

HCMP 337/2023
[2024] HKCFI 1915

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO. 337 OF 2023

IN THE MATTER OF Section 570 of
the Companies Ordinance (Cap 622,
Laws of Hong Kong)

and

IN THE MATTER OF FUMA
INTERNATIONAL LIMITED (福馬
國際有限公司) (Company No.
562813)

BETWEEN

KE ZUNJU (柯遵劇)

Plaintiff

and

FUMA INTERNATIONAL LIMITED
(福馬國際有限公司)

Defendant

Before: Hon Ng J in Chambers

Date of Hearing: 13 December 2023

Date of Judgment: 26 July 2024

J U D G M E N T

Introduction

1. This is the substantive hearing of the Plaintiff’s application by Originating Summons dated 2 March 2023 for an Order under s 570 of the Companies Ordinance, Cap 622 (“**CO**”) that a general meeting of the Defendant (“**Company**”) be convened, on the ground that it is impracticable to call a general meeting of the Company in the manner prescribed by its Articles and CO.

2. In the Originating Summons, the Plaintiff seeks an Order that:

- (1) A general meeting be convened for the Company.
- (2) Notice of the meeting be dispensed with.
- (3) The attendance of the Plaintiff (or his proxy) at the meeting shall constitute a quorum.
- (4) A resolution be put at the meeting and, if thought fit, be passed for the appointment of the Plaintiff (or such other person or persons as the Plaintiff considers appropriate) as a director or further or additional director(s) of the Company.

3. The Plaintiff’s application is principally supported by his 1st Affirmation (“**Ke 1**”) dated 2 March 2023. According to Ke 1, the Plaintiff is a majority shareholder of the Company, holding 62.68% of its shares (“**Shares**”).

4. At the call-over hearing on 18 April 2023, Mr Richard Leung for the Company indicated to this court that it did not dispute that a general meeting should be held but it did dispute the directions sought by the Plaintiff. As a result, the Originating Summons was adjourned for argument.

5. Subsequently, the Company changed its mind and filed the Affirmation of Ke Yonghe (柯永河) (“**Yonghe**” and “**Yonghe 1**”) dated 31 July 2023 to oppose the Originating Summons. Yonghe 1 was filed after an Unless Order had been made by Master To on 20 June 2023 that unless by 4pm on 1 August 2023, the Company filed and served its affirmation in opposition, it would be debarred from doing so.

6. As confirmed in para 4 of Yonghe 1, this is a litigation among members of the Ke family for control of *inter alia* the Company.

7. The Plaintiff then filed his 2nd Affirmation (“**Ke 2**”) dated 7 October 2023 in reply.

8. Less than 2 clear days before the hearing, there were two last-minute summonses issued by the Company:

(1) First, a summons filed on 11 December 2023, supported by the 2nd Affirmation of Yonghe dated 10 December 2023 (“**Yonghe 2**”) for an application to stay all further proceedings in this Action until 2 months after the final determination of all of the following proceedings (“**Stay Summons**”):

(a) Yonghe’s application intended to be filed on 11 December 2023 to set aside the Order dated

10 September 2019 by Mimmie Chan J (“**Chan J Order**”) and the Order dated 12 July 2021 by DHCJ To (“**DHCJ To Order**”) in HCCT 41/2019 (“**HCCT 41**”);

(b) The proceedings between Yonghe as plaintiff against the Plaintiff as defendant in HCA 1193/2023 concerning the shareholding in the Company (“**HCA 1193**”);

(c) The inheritance dispute commenced by Yonghe against his siblings, including the Plaintiff, in the Jinjiang Court (“**Jinjiang Court**”) Fujian Province, PRC (“**Succession Action**”);

(d) The proceedings commenced by Mak Kam Hung (“**Mak**”) against Yonghe and the Plaintiff concerning shareholding in the Company in the Jinjiang Court (“**Mak Action**”).

For want of a better description, these 4 proceedings are described in Mr Tang’s skeleton as the “**Parallel Proceedings**”.

(2) Second, a summons filed on 11 December 2023 (“**Yonghe 3 Summons**”) for leave to file and serve the 3rd Affirmation of Yonghe (“**Yonghe 3**”).

9. According to Mr Tang, the matters relied upon by the two summonses are largely the same:

(1) The Stay Summons is to persuade this Court to stay the Plaintiff’s Application pending determination of the Parallel Proceedings because of the following developments:

(a) In relation to HCCT 41, Yonghe has instructed his lawyers to set aside the 2 Orders dated 10 September 2019 and 12 July 2021. Yonghe intended to file the application on 11 December 2023.¹

(b) In relation to HCA 1193, the writ of summons was issued on 31 July 2023. Yonghe has filed and served his Statement of Claim to the Plaintiff on 6 November 2023. The Plaintiff was required to file and serve his Defence on 29 December 2023.

(c) In relation to the Succession Action, it was commenced on 31 August 2023. Yonghe had lost at the first instance on 24 November 2023. He had instructed his PRC lawyers to appeal against the first instance decision. According to the Company's PRC Legal Opinion, if the appeal is allowed, the Award referred to below would no longer be valid and/or should not be enforced.

(d) In relation to the Mak Action, which was commenced on 19 July 2023, if it is decided in Mak's favour, according to the Company's PRC Opinion, the Award would no longer be valid and/or should not be enforced.

(2) Yonghe 3 is said to update this Court with the latest development of these proceedings. In fact, the so-called latest development all relates to the aforesaid Parallel Proceedings. In essence, Yonghe 3 is made in support of the Stay Summons,

¹ According to Court record, the summons has indeed been filed on 11 December 2023.

as expressly stated at para 2 thereof.

Material Facts

10. The principal facts in support of the Originating Summons are actually quite simple. They can be summarised as follows.

11. The Company was incorporated in Hong Kong in 1996. It has at all material times been acting as a holding company holding shares of its subsidiaries which carried on various businesses such as trading in food products.

12. According to the Company's Articles of Association:

- (1) Article 7 provides *inter alia* that at every succeeding Ordinary General Meeting, all Directors shall retire from office and shall be eligible for re-election.
- (2) Article 11 provides that for holding a directors' meeting, the quorum shall be two.
- (3) Articles 23 provides that for all purposes, the quorum for all general meetings shall be two members personally present and holding either in his own right or by proxy at least 51% of the paid up capital of the Company.

13. In September 2017, the Plaintiff started arbitration proceedings in the Xiamen Arbitration Commission (“**Commission**”) for *inter alia* :

(1) a declaration that 6,268 shares of the Company (representing 62.68% of its shareholding) then held by Yonghe belonged to the Plaintiff ; and

(2) An Order for the transfer from Yonghe to the Plaintiff of the 6,268 shares.

14. On 29 May 2019, the Plaintiff obtained a favourable arbitral award from the Commission (“**Award**”) for:

(1) A declaration that 62.68% of the shares of the Company were owned by the Plaintiff and should be granted.

(2) The 62.68% of the shares of the Company should be transferred to the Plaintiff.

15. On 23 August 2019, Yonghe’s application to set aside the Award was rejected by the Intermediate People’s Court of Xiamen.

16. On 10 September 2019, the Plaintiff obtained leave from Mimmie Chan J in HCCT 41 ie the Chan J Order to enforce the Award against Yonghe so that the Shares be transferred to the Plaintiff and registered in his name. The Chan J Order was served on Yonghe out of the jurisdiction in the PRC in March 2020.

17. On 12 July 2021, the Plaintiff further obtained the DHCJ To Order in HCCT 41 that partners of the firm of solicitors instructed by the Plaintiff be authorised to execute an instrument of transfer in relation to the

Shares from Yonghe to the Plaintiff, a written board's resolution of the Company approving the transfer, directing the Plaintiff's name to be entered on the register of members, the issuance of the share certificate to the Plaintiff and directing the necessary Companies Registry form(s) be filed.

18. The instrument of transfer was executed on 18 October 2021 pursuant to the DHCJ To Order and duly stamped ("**Instrument of Transfer**"). The Plaintiff's name was eventually entered into the Company's register of members with effect from 20 December 2021 and a copy of the register was sent to the Plaintiff by the then company secretary Kingspeed Consultants Limited ("**Kingspeed**") by email. ("**P's Register of Members**"). However, the Company failed to issue a new share certificate to the Plaintiff. It transpired that on 11 February 2022, Mak, as 1 of the Company's 2 directors, resigned, leaving Yonghe as the sole director.² According to the email of 5 August 2022 from Kingspeed, no new certificate could be issued to the Plaintiff since no director ie Yonghe would sign the document.

19. Since August 2022, the Plaintiff had been trying to obtain a new share certificate from the Company and to request the Company via Kingspeed and Yonghe to convene an AGM with a view to *inter alia* appointing the Plaintiff and a Mr Hui Man Faat ("**Hui**") as directors of the Company. As far as the Plaintiff was aware, the Company had not convened an AGM for 2022. The Plaintiff then found out that Kingspeed's contract as

² Subsequently, on 26 January 2023, Mak was purportedly re-appointed as a director of the Company.

company secretary had expired in August 2022.³ There was no response from Yonghe or the Company to the Plaintiff's request for an AGM.

20. By an Annual Return dated 26 January 2023 which was made up to 27 August 2022, Yonghe was stated to be the holder of 9,999 shares in the Company and Mak was stated to hold 1 share. The Plaintiff was not stated as a shareholder at all.

21. On 2 March 2023, the Plaintiff issued the Originating Summons.

22. On 19 April 2023, the Plaintiff instructed his solicitors to arrange for the calling of a general meeting pursuant to section 566 of CO as a shareholder holding more than 5% shareholding of the Company. The purpose of the meeting was to consider the appointment of the Plaintiff, Hui and a Mr Chen Zhonghu ("**Chen**") as directors of the Company. The letter dated 19 April 2023 was sent to the Company, Yonghe and Mak. In the said letter, the directors of the Company were reminded that it was the directors' duty to call a general meeting within 21 days. None of them responded to the Plaintiff's request.

23. On 12 May 2023, the Plaintiff decided to exercise his shareholder's right to call for a general meeting himself and sent written notices to the Company, Yonghe and Mak. The written notices enclosed a Notice of Extraordinary General Meeting and Notice of Proposed Resolutions, both dated 12 May 2023. The purpose of the meeting was to consider the appointment of the Plaintiff, Hui and Chen as directors. The

³ On 6 July 2023, the Plaintiff was informed that Kingspeed had formally resigned as company secretary since 26 August 2022.

EGM was convened to be held on 2 June 2023. The Plaintiff's proxy attended the meeting on 2 June 2023. However, neither Mak nor Yonghe, as shareholders attended the meeting and therefore no sufficient quorum was present.

24. The long and short of it all is that despite being a 62.68% majority shareholder, the Plaintiff has been unable to procure the Company's board of directors to convene a general meeting, or to convene one himself in order to get himself and his nominees appointed as directors of the Company or to issue a new share certificate to evidence his majority shareholding.

Deliberation

25. Section 570 CO provides:

“570. Power of Court to order meeting

- (1) This section applies if for any reason it is impracticable—
 - (a) to call a general meeting of a company in any manner in which general meetings of that company may be called; or
 - (b) to conduct the meeting in the manner prescribed by the company's articles or this Ordinance.
- (2) The Court may, either of its own motion or on application—
 - (a) by a director of the company; or
 - (b) by a member of the company who would be entitled to vote at the meeting, order a general meeting of the company to be called, held and conducted in any manner the Court thinks fit.
- (3) If the order is made, the Court may give any ancillary or consequential directions that it thinks expedient.
- (4) Directions given under subsection (3) may include a direction that one member of the company present at the

meeting in person or by proxy is to be regarded as constituting a quorum.

- (5) A general meeting called, held and conducted in accordance with an order under subsection (2) is to be regarded for all purposes as a general meeting of the company duly called, held and conducted.”

26. It is well-established that in order for section 570 to apply, firstly, it should be shown that it would be impracticable to call a meeting of the company; secondly, it is a matter of discretion whether the Court would order a meeting. It is also well-established that the refusal of another shareholder to form a quorum for a meeting is an example of a situation where it would be impracticable to call a meeting of the company. A quorum requirement does not confer a veto power on a minority shareholder by his ability to prevent a shareholders’ meeting from being held.

Re Success Plan Ltd [2002] 3 HKLRD 560 at [42] and [43]

Re Mandarin Capital Advisory Ltd [2011] 2 HKLRD 1003 at [5]

27. The section is intended to have a wide scope. “Impracticable” does not simply mean impossible. The court must examine the individual circumstances of a particular case to answer the question whether, as a practical matter, the desired meeting can be convened and/or held as appropriate.

Re Yaumati Kai Fong Welfare Advancement Association Limited [2007] 4 HKLRD 643 at [39] - [40]

Re Reign Digital Creatives Limited [2020] HKCFI 3137 at [8]

28. According to para 29 of Mr Tang’s skeleton, the Company’s position is this:

(1) The Plaintiff is not a member of the Company, and therefore not entitled to bring the present application. (“**First Defence**”)

(2) The issue of the enforceability, validity and effect of the Award, and therefore the Parallel Proceedings, should be determined first. (“**Second Defence**”)

29. It does not appear to be in dispute that (i) it would be impracticable to call a meeting of the Company; (ii) in particular, the refusal of other shareholders, in this case, Yonghe and Mak, to form a quorum for a meeting is a situation where it would be impracticable to call a meeting of the Company; and (iii) if it is impracticable to call a meeting of the Company, then as a matter of discretion, the Court should order a meeting.

30. Mr Ng submits that on the evidence the Plaintiff has shown himself to be a member of the Company. The documents are self-explanatory ie the Award; Chan J’s Order; DHCJ To’s Order, the Instrument of Transfer executed pursuant to DHCJ To’s Order and the Plaintiff’s Register of Members as at 5 August 2022 received from Kingspeed before its resignation as company secretary.

31. At para 32 of Mr Tang’s skeleton, he submits that before the court are two different Registers of Members — one from the Plaintiff saying he is a member and one from the Company saying that he is not a member. The question is therefore whether the Plaintiff’s Register of

Members should be accepted. Naturally, Mr Tang submits that this court should not accept the Plaintiff's.

32. On the question of whether the Plaintiff is or is not a member of the Company, under section 635 CO, in the absence of evidence to the contrary, the register of members is proof of any matters that are by this Ordinance required or authorized to be inserted in it.

33. So the question is: what is the evidence to the contrary adduced by the Company in view of the Plaintiff's Registers of Members?

34. In Yonghe 1 at para 34, he mentioned that according to the documents returned to the Company on 3 July 2023 by Kingspeed (who informed the Company of its resignation on 26 August 2022 only on 2 June 2023), the shareholders on the Company's Register of Members were listed as Yonghe with 9,999 shares and Mak with 1 share while the Plaintiff had no shareholding in the Company ("**Company's Register of Members**"). According to the Company's Register of Members, recorded as at 26 August 2022, the Plaintiff had long ceased to be a member on 29 January 2013.

35. The fact that the Plaintiff was no longer a member of the Company in 29 January 2013 was already recorded in the Plaintiff's Register of Members and there is no dispute as to that. But what the Company's Register of Members has omitted are the material events subsequent to January 2013 which took place after the Award was obtained by the Plaintiff on 29 May 2019 ie the transfer of the Shares pursuant to the 2 Court Orders made in HCCT 41. This was only recorded in the Plaintiff's Register of Members but not the Company's.

36. It seems to this court that there are various curious features in Yonghe 1 which casts doubts on the Company's opposition to the Originating Summons based on the Company's Register of Members.

(1) First, as mentioned above, at the call-over hearing on 18 April 2023, Mr Richard Leung for the Company indicated to this court that it did not dispute that a general meeting should be held, implying that the Company accepted the Plaintiff was a member and had locus to call a general meeting.

(2) Second, it took months and an unless Order by Master To before the Company was finally able to come up with Yonghe 1 on 31 July 2023. Yonghe 1 for the first time exhibited the Company's Register of Members said to have been returned to the Company "the company kit with the following original documents" for the Company's retention on 3 July 2023. However, there is no explanation why the Company did not asked for the return of all its documents in the possession of Kingspeed, including the Company's Register of Members, immediately or shortly after Kingspeed resigned as company secretary on 26 August 2022.

(3) Third, although Company's Register of Members was purportedly recorded as at 26 August 2022 ie the date of Kingspeed's resignation, it did not record any material event after 29 January 2013 as far as the Plaintiff was concerned. This is so despite the fact that the original Instrument of Transfer executed in 2021 pursuant to DHCJ To's Order itself

was among the documents returned by Kingspeed to the Company.

37. Mr Ng reasonably submits that there are serious doubts as to the provenance of the Company's Register of Members. For the present purpose, it is not necessary to making a definite finding that the Company's Register of Members is false, as the Plaintiff suspects or that it is simply out of date but put forward as the most up to date register. Suffice it for this court to rule that the production of the Company's Register of Members is not sufficient evidence to the contrary to displace the substantial evidence in support of the Plaintiff's case that he is a member of the Company.

38. The Second Defence can be disposed of briefly.

39. First, as a general observation, HCA 1193 and the 2 PRC Actions were only commenced in July and August 2023. The setting aside application in HCCT 41 was filed only in December 2023. All the Parallel Proceedings were commenced well after the issue of the Originating Summons.

40. Second, as Mr Ng submits, the setting aside application in HCCT 41 was made years after the Award, the Chan J Order and the DHCJ To Order and the lateness was unexplained. The same can be said of HCA 1193 and the 2 PRC Actions. Coupled with the Company's indication in April 2023 that it did not object to the holding of a general meeting, it is difficult to escape the inference that the Stay Summons is simply a delaying tactic designed to ambush the Plaintiff.

41. Third, Mr Ng submits and this court agrees that staying the Originating Summons pending the resolution of the Parallel Proceedings is extremely unfair to the Plaintiff and wholly unsatisfactory since the Plaintiff has little control over the pace of their progress and it is unclear how long it would take to resolve them. As far as the application to set aside the 2 Orders in HCCT 41 are concerned, this is akin to an application for an indefinite stay of execution of the Orders, years after they had been made.

42. Fourth, as far as the 2 PRC Actions are concerned, Mr Tang frankly concedes that there are no materials on their merits other than the Company's PRC legal opinion. The gist of the opinion and the Company's point is that if either of them succeeds, the Plaintiff cannot rely on the Award and everything has to start all over again. In this court's view, this is simply a speculative proposition.

43. Mr Ng has made some other points on the validity of the Company's PRC legal opinion but it is unnecessary to go into them. The above should suffice to persuade this court to dismiss the Stay Summons and the Yonghe 3 Summons and this court shall so order.

Disposition and costs

44. There shall be an Order in terms of the Originating Summons sought by the Plaintiff.

45. The Stay Summons and the Yonghe 3 Summons are hereby dismissed.

46. The parties have already argued on costs at the hearing.

47. There shall be an Order that costs of the Originating Summons, the Stay Summons and the Yonghe 3 Summons be to the Plaintiff, to be taxed if not agreed, and paid by the Company forthwith, certificate for counsel.

(Peter Ng)
Judge of the Court of First Instance
High Court

Mr Ernest Ng, instructed by M/s Alvan Liu & Partners, for the Plaintiff

Mr Felix H Y Tang, instructed by M/s K Y Woo & Co, for the Defendant