In The Supreme Court of Bermuda

CIVIL JURISDICTION

2016: No. 64

BETWEEN:

CHINA HEALTH GROUP LIMITED

Plaintiff

-v-

(1) SPEEDY BRILLIANT INVESTMENTS LIMITED
(2) YING WEI

Defendants

REASONS FOR DECISION

(in Court)

Date of Decision: March 9, 2016
Date of Reasons: March 15, 2016

Mr Christian Luthi and Mr Rhys Williams, Conyers Dill & Pearman Limited, for the Plaintiff ('the Company")

Mr John Riihiluoma and Mr Henry Tucker, Appleby (Bermuda) Limited, for the Defendants

Introductory

1. The Company issued a Generally Indorsed Writ on February 25, 2016 seeking declarations that, *inter alia*, the Defendants were not entitled to convene a special general meeting because their requisition was invalid. On March 2, 2016, the Company obtained directions for an expedited *inter partes* hearing of the Company's application for an interim injunction restraining convening of a Special General Meeting convened by the Defendants and due to take place on March 10, 2016 ("the SGM"). In addition, I granted the Company's application for leave to serve the Defendants out of the jurisdiction pursuant to the provisions of Order 11 rule 1(1)(d) of the Rules of the Supreme Court ("the Ex Parte March 2 Order").

2. The central thesis underpinning the interim applications was that an executive director ("Chung") responsible for entering into agreements involving the issuance of three convertible notes on behalf of the Company had recently been discovered to have misled the Board and to have contracted on terms that resulted in a substantial discount for the counterparties concerned. Proceedings had been commenced in Hong Kong against Chung and Zheng Hua Investment Limited ("ZHI") and Pacas Worldwide Limited ("Pacas") seeking to avoid the ZHI and Pacas Agreements on December 11, 2015. On February 25, 2016, after the Defendants served a December 30, 2015 requisition ("the Requisition") exercising share rights acquired under a convertible note issued to Lin and Li ("LLI") in April 2015, the Company issued proceedings in Hong Kong to void the LLI Agreement as well.

3. The Requisition proposes the removal from the Board of all directors save for the two directors (Chung and Wang Jingming) the Company considers to be wrongdoers and in concert with the parties who acquired their share rights under the impugned Agreements. It was contended that the claims asserted in the present proceedings did not overlap with relief sought in the Hong Kong action against the same Defendants and was appropriate for resolution in Bermuda as it concerned the internal management of a Bermudian company.

4. By Summons dated March 4, 2016 issued returnable for the *inter partes* hearing of the Company's interim injunction application, the Defendants applied to set aside the Ex Parte March 2 Order on the grounds of *forum non conveniens*.

5. Having heard necessarily compressed arguments on the eve of the SGM, I made an Order on March 9, 2016 in the following terms:

    (1) I restrained the 1st Defendant from holding the SGM or any other meeting pursuant to Bye-law 58 and section 74 of the Act for seven days;

(2) I discharged the Ex Parte March 2 Order against the 2nd Defendant with immediate effect and as regards the 1st Defendant upon the expiration of seven days.

6. Even though the Company was, very marginally, able to access a jurisdictional gateway under Order 11 rule 1, the Defendants satisfied me that the Ex Parte March 2 Order should be set aside. This was because in *forum non conveniens* terms, the case was not a "*proper one*" under Order 11 rule 4(2) for this Court to assume jurisdiction over. Although it followed that the Company's application for an interim injunction must be refused, under the inherent jurisdiction of the Court I suspended the operation of decision to set aside leave to serve out for seven days and granted an interim injunction restraining the SGM taking place for a corresponding period. This was to enable the Company to seek interim injunctive relief, if so advised, in Hong Kong, the appropriate forum.

7. I now give brief reasons for that decision.

Order 11 rule 1(1)(d)

8. Order 11 rule 1(1)(d) empowers the Court to grant leave to serve out in respect of claims:

> "*(d) …brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract, being (in either case) a contract which—*
>
> *(i) was made within the jurisdiction, or*
> *(ii) was made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction, or*
> *(iii) is by its terms, or by implication, governed by the law of Bermuda, or*
> *(iv) contains a term to the effect that the Court shall have jurisdiction to hear and determine any action in respect of the contract…*"

9. It was common ground that the Bye-laws are a contract between the Company and its members which is governed by Bermudian law. Mr Luthi submitted that that the Company's case was that the Defendants were in breach of contract by misusing their powers under Bye-law 58 (as read with section 74 of the Act) in relation to the Requisition. This argument was a double-edged sword. On the one hand, it brought the Company within Order 11 rule 1(1)(d). On the other hand, the argument focussed attention on the apparently inconsistent claim asserted in Hong Kong seeking to establish that the Defendants are not shareholders at all and, more broadly, the close connection between the underlying facts in both proceedings. Mr Riihiluoma

submitted (at paragraph 33 of the Defendants Outline Submissions) that the Company "*cannot hunt with the hounds and run with the hares*".

10. On balance I narrowly found that the Company had made out a good arguable case for a breach of contract claim (or a claim to "*otherwise affect a contract*"), albeit without the benefit of the fullest argument and the most mature deliberation. In broad principle terms, it seemed to me that this Court ought not to take an overly technical approach to whether or not a claim seeking to impugn the right of a shareholder to enforce his rights under the Bye-laws fell within paragraph (d) of Order 11 rule 1(1) After all, the ambit of this jurisdictional gateway must be construed in light of the following further and related qualifying claim:

> "*(n) the claim is brought for a declaration that no contract exists where, if the contract was found to exist, it would comply with the conditions set out in paragraph (1) (d) of this rule.*"

11. It may be that consideration ought to given to amending the Rules to create a broader gateway in relation to both internal corporate management disputes similar to that under the Eastern Caribbean Civil Procedure Rules. As I observed in *Majuro Investment Corp-v- Timis and others* [2015] Bda LR 109 (at paragraph 26), which Mr Riihiluoma placed before the Court:

> "*…Mr Duncan's submission that Bermuda ought to assert a broad jurisdiction over the internal affairs of its company was more of a law reform point*[1] *than an argument on the proper construction of the existing rules.*"

Forum non conveniens

12. At the ex parte hearing, Mr Luthi very fairly disclosed that it might be argued against him that Hong Kong was the most appropriate forum for the Company's claim particularly since, contrary to the position in relation to a minority shareholder petition or some other Bermudian statute-based claim, it could not be said that Bermuda was the only forum competent to grant the relief the Company sought.

[1] The Eastern Caribbean CPR (rule 7.3(7)) provides for service abroad in relation to the following claims:

> "*(a) the constitution, administration, management or conduct of the affairs; or*
>
> *(b) the ownership or control of a company incorporated within the Jurisdiction.*"

13. I was persuaded by the argument that the claim involved Bermudian law and the internal management of a Bermudian company, together with the contention that discrete issues were raised not inextricably intertwined with the matters due to be determined in the Hong Kong proceedings (relating to the LLI Agreement) against the same Defendants, that leave could properly be granted. Mr Riihiluoma, however, put these arguments to the sword.

14. When the Company's claims in the present proceedings were carefully scrutinised, the following conclusions were inevitable. Firstly, although it was true that the Bermuda claims were not precise equivalents to the Hong Kong claims, it was clear that they depended on allegations of what might broadly be described as misconduct which were dependent upon the prior resolution of the Hong Kong proceedings against the same Defendants. The Company was not willing to elect to pursue all claims in Bermuda and to discontinue the Hong Kong proceedings (i.e. the ZHI, Pacas and Chung proceedings and/or the LLI proceedings against the Defendants). There was no satisfactory reason for not seeking interim injunctive relief from the Hong Kong Court which was seized of the primary attack on the validity of the Defendants' shareholding. And, more fundamentally, there was no good or sufficient reason impeding the Company from seeking the declaratory and permanent injunctive relief which underpinned the present proceedings in Hong Kong.

15. Because the Bermuda claims were essentially parasitic on the Hong Kong claims (or, more accurately, dependent upon findings likely to be made by the Hong Kong Court), the cogency of this Court's assessment that the Company had a good arguable case on the merits was somewhat undermined. However, focusing on the forum issue alone, Mr Riihiluoma enjoined the Court to follow the test laid down by the Privy Council in *Altimo Holdings and Investment Ltd-v-Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804 at 1822-1823. In that case, Lord Collins explained the third limb of the test an applicant had to meet for seeking leave to serve out in its broader canvass as follows:

> "*71. ..Third, the claimant must satisfy the court that in all the circumstances the Isle of Man is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.*" [emphasis added]

16. The Defendants' '*Outline Submissions on Setting Aside the Order for Service Out of the Jurisdiction*' concluded with the following irresistible submission:

> "*The Defendants respectfully urge this Court to ignore CHC's spurious contention that its claim in the Bermuda Proceedings Concerns a defect in Speedy's Requisition which invokes consideration of CHC's bye-laws. Lying*

at the heart of CHC's clam that Speedy's Requisition is invalid is its contention that Speedy's shareholding is invalid by reason of the matters alleged by CHC in the Hong Kong Proceedings. This dispute as to the validity of Speedy's shareholding in CHC is properly before the Hong Kong Court. Speedy's Hong Kong solicitors have accepted service of the Hong Kong proceedings on behalf of Speedy. CHC chose to bring proceedings in Hong Kong. It lies ill for CHC to say that Hong Kong is not the most appropriate forum for determination of the validity of the Speedy shareholding dispute. Further, without exception, the relevant Spiliada forum indicia in this case point to Hong Kong as being the most appropriate forum:

a. the Subscription Agreement is governed by Hong Kong law;

b. the Company is listed on the Hong Kong Stock Exchange and there appear to be a number of issues concerning Hong Kong's listing rules;

c. the Subscription Agreement is subject to the non-exclusive jurisdiction of the Hong Kong courts;

d. the SGM itself is scheduled to take place in Hong Kong;

e. the witnesses are in Hong Kong or Mainland China. There are no witnesses in Bermuda;

f. many of the documents are in Chinese and there may be witnesses who speak Chinese. The Hong Kong Courts are better placed to deal with these language issues."

17. Mr Riihiluoma also reminded the Court that the Hong Kong Court has, in appropriate cases, declined to grant relief in respect of matters before this Court (*Gold Seal Holding Ltd.-v- Paladin Ltd & Ors* [2014] Bda LR 81 at paragraph 3). He suggested that this was an appropriate case for this Court to reciprocate such jurisdictional deference.

18. Understandably, Mr Luthi could muster no coherent response to these compelling arguments. I accordingly found that the Ex Parte March 2 Order granting leave to the Company to serve the Defendants abroad had to be set aside.

The 2nd Defendant's status as a member

19. Further and in any event I found that there was no good arguable case against the 2nd Defendant alone because it was conceded that he was not a registered member of the

Company. He was joined as one of the "concert parties" who joined in the Requisition. However, it was obvious on closer scrutiny of the nature of the Company's claim that its fundamental basis was the relationship between the Company and its shareholders through the Bye-Laws. It is trite law that only registered shareholders are shareholders as regards the conduct of internal company management affairs.

20. It was conceded that the 2nd Defendant was not on the share register. It followed that no relief could be obtained against him through the asserted Bye-law enforcement claims. The 2nd Defendant's position was the other side of the coin based on which Mr Riihiluoma argued the attempt to obtain interim injunctive relief was misconceived:

> "*32…At all material times, Speedy was treated by CHC as a shareholder in the Company. CHC, in fact, asserted that Speedy was a substantial shareholder in the Company in various public filings in Hong Kong made pursuant to Hong Kong securities legislation/regulations. Speedy's status as a shareholder is evidenced by its entry in CHC's Register of Members. As Kawaley CJ ruled in his capacity as acting Justice of Appeal in the Eastern Caribbean Court of Appeal in Yukos Investments Limited v Yukos Hydrocarbons Investments Limited et al BVIHCV 2009/028:*
>
> > *'Moreover, it is a fundamental principle of British-based company law that a company's management is not only entitled but also legally obliged to operate on the assumption that the duly registered shareholders are the owners of the shares. If a dispute about the ultimate or intermediate ownership of the company's shares was itself sufficient to justify freezing a company's assets pending the resolution of the dispute at the instance of a prospective alternative ultimate or intermediate owner, the vital business activities of operating subsidiaries would all too frequently grind to a halt. The present application for interim relief is not in real terms based on a desire to preserve assets from a risk of dissipation pending trial. It is in substance (as Bannister J effectively found) an attempt to prevent the registered shareholders of the respondents from exercising control of the respondents until the dispute over their own ultimate and/or intermediate ownership is resolved. The appellants' desire to achieve this goal is commercially logical and may ultimately (through success in the Dutch proceedings) be legally vindicated. But at this juncture the appellants' goal is legally inadmissible in all the circumstances of the present case.'"*

Conclusion

21. For the above reasons, on March 9, 2016 I set aside my own Ex Parte Order of March 2, 2016 granting leave to serve the present proceedings on the Defendants abroad and declined to entertain on its merits the Company's application for interim relief in the form of restraining the SGM. I suspended the discharge of the Ex Parte March 2 Order for seven days and granted an interim 'holding' injunction to enable the Company, if so advised, to apply for interim relief from the Hong Kong Court.

Dated this 15th day of March, 2016 _____

IAN RC KAWALEY CJ