

Bounty Resources Armenia Ltd v Li Haidong
[2015] SGHC 188

Case Number : Suit No 1102 of 2014 (Registrar's Appeal No 114 of 2015 and Summons No 2282 of 2015)
Decision Date : 21 July 2015
Tribunal/Court : High Court
Coram : Woo Bih Li J
Counsel Name(s) : Edwin Lee, Wong Tjen Wee and Chia Xin Hui (Eldan Law LLP) for the plaintiff/respondent; Mark Cham (Lee & Lee) for the defendant/appellant
Parties : Bounty Resources Armenia Ltd — Li Haidong

Civil Procedure – judgment and orders

Civil Procedure – affidavits

21 July 2015

Woo Bih Li J:

Introduction

1 The present case concerns an appeal — Registrar's Appeal No 114 of 2015 ("RA 114/2015") — against the decision of an Assistant Registrar ("the AR") in Summons No 578 of 2015 ("SUM 578/2015") wherein the AR dismissed the application of the defendant, Li Haidong, to set aside a judgment granted in default of his appearance in the present suit ("the Default Judgment").

2 On 12 May 2015, two days before the present appeal was to be heard, the defendant filed Summons No 2282 of 2015 ("SUM 2282/2015") seeking the leave of court to file further affidavits.

3 I heard SUM 2282/2015 and RA No 114/2015 together and dismissed both the application for leave to file further affidavits and the appeal. The defendant has filed an appeal to the Court of Appeal ("CA"). I now set out the grounds for my decision.

Background facts

4 On 8 June 2011, the plaintiff, Bounty Resources Armenia Ltd, entered into a facility arrangement with Bounty Investment Holdings Ltd ("BIHL") wherein the plaintiff provided BIHL with a loan facility up to a maximum amount of US\$6,000,000 ("the Facility Agreement"). BIHL is a 10% shareholder of the plaintiff; the other 90% shareholding is held by Giant Global Development Limited ("GGDL"), [\[note: 1\]](#) which is in turn owned by an entity referred to by the defendant simply as Fortune Oil. [\[note: 2\]](#) Under the Facility Agreement, the defendant was the guarantor for the loan. The defendant was at the material time, and still is, a director of both BIHL and the plaintiff.

5 As one of the main arguments of the defendant is that the present suit was commenced without the authority of the directors of the plaintiff, it would be useful at this juncture to set out the composition of the plaintiff's board of directors. Apart from the defendant, the plaintiff has

another director — Michael David Jones (“Jones”). Jones was appointed to be a director of the plaintiff by GGDJ on 21 October 2010 while the defendant was appointed by BIHL on 3 June 2010. It should also be noted that at different times in the past, there were other individuals who had served on the plaintiff’s board of directors. [\[note: 3\]](#) At the time of the hearing, there was a dispute as to whether, apart from the defendant and Jones, one Tian Jun was also a director of the plaintiff.

6 Shortly after the Facility Agreement was entered into, BIHL requested for a drawdown of US\$6m. The plaintiff transferred this amount to BIHL on 20 June 2011. [\[note: 4\]](#) Under Schedule 6 of the Facility Agreement, the repayment date was three years from the date of drawdown. This would be 20 June 2014. However, in early 2013, the plaintiff, BIHL and the defendant entered into discussions for the earlier repayment of the loan. [\[note: 5\]](#) In February 2013, the parties agreed to a payment schedule. Apart from some payments amounting to US\$300,000 being made, [\[note: 6\]](#) BIHL did not make any further repayment of the loan. Further discussions were entered into for the full repayment of the loan. On 15 May 2014, the plaintiff, BIHL and the defendant entered into a deed of repayment which stipulated that the remaining loan amount due with accrued interest was to be paid in two tranches on 30 June 2014 and 30 July 2014 (“the Deed of Repayment”). [\[note: 7\]](#) BIHL, however, again failed to repay the outstanding loan amount. As a result, the plaintiff commenced the present suit against the defendant on 16 October 2014 claiming the sum of US\$5.7m with interest of US\$952,029. [\[note: 8\]](#)

7 The defendant failed to enter an appearance and the Default Judgment was therefore entered against him on 31 October 2014. Three months later, the defendant filed SUM 578/2015 on 4 February 2015 to set aside the Default Judgment. The AR dismissed the defendant’s application on 7 April 2015.

SUM 2282/2015

The defendant’s case

8 At the hearing of the defendant’s appeal before me, the defendant had filed SUM 2282/2015 to seek leave to admit three affidavits as further evidence:

- (a) Hugo Sam Moore Robertson’s (“Robertson”) affidavit;
- (b) To Wai Keung’s (“To”) affidavit; and
- (c) the defendant’s 3rd affidavit dated 12 May 2015.

9 The defendant argued that the conditions to admit fresh evidence as laid down in *Ladd v Marshall* [1954] 1 WLR 1489 (“*Ladd v Marshall*”) need not be applied in the present case since the hearing at first instance did not resemble that of a trial. He further submitted that the further affidavits should be admitted, notwithstanding the absence of special reasons, because the further evidence was material.

10 With respect to Robertson’s and To’s affidavits, the defendant contended that they contained expert evidence on issues of foreign law and would assist the court since one of his arguments was that the suit had been commenced in breach of the procedural requirements set out in the plaintiff’s Amended and Restated Articles of Association (“ARAA”) and the Joint Venture Agreement between the plaintiff, BIHL, the defendant, GGDJ and two other parties (“JVA”). According to the defendant, Robertson’s expert evidence was relevant because it related to British Virgin Islands (“BVI”) law, which was the law governing the incorporation of the plaintiff, and was therefore the law governing

the interpretation of the ARAA. To's expert evidence was relevant because it related to Hong Kong ("HK") law which was the law governing the JVA.

11 As for the defendant's 3rd affidavit, the defendant said that it was material because it alleged that, from 2012, the defendant had requested a copy of the plaintiff's bank statements. [\[note: 9\]](#) As a director of the plaintiff, he should have been regularly informed of the plaintiff's accounts and records. [\[note: 10\]](#) However, he was only given a copy of some of the plaintiff's bank statements on 29 April 2015. [\[note: 11\]](#) He then realised that the plaintiff had in fact registered a profit in 2012 but had not declared a dividend. [\[note: 12\]](#) He said that had he known of those profits, he would not have entered into the Deed of Repayment on 15 May 2014, nor would partial repayments of the loan have been made to the plaintiff. This was because under cl 8.2 of the Facility Agreement, BIHL was entitled to request that the repayment of the loan be deferred for two years if the plaintiff fails to declare a dividend notwithstanding that at the relevant time it has sufficient distributable profits available to do so. [\[note: 13\]](#)

12 The defendant also alternatively submitted that even if the *Ladd v Marshall* conditions were applicable, they had been fulfilled in the present case.

The plaintiff's case

13 The plaintiff contended that Robertson's affidavit should not be admitted as the defendant had previously been given two opportunities by the AR to file an affidavit from a lawyer in BVI. He, however, failed to do so. As for To's affidavit, the plaintiff similarly contended that the defendant could have obtained this affidavit evidence much earlier but had omitted to do so.

14 The plaintiff further contended that the principles of interpretation, whether of statutory provisions or contractual provisions, are the same in Singapore as in BVI and in HK.

15 As for the 3rd affidavit of the defendant, the plaintiff similarly contended that there was ample time for the defendant to have adduced the affidavit prior to the hearing before the AR. The plaintiff alleged that the defendant only made requests for the bank statements after the hearing before the AR (and not since 2012).

16 The plaintiff also highlighted that the Deed of Repayment was signed by the defendant on 15 May 2014 and that his requests for the accounts were made only after he had signed the Deed of Repayment. No cause of action arose from his allegation that he would not have signed the Deed of Repayment had he known of the profits made by the Plaintiff.

My decision

17 With respect to the law on adducing fresh evidence in an appeal from a registrar to a judge in chambers, the case of *WBG Networks (S) Pte Ltd v Sunny Daisy Ltd* [2007] 1 SLR(R) 1133 is instructive. There, the CA considered the test to be applied for adducing fresh evidence in a Registrar's Appeal *vis-à-vis* a summary judgment in the light of *Ladd v Marshall* [1954] 1 WLR 1489 where the court said (at 1491):

... To justify the reception of fresh evidence ... three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be

such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

18 The CA was of the view that these conditions did not strictly apply to a summary judgment and said at [14]–[15] that:

14 A party wishing to adduce further evidence before the judge in chambers in cases where the hearing at first instance did not possess the characteristics of a trial might still have to persuade the judge hearing the matter that he had overcome all three requirements of *Ladd v Marshall* if he were to entertain any hope of admitting the further evidence because the judge was *entitled*, though not *obliged*, to employ the conditions of *Ladd v Marshall* to help her decide whether or not to exercise her discretion to admit or reject the further evidence. In such a case, if the defendant could not persuade the judge that the conditions, if applied, would result in his favour, then it would be unlikely that the judge would allow his application to adduce the fresh evidence.

15 Reverting to the facts before this court, as the matter arose from a summary judgment application, the judge below was, strictly speaking, not obliged to apply the second and third conditions of *Ladd v Marshall*. Nonetheless, we are of the opinion that she was, nonetheless, entitled to apply the second and third conditions in *Ladd v Marshall* as part of her decision process concerning the application to adduce further evidence. As was observed in *Lassiter*, at [25] (reproduced at [10] above), given that the second and third conditions of *Ladd v Marshall* are not magical pronouncements capable of application only in the most unique of circumstances but simple and sensible directions which should be applied in most situations, we do not see how the appellant could reasonably mount any argument suggesting that neither condition was applicable on the facts. ...

[emphasis in original]

19 Here, I was similarly not obliged to apply the conditions in *Ladd v Marshall* as the hearing at first instance did not possess the characteristics of a trial (*ie*, it was to set aside a default judgment). Nevertheless, I took the view that the conditions in *Ladd v Marshall* were useful factors to consider in determining whether I should grant leave for the fresh evidence to be adduced.

20 First, with respect to Robertson’s affidavit, the defendant pointed out several salient paragraphs of Robertson’s opinion (which was annexed to the affidavit) that discussed the BVI Business Companies Act (No 16 of 2004) (“BVIBCA”). They were specifically, paras 3.8, 4.6, 4.10 and 4.13 of the opinion. Upon closer examination of the points made in these paragraphs, I took the view that they were not such points which required an expert to shed light upon. I address each in turn.

21 At para 3.8 of Robertson’s opinion, he cited the BVI High Court decision of *Chang Ho Kwok David and anor v Winbless Inc and anor* BVIHC (Com) No. 149 of 2013 to make the point that a single director was not entitled to convene a meeting of members on his own initiative since s 82(2) of the BVIBCA recognises that it is for the “directors” to comply with that obligation. It was not for a single director, in a case where the board has other members who have not been consulted on the matter, to convene a meeting on his own. This was a point which the defendant’s counsel could have made to me without the adducing of expert evidence. The defendant was simply relying on a literal and textual interpretation of s 82(2) of the BVIBCA, an interpretation which was not contested by the plaintiff. Expert evidence to establish this point was unnecessary.

22 At paras 4.6 and 4.10 of Robertson’s opinion, provisions of the BVIBCA were simply cited. Paragraph 4.13 of his opinion stated that the BVIBCA is silent on ratification and that common law

decisions of the English Courts were of highly persuasive authority. Again, these were points which did not require the substantiation or explanation of an expert as they were not contested.

23 Secondly, with respect to To's affidavit, that affidavit enclosed an opinion on various points.

24 The first point addressed by To's opinion was whether the terms of the JVA can override the terms of the ARAA. The JVA is governed by HK law. However, To's opinion simply applied common law principles of interpretation and there was nothing in his opinion which suggested that such principles as applied in HK were different from those applicable in Singapore.

25 The second point addressed by To's opinion was whether cl 8.2 of the Facility Agreement applied so that the loan was not due and payable yet. I will set out the terms of cl 8.2 later. For the time being, I need only say that there was no dispute on the interpretation of cl 8.2 or the principles of interpretation as applied in HK.

26 In the circumstances, To's opinion was not material.

27 I come now to the 3rd affidavit of the defendant. This affidavit relied on cl 8.2 of the Facility Agreement. I would add that cl 8.2 should be read with cl 8.3. These provisions stated:

8.2 If, whilst the Loan is outstanding, the Lender fails to declare a dividend notwithstanding having at the relevant time sufficient distributable profits available for that purpose, the Borrower shall be entitled to request that the Repayment Date be extended by a period of two years by giving notice to the Lender (the "Extension Request") no more than 90 days and no fewer than 60 days before the Repayment Date. The Extension Request shall be made in writing, be unconditional, irrevocable and binding on the Borrower.

8.3 Upon receipt of an Extension Request (in form and substance satisfactory to the Lender) the Repayment Date shall be extended to the Extended Repayment Date. The Lender shall promptly inform the Borrower of the extension of the Repayment Date to the Extended Repayment Date.

28 The defendant said that he had recently received on 29 April 2015 from Jones, five pages of the plaintiff's bank statements dated 31 December 2011, 31 December 2012, 31 December 2013, 31 March 2014 and 31 March 2015. He was shocked to learn from these bank statements that the plaintiff had in fact registered a profit in 2012 of US\$1,168,761 but had not declared a dividend. He said that had he been aware of this, BIHL, as the borrower, would have exercised its entitlement to extend the loan repayment date by two years, *ie*, till June 2016 (as apparently, the original loan was repayable in June 2014 before the negotiations in 2013 and 2014 to reschedule the repayment schedule).

29 It was not in dispute that BIHL did not make the Extension Request. The defendant's point was that he would have made the said request had he learned that the plaintiff had made a profit in 2012.

30 However, the obstacle facing the defendant was that the plaintiff was not obliged to disclose this information to him even if his allegation about the profit was true. Secondly, a question arose as to whether he had even asked for such information in 2012 as he alleged.

31 The defendant's 3rd affidavit exhibited various emails in 2015. In an email from the defendant to Jones dated 22 April 2015, he said he spoke to one Tee Kiam Poon ("Tee") a number of times requesting for the plaintiff's account statements since 2012 but his request was ignored.

32 On 24 April 2015, Jones replied to say that he had checked with Tee who said that no such request had been made.

33 The defendant sent an email to Jones on 27 April 2015. He maintained that he did request for the account statements in 2012 but Tee appeared to have forgotten about his requests. Yet, he also said in that email, "[t]he salient point is that you have been provided with my written requests of 15 and 22 April 2015[and] yet have failed to act upon them." This suggested that he was relying on his requests made in 2015 and not any request made in 2012.

34 Furthermore, as the defendant had himself said, if he had known about the profit in 2012, he would not have entered into the Deed of Repayment in 2014. However, that allegation demonstrated that if he had truly made his request in 2012 and if he had really wanted to read the plaintiff's bank account statements in 2012, he would have insisted on receiving them before he agreed to anything in relation to the repayment of the loan. Yet, in 2013 and in 2014, he agreed to certain repayment schedules as mentioned above.

35 In my view, his allegation about a request having been made in 2012 was not credible. Furthermore, as mentioned, the fact was that BIHL did not make any request pursuant to cl 8.2 to extend the repayment date. On the contrary, it agreed twice to reschedule the repayment of the loan. The first rescheduling already meant that BIHL would begin repaying the loan earlier than it was originally obliged to under Schedule 6 of the Facility Agreement.

36 In the circumstances, the defendant's 3rd affidavit was not credible. Accordingly, I dismissed the defendant's application for leave to adduce the three further affidavits.

RA 114/2015

37 I now set out the law with respect to the setting aside of default judgments. Order 13 r 8 of the Rules of Court (Cap 322, R5, 2014 Rev Ed) provides that "[t]he Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order".

38 In *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR(R) 907, the CA observed at [60] that in deciding whether to set aside a regular default judgment, the question for the court is whether the defendant can establish a *prima facie* defence in the sense of showing that there are triable or arguable issues. The CA also added at [65] that although the merits of the defence are a highly significant consideration in determining whether to set aside a regular default judgment, it is not the sole consideration. The defendant's explanations for both the default and for any delay, as well as any prejudice to the other party, are also relevant considerations in the balancing exercise.

39 In the defendant's 1st affidavit of 4 February 2015 filed to support his application to set aside the Default Judgment, he mentioned two grounds:

(a) That the plaintiff's lawyers were not authorised to commence the present action against him as they were acting on the instructions of Jones only, and Jones was only one of two directors of the plaintiff's board of directors.

(b) Jones had agreed with the defendant that the plaintiff would not continue with legal proceedings against the defendant pending the sale of a ruby.

40 In the defendant's 2nd affidavit of 5 April 2015, he raised the following additional grounds:

(c) Fortune Oil was supposed to invest US\$500m in three iron ore mines in Armenia. The profits from these operations would be paid to the plaintiff and BIHL in the form of dividends and would be more than sufficient to repay the loan of US\$6m when it became due. [\[note: 14\]](#)

(d) If dividends were not paid to BIHL, BIHL would be automatically entitled to the right to extend the loan repayment date by two years. [\[note: 15\]](#)

(e) If there was no initial public offer of another company called Caspian Bounty Steel Limited ("CBSL") after five years, Fortune Oil would take over BIHL's interest in the plaintiff at fair market value and the sale proceeds would be used to pay the loan with the balance to be paid to BIHL. Arising from (d) and (e) above, the US\$6m loan was not meant to be repaid and neither was the plaintiff to enforce the defendant's guarantee. [\[note: 16\]](#)

(f) GGDL was given 15% of the shares in the plaintiff in exchange for the US\$6m loan and it would be unconscionable for the plaintiff to demand repayment of the loan. [\[note: 17\]](#)

41 In the written submissions for the defendant in respect of the appeal, only four grounds were relied on:

(a) lack of authority;

(b) the defendant would not have entered into the Facility Agreement had it not been for the representations made by the plaintiff about investing money in three Armenian ore mines;

(c) BIHL would have extended the loan repayment date had the plaintiff disclosed there were profits available for distribution; and

(d) the understanding was that the US\$6m loan was not meant to be repaid by BIHL or for the defendant's guarantee to be reinforced (see (d) and (e) of [40] above).

42 The argument that BIHL would have extended the loan repayment date if the plaintiff had disclosed there were available profits for distribution to BIHL was based on cl 8.2 of the Facility Agreement, which was raised in the defendant's third affidavit that I had decided not to admit. I have addressed that argument and will not say any more about it.

43 The argument that the defendant would not have entered into the Facility Agreement had it not been for the plaintiff's representation about investing money in three Armenian ore mines was without merit. It was an argument which was raised too late in the day without explanation as to when the plaintiff allegedly came to realise that there was no investment in the ore mines and why he did not complain earlier. There was also no suggestion by the defendant that BIHL had used the US\$6m for some purpose for which the defendant was unaware.

44 The argument that BIHL would be automatically entitled to extend the repayment date if no dividend was paid to BIHL was also without merit. It was contrary to cl 8.2 of the Facility Agreement which the defendant was belatedly trying to rely on in his 3rd affidavit. Under that provision, BIHL had to give a written request to extend the repayment date.

45 The argument that Fortune Oil would take over BIHL's interest in the plaintiff if there was no initial public offer of CBSL was also without merit. It was contrary to the facts and was also raised too late in the day. If indeed the loan was never intended to be repaid by BIHL, the defendant would

not have entered into two rounds of negotiations in 2013 and in 2014 about repayment of the loan by BIHL. Likewise, after the writ of summons was served on the defendant, he would not have asked for time to make payment in reliance on a ruby if indeed his guarantee was not to be enforced. His conduct contradicted his argument and showed his argument to be without merit. Likewise, there was no merit in the argument that it was unconscionable for the plaintiff to demand repayment of the loan.

46 The defendant's main argument was the lack of authority to commence legal proceedings against him. He relied on Art 45.1 of the plaintiff's ARAA which provided that "the business and affairs of the Company shall be managed by, or under the direction or supervision of, the [Board of Directors]." He also referred to Art 57 of the ARAA which stipulated that the quorum necessary for the transaction of business at a meeting of directors shall be two directors comprising of at least one BIHL-appointed director and at least one GGDL-appointed director. [\[note: 18\]](#) Jones, as a single GGDL-appointed director was therefore not authorised to unilaterally commence the suit on behalf of the plaintiff.

47 The plaintiff relied on various arguments to address the lack of authority argument. Its strongest argument was its reliance on the *Duomatic* principle. In *Ng Joo Soon (alias Nga Ju Soon) v Dovechem Holdings Pte Ltd and another suit* [2011] 1 SLR 1155, the High Court said at [47]:

The manner of characterisation of the consent does not matter. In *EIC Services Ltd v Phipps* [2003] BCC 931 (reversed by the Court of Appeal on other grounds (see *EIC Services Ltd v Phipps* [2005] 1 WLR 1377)), Neuberger J stated at [122] that:

The essence of the *Duomatic* principle ... is that, where the articles of a company require a course to be approved by a group of shareholders at a general meeting, that requirement can be avoided if all members of the group, being aware of the relevant facts, either give their approval to that course, or so conduct themselves as to make it inequitable for them to deny that they have given their approval. Whether the approval is given in advance or after the event, whether it is characterised as agreement, ratification, waiver, or estoppels, and whether the members of the group give their consent in different ways at different times, does not matter.

48 Although the *Duomatic* principle arose in a case where there was an absence of approval in a general meeting of shareholders, and not a meeting of directors, the plaintiff submitted that the principle was also applied to decisions which ought to have been taken by a board of directors. This was done in *Ho Kang Peng v Scintronix Corp Ltd (formerly known as TTL Holdings Ltd)* [2014] 3 SLR 329 although the *Duomatic* principle was not specifically cited. In that case, the CA said at [51]–[53]:

51 In determining whether there has been authorisation of an act of a director by the company, the primary rules of attribution ought to apply. These may be found in the company's articles of association, or else in general principles of company law.

52 One such general principle is that there is a need for collective action of the board of directors in managing the business of the company. The authorisation of a director's acts should be done by way of a resolution of the board of directors at a meeting convened and conducted in accordance with the company's constitution. In addition, the informal assent of all the directors of a company would suffice as well (see this court's decision in *SAL Industrial Leasing Ltd v Lin Hwee Guan* [1998] 3 SLR(R) 31, where it was held that where both the directors of a company gave their assent to an agreement but only one of them signed the agreement on behalf of the

company, such assent was binding on the company *vis-à-vis* third parties). ... In short, both a decision of a majority of directors at a board meeting and an informal decision taken by *all* of the directors of a company are attributable to the company and would be binding on the company.

53 In the present case, it is not disputed that there was never any formal board approval of the Bontech Agreement and the Payments, or even of the outstation allowance arrangement. Therefore, the Appellant must show that all the directors of the Company at the material time consented or acquiesced to the Bontech Agreement and the Payments.

49 Was there consent or acquiescence by the defendant to the action? It was the defendant's own contention that after the writ of summons was served on him, he had negotiated with Jones for time to make payment, and Jones had agreed that the plaintiff would not continue with the action pending the sale of a ruby belonging to a friend of the defendant, the sale proceeds of which would be used to repay the loan.

50 Jones accepted that he had had discussions with the defendant about stopping the action commenced by the plaintiff. His version however was that he had only informed the defendant that the plaintiff could stop the action at any point in time but he had not agreed to do so until full repayment.

51 Therefore, on both versions, the parties had acted on the premise that Jones had the authority to give instructions on behalf of the plaintiff to commence the action and also to stop the action. The defendant, as a director of the plaintiff, was aware that there was no formal board meeting or resolution for the commencement of the action and never objected to the action on the ground of lack of authority until after the Default Judgment was entered against him. On the contrary, he proceeded on the premise that the action was commenced with the requisite authority. It does not matter whether this is treated as consent or acquiescence or estoppel by convention.

52 The plaintiff also relied on a directors' resolution of the plaintiff dated 10 June 2011 in which the plaintiff's "directors and the secretary" were authorised to do all things necessary to ensure compliance, completion and implementation of the Facility Agreement. I did not think that that resolution assisted the plaintiff. In terms, it refers to the "directors" of the plaintiff in the plural and not in the singular. The plaintiff said that that word should refer to a director in the singular because it was unnecessary to authorise all the directors to implement the Facility Agreement as they, collectively, already could do so. However, that did not necessarily mean that the resolution should be interpreted to refer to any director.

53 Secondly, I did not think that the authority to do all things necessary to "implement" the Facility Agreement meant the enforcement of the Facility Agreement as the plaintiff submitted. The word "implement" meant to give effect or to carry out the agreement in so far as the loan was concerned. That has been implemented.

54 The plaintiff also relied on steps taken subsequent to the commencement of the action to ratify the action but it was doubtful if these steps were sufficient and the point was not pressed by the plaintiff. It is not necessary for me to set out in detail the steps taken by the plaintiff. Neither was it necessary for me to conclude whether one Tian Jun was a director of the plaintiff (see [5] above).

55 The plaintiff also relied upon *Marshall's Valve Gear Company, Limited v Manning, Wardle & Co, Limited* [1909] 1 Ch 267 to argue that even if there existed a deadlock within the board of directors, and the proper procedure would have been to call for a shareholder's meeting to determine the issue, such a process could be dispensed with since it was a foregone conclusion that a majority of the

shareholders (*ie*, GGDL who holds 90% of the shareholding) would have agreed to the commencement of the suit. It is not necessary for me to address this argument in view of my conclusion that the defendant was precluded from raising the lack of authority point as stated above.

56 As regards the defendant's allegation that Jones had agreed not to take any further step in the action pending the sale of the ruby, this was not pursued in the defendant's written submission. In any event, it was clear from the email of Jones dated 22 October 2014, which the defendant was relying on, that all he said was that the plaintiff "can" stop the action at any point in time. He did not say that the plaintiff would do so. Indeed he informed the defendant "to progress all steps necessary to ensure the repayment of the overdue loan as soon as possible". It was also telling that after the Default Judgment was served on the defendant on 4 November 2014 (according to the plaintiff) or 7 November 2014 (according to the defendant), the defendant did not express surprise at the judgment or raise the alleged agreement by Jones not to take any further step. The first two letters from his lawyers, Lee & Lee, dated 24 November 2014 and 5 December 2014 were only on the question about authority to commence the present action.

57 In the circumstances, I dismissed the defendant's appeal with costs.

[\[note: 1\]](#) Jones' affidavit, 23/3/15 ("Jones' affidavit"), para 6(a)

[\[note: 2\]](#) Defendant's 1st affidavit, 4/2/15 ("Defendant's 1st affidavit"), para 6

[\[note: 3\]](#) Jones' affidavit, pp 32–33

[\[note: 4\]](#) Jones' affidavit, para 8

[\[note: 5\]](#) Jones' affidavit, para 23

[\[note: 6\]](#) Jones' affidavit, para 9

[\[note: 7\]](#) Statement of Claim, para 13

[\[note: 8\]](#) Jones' affidavit, para 10

[\[note: 9\]](#) Defendant's 3rd affidavit, 12/5/15 ("Defendant's 3rd affidavit"), para 5

[\[note: 10\]](#) Defendant's 3rd affidavit, para 8

[\[note: 11\]](#) Defendant's 3rd affidavit, para 10

[\[note: 12\]](#) Defendant's 3rd affidavit, para 12

[\[note: 13\]](#) Defendant's 3rd affidavit, para 23

[\[note: 14\]](#) Defendant's 2nd affidavit, 5/4/15 ("Defendant's 2nd affidavit"), para 17

[\[note: 15\]](#) Defendant's 2nd affidavit, para 21

[\[note: 16\]](#) Defendant's 2nd affidavit, paras 21-22

[\[note: 17\]](#) Defendant's 2nd affidavit, para 22

[\[note: 18\]](#) Defendant's 1st affidavit, para 15

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