In The Supreme Court of Bermuda

CIVIL JURISDICTION

COMMERCIAL COURT

2015: No 380

In the matter of UST Holdings Ltd
Company number EC – 40284

And in the matter of the Companies Act 1981

BETWEEN:-

MIGUEL A PULIDO

Plaintiff

-and-

(1) UST HOLDINGS LTD
(2) TRICASE INVESTMENTS HOLDINGS INC
(a company registered in the British Virgin Islands)
(3) ADVANTEC HOLDINGS SA
(a company registered in the British Virgin Islands)
(4) THE PILLAI FAMILY LIMITED PARTNERSHIP
(a limited partnership registered in California, USA)
(5) JAMUNA MENON

Defendants

RULING

(In Chambers)

Date of hearing: 25th September 2015
Date of ruling: 25th September 2015
Date of reasons: 30th September 2015

Mr Cameron Hill, Sedgwick Chudleigh Ltd, for the Plaintiff

Mr Martin Ouwehand and Mr Henry Tucker, Appleby (Bermuda) Limited, for the First Defendant

Mr Christian R Luthi and Mr Scott Pearman, Conyers Dill & Pearman Ltd, for the Second and Third Defendants

The Fourth and Fifth Defendants did not appear and were not represented

Introduction

1. The Plaintiff is the beneficial and, he contends, legal owner of 50,000 Class A common shares in the First Defendant, which is a company registered in Bermuda ("the Company"). He recently purchased them from the Fifth Defendant. However he has not yet been entered on the register of members. These shares, which are all fully paid, represent 0.009 per cent of the issued shares in that Class. The Second through Fifth Defendants are the registered shareholders of the Company. The Second and Third Defendants between them hold some 82 per cent of the Class A common shares.

2. On 17th September 2015 the Plaintiff obtained *ex parte* on short notice an injunction restraining the First Defendant ("the Company") from *inter alia* putting to the members of the Company at a special general meeting a resolution to consider and, if thought fit, approve and adopt amended and restated bye-laws in full substitution for the Company's existing bye-laws.

3. The Plaintiff submits that the restated bye-laws would not be *bona fide* in the best interests of the Company when considered from the point of view of the members as a whole. Specifically, he objects to provisions granting pre-

emption rights to the members and a provision that the Board may in its absolute discretion and without giving any reason refuse to register the transfer of a share. These provisions would, he submits, destroy any market in the shares and facilitate the acquisition by the majority of the shares of the minority at an artificially depressed price.

4. The current bye-laws, by contrast, do not contain pre-emption rights and their provisions for the transfer of shares are less restrictive:

"*31. Subject to the Companies Acts and to such of the restrictions contained in these Bye-Laws as may be applicable, any Shareholder may transfer all or any of his shares by an instrument of transfer in the usual common form or in any other form which the Board may approve.*

32. The instrument of transfer of a share shall be signed by or on behalf of the transferor and where any share is not fully-paid the transferee, and the transferor shall be deemed to remain the holder of the share until the name of the transferee is entered in the Register in respect thereof. All instruments of transfer when registered may be retained by the Company. The Board may, in its absolute discretion and without assigning any reason therefor, decline to register any transfer of any share which is not a fully paid share.

The Board may also decline to register any transfer unless:

(a) the instrument of transfer is duly stamped and lodged with the Company, accompanied by the certificate for the shares to which it relates, and such other evidence as the Board may reasonably require to show the right of the transferor to make the transfer,

(b) the instrument of transfer is in respect of only one class of share,

(c) where applicable, the permission of the Bermuda Monetary Authority with respect thereto has been obtained.

. . . . .

33. If the Board declines to register a transfer it shall, within three months after the date on which the instrument of transfer was lodged, send to the transferee notice of such refusal."

5. Thus, the Company could refuse to register the Plaintiff as a shareholder under the proposed bye-laws without giving any reason, but could only refuse to do so under the current bye-laws if any of the contingencies at (a) to (c) of bye-law 32 do not occur.

6. I was not concerned at the hearing with the merits of the Plaintiff's criticisms of the proposed restated bye-laws, although I note that the provisions about which he complains are not uncommon in the bye-laws of private companies. Rather, I was concerned as a preliminary point with whether, to borrow a useful concept from public law, the Plaintiff had standing to seek injunctive relief. Or, put another way, whether his interest in the shares was in principle one which the Court might properly protect by means of the injunction sought. I ruled that it was not. These are my reasons.

Background

7. On 18th August 2015, Mr Pulido entered into a written stock purchase agreement dated 17th August 2015 with the Fifth Defendant to purchase 50,000 Class A common shares in the First Defendant from her, with an option to purchase her remaining 950,000 Class A common shares.

8. On 25th August 2015, the Fifth Defendant wrote to Paul Hubbard, a director of the Company, informing him of the share transfer and requesting that he: (i) issue a new stock certificate to the Plaintiff evidencing his ownership of 50,000 Class A common shares; (ii) issue a new stock certificate to her evidencing that she owned 950,000 shares of the Company after the transfer; and (iii) update the Company's stock records accordingly. The Fifth Defendant asked Mr Hubbard to let her know if the Company required any additional documentation to complete the transfer, and to contact her if he had any questions. The letter was emailed to Mr Hubbard by Dan Gupta, whom the Fifth Defendant had appointed as her proxy for purposes of voting at the Company's general meetings, on 28th August 2015.

9. Meanwhile, Mr Pulido contacted Anthony Williams, a former Secretary of the Company, advised him of the share purchase, and expressed an interest in attending the Company's forthcoming Annual General Meeting ("AGM"), which was to be held on 3rd September 2015. On 31st August 2015, Mr Williams informed Mr Hubbard of this communication.

10. On 2nd September 2015, Debra Stevens, who was the Company Secretary, wrote to the Fifth Defendant to advise her of the formalities necessary to complete the transfer as stated in the bye-laws. The letter was sent to the Fifth Defendant in hard copy at her postal address in India. The Plaintiff complains that this was a deliberate delaying tactic by the Company, which could have sent the letter electronically via Mr Gupta. However the Company takes the position that in her letter of 25th August 2015 the Fifth Defendant had asked the Company to contact her directly. On 28th August 2015 Ms Stevens had emailed Mr Gupta requesting that he provide either an email or telephone number for the Fifth Defendant but by 2nd September 2015 he had not yet done so. Writing to the Fifth Defendant at her postal address, which Mr Gupta had confirmed in response to Ms Stevens' email of 28th August 2015, was thus the only way in which the Company could contact her directly.

11. Also on 2nd September 2015, the Plaintiff left a voice mail message for Mr Hubbard expressing a desire to participate in the AGM. That same day, Mr Hubbard emailed the Plaintiff a letter stating that he was not entitled to attend the AGM until his name appeared on the share register.

12. On 9th September 2015, the Company issued a notice of Special General Meeting ("SGM") to consider and, if thought fit, approve and adopt the amended and restated bye-laws about which the Plaintiff makes complaint. The meeting was to take place on 18th September 2015.

13. On 13th September 2015 the Fifth Defendant emailed the notice to the Plaintiff. The Plaintiff strongly suspects that one of the purposes of the proposed restated bye-laws was to allow the Company to prevent him from

becoming a member. The Company denies this and I am not in a position to form any view on the matter.

14. Also on 13th September 2015, the Plaintiff emailed Ms Stevens and requested that his shares be registered. On 16th September 2015 he emailed Ms Stevens a chasing letter dated 15th September 2015.

15. On 17th September 2015, the Plaintiff issued the present application, which came on before me. The application was urgent because the SGM was due to take place the following day. The Company was represented and made brief submissions. I granted the Plaintiff an injunction, but set an early return date of 25th September 2015 for full argument on the preliminary point with which this ruling is concerned. On the strength of the Plaintiff's submissions his application appeared to me to be sufficiently arguable to justify that course.

16. On 21st September 2015 the Fifth Defendant emailed a letter of even date to Ms Stevens stating that the Fifth Defendant had received Ms Stevens' letter of 2nd September 2015 on 18th September 2015. The Fifth Defendant attached an electronic version of the completed transfer form. She stated in the letter that she had couriered the original share certificate with her signature and a copy of the letter to the Plaintiff, so that he was able to sign the original certificate and courier it to the Company. However by the date of the hearing on 25th September 2015 the Company had not yet received these original documents.

17. Also on 21st September 2015 the Second and Third Defendants issued a summons seeking joinder of the Class A common shareholders as defendants to these proceedings.

18. On 22nd September 2015 the Company issued a summons for an order discharging the injunction.

19. The matter came back before me on 22nd September 2015. I made an order joining the Second through Fifth Defendants and varied the injunction in

certain respects. In particular, so as better to preserve the status quo by preventing any party from using the interval between the grant of the injunction and the SGM to alter their position in relation to holding shares in the Company, I ordered: (i) that until the SGM the Defendants were restrained from agreeing to sell, assign, transfer or otherwise dispose of any shares (or options therein) in the Company; and (ii) that the Company should not take any further steps to process the registration of the shares which the Plaintiff had purchased from the Fifth Defendant until the injunction was discharged or further order of the Court.

Discussion

20. The Plaintiff is not a member of the Company because his name has not yet been entered on the register of members. See section 19 of the Companies Act 1981 ("the Act"). He is therefore unable to petition for an order under section 111 of the Act on the ground that the Company's affairs are being or have been conducted in a manner oppressive or prejudicial to the interests of some part of the members, including him. See Re Full Apex (Holdings) Ltd [2012] Bda LR 9 at para 15 *per* Kawaley J (as he then was). For the avoidance of doubt, the terms "*member*" and "*shareholder*" are, for present purposes at least, synonymous. See In re DNick Holding plc [2013] 3 WLR 1316 Ch D at para 18 *per* Norris J.

21. Neither is the Plaintiff able to bring an application to rectify the register of members under section 67 of the Act by having his name entered on the register as he does not have an immediate right to registration. See Nilon v Royal Westminster Investments [2015] 2 BCLC 1 PC *per* Lord Collins, giving the judgment of the Board, at paras 38 and 51 – 52.

22. This is because the contingencies at bye-law 32 (a) and (c) have not yet occurred. As to (a), the Company has received an electronic copy of the duly stamped instrument of transfer, but it has not received the original document or the certificate of the shares to which it relates. Section 48(2) of

the Act provides that notwithstanding anything in the bye-laws of a company, it shall not be lawful for the company to register a transfer of shares in the company unless a proper instrument of transfer has been delivered to the company. I will assume without deciding that there is a good arguable case that under section 48 such instrument could be in electronic format. However in my judgment the Company cannot fairly be criticised for requiring production of the original instrument in hard copy.

23. As to (c), section 13(1) of the Exchange Control Regulations 1973 provides that where the transferor and the transferee are not both resident in Bermuda, the shares in question may not be transferred without the permission of the Controller of Foreign Exchange, who is a designated officer of the Bermuda Monetary Authority. The Company therefore requires the permission of the Controller before it may lawfully register the transfer. This has not yet been granted. The Controller will require to be satisfied that an applicant is a suitable person to hold shares in a Bermuda registered company. As the Plaintiff, who is the Mayor of Santa Ana in California, is *ex officio* a Politically Exposed Person, the grant of the requisite permission is not a foregone conclusion. As the Company has not yet received the permission of the Controller it may not lawfully register the transfer of shares from the Fifth Defendant to the Plaintiff.

24. Even if contingencies (a) and (c) of bye-law 32 were not underpinned by statute, absent exceptional circumstances there would not in my judgment be a good arguable case that the Court should interfere with a decision of the Company to decline to register a transfer where one of those contingencies had not been satisfied.

25. In the present case, however, the Board had not declined to register a transfer but was awaiting the satisfaction of the contingencies. As Martin Ouwehand, who appeared for the Company, submitted, until the Company did something which ought not to be done, or omitted to do something which ought to be done, no cause of action could arise between the

Company and the true owner of the shares, whoever that might be. See In re Ottos Kopje Diamond Mines, Limited [1893] 1 Ch 618 at 628 EWCA.

26. Confronted with these obstacles, Cameron Hill, who appeared for the Plaintiff and argued his case with great creativity, relied upon the principle that the power to amend a company's articles must be exercised in good faith in the interests of the company. The law in this area was conveniently summarised by Sir Terence Etherton C, giving the judgment of the Court in Arbuthnott v Bonnyman [2015] EWCA Civ 536, at para 90:

"*It is common ground that an alteration to a company's articles, even if passed by the requisite majority of shareholders, may be challenged as invalid in certain circumstances. We were taken to a number of cases which consider the conditions for an effective challenge. They included Allen v Gold Reefs of West Africa Limited [1900] Ch 656 , Sidebottom v Kershaw Leese and Co Ltd [1920] 1 Ch 154, Shuttleworth v Cox [1927] 2 KB 9, Peters' American Delicacy Co v Heath (1939) 61 CLR 457, Greenhalgh v Aderne Cinemas Ltd [1951] Ch 286, Citco Banking Corp NV v Pusser's Ltd [2007] UKPC 13, and Assenagon Asset Management SA v Irish Bank Resolution Corpn Ltd [2012] EWHC 2090 (Ch), [2013] Bus LR 266. It is not necessary to set out the facts of those cases. I would extract from them the following principles:*

(1) The limitations on the exercise of the power to amend a company's articles arise because, as in the case of all powers, the manner of their exercise is constrained by the purpose of the power and because the framers of the power of a majority to bind a minority will not, in the absence of clear words, have intended the power to be completely without limitation. These principles may be characterised as principles of law and equity or as implied terms: Allen at 671; Assenagon at 278–280.

(2) A power to amend will be validly exercised if it is exercised in good faith in the interests of the company: Sidebottom at 163.

(3) It is for the shareholders, and not the court, to say whether an alteration of the articles is for the benefit of the company but it will not be for the benefit of the company if no reasonable person would consider it to be such: Shuttleworth at 18–19, 23–24, 26–27; Peters' American Delicacy Co at 488.

(4) The view of shareholders acting in good faith that a proposed alteration of the articles is for the benefit of the company, and which cannot be said to be a view which no

reasonable person could hold, is not impugned by the fact that one or more of the shareholders was actually acting under some mistake of fact or lack of knowledge or understanding: Peters' American Delicacy Co at 491. In other words, the court will not investigate the quality of the subjective views of such shareholders.

(5) The mere fact that the amendment adversely affects, and even if it is intended adversely to affect, one or more minority shareholders and benefit others does not, of itself, invalidate the amendment if the amendment is made in good faith in the interests of the company: Sidebottom at 161, 163–167, 170–173; Shuttleworth; Citco at 490, 493; Peters' American Delicacy Co at 480, 486.

(6) A power to amend will also be validly exercised, even though the amendment is not for the benefit of the company because it relates to a matter in which the company as an entity has no interest but rather is only for the benefit of shareholders as such or some of them, provided that the amendment does not amount to oppression of the minority or is otherwise unjust or is outside the scope of the power: Peters' American Delicacy Co at 481, 504, 513, 515; Assenagon.

(7) The burden is on the person impugning the validity of the amendment of the articles to satisfy the court that there are grounds for doing so: Citco at 491; Peters' American Delicacy Co at 482."

27. It is evident from this summary that challenging an alteration to a company's bye-laws is no easy task. However the initial hurdle faced by Mr Hill was that in none of the cases cited above was an amendment to a company's articles challenged by anyone other than a member. This begs the question as to whether a non-member has standing to make such a challenge.

28. It is trite law, enshrined in section 65(7) of the Act, that a company is not bound to recognise trusts of shares. As stated by Lord Coleridge CJ in In Re Perkins Ex parte Santa Barbara Mining Co (1890) 24 QBD 613 EWCA at 616:

"*If a trustee is on the company's register as a holder of shares, the relations which he may have with some other person in respect of the shares are matters with which the company have nothing whatever to do; they can look only to the man whose name is upon the register.*"

29. Re Baku Consolidated Oilfields Ltd [1993] BCC 653 Ch, upon which Mr Hill relied, is not authority to the contrary. A liquidator sought directions as to the manner in which a fund held by a company should be distributed. Chadwick J (as he then was) held at 657:

> "*In the light of these provisions it is clear that neither the company, nor its liquidator, are obliged to recognise a person claiming title to shares as a transferee until an instrument of transfer in the prescribed form has been submitted for registration and has been registered.*
>
> *It follows that it would be wrong to direct the liquidator to distribute any part of the surplus assets to a person whose only claim to a share in those assets was that he or she was in possession of a share certificate. The liquidator ought not to be directed to distribute to a person claiming as a transferee save in circumstances in which he could be required to enter the name of that claimant on the register. But it does not follow that there are no circumstances in which it would be sensible and appropriate for the liquidator, if he thinks fit, to recognise the claim of a transferee claimant. If the liquidator is satisfied, on the evidence before him, that a particular claimant who is in possession of a share certificate is beneficially entitled to the shares to which that certificate relates – so that the claimant would be able to compel the person registered in respect of those shares, or his personal representative, to execute a proper instrument of transfer – then the liquidator ought not to be obliged to put the claimant to the trouble and expense of perfecting his title.*"

30. In summary, the Court confirmed the principle that the liquidator, who stood in the shoes of the company, was not bound to recognise the claims of anyone other than a member of the company. However, the Court directed that the liquidator could do so in the case of someone beneficially entitled to shares in the company if he thought fit. Thus recognition was at the discretion of the liquidator and not by compulsion.

31. I conclude that, as a company is not bound to recognise trusts of shares, there is not a good arguable case that a beneficial owner of shares in a company has any cause of action under the principles stated in Arbuthnott v Bonnyman permitting him to challenge a proposed restatement of the company's bye-laws. When considering such restatement the company can therefore act without regard to his beneficial interest.

32. Mr Hill submitted that further or alternatively the present case was an intermediate one where the Plaintiff, although not a member, was nonetheless the legal owner of the shares. Legal title, he submitted, passed upon the execution of the stock transfer agreement by the Plaintiff and the Fifth Defendant. Christian Luthi, who appeared for the Second and Third Defendants, submitted that on the contrary legal title was not perfected until the transfer was registered. Succinctly put, the issue was whether a share transfer is registered because the transferee has legal title, or whether the transferee has legal title because the share transfer is registered.

33. I did not hear full argument on the point and there is authority going both ways. Eg Hawks v McArthur [1951] 1 All ER 22 Ch and Pennington v Waine (No 1) [2002] 1 WLR 2075 EWCA *per* Arden LJ at para 51 and Clarke LJ (as he then was) at para 80 support Mr Luthi's position. On the other hand, in Nilon v Royal Westminster Investments Lord Collins stated at para 51 that:

> "*...proceedings for rectification can only be brought where the applicant has a right to registration by virtue of a valid transfer of legal title, ...*"

34. This statement was part of the *ratio* of the Board's decision and is therefore binding upon me. It appears to support the Plaintiff's position. However, it would arguably be problematic to hold that legal title to shares could pass in circumstances where, as in the present case in Bermuda, the permission of the Controller is a condition for the transfer of those shares but such permission has not yet been granted.

35. I shall proceed on the basis that the Plaintiff does have a good arguable case that he has legal title to the shares which he has purchased. However that does not avail him. If legal title precedes registration then for present purposes as between the Plaintiff and the Company its sole relevance is that it is a precondition for registration. See Re a Company No 007828 of 1985 (1986) 2 BCC 98,951, the citation of which by counsel was mentioned with approval at para 32 of Nilon v Royal Westminster Investments. At 98,954 Harman J noted that the registered holder has a legal estate in the shares, and

appeared to acknowledge that the legal estate may pass even though there is some further act such as registration to be done, but nonetheless stated that:

"*The nature of title to shares in companies with which the company is concerned is at all times that of the registered holder, …*"

36. Thus the material distinction is not between legal and beneficial ownership, but between members and non-members. As it is only members who can vote at a general meeting it is only members who have standing to challenge a proposed restatement of a company's bye-laws in the courts.

37. It is for these reasons that, after full argument, the Plaintiff's application to renew the injunction was dismissed.

38. I shall hear the parties as to costs.

DATED this 30th day of September, 2015

Hellman J