In The Supreme Court of Bermuda

CIVIL JURISDICTION
(COMMERCIAL COURT)
2014 No. 288

BETWEEN:

OUNG SHIH HUA JAMES

Plaintiff

-and-

PALADIN LIMITED

Defendant

EX TEMPORE JUDGMENT
(in Court)

Date of hearing: August 26, 2014

Mr. Jan Woloniecki, ASW Law Limited, for the Plaintiff

The Company did not appear

Background

1. In this matter the Plaintiff issued an Originating Summons on the 6th August 2014 and sought the following declaratory Orders:

> "*(1) A declaration or declarations that a lawfully convened Special General Meeting of the Defendant, Paladin Limited (the "Company"), was held in Hong*

Kong on 1 August 2014, and that the following resolutions were duly passed, in accordance with the bye-laws of the Company, by the requisite majority of members of the Company voting on a poll taken at the aforesaid Special Meeting:

'1(a) to remove Mr. Law Fong as director of the Company with immediate effect

1(b) to remove Mr. Chen Te Kuang Mike as director of the Company with immediate effect

1(c) to remove Ms. Song Fang Zhou as director of the Company with immediate effect

1(d) to remove Mr. Wong Chong Wei Runrun as director of the Company with immediate effect

1(e) to remove Ms. Ng Hei Pak as director of the Company with immediate effect

1(f) to remove Ms Lam Chi Wai Tammy as director of the Company with immediate effect

1(g) to remove any other person or persons who may have been appointed as directors of the Company by the board of the Company during the period from the date of the requisition notice dated 2 May 2014 from Gold Seal Holdings Limited and Mr. Oung Da Ming, the shareholders of the Company, to the date of the special general meeting of the Company

2(a) to appoint Mr. Yuen Chi Wah as a director of the Company with immediate effect

2(b) to appoint Mr. Chan Chi Ho as a director of the Company with immediate effect'.

(2)A declaration or declarations that from the passing of the resolutions referred to in (1) above none of the following persons are either directors of the Company or have any lawful authority whatsoever to act for or on behalf of the Company: Mr. Law Fong, Mr. Chen Te Kuang Mike, Ms. Song Fang Zhou, Mr. Wong Chong Wei Runrun, Ms. Ng Hei Pak and Ms. Lam Chi Wai Tammy.

(3)A declaration or declarations that since the passing of the resolutions referred to in (1) above the following persons are <u>the only</u>[1] directors of the Company and hold such office lawfully pursuant to the bye-laws of the Company: Mr. Oung Shih Hua James, Mr. Yuen Chi Wah, Mr. Chan Chi Ho, Mr. Zhu Pei Qing, Mr. Kwok Wai Chi.

(4)Such further or other relief as may be just or equitable.

(5)Costs."

The Plaintiff's evidence

2. The Plaintiff in his counsel's Skeleton Argument summarises the key facts relating to the special general meeting of the Company that took place in Hong Kong on 1st August 2014 (the "SGM", or the "Meeting") and contends, rightly it seems to me, that the results of the votes are not in dispute. The meeting was convened pursuant to a shareholders' requisition by a Notice dated 22nd May 2014 which was signed by the former Chairman, Mr. Law Fong, and by Mr. Chen Te Kuang Mike. In the course of argument, counsel referred me to the actual Notice.

3. After this, the Skeleton goes on to point out, Mike Chen made two unsuccessful attempts to obtain an injunction restraining the holding of the SGM on 1st August. The outcome of the application before this Court on 30th July 2014 was that the application was refused for the reasons set out in a Judgment which will be formally handed down[2] tomorrow. I was also told that an application was made to the BVI Court for a similar injunction that same afternoon, which application was unsuccessful. Those matters were supported by the First Oung Affirmation.

4. The substance of what happened on 1st August was that the Chairman opened the Meeting and, without inviting the shareholders present and entitled to vote to approve this course, purported to adjourn the Meeting on the grounds of a Notice circulated earlier that day raising concerns about the fitness of two of the nominee directors. The remaining shareholders, after the Chairman and scrutineers left, proceeded to 'elect' a new

[1] As a matter of formality, the underlined words were inserted by way of amendment into the prayer in the Originating Summons, with leave, at the conclusion of the trial.
[2] As is customary for Chambers judgments, Judgment was handed down without a hearing.

Chairman who, after offering the shareholders to adjourn the meeting (an offer which was not taken up) proceeded to pass the resolutions that were tabled. Thereafter the former team, principally Mr. Fong and Mike Chen, appear to have refused to accept the outcome of the Meeting and insisted that in fact the Meeting had been validly adjourned and that they were still the proper Board of the Company.

5. The problems this created should be self-evident but they were exemplified by the position of the Hong Kong Stock Exchange ("HKSX"), because the Company although incorporated in Bermuda is listed on the HKSX. The HKSX on 11th August 2014 indicated that it would monitor the dispute about who properly controlled the Company. That position was reiterated more recently as explained in paragraph 6 of Fourth Oung as follows. The HKSX in effective is taking a neutral position. One of the key vehicles for communicating with shareholders is the ability to communicate through the HKSX communication system. That requires a password. The passwords are under the control of persons who the Plaintiff contends are properly the former management. The new management is unable to access the HKSX communication system. This resulted in a purported meeting, which all had agreed should not take place[3], being attended by numerous shareholders who were extremely unhappy about not being contacted.

6. The significance of this state of limbo that the Company is in is what prompted me at the directions stage of this action to accede to the Plaintiff's request for expedited directions. The expedited directions, in effect, have waived the usual requirements for personal service on all parties affected[4]. That decision was taken for two reasons. Firstly it seemed to me to be obvious that the Company could not be allowed to be in a state of limbo for too long. Secondly, it seemed to me to be obvious that any persons who were likely to take an interest in the present proceedings were sophisticated well-resourced litigants who had demonstrated the capacity to instruct lawyers in multiple jurisdictions at the drop of a hat, even in pursuit of wholly unmeritorious claims.

7. So it appeared to me that if there was in fact any serious issue to be raised by those who were complaining that the SGM had been validly adjourned and that the resolutions purportedly passed were invalid, they would in fact have adequate opportunity to participate in these proceedings and be heard.

8. Rather oddly, Law Fong, the 'former' Chairman who 'adjourned' the meeting and who was perhaps the person most interested in this corporate control dispute actually instructed counsel, Mr Andrew Martin, who appeared on the hearing of the application

[3] This Court restrained the Company from proceeding with the meeting purportedly convened by the rival Board for the avoidance of doubt: *Oung Shih Hua James-v- Paladin Limited* [2014] SC (Bda) 62 Com (14 August 2014).
[4] The directions ordered on August 14, 2014 fixed a trial date of August 26, 2014 and gave the 'former' directors until August 19, 2014 to file evidence in reply to the Plaintiff's First Affirmation.

for expedited directions and interim injunctive relief. He filed a First Affirmation to explain his side of things and, most pertinently for present purposes, to explain why he 'adjourned' the SGM. I say that it was odd that he filed this Affirmation because while he filed it, he said this in paragraph 5:

> "*I am not a party to these proceedings and do not seek to be added as such. However, given the complicated factual background history to this matter, and the fact that the substance of the Originating Summons is intended to seek to set aside and declare invalid the decision I made to adjourn the SGM, I respectfully seek this Court's indulgence to receive an account of the background facts leading up to my decision, which the Court may think fit to take into account when considering the appropriate directions to make for the trial and conduct of these proceedings.*"

9. None of the matters which he set out appeared to me to be relevant to the need to give expedited directions for an early trial of this issue, but I did have regard to what is set out at paragraph 33 of his Affirmation in which he sets out why it is that he adjourned, or purported to adjourn, the SGM on 1st August. He said this:

> "*On the basis of Bermudian law advice which I obtained at the time of the meeting from Mr. Simon Benedek, I confirmed that in my capacity as Chairman I have a residual fiduciary power under Bermuda law to validly adjourn a general meeting of Shareholders if the circumstances are such that it appears to me to be appropriate to do so. I had been made aware of the various changes in shareholdings described above very shortly before the SGM was convened, and for the reasons I have given, I was concerned that that these changes did not appear to me to be in accordance with the historic position and Lilian's wishes, and there has been no change of circumstances which suggested to me that these changes were pursuant to a proper exercise of corporate powers.*"

10. I will immediately become clear from that recitation, that the concerns that he expressed in his First Affirmation were different to the concerns that he and his fellow Board members put before the Meeting, at the last possible opportunity on 1st August, about the fitness of two of the proposed directors. He did in fact make reference to this in paragraph 32 of his Affirmation, but what he says in paragraph 33 echoes, in fact, what appears to be the underlying grievance that he and his fellow director, or former director, Mike Chen have about underlying shareholder issues involving a BVI company called Five Star, in relation to which BVI proceedings have been commenced.

11. For the reasons set out in my Judgment to be formally handed down tomorrow in relation to the 30th July injunction application[5], those concerns in my view have no bearing on the 1st August SGM. This relates to a Bermuda company, and no question was raised about the standing of the relevant shareholder of Paladin to vote at the SGM.

The issues for determination at trial

12. The Plaintiff put before the Court a number of issues for determination at trial and those were essentially the following questions:

    (a) whether or not it was appropriate to grant declaratory relief;

    (b) whether, most substantively, in fact the Meeting was in fact validly continued after the 'former' Chairman left the Meeting; and

    (c) finally, as a matter of full and frank disclosure, whether or not any possible breach of the HKSX Listing Rules constituted an impediment to this Court granting the relief sought.

Findings

Should declaratory relief be granted?

13. On the issue of whether or not declaratory relief should be granted, Mr. Woloniecki essentially submitted that while declaratory relief in the context of default proceedings has been judicially deprecated, it is quite appropriate in cases where there has been a full trial and particularly in cases where it is the only way that justice can be done. In *Grant-v-Knaresborough Urban Council* [1928] 1 Ch 310 at 317, Astbury J was dealing with a not wholly dissimilar situation of a plaintiff seeking declaratory relief at a trial in which the defendant did not participate. He decided that it was appropriate to grant declaratory relief, and said this:

> "*This is an action asking for a declaration that certain parts of this form were illegal and ultra vires. At the date of the writ the plaintiff was entitled to make out that case. The form was then withdrawn, but afterwards a defence insisting upon its validity was put in. Later on that defence was withdrawn, and the plaintiff had to*

[5] In Civil Jurisdiction 2014: No. 197, *Gold Seal Holding Limited et al-v-Paladin Limited et al*.

consider what step to take. He was not bound in the circumstances to move for judgment in default of defence if, on such a motion, he could not obtain the relief he was clearly entitled to. The declaration asked involved evidence as to the invalidity of the form issued under the Act and the Court would not have made a declaration of that nature on a motion for judgment in default of defence without evidence and argument.

In those circumstances the plaintiff was entitled to bring the actin to trial and establish by evidence his right to the declaration.

14. I accept the submission that in all the circumstances this is an appropriate case for declaratory relief. It would be a very unsatisfactory state of affairs if a company, incorporated in Bermuda and listed on the HKSX, could be left in a state of limbo where there was a dispute about who made up the duly constituted Board of Directors, merely because those persons who were in dispute with the Plaintiff elected not to participate in the proceedings issued with a view to resolving the dispute.

Was the SGM validly continued and were the resolutions purportedly passed validly passed?

15. That brings me to the merits of the question of whether or not resolutions purportedly passed at the Meeting were in fact validly passed. The starting point is to look at Bye-law 69 of the Company's Bye-laws, which explains the voting rules. I only need to refer to the first sentence of that Bye-law:

> "*69. The Chairman may, with the consent of any general meeting at which a quorum is present, and shall, if so directed by the meeting, adjourn the meeting from time to time and from place to place as the meeting shall determine*…" [emphasis added]

16. That Bye-law, in my judgment, gives the power to adjourn a meeting not, fundamentally, to the Chairman, but rather to the meeting itself. What happened in this case it seems

clear, even by the account of the Chairman himself contained in the Affirmation which he filed in these proceedings, is that he took the view that he was entitled of his motion as it were, to adjourn the meeting. In my judgment it is quite clear that this does not reflect the Bermudian legal position. There were various authorities cited in support of this proposition but, at the end of the day, it seems to me, it is a question of construction of the Bye-laws[6]. And in this case the relevant Bye-law is quite clear[7].

Did any breaches of the HKSX Listing Rules occur which are fatal to the present application?

17. Counsel for the Plaintiff then went on to raise possible issues concerning the HKSX Listing Rules which might have been raised by any adverse party participating in the present proceedings. Those matters were in fact set out in the Third Affirmation of the Plaintiff. The points, as I understood them, were threefold.

18. First of all, paragraph 13.39(4) requires votes to be taken by poll, unless the chairman authorizes a show of hands. In this case, it is accepted by the Plaintiff that the appointment of a new chairman took place by a show of hands and not by a poll, and that the departure from the poll requirement was not in fact authorised by the Chairman. It is submitted, quite sensibly, that in the circumstances of the case where the duly appointed Chairman had left the Meeting precipitously, there was in fact no Chairman able to discharge that power. In the circumstances, any breach of that rule which had occurred was purely technical.

19. Paragraph 13.39(5) requires independent scrutineers to record the votes. A similar point in answer to this possible complaint. Independent scrutineers were engaged by the Company in advance of the Meeting, but they left with the Chairman, after the Meeting had purportedly been adjourned. Again here, it is submitted that any breach could not have been avoided in the circumstances.

20. Finally, and potentially most seriously, paragraph 13.73 of the Listing rules requires an adjournment of a meeting if the standard requirement that 10 days' notice of any matters material to a meeting is not possible. In this case, as I have already alluded to, what happened was that at the last possible opportunity on 1st August before the Meeting,

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[6] In *National Dwelling Society-v-Sykes* [1894] 3 Ch 159 at 162, Chitty J stated: "*The meeting by itself (and these articles certainly apply to what I have said) can resolve to go on with the business for which it had been convened, and appoint a chairman to conduct the business which the other chairman, forgetful of his duty or violating his duty, has tried to stop because the proceedings have taken a turn which he does not like.*"

[7] Even where, unlike here, the Bye-laws empowered the chairman of a meeting to have the last word on an adjournment and merely gave the shareholders a "*controlling voice*", the Judicial Committee of the Privy Council held that "[h]*e cannot, it is true, adjourn it of his own motion*": *Salisbury Gold Mining Company-v- Hathorn* [1897] A.C. 268 at 275.

concerns were circulated to shareholders about the appointment of two directors, it being suggested that it had just come to the attention of the Board that these persons were not fit and proper persons.

21. The broader submission that was made about these possible complaints was this. What this Court is primarily concerned with is whether the vote was valid in accordance with the Company's own constitution and Bermuda law. It is accepted entirely that the Listing Rules operate as a contract between the Company and the HKSX, and that disciplinary consequences might flow from any failure to abide by those Rules. But, it was contended, that even if there had been any non-compliance with those Rules, it could not as a matter of Bermuda law affect the validity of the votes otherwise duly taken at the SGM.

22. In my judgment the possible instances of non-compliance with the HKSX Listing Rules that have been identified are not matters of substance. It seems to me that the Rules of any sensible Stock Exchange are not meant to operate as a rigid and inflexible code which has no regard to matters of substance. And so I am satisfied that any non-compliance which did take place was not substantive, and certainly not substantive in terms of the Bermuda law considerations that are the primary concern of this Court.

23. As far as paragraphs 13. 39 (4) and 13.39(5) are concerned, I find that it was in the factual circumstances portrayed in the unopposed evidence before me impossible to comply with them. As far as the paragraph 13.73 issue of a lack of 10 days' notice, I find that there was no substantial need to have 10 days' notice. Because the challenge to the fitness of the directors, on all the material before me in this action and the related proceedings, was clearly a device to try and postpone the SGM. These concerns did not appear to me to be arguably matters raised in good faith.

24. The evidence of the Plaintiff, and it is not positively challenged, is that the concerns about the former bankruptcy of one director were known to the Company many years ago and that, in any event, he was discharged from bankruptcy in 2011. The concerns about the Company Secretary, it seems to me, were clearly matters which, if genuine and substantive, could have been raised by the Company at the time of convening the SGM. Because the Company Secretary has been, I find on the basis of the unopposed evidence of the Plaintiff, with the Company for many years.

25. And so, while the Plaintiff has quite properly disclosed these possible breaches of the HKSX Listing Rules, they do not in any way constitute grounds for holding that, as a matter of Bermuda law and the constitution of this Company, the resolutions passed at the Meeting were invalid.

Conclusion

26. Finally, I should just reiterate that in this case it seems to me to be justified to have had an expedited trial. Because not to do so would leave the Company, Paladin, in a state of limbo to the prejudice of its shareholders. And those persons who are in a position to challenge the results of the Meeting, most notably the former Chairman and CEO of the Company, clearly have had notice of these proceedings and an opportunity to participate in this proceedings, and have simply elected not to do so.

27. And so for those reasons I grant the declarations sought.

Dated this 26th day of August, 2014 _____

IAN R.C. KAWALEY
CHIEF JUSTICE