THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

VIRGIN ISLANDS

COMMERCIAL DIVISION

CLAIM NO. BVIHC (COM) 138 OF 2011

IN THE MATTER OF STARAY CAPITAL LIMITED
AND IN THE MATTER OF THE BVI BUSINESS COMPANIES ACT, 2004 (AS AMENDED)

BETWEEN:

CHA, YANG (also known as Stanley)

Claimant

-and-

1. **STARAY CAPITAL LIMITED**
2. **MARLON RAY CHEN**

Defendants

Appearances: Mr Matthew Collings QC and Mr Jeremy Child for the Claimant
Mr Stephen Atherton QC and Mr Oliver Clifton for the Defendants

2013: 28-31 January; 13 February

JUDGMENT

(Unfair prejudice – majority shareholder passing resolution entitling company to redeem shares of member found to have acquired his shares by misrepresentation or to have acted to the actual or potential disadvantage of the company – company serving notice to redeem – whether resolution passed bona fide in the interests of the company – **Citco Banking Corp v Pussers Ltd**[1] considered – whether resolution unfairly prejudicial, oppressive or unfairly discriminatory - section 184I, Business Companies Act, 2004 considered)

[1] **Bannister J [Ag]:** In these proceedings Mr Cha, Yang ('Mr Cha') complains that he has been unfairly treated as a result of the amendment of the Articles of Association of a

[1] [2007] UKPC 13, [2007] 2 BCLC 483

company in which he is a 20% shareholder to permit the company to compulsorily redeem his shares in certain events which the company claims to have happened. He seeks wide ranging relief designed not only to restrain redemption pursuant to this new provision but also to fossilize, if I may use that expression, the affairs of the company for the foreseeable (and indeed for the unforeseeable) future.

Background

[2] Mr Cha is a Chinese national by birth. He is a lawyer who was admitted to the bar of the State of New York in 1997 and who worked as a lawyer there between 1996 and 1999. In November 2006 his licence to practice in New York lapsed for failure to pay his annual dues. Mr Cha says that he was unaware that this had happened and was not notified of it. In 2000 Mr Cha started working as a lawyer in the People's Republic of China ('the PRC'), although according to the Beijing Municipal Bureau of Justice ('the BMBoJ'), which regulates the profession of lawyers in the Beijing Municipal District, Mr Cha did not become qualified until 2001.

[3] On 11 September 2001 Mr Cha was sworn in as an United States citizen and received his first United States passport on 17 September 2001.[2] Mr Cha claims that he became licensed to practice in the PRC in the summer of 2002, although according to the BMBoJ he did not become licensed to practice until 4 November 2005. Mr Cha's first post as a lawyer in the PRC was as an in house lawyer, but he says that he joined a firm called Llinks Law as a partner in 2003, despite the fact that it appears to be the case that Chinese law firms generally require partners to have three years practice before being admitted. Mr Cha says that this rule is not always strictly observed.

[4] Mr Chen, the second defendant, is from a Chinese family of industrialists, with a background in natural resources, including coal. In 2005 Mr Chen was engaged in aviation-based business and met Mr Cha while he was working at Llinks Law. They became acquaintances and, it seems, as time went on, friends, without being close. Mr Cha says that he told Mr Chen that he held a Chinese ID card and 'hukou.'[3]

[5] According to the website of the well known Chinese firm of King & Wood ('K&W') Mr Cha joined that firm in 2006. Mr Cha says that the Chinese text on the website entry describes him as having joined as a partner, although according to the BMBoJ Mr Cha did not start work at K&W until 28 October 2008 and then as an employed lawyer, rather than as a partner. I shall have to examine these matters in a little more detail later in this judgment.

[6] In February 2010 a Mr Qing Kong, the Chairman of a state owned company called Feicheng Mining Group Co Ltd ('Mr Kong', 'Feicheng'), who had been a friend of Mr Chen for some twenty years, told Mr Chen about a Canadian mining project proposed to be carried out in the Murray River area of British Columbia ('the project'). Feicheng had contracted with Canadian Dehua International Mine Limited, an affiliate of Canadian

[2] Mr Cha was issued with a further US passport on 28 February 2011

[3] the precise meaning of this word never became clear, although it may have been connected with the system of household registration (see paragraph [57])

Dehua Lvliang International Mines Group Inc (together 'Dehua') to promote the project. Dehua had acquired the mining rights to about 160 square kilometres of territory and Feicheng's role included an obligation to put up the US$20 million security deposit required before mining could commence. That was not proving easy for Feicheng and it was looking for someone to replace it in the venture with no contractual downside for Feicheng, Mr Chen decided to embark on the search for a replacement investor, no doubt in the hope of acquiring some participation in the project.

[7] Mr Chen made some contacts which were not fruitful and on 18 March 2010 spoke by telephone to Mr Naishun Liu, Chairman of Dehua ('Mr Liu'). On the following day the Asia representative of Dehua ('Mr Y Liu') met Mr Chen in a hotel in Beijing and indicated that Dehua wished to engage Mr Chen in connection with the project. He showed him, astonishingly, the hard copy prospecting results for the territory together with the Dehua/ Feicheng agreement, told him that Mr Liu would be in Beijing on 21 March 2010 and said that it was hoped that there could be a meeting to discuss the project in Hong Kong on 28 March 2010.

[8] Mr Chen called Mr Cha and arranged to meet him in a café near Mr Cha's apartment on 20 March 2010. Although Mr Cha played down the part that discussion of the project played at this meeting, I find that Mr Chen passed on to him what he had learned the previous day from Mr Y Liu and showed him the hard copy documents with which he had been supplied. Mr Chen says, and I accept, that Mr Cha told him that he was a partner at K&W and qualified to practice both in the PRC and in the US. Mr Chen explained that the reason why he turned to Mr Cha was because of Mr Cha's no doubt well earned reputation as an expert in capital markets and IPO's and because Mr Chen thought that his New York qualification would be useful in relation to the project. Mr Chen also thought that Mr Cha's fluency in English would be valuable. Mr Chen says that his own English is not fluent and indeed he gave evidence through an interpreter at trial. [4]

[9] Mr Chen says that Mr Cha was keen to participate and that he agreed to procure investors to contribute the security deposit; to provide legal advice; to begin preliminary work on listing on the Hong Kong or some other exchange; and to act as an interpreter. I find that Mr Cha did tell Mr Chen that he would provide legal advice and help in the search for investment. Mr Chen said that Mr Cha mentioned various investment banks, including JP Morgan. I have no reason to reject that evidence. I do not, however, think that at that stage the parties would have been discussing IPO's, and indeed, Mr Chen rather backed off from the allegation that this was even discussed at that time. As for Mr Cha's linguistic skills, I do not believe that they would have formed any part of discussions on 20 March 2010. They will have been assumed without saying.

[10] With remarkable speed, the two men agreed on this occasion that a company would be formed for the purpose of assisting the project and that in exchange for Mr Cha's work providing legal and language skills, he would be given 20% of its shares – the remaining 80% to be held by Mr Chen.

---

[4] I gathered the impression that Mr Chen was being modest about his spoken English, although I have no doubt that he felt more comfortable giving evidence in his first language

[11] Their ultimate aim, which I find was discussed at the meeting, was to acquire a share in the project in exchange for their assistance, without having to contribute capital of their own up front. Mr Cha said that this was his idea, but I do not think that it matters whose suggestion it was. The essential fact is that they agreed that that was what they would do.

[12] Mr Cha said that despite the intended 80/20 allocation of shares in the proposed company, the understanding between them was that control of the proposed company should be exercised on a 50/50 basis. I have no hesitation in rejecting this evidence. Mr Cha is a highly experienced lawyer. There is not a trace of any such understanding, let alone arrangement, in any of the documents that were subsequently generated during the course of the association and I simply do not accept Mr Cha's statement that the reason for its absence was that it would have been insulting to Mr Chen to have called his honour into question by committing the understanding to writing. Mr Cha was to be given a seat upon the proposed company's board, but I find that that was to be the limit of his management participation.

[13] On 21 March 2010 Mr Chen and Mr Cha met Mr Liu, when the elements of the project were outlined to them.

[14] On 22 March 2010 Mr Chen gave instructions to Ms Tam, of SY Yang and Company ('SY Yang'), to form a company to give effect to the agreement that had been reached between him and Mr Cha on 20 March. SY Yang were corporate services providers who had been made use of by Mr Chen in the past. At the suggestion of Mr Cha, the company was to be formed in the BVI and the first defendant company ('Staray') was incorporated on the same day. Eighty shares were issued to Mr Chen and the remaining twenty to Mr Cha. Staray's Memorandum and Articles of Association ('the M&A') were in the most basic form, without pre-emption rights of any sort and with no special provisions. There was some uninteresting evidence at trial about how the name Staray came to be chosen for the company and who thought of it, but the point is of no importance and it is not necessary for me to decide it. I find that Staray had none of the attributes of a quasi partnership company.

[15] Before parting with this point, however, I need to deal with certain pieces of evidence variously relied upon to show that Mr Cha was, or was not, in a quasi partnership with Mr Chen. None of them affects my conclusion.

[16] First, when instructing Ms Tam to incorporate Staray, Mr Chen referred to Mr Cha as his 'partner.' I am satisfied that no legal significance attaches to this language. Mr Chen explained that he meant that Mr Cha was his business partner. That is a common enough expression between two persons co-operating on a business venture.

[17] Next, on 11 May 2010 Mr Qing Ye ('Mr Ye') the principal of Huiyong Holding Group Company Limited ('Huiyong'), which ultimately took the place of Feicheng in the project, asked to see a CV for Mr Cha. On 20 May 2010 Mr Cha sent a CV describing himself as a partner in Staray. Mr Chen says he objected to this description. On 24 May 2010 Mr Cha sent a revised CV omitting the reference to 'partner' and describing himself as Executive

Director of Staray. Mr Cha says that this change was not made as a result of protest from Mr Chen, but was a spontaneous revision made by Mr Cha with a view to avoiding the risk of confusing Mr Ye by referring to a partner in what Mr Ye would have understood to be a limited company, having its management carried on by persons styled as directors. I have no hesitation in rejecting this explanation. If anything, this incident reinforces my finding that there was no quasi partnership between Mr Chen and Mr Cha, but its importance is at best trivial.

[18] Further on this point, on 2 July 2010 Mr Chen took delivery of what he describes as templates for the production of Staray business cards. These were in fact samples and were, apparently, produced in various colourways. Those intended for use by Mr Cha described him as 'Partner.' Mr Chen's described him as 'Chairman of Board/President.' Some time later a version with a slightly different logo was produced, with Mr Cha no longer described as 'Partner' and instead referred to as 'General Counsel.' Mr Cha's evidence in cross examination was , first, that he always used the card describing him as a partner and, later, that he used both versions, with 'partner' being used in dealings with banks. Mr Chen's evidence was that for external purposes Mr Cha used the 'General Counsel' version. I do not need to resolve this dispute since these various descriptions take matters, in my judgment, nowhere.

[19] Finally on this topic, Mr Cha accepts that in April 2011 he had agreed to pay HK$10,000 (presumably to SY Yang – Staray did not have its own bank account) against the costs of maintaining Staray in good standing. In fact, he overlooked this and in March 2011 an invoice for the then outstanding fees of HK$6,680 had to be sent to Staray by SY Yang. Ms Tam of SY Yang had to chase this on April and again in May of 2011, warning that failure to put SY Yang in funds by 5 May 2011 would lead to Staray being in default with the Registrar of Corporate Affairs. Mr Cha arranged for the HK$6,680 to be paid through K&W on 4 May 2011. I will have to return to these matters in the context of the breakdown of the relationship between the parties, but it does not seem to me that Mr Cha's agreeing to pay this relatively trivial amount displaces my finding that the relationship between the parties was not one of quasi partnership. Staray had no money of its own and I find it unsurprising that Mr Cha agreed to bear some of its administrative costs. Mr Chen bore the costs of incorporation and some other costs.

[20] Returning to the narrative, by the end of March 2010 Mr Chen had negotiated for Staray to have a 9% stake in the project if and when it was realized and on 1 April 2010 Staray entered into a non-exclusive agency agreement with Dehua, which included a provision to that effect. Mr Chen said that he had done the first draft, Mr Cha said that he could not remember who had done it. This may be the point to mention that most of the contractual documentation to which Staray had input appears to have been drafted in the first instance by Mr Chen, with the drafts being sent to Mr Cha for his comment. As Mr Chen accepted, that was not surprising, since during this time Mr Cha was fully engaged at K&W and was available to assist only in his spare time.

[21] On 9 April 2010 Mr Cha went to the United States on business for K&W. He agreed to travel to Vancouver, which is where Dehua appears to have had its base, and to seek its agreement to a supplemental agreement drafted (as I find) by Mr Chen which was

intended to clarify the manner in which Staray would provide consideration for its then anticipated 9% shareholding in the project.[5] On 19 April 2010 Mr Chen emailed the draft which he proposed to be put to Dehua to Mr Cha. Mr Cha met with Mr Liu in Vancouver on 21 April 2010. The draft which Dehua agreed to sign was not in precisely the same form as that emailed to Mr Cha two days earlier. While Mr Chen is content with the provisions of the Supplemental Agreement as executed so far as they relate to the payment for the 9%, he is critical of its restricted reference to potential investors (by whom the funding of Staray's intended investment was, in the first instance, intended to be provided). Mr Chen's point is that this restricted definition would leave Staray exposed if some third party turned out at the end of the day to be the person investing in the project.[6]

[22] Although Mr Chen accepted in cross examination that Mr Cha would have to have room to manoeuvre in his negotiations over the supplemental agreement with Mr Liu, he complains that he was not consulted over the change and that he was presented with a *fait accompli* when Mr Cha emailed a PDF version of the agreement as executed on 26 April 2010. He discovered that not only had the document been executed by Mr Cha, but that, apparently at the request of Mr Liu, Mr Cha had added Mr Chen's name, in Chinese characters, to the document. Mr Chen met Mr Cha on the same day and complained to Mr Cha) that Mr Cha should not have signed the document and that he should not have added Mr Chen's name to it, either. Mr Chen says that Mr Cha responded with an insulting obscenity.

[23] In late April 2010 Mr Chen became concerned about Feicheng's ability or willingness to continue with the project and come up with the security deposit. He decided to go to see Mr Ye, who was a friend of his father's and who Mr Chen had known for some time. Mr Ye was clearly a powerful industrialist. Mr Chen saw him on 30 April 2010 and suggested that his company, Huiyong, might take the place of Feicheng in the project. There was a meeting in Beijing on 11 May 2010 between Mr Chen and Mr Cha for Staray and Mr Liu and Mr Ye for Dehua and Huiyong respectively. At this meeting Mr Ye expressed an interest in the project.

[24] On 17 July 2010 a tripartite agreement was signed by Dehua, Huiyong and Staray providing for their co-operation in taking the project forward. Feicheng dropped out.

[25] On 23 July 2010 a meeting took place on site (as I understand) in Canada. Mr Chen says that there was an altercation at this meeting between Dehua's project engineer and Mr Cha because Mr Cha criticized his English. Mr Cha says that all he was doing was ensuring that the language was accurate. Mr Chen says that at the same meeting Mr Cha accused Dehua of deception, something which Mr Cha denies and which seems to me to be so improbable, given the circumstances, that I reject Mr Chen's evidence on this point. Mr Chen also says that at this meeting Mr Liu indicated that Mr Cha was not welcome to play any part in the project. I reject that evidence also, not least because on 12 September 2010 Mr Liu in an email to Mr Chen asked him to send his regards to Mr Cha. Mr Chen explains this by saying that there had been a dinner in Beijing with Mr Liu and senior Dehua management at which Mr Chen had brokered a rapprochement between Mr

[5] the holding was ultimately reduced by agreement to 5%, but that has no significance for present purposes
[6] in fact, the point went away, but that does not invalidate Mr Chen's concern

Liu and Mr Cha. While there may well have been a dinner on this date I reject this evidence also, because on 15 March 2011 Mr Liu sent an email thanking both Mr Chen and Mr Cha for their support in the project. I think that this evidence of Mr Chen was designed to show Mr Cha in a bad light in order to justify Mr Chen's later attempts to expel Mr Cha from Staray.

[26] Each of Mr Chen and Mr Cha agreed that In about May 2011the prospects for the project began to look firmer. Success seemed to be a real possibility.

[27] On 18 May 2011 there was a meeting attended by Mr Chen and Mr Cha (there was some disagreement about whether or not Mr Cha was awake throughout) at which Mr Chen discussed the possibility of introducing an additional investor in Staray, a Mr Yan. The significance of this evidence is that it is at or around this point that Mr Chen began to discuss with Mr Cha the possibility that he might transfer some of his twenty shares in Staray.

[28] This was the precursor to a series of events which involved two strands. The first strand consisted of unsuccessful attempts by Mr Chen to persuade Mr Cha to part with some of his shares. The second strand consisted of alarm, real or pretended, on the part of Mr Chen about Mr Cha's nationality status (and, as a derivative of that), about his ability to practise as a lawyer in the PRC.

[29] On 19 May 2011, Mr Cha asked Mr Chen to put him in touch with an unidentified lawyer friend of Mr Chen. Mr Cha's explanation for seeking this introduction was that he had a legal problem for which he required help. In fact, Mr Cha did not speak to the lawyer before he left on a trip to New York, but Mr Chen did and he says that the lawyer told him that Mr Cha had a United States Green Card. Mr Chen says that he then told the lawyer that Mr Cha had a United States passport, which prompted the lawyer to tell Mr Chen that in that case Mr Cha was unable to practice law in the PRC. Mr Chen says that other lawyers to whom he spoke were of the same opinion.

[30] Whether before or after he had received this advice, Mr Chen spoke to Mr Cha by telephone while Mr Cha was on the way to the airport and again raised the possibility of Mr Cha giving up some shares. Mr Cha apparently indicated that he was prepared to discuss the topic, but told Mr Chen to be careful. Mr Chen says that part of his motive in exploring these steps was to 'clean up Staray,' which I took to mean to end any association on the part of Staray with a person (Mr Cha) who, Mr Chen says he had been informed, was not qualified to practice his profession in the PRC. Mr Chen says that on the following day he shared his concerns with Mr Ye. He told him, he says in his witness statement, that Mr Cha may have lied to obtain his PRC lawyers licence. Mr Ye (who did not give evidence at the trial) is said thereupon to have advised Mr Chen to keep his distance.

[31] Over the next two days Mr Chen shared his concerns, with Mr Liu of Dehua; Mr Kong of Feicheng; the proposed new investor, Mr Yan; and even with Mr Yan's father, although it was not made clear what interest he might have had in receiving this intelligence. The consensus appears to have been that no-one would deal with Mr Cha during a visit to Canada scheduled to take place towards the end of May.

[32] Mr Chen says that on 21 May 2011 he telephoned Mr Cha, by then already in the United States, and told him of his concerns. He says that he told Mr Cha that he must regularize his status and deal with his breaches of Chinese law. Mr Cha said that the subject was not brought up on that occasion ('this was never a topic').

[33] On 24 May 2011 there was a meeting between Mr Chen and Mr Cha in Mr Chen's hotel room in Vancouver. Mr Cha's account in his witness statement is that Mr Chen asked him to transfer ten of his Staray shares to Mr Chen so that Mr Chen could make a gift of them to Mr Kong in recognition of his originally bringing them into the project. Mr Cha says that he said he would transfer five shares directly to Mr Kong and would consider selling other shares if the price was right. Mr Cha agrees that Mr Chen told him that he, Mr Cha, had a nationality problem and that Mr Cha said that if it became an issue, he would address it, perhaps by transferring his shares to his daughter, who was free from any such difficulties. Mr Cha also says that Mr Chen told him that if he did not give up some shares, he, Mr Chen, would be reluctant to move forward with the project.

[34] Mr Chen says that at this meeting he expressed his concern about Mr Cha's status as a PRC lawyer and about his conduct generally. The latter seems to have included a reference to Mr Cha's failure to put SY Yang in funds for Staray's regulatory fees, but includes the alleged failure of Mr Cha to regularize his right to practice law in the PRC and an allegation that Mr Cha had lied when he obtained his shares and failed to keep promises. The nature of the lie was not identified. Mr Chen says that he told Mr Cha that he was in breach of the agreement made between them when they arranged to form Staray. This seems to have been meant as an allegation of defective performance, Mr Chen stating in cross examination that he had contributed so little towards the project that he should surrender 15 shares - 75% of his holding. Mr Chen says that Mr Cha told him that he had already promised ten shares to a mutual acquaintance, who could help Staray. At that, says Mr Chen, he told Mr Cha that if he did that, Mr Cha could retain the remaining ten shares through a nominee. At another point in the discussion, Mr Chen claims to have suggested that Mr Cha transfer ten shares to his daughter, transfer five to Mr Chen and work together with Mr Chen to sell the remaining five, with the proceeds being split between them 60/40 in Mr Chen's favour. Mr Chen says that Mr Cha agreed to get his PRC lawyer status resolved; and that if he failed to do so, Mr Chen could do with his shares as he saw fit. He says that Mr Cha wept and said that he would never deceive him.

[35] In cross examination Mr Cha said that the question of his status to practice law in the PRC was not raised at this meeting on 24 May 2011, so that there was no agreement to deal with the supposed lawyer licence issue. Mr Chen did, however, raise the issue of Mr Cha's nationality, to which Mr Cha's response was that that could be dealt with by a transfer to his daughter. During the meeting, he says, Mr Chen suggested donating some shares to Mr Kong, with Mr Cha contributing ten. Mr Cha says he told Mr Chen he would think about it, but that ten was too many to give away.

[36] On 2 June 2011 Mr Chen received an email from Mr Liu expressing surprise that Mr Cha had attended the meetings in Vancouver at the end of May, because he (Mr Liu) had been given to understand by Mr Chen that Mr Cha was out of the project. Mr Chen's response

(on the following day) was cryptic. He told Mr Liu that as to the affairs of Staray ('my company') he would 'have it properly handled' and told Mr Liu not to worry. Mr Cha said that he knew nothing of any of this until he saw the defendants' disclosure in these proceedings, although he also said that Mr Chen had told him that Mr Liu had not wanted him to come to the Vancouver meeting. He said that Mr Chen advised him to keep a low profile as the other parties did not wish to be involved with him.

[37] The shareholders agreement for the joint venture was signed on 9 June 2011, with the vehicle being a newly incorporated company called HD Mining International Limited ('HD Mining'). Staray was to have a five per cent interest in this company. Huiyong was to have 55 per cent and Dehua 40 per cent.

[38] Mr Cha says that in mid June 2011 Mr Chen again pressed him to transfer shares to Mr Chen so that Mr Chen could pass them on to Mr Kong. Mr Cha says that he would agree to transfer some of his shares directly to Mr Kong and repeated his readiness to sell some of the balance at the right price.

[39] On 20 June 2011 Mr Cha and Mr Chen met at a hotel in Beijing. Mr Chen says that the meeting was to discuss status issues. He says that Mr Cha told him that he had spoken to the police, who had advised him that he must apply personally in New York if he wished to renounce his PRC citizenship. Mr Chen says that he believes that this was a lie. He says that when he had done the same he had done it through the embassy in Beijing. Mr Cha said that this meeting was not about nationality or lawyer status, but he did not deny that the subject had been discussed. The issue of transferring shares to Mr Kong was debated once again. Mr Chen says in his witness statement that he objected to Mr Cha's proposal to sell shares on the grounds that he (Mr Chen) wanted no change in the membership of Staray.

[40] The final meeting between Mr Cha and Mr Chen before they severed relations took place on 14 July 2011. Mr Cha says that Mr Chen asked him to transfer ten shares to him to be gifted to Mr Kong and that he refused to do so. He says that at that Mr Chen threatened to use his majority vote to seize his shares and to put pressure upon him through his nationality status. There was no mention on this occasion of any problem with Mr Cha's lawyer status.

[41] Mr Chen says that unless he regularized his position he wanted Mr Cha to resign as a director of Staray, although he might agree to the appointment of his daughter. He says that Mr Cha told him that it would take three months to sort out the nationality issue. He says that he asked Mr Cha to transfer ten of his shares forthwith, with the remainder to be dealt with later. He says that Mr Cha threatened to sue and, if he did not succeed, to destroy Staray and the project. He does not say how Mr Cha proposed to do that.

[42] On 24 July 2011 Mr Chen emailed Mr Cha to tell him that all further communications between them must be in writing.

[43] On 2 August 2011 a PRC company of which Mr Cha was an independent director ('BEM') issued a listing announcement, describing Mr Cha as a partner in K&W and as a Chinese

national without a permanent residence permit from any other country. In cross examination Mr Cha admitted that this was not entirely accurate, since, although he had given up his Green Card, he had the right to reside permanently in the United States. He took the position, however, that he was a Chinese national.

[44] On 8 September 2011 Mr Chen passed a shareholders resolution of Staray removing Mr Cha as a director. In cross examination he said that his reason for doing so was because Mr Cha had, according to Mr Chen, failed to rectify his nationality/lawyers licence position despite having been asked on four occasions to do so. Mr Chen had found out about the statements in the BEM listing particulars and was concerned, he says, about the harm (presumably by association) that might befall Staray as a result. Directors of companies, he said in cross examination, must abide by the law. He resolved to take control of Staray by legal means.

[45] On 27 September 2011 Mr Cha obtained a stop notice over his Staray shares.

[46] Mr Chen said in his witness statement that on 1 October 2011 he decided that Staray's M&A required amending to deal with the fact that Mr Cha had acquired his shares through misrepresentation.

[47] On 26 October 2011 Mr Chen passed a shareholders resolution amending the M&A. The significant parts of the resolution were:

> The following be inserted as Sub-Regulation 3.8 of the Articles of Association:
>
> "3.8 If a shareholder is found to have:
>
> a) Made material misrepresentations (whether fraudulent or negligent) in the course of acquiring its Shares; or
>
> b) Committed an act that may result in the Company incurring or suffering any pecuniary, legal, regulatory or administrative disadvantage or liability or negative publicity which the Company might not otherwise have incurred or suffered,
>
> (such Shareholder being a **"Defaulting Shareholder"**);
>
> the Company may compulsorily redeem any or all Shares held by the Defaulting Shareholder, by giving 15 days' notice to the Defaulting Shareholder (the **"Compulsory Redemption Notice Period"**).
>
> Under expiry of the Compulsory Redemption Notice Period and such compulsory redemption under this Sub-Regulation 3.8 being exercised by the Company, such Defaulting Shareholder will be entitled to receive the fair market value (without discount for any minority stake) as determined by a recognized international third party business valuer (the **"Valuation"**) in

respect of the Shares so redeemed (the "**Redemption Shares**"). The Valuation shall be conducted as soon as possible to determine the fair market value of the Redemption Shares as at the date of the compulsory redemption notice and the redemption price shall paid to such Defaulting Shareholder within reasonable time period of the Valuation report setting out the fair market value of the Redemption Shares having been given to the directors of the Company.

Notwithstanding any other provisions of these Regulations, from the expiry date of the Compulsory Redemption Notice Period until the register of members of the Company has been updated to remove the name of such Defaulting Shareholder, the Defaulting Shareholder shall have no other Shareholder's rights except the right to receive the redemption price and the right to receive any amounts declared but not yet paid by the Company in respect of the Shares so redeemed."

The resolution also provided for the directors to be able to refuse to register a transfer and inserted common form pre-emption provisions into the M&A, the consequence of which was that a person upon whom a redemption notice had been served could not escape its effect by transferring his shares to a stranger.

[48] A copy of the resolution was sent to Mr Cha on the same day, accompanied by a redemption notice providing that Mr Cha's shares would be redeemed as at 11 November 2011. That did not happen because Mr Cha obtained an interim injunction on 9 November 2011 preventing it.

[49] In cross examination Mr Chen denied that the amendment was discriminatory, since it applied with equal force to himself - and to another shareholder to whom Mr Chen was to transfer a single share on 17 February 2012. He said that he needed to protect Staray. He then said that while he was not targeting anyone in particular, it was directed at Mr Cha because he had made false statements. He said that a person to whom the law applies must accept the legal punishment. He maintained that a person becoming a director of a company is bound to disclose his complete information, both good and bad, to all shareholders. He said that he did not wish to continue in business with Mr Cha. He also said that he did not wish Mr Cha to be able to transfer his shares to any person with whom he was unfamiliar.

[50] On 11 November 2011 Mr Chen lodged a complaint about Mr Cha with the BMBoJ, complaining about the particulars registered against him as an independent director in the BEM listing document. On 24 November 2011 a law firm called Deheng Law Offices ('Deheng') provided an opinion to Staray confirming, in its view, that Mr Cha was in breach of Chinese law. The reasoning, although incomplete, as will be seen, is very clearly expressed and is as follows. Deheng say that a Chinese national who acquires foreign nationality automatically loses his Chinese nationality as a result. His/her identity card becomes invalid and must be surrendered to the authorities.

[51] In order to qualify as a lawyer in China, Deheng goes on, a candidate needs to take the national judicial examination. Only Chinese nationals may sit that examination. It follows that a United States citizen cannot be a practicing PRC lawyer or a partner in a PRC law firm. A person obtaining a lawyer's licence by misrepresentation or who does not fulfill the conditions for practice is liable to have his licence cancelled.

[52] Deheng concludes its advice by stating that public announcements by listed companies must include information as to the nationality and foreign residence status of senior managers. Concealment of such information amounts to fraud.

[53] On 12 December 2011 BMBoJ announced that Mr Cha had been practicing as a full time lawyer, but not as a partner, of K&W since 28 October 2008. In my judgment I have to accept that as establishing conclusively, for the purposes of these proceedings, that Mr Cha was never a partner in K&W.

[54] On 23 December 2011 Mr Cha resigned as an independent director of BEM. Between about 10 January 2012 and 13 January 2012 Mr Chen informed news media about Mr Cha's difficulties over the BEM listing document and his supposed nationality/lawyers licence difficulties. Damaging articles appeared in the press, critical of Mr Cha (and of BEM). Mr Chen said that he was the source of these allegations and that he publicized them because Mr Cha had spread misinformation to the effect that he had a good relationship with Staray. The public, he said, needed to be told.

[55] On 15 March 2012 Mr Chen launched an application for judicial review against the BMBoJ, on the grounds that it had failed adequately to respond to his complaint about Mr Cha's lawyer status. On 20 March 2012 the BMBoJ announced that it had opened a case against Mr Cha, whereupon Mr Chen withdrew the judicial review proceedings.

[56] On 12 April 2012 the Staray M&A were further amended by shareholders resolution to add a provision that if a member is found (by judicial, statutory or governmental authority in any jurisdiction) to have made dishonest representations in connection with the acquisition of his shares, Staray may redeem his shares compulsorily for no consideration. Mr Chen, asked about this, said that it was not targeted against Mr Cha.

[57] On 17 April 2012 Mr Chen met the Chairman and a senior partner of K&W. He sought Mr Cha's dismissal on the grounds that he had dual nationality and was thus ineligible to practise as a PRC lawyer. On 18 April 2012 Mr Cha resigned from K&W and ceased to practise full time in the PRC. He says in his witness statement that this was as a result of pressure from Mr Chen. He said that he could not practise, since Mr Chen had smeared his reputation. On 7 May 2012 he sought voluntary revocation of his practice licence, which was granted by the BMBoJ on 14 August 2012.

[58] On 3 August 2012 Mr Cha's household registration[7] lapsed. It seems that this must have happened in consequence of the authorities' discovery that Mr Cha held United States citizenship.

Discussion

[59] Given that I have found that Staray was not a quasi partnership company, it seems to me that the first issue which I have to decide is whether the members' resolution of 26 October 2011 was passed *bona fide* in the interests of Staray as a whole. I was referred to a number of authorities, analysed in **Citco Banking Corp NV v Pussers Ltd**,[8] where the principles are explained by Lord Hoffmann. As I understand it, a Court invited to review a particular exercise of a power available to a company's shareholders, such as a power to amend its articles of association, is not entitled to take a view upon the commercial merits of what has been done. If, however, the amendment is so oppressive as to cast suspicion upon the *bona fides* of those passing it, or so extravagant that no reasonable man could really consider it for the benefit of the company, the Court may set the resolution aside.

[60] In the light of the evidence which the Court has received and which I have set out in the previous section of this judgment, it may be worthwhile examining in a little more detail the operation of the 'good faith' requirement in the test which has been followed in the authorities since it was first formulated in **Allen v Gold Reefs of West Africa Limited**.[9] That case turned upon an amendment to the articles of association of the respondent company imposing a lien on fully paid shares in order to secure a debt due by a deceased shareholder to the company. The Court of Appeal did not consider that the fact that the only person affected, at the time that the resolution was passed, was the estate of the deceased, meant that the directors (*sc* in proposing the resolution) could be charged with bad faith. Lord Lindley MR said[10] that the fact that the deceased's executors were the only persons practically affected at the time by the alterations made in the articles excites suspicion as to the *bona fides* of the company. But he went on to say that although the executors were the only persons actually affected at the time, that was because the deceased was the only holder of paid up shares who was in arrears with calls. He pointed out that the amendment applied equally to all holders of fully paid shares and made no distinction between them and concluded that the directors could not be charged with bad faith.

[61] In **Sidebottom v Kershaw Leese & Co**[11] articles of association were amended to require members of the company who were in business in competition to redeem[12] their shares at their fair value. The respondent shareholders were in competition with the company and sought a declaration that the amendment was invalid. It was proved that the amendment

---

[7] apparently a form of internal passport used by the authorities to regulate the movement of Chinese citizens within the PRC

[8] [2007] UKPC 13; [2007] 2 BCLC 483

[9] [1900] Ch 656 (CA)

[10] at page 675

[11] [1920] Ch 154 (CA)

[12] the then state of company law meant that that had to be done circuitously

was proposed with the specific view of dealing with a threat from a shareholder (Bodden), who was also in competition with the company. Lord Sterndale MR held[13] that Lord Lindley's test did not involve two separate inquiries – (a) was the resolution *bona fide* and (b) were the amendments in the interests of the company as a whole. Rather, if the amendments are *bona fide* for the benefit of the company, they will be consonant with the interests of justice, excluding any question of fraud or malice.

[62] Lord Sterndale said[14] that if the amendment had been proposed with the intention of injuring Bodden only, or getting Bodden out of the company only without any reasonable ground, and not for the benefit of the company, then there would be a lack of *bona fides*. Later,[15] he said that if the amendment had been directed at Bodden from any malicious motive, he would agree that the amendment would cease to be *bona fide* at once.

[63] Warrington LJ, agreeing, dealt with the objection that because the amendment was passed with the special object of ridding the company of Bodden it could not, therefore, have been *bona fide*. He said that he was unable to follow the argument. Accepting that the directors had Bodden in mind when proposing the amendment, he said that that was very different from saying that the resolution was passed with the dishonest intention of getting rid of a member whom they did not wish to remain in the company. The fact, he added, that Bodden was in mind when the resolution was passed did not prevent it from having been passed *bona fide* in the interests of the company.

[64] Eve J, also concurring, said[16] that the fact that an amendment is adopted for the particular purpose of getting rid of a particular shareholder may amount to evidence of *mala fides*, but he did not accept that it constituted *mala fides*. He pointed out that in each of **Allen** and **Phillips v Manufacturers' Securities Ltd**[17] the circumstances showed that the amendments prejudiced a particular shareholder. But in neither case did that mean that the amendment had not been passed in perfect good faith. He concluded that the argument that the resolution, because it was aimed at a particular shareholder, was passed *mala fide*, failed.

[65] **Shuttleworth v Cox Brothers and Co (Maidenhead) Ltd**[18] involved an amendment to remove an individual from a permanent position on the board. He had been guilty of, at best, gross carelessness as general manager of the company. It was argued that the amendment was vindictive and so vitiated by want of good faith. Bankes LJ, relying on what Lord Sterndale had said in **Sidebottom v Kershaw Leese** about the test being a single, rather than a double limbed one, formulated it as being whether the alteration of the articles was in the opinion of the shareholders for the benefit of the company. He went on to say that a particular alteration may be so oppressive as to cast suspicion on the honesty

[13] at page 163
[14] at page 161
[15] at page 166
[16] at page 173
[17] 116 LT 290 (not cited to me)
[18] [1927] 2 KB 9

of the persons responsible for it, or so extravagant that no reasonable men could really consider it for the benefit of the company. He went on

> 'In such cases the Court is, I think, entitled to treat the conduct of shareholders as it does the verdict of the jury, and to say that the alteration of a company's articles shall not stand if it is such that no reasonable men could consider it for the benefit of the company. Or, if the facts should raise the question, the Court may be able to apply another test – namely whether or not the action of the shareholders is capable of being considered for the benefit of the company.'

[66] Scrutton LJ held[19] that an amendment might be struck down if it could be shown that an amendment was passed maliciously, or with any desire to spite the plaintiff, or from any motive other than that of doing what the members thought best in the interest of the company. Atkin LJ[20] expressed the question as being whether the shareholders, in considering whether to alter articles of association, honestly intend to exercise their power for the benefit of the company.

[67] The position seems, therefore, to be that the inquiry as to the validity of an amendment to a company's articles of association starts with a consideration of the terms of the amendment itself. If the amendment is one that by its nature cannot have been considered by reasonable men to have been for the benefit of the company[21] then it will be struck down. At the same time, the fact that in practice the amendment will prejudice a single individual, even if that individual was specifically targeted by those proposing the amendment, will not mean that it was passed *mala fide*. If, however, the only motive behind the amendment is to remove a shareholder without there being any reason based upon the interests of the company, then the amendment may be struck down as having been passed *mala fide*. It is clear that evidence of surrounding circumstances is admissible to resolve these questions.

[68] In the present case, Mr Chen admits that the resolution of 26 October 2011 was directed at Mr Cha. For the reasons given in the authorities to which I have referred, that is insufficient on its own to invalidate the amendment. Mr Chen also admits that from about the end of May 2011 he was interested in 'cleaning up' Staray – meaning ending any association of Mr Cha with it. He accepts that the various suggestions that Mr Cha might dispose of some of his shares or place them into the names of a nominee were motivated by this aim. Although Mr Chen denied making any threat, it is the evidence of Mr Cha that at the meeting of 14 July 2011 Mr Chen said that if Mr Cha did not transfer shares

---

[19] at page 21

[20] at pages 26, 27

[21] there is another strand of authority, grounded in the decision of the English Court of Appeal in **Greenhalgh v Arderne Cinemas Ltd** [1950] 2 All ER 1120, dealing with amendments which do not affect, or are not intended to benefit, the company, which are not, in my judgment, relevant to the present case

voluntarily as Mr Chen requested, he would use his majority votes to obtain the same result by compulsion. In the light of the authorities to which I have referred, I do not need to decide who was telling the truth on this point. The authorities show that a resolution which is *bona fide* for the benefit of a company cannot be impeached in the absence of 'fraud or malice.' A threat by Mr Chen to use his majority votes cannot have amounted to fraud and on its own does not justify a finding of malice as that term was used in context by Lord Sterndale. Lord Sterndale clearly had in mind a state of affairs where an amendment is made with the purpose of damaging the shareholder against whom it is directed rather than of benefiting the company.[22] If the passing of an amendment cannot be shown to have been motivated by malice in this sense, it will be consonant with the interests of justice, provided that it cannot be struck down as inherently unreasonable. If that is the position, it cannot be malicious to threaten to pass a resolution making such an amendment. The inquiry comes back to the question whether the resolution of 26 October 2011 can be attacked as not being *bona fide* in the interests of Staray.

[69] Applying these principles to the resolution of 26 October 2011, it seems to me that it is not possible for me to say that a company in general meeting cannot reasonably take the view that shareholders who have acquired their holdings as a result of misstatements, whether fraudulent or negligent, or who have committed acts which may result in the company incurring or suffering disadvantage or negative publicity, should have their shares redeemed at a valuation. By itself the amendment is not so oppressive or extravagant as to cast doubts upon the *bona fides* of Mr Chen in professing the view that it was in the best interests of Staray that Mr Cha should cease to be associated with it. The charge of malice falls away accordingly. Once that point is reached, the fact that Mr Cha was, when it was passed, the only person capable of being affected by the amendment is, in my judgment, irrelevant.

[70] Mr Collings QC makes further attacks based upon the scheme of the new Article 3.8. He says that the amendment does not specify who is to 'find' that a member is caught by it and is thus void for uncertainty. The same objection might have been taken to the amendment in **Sidebottom v Kershaw Leese**, which did not specify who was to 'find' that a shareholder was carrying on business in competition with the company. There is nothing in the point. Staray may serve a notice of redemption if its board sees fit to do so. A member asserting that he is not caught by the new Article 3.8 may challenge the notice on the facts, as Mr Cha does in his amended statement of claim.

[71] Although the point is not pleaded, Mr Cha also says that the new Article 3.8 is impossible of performance, because the value of Mr Cha's shares is a straight reflection of Staray's interest in HD Mining, the value of which cannot be ascertained without access to the books of HD Mining, which is neither listed nor a party to these proceedings. There is nothing in this point, either. The valuation is to be carried out by a recognized third party business valuer. That person will have access to information which I think I am entitled to assume will be available generally to those in the know in the market, from which he will no doubt be able to make informed assumptions about the value of the project overall. If reasonable requests for information from HD Mining itself are refused, he may be driven to

[22] see paragraph [61] above

making his valuation upon certain hypotheses, which may or may not be favourable to Staray. It will not be in the interests of Mr Chen, therefore, to seek to restrict the valuer's access to information and will be positively in his interest to use his best endeavours to facilitate his access to it.

[72] I therefore turn to the question whether Mr Cha is caught by Article 3.8, as pleaded by the defendants in paragraph 27 of the amended defence. In my judgment, he is not.

[73] As for the first limb of the new Article 3.8 (material misrepresentation in acquisition of shares), for a misrepresentation to be material, it must be shown to have been relied upon by the representee. The putative representee is, presumably, Staray, from whom the shares were acquired. The misrepresentations are supposed to have been made at the meeting of 20 March 2010. Staray was not then in existence. No case was cited to me showing that a company may rely upon a pre-incorporation misrepresentation. What Mr Cha said to Mr Chen on 20 March 2010 cannot, therefore, have amounted to material misrepresentations for the purposes of Article 3.8(a).

[74] Quite apart from that, while I have found that Mr Cha told Mr Chen on 20 March 2010 that he was a partner in K&W (which he was not) and qualified to practice in both the PRC (which he was, although as will be seen there are questions whether he should have been) and the US (he was qualified, although then not licensed to practice there), Mr Chen's stated reasons for agreeing to take Mr Cha into the project had nothing to do with whether or not Mr Cha was at the time a partner in, or merely employed by K&W. Mr Chen's evidence was that he took Mr Cha in because of Mr Cha's reputation as an expert in capital markets and IPO's and because he thought, bizarrely, that Mr Cha's New York qualification would be an advantage in dealing with Canadian mining concerns. He also valued Mr Cha's linguistic skills. Mr Cha was correct to tell Mr Chen that he was qualified in New York. Restoring his right to practice was a mechanical matter of paying his back dues, something which Mr Cha did on 4 September 2012. Nor is there any evidence that at any time before he ceased to take part in Staray's affairs Mr Chen/Staray needed or was even likely to need to call upon Mr Cha to appear in the Courts of New York. In my judgment and on the assumption that Mr Chen is to be treated as the representee for these purposes, there is no evidence that Mr Cha made any material misrepresentations to Mr Chen on 20 March 2010.

[75] As for the new Article 3.8(b) (commission by a shareholder of an act that may result in the company suffering pecuniary, legal, regulatory or administrative disadvantage or liability or negative publicity) which the company might not otherwise have incurred or suffered there is no evidence that Mr Cha has committed any 'act' with the potential to cause any of those consequences. The 'acts' relied upon in paragraph 27 of the amended defence are (1) that Mr Cha concealed his US citizenship from the Chinese Justice Department in order to fraudulently acquire and thereafter maintain his PRC practice licence; (2) that he made fraudulent statements to Chinese public companies to the effect that he was a Chinese licensed practicing lawyer with Chinese nationality and without the right of permanent residence in any foreign country and 'fraudulently acquired the position of independent director of various public companies; and (3) that Mr Cha has violated the laws of the United States, in respect of which Staray filed a complaint with the IRS in early June 2012.

[76] No evidence at all was led as to the third of these complaints. As to the first and second, and leaving aside whether the acts themselves have been established, there was no evidence that Staray has suffered or may suffer any of the pleaded detriments in consequence ('which the Company would not otherwise have . . . suffered'). No evidence was led to show that as a result of these alleged acts Staray has become exposed to a pecuniary, legal, regulatory or administrative disadvantage or liability or that it has or may suffer any negative publicity which it might not otherwise have suffered. Any negative publicity which *Staray* has suffered (none was proved) will have come about not as the result of Mr. Cha's alleged acts but only as a result of Mr Chen's own energetic efforts to blacken Mr Cha's name as widely as possible, including by bringing a judicial review claim in Staray's name against the BMBoJ. Even if Mr Chen persists in his campaign, I cannot see how Staray itself will be prejudiced.

[77] In my judgment, therefore, Staray had no right to serve a redemption notice on Mr Cha on 26 October 2011. I shall deal with the relief to which this finding entitles Mr Cha at the conclusion of this judgment. Although that is sufficient to dispose of these proceedings, during the course of them I heard extensive evidence of Chinese law on the interconnected questions of Mr Cha's nationality and of his licence to practice Chinese law. In the light of my findings that evidence becomes irrelevant, but in case this matter goes further I think that I should summarise it and give my conclusions upon it.

The expert evidence

[78] The first issue turns upon the question whether Mr Cha had, at the material times, dual United States and Chinese nationality. It was common ground that Mr Cha was born with Chinese nationality. The issue which divided the experts was whether Mr Cha automatically lost it when he obtained United States citizenship on 11 September 2001.

[79] Mr Jeff Liu, who was called by Mr Cha, is a PRC qualified lawyer who is currently a partner in Grandall Law Firm (Beijing), which I understand to be licensed by the BMBoJ. Mr Liu relied upon Article 9 of the PRC Nationality Law ('the Nationality Law'), which provides, in the official translation, that

> "Any Chinese national who has settled abroad and who has been naturalized as a foreign national or has acquired foreign nationality of his own free will shall automatically lose Chinese nationality'

[80] Mr Cha has clearly acquired foreign nationality of his own free will. Mr Liu's view, however, was that he will not have lost his Chinese nationality under Article 9 unless he has settled abroad. There is, apparently, no statutory definition of 'settled' but Mr Liu relied upon a so-called 'Explanation of Settlement (Trial)' published by the Overseas Chinese Affairs Office of State Council', which treats a person as settled in a place where (a) a Chinese citizen acquires the right of long term or permanent residence where he resides or (b) (not having such a right) he has lived legally in a foreign country for more than five consecutive years.

Mr Liu said that there was no evidence that Mr Cha had lived legally elsewhere for more than five consecutive years, and on that basis maintained that he had not lost his Chinese citizenship. He accepted, however, that if he had acquired the right to live permanently in (for example) the United States, he would, by the application of Article 9 of the Nationality Law, have lost his Chinese citizenship. Mr Liu will not have known that when he gave his evidence that Mr Cha admitted[23] that he had the right permanently to reside in the United States, which seems to me to dispose conclusively of this point in favour of the defendants. I should, however, summarise the positions of the experts on the issue.

[81] The Defendants called Mr Zhang, Decal as their expert. He relied upon Article 3 of the Nationality Law, which provides that the PRC does not recognize dual nationality for any Chinese national. He said that it followed that any person acquiring citizenship of a foreign country automatically loses his Chinese citizenship. So far as Article 9 of the Nationality Law was concerned, he accepted that as a matter of language loss of Chinese citizenship required proof that the individual had settled abroad, but he said bluntly that that was not how it was applied in practice. He said that in practice any Chinese national who obtained foreign nationality lost his Chinese nationality. He gave a counter-intuitive reason why this was the current state of the law on nationality, which I do not think that I need to go into.

[82] Mr Liu accepted that he had not dealt with Article 3 of the Nationality Law in his report, but in cross examination he explained that it meant that the PRC Government would not permit a Chinese national to rely upon any foreign citizenship which he may have acquired as a defence, for example, to a criminal charge or to a tax liability. He accepted, however, that the visas granted to Mr Cha by the PRC immigration authorities on occasions when Mr Cha entered China on his United States passport showed that for those purposes Mr Cha was being treated by the Chinese authorities as a foreign national.

[83] It seems to me that in reality this amounted to a concession by Mr Liu that Mr Zhang had the better of the argument. In any event, as I have said, Mr Cha's admission coupled with Mr Liu's acceptance that possession of the right permanently to reside in the United States would involve loss of Chinese citizenship, settles the matter. I find that Mr Cha ceased to have Chinese nationality on 11 September 2001.

[84] The second issue upon which I received expert evidence was whether at the material times Mr Cha (a) had a valid Chinese lawyer's qualification and (b) whether he was licensed to practice as a lawyer in the PRC.

[85] Mr Liu's evidence on this topic was that Mr Cha became qualified as a lawyer in December 2001 through what he called the verification route, which seems to have involved a personal grant rather than the passing of a general examination, which it was common ground that only Chinese nationals could sit for. At the time the verification route required that the applicant held Chinese nationality. The route ceased to be available in 2008 or 2009 and that led Mr Liu to conclude that it does not matter whether Mr Cha was a Chinese national in December 2001. I have to say that I found this a surprising conclusion, although it was not challenged in the evidence of Mr Zhang on this point. I

[23] see paragraph [42] above

therefore conclude that Mr Cha's qualification as a PRC lawyer was valid. As a matter of fact, I would have had difficulty concluding otherwise, since Mr Cha was registered by the BMBoJ. I accept Mr Liu's evidence that the registers of the BMBoJ are conclusive on matters of this sort until rectified. It cannot be right that a member of the public can be heard to assert that a person registered with the BMBoJ is not a qualified lawyer merely because he asserts that he should never have been registered in the first place. This Court can be in no different position. A person may, of course, assert that an individual should never have been registered because he had practiced material deception in obtaining his qualification, which is what Mr Chen asserts in the present case. I decline, however, to make a finding, on the evidence which I have heard, that Mr Cha practiced deception on the BMBoJ in order to become admitted as a Chinese lawyer. The issue was not put to Mr Cha and there are other possible reasons apart from fraud why the registration was granted and subsequently maintained. I am not prepared to make findings of fraud without solid material entitling me to do so.

[86] The position is the same as far as the licence to practice is concerned. Mr Cha was as a matter of fact licensed between 4 November 2005 and 14 August 2012. I should, however, briefly summarise the expert evidence on the point.

[87] Mr Zhang's evidence was that in order to obtain and maintain a practicing licence Mr Cha would have needed to have been a Chinese national. Mr Liu's evidence was that the subordinate legislation containing that requirement was repealed in July of 2000. Mr Zhang said he knew of no foreign nationals[24] holding a lawyer's licence in the PRC. He said that even if Mr Cha had obtained his practising licence while a Chinese citizen, he could not have lawfully maintained it after he had obtained United States nationality.

[88] Mr Liu's evidence on this point was unsatisfactory. When asked if Mr Cha would have been able to renew his lawyers licence had he produced his United States passport on each occasion, he was prepared only to say that he did not know.

[89] I prefer Mr Zhang's evidence on this point. It was coherent and made sense, while Mr Liu's evidence was elusive and unconvincing. I find that Mr Cha would not have obtained, or been able to maintain, his lawyer's licence had he informed the relevant licensing body, that he was a citizen of the United States. I make no further findings in that respect, for the same reasons as I have given in relation to the obtaining by Mr Cha of his lawyer's qualification.

Conclusion

[90] For the reasons given above, Mr Cha is entitled to an injunction restraining Staray from proceeding upon the redemption notice of 26 October 2011. Mr Cha has not demonstrated any entitlement to any of the other relief set out in paragraphs (1) to (3) of the prayer.[25] At the end of the hearing Mr Collings QC asked for an order restraining Staray from issuing further shares. While such relief might have been appropriate had I

[24] with the exception of citizens of Hong Kong and Taiwan

[25] the other claimed heads of relief have been abandoned

found that there was a quasi partnership between Mr Chen and Mr Cha, in circumstances where I have not done so it seems to me that Mr Cha shows no entitlement to an order of that type. Mr Collings QC further asked for an order that Staray be restrained from dealing with its 5% interest in HD mining without Mr Cha's consent. On the facts as I have found them, I see no reason to restrain Staray from dealing with its property as it seems fit. If any such dealing were to involve any breach of duty on the part of its directors, then no doubt Mr Cha will have a remedy. In the absence of any evidence that any such breach of duty is threatened or intended I do not think it right to grant an anticipatory injunction.

Commercial Court Judge
13 February 2013