

Shen Yixuan v Maxz Universal Development Group Pte Ltd and Others
[2009] SGHC 236

Case Number : Suit 581/2007, SUM 4621/2007, 4761/2007
Decision Date : 22 October 2009
Tribunal/Court : High Court
Coram : Kan Ting Chiu J
Counsel Name(s) : Tan Teng Muan and Loh Li Qin (Mallal & Namazie) for the plaintiff; Nehal Harpreet Singh, SC, Ho Shu-Wen Dawn and Chew Kiat Jinn (Drew & Napier LLC) for the 1st, 4th & 5th defendants; Kronenburg Edmund Jerome and Leong Kit Wan (Tan Peng Chin LLC) for the 2nd defendant; Omar Siraj and See Chern Yan (Premier Law LLC) for the 3rd defendant
Parties : Shen Yixuan — Maxz Universal Development Group Pte Ltd; Treasure Resort Pte Ltd; Seeto Keong; Tan Boon Kian; Poh Ban Leng; Wong Choon Hoy

Companies

22 October 2009

Kan Ting Chiu J:

1 The plaintiff Shen Yixuan is a shareholder of Treasure Resort Pte Ltd (“Treasure Resort”), the second defendant in this action. In October 2006, Treasure Resort issued to Maxz Development Group Pte Ltd (“Maxz”), the first defendant, 4,000,000 Treasure Resort shares.

2 The plaintiff instituted these proceedings to have the allotment set aside on two grounds. Firstly, he alleged that the allotment was fraudulent because there was no consideration for the allotted shares^[note: 1]. Secondly, he alleged that the allotment should be set aside because Treasure Resort has contravened s 76(1) (a) of the Companies Act (Cap 50, 2006 Rev Ed) by giving financial assistance to Maxz to acquire the allotted shares.^[note: 2]

3 On the basis of these allegations, the plaintiff prayed for

An order that the allotment of 4,000,000 ordinary shares of and in the 2nd Defendant to the 1st Defendant on or about 12 or 13 October 2006 (the “allotment of 12 or 13 October 2006”), being the capitalisation of a purported debt owed by the 2nd Defendant to the 1st Defendant said to arise from the 1st Defendant’s utilisation of monies borrowed against the security of *inter alia* the Property to pay SDC and Bank of China for the account of / on behalf of the 2nd Defendant, be cancelled or set aside wholly or in part by reason of fraud and/or contravention of section 76(1)(a) of the Companies Act (Cap.50);

in para 17(1) of the Statement of Claim.

4 In response to his claims, the defendants applied to strike out the whole Statement of Claim. The defendants’ application was heard in two tranches. In the first tranche, the application was dismissed. Then the defendants applied for further arguments to be made. In the resumed hearing, Mr Harpreet Singh SC, counsel for Maxz, Treasure Resort and two other defendants directed his submissions at the plaintiff’s allegations in respect of s 76(1) (a), and at para 17(1) of the Statement

of Claim.

5 To get a clear picture of the issues raised in the arguments, it is useful to refer to s 76 and s 76A. Section 76(1) reads:

- (1) Except as otherwise expressly provided by this Act, a company shall not —
 - (a) whether directly or indirectly, give any financial assistance for the purpose of, or in connection with —
 - (i) the acquisition by any person, whether before or at the same time as the giving of financial assistance, of —
 - (A) shares or units of shares in the company; or
 - (B) shares or units of shares in a holding company of the company; or
 - (ii) the proposed acquisition by any person of —
 - (A) shares or units of shares in the company; or
 - (B) shares or units of shares in a holding company of the company;
 - (b) whether directly or indirectly, in any way —
 - (i) acquire shares or units of shares in the company; or
 - (ii) purport to acquire shares or units of shares in a holding company of the company; or
 - (c) whether directly or indirectly, in any way, lend money on the security of —
 - (i) shares or units of shares in the company; or
 - (ii) shares or units of shares in a holding company of the company.

6 Section 76A lays down the effect of a contravention of s 76 on a contract or transaction. Section 76A(1) states that:

- (1) The following contracts or transactions made or entered into in contravention of section 76 shall be void:
 - (a) a contract or transaction by which a company acquires or purports to acquire its own shares or units of its own shares, or shares or units of shares in its holding company; and
 - (b) a contract or transaction by which a company lends money on the security of its own shares or units of its own shares, or on the security of shares or units of shares in its holding company.

The effect of this provision is that contracts and transactions made in contravention of s 76(1) (b) and (c) are **void**.

7 Section 76A(2) deals with contraventions of s 76(1), *ie* s 76(1) (a), for the giving of financial assistance. This provision states that an affected contract or transaction is **voidable** at the option of the company which gave the financial assistance, and that if the company intends to avoid the contract or transaction, it shall give notice in writing to the other party.

8 A member of a company may also take action to avoid a contract or transaction. Section 76A(3) provides that:

The Court may, on the application of a member of a company, a holder of debentures of a company, a trustee for the holders of debentures of a company or a director of a company, by order, authorise the member, holder of debentures, trustee or director to give a notice or notices under subsection (2) in the name of the company.

9 While a contract or transaction will not be avoided unless a notice is issued, the issuance of a notice will not avoid a contract or transaction, and it only sets the process of avoidance in motion.

10 Mr Singh's main argument is that the plaintiff does not have the *locus standi* as a shareholder of Treasure Resort to apply in his own name to set aside the share allotment as he is seeking to do in this action. While the plaintiff may apply under s 76A(3) for leave to give notice in the name of Treasure Resort to Maxz to avoid the allotment (which he has not done), he cannot apply to have the allotment set aside in these proceedings which are instituted in his own name.

11 The part that a member can play to set aside the allotment should be considered carefully. Even at the first stage, when he applies under s 76A(3) for authority to issue the notice to avoid in the name of the company, that authority would only be given after the company has been heard.

12 There are reasons for a court to withhold the authority, *inter alia*:

- (i) there may be a dispute whether financial assistance was given. Unless the court is satisfied that there is some *prima facie* evidence of that, the authority would not be given,
- (ii) even if financial assistance was given, the management of the company may decide that it is not in the company's interest to avoid the contract or transaction. But if a member issues the notice in the name of the company and the recipient accepts the notice, the company is bound by the acceptance, or
- (iii) there may be third-party interests involved which militate against the setting aside of the contract or transaction.

13 Even after authority is granted to a member to issue a notice of avoidance in the name of a company, there are other related issues to resolve. If the recipient of the notice refuses to accept that the contract or transaction is avoided, what can the member do? Does the authority to issue the notice in the name of the company extend to the institution of legal proceedings for a declaration that the contract or transaction is avoided? Section 76A(3) is silent on that. Should the member obtain leave to sue in the name of the company under s 216A which deals specifically with derivative or representative actions? These issues have not, to my knowledge, been determined.

14 Interesting as these questions are, they are academic in the present context as no notice of avoidance has been issued by or in the name of Treasure Resort to avoid the allotment.

15 Mr T M Tan, counsel for the plaintiff, did not address the lack of the notice to avoid the allotment directly. Instead he pointed out that the plaintiff can apply to court for relief under s 216(1) which states:

(1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister may apply to the Court for an order under this section on the ground —

- (a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or
- (b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

and that under s 216(2) (a), the court may:

direct or prohibit any act or cancel or vary any transaction or resolution

which he argued is wide enough for the cancellation of a share allotment.

16 Having shown that a member can apply under s 216(1) (a) to cancel a share allotment, the question remains whether the plaintiff has made such an application. It is to be noted that s 216(1) (a) and (b) refer to oppression, unfair discrimination and prejudice in the affairs of a company. However, the plaintiff did not invoke s 216(1) (a) or (b) in para 17(1) of his Statement of Claim where he prayed for the share allotment to be cancelled:

by reason of fraud and/or contravention of section 76(1)(a) of the Companies Act (Cap 50).

17 Consequently, the effect of the submission is that the plaintiff may apply under s 216 to cancel a share allotment, and not that the plaintiff has made such an application.

18 Mr Tan also submitted that the court can grant the plaintiff leave under s 216A for leave to bring an action in the name of Treasure Resort to cancel the allotment.

19 A member can apply to seek relief under s 216A if the court is satisfied that the requirements of s 216A(3) are satisfied. Again, while a member may apply under this provision, the plaintiff had not applied for or obtained leave under the provision. Even if he had applied for and obtained leave, he has to commence proceedings in the name of Treasure Resort for that purpose, and he cannot have the allotment set aside in the present proceedings.

20 In the circumstances, I ordered that the plaintiff's claims in respect to the breach of s 76(1) (a) and the cancellation of the share allotment be struck out.

[\[note: 1\]](#) Para 9 of the Statement of Claim (Amendment No. 1)

[\[note: 2\]](#) Para 10 of the Statement of Claim (Amendment No. 1)

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