

Ee Kee Chai v Chew Joo Song John and Others
[2006] SGHC 225

Case Number : CWU 93/2006, SUM 3732/2006, 3742/2006
Decision Date : 12 December 2006
Tribunal/Court : High Court
Coram : Lee Seiu Kin J
Counsel Name(s) : Sam Han Tatt and Lisa Sam Hui Min (H T Sam & Co) for the plaintiff; Roger Foo Hsiang Howe (Genesis Law Corporation) for the first defendant; Wong Tze Roy (Goh JP & Wong) for the second defendant
Parties : Ee Kee Chai — Chew Joo Song John; Tiagarajan Vemala Devi; Asiana Investment Pte Ltd

*Companies – Winding up – Ex parte application for appointment of provisional liquidators
– Applicant failed to disclose material facts when order was granted – Whether order should be discharged – Section 267 Companies Act (Cap 50, 2006 Rev Ed)*

12 December 2006

Lee Seiu Kin J:

1 On 24 July 2006, the plaintiff ("Ee") filed an application to wind up the third defendant, Asiana Investment Pte Ltd ("Asiana") under s 253(1)(c) of the Companies Act (Cap 50, 2006 Rev Ed). Ee is a shareholder of Asiana and made the application as a contributory thereof.

2 The following day, 25 July 2006, Ee filed Summons No 3371 of 2006 to apply *ex parte* for the appointment of provisional liquidators pending the hearing of the winding up application. This was heard on 26 July 2006 and Ee was granted an order appointing Mr Ramasamy Subramaniam Iyer, Mr Goh Thien Phong and Mr Chan Kheng Tek from the firm of PricewaterhouseCoopers as provisional liquidators of Asiana.

3 On 14 August 2006, the first defendant ("Chew") filed Summons No 3732 of 2006 to set aside the order of 26 July 2006 appointing provisional liquidators. On 15 August 2006, the second defendant ("Devi") filed a similar application in Summons No 3742 of 2006. Both summonses were heard by me on 8 September 2006, at the end of which, I granted the defendants' applications and made the following orders:

- (a) The order of court dated 26 July 2006 obtained by the plaintiff be set aside.
- (b) The expenses and remuneration of the provisional liquidators appointed pursuant to the order of court dated 26 July 2006 be borne and paid by the plaintiff.
- (c) The sale proceeds of the immovable properties of the third defendant at Nos 19, 20, 21 and 22 Race Course Lane, Singapore ("the Properties"), net of all outstanding loans and the costs of sale, are to be held in an escrow account of the third defendant's solicitors who are acting in the sale of the Properties until further orders from the Court or unless agreed to by all the third defendant's shareholders.
- (d) The third defendant shall deposit all revenue in its bank account and provide copies of its monthly bank statements and payment vouchers to all its directors by the 7th day of each month.

- (e) The plaintiff shall pay costs to the first defendant fixed at \$10,000, plus disbursements to be agreed or taxed.
- (f) The plaintiff shall pay costs to the second defendant fixed at \$8,000, plus disbursements to be agreed or taxed.
- (g) There be an inquiry as to the damages payable by the plaintiff to the third defendant in respect of any damage suffered by the third defendant arising from the appointment of the provisional liquidators pursuant to the order of court dated 26th July 2006.
- (h) By consent, the action herein is converted to a writ action.
- (i) Leave is granted to the plaintiff to include a claim under s 216 of the Companies Act in the action herein.
- (j) The plaintiff is to file and serve his statement of claim by 9th October 2006.
- (k) The first and the second defendants are to file and serve their defence within 14 days after the service on them of the statement of claim.
- (l) This order of court does not affect any person who is not a party to the action herein.
- (m) There be liberty to apply.

On 2 October 2006, Ee filed a notice of appeal against orders (a), (b), (e), (f) and (g). I now give the grounds for my decision.

4 Prior to the hearing of this matter, the parties had, on 18 August 2006, consented to an order empowering the provisional liquidators to carry out the sale of one of Asiana's properties, 76 Syed Alwi Road, which was imminent at the time.

Affidavit supporting winding up

5 In his affidavit filed in support of the winding up application, Ee provided the following background to the incorporation of Asiana. Ee first met Chew sometime in 1980 when Chew was working with Michael Sim Auctioneers. At that time Ee operated a Shell petrol station at Geylang Road and invested his profits from that business in properties. Their paths next crossed in 1988, by which time Chew had set up his own housing agency called Rich Home Properties Pte Ltd ("Rich Home"). Ee told Chew that he was interested in investing in properties and to keep him informed of any good opportunities. They came to an arrangement whereby Chew would identify the opportunities and Ee, who had access to banking facilities, would provide the capital needed. As Ee had no special knowledge in the property market, he relied solely on Chew's judgment of the property market. In any transaction, Chew would be entitled to 25% share of the net profit but would not be required to share any loss. Between 1988 and 1991, Chew identified many such opportunities and they profited from those transactions in accordance with their arrangement.

6 Sometime in 1991, Chew asked Ee to form a company to undertake such property transactions. They could pool their resources to obtain better financing terms from the banks. Chew also proposed to include his close friend and business associate, V Jayaraman ("Jayaraman"). The latter had contacts for properties located in Little India, which had a peculiar feature. Many properties there had as many as ten registered proprietors, many of whom resided in India and elsewhere in the world.

Jayaraman was confident that he could procure the consent of these proprietors to the sale of their properties and in this manner realise a high profit. The three parties agreed on the following arrangement in relation to the proposed company:

- (a) Jayaraman would be involved in the day-to-day operations of the company.
- (b) Ee, Chew and Jayaraman would not be entitled to receive any salary, directors' fee, remuneration or commission or any benefit for any property transaction undertaken by the company.
- (c) Profits from any transaction would be distributed in accordance with the shareholding structure of the company.
- (d) As the company would deal with residential properties and Jayaraman was a Malaysian citizen, his interest in the company would be held through his wife, Devi.
- (e) Ee, Chew and Devi would be directors of the company, with Ee as chairman of the board and Chew its managing director.
- (f) All payments emanating from the company must be signed by Ee, Chew and Devi.

7 Asiana was incorporated in February 1991 with Ee holding approximately 40% of the shares and Chew and Devi each holding about 30%. Ee said that as he was not conversant in English, he left it to Chew and Jayaraman to decide on the name of the company and deal with the necessary paper work. Chew and Jayaraman took charge of the day-to-day operations of Asiana. Things went well initially between Ee and both Chew and Jayaraman and their working relationship was close, to the extent that they socialised with each other. Ee said that he even did not object to Chew and Jayaraman conducting their personal business at the premises of Asiana. Chew even conducted operations of his housing agency, Rich Home, from Asiana offices rent-free. In addition, Chew and Jayaraman were partners in a firm called Trans-Island Enterprises ("Trans-Island") which, since 1995, had utilised Asiana's premises rent-free.

8 As for the finances of Asiana, there were three signatories to the bank accounts. Whenever the bank accounts showed a healthy balance, the parties would make a withdrawal in the proportion 40:30:30, with Ee receiving 40%. Payment would be by way of a cheque to each of the three of them for the amount he was entitled to. If there was any advance made to a party, this would be set off against the sum due.

9 However Ee said that his relationship with Chew and Jayaraman deteriorated in 2004. Chew approached him to ask to be paid commissions that would have accrued to third parties in relation to the transactions of Asiana. Chew confessed that many of the commissions that Asiana had purportedly paid to third parties were in fact received by him. Ee said that this came as a surprise to him as this was contrary to the arrangement they had. He had relied heavily on Chew and Jayaraman in relation to payment of expenses of Asiana and had signed all cheques on that basis. In particular, Ee had suffered heart problems from 1998 and had been unable to devote much attention to the business. This had increased his reliance on Chew and Jayaraman. In August 2005, his health deteriorated further and he asked his two sons to help him in relation to Asiana as he had become more suspicious of Chew and Jayaraman.

10 In June 2005, Chew disclosed to Ee for the first time that IRAS had raised queries on the income reported by Asiana. Chew said that IRAS had seized some of Asiana's books and accounting

records on 18 July 2000. Ee said that after this, he was even more hesitant to trust Chew and Jayaraman.

11 Ee said that Asiana had reported losses since its incorporation in 1991, and the total cumulative losses up to 2004 was in excess of \$2m. He said that this was despite gross profits of \$6.1m from nine properties sold between 1992 and 1997. Ee said that his attempts to look into the matter was hampered by the refusal of Chew and Jayaraman to cooperate and he had been denied access to the company's documents. Upon his solicitor's request for the statutory records of Asiana, a directors' meeting was convened on 19 August 2005. At that meeting, Chew and Jayaraman voted to remove Ee as chairman of the board. Chew was appointed chairman in his place. Ee was granted access to the company's documents but certain restrictions were imposed. On 6 September 2005, the Company Secretary, Lim Seng San resigned and this made Ee even more suspicious of the intentions of Chew and Jayaraman. On 21 September 2005, Chew and Jayaraman passed a resolution to change the cheque authorisation instruction to the bank from three signatories to two, those of Chew and Jayaraman only. In the course of examining the documents, Ee unearthed discrepancies in the accounts which indicated that Chew and Jayaraman had been receiving sums of money contrary to the arrangement they had agreed to and that they had been siphoning the company's funds by various means.

Affidavit supporting appointment of provisional liquidators

12 For the *ex parte* application for the appointment of provisional liquidators, Ee filed a further affidavit on 25 July 2006. He stated that the basis for the urgent application was that he had reason to believe that Chew and Jayaraman were disposing or dissipating the assets of Asiana such that there would be little left in the event of liquidation. To support this contention, Ee listed various payments by Asiana to Chew and Jayaraman that he alleged were contrary to the arrangement that they had agreed to upon the formation of the company. These included payment of commissions for sale or rental of properties to Chew, Devi and Jayaraman, booking of fictitious items in the company's accounts, payments of large sums of money to various persons and to various companies including Trans-Island and also to unidentified entities.

Defendants' affidavits opposing appointment of provisional liquidators

13 Chew filed his affidavit on 14 August 2006 opposing the winding up application and the appointment of provisional liquidators. For the purposes of the present summonses, I am concerned only with the issue of the appointment of provisional liquidators. Chew disputed much of the essential facts of the background provided by Ee. The first was that Chew contended that Ee was an experienced property player. Chew pointed out that during the period from 1988 to 1991, he had recommended more than ten properties to Ee from which the latter made substantial profits. Chew said that Ee told him that the latter had sold more than 90 properties by himself or through his companies or businesses. Chew said that Ee had a good understanding of the market and knew how to time his transactions. Chew pointed out that this was why Ee was prepared to give him 25% of the profits but did not require him to share losses as he was confident there would be none. Chew alleged that Ee did not pay him his full 25% share promptly but he did not press for it as Ee was an important business associate.

14 Insofar as their Asiana venture was concerned, Chew said that the understanding between them was that Ee would lend money to Asiana without interest, and that was the basis that they allotted more shares to him. Hence they were unhappy when Ee demanded a high interest for loans to Asiana. Chew also disputed Ee's contention that none of them would receive a salary from Asiana. He said that it was the company's practice to pay directors' fees and the usual commission to any party

that facilitated a sale, purchase or rental of property. Chew said that Ee himself had received director's fees of \$8,000 in November 2002. In 1999, Asiana paid Ee's son a commission of \$4,000 in connection with the tenancy of a property. Chew said that other company documents which showed Ee receiving other director's fees had gone missing since Ee raided the office in early July 2006. Chew said that Ee and his two sons had gone to Asiana's office and broken into various drawers and cabinets to remove documents of the company. Chew alleged that this was done to remove documents as Ee wanted to suppress from the court documents that would contradict his evidence such as payment vouchers that would show where various payments by way of cash cheques went. Chew contended that it was Ee's insistence on payments being made in cash cheques that has resulted in those payments that he now alleges as spurious. Many cheques were made out in cash and the clerk and general worker were tasked to cash the cheques from the banks. Chew said that withholding of information by Ee of the documents that he had taken on that occasion was a material non-disclosure.

15 Chew said that another material non-disclosure relates to Asiana's losses each year since incorporation. Chew said that Ee was aware of all the accounts of Asiana as he had reviewed them and consulted his accountants about them. Ee also made it a point to sign off on the directors' reports and statements accompanying the audited accounts for 1991 through 2003. He was therefore fully aware of Asiana's financial position. Also, Ee was aware that although Asiana had incurred operating losses every year, this did not mean that it was an ailing concern. Asiana was an investment company that bought and sold properties for capital gains. It was not a trading company relying on operating revenues. Asiana was initially capitalised at \$283,333 before this was increased to \$1m, not by cash injection but by fixed asset revaluation reserve. This meant that the shareholders only came up with a capital of \$283,333 and the company was highly leveraged through financing. Asiana therefore incurred high interest expenses. Chew said that the operating losses that Ee expressed surprise at were largely constituted by interest payments. However by 2004, Asiana's net worth had swelled to more than \$6m. Chew said that Ee knew the company was viable and financially sound, yet chose to disclose not the entire audited financial statements but only the management profit and loss accounts which do not show the reserves and gains.

16 Chew said that yet another material non-disclosure on the part of Ee was the fact that he himself had approved the payments to Chew, Devi and Jayaraman that he complained of. Also, some of those payments were made to himself.

17 Chew said that the seeds of their dispute were sowed in 2003 when Asiana moved out of its premises at 76 Syed Alwi Road which it had bought for \$250,000 in 1992. This had proved to be a valuable acquisition and in 2003, when they were offered a rent of \$13,000 per month, they decided to move Asiana out to another of its properties to take advantage of the high rental yield. After the shift, Ee asked Jayaraman if he could buy over 76 Syed Alwi Road for \$1.5m. Chew felt that it was worth more than \$2m at the time, and told Ee that it was worth at least \$2.2m. As this was during the SARS period, Chew was confident that the value could only improve. He felt that so long as they could hold the property, they could make a tidy profit later. With this in mind he tried to refinance the loan with the bank at a lower interest rate. However Ee did not cooperate and was initially reluctant to sign the bank documents for this.

18 Chew also said that since 1997 Asiana had not made any further property purchases. Its strategy was to maintain its portfolio and sell at the right time. From 2002, Asiana had essentially relied on rental income and overdraft facilities to meet its cashflow requirements. However despite this, Ee had continued to propose regular payments to shareholders. Chew suspected that Ee was doing this to engineer a cash flow crisis in Asiana requiring it to liquidate its assets prematurely. This came to a head in mid-2005 when Ee made an offer to Jayaraman to purchase 76 Syed Alwi Road for

\$2.6m. Ee even offered Jayaraman a 2% commission on the sale instead of the usual 1%. But Chew and Jayaraman were against the sale as they felt the market was on the uptrend. Ee was upset about this and threatened to wind up Asiana. Chew and Jayaraman did not want this as it would mean the properties would be sold before they had reached optimal prices. They offered to buy over Ee's shares in Asiana. However Ee rejected this.

19 Jayaraman also filed an affidavit opposing the winding up. However it is not necessary for me for the purposes of my decision to delve into it.

Plaintiffs' affidavit in reply

20 Ee filed two affidavits in reply. In the most part he denied the allegations of Chew and Jayaraman. I am not concerned here with the disputed facts as this will be a matter for the trial court to settle in the hearing of the winding up application. I noted that in his affidavit in support of winding up, Ee had painted a picture of himself as an ingénue in the area of property development, at least in the early period of his relationship with Chew. In any event he had given the impression that he was not involved in the operations of Asiana after his health turned bad in 1998 and he relied on Chew and Jayaraman to run the company. However in his fourth affidavit, he had shown that he was personally involved in the transactions involving 6, 8, 10 Lorong 11 Geylang and had the expertise to turn the acquisition around despite the many problems faced. He had also painted a picture of a person who was sidelined by Chew and Jayaraman. Whether or not this is true will have to be determined at a later stage. However I note with some degree of consternation that Ee did not deny the July 2006 incident and indirectly admitted to removing company documents. This was what he said in his fourth affidavit filed on 28 August 2006:

166. In fact, even when I attended at the offices of [Asiana] to have sight of the [documents], many documents were already missing and unavailable.

167. It is now so convenient for [Chew, Devi and Jayaraman] to claim that the documents had gone missing. The fact is that the Defendants had never been able to produce any of the documents for reasons known to themselves.

168. When the police attended at the office premises, [Chew] did not report on missing documents.

169. Given that [Chew, Devi, Jayaraman] and even Sally Neo cannot be trusted to keep the documents, the best persons to deal with [Asiana's] matters are independent and reputable firms such as [the provisional liquidators].

21 Ee had crucially failed to disclose the fact that he had gone to the company's office in July 2006 and removed documents of the company. This disclosure would have presented a very different picture to the court hearing the *ex parte* application. It would have indicated to the court that he was not as helpless as he described himself to be. I was also somewhat perturbed at the manner in which he had brushed aside the incident in his fourth affidavit and failed to disclose what documents he had taken.

22 The documents were significant because the defendants alleged that Ee had misused the financial documents to give the impression that the company was incurring losses. Ee's explanation was that he could not rely on the valuations of the properties as an indication of the profitability of the company as they are unrealised and subject to a downturn in a volatile market. This statement was rather surprising, coming from someone who has been a property player for the last 15 years.

The entire object of Asiana had been to purchase property for resale at a profit. During the period that it held them, it did not expect them to turn a profit merely from the rental, especially with its high gearing. The failure to disclose the audited statements and the use, instead, of the Management Profit and Loss Account are clearly intended to lead the court into believing that Asiana was a losing venture.

23 In my view Ee had clearly misled the court into believing that Asiana was being bled by Chew and Jayaraman, hence the losses.

Conclusion

24 I therefore found that Ee had failed to fully disclose these matters and had misled the court when he made his *ex parte* application. For those reasons, I discharged the order of 26 July 2006 appointing Mr Ramasamy Subramaniam Iyer, Mr Goh Thien Phong and Mr Chan Kheng Tek from the firm of PricewaterhouseCoopers as provisional liquidators of Asiana.

25 I also ordered costs against Ee and an inquiry on damages. This is because had Ee made full disclosure, or had the court an opportunity to hear the defendants, the court would not have appointed provisional liquidators in view of the high expenses that are likely to be incurred. The company's assets lay in its properties and had very little cash. I was of the view that the interests of all parties could be preserved by the orders I had made to ensure that the net proceeds of sale be paid in escrow.

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