Singapore Flyer Pte Ltd v Purcell Peter Francis
[2009] SGHC 120

Case Number : OS 1369/2008, SUM 1155/2009

Decision Date : 19 May 2009

Tribunal/Court : High Court

Coram : Nathaniel Khng AR

Counsel Name(s) : Prakash P Mulani s/o Purshotamdas and Alvin Chang Jit Hua (M & A Law Corporation) for the applicant/defendant; Fong Yeng Fatt Phillip and Khaleel Namazie (Harry Elias Partnership) for the respondent/plaintiff

Parties : Singapore Flyer Pte Ltd — Purcell Peter Francis

Civil Procedure

Companies

19 May 2009 Judgment reserved.

Nathaniel Khng AR:

Introduction

1 Summons No 1155 of 2009 ("the Application") is an application by Singapore Flyer Pte Ltd ("the Applicant") to strike out Originating Summons No 1369 of 2008 ("the Originating Summons") pursuant to O 18 r 19 of the Rules of Court (Cap 332, R 5, 2006 Rev Ed). The Originating Summons had been filed by Peter Francis Purcell ("the Respondent") for the purposes of obtaining an order pursuant to s 199 of the Companies Act for an accountant to be allowed to inspect and take copies of the accounting and other financial records of the Applicant. The Application had been filed after the Respondent had been removed and/or resigned from his position as a director on the board of directors of the Applicant ("the Board"). Prior to the hearing of the Application, however, the Respondent purported to be reappointed as a director of the Applicant.

Section 199 of the Companies Act

2 Section 199 of the Companies Act states that a director of a company can, at all times, inspect the accounting and other financial records of the company in question (*per* s 199(4)) and/or apply to the court for an order that a public accountant acting for the director be allowed to inspect the accounts and other financial records, provided that the accountant had given a written undertaking to the court that any information acquired would be disclosed only to the director (*per* s 199(5)). In *Re Funerals of Distinction Pty Ltd* [1963] NSWR 614, Slade J described the general basis for such rights of access to the records of a company as follows (at 615):

> It is to enable a director to make sure that he is not a director of a company in which there is any criticism open of the accounts – criticism which might be made by shareholders or by a liquidator. A director is entitled to know what is going on in the company, and if his accounting knowledge does not equip him to find out what is going on, then he should have the assistance of an expert.

3 In *Haw Par Bros (Pte) Ltd v Dato Aw Kow* [1972-1974] SLR 183 ("*Haw Par Bros*"), the Court of Appeal had stated that a director must be a director at the time of his or her application under s 199

of the Companies Act in order for that application to be allowed. In that case, the director had obtained an order to inspect the records of a company pursuant to the then equivalents of ss 199(4) and 199(5), *viz*, ss 167(3) and 167(5) of the Companies Act (Cap 185, 1970 Rev Ed). After the order had been granted and the auditor acting for the director had begun inspection, the company's shareholders acted to remove the director from his directorship in accordance with the company's articles of association. The company then refused to allow the auditor to continue to inspect the documents. The (former) director then commenced an action, seeking an injunction to restrain the company from preventing the auditor from inspecting the documents. An interim injunction was subsequently granted by the High Court, and the company appealed against that decision. The appeal was allowed. In allowing the appeal, Wee Chong Jin CJ, who delivered the judgment of the Court of Appeal, held (*id* at 186, [12]–[14]):

> 12 … It seems to us clear [*sic*] that s 167(3) gives an absolute right to inspect the accounting and other records required to be kept by a company and its directors under s 167(1) only to persons who *are* the then directors of the company. It is clear that s 167(3) cannot be successfully invoked by an ex-director. In our opinion where an ex-director wishes to inspect such accounting and other records of a company he cannot rely on s 167(3) and must rely on other grounds because it is clear law that an ex-director, as such, has no proprietary, managerial or other similar interest in the accounting and other records of a company.
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> 13 It seems to us clear [*sic*] also that s 167(5) is in aid of the right to inspection which is given to a director by s 167(3) and therefore the court has no power under s 167(5) to order that the accounting and other records of a company should be open for inspection on behalf of an ex-director of that company.
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> 14 The more difficult question, and that is the question before us, is whether or not, where an order for inspection has been made by a court under s 167(5), the order continues in full force and effect after a director of a company ceases to be a director. It seems to us that we must first consider whether a director who has ceased to be a director has under s 167(3) the continued right of personal inspection and as we have earlier said an ex-director's right ceases once he is no longer a director. It follows, in our opinion, that in principle an agent's right to inspect which has been granted by an order of court made under s 167(5), a right which is dependent upon his principal's right under s 167(3), must also cease once his principal is no longer a director.
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> [emphasis in original]

4 In *Wuu Khek Chiang George v ECRC Land Pte Ltd* [1998] SGHC 373 ("*Wuu Khek Chiang*"), Warren L H Khoo J referred to *Haw Par Bros* and declared that the right of a director under s 199 of the Companies Act to have access to the company's records terminates once a person ceases to be a director (*Wuu Khek Chiang* at [16]; see, also, the judgments of the Court of Appeal in *Wuu Khek Chiang George v ECRC Land Pte Ltd* [1999] 3 SLR 65 at [26] and *Hoban Steven Maurice Dixon v Scanlon Graeme John* [2007] 2 SLR 770 at [43]) Case law from other jurisdictions on similar provisions would not indicate otherwise (see, *eg*, the Australian cases of *Re Funerals of Distinction Pty Ltd* ([2] *supra*), *Re South Queensland Broadcasting Holdings Pty Ltd* (1976) Qd R 69, *State of South Australia v Barrett* [1995] 13 ACLC 1369, *Ansons Pty Ltd v Merlex Corporation Pty Ltd* [2001] WASC 204, and *Lei Zi Shen v Garry Cordukes* [2004] FCA 1488; see, *eg*, the English case of *Conway v Petronius Clothing Co Ltd* [1978] 1 WLR 72 and *Oxford Legal Group Ltd v Sibbasbridge Services Ltd* [2008] EWCA Civ 387).

Material background facts

5 The Applicant was incorporated on 1 July 2003 for the purposes of designing, constructing and operating a giant observation structure (in the form of a Ferris wheel) known as the "Singapore Flyer". The original shareholders of the Applicant were O&P Management Limited ("OPM"), Melchers Project Investments Pte Ltd ("MPI") (now known as Great Singapore Flyer Holding Pte Ltd) and AAA Equity Holdings Limited ("AAA"), which were "A Shareholders", and Singapore Flyer GmbH & Co KG ("SFGK"), which was a "B Shareholder". Under the Applicant's articles of association ("the Articles of Association") and a shareholders' agreement dated 2 September 2005 ("the Shareholders' Agreement") between OPM, MPI, AAA and SFGK, OPM and MPI were entitled to appoint one director to the Board and AAA was entitled to appoint up to two directors to the Board. The Respondent was (and still is) a director and shareholder of OPM, and he had been, at the outset, appointed as OPM's representative on the Board. Until his resignation in April 2007, he was also the managing director of the Applicant. Following his resignation, the day to day running of the Applicant was left in the hands of Mr Andreas Franz Ansgar Bollen ("Bollen") and his management team ("the current management"). The Respondent was not involved in the day to day running of the Applicant, but remained as a representative of OPM on the Board.

6 According to the Respondent, in 2008, there was a series of questionable financial transactions by the Applicant and breaches of corporate governance by Bollen and/or the current management, such as the agreement for the construction of a floating jetty next to the Singapore Flyer without the requisite approval of the Board and the issuing of 117,000 free tickets to the Singapore Flyer without the requisite approval of the Board. The Respondent's subsequent efforts to obtain information and documentation from Bollen and/or the current management over the questionable transactions and other issues had limited success, and no action was taken after he informed the managing directors of SFGK, Mr Harald Junke ("Junke") and Mr Marcus Lori ("Lori"), of the irregularities. On 16 October 2008 and 24 October 2008, the Respondent and an audit team, on behalf of OPM, attempted to exercise OPM's right as a shareholder under Art 13.6 of the Shareholders' Agreement, which gave a shareholder and/or auditors acting on the behalf of a shareholder "free access" to the Applicant's records. The access sought was denied, and, consequently, on 24 October 2008, the Respondent filed the Originating Summons. In support of the Originating Summons, Mr Leow Quek Shyong, a partner at M/s BDO Raffles, a firm of public accountants in Singapore, gave a written undertaking that any information acquired by him or his representatives would be disclosed only to the Respondent or to the Respondent's solicitors.

7 After the filing of the Originating Summons, in emails dated 29 October 2008 and 31 October 2008, the Respondent wrote to Junke and Lori over their lack of action against Bollen and the current management. Rather than take action against Bollen and the current management, on 7 November 2008, Junke and Lori, on behalf of SFGK, issued a First Warning Notice ("the Notice") pursuant to Art 3.8 of the Shareholders' Agreement to OPM. The issuing of the Notice was the first step in the process of removing the Respondent as a director of the Applicant, as set out in Arts 3.8–3.10 of the Shareholders' Agreement, which state as follows:

> **3.8** If, in the reasonable opinion of the B Shareholder [*ie*, SFGK], any Director appointed by an A Shareholder has failed to perform his duties or exercise his powers with the required standard of skill or expertise ("Director Default"), then the B Shareholder shall (acting in good faith) be entitled to issue to the A Shareholders a notice ("First Warning Notice") identifying the Director Default and the reasons for such failure.
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> **3.9** On receipt of a First Warning Notice, the A Shareholders shall rectify the Director Default identified in the First Warning Notice within ninety (90) days of receipt of such First Warning Notice.

3.10 If, within ninety (90) days of receipt by the A Shareholders of such First Warning Notice, the A Shareholders have not complied with their obligations under Article 3.9, then the B Shareholder shall be entitled by written notice to the A Shareholders no later than a further ten (10) days after the ninety (90) day period referred to above, to remove such Director and the relevant A Shareholder or the [Applicant] shall appoint a new Director in his place respectively.

8 The Notice asserted that the Respondent had "failed to perform his duties and exercise his powers with the requisite standard of skill or expertise", and cited the Respondent's refusal to sign a circular resolution of the Board to update the list of authorised signatories of the Applicant's bank account ("the Circular Resolution") unless preferential rights were given to him and/or OPM and the Respondent's attempts to block payments by the Applicant to its principal lenders after the Circular Resolution had been passed at an emergency meeting on 29 October 2008. The Notice concluded by calling for the following to be carried out by OPM in rectification:

(a) that OPM remove [the Respondent] as their nominee on [the Board] and replace him with another nominee;

(b) that OPM instructs [the Respondent] to write to DBS and HSBC to withdraw any allegations made by him in respect of [the Board] resolution passed on 29 October 2008 [*ie*, the Circular Resolution] and that OPM provide a copy of [the Respondent's] correspondence with DBS and HSBC in [*sic*] to [the Board];

(c) that OPM instructs [the Respondent] provide [*sic*] a full written report on all written and verbal correspondence (whether made by him or through [his solicitors]) with DBS and HSBC detailing the contents of such correspondence to [the Board] and the B Shareholder [*ie*, SFGK].

9 The Respondent subsequently sent several letters to SFGK's solicitors to dispute the Notice, but SFGK refused to withdraw the Notice. Finally, on 7 February, after the 90-day period for rectification had expired (see Arts 3.9 of the Shareholders' Agreement (at [7] above)), SFGK sent another letter to OPM, stating that the Respondent had been removed as a director of the Applicant pursuant to Art 3.10 of the Shareholders' Agreement. The material portion of the letter from SFGK is as follows:

9. [The Respondent] has shown that he is clearly unable to discharge his duties as a director of [the Applicant] properly. Had OPM complied with the remedial action requested, these breaches could have been avoided.

10. In the circumstances, [SFGK] is now entitled under Article 3.10 of the Shareholders' Agreement to issue a written notice to remove [the Respondent] as a director of [the Applicant], and to require OPM to appoint a new director in his place.

11. By this notice:

(a) we hereby remove [the Respondent] as Director of [the Applicant] ([the Respondent] is no longer a director of [the Applicant] as of 7 February 2009); and

(b) request OPM to appoint a new Director in his stead within 5 calendar days from the date of this Notice.

If OPM does not avail itself of its right to appoint a new director in place of [the Respondent] within the specified period, then under the terms of the Shareholders' Agreement, [the Applicant] should appoint a new director in his place.

10 On 10 February 2009, the Respondent issued a letter of resignation from his position as a director of the Applicant, in which he purported to resign with immediate effect. At the same time, the Respondent's solicitors filed documents with the Accounting and Corporate Regulatory Authority ("ACRA") to record that the Respondent had resigned as a director of the Applicant on 10 February 2009 instead of having been removed as a director as of 7 February 2009. This was done without the Applicant's approval. Meanwhile, Mr Christopher Martin George Brown ("Brown") was appointed by OPM as a director of the Applicant. Although the Respondent was no longer a director of the Applicant, he did not discontinue his action under s 199 of the Companies Act, and on 13 March 2009, the Applicant filed the Application (*ie*, this application to strike out the Originating Summons). On that same day, Brown tendered his resignation as a director of the Applicant, and OPM purported to reappoint the Respondent as a director of the Applicant pursuant to Art 3.4 of the Shareholders' Agreement, which states:

> A party may appoint or remove a Director nominated by it by notice to [the Applicant] signed by it or on its behalf. The appointment or removal shall, subject to compliance with necessary legal requirements, take effect when the notice is delivered to [the Applicant], unless the notice indicates otherwise.

11 According to the Respondent in his affidavits dated 19 March 2009 and 22 April 2009, he had been validly reappointed as a director of the Applicant pursuant to the Shareholders' Agreement. The Respondent's solicitors also informed ACRA about the Respondent's reappointment and Brown's resignation and the records were updated accordingly. On 20 March 2009, however, the Applicant's company secretary wrote to ACRA to have the Respondent's name removed as a director of the Applicant. Subsequently, on 9 April 2009, the Respondent's solicitors wrote to ACRA to have the Respondent's name reinstated as a director of the Applicant.

The submissions of the parties

The Applicant's submissions

12 The Respondent had been validly removed as a director of the Applicant in accordance with the Shareholders' Agreement, and based on *Haw Par Bros* ([3] *supra*), he therefore had no right to pursue his action under s 199 of the Companies Act. The court should not look into the motives for the removal of the Respondent as a director, but should, according to *Haw Par Bros*, only ascertain that there was indeed a *prima facie* power to remove him and that the power was so exercised. In this regard, there clearly was a *prima facie* power to remove the Respondent and this power had been exercised. As for the Respondent's purported reappointment on 13 March 2009, to accept that the

Respondent can reappoint himself would be "absurd", as this would render Arts 3.8–3.10 of the Shareholders' Agreement "totally otiose". There should be an implied term that a director removed under those provisions cannot be reappointed, as such a term would give "business efficacy" to the contract and would "undoubtedly represent the obvious but unexpected intention of the parties". Further, it should be of no help to the Respondent to point to the fact that he was registered with ACRA as a director on 13 March 209, as ACRA states in its Legal Digest (April 2006, Issue No 10) that (at para 1.4.1):

> Professionals, such as advocates and solicitors, public accountants and corporate secretarial firms are reminded that when taking instructions from ex-directors to file any documents on behalf of the company, the filing is in fact done on behalf of the company. As the director had already resigned from the company, professionals cannot assume that the director has any authority to act for the company. As a precautionary step, the professionals should obtain separate confirmation from the company. Professional firms should therefore exercise great caution when lodging a notice of resignation under section 173(6) [of the Companies Act]. ACRA will not hesitate to take action against errant professionals who advise the business public.

13 Even if the Respondent's reappointment as a director of the Applicant were to be accepted, when the Respondent lost his position as a director of the Applicant, he lost his rights under s 199 of the Companies Act and his action thereby "died". The Respondent, by relying on his purported reappointment, would be introducing a new cause of action by way of affidavit after the date of the filing of the Originating Summons and this should not be allowed, as a new cause of action cannot be introduced after the date of the filing of the originating process. This is trite law, as indicated by *Eshelby v Federated European Bank Ltd* [1932] 1 KB 254 ("*Eshelby*"), *Saga Foodstuffs Manufacturing Pte Ltd v Best Food Pte Ltd* [1994] 2 SLR 802 ("*Saga Foodstuffs*"), and *The Jarguh Sawit* [1998] 1 SLR 648. The Respondent's original action "died" on 7 February 2009 when he was removed as a director or on 10 February 2009 when he resigned as a director, and he cannot be allowed to "revive" it in this manner.

The Respondent's submissions

14 The Respondent submitted that he is presently a director of the Applicant, having been validly reappointed under Art 3.4 of the Shareholders' Agreement, and, therefore, he does have the *locus standi* to apply to the court under s 199 of the Companies Act. Neither the Shareholders' Agreement nor the Articles of Association prevent the Respondent from being reappointed, and this would not be the correct forum to deal with the merits of whether there was an implied term to prevent the Respondent from being reappointed. As for the Respondent's status as a director having been registered with ACRA, the Companies Act does not prevent professionals from lodging the status of a director with ACRA. In any event, the ACRA status would be irrelevant towards the issue of whether the Respondent had been duly appointed as a director of the Applicant. This would, rather, be governed by the Articles of Association and the Shareholders' Agreement.

15 The Respondent's purported removal as a director on 7 February 2009 was in bad faith. The Respondent had at all times acted in accordance with the standard expected of a director. No action had been taken by SFGK against Bollen despite the Respondent having informed Junke and Lori about the many breaches committed. The Respondent was entitled not to sign the Circular Resolution on 28 October 2009 as the meeting had not been called in accordance with the terms of the Shareholders' Agreement, and in particular the 30 day notice period set out in Art 5.1. And as there was also a breach of Art 5.1 of the Shareholders' Agreement in the passing of the Circular Resolution on 29 October 2009 in, there could be no reason for SFGK to complain when the Respondent proceeded to write in to attempt to block payments to the Applicant's principal lenders.

16 *Haw Par Bros* ([3] *supra*) was not decided in the context of a striking out application, but was decided in the context of an application for an injunction to prevent the blocking of access to the financial records of a company where a director had been removed subsequent to an order being granted pursuant to the then equivalent of s 199 of the Companies Act. Likewise, *Eshelby* ([13] *supra*), *Saga Foodstuffs* ([13] *supra*), and *The Jarguh Sawit* ([13] *supra*) were all not decided in the context of a striking out application, but were decided in the context of applications for leave to amend pleadings in writ actions. The Respondent might not have been a director after he had resigned from the Board and before he was reappointed, but this should be inconsequential, as he had been a director of the Applicant at the time of the filing of the Originating Summons, he is presently a director, and he will be a director at the time of the hearing of the Originating Summons.

Principles relating to the exercise of power under O 18 r 19

17 Order 18 r 19 of the Rules of Court allows the court to strike out an originating summons if it discloses no reasonable cause of action or defence (*per* O 18 r 19(1)(a)), is scandalous, frivolous or vexatious (*per* O 18 r 19(1)(b)), may prejudice, embarrass or delay the fair trial of the action (*per* O 18 r 19(1)(c)), or is an abuse of the process of the court (*per* O 18 r 19(1)(d)). The Court of Appeal recently reiterated in *Wing Joo Loong Ginseng Hong (Singapore) Co Pte Ltd v Qinghai Xinyuan Foreign Trade Co Ltd* [2009] SGCA 9 that the power to grant a striking out application will only be exercised in *plain* and *obvious* situations (see [171]–[173]). In support of this proposition, several cases were referred to, including *Gabriel Peter & Partners v Wee Chong Jin* [1998] 1 SLR 374, where Yong Pung How CJ held (at [18]):

> In general, it is only in plain and obvious cases that the power of striking out should be invoked. This was the view taken by Lindley MR in *Hubbuck & Sons v Wilkinson, Heywood and Clark* [1899] 1 QB 86 at p 91. It should not be exercised by a minute and protracted examination of the documents and facts of the case in order to see if the plaintiff really has a cause of action. The practice of the courts has been that, where an application for striking out involves a lengthy and serious argument, the court should decline to proceed with the argument unless, not only does it have doubts as to the soundness of the pleading but, in addition, it is satisfied that striking out will obviate the necessity for a trial or reduce the burden of preparing for a trial.

18 In certain applications for striking out, questions of law may arise. For such applications, Lim Beng Choon J, in *Oh Thevesa v Sia Hok Chai* [1992] 1 MLJ 215 ("*Oh Thevesa*") (cited in *Singapore Civil Procedure 2007* (G P Selvam chief ed) (Sweet & Maxwell Asia, 2007) at para 18/19/6), was of the opinion that it is not appropriate for a striking out to be granted if there must be a "mature and careful consideration on a serious point of law" (*Oh Thevesa* at 223). *Pengiran Othman Shah bin Pengiran Mohd Yusoff v Karambunai Resorts Sdn Bhd* [1996] 1 MLJ 309 ("*Pengiran Othman Shah*") (also cited in *Singapore Civil Procedure 2007* at para 18/19/6) is similarly instructive. In that case, Siti Norma Yaakob JCA stated (*Pengiran Othman Shah* at 321):

> When a question of law becomes an issue, this in itself will not prevent the court from granting the application, for as long as the court is satisfied that the issue of law is unarguable and unsustainable, it may proceed to determine that question. (See *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400.) Likewise, where the affidavit evidence discloses a dispute of facts, such facts must be analysed and if they are found to be inconsistent with undisputed contemporary documents or inherently improbable in themselves, the court is entitled to reject those facts and proceed upon the undisputed contemporaneous documentary evidence.

The issues to be considered

19 The first issue that should be considered would be whether it is plain and obvious that the Respondent's reappointment as a director of the Applicant should be disregarded ("the First Issue"). The law, as mentioned earlier, is clear that an applicant will be unsuccessful in seeking an order under s 199 of the Companies Act if he or she is not a director of that company (see [2]–[4] above). Accordingly, if it is plain and obvious that the Respondent's reappointment as a director of the Applicant should be disregarded, the Originating Summons should be struck out.

20 However, whether or not it is plain and obvious that the Respondent's reappointment as a director of the Applicant should be disregarded, the fact remains that the Respondent had resigned as a director on 10 February 2009, and had therefore, at the least, not been a director of the Applicant between 10 February 2009 and 13 March 2009 ("the Material Period"). Counsel for the Respondent, Mr Phillip Fong, did, in fact, concede in his submissions that the Respondent had not been a director of the Applicant during the Material Period. Thus, the second issue that follows for consideration would be whether the fact that the Respondent was not a director of the Applicant during the Material Period should result in the Originating Summons being struck out ("the Second Issue").

The First Issue

21 The Applicant does not dispute that any of the requirements set out in Art 3.4 of the Shareholders' Agreement for the appointment of a director or any of the statutory requirements for the appointment of a director was not met by the Respondent. The main contention against the Respondent's reappointment is that there must be a term implied in *fact* that a director removed under Arts 3.8–3.10 of the Shareholders' Agreement cannot be reappointed. In *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR 927 ("Forefront"), which was approved by the Court of Appeal in *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] SGCA 19, Andrew Phang Boon Leong J stated that a term would be implied in fact "only rarely" and in "exceptional cases" where the "business efficacy" test and the "officious bystander test", applied as complementary tests rather than wholly different tests, are met (see *Forefront* at [29]–[40]). The "business efficacy" test was set out in the famous case of *The Moorcock* (1889) 14 PD 64 by Bowen LJ, who stated (at 68):

> Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and there are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are [businessmen]; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances.

The "officious bystander" test was set out in the equally famous case of *Shirlaw v Southern Foundries (1926) Limited* [1939] 2 KB 206 by MacKinnon LJ, who stated (at 227):

> If I may quote from an essay which I wrote some years ago, I then said: "Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it

goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'"

At least it is true, I think, that, if a term were never implied by a judge unless it could pass that test, he could not be held to be wrong.

22 In my view, it is not plain and obvious that either the "business efficacy" test or the "officious bystander" test is met. For one, there is always the possibility of bringing a decent argument against an implied term where the contract in question is detailed and carefully drafted (like the Shareholder's Agreement) (see *Shell UK Ltd v Lostock Garages Ltd* [1976] 1 WLR 1187 at 1200). For completeness, I would add that even if there was an implied term that a director removed under Arts 3.8–3.10 of the Shareholders' Agreement cannot be reappointed, it is not plain and obvious that the said power to remove a director under Arts 3.8–3.10 had been validly exercised *vis-à-vis* the Respondent. The Applicant had submitted that based on *Haw Par Bros* ([3] *supra*), it should be sufficient if there was a *prima facie* power to remove the Respondent which was so exercised and motives are irrelevant. Wee CJ, in that case, had, in fact, stated (*id* at 186–187, [15]):

> It is, however, contended by Mr Lloyd, counsel for the respondent, that no final determination had been arrived at as to whether or not the "purported" removal of the respondent as a director was valid and the court ought not to prejudge this issue. We are not able to accept this contention. *In our opinion it was necessary for the respondent to establish*, inter alia*, a* prima facie *case that the shareholders had no power to remove him from his directorship or that the shareholders had not exercised their right in accordance with the articles of association of the appellant company to support his claim for an interim injunction in the present proceedings*. *Article 5(2) provides that the holders of two-thirds of the issued shares may by notice in writing to the company remove any director from office. This power was exercised by shareholders holding over two-thirds of the issued shares and was exercised in accordance with the terms of Art 5(2). What their motives were are entirely irrelevant*. [emphasis added]

23 The latter part of the Applicant's proposition, *viz*, that motives are irrelevant, is, in my view, clearly misconceived. The reason as to why the court in *Haw Par Bros* had opined that motives were irrelevant, as apparent from the passage cited in the preceding paragraph, would be that the articles of association of the company in that case provided for the removal of a director if the holders of two-thirds of the issued shares had given notice in writing to the company to remove any director from office, without more. In contrast, Art 3.8 of the Shareholders' Agreement requires the B Shareholder (*ie*, SFGK) to act in "good faith" in issuing the First Warning Notice. Thus, the motives of SFGK would not be irrelevant.

24 That having been said, the Respondent's evidence was that he had complained to Junke and Lori on a number of occasions about Bollen and/or the current management but nothing was done. Junke and Lori, however, provided no evidence to refute the Respondent's allegations that his complaints were not investigated into. As the events show, barely two weeks after the Originating Summons was filed, the Notice was issued by Junke and Lori. Such circumstances suggest that there can be a possible argument against the *bona fides* of SFGK in its issuing of the Notice. There could also be a plausible argument as to SFGK not having had a "reasonable" opinion on the failure of the Respondent to perform his duties with the requisite standard of skill or expertise (*per* Art 3.8 of the Shareholders' Agreement), as the failure of the Respondent to sign the Circular Resolution and his communications with the banks do not appear overly egregious in light of the breaches of the Shareholders' Agreement he had identified. In the circumstances, the legitimacy of the removal of the Respondent cannot be said to be plain and obvious. In other words, it is not plain and obvious that

the Respondent's reappointment should be disregarded, even if there was an implied term that a director removed under Arts 3.8–3.10 of the Shareholders' Agreement cannot be reappointed.

The Second Issue

25 Counsel for the Applicant, Mr Prakash Mulani, in his submissions, emphasised that *Eshelby* ([13] *supra*) (affirmed, [1932] 1 KB 429) was an instructive case in support of a striking out of the Originating Summons for the reason that the Respondent was not a director of the Applicant during the Material Period. In that case, the plaintiff sought to amend his claim by adding a new cause of action that did not exist at the date of the issue of the writ. The amendment had been allowed by the official referee who had heard the case at first instance. On appeal, the English High Court unanimously held that the amendment had been erroneously allowed, with Charles J stating (*Eshelby* at 268):

> The Court is limited in giving its leave [to amend] to the powers which are conferred upon it by the Rules and by the statute under which those Rules are made, and I cannot see how, without the consent of the parties, the Court can so amend a writ as completely to change the cause of action so as to bring in a cause of action which was non-existent at the time the writ was originally issued.

26 The principle that a new cause of action may not be introduced by way of an amendment if the cause of action had arisen after the date of the issue of a writ (referred to hereafter as the "*Eshelby* Principle" for convenience), which can be traced back to *Attorney-General v Portreeve, Aldermen and Burgesses of Avon* (1870) 3 De G J & Sm 637 and *Tottenham Local Board of Health v Lea Conservancy Board* (1886) TLR 410, was applied in *Saga Foodstuffs* ([13] *supra*) by Lai Siu Chiu J, although no mention was made of *Eshelby* ([13] *supra*). In *The Jarguh Sawit* ([13] *supra*), Karthigesu JA, who delivered the judgment of the Court of Appeal, provided the following succinct summary of the decision of Lai J in *Saga Foodstuffs* (*The Jarguh Sawit* at [59] and [61]):

> 59 In *Saga Foodstuffs*, her Honour decided that where the plaintiffs took an assignment of trademark rights subsequent to the issue of the writ, the plaintiffs were not entitled to amend their pleadings to include a claim for trademark infringement. Applying the rule that an amendment operates retrospectively to the date of the writ, she held that plaintiffs did not have trademark rights on the date of the writ. This was because the plaintiffs were only vested with the trademark rights after the date of the writ. The amendment to include a claim for a right not existing at the date of the writ was therefore not apt.
>
> …
>
> 61 … In *Saga Foodstuffs*, Lai Siu Chiu J prohibited the plaintiffs from counterclaiming for infringement of a mark which they did not own at the time of the infringement. The plaintiffs never owned the chose in action pertaining to the infringement, they only owned the rights attached to the property in the mark, including the right to sue for *future*, but not past infringements.

27 In *Galistan Gerard Clive Martin v L & M Prestressing Pte Ltd* [1999] SGHC 77, Lim Teong Qwee JC rejected the application of the *Eshelby* Principle as it was "no longer valid" (at [12]). But in *The Jarguh Sawit*, Karthigesu JA upheld the application of the *Eshelby* Principle. The learned Judge of Appeal stated (*id* at [58]):

> 58 In our view, the learned judicial commissioner was right to agree with NMB's contention

that a new cause of action may not be introduced if it arises after the date of the writ. This was also the view of Lai Siu Chiu J in *Saga Foodstuffs Manufacturing Pte Ltd v Best Food Pte Ltd* [1994] 2 SLR 802.

He then distinguished *Saga Foodstuffs* from the case before him for the following reasons (*id* at [62]–[64]):

> 62 In the present case, the appellants acquired all of OJI's rights under the memorandum of agreement made between OJI and NMB dated 7 May 1992 and its amendments. Unlike the assignment of the trademark in Saga Foodstuffs, the present assignment was one of accrued and future choses in action relating to the memorandum of agreement. Since OJI's claim for damages against NMB was already accrued at the date of the writ, the objection relied on by the defendants in *Saga Foodstuffs* is not applicable in the present case. The cause of action was in existence at the date of the writ — it was merely that the cause of action vested in the appellants subsequent to that date.
>
> 63 However, as the appellants pointed out, this vesting has retrospective effect ….
>
> 64 We therefore hold that the learned judicial commissioner erred in his application of the principles relating to the application to amend the counterclaim. The appellants stand in the shoes of OJI for the purposes of a suit (or counterclaim) against NMB and are entitled to make the amendment accordingly. The assignment, however, is subject to equities, meaning that defences available to NMB against OJI are available against the appellants. Similarly, all limitation periods run from the date the rights accrued, not the date of the assignment.

28 In *Chuang Uming (Pte) Ltd v Setron Ltd* [2000] 1 SLR 166 ("*Chuang Uming*"), the Court of Appeal was invited to depart from *The Jarguh Sawit* and *Saga Foodstuffs* insofar as the application of the *Eshelby* Principle was concerned, but the court was of the opinion that a review of the authorities was not necessary (*Chuang Uming* at [73]–[74]). Thus, the *Ehelby* Principle continues to apply. Parenthetically, it may be observed that the *Eshelby* Principle has been applied in many cases in other jurisdictions. (see, *eg*, the Malaysian cases of *Mohamed Said v Fatimah* [1962] MLJ 328, *Sio Koon Lin v S B Mehra* [1981] 1 MLJ 225, and *Simetech (M) Sdn Bhd v Yeoh Cheng Liam Construction Sdn Bhd* [1992] 1 MLJ 11; see, *eg*, the Hong Kong cases of *Moscow Narodny Bank Ltd v Edward Wong Wing-Cheung* [1986] HKLR 843, *Lark International Finance Limited v Lam Kim* [2000] HKEC 1330, and *Wing Siu Co Ltd v Goldquest International Ltd* [2003] HKEC 196), but there are cases that suggest that it may be ripe for review (see, *eg*, *Beecham Group Plc v Norton Healthcare Ltd* [1997] FSR 81 and *Chan Yuen Yee v Chan Chuck Kwong* [2005] 2 HKLRD 416 ("*Chan Yuen Yee*")).

29 In the Singapore cases mentioned earlier (see [27]–[28] above), the *Eshelby* Principle was applied in the context of applications to amend pleadings in writ actions. But the court's powers to amend a writ or pleading with leave is to be similarly exercised in respect to originating summonses pursuant to O 20 r 7 of the Rules of Court. As such, the *Ehelby* Principle should apply where originating summonses are concerned. (In fact, in the Hong Kong case of *Chan Yuen Yee*, the *Eshelby* Principle was applied in an application to amend an originating summons.) That having been said, it was the Applicant's submission that the Respondent, by relying on his purported reappointment, would be introducing a new cause of action by way of affidavit after the date of the filing of the Originating Summons and this should not be allowed. It was stressed that the Respondent, by trying to "revive" his old cause of action, had clearly started a new action.

30 In my view, the law is not so clearly in favour of the Applicant such that the summary powers of the court to strike out the Originating Summons should be exercised. It is by no means obvious

that the Respondent should be regarded as having amended the Originating Summons implicitly with his affidavit evidence on his reappointment as a director or that the Respondent's reappointment as a director of the Applicant is tantamount to a new cause of action being brought into existence after the time of the filing of the Originating Summons. If anything, it would appear that the law favours the Respondent. The phrase "cause of action" has been said to refer to "the fact or combination of facts which give rise to a right to sue" (John Burke, *Jowitt's Dictionary of English Law*, vol 1 (Sweet & Maxwell, 2nd Ed, 1977) at p 297; see, also, *Black's Law Dictionary* (Bryan A Garner chief ed) (West Publishing, 8th Ed, 2004) at p 235, *Oxford Dictionary of Law* (Elizabeth A Martin & Jonathan Law eds) (Oxford University Press, 6th Ed, 2006) at p 77). *Ex hypothesi*, if the facts or circumstances that give rise to a right to sue are the same, it cannot be said that a new cause of action has been created. In the present matter, although the Respondent was reappointed as a director of the Applicant, the same rights (*viz*, rights under s 199 of the Companies Act) are being claimed, the same party (*viz*, the Respondent) is claiming the rights, the basis for claiming the rights (*viz*, the Respondent's being a director of the Applicant) is the same, and the same party (*viz*, the Applicant) is the defendant. Accordingly, it would appear that no new cause of action has been brought about by the Respondent's reappointment as a director of the Applicant. It does not follow that the revival of an old cause of action would necessarily entail the creation of a new cause of action, and I was not made aware of any authority that states that this should be so.

Conclusion

31 For the foregoing reasons, the Application is dismissed. I will hear the parties on costs.