Maxz Universal Development Group Pte Ltd *v* Lian Hwee Choo Phebe [2010] SGHC 64

Case Number : Suit No 643 of 2008/M

Decision Date : 26 February 2010

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Edmund Kronenburg, Charmaine Cheong and Lye Hui Xian (Braddell Brothers) for the plaintiff; Srinivasan V.N., Rahayu binte Mahzam (Heng Leong & Srinivasan) and Jimmy Yap (co-counsel) for the defendant.

Parties : Maxz Universal Development Group Pte Ltd — Lian Hwee Choo Phebe

Companies

Civil Procedure – Costs

26 February 2010 Judgment reserved

Lai Siu Chiu J:

Introduction

1 This suit was a culmination of one of several disputes involving Maxz Universal Development Group Pte Ltd ("the plaintiff") and its shareholders and directors. In these proceedings, the plaintiff is suing Lian Hwee Choo Phebe ("Phebe Lian"), its shareholder and former director, for breach of director's duties. The plaintiff alleged that Phebe Lian had sent a letter to Malayan Banking Berhad ("Maybank") prompting Maybank to refrain from refinancing the plaintiff's banking/credit facilities, thereby causing loss to the plaintiff. The plaintiff also accused Phebe Lian of acting in conflict of interest by causing her company, Corporate United Limited ("CUL"), to extend a $1m Standby Letter of Credit ("SBLC") in favour of the plaintiff at a cost of $53,664. The plaintiff sought substantial damages ($15,666,372.76) from Phebe Lian in the alternative damages to be assessed.

The Facts

2 The plaintiff is an investment holding company with no business operations of its own. In January 2005, after encouragement from her friend Benedict Kusni ("Kusni"), Phebe Lian made a capital injection of $100,000 into the plaintiff through her corporate vehicle, Phebe Investment Pte Ltd in return for 10% of the plaintiff's shares, thereby making her an indirect shareholder of the plaintiff.

3 At the material time, the plaintiff was managed and controlled by one Seeto Keong ("Seeto") and one Sebastian Wong Cheen Pong ("Sebastian"). Seeto was the plaintiff's director and chief executive officer, while Sebastian was its financial controller. At the trial (under cross-examination), Seeto agreed that Sebastian was a *de facto* director of the plaintiff. Both Seeto and Kusni held shares in the plaintiff. Sebastian indirectly held shares in the plaintiff through his wife and daughter because he was facing bankruptcy proceedings (and was eventually made a bankrupt in early 2005).

4 In early 2005, the plaintiff was given the opportunity to take over the lease of and to

redevelop a hotel at 23 Beach View, Sentosa ("the Hotel"). The Hotel was, at the time, owned by Sijori Resort (Sentosa) Pte Ltd ("Sijori") and the lessor of the land on which the Hotel stood was Sentosa Development Corporation ("SDC"). It was decided that the plaintiff's subsidiary, Treasure Resort Pte Ltd ("Treasure Resort"), would acquire the Hotel and have it managed by the Movenpick group of hotel operators (which does not have a presence in Singapore). Even though Phebe Lian was a minority shareholder of the plaintiff, she provided substantial financial assistance for the acquisition apart from which, the plaintiff relied almost entirely on borrowed funds. The financial assistance rendered by Phebe Lian is summarised in the following three paragraphs.

5 On 13 May 2005, Phebe Lian provided the plaintiff with an SBLC for $200,000 which the plaintiff used as collateral for a $200,000 credit facility from OCBC. The SBLC was provided by CUL and it was to be discharged in six months *viz* by November 2005. On 17 November 2005, through CUL, Phebe Lian also provided the plaintiff with an interest free loan of $100,000.

6 On 11 May 2006, Phebe Lian was made a director of the plaintiff. The management of the plaintiff still remained primarily in the hands of Seeto and Sebastian although Phebe Lian now had an additional reason to assist the plaintiff. In June 2006, the plaintiff obtained an $8m loan from Moscow Narodny Bank Limited which was subsequently renamed VTB Bank Europe ("VTB"). In order to convince VTB to extend the loan, the plaintiff had to demonstrate that it had funds of its own. To that end, Seeto caused the plaintiff to borrow $1m from Sit Ley Timber Pte Ltd. The plaintiff, however, could not meet the condition of Sit Ley Timber Pte Ltd to pay $100,000 upfront as interest and the arrangement fell through. To assist the plaintiff, Phebe Lian provided the plaintiff, again through CUL, an SBLC for $1m, which enabled the plaintiff to obtain a $1m credit facility from the Overseas Chinese Banking Corporation ("OCBC"). The deadline for this SBLC to be discharged was 30 November 2006 but, at the plaintiff's request, it was extended to 28 February 2007.

7 Phebe Lian also stood as a guarantor for the plaintiff. In November 2006, the plaintiff obtained a loan of $5m from Maybank which was secured by (a) a joint and several guarantee for the sum by Phebe Lian and Seeto and (b) two Insurance Guarantee Bonds for an amount totalling $5m from See Hoy Chan Capital Limited ("SHC").

8 On 14 November 2006, Treasure Resorts entered into a Novation Agreement with Sijori and a Supplemental Agreement with SDC the effect of which was to make Treasure Resorts the lessee of the land on which the Hotel stood. In the same month, Phebe Lian began making enquiries about the plaintiff's financial status. At the time, the plaintiff had (i) an $8m loan from VTB; (ii) a $5m loan from Maybank; and (iii) a $1.2m loan from the OCBC. Despite having substantial funds, the SBLC of $200,000 issued by CUL in May 2005 was not discharged. Further, the date of repayment of Phebe Lian's loan of $100,000 (which had been extended for 2 weeks in November 2005) had to be extended yet again and was only repaid in May 2006; the date of discharge of the $1m SBLC also had to be extended.

9 Yet, Phebe Lian noticed that Seeto and Sebastian were driving brand new seven and five series BMW cars respectively, which they obtained in October and December 2006 from the local distributor Performance Motors Ltd, on hire purchase financing, paid by the plaintiff. In Sebastian's case, he registered the vehicle in his daughter's name as by 13 January 2005, he had been adjudged a bankrupt. Further, Seeto and Sebastian each acquired a condominium apartment. At that time, the plaintiff had no income and while it had funds, these were all borrowed moneys a portion of which came from Phebe Lian. Although there was also no agreement for directors to be remunerated, in the course of Seeto's cross-examination, it was revealed that he paid himself $6,000 'allowance' a month while Sebastian was paid $5,000 by the plaintiff. Not surprisingly, Phebe Lian began to harbour suspicions of the source of Seeto and Sebastian's new found wealth and started to make enquiries.

She questioned Seeto and Sebastian as to how the plaintiff's funds were being utilised and how the plaintiff intended to repay CUL. In addition, she sought to examine the plaintiff's accounts and to be made a co-signatory to the plaintiff's bank accounts. Seeto and Sebastian ignored her enquiries and her requests.

10 On 19 January 2007, CUL sought repayment of its loans. When the moneys were not repaid, Phebe Lian became more anxious and suspicious as to how the plaintiff's finances were being managed. Phebe Lian was particularly anxious because not only was she a director of the plaintiff, she was also a joint-guarantor of the plaintiff's $5m loan and had, through CUL, provided the plaintiff with financial assistance of a sum totalling $1.3m without security.

11 After further fruitless attempts to obtain information from Seeto and/or Sebastian with regard to the plaintiff's financial status, Phebe Lian sent a letter to the plaintiff's bankers (including Maybank) dated 29 January 2007 ("the letter") to informed the banks that she would be making an inquiry into the plaintiff's financial affairs and that the banks should not act on the instructions of the plaintiff unless those instructions bore her authorising signature. In the letter, Phebe Lian mistakenly described herself as the "managing director" of the company. On 7 February 2007, she wrote to the banks to seek copies of the plaintiff's bank statements and to correct her earlier mistake in the letter by clarifying that she was only a director of the plaintiff and not its managing director.

12 On 30 January 2007, Phebe Lian's lawyers wrote to Seeto expressing concern at the fact that she had yet to receive any of the plaintiff's financial reports and that her repeated requests for information pertaining to the company's finances had been refused or ignored. Phebe Lian's lawyers demanded that the plaintiff:

> 1) furnish [Phebe Lian] with [the plaintiff's] financial accounts for the years 2005 and 2006;
>
> 2) furnish [Phebe Lian] with a copy of all the minutes and resolutions passed by the Board of Directors and shareholders in the year 2006;
>
> 3) furnish [Phebe Lian] with a copy of [the plaintiff's] bank statements for the year 2006; and
>
> 4) cause to be passed, the necessary directors' resolution to remove sole signatories to [the plaintiff's] bank accounts and to authorise [the plaintiff's] bank accounts to be operated only by joint signatories, one of whom shall be [Phebe Lian].

Legal action was threatened if the above conditions were not satisfied within 5 days.

13 After Phebe Lian had written to the banks and to Seeto, Seeto and Sebastian responded in several emails to try to assuage her concerns. In an email sent on 30 January 2007, Seeto expressed his hope that their business relationship will not "fall apart" and informed Phebe Lian that he had already directed Sebastian to prepare board resolutions to add her as a signatory to the plaintiff's bank accounts. He also apologised to her and in doing so stated the following:

> Finally, i offer my apology to you if i had probably cause you to feel uneasy in anyway. I maintain my statement that you are the director of [the plaintiff] i respected and will still be.

14 Sebastian also wrote to Phebe Lian in an email dated 6 February 2007 stating, *inter alia*, that he would:

> …change bank signatories for VTB Bank Europe plc (formerly known as Moscow Narodny Bank)

> and Maybank to jointly between you and Seeto Keong instead of singly any one and to add your signatory to OCBC to be signed between yourself, Seeto Keong or Sebastian, any two.

He also added that he would:

> … improve corporate governance by setting up an Executive Committee to veto and pass all capital expenditures and investments and also appointment of Senior management staff for the group and its subsidiaries.

15 Seeto's reply to the letter of 30 January 2007 from Phebe Lian's lawyers (quoted in [12] above), however, manifested a different attitude. He was evasive and stated that the request be redirected to the plaintiff and not to himself in his personal capacity even though the solicitors' letter had expressly acknowledged the fact that Seeto was CEO of the plaintiff.

16 Despite this series of correspondence, Phebe Lian still did not receive any information regarding the plaintiff's accounts. Instead, she was removed by Seeto as a director of the plaintiff at an Extra-ordinary General Meeting held on 15 March 2007, with the support of Sebastian's daughter (who held shares in the plaintiff on his behalf) and Kusni.

17 In the same month, Sebastian's negotiations with Maybank's Darren Tan to refinance its existing loans to the tune of $15m failed.

18 In May 2007, Seeto and Sebastian transferred their shares in the plaintiff to Roscent Group Holdings ("Roscent"), a company controlled by one Tan Boon Kian ("Rodney Tan"), who eventually became the majority shareholder and a director of the plaintiff when the plaintiff could not repay his loans. In that same month, CUL commenced legal action against the plaintiff to compel the company to satisfy its obligations pursuant to the issuance of the SBLCs amounting to $1.2m. The plaintiff eventually paid CUL $1.2m and CUL discontinued its suit.

19 On 2 August 2007, Maybank granted Treasure Resorts a loan of $26.1m to enable the latter to refinance the loans that the plaintiff had taken to fund Treasure Resorts' acquisition of and the necessary renovation and refurbishment works for the Hotel.

20 On 8 January 2008, Phebe Lian and Kok Lan Choo, the other minority shareholder of the plaintiff, commenced Originating Summons No 18 of 2008 ("the OS") against the plaintiff (as a nominal defendant) and the controlling shareholders and directors of the plaintiff (which included Seeto and Rodney Tan) seeking relief under s 216 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Companies Act") for oppression. The OS was subsequently converted to Suit No 75 of 2008. On 1 August 2008, Phebe Lian and Kok Lan Choo commenced Suit No 536 of 2008 ("Suit 536") against the plaintiff (as nominal defendant) and the other directors/shareholders including Seeto, Sebastian and Rodney Tan, for conspiracy.

21 On 11 September 2008, barely six weeks after Suit 536 was filed, the plaintiff commenced the present action against Phebe Lian for breach of her director's duties by sending the letter to Maybank, alleging that this had caused Maybank to refuse to go ahead with the refinancing of its banking/credit facilities (see [11] and [17] above). Phebe Lian was further accused of placing herself in a conflict of interest situation by causing CUL to extend the $1m SBLC at a cost of $53,664 to the plaintiff.

22 Not surprisingly, Phebe Lian denied the plaintiff's allegations. In her defence (Amendment No 2), she contended that the directors of the plaintiff brought these proceedings in bad faith with a view to

enabling any one or more of them to lend money to the plaintiff for the purpose of financing the proceedings and then to convert the loan to equity in the plaintiff at an undervalue. She averred that such conduct amounted to an abuse of the process of the court.

The decision

Did Phebe Lian breach her director's duties by sending the letter of 29 January 2007 to Maybank?

23 From the outset, it was obvious that the plaintiff's case was weak and its many improbable allegations and claims put forward by Seeto lent weight to Phebe Lian's counsel's contention that these proceedings were nothing more than a retaliatory suit brought in response to Suit 536. With regard to its claim that Phebe Lian had scuttled the refinancing deal with Maybank by sending the letter, the plaintiff's pleaded case was that Maybank's representative, one Francis Wong, had *orally* informed Sebastian that the bank would not be refinancing the plaintiff's banking/credit facilities because of what appeared to be a brewing shareholders' dispute. In other words, evidence of the causal link between the letter and Maybank's decision not to refinance the plaintiff's bank/credit facilities was reposed in Francis Wong and Sebastian. Yet, neither person was called to testify. For that reason, Phebe Lian's counsel invited the court to draw an adverse inference against the plaintiff under s 116(g) of the Evidence Act (Cap 97, 1997 Rev Ed) for not calling Sebastian as a witness even though he was still in the plaintiff's employment.

24 In my view, even if no such adverse inference is drawn (although I did draw such inference), the plaintiff still could not/did not prove its case. Its claim was a non-starter because, in the absence of testimony by Francis Wong or Sebastian, there was insufficient evidence which would have enabled this court to make a finding that Phebe Lian's actions had caused the plaintiff's loss. On this point alone, the plaintiff's claim pertaining to its purported loss caused by Maybank's refusal to refinance fails *in limine*.

25 I note that in his Affidavit of Evidence-in-Chief ("AEIC"), Seeto had deposed that Maybank's representative had orally informed Sebastian *and him* of the reasons for Maybank's decision. Seeto's evidence was an untruth. This was not the plaintiff's pleaded case (which was limited to the plea that Maybank's representative had informed Sebastian). In my view, this was an afterthought included by Seeto in his AEIC to bolster the plaintiff's flimsy claim. Indeed, this was one of many instances where Seeto economised on the truth in the course of the trial. Under rigorous cross-examination, Seeto finally conceded that there had been no letter of offer or even a verbal offer in December 2006 from Maybank, to refinance the plaintiff's banking/credit facilities. Simply put, if there was no evidence of an offer to refinance, there was nothing to scuttle. In this regard, it may be possible in a case with more evidence, for a director to be found to be in breach of his duties by acting in a way so as to jeopardize an inchoate deal, but it will not be possible to make this finding here where the evidence of any such deal was lacking and where there was nothing to show any causal link between the acts of the director and the failure of the deal to materialise.

26 Further, in my view, not only did Phebe Lian not breach her director's duties, she had acted *consistently* within her duties and responsibilities as a director by sending the letter to the banks. Phebe Lian had written to the banks because she was concerned with the financial status of the plaintiff. Seeto and Sebastian were stonewalling her inquiries by ignoring her repeated requests for information (see [9] above). In the circumstances, it was not only reasonable for Phebe Lian to write to the banks but quite proper for her to do so as a director, to try to uncover any financial irregularities given the suspicious circumstances (set out at [9] above).

27 Counsel for the plaintiff sought to make much of the fact that Phebe Lian had wrongly identified herself as the "managing director" of the plaintiff in the letter. I accept Phebe Lian's explanation that this was an innocent mistake and note that her explanation was supported by her subsequent letter of 7 February 2009 to the banks in which she clarified that she was merely a director of the plaintiff.

28 It is to be noted that on 2 August 2007, Maybank had gone ahead to provide a $26.1m loan to Treasure Resorts, the plaintiff's subsidiary (see [19] above). If indeed the letter had so shaken the faith of Maybank in the creditworthiness of the plaintiff, it is highly unlikely that Maybank would have extended a massive loan of $26.1m to its subsidiary. This was yet another reason why I find the plaintiff's claim to be unmeritorious.

29 Consequently, I dismiss the plaintiff's claim against Phebe Lian for breach of her director's duties pertaining to her sending of the letter to the banks and Maybank in particular.

Did Phebe Lian breach her duties by causing CUL to extend the $1m SBLC at a cost of $53,664 to the plaintiff?

30 The plaintiff's counsel focussed his energy in the course of the seven-day trial on the claim for $53,664 paid to CUL in return for the $1m SBLC. Ordinarily, this would have been surprising given the fact that this claim formed an insignificant percentage of the total claim for damages of over $15m. However it was not, given the frivolity of the plaintiff's primary claim.

31 The plaintiff's case with regard to this claim for $53,664 was that Phebe Lian had acted in conflict of interest by causing CUL to extend the $1m SBLC at a cost of $53,664 to the plaintiff. The plaintiff took the position that Phebe Lian had concealed her interests in CUL so that the plaintiff's other directors did not know that she was the owner of CUL. However, Phebe Lian had testified that she had openly revealed her status as owner of CUL to the staff who worked in the plaintiff's office, including Seeto and Sebastian. I believe her testimony. It is inconceivable that Seeto and Sebastian could have been unaware that CUL was owned by Phebe Lian. It bears noting that CUL had given the plaintiff financial assistance not once but on numerous occasions. CUL had provided the plaintiff with SBLCs of up to $1.2m followed by an interest-free unsecured loan of $100,000 on 17 November 2005.

32 When asked if he was curious as to why CUL was rendering assistance to the plaintiff, Seeto claimed that he had thought that CUL "was a really friendly party". This answer was unconvincing if not totally incredible. Seeto could not have been so naïve. The only reason why CUL was willing to render financial assistance to the plaintiff, to the extent of making an unsecured interest-free loan of $100,000, was due to the fact that Phebe Lian was the owner of CUL. Phebe Lian caused CUL to help the plaintiff because she was a director and shareholder of the plaintiff and Seeto and Sebastian well knew this fact.

33 In fact, it was precisely because Seeto and Sebastian were aware that Phebe Lian owned CUL that they had approached her on 2 December 2005 at her home in Telok Kurau to seek her help in getting CUL to extend the date of repayment of the $100,000 loan for two months. Phebe Lian had tendered in evidence a letter which Sebastian had prepared and which he and Seeto had brought to Phebe Lian's home for her to sign on that occasion. The letter reads:

Jennifer Lian

8 Lorong G Telok Kurau

Singapore 426172

2 December 2005

Mr James Tang/Ms Anna Goh ***FAX No. 6538 4959***

American Express Bank Ltd

16 Collyer Quay

7th Floor Hitachi Tower

Singapore 049138

Dear James,

RE: **Account Number 100990**

In the name of Corporate United Ltd

I refer to the abovementioned account and would appreciate if you could arrange for the extension of the loan of SGD 100,000.00 drawdown for value 17 November 2005 to 31 January 2006.

Thank you for your kind assistance.

Yours sincerely,

[signature]

Jennifer Lian

34 It was subsequently discovered that such a letter was not required for an extension of the loan because CUL's account with American Express Bank Ltd ("AMEX") was an overdraft account and there was no time limit for the loan to be repaid. Nonetheless, this letter demonstrated that Seeto and Sebastian knew that Phebe Lian (referred to as "Jennifer" which was her alternative name) was in control of CUL. Seeto had raised the lame excuse that in his view, Phebe Lian was merely a "link person to CUL" and that he did not know who owned CUL. Again, I reject his explanation. I find that Seeto and Sebastian knew that Phebe Lian was the owner of CUL and that this was why they had approached her to write to AMEX to extend the $100,000 loan.

35 As for the $1m SBLC, after the plaintiff had agreed to pay the sum of $53,664 to CUL on 9 November 2006, Seeto had attended an informal meeting with Phebe Lian, Kusni and Sebastian. At that meeting, Sebastian produced two typewritten notes to explain the cash flow situation of the plaintiff for November and December 2006. The note for November 2006 recorded, *inter alia*, a sum of $53,664 to be paid as "Interest for $1 million (Jennifer)". In my view, this note, along with the evidence considered above (at [31] to [33]) demonstrated that the other directors of the plaintiff were aware all along that Phebe Lian was the owner of CUL and that they had in fact sought assistance from her to cause CUL to provide financial aid to the plaintiff.

36 In my view, the fact that the directors of the plaintiff knew of Phebe Lian's interest in CUL absolved her of any liability for conflict of interest pertaining to CUL's receipt of the $53,664 in return for providing the $1m SBLC. Where the directors of a company know of another director's interest in a

particular transaction, the failure of that director to make a formal disclosure to the other directors does not make the director liable for breach of his fiduciary duties.

37 The above proposition is supported by the Australian case of *Woolworths Ltd v Kelly* (1991) 4 ACSR 431 ("*Woolworths*") where the respondent, Kelly, was the chairman of the board of directors of a public company. In February 1975, the board agreed to establish a pension scheme under which Kelly would be entitled to $26,000 per annum. In 1979, the board decided to increase the annual entitlement by $8,666 per annum to reflect the fact that Kelly was owed $60,000 by the company for his provision of consultancy services. There was a change in the board of the company and the new board resolved that payments to Kelly should be substantially reduced. Kelly sued the company to enforce his contractual right to receive his pension at the original rate. Kelly succeeded at first instance; and on appeal, the company argued that Kelly had failed to make a formal disclosure of his interest in the contract as required by s 123 of the Australian Companies Act 1961 (which is in *pari materia* to s 156 of the Companies Act). The Court of Appeal of New South Wales held, by a majority, that no disclosure was necessary where the nature of the interest was known to the other directors. Likewise, in *Lee Panavision Ltd v Lee Lightning Ltd* [1992] BCLC 22 ("*Lee Panavision*"), Dillon LJ (with whom the other members of the English Court of Appeal agreed), doubted whether the non-disclosure of an interest common to all the directors and *ex hypothesi* known to all of them would be a breach of the English equivalent of s 156(1) of the Companies Act.

38 The plaintiff had cited the decision in *Dayco Products Singapore Pte Ltd (in liquidation) v Ong Cheng Aik* [2004] 4SLR(R) 318, in which the court (at [18]) regarded as unsustainable in law the proposition that informal disclosure or knowledge is sufficient to satisfy the disclosure requirements under s 156(1) of the Companies Act. However, that was not a case where there was in fact informal disclosure to the board of directors of the errant director's interest in certain transactions. Further, no reference was made in that case to the decisions in *Woolworths* and *Lee Panavision* which I find persuasive. In this regard I agree with the view expressed in *Walter Woon on Company Law* (Singapore: Sweet & Maxwell, 3rd Ed., 2005) at pp 287-288 and *Halsbury's Laws of Singapore* vol 6 (Singapore: Butterworths Asia, 2000) at para 70.247 that there is no reason why the position in *Woolworths* and *Lee Panavision* should not hold good in Singapore.

39 Accordingly, I find that Phebe Lian was not in breach of her director's duties by causing CUL to extend the $1m SBLC in favour of the plaintiff in return for the $53,664. I should add that I found the position taken by Seeto on the stand to be reprehensible – he and Sebastian had sought the help of Phebe Lian (having done so several times previously) and had offered the payment of $53,664 to CUL in return for the $1m SBLC which the plaintiff desperately needed. Yet Seeto subsequently took the position that the defendant had acted in conflict of interest. That, in my view, was an extraordinary act of ingratitude; it was a proverbial case of a dog that bit the hand that fed it. Both Seeto and Sebastian (even before his bankruptcy) were men of straw. Had Maybank called upon the joint and several guarantees furnished by Seeto and Phebe Lian for its loan of $5m, Maybank would in all probabilities have pursued Phebe Lian for its claim as Seeto's guarantee was unlikely to be worth the paper it was written on.

40 What this court found to be even more galling was the fact that Seeto and the plaintiff's other directors sued Phebe Lian here over payment of a mere $53,664 for a loan from CUL of $1m that was not repaid for more than a year. As a percentage of $1m, $53,664 was equivalent to 5%. Yet, they were prepared to and did use, the plaintiff's borrowed funds to pay one Wong Nam Sing interest amounting to $128,000 or 51% for a four week loan of $250,000 which, calculated over twelve months, equated to a staggering interest rate of 612% per annum. In addition, Seeto admitted that during the hearing of Suit 536 before another court, he revealed that he and Sebastian had taken a loan of $1.9m for the plaintiff from Rodney Tan in or about May 2007, for which they agreed to pay

Rodney Tan 5% interest per annum.

Conclusion

41 Consequently, I dismiss the plaintiff's claims with costs to Phebe Lian to be taxed on a standard basis unless otherwise agreed.

42 I shall hear further arguments from the parties as to why Seeto and the other directors of the plaintiff should not be made personally liable for Phebe Lian's costs. It is my finding that this suit was indeed a retaliatory tactic by Seeto, Sebastian and Rodney Tan for what they considered to be Phebe Lian's temerity in suing them in Suit 536. As it was instituted by the company's directors in bad faith, I see no reason why the plaintiff should be liable for and its funds used to pay, the costs due to Phebe Lian.

Supplemental Judgment

19 April 2010

Lai Siu Chiu J:

43 Pursuant to para 42 of my judgment dated 26 February 2010, Phebe Lian's solicitors applied for arguments on costs, and gave notice to the directors of the plaintiff, in particular Rodney Tan, Seeto, Sebastian as well as Lim Kwee Wah ("Lim") when the court fixed a hearing date which was on 15 April 2010.

44 The plaintiff and its three directors were present in court via their counsel. The three directors who were represented were Rodney Tan, Seeto and Lim while Sebastian appeared in person.

45 The court was informed by counsel for Phebe Lian, Mr Srinivasan, that Justice Andrew Ang ("Ang J") had on 1 February 2010 delivered oral judgment in Suit 536 in favour of Phebe Lian and her co-plaintiff Kok Lan Choo ('Kok"). Ang J found that Rodney Tan, Seeto, Lim, Sebastian together with the fifth defendant in the suit, Cairnhill Treasure Investment (S) Pte Ltd ("Cairnhill Treasure") (a company which belongs to Rodney Tan) had conducted the affairs of the plaintiff (the first defendant in Suit 536) in a manner oppressive to Phebe Lian and Kok.

46 Consequently, Ang J ordered a buy-out of the shares of Phebe Lian in the plaintiff by Rodney Tan and Cairnhill Treasure. Ang J directed that an independent valuer was to be appointed by mutual agreement to value the shares of Phebe Lian and Kok in that regard. Ang J not only ordered costs to be paid to Phebe Lian and Kok by Seeto, Lim and Sebastian for Suit 536 (being costs that followed the event) but went further to direct that Rodney Tan, Seeto, Lim, Sebastian and Cairnhill Treasure were to reimburse in full the plaintiff for all fees, costs, expenses and disbursements that were incurred and charged to the plaintiff arising out of or in connection with Phebe Lian's and Kok's complaints. He reserved costs until final resolution of the matter with regard to the proceedings against Rodney Tan and Cairnhill Treasure. I should point out that Rodney Tan/Cairnhill Treasure and Lim have appealed against Ang J's judgment in Civil Appeals No 30 of 2010 and No 32 of 2010 respectively.

47 This court was further informed that Ang J after delivery of his oral judgment in Suit 536 had, in a subsequent hearing in March 2010, informed parties that the valuation date for the buy-out of the shares of Phebe Lian and Kok would either be December 2007 or 1 February 2010.

48 Mr Kronenburg (counsel for the plaintiff) informed the court that his client adopted a neutral stand on the issue of costs and left the decision to the court.

49 Mr Srinivasan referred to Ang J's judgment and informed the court that Ang J had set aside the first rights issue but allowed the second rights issue of the plaintiff to stand. Prior to the first rights issue (in January 2008) Phebe Lian owned about 18.18% of the plaintiff's shares. Pursuant to the second rights issue (in June 2008), her interest had been diluted to 3.42%. That being the case, Mr Srinivasan indicated that Phebe Lian would not object if the court ordered the plaintiff to pay her costs in these proceedings.

50 Although he accepted that O 59 r 2(2) of the Rules of Court (Cap 322, R 5 2006 Rev Ed) ("the Rules") gave the court full powers to determine by whom and to what extent costs are to be paid, counsel for Rodney Tan argued (which arguments counsel for Seeto and Lim adopted as applicable to their clients) that this court should not make any order for costs against his client personally for the reasons that appear in [51] to [55] below.

51 First, orders for costs against non-parties were exceptional and rarely appropriate. It should not be made without sufficient (advance) warning to non-parties who are asked to pay the costs. Here, no such notice was given by Phebe Lian save that in the concluding para 34 of her opening statement dated 13 November 2009, she contended that the plaintiff's claim was "probably instituted by those in control of the plaintiff in retaliation against the defendant for commencing an action against them for their oppressive behaviour". It was later raised briefly by her counsel (in the midst of cross-examination of Seeto on 24 November 2009 [note: 1]), when he indicated he would address this court on third parties paying costs in the event his client won this suit. Rodney Tan was not a witness in this case and had no opportunity to respond to the allegation that this suit was a form of retaliation against Phebe Lian.

52 Second, courts would be willing to order costs against a non-party director where a company which is a party to litigation is insolvent and where the non-party director had caused the company to improperly prosecute or defend proceedings. This was not the case here as the plaintiff is solvent and Phebe Lian would not be prejudiced by the usual order for costs to be paid to her by the unsuccessful plaintiff.

53 Third, the directors of the plaintiff had sought and obtained legal advice not from one but two law firms that the plaintiff had a valid claim against Phebe Lian before commencement of this suit (see *In re Land and Property Trust Co plc No.2* [1993] BCC 462).

54 Counsel pointed out that the plaintiff was practically insolvent before Rodney Tan came into the picture in or about May/June 2007 and injected $26m-$28m (which sum was disputed by Phebe Lian's counsel) into the plaintiff to recapitalise the company. None of the other shareholders contributed funds to the company.

55 Because of the buy-out of her shares as ordered by Ang J, Phebe Lian would not be prejudiced if the plaintiff was ordered to pay her costs as, regardless of whether her shares were valued as of December 2007 or 1 February 2010, the present costs order would come after the two dates and the remaining shareholders of the plaintiff would be the ones affected thereby, not she.

56 Counsel (Mr See Chern Yang) for Seeto adopted for his client the arguments put forth for Rodney Tan (particularly on the lack of notice). He complained that because of the lack of notice, Seeto was deprived of the opportunity to seek independent legal advice personally. Counsel raised another issue as to why Seeto should not be made to bear the costs payable to Phebe Lian. He

pointed out that case-law (citing *Symphony Group plc v Hodgson* [1994] QB 179) ("*Symphony*") supported his proposition that where a party is seeking costs against a non-party, that non-party should have been joined to the proceedings. Here not only did Phebe Lian not join Seeto to this suit, she was attempting to pierce the corporate veil by alleging that all the directors had conspired to make use of the plaintiff as a front (see [22] of the judgment) by financing these proceedings. Phebe Lian could have or should have brought a counterclaim in conspiracy and included Seeto as a party. She failed to do so and he considered her allegation frivolous.

57 Mr See then pointed out that Seeto had given up active management of the plaintiff as of June 2007. Consequently, he did not actively participate in prosecuting this suit. He contended that the notice given on 24 November 2009 by counsel for Phebe Lian while cross-examining Seeto was not a direct warning to Seeto that Phebe Lian would be seeking costs from Seeto should she win this suit. He submitted that a reasonable inference by anyone in Seeto's shoes would be that the warning to seek costs from third parties excluded Seeto.

58 The arguments raised by counsel (Mr Kumar) on behalf of Lim echoed those put forward for Rodney Tan and Seeto. It is therefore unnecessary to repeat them save for one new submission – counsel pointed out that Lim was neither a shareholder of the plaintiff nor of its subsidiary Treasure Resort; he was only a director and was never involved in this suit.

59 Counsel for Phebe Lian took umbrage with the claim by his counsel in [54] that Rodney Tan was a white knight who had injected millions into the plaintiff and turned it around from an insolvent to a solvent company. Mr Srinivasan pointed out that there was no evidence in this suit or in Suit 536 of such huge injections of capital. He refuted the argument that Phebe Lian could have/should have sued the directors personally in conspiracy by pointing out that the company as the plaintiff was controlled by its directors who initiated this action. It was the company that could sue the directors but would not for obvious reasons.

60 As for the alleged lack of notice to the directors, Mr Srinivasan pointed out (as the court had indicated to counsel for Rodney Tan) that the judgment was dated and released more than a month ago (on 26 February 2010). This hearing was itself notice and adequate notice at that, to the directors to make submissions on the issue of their possible liability for costs.

The decision

61 Having heard all the arguments of the parties, I ordered costs payable to Phebe Lian to be borne by the plaintiff and left it to the company to recover such costs from some or all of its directors as it deemed fit.

62 I had however rejected the directors' complaint that they had not been given notice or adequate warning of Phebe Lian's intention to seek costs from them personally. The judgment was released on 26 February 2010 and collected by both parties the very same day. I had clearly identified (in [42]) of the judgment who were the directors who could possibly be made personally liable to bear Phebe Lian's costs; I did not mention Lim. All three named directors (Seeto, Sebastian and Rodney Tan) had more than enough notice to prepare themselves for the eventuality should this court make an order for costs against one or more of them.

63 As I pointed out to counsel for Rodney Tan, his client could have applied to court to intervene in these proceedings after the judgment was released but he did not. He (as well as Seeto and Lim) could also have written to this court to raise objections to [42] of the judgment but he did not. The excuse of counsel that intervening after the trial was concluded would have been too late is

unpersuasive. It is noteworthy that Seeto was being cross-examined when counsel for Phebe Lian gave notice in no uncertain terms that he would be looking to third parties to pay her costs should she win this case. I cannot fathom how Seeto (as his counsel submitted) could possibly think from reading the transcript of the cross-examination of 24 November 2009 that the notice did not apply to him. He was the only director of the plaintiff to testify; such conduct further contradicts his counsel's submission that he no longer played an active role in the company's management. Why then did Rodney Tan and Sebastian not testify?

64 As counsel for all the directors cited *Symphony* (*supra*[56]) *in extenso* to support the submission that a non-party should not be made to pay costs as a rule, I turn now to examine the case briefly.

65 In *Symphony*, the plaintiff company employed the defendant (Hodgson) under a contract which included a term restricting him from engaging in the manufacture or supply of kitchen furniture for one year after termination of his employment with the plaintiff. In April 1992, the defendant accepted an offer of employment from H Ltd, a competitor of the plaintiff. On 1 May 1992, the defendant gave notice to the plaintiff and left its services on 8 May 1992. On the advice of the solicitors of H Ltd, he then wrote to the plaintiff claiming it had repudiated his contract of employment. On 11 May 1992, the plaintiff issued a writ seeking damages and an injunction against the defendant. The trial judge found in favour of the plaintiff's claims and because the defendant was legally aided, he granted an order for costs against H Ltd on the plaintiff's application. H Ltd appealed against the order for costs.

66 In allowing the appeal of H Ltd, the Court of Appeal held that H Ltd had been deprived of the procedural protection to which it would have been entitled if it had been a defendant to the action, that H Ltd had been disadvantaged by the failure of the plaintiff to inform it of its intention to make the application and the circumstances were not such as to justify the exercise of the court's discretion to make an order for costs against H Ltd.

67 Counsel referred to extracts (at 192-194) of Balcombe LJ's judgment where he spelt out nine guidelines for the court's exercise of discretion in relation to payment of costs by non-parties. The guidelines included points made by counsel summarised at [51], [52] and [56] above. Counsel for Lim also drew the court's attention to guideline No 8 where Balcombe LJ held (at 194):

> The fact that an employee, or even a director or the managing director, of a company gives evidence in an action does not normally mean that the company is taking part in that action, in so far as that is an allegation relied upon by the party who applies for an order for costs against a non-party company.

68 I noted (as did counsel for Phebe Lian) that that the trial judge made H Ltd liable for the plaintiff's costs in *Symphony* because the defendant was legally aided and (presumably) because H Ltd had induced the defendant to breach his contract of employment with the plaintiff, I accept this was not the scenario in our case as the plaintiff was said to be solvent.

69 Another case cited on Rodney Tan's behalf was *Karting Club of Singapore v Mak David & others* [1992] 1 SLR(R) 786. There, the intervener Wee was the chairman of the plaintiff, an unincorporated club. The plaintiff sought a declaration that the defendants be deemed to have retired as officers and/or committee members of the club. Its claim was dismissed and costs were ordered against Wee personally by the trial judge as the action was initiated by him as chairman in the club's name. Wee applied to intervene in these proceedings to be added as a defendant. He submitted that the costs order was improperly made as he was not a party to the action. Wee's application was dismissed. Chan Sek Keong J held that s 18 of the Supreme Court of Judicature Act (Cap 322, 1985 Rev Ed) read

with O 59 r 2(2) of the Rules (*supra*[50]) conferred on the court the power to determine who should pay costs, which power was completely unfettered though it had to be exercised judicially. The learned judge added at [9]:

> The second reason why the application was misconceived was even more obvious. The plaintiffs were an unincorporated association and the applicant was its chairman. He and his fellow members were the plaintiffs. The applicant was found by F A Chua J to have been responsible for initiating an unwarranted action in the name of the club against the defendants. Accordingly, if costs had been ordered against the plaintiffs, it would have meant that the successful defendants and the other members had to finance the unwarranted action brought at the instigation of the applicant.

70 I had entertained the same fears as the trial judge in *Karting Club of Singapore v Mak David*. If not for Ang J's judgment in Suit 536, Phebe Lian would have been prejudiced had I ordered costs against the plaintiff in which she held 18.18% shares. The outcome of Suit 536 having overtaken this hearing on the issue of costs, the possible prejudice against Phebe Lian no longer existed.

71 Consequently, I granted the usual order that the unsuccessful party *viz* the plaintiff should pay the costs of the action on a standard basis to the successful defendant Phebe Lian to be taxed unless otherwise agreed.

[note: 1] See NE, 24 November 2009, p 414])