

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 220

Originating Summons 636 of 2019

Between

Cheng Tim Jin

... Plaintiff

And

Alvamar Capital Pte Ltd

... Defendant

GROUND OF DECISION

[Companies] — [Directors] — [De facto] — [Right to inspect accounts]

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Cheng Tim Jin
v
Alvamar Capital Pte Ltd

[2019] SGHC 220

High Court — Originating Summons 636 of 2019
Vincent Hoong JC
10 September 2019

19 September 2019

Vincent Hoong JC:

Introduction

1 By Originating Summons 636 of 2019, the plaintiff sought a declaration that he is a *de facto* director¹ of the defendant company for the purposes of s 4(1) of the Companies Act (Cap 50, 2006 Rev Ed) (“the Act”). The plaintiff also sought orders for him to inspect the accounts of the company.

2 Having heard the parties’ submissions, I granted the plaintiff’s application, and delivered an oral judgment detailing my reasons.

3 Given the novelty of the issue, I publish my grounds of decision herein.

¹ Plaintiff’s Further Written Submissions p 5 at para 15.

Facts

4 The defendant is a company that was incorporated by the plaintiff on 9 September 2009. At the time of its incorporation, the plaintiff was the sole director of the defendant, while his wife was the sole shareholder.²

5 In February 2010, one Chan Kam Piew (“KP”) and Hidayat Charles (“Charles”) took up shares in the defendant.³ Subsequently, Charles resigned as a director of the defendant, and transferred his 20% shareholding in the defendant to KP and the plaintiff in equal shares.⁴

6 In April 2012, the plaintiff arranged for all the shares in the defendant that were held by his wife and himself to be held by KP, pursuant to a trust deed dated 3 April 2012 (“the Trust Deed”). The result of the Trust Deed was that KP held 50% of the defendant’s shares absolutely, while he held the remaining 50% of the shares on trust for the plaintiff.⁵

7 Following the execution of the Trust Deed, on 13 April 2012, the plaintiff resigned as a director of the defendant.⁶

8 The plaintiff did not want to be a registered shareholder and director of the defendant because he “wanted to avoid the possible risk of transactions between the [d]efendant and the companies under [his] control being regarded

² Cheng Tim Jin’s first affidavit dated 23 May 2019 (“CTJ1”) at para 2.

³ CTJ1 at para 7.

⁴ CTJ1 at para 9.

⁵ CTJ1 at para 10 and Tab 2, pp 23–28; Chan Kam Piew’s affidavit (“CKP”) at para 11.

⁶ CKP at p 36.

as related party transactions under the [Act], which may then require certain disclosure or approvals.”⁷

9 After his formal resignation as the director of the defendant, on 8 December 2012, the plaintiff was appointed as the “Marketing Director” of the defendant.⁸ He continued to play an active role in the financial and operational matters of the defendant⁹ until about August 2018, when he was allegedly shut out of the defendant’s affairs by KP, who remained the only formally appointed director of the defendant.¹⁰

10 On this backdrop, the plaintiff sought a declaration that he is a *de facto* director of the company. Flowing from such directorship, the plaintiff also sought access to the defendant’s accounts so that he could investigate into suspected wrongdoings or mismanagement by KP.¹¹

The issues

11 I dealt with the issues in the following order:

- (a) First, is the plaintiff a *de facto* director?
- (b) Second, if the plaintiff is a *de facto* director, does this give him the right to inspect the company’s accounts?

⁷ CTJ1 at para 11.

⁸ CKP at p 40.

⁹ CTJ1 at para 16.

¹⁰ Cheng Tim Jin’s second affidavit dated 7 August 2019 (“CTJ2”) at para 19.

¹¹ CTJ2 at paras 16–17.

(c) Third, even if the plaintiff is a *de facto* director and such directorship gives him the right to inspect the company's accounts, does any consideration operate to deny him such right of inspection?

12 Before dealing with each issue, however, a preliminary matter that was disposed of related to the appointment of the plaintiff as a *de jure* director of the defendant. In this regard, KP stated in his affidavit that he “would not object to the [p]laintiff being formally appointed a director”¹² of the defendant, and he had in fact taken steps in early 2018 to formally appoint the plaintiff as such.¹³ However, the plaintiff declined to be formally appointed,¹⁴ allegedly because he suspected that doing so would allow KP to resign as a director. Given that the defendant no longer has any employees, KP's resignation as the only formal director of the defendant could leave the plaintiff unable to investigate into the financial affairs of the company.¹⁵

13 During the hearing, I asked the defendant's counsel, Mr Fong Wei Li (“Mr Fong”), if KP would be willing to give an undertaking that he would not resign as a director were the plaintiff to be formally appointed as a director of the company. In my view, such an approach would have been the most obvious mode of resolving the matters at hand, as the plaintiff could be a *de jure* director with the concomitant right to inspect the company's accounts pursuant to s 199 of the Act while KP would stay on as a director to assist in any such inspection. However, Mr Fong explained that he did not have any instructions from KP as

¹² CKP at para 29.

¹³ CKP at para 31 and p 77.

¹⁴ CKP at para 31 and p 76.

¹⁵ CTJ2 at para 19.

to whether the latter was willing to give such an undertaking but, in any event, it was also KP's prerogative to resign as a director if he so wished. In the circumstances, I proceeded to consider the merits of the plaintiff's application to be declared a *de facto* director, and to be granted the right to inspect the defendant's accounts.

Plaintiff is a *de facto* director

14 Turning to the issue of whether the plaintiff is a *de facto* director of the defendant, I was cognisant of the following principles expressed in *Gemma Ltd v Davies* [2008] BCC 812, which were endorsed in *Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others (Tung Yu-Lien Margaret and others, third parties)* [2010] SGHC 163 ("*Raffles Town Club*") at [58]:

... [R]ather than an iron-clad test, in inquiring whether there had been *de facto* directorship ... [the following propositions may be derived from the cases:] ...

(1) To establish that a person was a *de facto* director of a company, it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director (per Millett J. in *Re Hydrodam (Corby) Ltd (in liq.)* [1994] BCC 161 at 163).

(2) It is not a necessary characteristic of a *de facto* director that he is held out as a director; **such "holding out" may, however, be important evidence in support of the conclusion that a person acted as a director in fact** (per Etherton J. in *Secretary of State for Trade and Industry v Hollier* [2006] EWHC 1804 (Ch); [2007] BCC 11 at [66]).

(3) **Holding out is not a sufficient condition** either. What matters is not what he called himself but what he did (per Lewison J. in *Re Mea Corp Ltd* [2006] EWHC 1846 (Ch); [2007] BCC 288).

(4) It is necessary for the person alleged to be a *de facto* director to have **participated in directing the affairs of the company** (Hollier (above) at [68]) on an

equal footing with the other director(s) and not in a subordinate role (above at [68] and [69] explaining dicta of Timothy Lloyd Q.C. in *Re Richborough Furniture Ltd* [1996] BCC 155 at 169–170).

(5) The person in question must be shown to have assumed the status and functions of a company director and to have **exercised “real influence” in the corporate governance of the company** (per Robert Walker L.J. in *Re Kaytech International Plc* [1999] BCC 390 [“*Kaytech*”]).

(6) If it is unclear whether the acts of the person in question are referable to an assumed directorship or to some other capacity, the person in question is entitled to the benefit of the doubt (per Timothy Lloyd Q.C. in *Re Richborough Furniture Ltd* (above)), but the court must be careful not to strain the facts in deference to this observation (per Robert Walker L.J. in *Kaytech* at 401).

[emphasis added in bold]

15 Reviewing the evidence, I found that the plaintiff is a *de facto* director of the defendant for several reasons.

16 As a starting point, the plaintiff was held out as a “Marketing Director” of the defendant.¹⁶ While this is not sufficient in and of itself, this was at least probative of the fact that he was the *de facto* director of the defendant.

17 More importantly, the plaintiff clearly exercised real influence in the defendant, and participated in the management of the affairs of the company on an *equal footing* with KP, the defendant’s only formally-appointed director.

18 In this regard, even after his resignation as a *de jure* director of the defendant in April 2012,¹⁷ the plaintiff continued to participate as a director in

¹⁶ CKP at p 40; CTJ1 at p 62

¹⁷ CKP at p 36.

almost all aspects of the company, be it with respect to the company’s finances, banking, human resource, or even in business dealings (which was client facing).¹⁸

19 That the plaintiff acted as a co-equal to KP was confirmed by Vina Misra d/o Rama Kantmisra (“Vina”), whose evidence was not directly contradicted by the *de jure* director, KP. Vina was employed as the Business Analyst of the defendant from 9 July 2012 to 29 July 2016, and she gave evidence that both KP and the plaintiff were involved in hiring her, and that decisions were *jointly* made by the plaintiff and KP.¹⁹ In fact, emails tendered by the plaintiff confirmed that Vina had sought the approval of *both* the plaintiff and KP for business decisions.²⁰

20 Thuy Le, another employee of the defendant, also gave financial updates relating to the defendant to *both* the plaintiff and KP,²¹ further corroborating the fact that the plaintiff was actively involved in the financial management of the company.

21 Secondly, the plaintiff had access to and could produce the company’s *unaudited* accounts from 2010 to 2018.²² Such accounts would not ordinarily be available to members of the company, as s 203 of the Act only entitles members to the *audited* financial statements of a company. In fact, while Mr Fong suggested that the plaintiff would have access to the company’s accounts by

¹⁸ CTJ1 at para 16; pp 70–98.

¹⁹ Vina Misra D/O Rama Kantmisra’s affidavit dated 1 August 2019 at paras 1, 3 and 7.

²⁰ CTJ1 at pp 74.

²¹ CTJ1 at pp 78, 79.

²² CTJ2 at Tab 3, pp 24–64.

virtue of his indirect shareholding in the defendant (through KP), clause 106 of the defendant's articles of association stipulates that "no member (not being a director) shall have any right of inspecting any account ... except as conferred by statute or authorised by the directors or by the company in general meeting".²³ There was no evidence that separate approval had been sought from KP (the *de jure* director) or at a general meeting of members for the plaintiff to obtain the unaudited accounts. This supported the plaintiff's case that he had always had access to the defendant's accounts, until he was shut out by KP sometime in August 2018.²⁴ In my view, the fact that the plaintiff was able to produce the company's unaudited accounts since 2010 showed that he had always been actively involved in the financial management of the defendant in his capacity as a *de facto* director.

22 Thirdly, and crucially, KP had absolutely no issue with formally appointing the plaintiff as a director when the plaintiff so requested, and he in fact took steps to get the company secretary to formally appoint the plaintiff as such.²⁵ The formal appointment did not however go through as the plaintiff later retracted his request to be a director of the company.²⁶ Be that as it may, KP's readiness to formally appoint the plaintiff as a director strongly suggested that the plaintiff had all along been acting as a *de facto* director of the defendant, such that any formal appointment would not disrupt the status quo.

²³ CKP at p 65.

²⁴ CTJ2 at para 19.

²⁵ CKP at pp 70 and 77.

²⁶ CKP at p 76.

23 In totality, I was satisfied on the evidence that the plaintiff is a *de facto* director of the company. In this regard, I did not accept the defendant's argument that the court has no power to make the declaration that the plaintiff is a *de facto* director. As Mr Fong conceded, the courts have traditionally declared persons to be *de facto* directors, although such declarations have often been for the imposition of directorial duties. It would therefore be incongruent if the court were to be denied its powers to make a declaration that a person is a *de facto* director of a company simply because the putative director seeks to exert rights of directorship. No reasons were proffered to explain why a distinction ought to be made in such cases.

Power of *de facto* directors to inspect a company's accounts

24 In fact, in *Wuu Khek Chiang George v ECRC Land Pte Ltd* [1999] 2 SLR(R) 352 ("*George Wu*"), the Court of Appeal recognised that "*a director has the right of inspection of any documents such as the accounting and other records of the company and such right is a concomitant of the fiduciary duties of good faith, care, skill and diligence which the director owes to the company. ... The language of [s 199 of the Act] clearly shows the obligation of the company to allow inspection by its director as mandatory*" [emphasis added] (*George Wu* at [25]).

25 Hence, the "right of a director to inspect the books and records of the company flows from his office as a director and enables him to perform his duties as a director". This is because "unless a director has access to these sources of information, he would be severely inhibited in the proper performance of his duties": *George Wu* at [33]; see also *Mukherjee Amitava v DyStar Global Holdings (Singapore) Pte Ltd and others* [2018] 2 SLR 1054 ("*Mukherjee (CA)*") at [25].

26 The “director” contemplated under s 199 of the Act extends to *de facto* directors, although the burden is on the *de facto* director to show that he is one. As Vinodh Coomaraswamy J explained in *Murkherjee Amitava v DyStar Global Holdings (Singapore) Pte Ltd and others* [2018] 5 SLR 256 at [22]–[23], under the statutory scheme of s 199(3) of the Act, three elements must be satisfied before a director’s right to inspect the company’s records arises:

... (a) The person who wishes to inspect the company’s records must be a director of the company.

(b) The documents which the director wishes to inspect must be the company’s “accounting and other records” within the meaning of s 199(1) or a subset of those records.

(c) The director must seek inspection for a proper purpose.

23 The burden of proving the first element above [*ie*, that he is a director] ... must rest on the putative director. ... In almost all cases, that burden will be discharged so easily that this element will not even be disputed. Whether or not the party seeking inspection is a director of the company is a matter of record, unless he relies on the ***extended definition of ‘director’ in s 4(1) of the Act***. If that is the case, issues of fact may arise on this element. The burden of proof on those issues of fact should rightly rest on the putative director.

[emphasis added in bold italics]

27 The “extended definition of ‘director’ in s 4(1) of the Act” encompasses a *de facto* director. In *Raffles Town Club*, Chan Seng Onn J held at [54] that “our s 4(1) [of the Act] which speaks of a person ‘occupying the position of director of a corporation by whatever name’ alludes to a *de facto* director”.

28 Hence, as I found on the evidence that the plaintiff is a *de facto* director of the defendant, it followed from the authorities above that he has the right to inspect the accounting records of the company.

The right to inspect was not being utilised for purposes unconnected to his duties as a director

29 Nonetheless, the right of a director to inspect a company's accounts is not an unfettered one. The Court of Appeal in *Mukherjee* (CA) highlighted at [25] that

... [A] director has an almost-presumptive right to inspect the documents of the company to the extent these fall within the ambit of s 199 of the Act. To exercise this right, the director would not have to demonstrate any particular ground for inspection. ***Instead, the burden is on the company, if it resists the application to inspect, to show that such access should not be permitted because there is some abuse of process or privilege that underlies the request, such as when the director intends to use the right to inspect for purposes that are largely unconnected to the discharge of the director's duties ...*** [emphasis in original]

30 Mr Fong confirmed that it was not alleged that if the plaintiff were granted access to the company's financial documents, there was a risk that he might abuse such right of access. In any event, the plaintiff stated on affidavit that he was seeking access to the defendant's accounts to investigate suspected wrongdoings or mismanagement by KP.²⁷ No evidence was tendered to contradict this.

31 Therefore, I was satisfied that the access to the accounts of the defendant would not be misused by the plaintiff.

²⁷ CTJ2 at paras 16 and 17.

Conclusion

32 In the circumstances, I granted the following orders:

- (a) a declaration that the plaintiff is a director of the defendant for the purposes of s 4(1) of the Act;
- (b) an order that the defendant make available for inspection by the plaintiff and/or a public accountant acting for the plaintiff all accounting and other records, including those in electronic form, as will sufficiently explain the transactions and financial position of the defendant; and
- (c) an order that the plaintiff and/or a public accountant acting for the plaintiff be permitted to make copies of or take extracts from the records to be made available for inspection.

33 I also ordered costs of \$7,000 (inclusive of disbursements) to be paid by the defendant to the plaintiff.

Vincent Hoong
Judicial Commissioner

Goh Kim Thong Andrew and Tan Hui Jin (Andrew Goh Chambers)
for the plaintiff;
Fong Wei Li (Kuang Weili) and Leong Wen Jia, Nicholas (DC Law
LLC) for the defendant.