IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 108

Originating Summons No 480 of 2018
(Summons No 1929 of 2018)

Between

Goldilocks Investment Company Limited

… *Applicant*

And

Noble Group Limited

… *Respondent*

GROUNDS OF DECISION

[Civil procedure] — [Injunctions]
[Companies] — [Members]
[Conflict of laws] — [Choice of law] — [Forum mandatory statute]

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Aedit Abdullah J:

1 These are my brief reasons, capturing and elaborating on my oral remarks made at the hearing of this matter. These brief reasons are issued to assist the parties, as well as others, in the light of the conclusions I have reached about the operation of the Securities and Futures Act (Cap 289, 2006 Rev Ed) ("the SFA"). I do not address here all the arguments raised in the submissions.

Background

2 The applicant, Goldilocks Investment Company Limited ("Goldilocks"), sought an interim injunction against the respondent, Noble Group Limited ("Noble"), pending the determination of the main substantive application in Originating Summons No 480 of 2018 ("OS 480/2018"). Goldilocks is a company incorporated in the United Arab Emirates while Noble is a Bermuda-incorporated company listed on the Singapore Exchange.[1] The

interim injunction sought to restrain Noble from holding any shareholders' meetings, including its annual general meeting that was scheduled for 30 April 2018 ("the AGM"), pending the final disposal of OS 480/2018.

3 In OS 480/2018, Goldilocks is applying for, *inter alia*, a declaration that it is entitled to propose directors for election to the board of Noble at general meetings of Noble, and that it is entitled to exercise all rights as a shareholder and as a member of Noble.

4 At the time of the injunction application, Goldilocks held an 8.1% share in Noble through an account with DBS Nominees Pte Ltd ("DBS nominee account"), which in turn held the shares through the Central Depository Pte Ltd ("the CDP").[2] Noble takes the view that Goldilocks is not a member of Noble as it is not listed on Noble's register of members. Noble therefore rejected requisitions issued by Goldilocks *qua* member with respect to the AGM on the basis that Goldilocks is not a member.[3] The requisitions issued by Goldilocks included one which proposed five directors for appointment at the AGM.[4]

5 At the conclusion of the hearing for the injunction application, I granted the injunction but on modified terms.

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1 Goldilocks's submissions dated 27 April 2018 ("Goldilocks's submissions") at paras 5–6.

2 Affidavit of Ajit Vijay Joshi dated 27 April 2018 ("Affidavit of AVJ") at para 4; Goldilocks's submissions at paras 5, 7.

3 Affidavit of AVJ at pp 418–419; Noble's submissions dated 27 April 2018 ("Noble's submissions") at paras 14–15.

4 Goldilocks's submissions at para 13; Noble's submissions at para 14.

Law

6 The criteria governing the granting of an interim injunction were not in dispute. The legal principles to be applied in an interim injunction application are those set out in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 which involve two main considerations, namely, whether there is a serious question to be tried and whether the balance of convenience lies in favour of the injunction being granted. No question of adequacy of damages arose in the present case.

Decision

Serious question to be tried

7 Noble argued that there is no serious question to be tried as Goldilocks has no real prospect of success in its main substantive application in OS 480/2018.[5] According to Noble, it is clear that only individuals or entities appearing on Noble's register of members are members pursuant to Noble's bye-laws and Bermuda law. Given that Goldilocks held its shares in Noble through a DBS nominee account, which in turn held the shares through the CDP, Goldilocks was not on the register of members of Noble and could not act *qua* member.

8 Goldilocks took the position on the other hand that pursuant to s 81SJ of the SFA, which it argued is the applicable law, it is Goldilocks and not the CDP that is a member of Noble.[6] There is a serious question to be tried, *viz*, whether the fact that Goldilocks holds its shares in Noble through the CDP meant that Goldilocks is not a member and cannot exercise member rights. This issue was

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5 Noble's submissions at paras 23–40.

6 Goldilocks's submissions at paras 33–41.

said to be one of significant importance not just to Goldilocks but to other investors in Singapore who hold their shares through the CDP.[7]

9 I was satisfied that there is a serious question to be tried in the main substantive action in OS 480/2018, as to whether Goldilocks has the right to lodge requisitions, to propose directors for election and to exercise other rights as a member of Noble. In the determination of this issue, the question of which law is the applicable law governing whether Goldilocks has rights as a member also arises.

10 While arguments were made by Noble on Bermuda law and the bye-laws of Noble, which it argued made it clear that Goldilocks is not a member,[8] I was of the view that the SFA could operate as a forum mandatory statute, displacing the application of foreign law.

11 Where book-entry securities of a corporation are deposited with the "Depository", s 81SJ of the SFA deems those named as the depositors in the Depository Register, rather than the Depository, as the members of the corporation. The provision reads:

> **Depository not member of company and depositors deemed to be members**
>
> **81SJ.**—(1) Notwithstanding anything in the Companies Act (Cap. 50) or any other written law or rule of law or in any instrument or in the constitution of a corporation, where book-entry securities of the corporation are deposited with the Depository or its nominee —
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> (*a*) the Depository or its nominee (as the case may be) shall be deemed not to be a member of the corporation; and

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7 Goldilocks's submissions at paras 37–38, 47.

8 Noble's submissions at paras 25–26, 38–39.

> (*b*) the persons named as the depositors in a Depository Register shall, for such period as the book-entry securities are entered against their names in the Depository Register, be deemed to be —
>
> (i) members of the corporation in respect of the amount of book-entry securities (relating to the stocks or shares issued by the corporation) entered against their respective names in the Depository Register; or
>
> (ii) holders of the amount of the book-entry securities (relating to the debentures or any derivative instrument) entered against their respective names in the Depository Register.
>
> …

12 Section 81SF defines the term "Depository" as the CDP or any other corporation approved by the Monetary Authority of Singapore as a depository company or corporation for the purposes of the SFA. "Depository Register" is defined as "a register maintained by the Depository in respect of book-entry securities". Therefore, by operation of law, those who hold accounts with the CDP in respect of shares in corporations are the members of those corporations, as opposed to the CDP.

13 I was of the view that the SFA could, given its regulatory nature, possibly operate as a forum mandatory statute, as with penal, revenue, and other public laws. Otherwise, the status and rights of a shareholder that holds its shares in a company listed on the Singapore Exchange through the CDP would differ depending on whether the company is incorporated in Singapore or elsewhere. Such a position is counter-intuitive and would likely have unjust effects. The mandatory application of the forum's laws is recognised as an exception to choice of law. As Prof Richard Fentiman explains in *International Commercial Litigation* (Oxford University Press, 2nd Ed, 2015) at para 4.06:

> The scope of the choice-of-law process is limited to the extent that certain issues are or may be subject to the local law of the

> forum. The law of the forum will apply directly as the applicable law in three circumstances: where the issue is procedural; where local law is paramount; and where the parties have the option to plead the law of the forum. It may also apply indirectly, insofar as a court may by reason of public policy deny effect to a foreign law that would otherwise apply.

For the purposes of the injunction application, I was satisfied that it may be found that s 81SJ of the SFA is to be applied as a forum mandatory rule. The language of the provision does not appear to be limited to situations where Singapore law is the *lex causae*. In the light of this, I thus rejected Noble's argument that there is no serious question to be tried in OS 480/2018 and also its related submission that the bringing of the injunction application is an abuse of process by Goldilocks.

14 The difficulty in the present case though, as alluded to above at [4], is that at the time of the injunction application, Goldilocks held its shares in Noble through a DBS nominee account, which in turn held the shares through the CDP. The term "depositor" is defined under s 81SF of the SFA as "an account holder or a depository agent but does not include a sub-account holder". Goldilocks did not therefore fall squarely within the words of s 81SJ read with s 81SF.

15 Normally, the court would expect an applicant, particularly one that is represented, to ensure that it meets all the necessary legal requirements for its application. However, I accepted here that the equities of the situation did not require immediate strict compliance with s 81SJ and that the injunction application should not be dismissed on the basis that Goldilocks did not fall squarely within the wording of s 81SJ. I found that it was within Goldilocks's rights to so register itself as the depositor in respect of its shares in Noble in the CDP register. Following the discussion at the hearing, I directed that Goldilocks, at least, begins the process of such registration by 3 May 2018.

Balance of convenience

16 I was satisfied also that the balance of convenience lay in favour of the grant of the injunction. I noted that at least some creditors of Noble may be affected by the delay in the holding of the AGM from the grant of the injunction, and that this may in turn affect the position of Noble, including the timelines for its restructuring. However, I found that this did not override the prejudice to Goldilocks resulting from the denial of its right, as a member, to propose directors and have its nominees voted upon at Noble's annual general meeting, should OS 480/2018 be determined in Goldilocks's favour. I did not find any other factor pointing against the grant of the injunction.

Conclusion

17 For the foregoing reasons, I found that the grant of the interim injunction carried the lower risk of injustice, and so granted the injunction though on modified terms, including a limitation of the scope of the injunction to the holding of Noble's annual general meeting, as opposed to all shareholders' meetings.

18 At a subsequent hearing, I permitted the convening of the AGM only to allow those turning up to be informed that it is to be adjourned, pursuant to the order of court.[9]

Aedit Abdullah
Judge

Nair Suresh Sukumaran and Tan Tse Hsien Bryan
(Nair & Co LLC) for the applicant;
Jason Chan Tai-Hui, Evangeline Oh Jialing and Rebecca Chia Su Min (Allen & Gledhill LLP) for the respondent.

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[9] Minute Sheet dated 30 April 2018.