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Foo Peow Yong Douglas

v

ERC Prime II Pte Ltd

[2017] SGHC 299

High Court — Companies Winding Up No 143 of 2017
Chua Lee Ming J
19 September 2017

Companies — Winding up

16 November 2017

Chua Lee Ming J:

Introduction

1 The plaintiff, Mr Douglas Foo Peow Yong (“Douglas Foo”), applied to wind up the defendant, ERC Prime II Pte Ltd (“the Company”), on the ground that

(a) the directors of the Company had acted in the affairs of the Company in their own interests rather than in the interests of the members as a whole, and/or in such manner which appeared to be unfair or unjust to other members (s 254(1)(f) of the Companies Act (Cap 50, 2006 Rev Ed) (“the CA”)); and/or

(b) it was just and equitable to wind up the Company (s 254(1)(i) of the CA).

2 On 19 September 2017, I dismissed the application and Douglas Foo has appealed against my decision.

Background

3 In 2009/2010, Mr Ong Siew Kwee (“Andy Ong”) invited Douglas Foo to invest in two projects – the acquisition of a property at 200 Middle Road, Singapore, formerly known as the Big Hotel (“the Big Hotel Project”) and the acquisition of a property at 470 North Bridge Road, Singapore, now known as the Bugis Cube (“the Bugis Cube Project”). Andy Ong set up a complex structure using special purpose vehicles (“SPVs”) to hold (directly or indirectly) the investment in each project. One of these SPVs was the Company which was incorporated on 30 November 2010 for purposes of the Big Hotel Project.

4 Douglas Foo invested in the Big Hotel Project by acquiring 19.8% of the shareholding in the Company upon its incorporation. The other shareholders of the Company included ERC Holdings Pte Ltd (“ERC Holdings”) and numerous other individual shareholders.¹ At the time of the hearing before me, Andy Ong and Mr Ong Han Boon (“Han Boon”) were the directors of the Company.²

5 The Company was a shareholder (32.24%) of ERC Unicampus Pte Ltd (“ERCU”) which had acquired the Big Hotel in late 2010. The other shareholders of ERCU were ERC Holdings and various other SPVs set up by Andy Ong. ERC Holdings’ acquisition of shares in ERCU was the subject-matter of one of Douglas Foo’s complaints in the present proceedings (see [19(a)] below).

6 Sakae Holdings Ltd (“Sakae”), a listed company (of which Douglas Foo was a director and chairman of the board), invested in the Bugis Cube Project by acquiring 24.69% of the shareholding in a joint venture company, Griffin

Real Estate Investment Holdings Pte Ltd (“GREIH”). The other 75.31% in GREIH was held by Gryphon Real Estate Investment Corporation Pte Ltd (“GREIC”). GREIH was an SPV incorporated for purposes of the Bugis Cube Project.

7 As mentioned earlier, ERC Holdings was a shareholder of the Company. In addition, ERC Holdings was also the ultimate holding company of GREIC and ERCU, among others. Andy Ong incorporated ERC Holdings on 13 May 1999 and was the substantial shareholder until 15 May 2017 when he transferred all his shares (91.85%) to his sister, Ms Ong Geok Yen (“Geok Yen”). Andy Ong was also a director of ERC Holdings from incorporation until 15 February 2016 when he was replaced by Geok Yen as director. Han Boon was a shareholder (3.66%) of ERC Holdings from 6 November 2012 until 12 July 2016 and a director from 10 December 2010 to 15 February 2016. At the time of the hearing before me, the directors of ERC Holdings were Geok Yen and Ms Ong Geok Hong Lydia who was also Andy Ong’s sister.

8 The Big Hotel property was subsequently sold for \$203m and the sale completed on 17 November 2015. The proceeds of sale have been returned to the ultimate individual shareholders of the Company save for:

- (a) a security deposit returned by the purchaser of the Big Hotel to ERCU; and
- (b) the sum of \$33.45m held in escrow (“the Escrow Sum”) by M/s Rajah & Tann Singapore LLP who are the solicitors for the Company.

9 The Big Hotel Project and the Bugis Cube Project spawned several other legal proceedings apart from the present case. These other proceedings included the following:

- (a) Suit No 1098 of 2013 (“S1098/2013”);
- (b) Originating Summons No 924 of 2015 (“OS924/2015”);
- (c) Originating Summons No 471 of 2017 (“OS471/2017”); and
- (d) Originating Summons No 1004 of 2017 (“OS1004/2017”).

10 S1098/2013 was a minority oppression action by Sakae against GREIC, ERC Holdings, ERCU, Andy Ong, Ho Yew Kong and Han Boon, among others. Sakae made numerous allegations against Andy Ong, Ho Yew Kong and Han Boon for wrongfully diverting moneys from GREIH over the course of seven transactions. In brief, the High Court found that there was minority oppression and made several orders including an order that GREIH be wound up – see *Sakae Holdings Ltd v Gryphon Real Estate Investment Corporation Pte Ltd and others* [2017] SGHC 73. The High Court judgment is currently under appeal.

11 OS924/2015 was an application by Mr Yap Chew Loong (“Yap”), whom the Company alleged was Douglas Foo’s associate, for, among others, a declaration that the directors of ERCU provide a proper account of the investment relating to the Big Hotel Project. Yap was a shareholder of the Company which in turn was a shareholder of ERCU but Yap himself was not a shareholder of ERCU. The High Court found that there was no reason to disregard the doctrine of separate legal personality and dismissed Yap’s application on the ground that he did not have the necessary standing.

12 In OS471/2017 the liquidators of GREIH obtained an injunction restraining ERCU from dealing with the Escrow Sum pending the full disposal of GREIH’s claim in OS1004/2017 that it was entitled to the Escrow Sum.

Whether the Company should be wound up

13 It was not disputed that the Company had, and has, no operations and that it has no other assets except a claim to a share of the security deposit held by ERCU and a potential claim to a share of the Escrow Sum if or to the extent that GREIH's claim against ERCU for the same fails (see [8] and [12] above). The Company confirmed that it had no objections to being wound up after the dispute over the Escrow Sum had been resolved.

14 However, Douglas Foo pressed on with his application to have the Company wound up in the present proceedings. The crux of Douglas Foo's case, as argued before me, was that

- (a) the substratum of the Company had been lost because the Company had been set up as an SPV solely to participate in the Big Hotel Project through holding shares in ERCU and the Big Hotel property had since been sold; and
- (b) he had no confidence that the directors of the Company, *ie*, Andy Ong and Han Boon, would ensure the proper distribution of its share of the Escrow Sum (if any).

Loss of substratum

15 A company's substratum is lost if its main objects, for which it was set up, can no longer be achieved or have been abandoned by the company: *Walter Woon on Company Law* (Tan Cheng Han, SC gen ed) (Sweet & Maxwell, Rev 3rd Ed, 2009) at paras 17.54 and 17.58 and *Chua Kien How v Goodwealth Trading Pte Ltd and another* [1992] 1 SLR(R) 870 at [15].

16 It was not disputed that the Company was an SPV set up solely to participate in the Big Hotel Project through holding shares in ERCU. Clause 2.3 of a Shareholders' Agreement dated 21 February 2011 ("the Shareholders' Agreement") provided that the "principal business of the Company shall be to invest in the project of acquiring, converting and managing up to 52.5% of [the Big Hotel] through [ERCU]".³

17 The Company argued that the logical conclusion to this endeavour would be the distribution of the returns from the investment in the Big Hotel Project to its shareholders. Therefore, according to the Company, it had not lost its substratum because the dispute over the Escrow Sum had not been resolved. I agreed with the Company. The objective of investing in the Big Hotel Project must include the recovery and distribution of the returns from that investment.

Loss of confidence

18 Loss of confidence in the directors on account of their lack of probity in the conduct and management of the company affairs can justify a winding up on the "just and equitable" ground: *Chong Choon Chai and another v Tan Gee Cheng and another* [1993] 2 SLR(R) 685 at [9]. However, the Company has no operations and its only outstanding affairs were the distribution of its share of the security deposit and the Escrow Sum (if any) upon receipt of the same from ERCU. The Company had confirmed that it had no objections to being wound up after the dispute over the Escrow Sum was resolved.

19 Douglas Foo submitted that he had no confidence that Andy Ong and Han Boon would properly distribute the Company's share of the Escrow Sum (if any) to the Company's shareholders. Douglas Foo went so far as to say that he believed that Andy Ong and Han Boon may siphon away the Company's

share of the Escrow Sum. Douglas Foo submitted that this was a reasonable inference to be drawn from the following actions taken by Andy Ong and Han Boon in the past:

(a) The unauthorised grant of a share option by ERCU to ERC Holdings on 31 May 2011. In October 2013, ERC Holdings exercised a portion of the option and this resulted in a dilution of the Company's shareholding in ERCU. At all material times, Andy Ong and Han Boon were shareholders and directors of ERC Holdings and Andy Ong was the substantial shareholder.

(b) The payment of management fees by ERCU to its management company, Gryphon Estate Management Pte Ltd ("GEM") in excess of what had been agreed pursuant to a management agreement dated 21 September 2010 between ERCU and GEM. On record, GEM is wholly owned by ERC Holdings although the plaintiff has claimed ownership to 6.5% of the shareholding in GEM.

(c) The payment of excessive management fees by ERCU's wholly owned subsidiary company, Big Hotel (Singapore) Pte Ltd ("BHS"), to the alleged manager of the Big Hotel, Gryphon Hospitality Services Pte Ltd ("GHS"). GHS was owned by ERC Consulting Pte Ltd which in turn was wholly owned by ERC Holdings.

(d) Exorbitant interest rates charged by ERC Holdings to ERCU for a loan given to ERCU which had been agreed to be "interest-free".

Douglas Foo submitted that the above actions benefited Andy Ong since he was the substantial shareholder in ERC Holdings.

20 In his supporting affidavit, Douglas Foo also referred to certain findings made by the High Court in S1098/2013 against Andy Ong, Han Boon and Ho Yew Kong.⁴ However, these were not relied on during submissions. In any event, as the Company submitted, the findings in S1098/2013 related to the Bugis Cube Project and not the Big Hotel Project.

21 The Company disputed Douglas Foo's allegations set out at [1918] above. The Company also argued that Andy Ong and Han Boon's alleged wrongdoings in relation to ERCU had been fully litigated in OS924/2015, and the Court had found that there was no fraud, deceit, concealment, evasion or wrongdoing to justify lifting the corporate veil as between ERCU and the Company. I had some doubt as to the extent that the Company could rely on OS924/2015. However, I did not have to decide this issue because I concluded that it was unnecessary for me to make any findings on the specific allegations of misconduct made by Douglas Foo.

22 Even assuming that the allegations of misconduct were established, I disagreed with Douglas Foo that the past conduct of Andy Ong and Han Boon meant that they would siphon away the Company's share of the Escrow Sum (assuming GREIH fails in its claim) instead of distributing the same to the Company's shareholders. In my view, Douglas Foo's fears were grossly exaggerated. It was not disputed that the more substantial portion of the proceeds from the sale of the Big Hotel property had already been distributed by ERCU and that Andy Ong and Han Boon (as directors of the Company) had in turn distributed the Company's share to its shareholders including Douglas Foo. Besides, the dispute between GREIH and ERCU over the Escrow Sum was now out in the open. I had no doubt that Douglas Foo could and would be monitoring the progress of GREIH's claim to the Escrow Sum. The Escrow Sum itself was not at risk, being held by solicitors for the Company pending the

resolution of GREIH's claim. In my judgment, there was no basis for Douglas Foo's allegation that Andy Ong and Han Boon might siphon away the Company's share of the Escrow Sum if GREIH failed in its claim.

23 Further and in any event, the law is clear that even if the statutory grounds for winding up a company have been technically established, the court retains the residual discretion to consider all the relevant factors, including the utility, propriety and effect of a winding up order as well as the overall fairness and justice of the case, before deciding whether or not to wind up the company: *Lai Shit Har and another v Lau Yu Man* [2008] 4 SLR(R) 348 at [33].

24 In the present case, even assuming that there was some basis for Douglas Foo's loss of confidence in the management of the Company's affairs, I was of the view that a winding up order ought not to be made for the following reasons.

25 First, as stated earlier, the Company had no objections to being wound up after the dispute over the Escrow Sum had been resolved. In my view, there was no pressing reason to wind up the Company before that dispute was resolved. This was not a case where liquidation would lead to a distribution of assets to the shareholders who could each then go their own way. The Company has no assets other than its share of the security deposit held by ERCU and its potential share of the Escrow Sum. Even if a winding up order were made, the liquidation of the Company cannot be completed until the resolution of the dispute over the Escrow Sum. As for the alleged wrongdoings by Andy Ong and Han Boon, it would be open to the liquidators to investigate these regardless of when a winding up order was made.

26 Second, I agreed with the Company that winding up the Company now could unnecessarily complicate ERCU's defence (which was and is being

handled by Andy Ong and Han Boon) against the claim for the Escrow Sum by the liquidators of GREIH. As the Company submitted, the grounds relied on by Douglas Foo in the present proceedings were equally applicable to the other SPV-shareholders in ERCU, and if Douglas Foo succeeded in winding up the Company, it would likely lead to similar applications being made to wind up the other SPV-shareholders. This could potentially lead to ECRU being controlled by liquidators of ERCU's SPV-shareholders and complicate ERCU's defence against GREIH's claim.

27 Third, although liquidators would be capable of handling the distribution of the Company's share of the Escrow Sum (if any) to its shareholders, this would incur additional expenses unnecessarily. Douglas Foo confirmed that he was looking to the Company's liquidators being paid from the Company's share of the security deposit held by ERCU (see [8(a)] above).

28 Fourth, not all the shareholders were in favour of winding up the Company before the dispute over the Escrow Sum was resolved. Two of them, Ms Aion binte Ismail and Mr Tan Tek Seng Kelvin, appeared at the hearing to oppose Douglas Foo's application. Both of them submitted that Douglas Foo did not speak for all other shareholders of the Company. They also submitted that Douglas Foo did not have the support of the other shareholders of the Company and that was why he had not sought to replace the directors of the Company.

The Company's other defences

29 For completeness, I shall deal with two other defences raised by the Company. The Company submitted that the present application by Douglas Foo

was a circumvention of cl 11(iii) of the Shareholders' Agreement which provided as follows:⁵

11. APPROVAL OF CERTAIN ACTIVITIES

Save as is otherwise specifically required under this Agreement and notwithstanding the provisions of Clause 9 above, the following matters shall only be *undertaken by the Company* with the prior written approval of such number of Shareholders who hold between them at least 75% of the issued Shares:

...

(iii) Any petition or resolution for winding up the Company;

...

[emphasis added]

The Company argued that Douglas Foo failed to comply with cl 11(iii), which required him to convene a general meeting to propose the Company's winding up and to obtain approval from the requisite number of shareholders. I disagreed with the Company. It was clear that cl 11(iii) referred to an application being made by the Company and did not apply to a shareholder exercising his rights under the CA.

30 The Company also submitted that the present application was an abuse of process because it was aimed at derailing Andy Ong's and Han Boon's preparations for the upcoming hearings in the appeal against the High Court decision in S1098/2013 and ERCU's defence against GREIH's claim to the Escrow Sum in OS471/2017 and OS1004/2017. The Company relied on the fact that this application to wind up the Company had been commenced (a) three years after Douglas Foo discovered Andy Ong's and Han Boon's alleged misconduct, and (b) in the midst of Andy Ong's and Han Boon's preparations for their appeal against the decision in S1098/2013 and ERCU's defence against GREIH's claim. I rejected this submission. Whilst I understood the suspicion as

to Douglas Foo's motive, in my view, the evidence did not warrant drawing the inference sought by the Company.

Conclusion

31 In my judgment, justice was best served in this case by not winding up the Company pending the resolution of the dispute over the Escrow Sum. I therefore dismissed Douglas Foo's application and ordered him to pay costs to the Company fixed at \$10,000 (inclusive of disbursements) and costs to the two non-parties (Ms Aion binte Ismail and Mr Tan Tek Seng Kelvin, both of whom were represented by the same counsel) fixed at \$2,000 (inclusive of disbursements).

Chua Lee Ming

Judge

Chen Jie'an Jared, Huang Meizhen, Margaret and Ong Pei Chin
(WongPartnership LLP) for the plaintiff;
Vikram Nair and Foo Xian Fong (Rajah & Tann Singapore LLP) for
the defendant;
S Suresh and Farrah Isaac (Eversheds Harry Elias LLP) for the two
non-parties; and
Benjamin Yim for the Official Receiver.

¹ 1st affidavit of Douglas Foo filed on 21 July 2017, exh DF-1.
² 1st affidavit of Douglas Foo filed on 21 July 2017, exh DF-1.
³ 1st Affidavit of Ong Han Boon filed on 31 August 2017, at p 69.
⁴ 1st affidavit of Douglas Foo filed on 21 July 2017, at paras 9–12.
⁵ 1st Affidavit of Ong Han Boon filed on 31 August 2017, at p 71.