

HCCW001080A/2000

HCCW 1080 of 2000

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
COMPANIES (WINDING-UP) NO. 1080 OF 2000

IN THE MATTER OF TECHNOLOGY
INNOVATION INTERNATIONAL
COMPANY LIMITED

AND

IN THE MATTER OF SECTION 168A
OF THE COMPANIES ORDINANCE

BETWEEN:

FUNG KEI MAN

Petitioner

AND

IP WAI HUNG

1st Respondent

CHEUNG SHIU CHUNG

2nd Respondent

KU SAU YING

3rd Respondent

TECHNOLOGY INNOVATION
INTERNATIONAL COMPANY
LIMITED

4th Respondent

Coram: Hon. Yuen J.A. (sitting as an Additional Judge of the Court of First Instance)
in chambers

Date of hearing: 30 September 2002

Date of decision: 3 October 2002

DECISION

1. On 13 and 17 June 2002, I heard the Petitioner's petition for an order under s.168A Companies Ordinance.

The Petition

2. The Petitioner alleged that there had been unfair prejudice in that he had been excluded from management of the Company.

3. The individual respondents (1st - 3rd Respondents) who were the remaining shareholders of the Company denied that there had been any unfair prejudice.

4. In addition, the 1st Respondent alleged in his affirmation in opposition that there had been an agreement between the Petitioner and himself that the Petitioner would transfer his shares to the Company or to himself when the Petitioner ceased to work for the Company. The 1st Respondent also alleged that the Petitioner was merely holding the shares on his behalf, and if dividends had been paid, they should have gone to him (the 1st Respondent), and he would have decided whether to give any part of them to the Petitioner.

5. The 2nd Respondent did not suggest that he had been present when the alleged agreement between the 1st Respondent and the Petitioner was made, but his evidence was that the 1st Respondent did have such an agreement with him.

6. The 3rd Respondent is the 1st Respondent's wife and took relatively little part in the proceedings.

Issues at the Petition

7. There were therefore two main issues that fell to be decided:

(1) was there an agreement that the Petitioner would transfer his shares to the Company or the 1st Respondent when he ceased to work for the Company, which was prior to the presentation of the petition?

(2) if there was no such agreement, was there unfair prejudice?

Order made on the Petition

8. In my Judgment handed down on 22 July 2002, I found that there was no agreement, but I also found that there had been no unfair prejudice. I dismissed the petition and gave an order nisi that the Petitioner should bear half of the costs of the Petition, so as to reflect the fact that at least half of the time of the hearing was spent on the allegation of the agreement.

Application for variation of costs order nisi

9. Both parties sought to vary the costs order nisi. On behalf of the 1st - 3rd Respondents, Mr Liu submitted that the Petitioner should be ordered to bear all the costs of the proceedings as it is a general rule that costs should follow the event, and although the allegation of an agreement failed, there was no misconduct or neglect on the part of his clients.

10. As a fall-back submission, Mr Liu submitted that the order as to costs should be split such that although the Petitioner need only pay half of the 1st Respondent's costs, the entirety of the 2nd and 3rd Respondents' costs should be borne by the Petitioner.

11. The Petitioner, who now appears in person, submitted that as much time had been used up at the hearing of the Petition on irrelevant matters, the Respondents should bear all the costs of the proceedings.

Costs order absolute

12. Order 62 r.3(2) RHC provides for the general rule that costs should follow the event, except when it appears to the Court that in the circumstances of the case, some other order should be made as to the whole or part of the costs. Guidance as to the circumstances that may cause the Court to exercise its discretion to order that the

successful party should only have part of its costs is found in **Ritter v Godfrey** [1920] 2 KB 47, i.e. if :-

(1) the defendant (in this case, the respondents) had brought the action upon himself; or

(2) the defendant (respondents) had done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation or expense; or

(3) the defendant (respondents) had done some wrongful act in the course of the transaction of which the plaintiff complains.

13. In my view, the allegation of an agreement for the holding or transfer of the shares fell within the second exception. As noted in paragraph 22 of my Judgment, although the Company had alleged in July 2000 that the Petitioner had agreed to transfer his shares on the termination of his employment with it, that allegation was not part of the Petitioner's case.

14. That allegation only became a live issue, and a significant one, when the 1st Respondent chose to file affirmation evidence to that effect in opposition to the Petition. For the reasons set out in my Judgment, however, I have found that there was in fact no agreement.

15. Once the 1st Respondent made that allegation however, it was obvious that the Petitioner would have to go to the trouble and expense of meeting it, because if the Petitioner was not beneficially entitled to the shares, then there would be no question of any unfair prejudice. I find that the imposing of that additional first hurdle was calculated to occasion unnecessary litigation or expense. As noted in my Judgment, at least half of the time at the hearing was spent on the allegation of the agreement.

16. As for Mr Liu's fall-back submission, all the individual respondents had acted by the same legal representatives. The 1st Respondent's allegation if successful would have enured to the benefit of the 2nd and 3rd Respondents as well, because if the 1st Respondent succeeded, the Petitioner would have had no locus standi to proceed

with the Petition. Neither the 2nd nor the 3rd Respondent disclaimed support for the 1st Respondent's allegation, nor indeed was any indication given to the Court that in proffering the allegation of the agreement, counsel was acting only for the 1st Respondent. In the circumstances, as the 1st - 3rd Respondents had acted throughout as one camp, the fall-back submission appears to me to be artificial.

Order

17. In the circumstances set out above, I see no reason to vary the costs order nisi which I now confirm.

18. As for the costs of the hearing for variation, since both parties have failed, I would make an order nisi that there should be no order as to costs.

(MARIA YUEN)

Justice of Appeal

(Sitting as an Additional Judge of the
Court of First Instance)

Representation:

The Petitioner in person

Mr Alvan Liu of Messrs Alvan Liu & Partners, Solicitors for the 1st - 3rd
Respondents