

Bakery Mart Pte Ltd v Avante Investment Pte Ltd and Another
[2002] SGHC 304

Case Number : Suit 887/2002, SIC 2718/2002
Decision Date : 13 December 2002
Tribunal/Court : High Court
Coram : S Rajendran J
Counsel Name(s) : Peter Gabriel and Diana The (Gabriel Peter & Pnrs) for the plaintiffs/applicants;
Philip Ling (Wong Tan & Molly Lim) for the defendants
Parties : Bakery Mart Pte Ltd — Avante Investment Pte Ltd; Culina Pte Ltd

Judgment

GROUND OF DECISION

1. The plaintiffs, Bakery Mart Pte Ltd ("BM"), were bread, cake and confectionery manufacturers. BM's managing director was Ng Yew Hong ("Ng"). Ng owned and managed BM with his sister Ng Sock Cheng ("Cheng"). The 1st defendants, Avante Investment Pte Ltd ("Avante"), were a subsidiary of Sincere Watch Ltd, a public-listed company. The 2nd defendants, Culina Pte Ltd ("Culina"), were (previously) a subsidiary of Hai Sun Hup, another public-listed company. Culina were in the business of importing and distributing fine foods, wines and bakery products.

2. In July 1999, Ng, on behalf of himself and Sincere Watch Ltd, successfully negotiated the purchase the entire share capital of Culina. As a result of that purchase BM and Avante each became 50% shareholder of Culina. At the time of the takeover of Culina, it was, according to Ng, agreed that BM and Avante each would nominate two persons to represent their respective interests on the Board of Culina. It was also agreed that Ng, who had hands-on experience in the food and bakery business, would be managing director of Culina and take charge of its operations. Accordingly, when the sale and purchase was completed Avante nominated Tay Liam Wee ("Tay") and Soh Gim Teik ("SGT") and BM nominated Ng and Cheng to the Board of Culina. Ng was appointed managing director. Some time later BM replaced Cheng with Soh Yeow Hwa ("Soh") on the Board of Culina.

3. Towards the end of 2001, one Ng Wei Min ("NWM") was appointed as business adviser to Culina at the request of Avante. Ng and NWM could not get along and misunderstandings began to surface between the parties. On 17 July 2002, Ng received from the company secretary of Culina a Notice of Directors' Meeting to be held on 19 July 2002. There were only two items on the Agenda:

(a) To discuss on the Writ of Summons issued by Francois Gigandet ("Gigandet");
and

(b) Any other business.

Gigandet had been the managing director of Culina when Hai Sun Hup controlled Culina and had remained with Culina as executive director after the takeover of Culina. According to Ng, Gigandet was very familiar with all aspects of the business of Culina and represented a substantial part of its goodwill at the time of the takeover. Before dealing with the events that took place at the meeting scheduled for 19 July 2002, some background on Gigandet would be relevant.

4. Ng at the time he negotiated the purchase of Culina, realised that Gigandet may not remain long with Culina after the takeover. To induce Gigandet to stay, Ng gave his personal guarantee that in the event Gigandet's services were terminated by Culina, Ng would pay Gigandet an amount equal to 13 months of salary. On the strength of that guarantee, Gigandet (in September 1999) accepted appointment with Culina for a period of 2 years with an option to renew for a further 2 years. In September 2001, Gigandet's appointment was renewed for 2 years.

5. In January 2002, the Board of Culina (including Ng) decided that it was no longer in the interests of Culina to retain Gigandet's

services. His services were, accordingly, terminated. On 2 March 2002, Gigandet sued Ng under the personal guarantee and on 25 June 2002 Gigandet sued Culina for some alleged error in the profits payable to him under a profit-sharing scheme.

6. When Ng attended the Board meeting on 19 July 2002 pursuant to the Notice referred to above, he was under the impression that the meeting was convened to discuss the suit Gigandet had instituted against Culina. That was, however, not so. Instead, at the meeting Ng was confronted with the accusation that by giving his personal guarantee to Gigandet, he had put himself in a position of conflict of interest and he was told by SGT that, because of that conflict, he would be removed as a director of Culina.

7. Following the meeting NWM announced to the staff of Culina that Ng had been removed as managing director and that NWM was taking over as Chief Executive Officer (CEO). Suppliers and customers of Culina were also informed of this change. Ng was told to remove all his personal effects and vacate his office at Culina by 26 July 2002.

8. On 22 July 2002, M/s Gabriel Peter & Pnrs ("GP&P"), acting for BM and Ng wrote to Avante, SGT and Tay pointing out that:

(a) BM and Avante had agreed that each would appoint two directors on the Board of Culina and that in the light of that agreement Ng, as one of the appointees of BM, could not be removed except by consent of BM.

(b) No notice was given in the Agenda that the meeting of the Board of Culina was being convened to remove Ng as a director and that the Board did not have the powers to effect such removal.

(c) The personal guarantee to Gigandet had been given by Ng for the benefit of Culina and so the allegation of conflict had no basis. In any event, the fact that Ng had supported the move to terminate Gigandet's services showed that he was not acting in his own interest.

GP&P asked that each of the addressees confirm in writing that the meeting held on 19 July 2002 was null and void.

9. On 23 July 2002, GP&P again wrote to Avante informing Avante that BM was appointing Leslie Yong Boon Chuan ("Yong") to be a director of Culina in place of Soh and asked Avante to arrange for this replacement to take effect immediately.

10. On 25 July 2002, M/s Wong Tan & Molly Lim ("WT&ML") responded on behalf of Avante, SGT and Tay to the two letters from GP&P. They took the position that the removal of Ng at the meeting of the Board of Culina held on 19 July 2002 was valid as it was carried out in accordance with s 82(g) of the Articles of Association of Culina under which the office of a director becomes vacant if the director was requested, in writing, by all his co-directors to resign. WT&ML pointed out that all the other directors of Culina – including Soh whom WT&ML described as "the nominee of BM on the Board" – had voted for the removal of Ng. WT&ML took the position that the Notice of Meeting was an adequate notice, that the Board had the powers to remove Ng and that by giving his personal guarantee to Gigandet, Ng had placed himself in a position where his duties to Culina as a director was in direct conflict with his personal obligations under the guarantee.

11. On GP&P's letter of 23 July 2002, WT&ML took the position that under the Articles of Association of Culina, the power to appoint/remove a director was a matter solely within the province of the Board of Culina and that the directions to replace Soh with Yong would not be carried out.

12. On 30 July 2002, BM instituted these proceedings against Avante and Culina. Amongst the reliefs that BM sought was an injunction restraining Avante and Culina from excluding or attempting to exclude BM from exercising together with Avante its rights of control and management over Culina. Simultaneously with the writ, BM took out this Summons-in-Chambers seeking an interim injunction to that effect.

13. The application for the interim injunction was heard by me on an inter parte basis. Mr Peter Gabriel, who appeared for BM, emphasised from the start that what his clients sought was the maintenance of the status quo pending the final resolution of the dispute between the parties. BM's position was that irrespective of what the Articles of Association of Culina stated, BM and Avante had, at the time they took over Culina, agreed that – to represent their respective rights – each party would be entitled to appoint two directors on the Board of Culina. The party making the appointment, Mr Gabriel submitted, would have the right to remove and replace that appointee and it

would be objecting on the other party to ensure that this right is given effect to.

14. Avante's position with regard to this alleged agreement was not very clear. Soh, in his affidavit, denied the existence of any agreement between the parties at the time of the takeover other than an agreement that each party would acquire 50% of the issued share capital of Culina. However, he conceded that it was agreed that Ng was to be fully in charge of the operations of Culina. And WT&ML, as noted earlier, accepted that Soh was the nominee of BM on the Board of Culina. Mr Philip Ling, who appeared for Avante and Culina, accepted, in the course of submissions, that BM can appoint and remove its representatives on the said Board.

15. I make the above comments not in the context of determining whether or not such a shareholders' agreement between BM and Avante existed – that is a matter to be determined at trial – but to assess whether or not there were serious issues to be tried. If there was such an agreement between BM and Avante as shareholders of Culina, then it could be argued that it was incumbent on each party to exercise its respective rights under the Articles of Association of Culina in such a way as to give effect to that agreement (as was done, for instance, when BM replaced Cheng with Soh).

16. I formed the view that the existence or otherwise of such an agreement was a serious issue to be tried. There were also other serious issues to be tried, namely: (a) whether Article 82(g) of the Articles of Association of Culina can be said to have been sufficiently complied with if there was no request, in writing, for the resignation of Ng from all the co-directors; (b) whether Ng was in a position of conflict of interest warranting his immediate dismissal; (c) whether adequate notice ought to have been given; and (d) whether the Board of Culina had the power to remove Ng

17. BM was a 50% shareholder of Culina and it was not (seriously) in dispute that BM and Avante were each entitled to nominate two members on the Board of Culina. With the removal of Ng only one of the two persons nominated by BM – namely Soh – remained on the Board. Mr Ling argued that the continued presence of Soh on the Board of Culina negated BM's claim that BM had been excluded from control over Culina. Mr Ling also submitted that, through Soh, BM continued to have access to the books of Culina and therefore it could not be said that if the injunction was not granted BM would suffer irreparable loss not compensatable by damages.

18. I found Mr Ling's submission that BM still retained control over Culina through Soh difficult to accept. The fact was that Soh and BM had fallen out and BM no longer wished to have Soh representing its interests in Culina. Indeed, BM had sought to have Soh replaced but Avante and Culina had refused to accommodate that request. The reality of the situation therefore was that BM, a 50% shareholder of Culina, no longer had any say in the Board of Culina. This was an untenable position for BM.

19. I felt that the balance of convenience was clearly on the side of the status quo being maintained at least to the extent that BM should continue to have two persons representing BM's interests on the Board of Culina. Accordingly, I ordered that, until further order, Avante and Culina by themselves, their directors, officers, servants and/or agents, be restrained from the following acts or any of them:

(a) excluding or attempting to exclude BM, through its nominees to the Board of Culina, namely, Ng and Yong from carrying out, with Avante's two nominees to the said Board, the control and management of Culina's business;

(b) excluding BM or its nominees, servants and/or agents from any part of the premises of Culina at 24 Senoko Way, Singapore; and

(c) excluding BM or its nominees, servants and/or agents, from having full access to all the business books of account, letters or other documents of Culina.

I further ordered that the costs of this application be costs in the cause.

Sgd:

S. RAJENDRAN

Judge

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