IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
VIRGIN ISLANDS
COMMERCIAL DIVISION

CLAIM NO: BVIHCM (COM) 138/2011

In the matter of

The BVI Business Companies Act, 2004 (as amended)

Claimants:

Cha, Yang (also known as Stanley)

Defendants:

(1) Staray Capital Limited
(2) Marlon Ray Chen

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

2013: 17, 25 April

JUDGMENT

(Costs – claimant succeeding for practical purposes but failing to establish claim as advanced – whether to be treated as successful party – CPR 64.6(1) and (2) considered – whether award to be discounted – CPR 64.6(6) and 64.6(4) considered – amount of discount – interim payment)

[1] I have to decide, first, the incidence of costs of these proceedings; secondly, whether there should be an interim payment and, if so, in what sum; and, thirdly, what is the appropriate form of relief given my decision and its reasons. For the background I refer to my judgment of 13 February 2013.

The incidence of costs

[2] Although I have had the benefit of excellent and comprehensive submissions from both Counsel on the main question, their respective positions can be summarized as follows: Mr Collings QC, for Mr Cha, says that Mr Cha was the successful party because he succeeded in preventing Staray from compulsorily purchasing his shares pursuant to the notice of 26 October 2011. Mr Atherton QC, for Staray and the second Defendant ('Mr Chen'), says that they are to be treated as the winning side because Mr Cha was seeking relief, both interim and final, under section 184I of the Business Companies Act, 2004 ('section 184I') and failed to obtain it. Although Mr Cha did obtain a judgment which held that the notice was bad, that had nothing to do with section 184I, but was because none of the facts upon which the notice relied were made good at trial. So, says Mr Atherton

QC, Mr Cha failed and should pay the Defendants' costs of the interim applications and of the proceedings generally. He says that the point upon which Mr Cha succeeded at trial was not advanced at the hearing, was taken by the Court and that it did not form the basis of Mr Cha's real claim.

[3] It seems to me that Mr Atherton's characterization of the nature of Mr Cha's claim is right. He obtained interim relief expressly on the basis that he intended to advance a claim under section 184I. He obtained an order that Staray be restrained from issuing any further shares, which can have had no basis in the soundness or otherwise of the 26 October 2011 notice and can have been justified only on the footing that Mr Cha had a case under section 184I. Indeed, that was expressly made plain in the order made on Mr Cha's *inter partes* application in December 2011. Mr Cha's claim form was expressed to be an application under section 184I and sought orders under that provision. The amended statement of claim claims[1] such relief as is just and equitable pursuant to section 184I and the three heads of relief that survived amendment are consistent only with a section 184I claim (so far as it refers to redemption, it is in general terms and is not confined to the notice of 26 October 2011). The amended statement of claim relies upon quasi partnership and sets out the terms of the supposed agreement upon which it was claimed that Staray was brought into being. The amendment to Staray's Articles of Association to permit compulsory redemption is characterized as an act of unfair prejudice, unfair discrimination or oppression and the attempt to compel Mr Cha to redeem is similarly described. Although it is said that Mr Cha was provided with no explanation why Staray might suffer detriment as a result of the events relied upon in the notice of 26 October 2011, the failure to give such an explanation is itself relied upon as an act of unfair prejudice, etc. No-where in the amended statement of claim is the validity of the notice *qua* notice put in issue.

[4] On the other hand, I do not think that it is right to say that the inherent validity of the notice was not in issue in these proceedings. Paragraph 27 of the amended defence pleads why on the facts Staray was entitled under its amended Articles of Association to serve the notice of 26 October 2011. Those allegations of fact are challenged in paragraphs 19.2 and 19.3 of Mr Cha's amended reply and the expert evidence was devoted to establishing whether some, at any rate, of the matters relied upon in the 26 October 2011 notice had a factual basis – although Mr Cha failed in his argument on nationality and substantially lost on the legal qualification/licence points. Mr Cha succeeded on the notice point only because the Court found no evidence that a material misrepresentation had induced the allotment of his 20% holding or that any of the facts which Staray did prove were likely to cause the consequences which were a condition precedent for the service of a valid notice.

[1] paragraph 47

[5] At trial Mr Cha failed to establish that the relationship between himself and Mr Chen was one of quasi partnership or that any of the acts of which he complained was unfair, discriminatory or oppressive so as to engage the section 184I jurisdiction. Mr Collings QC argued that service of a bad notice on a member of the company was itself unfair within the meaning of section 184I but I cannot accept that submission. Mr Cha succeeded on this point because there was no evidence that the conditions for service of a valid notice existed, not because it was unfair to serve it.

[6] I think, therefore, that it must follow that Mr Cha has failed to establish his case as advanced. What Mr Cha wanted was an order, based upon his establishing a quasi partnership, which would entrench his position as a 20% shareholder in Staray. He failed to obtain one.

[7] None the less, if one stands back and surveys the battlefield and asks the question, who is left standing, I think that the answer must be that it is Mr Cha. The Defendants did not, in point of form, counterclaim, but they wanted Mr Cha out of Staray and together pleaded that he had been lawfully ousted. He is still there. The whole genesis of the dispute was an attempt to deprive Mr Cha of his shares by service of the redemption notice. That has failed. It seems to me, therefore, that for the purposes of CPR 64.6(1) and (2) Mr Cha is to be regarded as the successful party. I can see an argument that Mr Cha's success was, in point of law, a success against Staray alone, but the reality is that the dispute was between Mr Cha and Mr Chen. Staray's defence was the same as that of Mr Chen and it was plainly maintained and funded by Mr Chen. Indeed, in his skeleton submissions Mr Atherton QC rightly recognizes this by making submissions on behalf of Mr Chen alone with no mention of Staray as having some separate or stand alone entitlement. So I think that any order for costs in Mr Cha's favour should be against the Defendants jointly.

[8] I see no reason for ordering Mr Cha, as successful party, to pay any of the Defendants' costs of these proceedings. This is not a case where a claimant succeeds on one minor issue and fails on everything else, so as to turn a nominal success into overall failure. The dispute started with an attempt to force Mr Cha to dispose of his shares and, as I have said, he still has them. That is a real, rather than a nominal, success. For the same reason, I do not think that it would be right to refuse to make any costs order in Mr Cha's favour.

[9] I must also take into account, however, that the defendants have themselves successfully resisted Mr Cha's attempts to impose upon Staray and Mr Chen a regime which he plainly had no right to ask for and which would have significantly altered the balance of power within Staray had it succeeded. Instead of confining himself to a challenge to the redemption notice and, possibly, an attack on the amendments to

Staray's Articles of Association, Mr Cha attempted to improve his status within Staray so as to give him a position which had never been bargained for.

[10] In my judgment and having regard to the matters to which the Court is directed by CPR 64.6(6) and to the provisions of CPR 64.6(4), the right order in the present case is that the Defendants should pay Mr Cha 40% of his costs of these proceedings, as assessed or agreed. I reach this figure, which cannot, in the circumstances, have any precise scientific or arithmetical foundation, for the following reasons.

[11] Although I have held that Mr Cha is to be considered as the successful party, he lost on the **Citco v Pussers** point; he lost on the expert evidence; and he failed to achieve his object of entrenching his position through reliance upon section 184I. These issues took up significant portions of time at trial and must have occupied roughly corresponding amounts of time in preparation. I consider that these factors call for a substantial discount in the award of costs to which Mr Cha as the successful party is *prima facie* entitled. Although I freely confess that apportionment in a case like this must to an extent be a matter of feel, I have given a great deal of thought to arriving at what I consider to be the just amount of the discount to be applied and I am satisfied that a discount of 60% is appropriate and properly balances the success/failure ratios in this particular case. I do not find it possible to rationalize that part of this decision with any greater precision.

[12] I should make clear that this apportionment is a global figure and takes into account (a) the costs of the interim injunction applications which were reserved to trial; and (b) Mr Cha's liability for the costs occasioned by service of the amended statement of claim.

Interim payment

[13] Mr Collings QC seeks an interim payment. Both sides have now put in preliminary costs schedules which are in the sum of roughly US$1 million each for the whole of the proceedings. Walkers, for the Defendants, have made some criticisms of even the latest Harneys schedule, but these can probably be accommodated for present purposes by taking the figure at a round US$1 million. Assuming that an interim payment of 40% is appropriate, I propose on that basis to order an interim payment from Staray and Mr Chen to Mr Cha in the sum of US$160,000, to be paid within 14 days of the handing down of this judgment.

Form of Order

[14] Although at paragraph [90] of my judgment I described Mr Cha as entitled to an injunction restraining Staray from proceeding with the redemption of his shares, Mr Atherton QC has submitted that it is unnecessary for one to be granted in the circumstances of the present case. I think that that must be right and Mr Collings QC, who has done everything in his power to protect his Client's position, rightly did not

dissent more than faintly. The order will not, therefore, contain any injunction against the Defendants.

Commercial Court Judge
25 April 2013