# UOB Venture Investments Ltd v Tong Garden Holdings Pte Ltd and Others
[2000] SGHC 228

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| **Case Number** | : Suit 84/2000, RA 26/2000, 27/2000 |
| **Decision Date** | : 10 November 2000 |
| **Tribunal/Court** | : High Court |
| **Coram** | : G P Selvam J |
| **Counsel Name(s)** | : Ng Hwee Chong (Rodyk & Davidson) for the plaintiffs; Tan Cheng Yew (Tan Cheng Yew & Partners) for the defendants |
| **Parties** | : UOB Venture Investments Ltd — Tong Garden Holdings Pte Ltd |

*Companies – Shares – Redeemable preference shares – Redemption at shareholder's discretion – Contractual obligation of company to redeem – Whether lack of profits to redeem valid excuse – Remedies of preference shareholder – Joint and several liability of directors to redeem – s 70(3) Companies Act (Cap 50)*

: ***The march of events***

The plaintiffs are a company incorporated in Singapore. Their business, as the name suggests, is venture capital investment.

They brought this action against four defendants. The first defendants, Tong Garden Holdings Pte Ltd (`the company defendants` or `the first defendants`) are a company incorporated in Singapore. They are a holding company of several subsidiaries engaged in the business of nut processing and packaging.

The second, third and fourth defendants were at all material times directors of the first defendants. By name they are Ong Leong Chuan, Ong Teck Chuan and Ong Heng Chuan. The second defendant ceased to be a director in November 1999. The second, third and fourth defendants were also at all material times shareholders of Tong Guan Food Products Pte Ltd (`TGFP`), a shareholder of the company defendants. The expression `director defendants` in this judgment shall refer to these three individual defendants.

By an investment agreement dated 12 December 1995 (`the Investment Agreement`) entered into between the plaintiffs, the four defendants and TGFP, the plaintiffs agreed to invest a sum of $3,500,000 in the company defendants by subscribing for redeemable convertible preference shares (`the preference shares`) in the capital of the company defendants. That amount was comprised of 1,000,000 redeemable convertible preference shares of the par value of $0.01 each (yielding $10,000) and a premium of $3,490,000.

Clause 6 of the investment agreement provided that the preference shares shall be redeemed at the investors` absolute discretion upon certain contingencies. One of them was the company defendants` non-listing on the Stock Exchange of Singapore Limited (`the SES`) by 31 December 1998. This dateline could be extended, inter alia, to 30 June 1999 provided that the investors were satisfied with certain circumstances.

It was also provided in the investment agreement that on the happening of an event of default the investors (ie the plaintiffs) had the absolute discretion by written notice to the company defendants and/or TGFP to require the company defendants to redeem the preference shares held by the investors. The event of default was the non-listing of the company defendants.

The completion of the redemption was to take place within six months from the date of the written notice issued by the investors to the company defendants or TGFP.

The price of the redemption of the preference shares arising from the event of default was the sum of $3,500,000 plus interest calculated with effect from 5 December 1995, or such other date as the parties may agree up to the date of redemption at the rate of 10% per annum on a yearly rests basis and compounded annually less any dividends paid to the investors. If the company defendants failed to redeem the preference shares on or before the stipulated completion date the investors were entitled, inter alia, to demand the payment of the redemption price payable from the director defendants. The director defendants jointly and severally covenanted in the investment agreement to pay the redemption price to the plaintiffs in exchange for the preference share certificates.

The company defendants were not listed as stipulated. In the result the plaintiffs issued a written notice dated 26 August 1999 to the company defendants for the redemption of the preference shares. They paid $1,000,0000 in November 1999 and $260,000 in March 2000. The company defendants failed to pay the balance of the redemption price and the interest on it within six months of the plaintiffs` notice, that is by 25 February 2000.

On 3 March 2000 the plaintiffs demanded payment of the redemption price due to them inclusive of the 10% per annum contractual interest rate. The defendants failed to comply with the demand.

***The action***

In the result the plaintiffs issued the writ in this action. They claimed against the company defendants a declaration that the first defendants were in breach of their contractual obligation to redeem the preference shares under the investment agreement dated 12 December 1995. They further sought an order that the first defendants take the necessary steps to complete the redemption of the preference shares plus interest.

As against the director defendants the plaintiffs sought judgment for the balance redemption price, that is $2,240,000. They further sought interest at 10% per annum of a yearly rests basis compounded annually from 5 December 1995 up to the date of full payment of the redemption sum.

The plaintiffs then filed applications for summary judgment against all defendants. The second defendant had his own legal representation. The first, third and fourth defendants were jointly represented by another legal firm.

***Summary judgment applications and appeals***

The senior assistant registrar gave the company defendants unconditional leave to defend. The plaintiffs appealed against this decision by way of RA 27/2000. He gave the second, third and fourth defendants conditional leave to defend. The third and fourth defendants (`the appellant defendants`) appealed against the decision by RA 26/2000. They wanted unconditional leave to defend. The second defendant has not appealed. In the meantime, however, judgments have been entered against all three director defendants.

***The law***

The appeals concern an ingenious point of law raised by the appellant defendants. They based it on s 70(3) of the Companies Act (Cap 50). They cited in support a decision of the Australian Federal Court: **Federal Commissioner of Taxation v Coppleson** [1981] 6 ACLR 428. The facts of this case in brief were these: Warrawanda Ltd was incorporated on 17 June 1976. Within a week of incorporation the company issued 39,990 $1 redeemable preference shares to Copston Securities Pty Ltd. On the same day, that is 23 June 1976, Dr Coppleson purchased those shares from Copston Securities. Two days later, Dr Coppleson donated the shares to Royal Prince Alfred Hospital. One of the articles of association of Warrawanda Ltd provided that `Redeemable Shares may be redeemed at the option of the holder thereof within six months of the date of allotment of the Redeemable Shares to be redeemed, by such holder giving the Company not less than thirty days notice requiring redemption`. This was a strange provision. But there it was. It was there for a special purpose. The article further stated that `Subject to the provisions of the Companies Ordinance the Company shall be bound to redeem Redeemable Shares in respect of which notice as aforesaid has been given in accordance with such notice`. (There was another provision in the articles giving the company the option to redeem the shares after the six months; it did not concern the court.)

Section 61(3) of the Companies Ordinance, the equivalent of s 70(3) of our Companies Act, prohibited redemption of redeemable preference shares except out of profits which would otherwise be available for dividend or out of proceeds of a fresh issue of shares made for the purposes of the redemption. The question for determination by the court was whether the holder of the redeemable preference shares would be in a position to compel a liquidation of the company on the ground that it would be just and equitable to do so if it failed to redeem the shares.

The court`s answer was `No`. The court reasoned as follows at pp 433-434:

> *Winding up on the just and equitable ground is an example of the court subjecting the exercise of legal rights to equitable considerations. There must be special circumstances to justify this intervention. In the case before us there are no such special circumstances. The company, in failing to redeem, would not be misusing its legal rights but merely acting, as it is obliged to do, in accordance with the law. The parties must be presumed to be aware of the statutory limitations. The transaction was a purely commercial arrangement, and there is no evidence of any understanding between the parties. Nor was there any evidence that the directors had acted unfairly or improperly or in breach of any duty. Indeed, no relevant change had taken place in the position of the company after the original allotment of the redeemable preference shares.*
>
> *We are unable to discern any basis to support a petition for winding up upon the `just and equitable` ground. Some arguments could be put to the contrary. Winding up and transfer of assets to the hospital would destroy the purpose which the taxpayer (Dr Coppleson) had of maintaining some control over the form of the investment. In addition, the taxpayer (Dr Coppleson) would not have had the same chance of endeavouring to ensure that income was used for research in the way he envisaged when making the gift.*
>
> *The argument on valuation was based on the price a willing but not anxious purchaser would pay for the shares, one of the matters for consideration being the ability of that purchaser to compel winding up. The right of a holder of redeemable preference shares to require redemption within six months after those shares were allotted, that is, virtually as soon as the company is formed in a case such as the present, may be illusory. The possibility of there existing either of the funds referred to in s 61(3) is remote indeed. It was common ground both before the trial judge and before us that a hypothetical purchaser*

*would not envisage the existence of such funds at the relevant time. Nevertheless, this is the basis on which they accepted the shares and they are bound by it. They cannot show any injustice or inequity which might enable them to invoke the jurisdiction of the court to obtain early access to their capital.*

*Considering all the circumstances, we conclude that the holders of the redeemable preference shares would not be able to compel the company to be wound up on the ground that such a course would be just and equitable.*

I must at once add that in the ***Coppleson*** case the shareholder did not ask the Company to redeem the share within the six-month period as provided in the article. Consequently there was no petition to wind-up the company. Indeed it was not a fray between the shareholder and the company. The issue of winding-up came up hypothetically in connection with the correct value of the shares on 25 June 1976 for the purpose of taxation. That was two days after the acquisition of the shares and eight days after the incorporation of the company. It was accepted that the possibility of funds being available for redemption so soon after the incorporation was remote. The company was incorporated and the redeemable preference shares were issued and then purchased and donated by Dr Coppleson pursuant to a tax avoidance scheme. The court held that valuation on liquidation was not the correct basis. Having regard to s 61(3) of the Companies Ordinance it could not have been the intention that the investor would take up the preference shares, call on the company to redeem them two days later and apply to wind-up the company. In those unordinary assumed circumstances no court would order a winding-up on the ground that it would be just and equitable to do so. The decision was eminently correct. The circumstances and the true issue in the present case are hugely different. Later I shall now demonstrate how .

**Mutual Life and Citizens Assurance Co Ltd v Mosgiel Ltd** [1994] 1 NZLR 146, a decision of the New Zealand Court of Appeal, is relevant to the issue. In it Richardson J delivering the joint judgment of the court made these salutary statements at p 152 :

*In contracting with the shareholder in terms of the resolutions the company has undertaken that it will ensure that by having available profits or making a fresh issue of shares it will honour that obligation.*

*It is arguable that it is for the company to organise its affairs so as to ensure that it will have appropriate profits out of which to meet its obligations to redeem and if it seems apparent that it will not be able to meet its contractual commitments on redemption then the company faces the prospect of being wound up before the redemption date under the `just and equitable` rule at the suit of disgruntled shareholders.*

Finally, ***Australian Corporation Law: Principles and Practice*** Vol 1, para 2.6.0205 points out that :

*To the extent that a redeemable preference shareholder may have a remedy for damages, or for interest, in connection with a failure by a company to honour the terms of issue of the shares, the shareholder`s claim would rank after the claims of creditors in a winding up.*

***The plaintiffs` appeal***

First, I shall state the company defendants line of defence against the plaintiffs. Their basic position was that the plaintiffs had no ***claim*** against them and they had ***no remedy*** against them. Their reason for these assertions is s 70(3) of the Companies Act (Cap 50). This provides like the statute in the ***Coppleson*** case, that redeemable preference shares shall not be redeemed except out of profits which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for the purpose of the redemption. They relied on the ***Coppleson*** case. The company defendants next said that they had not made any profits since incorporation and they had not issued any shares for the purposes of redeeming the shares. If they are right it means that s 70(3) of the Companies Act gave them an immunity if they could ensure that they did not make any profits. Not making profits, and for that matter making losses is a simple exercise. Losses, sometimes, can be achieved by creative accounting. Making profits entails much labour. The company, by clever diversion of capital and resources to alien entities, can ensure that no profits or very little profits are made in perpetuity. By such article the company can keep the holders of the preference shares at bay indefinitely. Temporary membership of preference shareholders thus may be transformed into a permanent loss making investment.

***The decision***

In my judgment, there is a fundamental flaw in the company defendants` argument. The plaintiffs` claim is in contract. The contract provides that if the company defendants fail to secure a listing within the stipulated time, the plaintiffs may call for a redemption. Under the contract the obligation to redeem on notice is absolute. When the first defendants contracted for that obligation they were fully aware of s 70(3) of the Companies Act. They must therefore be presumed to have contracted on the basis of s 70(3) of the Companies Act. In the context of s 70(3) of the Companies Act, the company defendants` contractual obligation to redeem implies that they must bustle about to bring in the funds. They must expend all their energy in their veins to find the funds in the manner permitted by s 70(3) of the Companies Act. The defendants are not allowed to call in aid their own indolence and inaction. Nor can they seek shelter under s 70(3) of the Companies Act. Their contractual obligation implies that they will see to it that their subsidiary and related entities and persons will put them in sufficient profits or take up new shares to produce sufficient funds. Finding the funds by those two options, I repeat, is an absolute obligation. If they fail there are three remedies to the preference shareholder: equity can compel them to do so by an order for specific performance; common law can award damages; and company law can order them to be wound up. If damages are awarded they must come from profits or fresh share issue. In the event of liquidation the shareholders` claim would rank after the claims of creditors.

The ***Coppleson*** case is clearly distinguishable. There the question was whether the company in a hypothetical situation was in default soon after the issue of the shares. In the present case the contract was made on 12 December 1995. The event of default occurred on 31 December 1998, that is three years later. The notice requiring redemption was given on 26 August 1999. The action was commenced on 29 March 2000. It was almost five years since the date of contract. The defendants here had adequate time to realize the funds. By failing to find the funds they breached the contract.

Accordingly I declare that the first defendants are in breach of their obligation to redeem the redeemable convertible preference shares under the investment agreement dated 12 December 1995. There will be a further order that they will take the necessary steps to fulfil their obligations within four weeks. The contractual obligation of the company defendant has now been converted into the command of the court, with its attendant consequences. I defer the plaintiffs` claim for damages in lieu of specific performance and give liberty for both sides to apply. They also have the option to petition to wind-up the company defendants. The petition may be grounded on insolvency or just and equitable provisions. This means that the plaintiffs` appeal succeeds.

***The appeal against the plaintiffs***

Now I turn to the third and fourth defendants. They say that they must be asked to redeem the entire lot. Since the plaintiffs cannot do that they are not liable at all. I hold that the liability of the company defendants is separate from that of the director defendants. The liability of the latter is joint and several and their liability is surety liability. The defendants` liabilities are several but at the same time the individual defendants` liabilities are joint. If they wanted all the shares they had the option to pay for all and receive all the shares. They did not do so. The plaintiffs for their part cannot refuse part performance by one or more defendants. That is the nature of the joint and several obligation and surety liability. The individual defendants` argument, therefore, is untenable. Accordingly there should have been judgment against them. However, they were given conditional leave to defend. They failed to fulfil the condition and judgments have been entered against them. The second defendant did not appeal. In the circumstances the appeal of the third and fourth defendants fails.

There will be costs to the plaintiffs on both appeals.

**Outcome:**

Plaintiffs` appeal allowed; third and fourth defendants` appeal dismissed.