the following week.

21 Lee was not ready with the accounts. He said that the final accounts of SEPLT and SPT would take some time to complete. Lee agreed, in the meantime, to "entrust [them] with the control of Gracedale. Lee also promised to hand over the corporate seal and the company stamp". Ding, in cross-examination, explained that it took some time to convince Lee to accept his proposal. Eventually, he succeeded and secured Lee's agreement during a conversation he had with Lee either in late May or early June 2001.

22 From July to October 2001, there was no sign of the accounts as promised. Lee was not able to verify with documents how the A$2.5m was allegedly spent. The collaborators met on 7 October 2001 at the Dynasty Hotel in Kuala Lumpur. Also present at this meeting was Patrick Leong ("Leong"), a former unitholder of SEPLT and SPT. Leong had been responsible for keeping some of the financial records of the trustee company during the time of his involvement and he was requested to attend the meeting to assist in resolving some of Lee's expense claims.

23 At the meeting, Lee provided figures for expenses and provisions for the trusts. He was still

unable to justify some of the expenses and provisions he had made. He promised to do so by 29 October 2001.

24 The next day, Lee, Ding and Phua met at Ding's office. After discussion, a second statement was drawn up. Ding and Phua referred to it as the "second agreement". There were nine items marked with asterisks totalling A$2.44m that Lee had to justify with supporting documents by 29 October 2001.

25 Ding, whose evidence was supported by Phua, testified that the "second agreement" recorded the terms of their agreement with Lee in respect of "an agreed offer of settlement with M/s Mei Leong & Lam." It was recorded as:

> Amount payable to Mei Leong for [Phua's] indemnity A$820,000

26 In September 2001, Ding wrote to Ms Borelli for the accounts of SEPLT and SPT for the financial year ended 30 June 2001. Ms Borelli replied on 3 October 2001. Her reply and the management accounts she sent, generated further queries about the state of the accounts. The management accounts for the financial year ended 30 June 2001 disclosed that SEPLT had an operating profit of A$765,176. The operating profit of SPT was A$248,808. That meant that the total operating profit from the sale of Melbourne properties was A$1,013,984 as compared to Ms Borelli's quote of a paper profit before tax of A$4.56m. Lee was questioned about this marked discrepancy and difference. Lee claimed that the management accounts extended to him were preliminary accounts. Ms Borelli's explanation was that the management accounts of SEPLT and SPT had yet to be finalised. At that juncture, Ding insisted that the accounts of SEPLT and SPT be audited before submission to the Australian tax authorities.

27 Ding and Phua engaged PricewaterhouseCoopers to audit the 2001 accounts of SEPLT and SPT. Lee objected to Ms Borelli meeting the two auditors from PricewaterhouseCoopers. Commenting on the management accounts sent to Ding by Ms Borelli in October 2001, PricewaterhouseCoopers advised Ding and Phua on 20 December 2001 that:

> [O]ur limited financial analysis has confirmed that the profit on sale of the properties is greatly affected by the cost base of the buildings which is inclusive of capitalised interest (approximately $4 million in interest has been capitalised on a loan that has ranged from $3 million to $4 million in a period of less than 5 years).

PricewaterhouseCoopers recommended that the interest expense be investigated, audited and verified. They listed a number of documents they needed to review in order to, *inter alia*, verify the flow of funds.

28 Despite his earlier promise, Lee did not verify with documents the nine items marked with asterisks by 29 October 2001 or at all. Exasperated, Ding, on 29 December 2001, wrote to the board of directors of the trustee company, but marked for the attention of Lee, calling for the accounts of SEPLT and SPT to be audited. His request was made pursuant to s 293 of the Australian Corporations Act 2001 which permits a shareholder with more than 5% of the votes in the trustee company to direct the board to prepare audited financial accounts of the trustee company. Pursuant to s 290(1) of the same Act, he requested, as director of the trustee company, inspection of the financial records of the trustee company. Having received no response to his letter, Ding, on or about 21 January 2002, called a board meeting to discuss the two matters. The first meeting was aborted as an objection was taken to the power of attorney granted by the directors of the trustee company (*ie* Ding Poi Bor and Alice Tan) to Soh Yoke Moi and Wilfred Choo, to attend the meeting. In February

2002, Ding called a second meeting. The meeting was held on 4 March 2002. Present were Alice Tan, Ding and Ms Borelli. The board resolved that Ding had a statutory right to have the accounts audited and that as a director, Ding could inspect the records of the trustee company.

29 Lee and Cheng, as shareholders of the trustee company, called for an extraordinary general meeting to remove the existing board and appoint Lee and Cheng as directors of the trustee company. The resolution was passed on 7 March 2002 despite Ding and Phua's objections that the meeting was void because of procedural defects. In Ding's words, the removal of the board was the final straw. Ding saw the removal of the existing board as Lee's attempt to stop him from getting the accounts audited and from inspecting the financial records of the trustee company. He and Phua then decided that it was time to assert control over Gracedale and the ACU account. I have already narrated what happened thereafter at [9] above.

Phua's evidence

30 Phua was able to corroborate Ding's evidence with regards to the occasions where he had participated in meetings and conference calls. He also testified that sometime in July 2001, Lee gave the corporate seal and the company stamp to him at Terminal 2, Changi International Airport. He was certain that the corporate seal and company stamp were handed over because of Lee's agreement to cede control of Gracedale and the ACU account to Ding and himself, as there was no other reason for Lee to relinquish possession of them to him.

31 Phua testified that following the agreement Ding reached with Lee, a total of 144 new bearer shares were issued on 24 July 2001. Together with the 144 new bearer shares and the initial four bearer shares issued in December 2000, both Ding and Phua held 95% of the issued share capital. The sole reason for issuing 144 bearer shares was to be able to convene a meeting of members on short notice. Article 66(a) of the articles of association of Gracedale provides that members holding not less than 90% of the total number of shares are eligible to call a meeting of members on short notice.

32 As for the apparent discrepancy in the date on one of the bearer share certificates ("certificate 04"), Ding explained that as his wife usually accompanied him on his travels, he had arranged for her to pre-sign certificate 04 in April 2001. Phua who, as company secretary, had the blank share certificates in his possession, was able to corroborate Ding's testimony. Until sealed, the certificates would not be considered as issued under art 11 of the articles of association of Gracedale.

33 Phua testified that acting on Lee's agreement to use A$820,000 from the ACU account to pay M/s Mei Leong, Lam & Co (and it was agreed with Lee that he and Ding were to make up the difference of A$80,000), he reached an in principle agreement with M/s Mei Leong, Lam & Co on 15 October 2001. By that in principle agreement, Phua would pay a sum of A$900,000 to M/s Mei Leong, Lam & Co in exchange for the cancellation of the letter of guarantee/indemnity Phua had given to Yip Wui Kuen ("Yip") and his nominees, Tartan Capital Limited ("Tartan") and Xiao Yongle ("Xiao") as well as the return of 3.4 million shares in Atech to Phua. Lee had provided Phua with a counter-indemnity to this letter of guarantee/indemnity.

Cheng's and Lee's evidence

34 Lee is a civil engineer and is now semi-retired. He received his tertiary education in Australia. He has also worked in Melbourne and Sydney. He has more than 30 years of experience in engineering design, construction and property development in Malaysia and Australia. His wife, Cheng, is a retired state registered nurse.

35 It is evident from Cheng's testimony that what she knows of the purpose for the setting up of the ACU account and what Lee did to acquire Gracedale was told to her by Lee. She testified that bearer certificate 01 for six bearer shares is in her possession. She stated in her written testimony that it would have been "unthinkable" for Lee and her to have agreed to give control of Gracedale's account in ANZ Bank to Ding and Phua as Cheng and Lee have a 60% stake in the moneys in the account. Lee also stated in his affidavit of evidence-in-chief that the moneys in the ACU account substantially belong to Cheng and him and that Ding and Phua were attempting to wrongfully take the moneys from them. He stated that as Jade Tower Limited is a beneficiary with a 60% interest in the two trusts, he and his wife, as owners of Jade Tower Limited, would never have agreed to give up control of the moneys. They denied receiving notice of the 1 May 2002 meeting and a copy of the May resolution that was sent to Lee at his last known address in Malaysia.

36 Lee denied that he had handed over the corporate seal to Phua and Ding to let them have control of Gracedale and the ACU account. Sometime in June or July 2001, Ding, Phua and he decided to open another bank account in Citibank, Singapore ("Citibank") for Gracedale. He brought the corporate seal to Singapore for this purpose and left it with Citibank. He requested Phua's wife, who worked in the same building, to collect it from the bank. That was how Phua gained possession of the corporate seal.

37 It is Lee's evidence that in June 1998, he entered into an agreement with Yip to sell 14 million shares and 4 million options in an Australian Stock Exchange listed company called Seaa Corporation Limited which later changed its name to Atech Holdings Limited. He entered into the sale agreement for himself and on behalf of Ding and Phua. Yip and two other parties (Tartan and Xiao) were to acquire the 14 million shares. Mei Leong was their lawyer. Yip, Tartan and Xiao required Phua to sign an indemnity concerning the share scripts. Lee said Phua signed the indemnity on behalf of the three of them. Lee also said a sum equivalent to A$820,000 was received pursuant to the sale of shares and not a loan as claimed by Phua and Ding.

38 Lee denied having agreed to pay A$820,000 to M/s Mei Leong, Lam & Co. He was upset that Phua signed a settlement agreement with M/s Mei Leong, Lam & Co without his consent. He also questioned the firm's authority to act for the buyer (*ie* Yip and his nominees Tartan and Xiao). Previously, on 23 September 1999, Yip had informed a director of Atech that M/s Mei Leong, Lam & Co no longer represented him and Xiao. On 6 October 1999, Yip again wrote to M/s Mei Leong, Lam & Co whereby he stated that he had terminated the firm's mandate to act for him. On 11 December 2000, M/s David Ong & Co, representing Phua, asked M/s Mei Leong, Lam & Co to confirm the latter's authority to act for Yip and his two nominees but they never did. Yip died on 15 July 2001. As for Xiao, he is reported to be in prison in China.

Findings and decision

39 The sum of A$1.8m in the ACU account is part of the proceeds from the sale of the properties in Melbourne and it is money belonging to the trusts. It is not disputed that at the outset, all three of them, namely Lee, Ding and Phua agreed that A$1.8m be kept in their joint custody on behalf of the trusts. I find that this was a separate arrangement. By this separate arrangement, Ding, Phua and Lee agreed, in their personal capacity, to hold the moneys on behalf of the trusts. Gracedale was the vehicle used by the three investors to carry out their agreement. Cheng, I accept and find, was simply the nominee of Lee. In the same way, Soh Yoke Mei was Ding's nominee. Six bearer shares were issued to Lee and two shares each were issued to Ding and Phua. The proportion of bearer shares issued reflected their respective interests in the trusts through Jade Tower Limited, Winlong Holdings Limited and Hsuante Investment Limited. But that did not alter the underlying agreement in which Lee, Ding and Phua agreed to hold the money on behalf of the trust and the

amount set aside was to meet contingent obligations arising from their venture, namely the Melbourne properties. This was recorded in the statement signed by Lee, Ding and Phua on 8 December 2000. At any rate, the proportion of bearer shares issued did not automatically or necessarily reflect their ultimate share entitlement to all the moneys in the ACU account. Much depends on whether there would be any money left unutilised afterwards.

40 In their fax of 29 December 2000, Ding and Phua stated that the moneys were:

> … for purposes of satisfying any call [on] the indemnity signed by Tom Phua dated 8 July 1999, payment of capital gains and related taxes arising from the sale of the properties at 171 Collins Street and 180 Flinders Lane, and other miscellaneous expenses that may arise from the sales, mgt (Charles), forex losses and legal cost etc. …

Lee, in his written testimony, accepted that A$1.8m was to "cater for claims arising from the Atech shares we delivered, for tax and miscellaneous items". It was evident that in making the provision of A$820,000, the three of them had no intention of drawing a distinction between the status, rights and obligations of the individuals, unitholders, trustee company, SEPLT and SPT.

41 I should mention that a large part of Ding's evidence detailing the conversations and meetings with Lee for the accounts of SEPLT and SPT to be provided in order to come to a decision on the accounts for the venture, was unchallenged. Cheng claimed that when bills needed to be paid, Lee would make payment and hence her reasoning was that after the properties were sold, Lee was entitled to be reimbursed for the payments he made. The very curious feature of this case is that Lee was in no position to prove the payments he made. There ought to be invoices, receipts and other documents to verify Lee and Cheng's assertion. That was exactly what Ding and Phua were after. Lee's inability to produce documents to verify his claim for reimbursement calls for an explanation. If no sufficiently credible explanation is forthcoming when one might be expected, as was the case here where no explanation was proffered, then in my judgment, this serves to undermine their testimony.

42 It was on account of Lee's inability to verify the expenses of the trusts and apparent dilatoriness in attending to the matter that caused Ding to offer at his own expense to send for accountants to assist with the accounts. His offer was rejected. In fact, Lee admitted in the witness box that he had not been in a position, even then, to verify with documents the figures marked with asterisks in the statement of 7 October 2001 totalling A$2.44m, which he had promised to do so by 29 October 2001. Lee's inability to provide the accounts and to verify expenses was all the more questionable particularly where the trustee company is obliged to maintain financial records as Lee well knew. Counsel for Ding and Phua referred me to cll 22 and 43 of the trust deeds of the respective trusts. By cl 22, the trustee company is required to keep complete and accurate records of all receipts and expenditures on the trust fund. Also, the trustee company is required to prepare a written accounting report (consisting a balance sheet, a statement of income and expenditure and list of assets) promptly after the close of each accounting year. Clause 43 provides that copies of the written accounting report mentioned in cl 22 shall be provided to the unitholders. There is also cl 6.1 of the Unitholders Agreement which states that the trustee company shall maintain and provide to the unitholders such financial reports as is required by the trust deed, the articles of association of the trustee company or by law.

43 At the initial stages, the story as it unfolded appeared to be that Lee had simply been procrastinating in getting the accounts of SEPLT and SPT finalised and in accounting for the A$2.5m under his control. Views, however, changed after it appeared to Ding and Phua that there was something seriously amiss. Apparently, there were serious irregularities in the profits from the sale of the Melbourne properties. This came to light in October 2001 when Ms Borelli, at the request of Ding,

sent him the preliminary management accounts of SEPLT and SPT where the total operating profit was shown to be A$1,013,984 as compared to the paper profit before tax of A$4.56m. Moreover, Lee led no evidence to refute the comments of PricewaterhouseCoopers on the exceedingly high interest charge of A$4m for loans of between A$3m and A$4m over a period of less than five years.

44 Ding and Phua's call for the accounts of SEPLT and SPT to be audited fell on deaf ears. Lee's explanation that he did not reply to Ding's letter of 29 December 2001 as it was addressed to the board and he had simply passed it to Ms Borelli, is tissue paper thin. The letter was clearly marked for his attention. In my judgment, he simply chose to ignore it. He stonewalled Ding and Phua's efforts to appoint PricewaterhouseCoopers to audit the accounts of SEPLT and SPT. When he could no longer stonewall Ding's demands, made first as a shareholder for the board to audit the accounts of the trustee company and second as a director to inspect the financial records of the trustee company, he and Cheng took the drastic step of removing Ding, and Phua's sister, Alice Tan, from the board. The new board comprised of Lee and Cheng. Lee, on his part, in cross-examination, accepted that Ding's request to inspect the accounts and have the accounts of the trustee company audited was not unreasonable and within his statutory rights. Yet, Lee did not proffer any explanation for his decision to replace the board. Cheng was also unable to satisfactorily explain the reason for their decision. Her answer that it was because of Phua and Ding's behaviour, is desultory and nebulous. Having heard the evidence of everyone, in my judgment, the decision of Lee and Cheng to replace the board was deliberate and calculated to stop Ding from getting hold of the financial records and to forestall the audit of the accounts.

45 Having regard to the overall picture, I accept Ding's testimony on the discussions he had with Lee and I find that Lee acceded to Ding's proposal to give him and Phua control of Gracedale and the ACU account pending the production of the accounts of SEPLT and SPT. The alternative of producing the accounts within a week was an option that Lee did not want. Events thereafter showed that the difficulties with the accounts were real and I find that Lee was fully aware of the difficulties from the outset. He consented in order to buy time. It was not an impulsive decision. I am satisfied that Lee's motivation in accepting Ding's proposal was because he could not verify the expense claims. He was given time by Ding and Phua to produce the accounts of SEPLT and SPT and to account for the A$2.5m. That was the bargain struck in exchange for control of Gracedale and the ACU account.

46 Counsel for Cheng submits that the conduct of the parties showed that there was no such agreement. As at late 30 July 2001, the number of bearer shares in Gracedale was stated as ten and not 154 (*ie* 144 plus ten) in the documents for the opening of an account for Gracedale with Citibank. That also indicated that Lee had not agreed to and had no knowledge of the issue of 144 new bearer shares.

47 The documents relied upon by counsel are not determinative. The evidence, in my view, is equivocal. Cheng cannot recall when she signed the forms. It seems to me that she and Lee identified the month of July from the date 30 July 2001 written down on the documents. No evidence was led that it was Lee or Cheng who dated the document. So, there is no satisfactory evidence as to whether the forms were signed by everyone before or after 24 July 2001. In the Resolution for Opening of Account, the specimen signatures of Phua, Ding and Soh Yoke Moi were provided and they were identified as the officers of the company who, acting jointly with any two signatories (one from Group A and one from Group B), were authorised to operate the account. Notably, Cheng's case is that Ding and Phua are not officers of the company. In the forms, Cheng was identified as the company secretary when, in fact, Phua was at all material times the company secretary.

48 Lee's clarification in cross-examination was that this account was opened in order for him to get some statements for his own account from Citibank without incurring charges. Ding and Phua

agreed to assist him on a rather trivial matter. I would not have expected them to pay too much attention to the forms. In the end, the account was not opened.

49 I accept and find that Lee was told about the intention to issue additional bearer shares and he agreed to that so as to put Ding and Phua in control of Gracedale to buy some time. Ding testified that before Lee passed the corporate seal and company stamp to Phua, Lee had already consented to the issue of the additional bearer shares that Ding had told him about. The additional bearer shares were created for the purpose of exerting control. The issuing of 144 bearer shares was for the purpose of convening a meeting of members on short notice. The main purpose was to protect the funds in the ACU account. I agree that Lee would not have known that Ding and Phua would issue as many as 144 bearer shares. His ignorance is not critical.

50 Counsel for Cheng submits that it was not pleaded that Lee had consented to the issuing of additional bearer shares in Gracedale to Ding and Phua. I agree that although it was not expressly pleaded, it is implicit from the pleadings that the extra bearer shares were issued pursuant to the alleged agreement.

51 Lee gave unsatisfactory evidence as to the circumstances which led to the corporate seal coming into Phua's possession through his wife who collected it from Citibank. I find Lee's story about getting a Citibank officer to telephone Phua's wife, and that he spoke to Phua's wife, to be rather dubious. When and what was said in that conversation did not emerge from the evidence. It is unlikely that Citibank would have agreed to release the corporate seal without proper written authorisation. What was surprising was Lee's inability to provide the court with the name of the officer concerned. The alleged arrangement with Citibank was too casual to be plausible. Cheng's testimony was not corroborative. She had no knowledge about Lee leaving the seal with Citibank. It was only after counsel referred her to Lee's written testimony that she adjusted her evidence to suit Lee's written testimony. Her inability to recall matters in answer to questions from counsel did not help her case.

52 There was no mention of the company stamp in Lee's written statement. Lee only testified to leaving the corporate seal with Citibank. Phua's testimony is that besides the corporate seal, Lee handed to him the company stamp at Terminal 2 of Changi International Airport.

53 In my view, and I so find that, the corporate seal was handed to Phua for the additional bearer shares to be issued by Phua who, as company secretary, kept the blank share certificates. The additional bearer shares were issued on 24 July 2001 soon after the corporate seal was handed to Phua. The fact that the additional bearer shares were issued proximate in time to the handing over of the corporate seal and company stamp is consistent with Ding and Phua's story. They were not issued after matters came to a head several months later.

54 Other than issuing the additional shares, the authorised signatories were left very much at *status quo* as Ding promised. It was only when Lee, on 7 March 2002, reneged on his promise and showed that he was not going to let Ding and Phua have the accounts, that Ding and Phua took steps to change the authorised signatories to the ACU account. That decision is consistent with Ding's earlier testimony that he had told Lee that so long as Lee was serious or sincere about giving him and Phua the accounts, he and Phua would not change the authorised signatories to the ACU account.

55 Cheng's counsel submits that in October 2001, and again in November 2001, when demanding that Lee authorise payment to M/s Mei Leong Lam & Co, it was not alleged in the letters from M/s JC Ho & Kang (counsel for Ding and Phua) that Lee had agreed to let Ding and Phua have control of

Gracedale and the ACU account. In fact, the demand was that Lee authorise ANZ Bank to remit payment. I am unable to read much into the demands when judged in the light of Ding's promise to keep the authorised signatories at *status quo*. What the demands seek is for a Group A signatory to countersign payment.

56 Counsel for Cheng contends that no resolution (either a directors resolution or a members resolution) was passed for the issue of the 144 new bearer shares as required by art 20 of Gracedale's articles of association. Ding's explanation was that it was agreed at the inception of Gracedale that such resolution was not necessary for the issuing of shares. Counsel submits that this assertion was not pleaded nor is it in the affidavits of evidence-in-chief of Ding and Phua. Furthermore, control does not depend on who holds the corporate seal. A common seal is merely an instrument for the execution of documents under seal by the company. That may be so, but in the present case, the parties were dealing with a company that had opted from the outset to issue bearer as opposed to registered shares.

57 Having reached the conclusion that there was an agreement to let Ding and Phua control Gracedale and the ACU account, this is not the end of the matter. In my judgment, resort must be had to the articles of association of Gracedale and the laws of the British Virgin Islands to determine whether or not the 144 bearer shares were properly issued given Lee's agreement to entrust control of Gracedale and the ACU account to Ding and Phua. Another question is whether or not the resolution to remove Lee and Cheng as authorised signatories to the ACU account and the removal of Cheng as a director were in accordance with the articles of association and the laws of the British Virgin Islands.

58 The resolution to ratify the removal of Cheng as director and the appointment of new directors and new authorised signatories presupposes the proper issue of the extra bearer shares despite absence of formalities and procedure, if any. As to whether this is correct under the laws of the British Virgin Islands and the articles of association in the circumstances of this case, was a matter not addressed in the evidence and in submissions. No evidence emerged as to what the position is under the articles of association or the laws of the British Virgin Islands or both. I am thus unable to answer these questions either way. Be that as it may, it does not follow that the original mandate continues to apply in the present case. There was, as I have concluded, an agreement to let Ding and Phua control Gracedale and the ACU account. I am satisfied that Ding and Phua acted honestly, based on a genuine belief in the agreement they had with Lee. It is only in respect of the mechanics of the control that I am unable to come to a decision either way for the reasons stated.

59 The jurisdiction of the court under O 17 r 8 of the Rules of Court allows the court to make such order as it thinks fit in the matter, even though it interferes with the rights of the parties, if it is for the just solution of the case: *BP Benzin und Petroleum AG v European-American Banking Corporation* [1978] 1 Lloyd's Rep 364. There is no evidence or any basis otherwise of prejudice to Lee and Cheng. Finally, I am satisfied that no substantial injustice has been caused or is likely to be caused to any persons if I make the orders I propose.

60 Before I come to the orders I propose to make, I must state that a determination of the claim that Lee had agreed to Ding and Phua paying A$820,000 to the law firm of M/s Mei Leong, Lam & Co, is outside the ambit of the interpleader issue. What is clear and undisputed is that a sum of A$820,000 was agreed to be set aside by the three of them to meet claims consequent upon the letter of guarantee/indemnity provided by Phua. Lee did not challenge Ding's evidence that some of the terms of the in principle agreement came from him. However, whether the sum of A$820,000 was a loan as alleged by Ding and Phua or part payment for the Atech shares is more involved than a passing reference made in these proceedings. If Lee had gone back on his word, whether that, in the

circumstances, gave rise to a breach of an agreement to pay M/s Mei Leong, Lam & Co as alleged or an estoppel, is plainly a matter for separate proceedings.

61 In view of my finding that there was an agreement to entrust control of Gracedale and the ACU account to Ding and Phua, I am accordingly satisfied that the just thing to do in the circumstances of this case is to make the following orders:

(a) The moneys in the ACU deposit account no 468488 are to be retained in the account until further order.

(b) Both parties are to have general liberty to apply in connection with the order made pursuant to this judgment.

62 I shall hear parties on costs.