Lian Hwee Choo Phebe and Another v Maxz Universal Development Group Pte Ltd and Others [2008] SGHC 102

Case Number : Suit 75/2008, SUM 663/2008

Decision Date : 30 June 2008

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Suresh Nair and Tan Chin Kwan Jonathan (Allen & Gledhill LLP) for the plaintiffs; Harpreet Singh Nehal SC, Meyer Bernette Colleen and Dawn Ho (Drew & Napier LLC) for the second and fourth defendants; Siraj Omar and See Chern Yang (Premier Law LLC) for the third defendant

Parties : Lian Hwee Choo Phebe; Kok Lan Choo — Maxz Universal Development Group Pte Ltd; Tan Boon Kian; Seeto Keong; Wong Choon Hoy

Companies – Memorandum and articles of association – Whether article providing for increase in share capital referred only to authorised share capital – Whether abolition of authorised share capital rendered said article otiose – Companies Act (Cap 50, 1994 Rev Ed) Fourth Schedule Table A Art 40(a)

30 June 2008 Judgment reserved.

Andrew Ang J:

1 This was the plaintiffs' application for judgment on the determination of a preliminary issue pursuant to O 14 r 12 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). At the hearing on 3 April 2008, I ruled in favour of the defendants. After reading the plaintiffs' written submissions for further arguments dated 10 April 2008, I ruled that no further arguments on the above matter were necessary. The following are my reasons for so doing.

2 The question for determination was whether the following resolution passed at an Extraordinary General Meeting of the first defendant Maxz Universal Development Group Pte Ltd ("MDG") on 13 December 2007 ("the Resolution") contravened MDG's Articles of Association and was therefore invalid:

> **ORDINARY RESOLUTION**
>
> **SECTION 161 AUTHORITY TO ALLOT AND ISSUE SHARES**
>
> RESOLVED THAT pursuant to the provisions of Section 161 of the Companies Act, Cap. 50 (the "Act") and the Articles of Association of the company, the Directors be and are hereby authorised to issue shares of the Company to such persons on such terms and conditions and with such rights or restrictions as they may think fit to impose and that such authority shall continue in force until the conclusion of the next Annual General Meeting or the expiration of the period within which the next Annual General Meeting of the Company is required by law to be held, whichever is the earlier.

3 The only point raised by the plaintiffs in this regard was that as the Resolution did not prescribe the number of shares to be issued, it contravened Article 32 of MDG's Articles of Association ("Article 32"). The said Article 32 provides that:

> The Company may from time to time by ordinary resolution increase the share capital by such sum, to be divided into shares of such amount, as the resolution shall prescribe.

4 The second and fourth defendants' position (which the third defendant adopted) was that Article 32 had no application to the Resolution as it applied only to a resolution to increase the company's authorised share capital. In that regard, the defendants submitted that Article 32 (which was *in pari materia* with Article 40(a) of Table A) owed its existence to s 71(1) (which has since been repealed) of the Companies Act (Cap 50, 1994 Rev Ed), which provided:

> 71. — (1) A company, *if so authorised by its articles*, may in general meeting alter the *conditions of its memorandum* in any one or more of the following ways:
>
> (a) increase its share capital by the creation of new shares of such amount as it thinks expedient; …
>
> [emphasis added]

5 Mr Harpreet Singh, counsel for the second and fourth defendants, submitted that s 71(1)(*a*) clearly referred to an increase in the authorised share capital, as opposed to an increase in issued and paid up share capital, since only the authorised share capital was required to be stated in the Memorandum of a company. It was to facilitate such increase of authorised share capital as provided for under s 71(1)(*a*) that Table A of the Companies Act included Article 40(a). Mr Singh also referred to *Palmer's Company Law*, vol 1 (Sweet & Maxwell, 25th Ed, R.68: December 1998), where the learned authors stated at [4.203]:

> To increase the nominal capital of a company limited by shares involves an alteration of one of the conditions of its memorandum, but section 121(2)(*a*) empowers a company limited by shares "if so authorised by its articles" to alter that condition of its memorandum so as to "increase its share capital by new shares of such amount as it thinks expedient." Article 32 of Table A is a specimen of such an authorisation by the articles. If this provision of Table A is excluded and the articles give no authority, the articles must be altered before the resolution to increase is passed, but if the company passes a special resolution authorising the creation and issue of the desired new shares, that will in effect not only give the authority to increase required by section 121 but *uno flatu* enable the directors to exercise it. The power to increase can be exercised from time to time. An increase of capital does not of itself imply a further issue of shares, it merely increases the *nominal* and not the *issued* or *allotted* capital. The *issue* of shares is done by the directors but they require authority to do so by an ordinary resolution of the general meeting or the articles and their authority is limited to five years. … The power to increase the capital must, as stated earlier in general terms, be exercised by the company in general meeting, and the directors have no power to exercise it. … The 1985 Act admits provisions in the articles authorising the increase of capital by ordinary resolution (s.121(4)) and this is the method expressly authorised by article 32 as regards companies to which Table A applies. There is no objection to a company in its registered articles prescribing additional, and stricter, requirements, *e.g*. that the capital may be increased by extraordinary or by special resolution, but such provisions are uncommon in modern company practice. [emphasis in original]

6 Further, the defendants pointed to the fact that over the years, MDG had given unconditional authority to its directors to issue shares pursuant to s 161 of the Companies Act. The resolutions authorising the issuance of shares did not limit the number of shares that could be issued by the directors. At all times in the past, whenever MDG passed ordinary resolutions granting the directors the power to issue new shares up to the authorised share capital limit, it did not at the same time pass ordinary resolutions increasing share capital pursuant to Article 32. There was no need to do so as all the directors, including the first plaintiff at the time, understood that Article 32 did not apply to

resolutions to issue shares but applied only to resolutions to increase the authorised capital. This meant that the shareholders of MDG never regarded Article 32 as relating to share issues within the authorised share capital. Instead, they understood that Article 32 related only to increases in authorised share capital.

7 The plaintiffs conceded that prior to the abolishment of the concept of authorised share capital in Singapore, Article 32 referred to an increase in authorised share capital. However, they argued that subsequent to the abolishment, Article 32 would then apply to all issuance of new shares.

The decision of the court

8 The term "share capital", in relation to a company, has several distinct meanings. In Charlesworth's *Company Law*, Geoffrey Morse, (Sweet & Maxwell, 17th Ed, 2005), it was observed at p 139 that:

> [t]he word "capital" used in connection with a company has several different meanings, thus it may mean the nominal or authorised share capital, the issued or allotted share capital, the paid-up share capital or the reserve share capital of the company.

9 The question at the outset was which type of share capital did Article 32 in MDG's Articles of Association relate to? In my view, it was clear that at the time of MDG's incorporation, Article 32 was understood to govern an increase in authorised share capital and not an increase in paid-up or issued share capital within the authorised capital. Apart from the authorities cited by the second defendant (see [5] above), in Charlesworth's *Company Law* ([8] *supra*) it was observed at p 147 that:

> **Increase in capital**
>
> Every increase of the nominal or authorised capital figure in the memorandum, must be effected by the company in general meeting: s.121. If the articles authorise the increase of capital, whether an ordinary or a special resolution is required depends on the articles.
>
> Table A, reg.32 provides: "The company may be ordinary resolution – (a) increase its share capital by new shares of such amount as the resolution prescribes; …"

10 In a similar vein, *Gore-Browne on Companies*, vol 2 (Jordans, 45th Ed, 2003) (Update 64) noted at para 26.2 that:

> **Increase of capital**
>
> The 'capital' referred to here is the nominal capital authorised by the memorandum of association, and must not be confused with the issued capital or the paid-up capital. It follows that to make an issue of shares already authorised, or to make a call upon the shares already issued, would increase the issued share capital or the paid-up capital respectively, but neither proceeding would be such an increase of capital as to fall within the provisions of the Companies Act as described hereafter.
>
> By virtue of s 121 of the Companies Act 1985, a company limited by shares, or a company limited by guarantee and having a share capital, may, if authorised by its articles (see e g 1985 Table A, reg 32), increase its share capital by new shares of such amount as it thinks expedient. The increase must be effected by the company in general meeting, unless a private company takes advantage of the statutory written resolution procedure.

11 The above authorities are squarely applicable to the case at hand as the English Companies Act 1985, Table A, reg 32, was *in pari materia* with Art 40 of the pre-amended Table A and therefore with Article 32.

12 Interpreting Article 32 to apply only to authorised share capital would also be consistent with Article 4(a) of MDG's Articles of Association, which accords the directors of MDG the power and discretion to issue authorised but unissued shares. For the above reasons, I was of the view that at the time MDG was incorporated, Article 32 applied exclusively to an increase in authorised share capital.

13 I turn now to the plaintiffs' submissions that given that the concept of authorised share capital has since been abolished, Article 32 should then be re-interpreted to apply to all share issuances and that "[Article 32] provide that [MDG's] shareholders must authorise any share issuance in general meeting" (see para 58 of the plaintiffs' written submissions). I rejected the said submissions for the following reasons.

14 First, the plaintiffs' re-interpretation of Article 32 would mean that every time the company decides to issue shares, shareholders' approval must first be sought. This is so as Article 32 does not have a blanket annual approval provision similar to that in s 161(2) of the Companies Act. As noted at [12] above, such an interpretation would run counter to Article 4(a) whose effect is to devolve the general powers of the company to issue shares to MDG's board.

15 Second, it would be recalled that the Articles of Association constitute a contract between the company and its members and among the members *inter se*. Here, it is trite law that in the interpretation of any term of a contract, the proper approach is to examine its meaning in the light of circumstances existing at the time the contract was made, and not through the prism of subsequent events: see in general Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 4th Ed, 2007) at pp 111 and 112 which cited, *inter alia*, *Union Insurance Society of Canton Ltd v George Wills & Co* [1916] 1 AC 281 where the Privy Council stated, at p 288, that:

> It is immaterial to the construction of the contract to consider subsequent events. The intention of the parties must be gathered from the language of the contract, the subject-matter, and the circumstances in existence at the time it was made.

16 In the circumstances, I was of the view that it would not be proper to take into account the fact that the concept of authorised share capital had been subsequently abolished in determining the true construction of Article 32. I accepted the defendants' submissions that a contract should not be interpreted in the light of subsequent events as "[o]therwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later"; citing *Whitworth Street Estates (Manchester) Ltd v James Miller & Partners Ltd* [1970] AC 583 ("*Whitworth*") at 603.

17 Although Whitworth is a case which involves the subsequent conduct of the parties while the present case involves a subsequent change of the law, I was of the view that the principle elucidated in Whitworth applies equally to the case at hand. A contract must be interpreted in the light of the circumstances existing at the time it was made. Here, the abolition of the concept of authorised share capital took place some five years after the Articles of Association of MDG had been adopted. This subsequent event should not cause a change in the interpretation of Article 32. In the premises, I agreed with the defendants' submission that Article 32, as it stood, had been rendered otiose by the change in the law and ceased to have any practical effect.

18 While such a conclusion might, at first blush, appear to give *carte blanche* to a company's board to issue an unlimited number of shares, it is to be noted that s 161 of the Companies Act requires that, notwithstanding anything in a company's Memorandum or Articles of Association, the prior approval of the company in general meeting is to be obtained before the directors may exercise any power of the company to issue shares. Section 161 also provides that such approval may be unconditional or *subject to conditions*. Thus, notwithstanding the redundancy of Article 32, the directors' powers to issue shares could still be circumscribed by the company's shareholders in general meeting.

19 For the foregoing reasons, I was of the view that the Resolution did not contravene the Articles of Association of MDG. Accordingly, I dismissed the plaintiffs' application with costs.