Pacrim Investments Pte Ltd v Tan Mui Keow Claire and Another
[2004] SGHC 240

Case Number : OS 165/2004, NAOS 137/2004

Decision Date : 25 October 2004

Tribunal/Court : High Court

Coram : Andrew Ang JC

Counsel Name(s) : Peter Pang (Peter Pang and Co) for applicant; On further arguments, Lim Chor Pee (Chor Pee and Partners) for applicant; Johnny Cheo (Cheo Yeoh and Associates LLC) for respondents

Parties : Pacrim Investments Pte Ltd — Tan Mui Keow Claire; Mediastream Ltd

Companies – Secretary – Powers – Plaintiff company suing defendant company secretary for refusing to register transfer of shares – Whether secretary having power to register transfer without authority from board of directors – Whether appropriate to make secretary defendant in action under circumstances

Companies – Shares – Transfer – Allotment of shares subject to moratorium restricting subsequent transfer of shares – Whether subsequent transfer of shares in breach of moratorium effective – Moratorium existing outside company's articles of association – Whether moratorium valid restriction on transfer of shares – Section 121 Companies Act (Cap 50, 1994 Rev Ed)

Credit and Security – Pledges and pawns – Pledge of shares in company created in plaintiff's favour to secure payment of commission to plaintiff – Plaintiff entitled to transfer shares upon default – Whether pledge amounting to equitable mortgage of shares

Insolvency Law – Bankruptcy – Bankruptcy effects – Allotment of shares subject to moratorium restricting subsequent transfer of shares – Purported transfer of beneficial interest in shares breaching moratorium made before bankruptcy of shareholder – Whether such transfer would be void – Section 77(1) Bankruptcy Act (Cap 20, 2000 Rev Ed)

25 October 2004

Andrew Ang JC:

1 This was an originating summons taken out by the plaintiff for:

(a) an order that the first defendant (as company secretary) register the transfer of 50 million shares in the second defendant (Mediastream Ltd) ("MSL"); and

(b) damages to be assessed.

I dismissed the application and now set out the grounds of my decision.

Background

2 Pursuant to an acquisition agreement dated 14 May 2002 ("the Aquisition Agreement"), MSL acquired all the shares held by Desmond Poh ("DP") and his wife Cho Wee Min ("Cho") in Allandes Corporation Pte Ltd ("Allandes"). These shares constituted 100% of the issued share capital of Allandes. Low Ee Chin ("Low"), the managing director of the plaintiff, had introduced DP to MSL and had acted as advisor to DP and Cho in the transaction.

3 As part of the consideration for the acquisition of Allandes, at completion on 22 September 2002, MSL issued and allotted to DP and Cho 210 million shares in MSL valued at $2.6m. The

Acquisition Agreement included a covenant by DP and Cho in favour of MSL in the following terms:

> The Vendors [DP and Cho] hereby jointly and severally undertake not to sell, assign or dispose of any of the Consideration Shares allotted and issued to them on Completion, for a period of one (1) year from Completion, unless the prior written consent of the Purchaser [MSL] has been obtained, such consent not to be unreasonably withheld.

The rationale for the moratorium was given by Thia Peng Heok ("Thia"), a director of MSL, in his affidavit of 4 March 2004 (at para 24) as follows:

> (1) A major part of the acquisition is the expertise and technical knowledge of DP in the Modular Cabin Business of [Allandes]. Accordingly, it was necessary to ensure that DP and Cho would remain as substantial shareholders and be committed to MSL (and through it [Allandes]);
>
> (2) It would take about 1 year to evaluate [Allandes'] performance as well as to ensure that the warranties given by DP and Cho under the Acquisition Agreement [are] true. In particular, this relates to [Allandes'] recovery of the monies owing by companies owned by DP and Cho.

4 On 29 September 2002, DP created in favour of the plaintiff, a pledge over 70 million shares in MSL ("the Pledge") to secure payment of a commission of $2.4m to the plaintiff for broking and arranging the sale of DP's and Cho's shares in Allandes to MSL. It does not appear from the evidence that there had been any attempt to obtain MSL's consent for the same. According to Low, it had been agreed between DP and the plaintiff that the payment of the commission would be deferred for one year but no later than 22 September 2003 (the last day of the moratorium period). Upon default, the plaintiff would be entitled to transfer the 50 million MSL shares into its name or that of a nominee, and to sell the same to pay for the brokerage. According to Low, in September 2002, soon after the Pledge was given, 20 million MSL shares were "taken back by DP to raise funds to pay for part of the brokerage to the plaintiff". (This was somewhat curious in view of the agreement between the plaintiff and DP that payment would be deferred for one year. However, nothing seems to turn upon it.)

5 By a letter of 17 July 2003, MSL rescinded the Acquisition Agreement on the ground that DP and Cho had made fraudulent misrepresentations concerning the financial state of Allandes in reliance upon which MSL had been induced to enter into the Acquisition Agreement. MSL commenced legal proceedings against DP and Cho seeking a declaration that the Acquisition Agreement had been validly rescinded and for delivery up of the MSL consideration shares that had been issued and allotted to DP and Cho pursuant to the Acquisition Agreement.

6 A bankruptcy order was made against DP on 29 August 2003 pursuant to a bankruptcy petition filed on 12 December 2002.

7 On 23 September 2003, the day following the date of expiry of the moratorium, a share transfer (of 20 million of the MSL shares pledged to the plaintiff) in favour of one Cheng Woei Fern was submitted for registration and this was followed the next day by a transfer of the remaining 30 million shares in MSL in favour of Low. The first defendant declined to register the transfers, holding that the transfers had to be referred to the Official Assignee in view of the bankruptcy of the registered owner, DP. Later, when the plaintiff applied to register the transfers a second time, a further reason was given (through the defendants' solicitors by letter of 21 October 2003) that MSL had on 17 July 2003 rescinded the Acquisition Agreement of 14 May 2002. At the hearing, counsel for the defendants submitted (a) as a preliminary issue, that there was no basis to make the company secretary a party to the action; and (b) that although the plaintiff had described the arrangement

between DP and itself as a pledge, it was in law an equitable mortgage and that, as such, it was a breach of the moratorium. Accordingly, the transferees of the shares did not acquire good title to the shares and were not entitled to have the transfers registered.

Preliminary issue

8 The secretary of a company is its administrative officer. He ensures that the company complies with the many regulatory provisions governing the company; these include the keeping of registers, service of notices of meetings, taking of minutes and the filing of prescribed forms. It is his function to carry out or implement decisions of the board of directors, but he has no power to participate in the management of the company's affairs. Accordingly, he cannot negotiate or conclude contracts on the company's behalf save on instructions of the board in connection with the administration of the company's organisation. Nor can he register transfers of shares without the board's authority: *Chida Mines (Limited) v Anderson* (1905) 22 TLR 27.

9 The company secretary was therefore wrongly made a defendant in this action. Nevertheless, as MSL itself was made the second defendant I decided, in the interest of expedition in the legal process, to consider the application on the merits (or lack thereof) even though the relevant prayer in the originating summons was for an order directed specifically at the company secretary.

The plaintiff's position

10 The plaintiff argued that the creation of the Pledge did not breach the moratorium. Alternatively, the plaintiff alleged that MSL's Thia had represented to DP and Cho that they could pledge the MSL shares to raise financing. This was denied by Thia in his first affidavit filed on 4 March 2004 and the plaintiff did not pursue it at the hearing.

11 The plaintiff further argued that rescission as a remedy was not available to MSL for reasons which, given my decision herein, it is unnecessary to go into.

12 DP swore an affidavit in support of the plaintiff in which he asserted that the Pledge only matured on 23 September 2003 and hence did not contravene the terms of the moratorium. He further averred that at the time of the Pledge, he only parted with possession of the shares and there was no transfer of interest in the shares. According to DP, it was only upon his default in the payment of the commission on 23 September 2003 that the plaintiff could exercise its right to sell or transfer the shares to recover the sum secured by the Pledge.

13 Low also swore an affidavit averring that:

> [T]here was no disposal of the shares until the expiry of the moratorium period [on 22 September 2003] when the transfer and registration of the shares were applied [for] on the 26 September 2003 and the 16 October 2003 …

Consistently with DP, he also contended that when DP pledged the 70 million shares on 29 September 2002, he only parted with possession of the shares and that it was only after expiry of the moratorium that, upon application for the transfer and registration of the shares, there was a disposal of the same.

Pledge or equitable mortgage?

14 There are ample authorities to support the defendants' contention that the Pledge actually

amounted to an equitable mortgage. In *Harrold v Plenty* [1901] 2 Ch 314, Cozens-Hardy J held that the deposit of a share certificate by way of security for a debt amounted to an equitable mortgage. Citing this case as authority, Professor Roy Goode, in his book *Legal Problems of Credit and Security* (3rd Ed, 2003), states at para 1–47, p 33:

> [I]t would seem that English law does not recognise a pledge of registered securities. A contrary position is taken in the United States, where even registered securities are pledgeable if they are certificated. By contrast, decisions in English cases assume that even where the delivery of the certificate to the creditor is accompanied by a completed or blank transfer the interest of the transferee is purely equitable until the transfer has been registered, and that pending registration he is an equitable mortgagee or chargee, not a pledgee. This assumption accords with commercial realities.

Likewise, Sykes and Walker in *The Law of Securities* (5th Ed, 1993) at p 782 state:

> [A] deposit of a share certificate has always been held to constitute an equitable mortgage.

They go on to explain that although

> [t]he term "pledge" has been applied to deposits of share certificates, whether negotiable securities or not, … this was in cases concerning priority issues. In the relevant cases there was also handed over a blank transfer of the shares; accordingly, no reason arose for deciding the nature of the transaction effected by the deposit.

In Singapore, the Court of Appeal in *Chase Manhattan Bank NA v Wong Tui Sun* [1993] 1 SLR 1, had occasion to decide whether certain arrangements made between a stockbroking company and one of its bankers created a pledge of the shares (which did not require registration pursuant to s 131 of the Companies Act (Cap 50, 1990 Rev Ed)) or an equitable mortgage which, for want of registration under the Companies Act, was void against the liquidator and creditors of the company. Although the decisions in the case both in the court below and in the Court of Appeal (which upheld the decision of the lower court) were based on a construction of the memorandum of agreement setting out the arrangements rather than a categorical dismissal of the possibility that a pledge could be created over registered securities, the case is nevertheless instructive. We shall therefore examine it a little more closely.

15 In that case, pursuant to cl 1 of the memorandum, the stockbroking firm deposited and agreed to deposit with the bank, from time to time, securities as a continuing security for the payment and satisfaction of banking facilities extended or to be extended by the bank. As to those shares, it was common ground that an equitable mortgage was thereby created. However, under cl 4, the memorandum also required the stockbroking company to hold, in favour of the bank, certain stocks and shares in a safe within the stockbroking company's premises. The bank was given right of access to the premises at all times to take and transfer such stocks and shares from the safe. The company further undertook in cl 4(iv) that all such stocks and shares "so pledged" shall be kept fully insured.

16 In the court below, Lai Kew Chai J was of the view that the issue was one of construction of the memorandum by which these arrangements were entered into. Reading the memorandum as a whole, he came to the view that there was an intention to create a charge over the stocks and shares and not merely a pledge over the share scrips and transfer forms as pieces of paper or documents. In *Re EG Tan & Co (Pte)*; *Wong Tui San v Chase Manhattan Bank NA* [1990] SLR 1030, he said at [15], 1037:

> In the context of a firm of stockbrokers seeking financing over marketable shares, which are its stock-in-trade, it would be in my view rather unusual for a bank to be content to accept the pledge of the paper relating to the shares and not security over the rights or choses in action attaching thereto. The use of the words "so pledged" in cl 4(iv) in the memorandum is not sufficient to displace the clear intention of the parties …

The Court of Appeal upheld Lai J's judgment. Chao Hick Tin J (as he then was), in delivering judgment of the Court of Appeal in *Chase Manhattan Bank NA v Wong Tui Sun* ([14] *supra*), had this to say, at [28], 11:

> Whatever might be the answer to the general question whether there could be a mere pledge of a share certificate, in the present case, considering the 1982 memorandum as a whole, in particular all those rights accorded to the bank, it is clearly beyond any peradventure that the security created was not a mere pledge of the share certificates, whether actually deposited with the bank or placed in the designated safe, but an equitable mortgage or a charge. Those provisions in the memorandum show that the bank were not looking at the pieces of paper as their security but the rights attached to the shares or the choses in action. Many of the rights conferred upon the bank undoubtedly went beyond the scope of what would ordinarily be the rights of a pledgee.

17 Likewise, in the instant case, I am of the view that the alleged Pledge was an equitable mortgage. The intention of DP and the plaintiff was that the MSL shares were to be security for the deferred payment of the commission of $2.4m to the plaintiff.

18 As Prof Goode ([14] *supra*), has stated at para 1–44, pp 31–32:

> In practice, pledges are confined to goods and to documentary intangibles, that is, documents embodying title to goods, money or securities such that the right to these assets is vested in the holder of the document for the time being and can be transferred by delivery of the document with any necessary indorsement.

A share certificate is not a documentary intangible. A pledge of a share certificate does not confer on the pledgee the rights attaching to the shares but only possessory title to the paper on which the share certificate is printed. Accordingly, no interest in the shares passes thereby.

19 Where, however, a blank transfer duly executed by the registered shareholder was also deposited upon the terms agreed between DP and the plaintiff, what was created was not merely a pledge but the means whereby legal title to be shares might be transferred by completion and registration of such transfer. In my view, such an arrangement created an equitable mortgage and not a mere pledge. As such, it was a breach of the moratorium.

Consequence of breach of moratorium

20 A share is a legal chose in action, or rather a bundle of contractual and statutory rights, each of which is a legal chose in action. Legal choses in action can usually be assigned or transferred only subject to equities existing between the original parties at the date when notification of the assignment is given to the obligor: see s 4(8) of the Civil Law Act (Cap 43, 1999 Rev Ed). Where a transferee of shares seeks registration as a member, a company is not precluded from raising equities against him although, if he were registered as a member, the company would be precluded from disputing his title even if the original allotment to the transferor was defective.

21 It is clear that if there is a provision in the contract which prohibits assignment of rights thereunder, a contravention of this provision is not only a breach of contract as between the original parties; the "assignment" would also be ineffective, in the sense that it would not give the assignee any rights against the debtors (see *Treitel, The Law of Contract* (11th Ed, 2003) at p 693).

22 In the leading case of *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, the lessees of properties on which building works were in progress purported to assign the benefits of the building contracts in favour of assignees of the leases. The building contracts prohibited any assignment thereof by either party without the other's consent. No such consent was obtained. The House of Lords held that, on the true construction of the prohibition against assignment, not only was vicarious performance disallowed, but assignment of the benefit of the contracts was also prohibited. It further held that the parties had drawn no distinction between barring an assignment of the right to future performance, as opposed to the fruits, of the contract.

23 In *Hendry v Chartsearch Ltd* (The Times, September 16, 1998, CA), the majority of the Court of Appeal held that, where there was a clause requiring consent for an assignment, such consent not to be unreasonably withheld, failure to obtain the debtor's consent was fatal to the validity of the assignment. The court further held that it was irrelevant that, on the facts of that case, it would have been unreasonable to withhold consent.

24 In the present case, the moratorium was imposed as a term of the allotment of the MSL shares. A transfer of such shares in breach of the moratorium is not merely a breach of contract as between DP and MSL; it is ineffective to pass any property rights in the shares to the plaintiff.

Effect of DP's bankruptcy

25 Even if I were to accept that there had been only a pledge of the share certificate (as distinct from an equitable mortgage) and therefore no breach of the moratorium at the time of the Pledge, that is not the end of the plaintiff's difficulties. In that case, on the basis of the plaintiff's contention, no interest in the shares passed at the time of the Pledge. However, the subsequent completion of the share transfers would have been a purported transfer of beneficial interest in the shares. Presumably, this would have taken place on 23 July 2003 when the transfer forms were completed. If so, the transfers would have been in breach of the moratorium as it was then still extant.

26 Besides, whether the purported transfers took place on 23 July 2003 or after expiry of the moratorium, they would be affected by DP's bankruptcy. As noted earlier, the bankruptcy order against DP was made on 29 August 2003 pursuant to a petition filed on 12 December 2002.

27 Under s 77(1) of the Bankruptcy Act (Cap 20, 2000 Rev Ed):

> Where a person is adjudged bankrupt, any disposition of property made by him during the period beginning with the day of the presentation of the bankruptcy petition and ending with the making of the bankruptcy order shall be void except to the extent that such disposition has been made with the consent of, or been subsequently ratified by, the court.

Section 77(3) provides:

> Nothing in this section shall give a remedy against any person in respect of –
>
> (a) any property or payment which he received from the bankrupt before the commencement

of the bankruptcy in good faith, for value and without notice that the bankruptcy petition had been presented; or

(b) any interest in property which derives from an interest in respect of which there is, by virtue of this subsection, no remedy.

To be consistent with the plaintiff's own contention, it could not, before the commencement of the bankruptcy, have obtained, by virtue of a mere pledge, the property in the shares nor any interest therein within the meaning of s 77(3)(b). Section 77(3) therefore does not apply. Without the court's sanction required under s 77(1), the transfers would be void and could not be registered. The defendants were therefore right to decline to register the transfers.

Restrictions on share transfers

28 During further arguments before me, Mr Lim Chor Pee, counsel for the plaintiff, submitted that the directors' right to refuse registration of a transfer was limited to the circumstances set out in the articles of association of MSL. He first referred to s 121 of the Companies Act (Cap 50, 1994 Rev Ed) which provides that:

The shares or other interest of any member in a company shall be … transferable in the manner provided by the articles …

Article 38A of the articles of association of MSL, which he next referred to, provides as follows:

There shall be no restriction on the transfer of fully paid up shares (except where required by law, the listing rules of any Stock Exchange upon which the shares of the Company may be listed or the rules and/or bye-laws governing any Stock Exchange upon which the shares of the Company may be listed) but the Directors may in their discretion decline to register any transfer of shares upon which the Company has a lien and in the case of shares not fully paid up may refuse to register a transfer to a transferee of whom they do not approve. Provided always that in the event of the Directors refusing to register a transfer of shares, they shall within 10 market days beginning with the day on which the application for a transfer of shares was made, serve a notice in writing to the applicant stating the facts which are considered to justify the refusal as required by the Statutes.

He then concluded that, in the absence of any applicable restriction stipulated in the articles, the MSL shares had to be freely transferable.

29 Counsel for the defendants disagreed. He referred to Pennington's *Company Law* (8th Ed, 2001) at p 403 where it is stated:

If the transferee has no right to be registered at all, because, for example, his title to the shares is defective, the company does not lose its power to refuse to register him as a member, and he acquires no right to be registered, merely because the company delays for more than two months in informing him that it will not register him.

Also cited was *The Law of Securities* by Sykes and Walker ([14] *supra*) which states at pp 876–877:

The company is quite entitled to hold up registration of a transfer pending an inquiry as to the existence of other titles …

While defence counsel correctly pointed out that outside of the articles, the directors of a company may refuse registration of a share transfer where the transferee's title is in question, that, in my view, was not a complete answer to the argument of the plaintiff's counsel. In the case before me, the transferee's alleged lack of or defect in title arose from a breach of the moratorium which was itself, *inter alia*, a restriction on the right to transfer. Defence counsel's rebuttal begged the question whether the moratorium could validly exist outside of the articles. Be that as it may, for the reasons which follow I am of the view that the moratorium could and did validly exist outside of the articles.

30 Section 121 of the Companies Act was given too extensive a construction by counsel for the plaintiff. The effect of s 121 is not to limit the grounds upon which a company may refuse registration to those set out in the articles only. Rather, the section confers a right on a transferee to call for registration (under the articles of association) where previously such a right would have been enjoyed only by members. (I had initially thought that as the articles of association constitute an agreement between the members *inter se* and the company, the plaintiff as a third party would have no rights under Art 38A. However, upon reflection, I am satisfied that in view of s 121 of the Companies Act that would not be correct.)

31 Woon in *Company Law* (2nd Ed, 1997) at p 573 states that the right to transfer shares may be restricted by agreement. *Buckley on the Companies Acts*, vol 1 (14th Ed, 1981) at p 203 has this to say when commenting on s 73 of the UK Companies Act 1948 (the progenitor of s 121 of our Companies Act):

> In the absence of restrictions in the articles, or by agreement with the company outside the articles, the shareholders may transfer their shares without any consent, and the directors have no discretionary power to refuse to register a transfer bona fide made.

32 Authority for this statement may be found in *Ontario Jockey Club, Limited v McBride* [1927] AC 916, a decision of the Privy Council on appeal from the Supreme Court of Canada. The facts of the case as set out in the headnotes are as follows:

> On an allotment of fully paid shares in an Ontario company the allottee, in common with all other allottees, signed an agreement with the company that he would not transfer the shares to any person not already a shareholder without first giving the company an opportunity to purchase. That agreement was in the terms of a then valid by-law of the company, the effect of which appeared in the share certificate. Later, by virtue of his holding, the shareholder was allotted further fully paid shares. On that allotment he did not sign an agreement, but he accepted a new certificate for the old and new shares, which were not identified by numbers, stating the restriction. Previously to the further allotment the legislature of Ontario had enacted subject to an immaterial exception that no company by-law should be passed which in any way restricted the right of the holder of a fully paid share to transfer it. The holder having sold one share without giving the company an opportunity to purchase it, the directors refused to register the transfer.

It was held that the agreement was binding upon the shareholder as to all the shares he held, and that the directors were entitled to refuse to register the transfer. The Privy Council found it unnecessary to consider whether the legislative provision had retrospective effect so as to nullify the by-law. This was because the shareholders and the company had separately entered into an agreement in terms similar to the by-law. Such agreement was unaffected by the legislative provision. Lord Wrenbury, delivering their Lordships' judgment, said at 923:

> Whether by-law No. 37 was or was not binding as a by-law, it was competent to the shareholder

> to bind himself to the restriction expressed in it, and by signing the agreement he became … bound by that restriction. …
>
> That restrictions may be placed upon a shareholder's right of transfer of his shares cannot be questioned. The cases are numerous in which such restrictions have been upheld. Shares are prima facie transferable. But there is no law which precludes the shareholders from contracting for value that they shall each submit to any reasonable restriction which they choose to agree to.

33 Likewise in the case before me, the moratorium was an impediment to registration of the transfers even though such restriction was outside the articles. (I considered it immaterial that the agreement in our case was between the plaintiff and the second defendant whereas in *McBride*'s case ([32] *supra*), it included the other shareholders.)

34 For all the foregoing reasons, I dismissed the plaintiff's application with costs.