Purcell Peter Francis *v* Singapore Flyer Pte Ltd and others
[2010] SGHC 156

Case Number : Originating Summons No 1369 of 2008

Decision Date : 21 May 2010

Tribunal/Court : High Court

Coram : Lee Seiu Kin J

Counsel Name(s) : Philip Fong, Tan Chau Yee and Shazana Anuar (Harry Elias Partnership) for the plaintiff; Prakash Mulani and Alvin Chang (M&A Law Corporation) for the first defendant; Indranee Rajah SC, Daniel Tan and Rakesh Kirpalani (Drew & Napier LLC) for the second to fourth defendants.

Parties : Purcell Peter Francis — Singapore Flyer Pte Ltd and others

Contract

Companies

21 May 2010

Lee Seiu Kin J:

Introduction

1 The first defendant, Singapore Flyer Pte Ltd ("the Company") is a company incorporated in Singapore. It owns and operates the eponymous giant ferris wheel located at Marina Bay which commenced operation on 15 April 2008. The plaintiff, in his capacity as a director of the Company, filed this originating summons (the "OS") on 24 October 2008 against the Company. In this OS, the plaintiff sought an order under s 199(5) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act") for the accounting and other records of the Company to be open to inspection by Mr Leow Quek Shyong, a public accountant.

2 The Company was the sole defendant when the OS was filed. On 3 November 2009 the second, third and fourth defendants were granted leave to intervene in the OS. The second defendant, Singapore Flyer GMBH & Co KG ("SFKG"), is a company incorporated in Germany and holds all the Class B shares in the Company. The third defendant, AAA Equity Holdings Ltd ("AAA"), is a company incorporated in the British Virgin Islands and holds 61.2% of the Class A shares in the Company. The fourth defendant, Great Singapore Flyer Holding Pte Ltd ("GSF"), is a company incorporated in Singapore and it holds 29.1% of the Class A shares in the Company. The remaining 9.7% of the Class A shares are owned by O&P Management Ltd ("OPM").

3 The Company was incorporated on 1 July 2003 to design, construct and operate the Singapore Flyer. The plaintiff had conceptualised the project and marketed it to a number of investors, namely SFKG, AAA, GSF and OPM. As sole holders of the Class B shares, SFKG were the preference shareholders of the Company. Pursuant to a shareholders' agreement dated 2 September 2005 ("the Shareholders' Agreement"), GSF and OPM were each entitled to appoint one director to the board of the Company ("the Board") and AAA was entitled to appoint two directors.

4 The plaintiff was named by OPM to be its nominee to the Board on 2 September 2005. The

plaintiff was also appointed the managing director of the Company, a position he held until his resignation in April 2007. He claimed that at the time of his resignation, the finances of the Company were in good order and the Company was well-run and well-organised. Thereafter, the Company was managed by other persons. Although the plaintiff was not involved in its day-to-day operations, he took a keen interest in the Company at Board level in view of his statutory duties as a director.

5 In his affidavit supporting the OS, the plaintiff alleged that he had, for a number of months, been thwarted in his efforts to obtain information and records of the Company by its management. He had also discovered several questionable financial transactions but could not investigate further without the Company's records. The purpose of the OS was therefore to gain access to those records.

6 Under s 199(3) of the Act, the plaintiff, as a director, would be entitled to inspect the accounting records of the Company and such other records as will sufficiently explain its transactions and financial position. In this OS, the plaintiff prayed for an accountant employed by him to conduct such inspection. Ordinarily the court would make such an order on the application of a director of a company. However, events intervened between the time of the filing of the OS and the hearing of the application. Specifically, on 7 November 2008, SFKG issued to OPM a first warning notice ("the 2008 First Warning Notice") pursuant to Art 3.8 of the Shareholders' Agreement, which provided:

> If, in the reasonable opinion of [SFKG], 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 [SKFG] 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.

7 The 2008 First Warning Notice stated that SFKG was of the opinion that the plaintiff had failed to perform his duties and exercise his powers with the required standard of skill or expertise on the grounds that he had refused to sign a circular resolution to appoint an authorised Group A signature unless preferential rights were accorded to OPM and/or the plaintiff, and attempted to block payments to the Company's principal lenders. The notice contained details of the acts of the plaintiff that gave rise to these grounds and requested OPM to remove the plaintiff as its nominee as director in the Company and to instruct the plaintiff to write to the Company's banks to try to unblock the payments.

8 Articles 3.9 and 3.10 of the Shareholders' Agreement set out the effects and consequences of the issue of a First Warning Notice; they provided:

> 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 [SFKG] shall be entitled by written notice to the A Shareholders no later than a further ten (10) days after the ninety (90) day period ... to remove such Director and the relevant A Shareholder or the Company shall appoint a new Director in his place respectively.

9 The plaintiff sent several letters to SFKG to dispute the 2008 First Warning Notice but these did not move the latter to withdraw it. After the expiry of the 90-day rectification period under Art 3.9, SFKG sent a letter to OPM on 7 February 2009 ("the Notice of Removal") to remove the plaintiff as director of the Company pursuant to Art 3.10 as OPM had not removed him within the 90-day period

provided.

10 Three days later, by letter to the Company dated 10 February 2009, the plaintiff tendered his resignation as director with immediate effect. On the same day, OPM nominated one Christopher Brown ("Brown") as its director on the Board in replacement of the plaintiff. However about a month later, on 13 March 2009, Brown resigned as director. On the same day, OPM nominated the plaintiff pursuant to Art 3.4 of the Shareholders' Agreement, which provided:

> A party may appoint or remove a Director nominated by it by notice to the Company signed by it or on its behalf. The appointment or removal shall ... take effect when the notice is delivered to the Company, unless the notice indicates otherwise.

11 The plaintiff's application in the OS turned on whether the plaintiff was a director of the Company at the date of the hearing. If he were, the application would be granted, otherwise it would be rejected as he would have no standing to make an application under s 199(5) of the Act. The outcome depended on the answers to the following two questions, namely:

> (a) whether the plaintiff was validly removed as a director of the Company on 7 February 2009; and
>
> (b) whether the re-nomination of the plaintiff as director of the Company on 13 March 2009 was valid.

Whether removal on 7 February 2009 valid

12 It turned out that the 2008 First Warning Notice was not the first such notice issued in respect of the plaintiff. SFKG had, on 6 June 2007, issued an earlier First Warning Notice in which it complained that the plaintiff had:

> (a) deliberately broken quorum during Board meetings on two occasions in May 2007 so that the meetings could not proceed;
>
> (b) called for meetings involving the Companies' lenders and contractors without prior authorisation from or notification to the Board;
>
> (c) failed to deliver the requisite documents for the cancellation of his employment pass;
>
> (d) failed to vacate the Company's premises;
>
> (e) wrongfully interfered with the rights of another director/shareholder to access the Company's records; and
>
> (f) used rude and discourteous language in his correspondence and conversations with the members of the Board.

13 The plaintiff sent a conciliatory email to SFKG and the latter eventually did not issue a Notice of Removal under Art 3.10. Matters rested there until events leading to the issue of the 2008 First Warning Notice. In that notice, SFKG alleged that the plaintiff had refused to sign a circular resolution appointing new "Group A" signatories to replace the existing two signatories who had since left the Company. Without such an appointment, the Company would not be able to issue any cheques to make payment to its creditors, some of which were imminent and a default would be disastrous. However the plaintiff demanded that he be made a mandatory signatory for all cheques, which would

give OPM, a holder of 10% of the shares in the Company, control over all payments flowing from the Company. When SFKG did not agree to this, the plaintiff suggested, in the alternative, that one of the original signatories, should continue to sign the cheques even though she was no longer an employee of the Company. This impasse had nearly resulted in the Company defaulting on a loan repayment and the Board of the Company had to call an emergency directors' meeting on 29 October 2008 to pass a resolution updating the bank signatories. The plaintiff had refused to attend that meeting. SFKG pointed out that defaulting on the loan would have had serious consequences on the Company, yet the plaintiff had tried to frustrate even the holding of the directors' meeting. Therefore on 7 November 2008, SFKG issued the 2008 First Warning Notice.

14 The plaintiff had alleged that the 2008 First Warning Notice was not *bona fide* and was issued as a means of preventing him from exercising his powers as director to look into the mismanagement of the Company. However he did not satisfactorily explain the allegations made by SFKG. In the circumstances, there was no basis for the allegation of a lack of *bona fide* in the issue of the 2008 First Warning Notice. Once the element of bad faith was negated, it was clear from the affidavits that SFKG had ample grounds to form the "reasonable opinion" that the plaintiff had committed a "Director Default" under Art 3.8 of the Shareholders' Agreement. Accordingly, upon expiry of the 90-day rectification period during which OPM had failed to rectify the director default, SFKG had validly exercised its right under Art 3.10 when it sent the Notice of Removal to OPM on 7 February 2009, whereupon the plaintiff's appointment as director of the Company would have ceased. It followed that the plaintiff's letter of resignation dated 10 February 2009 had no effect as he was already removed as director on 7 February 2009.

Whether re-nomination valid

15 The plaintiff's position was straightforward: OPM had validly nominated him as director pursuant to Art 3.4 of the Shareholders' Agreement. SFKG's contention, however, was that it was an express term of Art 3.10 that the A Shareholder (OPM in this case) had to nominate a "new" director. The only issue is whether, with OPM's nomination of Brown as director after the plaintiff was removed, Art 3.10 was "spent" and after Brown resigned, OPM was not precluded from nominating the plaintiff under Art 3.4.

16 In my view, a party's power to appoint a director under Art 3.4 must be constrained by Art 3.10, otherwise it will render the latter provision ineffectual. It will be obvious to anyone that adopting the interpretation favoured by the plaintiff, the requirement in Art 3.10 for a "new" director to be nominated can easily be circumvented by appointing a seat warmer who resigns within a short period and leaving the door open for the A Shareholder to renominate the original director. Article 3.10 can only be effective if Art 3.4 is constrained by it, *ie* an A Shareholder may not nominate a director who had been removed under Art 3.10.

17 SFKG submitted in the alternative that it was an implied term of the Shareholders' Agreement that a director nominated by an A shareholder who had been removed by SFKG under Art 3.10 may not be nominated again by that A Shareholder unless with the consent of SFKG. I agreed with this alternative submission. Clearly, Art 3.10 would be ineffective if the A Shareholder could keep nominating the same director after each removal and therefore would satisfy the "business efficacy" as well as the "officious bystander" tests.

18 Although there was an entire agreement provision in the Shareholders' Agreement, it did not stand in the way of the implied term in question. Article 24 provided:

> This Agreement and the agreements referred to herein embody all the terms and conditions

agreed upon and understood by the parties with respect to the subject matter of this Agreement. This Agreement supercedes all previous agreements, arrangements and understandings between the parties or any of them with regard to such subject matter. It is agreed that:

(a) no party has entered into this Agreement … in reliance upon any statement, representation, warranty or undertaking of any other party other than those expressly set out or referred to in this Agreement …

(b) save for such liability as a party has under or in respect of any breach of this Agreement … no party shall owe any duty of care, nor have any liability in tort or otherwise, to any other party in respect or arising out of, or in any way relating to the matters contemplated by this Agreement; and

(c) this Article shall not exclude any liability for, or remedy in respect of, fraudulent misrepresentation.

In *Ng Giap Hon v Westcomb Securities Pte Ltd and others* [2009] 3 SLR(R) 518, the Court of Appeal held at [31] that the presence of such a clause would not, as a general principle, exclude the implication of terms into a contract. Further, at [32], for an entire agreement clause to have this effect, it would need to express such effect in clear and unambiguous language. In my view, there was nothing in Art 24 that precluded implied terms in the Shareholders' Agreement.

Conclusion

19 For the foregoing reasons, I held that the plaintiff was validly removed as a director of the Company on 7 February 2009 and that his nomination by OPM on 13 March 2009 was invalid. As he was no longer a director at the time of the hearing, he was not entitled to be granted an order under s 199(5) of the Act. I accordingly dismissed the plaintiff's application in the OS with costs.