Wang CongQin Bobby v Ong Heng Huat and another action
[2001] SGHC 202

Case Number : Suit 1023/2000, 1024/2000

Decision Date : 30 July 2001

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Philip Fong and Chang Man Phing (Harry Elias Partnership) for the plaintiffs; Kirpal Singh (Kirpal & Associates) for the defendant

Parties : Wang CongQin Bobby — Ong Heng Huat

Contract – Illegality and public policy – Use of company's properties as collateral for bank loan – Whether agreement ultra vires company's memorandum and articles of association and unenforceable – Whether proper resolutions authorising transaction have been passed – Failure to declare interest payments to tax authorities – Effect on enforceability of transaction – Whether consideration given for agreement – What constitutes consideration

: At the conclusion of the trial, I awarded judgment to the plaintiffs on their claims against the defendant. The defendant has now appealed against my decision (in CA 600058/2001).

Facts

The plaintiffs and the defendant in both suits are related; Bobby Wang (`the first plaintiff`) the plaintiff in Suit 1023/2000 (`the first suit`) is the cousin of the siblings Ong Kian Leong, Ong Boon Leong and Ong Seng Leong (`the second plaintiffs`) who are suing in Suit 1024/2000 (`the second suit`). The first and second plaintiffs are the nephews of the defendant. The first and second plaintiffs as well as the defendant hold shares in and are also directors of, a company called Ong Toh Property Pte Ltd (`OTP`) which had been started in 1986 by the late Ong Toh, who was the grandfather and father respectively, of the plaintiffs and the defendant. OTP is a holding company and its main activity is investment with its main source of income being rental collected from various properties it owns and which at one time included Nos 16 and 20 Kallang Pudding Road (`the Kallang properties`) and No 11 Tannery Lane (`the Tannery Lane property`).

Ong Toh passed away on 30 March 1995 and under his will dated 16 September 1993, Ong Soon Huat (`OSH`) who is his nephew and the defendant`s cousin, was appointed the sole executor of his estate. The beneficiaries of Ong Toh`s estate (`the estate`) are the defendant and the first plaintiff in the proportions of 80% and 20% respectively. OSH has applied for probate of the estate in Probate 1489/95 but the grant has not yet been issued by the High Court, because (according to the first plaintiff and which OSH confirmed) estate duty has not yet been paid. Presently, OTP is in voluntary liquidation pursuant to a special resolution passed by the company on 5 February 2001. The liquidator is Chan Siew Wei (`Chan`) from the accounting firm of Chan Hock Seng & Co, who are the auditors of OTP.

The defendant is a substantial shareholder (60%) and chairman of another company called Long An Development Pte Ltd (`LAD`) which at the material time was developing an office-cum-residential block in Beijing, China (`the China project`). Ong Toh Development Pte Ltd (`OTD`), another company started by the plaintiffs` grandfather is also a shareholder (7%) of LAD while the first plaintiff himself holds approximately 12% shares in OTD. At a meeting of LAD`s board in early 1997,

attended inter alia by the defendant, the first plaintiff (representing OTD and as a director of LAD) and two of his three cousins, the subject of raising urgently needed capital for the China project was mooted. LAD`s managing director, a Taiwanese called Wang Shih Chieh (`Wang`), suggested that the properties of OTP be used as collateral to obtain a bank loan in return for which the defendant could offer some compensation payment to other shareholders of the company; this suggestion was, however, not pursued.

Between April and July 1997, the defendant approached the plaintiffs saying he wanted to utilise OTP`s properties at Kallang and Tannery Lane to obtain a bank loan; he offered to pay the plaintiffs interest at 8% p[thinsp]a on th+e outstanding sums owed to the financial institution for the risk involved; the defendant also approached his uncle and the father of the second plaintiffs Ong Thiam Huat (`Ong`), with the same proposal. The plaintiffs did not agree as they felt that there were great risks involved in LAD`s China project and should it fail, the lending bank would call on OTP`s properties as security. The first plaintiff also felt that the minority shareholders (holding 40%) of LAD should play their part by pledging their personal properties as collateral to raise loans.

However, at a subsequent discussion the first plaintiff had with two other shareholders of LAD, namely, Calvin Tan (whom he described as the defendant`s financial adviser) and Philip Kwek (who is also a friend of the defendant) at the latter`s house, it was intimated to the first plaintiff that if the plaintiffs did not agree to the defendant`s proposal, the defendant would use his position as a majority shareholder to remove them as directors. Thereafter, the defendant would pass the requisite resolution to secure approval for his proposal to use OTP`s properties as security for his loan. The first plaintiff conveyed the defendant`s threat to the second plaintiffs and their father. After due consideration, they agreed it would be difficult to fight the defendant in his capacity as the majority shareholder of OTP. The plaintiffs felt it was the lesser of two evils for them to agree to the defendant`s proposal and remain as directors of OTP than, to reject the proposal and be removed from the board and thereafter not know about or have any say in, the running of the company as minority shareholders. Consequently, the plaintiffs agreed to the defendant`s proposal, albeit reluctantly, and informed him accordingly in July 1997; the parties arranged to meet.

On or about 28 July 1997 there was a meeting attended by the first plaintiff, the defendant, Ong and his two sons Ong Kian Leong and Ong Seng Leong; Ong Boon Leong was absent. Prior to the discussion, a draft agreement (`the agreement`) was handed by the defendant to the first plaintiff wherein it was stated that the parties agreed to allow the defendant to borrow $16m (`the loan`) from the International Bank of Singapore Ltd (`IBS`) secured by mortgages on OTP`s properties at Kallang and Tannery Lane. The first plaintiff noted therefrom that it was not stated how the defendant`s payment of 8% interest would be distributed. So he re-typed the draft which was in the form of a letter from the defendant addressed to him and the second plaintiffs (see 1AB66-67) and added (as para 5) the formula for distribution of the 8% interest amongst the plaintiffs. Although OTP was also named in the agreement, the company was not included as a recipient of the interest. When cross-examined, the plaintiffs denied that they were the ones who had demanded 8% interest from the defendant. The first plaintiff said they accepted the defendant`s proposal of 8% as it was then the prevailing interest rate charged by banks.

Questioned by counsel for the defendant on why OTP had been excluded from the compensation payment, the first plaintiff explained that the defendant in fact attempted to include all shareholders of the company as recipients of the defendant`s payment but the plaintiffs refused - it would mean that a substantial part of the compensation would indirectly return to the defendant as he had 65% direct and beneficial interest in the company through his 80% share of their grandfather`s estate; it would be tantamount to the left hand paying the right hand. The first plaintiff pointed out that in addition to trying to include OTP as a payee of the interest for his own ultimate benefit, the

defendant also attempted to renege on his agreement to pay 8%; he wanted to pay a lower rate of 5-6% as interest after the plaintiffs had agreed to his proposal. This attempt was also rejected by the plaintiffs as a breach of trust and principle bearing in mind that it was the defendant who initially offered, not they asked for, 8% compensation.

After he had re-typed the agreement, the first plaintiff printed out two copies, one was handed to the defendant and the other copy was handed to the second plaintiffs, for perusal. The salient provisions of the agreement are as follows:

(1) the defendant would repay the loan in three years or less at his option;

(2) the defendant would be responsible for the payment of interest to IBS which prevailing rate was then 6.5% p[thinsp]a on the amount of the drawdown;

(3) the defendant would compensate the plaintiffs opportunity cost at 8% p[thinsp]a monthly, on the outstanding principal amount owing to IBS;

(4) if for any reason the defendant failed to pay any part of the loan when due to IBS, he agreed that a portion of his shares bequeathed to him by the estate should be distributed to all the shareholders of OTP (in proportion to their shareholdings) of the company (including himself) using the formula prepared by the first plaintiff and set out in para 5 of the agreement.

After everyone present had agreed to the terms, the defendant signed one copy of the agreement but did not date it. The first plaintiff put the signed copy into an envelope, sealed it and kept it at his office; it was understood that the envelope would not be opened unless and until the defendant defaulted in his payments of the 8% interest.

After the agreement had been signed, the first plaintiff reminded the defendant to inform OSH as a matter of courtesy, in the light of provision (4) in the agreement set out in para 9 above. The defendant did so inform OSH by his letter dated 15 October 1997 (see 1AB97) addressed to OSH as the executor of the estate of Ong Toh deceased and which was witnessed by a solicitor (`Peter Sim`); the letter stated:

> *I, Ong Heng Huat, irrevocably instruct you to comply with the provisions relating to the transfer of my interests in the* ***estate of Ong Toh deceased*** *as contained in my letter to the shareholders of Ong Toh Property Pte Ltd dated 20 August 1997.*

By a letter dated 7 August 1997, IBS offered the defendant overdraft facilities of $16m which offer the defendant accepted on 15 August 1997. On the same day, OTP wrote (letter was signed by the first plaintiff and the defendant) to IBS forwarding a certified copy of OTP`s special resolution passed on 23 July 1997, sanctioning the mortgage of the company`s Kallang and Tannery Lane properties to secure the bank`s facility offered to the defendant. This was followed by another resolution of the company passed on 2 September 1997 (signed by the plaintiffs and the defendant but not OSH on behalf of the estate) approving the affixing of the company`s common seal to the mortgage and all other relevant documents, pursuant to the earlier special resolution.

Sometime in July 1998, the defendant informed the plaintiffs that the banking facilities had been revised by IBS - part of the overdraft facility was converted to a term loan. Consequently, OTP passed a fresh resolution on 28 July 1998 to approve the facilities set out in the revised letter of offer dated 16 July from IBS and, to confirm that the company`s Kallang and Tannery Lane properties would continue to be security for the revised facilities. The company wrote to IBS on the same day forwarding the aforesaid resolution.

The defendant paid the agreed 8% interest to the plaintiffs between 31 August 1997 and 31 March 1999. Initially, the defendant provided the first plaintiff with copies of the monthly statements of IBS. The practice was for the first plaintiff to contact the defendant`s personal assistant Danny Chng (`Danny`) to remind the defendant followed by the first plaintiff`s sending to Danny a spreadsheet setting out the plaintiffs` computation of the interest payable. Sometimes Danny would revert over slight differences between the first plaintiff`s and Danny`s calculations. The defendant would then ask the first plaintiff to meet him to collect the sum. Payment was always made in cash at the first plaintiff`s request; he was responsible for collecting and paying to his three cousins their share and he wanted to avoid issuing several cheques every month. The defendant was always if not perpetually, late in payment, particularly from 1998 onwards.

The first plaintiff denied he had hounded the defendant for payment as the latter had alleged in his written testimony. When the defendant repeatedly told the first plaintiff he could no longer afford to pay the interest, the first plaintiff advised his cousins (in June-July 1999) to give the defendant some breathing space, until the defendant could sell the China project. In fact, the plaintiffs completely stopped asking the defendant for payment until October 2000, when completion of the sale of OTP`s three properties was near.

Although the only purpose of the loan was to finance the China project, moneys drawn-down never went into that project. The first plaintiff alleged that the defendant wired $933,000 from the loan moneys to Australia and gave another $500,000 to Tay Teck Huat (a shareholder of LAD). This was not only not denied by the defendant but he went further to admit that he may also have advanced $150,000 (see N/E105) to the girlfriend of or another, shareholder (Lee Choon Sing) of LAD, from the loan. The first plaintiff testified he had insisted that so long as the accounts of the China project were controlled by Wang (whom he accused of siphoning funds out of LAD), not one cent should be remitted to China. Although the first plaintiff expressed his concerns to the defendant and Calvin Tan and there were heated arguments over the matter, the latter continued to send millions to China. However, the first plaintiff managed to garner enough support to remove Wang as general manager and chairman of LAD`s Beijing office, for which he received a death threat from Wang. On 18 March 1998, shortly after he had returned from removing Wang from the Beijing office, the first plaintiff decided he had had enough; he tendered his resignation as director and managing director of LAD.

Cross-examined why the plaintiffs did not disclose the agreement and compensation in their position as directors of OTP, the first plaintiff countered, who should he/they make the disclosure to? All directors of the board of OTP had agreed it was a private arrangement between shareholders. Moreover, the shareholders (save for OSH) were also directors of the company. Further, OSH had been notified of the agreement by the defendant`s letter dated 15 October 1997 and, OSH was not a beneficial owner but trustee (for the defendant and the first plaintiff), of the shares he held in OTP. When he testified, OSH (DW4) confirmed that he had indeed been so notified.

Peter Sim was directed by the court to testify. His testimony, however, proved to be singularly unhelpful. He (CW1) said he did not draft the agreement as the first plaintiff had asserted. He vaguely remembered (N/E76) having been shown the document by Calvin Tan (who consulted him on a friendly basis) but not when, nor having told the latter that `it is a very messy situation` and `no lawyer will go near the agreement with a ten foot pole`. However, he did recall that he had declined to act because he noted that the agreement involved probate. Peter Sim also recalled that at a later date when the defendant came to his office with Calvin Tan, he had asked the defendant whether the latter understood the contents before he witnessed the defendant`s signing of the letter dated 15 October 1997. He was told that the defendant`s cousin Bobby wanted the letter witnessed by a lawyer and he obliged.

Repayment to IBS of the loan was due in June 2000. When the plaintiffs and Ong met up with the defendant to discuss repayment, he said he had no money. The plaintiffs and Ong then suggested that the only solution was to sell the company`s properties to pay off the loan. The defendant agreed and signed a company resolution approving the sale, contradicting his written testimony that he was shocked when the first plaintiff told him that the latter had signed an agreement for sale and purchase with the buyer.

OTP`s properties were put up for sale. The Kallang and Tannery Lane properties were valued at $27m (by valuers CB Richard Ellis (Pte) Ltd) as at 31 May 2000, but were sold for $33.5m in July 2000, out of which $16,388,000 went to repayment of the loan. The two figures were a far cry from an earlier valuation done in September 1997 at the behest of IBS which gave a market value and a forced sale value of $51m and $45.9m respectively, for the properties. Previously (August 1995), another firm of valuers had assessed the three properties as having a land value of $50,733,469 (see 1AB51) as part of a feasibility study for redevelopment commissioned by OTD. Even on the sale, the plaintiffs had complaints against the defendant. The first plaintiff testified that the defendant kept holding back the sale by saying he had better offers which never materialised. This resulted in OTP losing an offer of $33.5m for two of the three properties, when the prospective buyer through his solicitors withdrew his offer (on 4 July 2000 at 1AB335), due to the company`s delay in granting an option.

After the sale was completed, the plaintiffs demanded but the defendant refused, to pay the $16,388,000 owed to OTP. The defendant complained he had been penalised in paying interest to IBS and also in the monthly interest payments he made to the plaintiffs. The plaintiffs proposed that the sum of $16,388,000 be treated as a director`s loan to the defendant; they also asked for directors` loans to themselves from the balance sale proceeds of the properties, arguing that they were entitled to the same benefits from the company as the defendant. The defendant countered that in that case, the plaintiffs should also compensate him with interest payment.

In October 2000, the first plaintiff discovered that the defendant had approached OSH in an attempt to obtain a transfer to himself (the defendant) of the estate`s shares in OTP. The first plaintiff considered the defendant`s act as a clear breach of para 7 of the agreement (set out in para 9(4) above). The second plaintiffs were accordingly informed and the plaintiffs decided to enforce the agreement. The sealed envelope containing the agreement was opened, the first plaintiff inserted the date 28 July 1997 into the agreement and subsequently these proceedings were commenced.

Pleadings

CLAIM

In their respective statements of claim, the first and second plaintiffs claimed their share of the 8% interest based on the outstanding principal amount owed to IBS between 1 April 1999 and 25 October 2000, of $1,596,947.94. The first plaintiff claimed $910,260.33 as his share of interest while the second plaintiffs claimed the difference of $686,687.61 ($1,596,947.94 less $910,260.33). Neither the plaintiffs nor the defendant disputed that the latter had previously paid the plaintiffs $1,306,294.75 by way of interest between 31 August 1997 and 31 March 1999.

DEFENCE

The defendant`s somewhat convoluted defences to the plaintiffs` claims were as follows:

(1) taking into account his 65% beneficial interest in OTP via his inheritance in the estate, the defendant calculated that in or about July 1997, his 65% interest based on the then value ($51m) of the three properties was worth $33m. Therefore it was well within his rights to borrow $16m using the properties as security;

(2) the plaintiffs gave no consideration for the loan of $16m from IBS;

(3) he denied he had entered into the agreement with the plaintiffs;

(4) the agreement was in any event illegal and unenforceable as:
(a) it was ultra vires the memorandum and articles of association of OTP;
(b) the plaintiffs who were directors of OTP had failed to disclose their interests under the agreement when approving and passing the resolution;
(c) the plaintiffs as directors of OTP had also failed to obtain the approval of and suppressed from the company the fact of, the direct pecuniary benefit they obtained under the agreement;
(d) no company resolution was passed by OTP to approve the pecuniary benefit the plaintiffs obtained under the agreement;
(e) the plaintiffs breached their fiduciary duties to OTP;
(f) the agreement was contrary to public policy as it was calculated to be concealed from and to deceive, the tax authorities of Singapore;
(g) the agreement offended the provisions of the Moneylenders Act (Cap 188);

(5) in the alternative, the defendant relied on ss 156 and 157 of the Companies Act (Cap 50).

Evidence

At the commencement of the trial, I had informed counsel for the defendant that the defences of illegality relating to the alleged tax evasion by the plaintiffs and their alleged breach of fiduciary duties as directors, were no answer to the plaintiffs` claim. These defences were unsustainable as the plaintiffs` claim was based on contract and the company (OTP) was not a party to the action. Further, it was a matter between the tax authorities and the plaintiffs whether the interest the latter received from the defendant should be considered taxable income but, the fact they may have failed to declare the amount as income did not afford the defendant a valid defence to the plaintiffs` claim. Despite my direction and despite his concession that OTP was not a party to this litigation, counsel persisted in cross-examining the plaintiffs on both issues. He relied on **Miller v Karlinski** [1945] 62 TLR 85 as well as **Napier v National Business Agency** [1951] 2 All ER 264 as authority for doing so. I disagreed, for reasons which I shall set out later.

Defendant`s case

I have in [para]1-22 above, set out the salient facts according to the first plaintiff`s testimony, which was confirmed by his cousins and their father Ong. I turn now to the defendant`s evidence.

Cross-examined, the defendant (who is only two years older than the first plaintiff) admitted (N/E126) that the reason he did not pay his nephews was because he felt it was `not fair` as he had paid interest to IBS in addition to paying the plaintiffs. However, this assertion was not quite correct as IBS was paid $16,388,000 from the sale proceeds of OTP`s properties; this meant that the defendant had defaulted in payment of $388,000 by way of interest and, he was in arrears for more than the two to three months that he claimed. Further, the defendant admitted owing OTP another $6.4m as director`s loan.

The defendant also revealed that after Calvin Tan had sourced out IBS as a willing lender, he decided he would borrow $16m even though only US$7m (then equivalent to S$10-$11m) was actually needed for the China project. This was because he had to make provision for interest ($6m) for the duration of the loan (two to three years). The figure was $16m because Calvin Tan had worked out that he could borrow 50% of his 65% entitlement in OTP, which was equivalent to $33m based on a valuation of $50m as the company`s assets. About $5m of the loan was utilised by the defendant for purposes not related to the China project - part of it was used to pay the plaintiffs, $1m went into his Australian investment and he lent Tan Teck Huat $500,000. Although he was repaid what he lent to Tan Teck Huat (by instalments up to last year), the defendant admitted that he did not use the repayments either to pay the plaintiffs or IBS - he used the sums for `expenses for the company` presumably LAD.

The impression I gained of the defendant was, that he was incredibly naïve; he can hardly be described as a hard-nosed businessman. In actual fact, he was extremely generous to his friends and fellow investors. My observations were based on the following evidence adduced from him and/or Calvin Tan (DW3):

> (1) on Wang`s advice (N/E96), he had remitted S$2m as `tea money` to Chinese authorities so as to be able to invest in the China project; the cheque (dated 28 January 1995) was drawn on a joint bank account he maintained with his father (while the latter was still alive). The defendant did not question the propriety of the payment nor who would be the ultimate recipient. He testified that the payment was supposedly to show that LAD had the financial means to invest in the China project and was meant to be refunded. Yet he deposited it into Wang`s Beijing bank account without question. It is doubtful that the late Ong Toh knew of the payment as the defendant claimed since, according to OSH, when the defendant was questioned on the cheque by the estate`s solicitors, he did not mention that Ong Toh knew;
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> (2) even more surprising, although Lee Choon Sing (his co-founder of LAD) and Wang were the original investors in the China project, the defendant did not think of asking either of them to contribute their share of capital after he had deposited S$2m into Wang`s account; Wang (although 15-20% shareholder) merely paid LAD`s expenses (which amount he could not even remember) while Lee paid nothing;
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> (3) notwithstanding that there were minority shareholders (holding 40% shares) in LAD including Calvin Tan, the defendant did not insist that they do their part to help raise funds for the China project. Neither did he insist that they sign a back-to-back guarantee in his favour (although they had apparently agreed to do so, according to the first plaintiff and Calvin Tan) after he had secured the loan. Although Calvin Tan testified (N/E140) that he had obtained from his office (Millennium Securities) and handed to the first plaintiff/the China project investors a standard form of guarantee (see 1AB163-166), the foolish defendant did not press any of his fellow shareholders to sign the document, thereby shouldering alone, the financing burden for the China project.

I also found that the defendant adopted a cavalier attitude towards his debts. Even if he was not instigated by Calvin Tan to do so (which I believed he was) he had borrowed $16m from IBS using OTP`s properties as collateral in the mistaken (and simplistic) belief that this was (less than) his ultimate entitlement, based on his direct and beneficial interest (65%) in the company. However, he

did not seem to have given much or indeed any thought, to how he would repay what he borrowed from the company, which ultimately ballooned to $22,788,000. Even when he had the means to do so (one example being the repayment of $500,000 by Tan Teck Huat) the defendant failed to service the loan and/or pay his nephews.

I turn next to the testimony adduced from the defendant`s witnesses, starting with Calvin Tan (DW2), whom I found to be a far shrewder businessman than the defendant. Calvin Tan (who is both a stockbroker and cigar merchant) testified that he himself had invested close to $900,000 for his 5% share in the China project; he purchased it from an investor who held 30% share, after the defendant had invested. Calvin Tan could not recall having calculated the defendant`s interest in OTP and which computation of $33m prompted the defendant to borrow 50% thereof ($16m) from IBS. Neither could he remember making the suggestion that the defendant should borrow enough to cover the interest element as well. However, he admitted that the other shareholders were reluctant to put more capital into the China project and they had all agreed that the defendant should look for alternative financing. I had no doubt that Calvin Tan was less than candid in his testimony and I believe he deliberately played down his role as the defendant`s financial adviser. I am certain he was instrumental in suggesting to the defendant the possibility of removing the plaintiffs from the board of OTP, if the defendant was not allowed to have his way. Quite simply, the defendant was not the sort who was capable of coming up with such a threat on his own initiative.

I have already touched on Peter Sim`s testimony (see [para]18 above) which did little to explain the genesis of the agreement. In any case, in his written testimony, Calvin Tan had confirmed that Peter Sim was not the draftsman. Although the question of who prepared the agreement is not material to my findings, I believe it is more than likely that Calvin Tan came up with the draft somehow, contrary to his denials (N/E144). I do not believe the first plaintiff had any hand in the drafting, save for the formula for payment of the interest, in para 5.

Another witness called by the defendant was OSH. I rejected the application of his counsel to treat OSH as a hostile witness from the very outset, without first listening to his testimony. There was no basis for such an application, merely because OSH had made it plain to counsel he was reluctant to attend court and get involved in the dispute between the nephews and their uncle, who was also his cousin. I did not view his refusal to acknowledge service of counsel`s subpoena as a hostile act; it was not an uncommon occurrence amongst lay persons especially the less educated; OSH had said he is illiterate (N/E165).

In fact, I found OSH (DW4) to be a truthful albeit a reluctant, witness. OSH confirmed that he did not attend meetings of OTP prior to 1999 because there was no disagreement amongst the directors and, his role was only to represent the estate; he was also not a director. It was only after disputes arose between the parties that he started attending meetings of OTP. This is reflected in the minutes such as that of the meeting dated 22 November 2000 (see 2AB123) where it was he, not the plaintiffs or the defendant, who proposed that the company be wound up after it had disposed of its properties; OSH explained his move was prompted by the deadlock in the company resulting from the plaintiffs` intention to take loans and, the defendant`s refusal to sign cheques for the same. His proposal was approved by the plaintiffs and passed; the defendant however objected, notwithstanding that on 27 July 2000 (see 1AB341), at a general meeting held to amend various articles of association of the company, he had signed (for filing with the Registry of Companies) resolutions which included the following:

> *Insertion of article 154A*
>
> *In the event of a sale by the company of the properties situate at 11 Tannery Lane, 16 Kallang Pudding Road and 20 Kallang Pudding Road, the company shall be dissolved immediately upon completion of the sale of the said properties.*

OSH confirmed the testimony of the first plaintiff that although he was the executor of the estate, he left estate matters to the solicitors and the defendant to handle. He was not even aware that the grant of probate had been extracted on 18 October 1999. Whenever the solicitors asked questions

pertaining to the estate, he would refer the same to the defendant (this was confirmed by the defendant). One reason was because OSH was not familiar with the affairs nor with the various companies of, his late uncle. Secondly, he was pre-occupied with his own hardware business. Even so, when the defendant approached him to be appointed executor of the estate in his place sometime last year, OSH refused - he was afraid there would be chaos if he agreed (N/E174). Further, he did not think the defendant had been handling the estate matters well. Although he clearly did not relish his appointment by the late Ong Toh (according to the first plaintiff OSH was chosen because he had no direct stake in the estate), I found that OSH nevertheless discharged his duties as executor. This can be seen from the fact that he took the initiative to change solicitors for the probate proceedings when he was dissatisfied with the slow pace of the firm appointed by the defendant and, he was not willing to relinquish his executorship in favour of the defendant.

OSH said he did not know about the agreement nor that OTP`s properties were used as collateral for the defendant`s bank borrowings nor that the defendant paid compensation to the plaintiffs, until 1999; this was after the parties` relationship had soured. When there was no dispute between the parties, OSH said there was no need to inform him of what happened in the company. However, he refuted the defendant`s written testimony that he was told about the loan in August-September 2000 and, that the plaintiffs were then intending to wind up the company, let alone that he had expressed surprise at the defendant`s information. OSH explained that he abstained from voting at the meeting on 26 December 2000 (see 2AB126) on the change to art 92(1) of the company`s articles of association with regards to who should be bank signatories because, he did not wish to interfere in the running of the company. Hence, at the earlier annual general meeting (on 27 July 2000) of the company touching on amending the same article, he had also abstained from voting on a motion to have three groups of bank signatories comprising of:

(1) the second plaintiffs;

(2) the first plaintiff;

(3) the defendant.

Against the objections of the first plaintiff, the resolution was carried and the minutes signed by the defendant as chairman. Subsequently, on 22 November 2000, OSH was added as a fourth group to the authorised bank signatories (on a motion proposed by the first plaintiff), despite the defendant`s objections. The move was to override the defendant`s refusal to sign cheques for the loans the plaintiffs wanted. It appeared from the minutes (see 2AB123-124) that OSH departed from his usual policy of non-interference and cast his vote in favour of the motion.

According to OSH, the plaintiffs did take loans from OTP. OSH took the view that as the defendant had borrowed $16m from the company based on the defendant`s percentage of shareholdings, there was no reason why the plaintiffs could not do the same. He testified (N/E169) that the second plaintiffs wanted to borrow $1.45m each but there was something wrong with the dates on the cheques issued to them (which he co-signed) so the cheques were not cleared. As for the first plaintiff, his cheque for $5.49m was cleared but he returned the money to the company subsequently, at the request of OSH, in the light of the growing dispute between the parties.

Finally, OSH confirmed the defendant gave him a copy of the letter dated 15 October 1997 after taking him to the office of Peter Sim to witness its signing, but not the agreement. Contrary to Calvin Tan`s claim, however, OSH said only he and the defendant were present at the lawyer`s office, not Calvin Tan.

OSH`s evidence on his non-interference in the affairs of the company and his absence from meetings of OTP (before July 1999) was confirmed by the liquidator, Chan (DW3). Although Chan Hwee Ping (from an associated company Sincere Secretarial Services) was the company secretary, Chan testified that he had been assisting the former (since 1989 to date) in drafting minutes of meetings.

It was the practice for the company secretary to circulate resolutions for signature amongst the shareholders, including OSH. Usually, resolutions would be prepared based on telephone requests from either a director or a clerk but he was unable to tell who specifically instructed which resolution to be prepared. When his attention was drawn to resolutions (see 1AB77) which did not contain the signature of OSH, Chan explained that the company secretary assumed that OSH would sign it eventually and the matter was left at that. Chan further confirmed that because OTP was a family company, notice for meetings (whether general or special/extraordinary) was usually waived.

As for the liquidation proceedings, Chan said he was awaiting tax clearance, after having published the requisite notices in the newspapers. He confirmed that it was incumbent on him as the company`s liquidator, to investigate any allegations of breach of director`s duties and to prosecute offenders, if necessary.

Decision

I awarded judgment to the plaintiffs on both suits because the defendant`s various defences were without any merit whatsoever, not to mention that he failed to discharge the burden to prove his allegations; I shall now address each of his defences in turn.

ILLEGALITY

(1)the agreement was ultra vires the articles of association of OTP

(2)breach of the plaintiffs` fidicuary duties to OTP

(3)failure by the plaintiffs to disclose their interests under the agreement when passing the resolutions agreeing to mortgage the properties

(4)no company resolution approving the pecuniary benefit the plaintiffs obtained under the agreement

These defences were totally misconceived as the company was not involved in the agreement at all. As the plaintiffs had repeatedly asserted, it was a private arrangement between themselves and the defendant ***in their personal capacities*** . The plaintiffs and the defendant were also the company`s common shareholders/directors; they had approved the use by the defendant of the company`s properties as collateral for his personal loan and the necessary board resolutions had been passed. OSH was ***not*** a shareholder of OTP in his own right but represented the estate which ultimate beneficiaries were also the first plaintiff and the defendant. As the first plaintiff had asked of counsel for the defendant - who else should the plaintiffs declare their interests to? My view is reinforced by an extract from a textbook authority relied on by the defendant, namely ***Walter Woon`s Company***

Law (2nd Ed) at p 266, which states:

> *Directors must exercise their discretion bona fide in what they consider (not what a court may consider) is in the interest of the company ... Their overriding motive must be to advance the company`s interests. Put in its extreme form, what this rule amounts to is this: everything that a director does **qua** director must be done to promote or advance the interests of his company.*

On the issue of ultra vires, I need only refer to two extracts from ***Guide to Company Law in Malaysia and Singapore*** (3rd Ed) at pp 104-105 included in the defendant`s bundle of authorities:

> *[para]3-145 Acts which are ultra vires*
>
> *Ultra vires acts are acts which are unauthorised by the objects clause in the Memorandum of Association of a company ...*
>
> *[para]3-150 Effect of ultra vires acts*
>
> *A transaction which is found to be ultra vires is void and unenforceable **against the company** ... [Emphasis is added.]*

Consequently, the numerous authorities cited by counsel for the defendant, of the duty on directors to declare secret profits they received at the expense of their companies, has no relevance to our case.

Although it was pleaded in the further and better particulars of the defence (filed on 7 February 2001) on the issue of ultra vires that:

> *The alleged agreement which inter alia allowed the plaintiff to claim an interest of 8% per annum through the Company`s Properties being used as a security is not provided for under the Company`s Memorandum and Articles of Association*

the defendant did not exhibit the company`s articles of association either in his affidavit of evidence or in his bundle of documents (2AB1-128); nor were they included in the plaintiffs` documents. Consequently, the defendant`s allegation could not be verified. In any case, I noted that the company had passed a special resolution at an extraordinary general meeting held on 23 July 1997 (see 1AB64-65) to amend its articles of association to include clauses which allowed the company to guarantee the debts, etc of third parties by mortgaging its assets (if indeed the provision was absent from its articles of association).

I return now to the authorities mentioned earlier, starting with ***Miller v Karlinski*** (supra). That case has no relevance whatsoever as can be seen from the following headnotes:

> *A contract of employment by which the employee is to be paid a specified weekly sum as salary and to recover from his employer the amount payable out of that sum in respect of income tax by including it in an account for travelling*

> *expenses is not severable, but* ***the whole contract is illegal as being contrary to public policy and the courts will not entertain an action to enforce any of its terms. No action will therefore lie to recover arrears of salary alleged to be due.*** *[Emphasis ia added.]*

It bears reiterating at this juncture that the agreement is not illegal per se so as to preclude its enforcement.

As for ***Napier v National Business Agency*** (supra), that case again touched on a scheme calculated to deceive the revenue authorities which the appellate court again held was unenforceable; this is apparent from its headnotes which read:

> *The defendants engaged the plaintiff to act as their secretary and accountant at a salary of o13 a week together with o6 a week for expenses. Both parties were aware that the plaintiff`s expenses could never amount to o6 a week and, in fact, they did not exceed o1 a week. Each week the defendants deducted from the salary of o13 a week the amount of income tax appropriate to that sum, and the payment of o6 a week was represented as a reimbursement of expenses on the returns made to the Inland Revenue Commissioners. The plaintiff was summarily dismissed, and claimed payment from the defendants, in lieu of notice, of o13 a week for a certain period.*
>
> *Held:*
>
> > *(i) the provisions of the service agreement relating expenses were intended to mislead the taxation authorities and evade tax, and, therefore, the agreement was contrary to public policy;*
> >
> > *(ii) although the plaintiff sought only to enforce the provisions of the agreement relating to salary, those provisions were not severable from the rest of the agreement and were equally unenforceable.*

(5)concealing the agreement from and deceiving, the inland revenue authorities

Unlike the plaintiffs in ***Miller v Karlinski*** and ***Napier v National Business Agency*** (supra), the plaintiffs in this case did not attempt to create a false agreement to deceive the tax authorities; they sued on the agreement which reflected the actual intention of both parties. How then can it be said they had deceived the Inland Revenue Authority of Singapore (`IRAS`)? What is true and which the plaintiffs readily admitted was, they did not declare to IRAS the interest they had received from the defendant, as part of their income. As I had said in [para]25 above, that is a matter between the plaintiffs and IRAS - whether the interest is deemed to be taxable income; it does not concern the court and failure to declare the income (if found to be the case) to IRAS does not afford the defendant any defence to the plaintiffs` claim.

(6)the agreement offended sections 3 and 8 of the Moneylenders Act (Cap 188)

The defendant did not adduce any evidence to substantiate this defence nor did his counsel question the plaintiffs or make reference to it in his final submissions. Consequently, this defence was deemed to be abandoned.

LACK OF CONSIDERATION

I believe it is clear from the face of the agreement itself, that the plaintiffs did provide good and valuable consideration for the defendant`s payment. The operative words are to be found in para 4 which states:

> *Because you [the plaintiffs] have all willingly permitted the Company to so mortgage the property [the three properties] to IBS for my benefit, I will compensate you for your opportunity cost at the rate of eight (8) percent per annum payable monthly on the outstanding principal sum owing to IBS ...*

On the law, the learned authors of ***Chitty on Contracts*** (28th Ed) Vol 1 p 187 state as follows:

> *3-036[ensp]Benefit to promisor sufficient*
>
> *The requirement that consideration must move from the promisee is most generally satisfied where some detriment is suffered by him e.g. where he parts with money or goods, or renders services, in exchange for the promise. But the requirement may equally be satisfied where the promisee confers a benefit on the promisor without suffering any detriment.*

Consequently, the fact that OTP, not the plaintiffs, suffered a detriment which led eventually to its properties being sold, does not render the consideration provided by the plaintiffs any less valuable.

Conclusion

Having considered the evidence in its totality, I was of the view that the plaintiffs (whose testimony I accepted) had proved their case on a balance of probabilities. The defendant on the other hand, was not able to substantiate any of the defences he had put up. In addition, his testimony sometimes contradicted the documents produced in court. Accordingly, I awarded judgment to the first and second plaintiffs in the first and second suits as per their claims.

Outcome:

Claims allowed.