IN THE EASTERN CARIBBEAN SUPREME COURT

TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

COMMERCIAL DIVISION

CLAIM NO.: BVIHC (COM) 16 of 2019

BETWEEN

[1] SPA II GUANGDONG LTD
[2] SPA II-A GUANGDONG LTD

Claimants/Applicants

and

[1] FAVOR SHARP ENTERPRISES LIMITED
First Defendant/Respondent
[2] DECENT MANAGEMENT LIMITED

Second Defendant

Appearances:

Mr Peter McMaster QC, with him Mr Andrew Willins and Mr Fraser Mitchell of Appleby for the Claimants/Applicants

Mr Peter Ferrer, with him Ms Sarah Bolt of Harneys for the First Defendant/Respondent

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2019: February 13 and 28
March 7

ORAL JUDGMENT

[1] GREEN QC, J. [Ag.]: This is an application by two Caymanian companies who are the majority shareholders in a BVI company, the Second Respondent, Decent Management Limited ('Decent'). The First Respondent ('FSE') is a minority shareholder in Decent and this application seeks an interim order of this court to convene a meeting of the Board of Directors of Decent to pass various resolutions in relation to subsidiary companies while suspending the quorum requirements specified in Decent's Articles of Association. This unusual and perhaps novel application is made in the context of an

unfair prejudice claim under section 184I of the BVI Business Companies Act in which the Applicants assert that FSE is abusing the quorum provisions in Decent's Articles by refusing to attend board meetings at which the Applicants' appointed directors would otherwise be able to pass various resolutions.

[2] The application was first before me on the 13th of February having been served on FSE's legal representatives Harneys on the 11th. I adjourned it for evidence, including expert evidence to be filed and it came on for hearing on the 28th of February, listed for three hours, a quite unrealistic time estimate given the amount of evidence that was filed. We ran out of time on the 28th of February so I directed further written submissions should be filed and I would deliver judgment as soon as possible this week as the Applicants are maintaining that this is very urgent.

Background

[3] The Applicants are each owned by a Cayman Islands exempted limited partnership which I will refer to collectively, including the Applicant companies, as CBRE. CBRE holds a total of 54.74% of the shares in Decent. FSE holds 37.26%. There are two other small shareholders, a PRC resident Mr. Xiao Dong with 5% and a BVI company called Aimswin Ltd with 3%.

[4] On the 9th April, 2008 the above-mentioned four shareholders entered into a Shareholders Agreement in relation to Decent and its Articles were amended on the same day. I will come back to the terms of the Shareholders Agreement and Articles, but just to say at this stage that by its terms the Shareholders Agreement expired in 2015 and the Applicants say that it is no longer operable or relevant. The Articles, of course, continue to bind the parties.

[5] Decent holds 100% of the shares in a Hong Kong company called Samman Investments Limited ('Samman'). Samman in turn owns 95% in a PRC company called Shanghai Taiqi Real Estate Development Company ('SHTQ'). The other 5% of SHTQ

is owned by another PRC company called Kaishiyin Investment Co Ltd ('KSY'). SHTQ is a Shanghai property development company owning commercial retail premises and serviced apartments. The serviced apartments were actually sold in August 2017 as part of a plan to enable CBRE to exit from the investment and to be bought out. The appropriate use of the proceeds of sale including facilitating the buyout of CBRE is at the heart of the present dispute.

[6] By virtue of its majority in Decent, CBRE would have been able to control who was on the Board of Decent, which in turn would lead to control of Samman and SHTQ. However, the majority's power was restricted by the Shareholders Agreement and Decent's Articles, which as Mr. McMaster for the Applicants accepted, was meant to be replicated down the structure. This was actually specified in clause 5.16 of the Shareholders Agreement. In both the Shareholders Agreement and the Articles, 'Major Shareholder' is defined as both CBRE and FSE.

[7] By regulation 8.3 of the Articles, the Board of Decent was to be made up of five directors of which three were to be appointed by CBRE and the other two by FSE. By regulation 8.5, the director could only be removed upon the request of the shareholder who nominated that director and he or she could only be replaced by that shareholder. By regulation 10.6, the quorum was to be two, but it had to consist of at least one CBRE and one FSE director. The Chairman was to be a CBRE director and FSE was entitled to nominate a Chief Executive Officer of Decent and its subsidiaries.

[8] Samman's Articles were to the same effect: five directors; three for CBRE; and two for FSE. There was also a quorum of two requiring the attendance of at least one CBRE and one FSE director. In SHTQ's Articles, account had to be taken of the participation of KSY which had 5%. Again, its Board was to be comprised of five directors: two appointed by KSY; and three by Samman. The Board is currently made up of two CBRE directors and one FSE director making up the three Samman directors. As FSE appear to have sided with KSY in SHTQ, it is this director that CBRE is targeting in this application. CBRE says that it is entitled to that directorship and that it should be able

to control the SHTQ Board to the exclusion of FSE. FSE says that it is entitled to a director on the Board of SHTQ and that is the corporate structure throughout the Group that CBRE and FSE signed up to in 2008.

[9] So unlike the normal quorum provisions requiring a certain number of directors to attend the meeting, the minority shareholders and minority on the Board, FSE, were given substantial rights to protect their minority shareholding and to prevent infringement of their rights as such, including under the Shareholders Agreement.

[10] The point was emphasised further by the definition of a "resolution of directors" in the Articles which included reference to the meeting being properly convened and constituted, i.e. quorate. It seems to me that this adjustment to the quorum provisions is significant and that it was anticipated that it could be used by FSE to ensure compliance with the Articles and/or the Shareholders Agreement.

[11] In relation to Shareholders' meetings, the quorum provisions were that 70% of the shareholders had to attend (that is also referred to in the definition of "resolution of shareholders" in the Articles). Accordingly, FSE could effectively prevent any such meeting taking place by not attending. There were certain matters that could not be done in Decent by either the Board or the shareholders save with the written consent of the Major Shareholders, that is CBRE and FSE. Regulation 7.22 affords a veto to FSE in respect of:

1. Any change to the Memorandum and Articles of Association;

2. The repurchase, cancellation or redemption of share capital of Decent or any Group company or any reduction of capital;

3. Any approval or amendment of annual operating plans or budgets or any activity outside the scope of the annual budget of any Group company;

4. The making of any loan or advance by any Group company or give any credit or the creation, renewal or extension of any borrowings by any Group company; and

5. Any transaction by any Group company with any shareholder.

[12] The Shareholders Agreement provided that this requirement for Major Shareholder consent has to be replicated in all subsidiaries to the maximum extent permissible and practicable under applicable law.

[13] Samman's Articles replicated the above provisions in Article 66A, however, for some reason the term 'Major Shareholder' which is defined in Samman's Articles in the same way was substituted by the term 'shareholder'. As Decent is the 100% shareholder in Samman, it is a bit of a nonsense specifying that any resolution on those major matters requires the consent of the "shareholder". This must be a mistake for 'Major Shareholder', but I clearly cannot determine that on this application. It must be arguable, however, that any resolution on those reserved matters in Samman must require the consent of FSE as well.

[14] SHTQ's Articles restricted the rights of directors to vote on material matters such as amendments to the articles and distribution of profits. For any such matters, the unanimous resolution of the directors was required.

[15] So what is the reason for the Applicants' concerns? The reason for the Applicants' concerns and the alleged urgency of this application is because of what they say the Board of SHTQ is proposing to do. There is very complicated and disputed factual

history since the receipt of the proceeds of sale which was approximately $75 million for the serviced apartments, which was done to facilitate the withdrawal of CBRE. I will not and cannot engage in a detailed analysis of the evidence as to what is going on in the PRC and in particular how those proceeds are to be deployed. It is one of the reasons why Mr. Ferrer on behalf of FSE says this is wholly unsuited to this sort of application and is effectively a summary disposal of the claim.

[16] This is a very brief summary of the position as set out in the evidence in support of this application which was sworn by Mr. Michael Pierce and the evidence in opposition sworn by Mr. Wang Luo Xin. The Applicants say that all the net proceeds of sale from the serviced apartments should be distributed by SHTQ up the structure. However, both FSE and KSY have combined together to resolve to use RMB150 million of the proceeds to make a loan to a party related to KSY, and indeed a partial drawdown of that loan has taken place. CBRE, through Mr. Pierce, have commenced proceedings in the PRC to stop this going ahead. Although the Court in the PRC has held that Mr. Pierce does not have standing to pursue those proceedings, a freezing order was put in place pending an appeal. That appeal has now been heard and is expected to be unsuccessful, so far as CBRE is concerned, which will mean that the freezing order will be discharged. CBRE expects this to happen imminently hence the urgency of this application and the delivery of this judgment.

[17] In response, FSE says that this is a complete misrepresentation of the position in the PRC and there is no real urgency. It says that it has made such a loan, but it is a secured loan and is a perfectly proper use of SHTQ's funds, particularly because there are restrictions as to how much can be distributed by way of dividends outside of the PRC in any one year. Furthermore, they say that this was all part and parcel of the agreed buyout mechanism of CBRE's interests in the Group which has to go through a number of stages, including a capital distribution to Samman to discharge shareholder loans and a profit distribution up to Decent together with a further payment by FSE to CBRE.

[18] As I have said, any distribution requires the unanimous approval of the directors of SHTQ, but FSE says that CBRE have refused to agree to it because they are unhappy with the loan. FSE further says that CBRE has no right to be bought out, but that this was all agreed and when CBRE is bought out, it can have no complaint about SHTQ using its money to make the loan.

The Application

[19] So with that somewhat confusing and perhaps incomplete background, what is it that the Applicants want? Clearly to stop the loan; alternatively to be bought out at an appropriate price. Mr. Pierce has sought first to convene a Board meeting of Samman to pass resolutions designed to replace the FSE director on the Board of SHTQ, that is Mr. Wang, with CBRE's own appointee. In addition he was seeking a resolution authorising the commencement of proceedings in the PRC in the name of Samman to prevent the loan going ahead. However, it is CBRE's case that FSE has refused to attend the Samman board meeting which, because of the quorum provisions, meant that it could not pass any resolutions. CBRE has, therefore, attempted to convene board meetings of Decent to pass a resolution authorizing Decent to use its power as a shareholder of Samman to amend its articles to remove the quorum provisions. Again, CBRE says that FSE's directors have refused to attend Decent board meetings thereby preventing such resolutions from being passed. CBRE says this is all an abuse of the quorum provisions and the Court should effectively waive those provisions to enable CBRE to pass its proposed resolutions

[20] By the notice of application the Applicants are seeking the following:

1. That the Court do convene a meeting of directors of the Second Respondent and that the meeting of the directors of Decent should take place at a time and date to be fixed by the Court;

2. That the meeting shall consider and vote on the resolutions attached to this Order, and I will come to that, and that that should be the only business of the meeting;

3. That the meeting should be arranged so that attendees may participate by telephone;

4. Notice of meeting should be given by delivering a copy of this order and the attached resolution to the registered office of the company and to the registered office of FSE and marked for the attention of the Company and FSE, respectively, on any working day following the making of this order, and such notice shall be deemed adequate notice of the meeting to all directors and notwithstanding anything to the contrary in the Company's Amended Articles of Association;

5. That the quorum of the meeting shall be two and there shall be no requirement for at least one FSE director within the meaning of that expression at Clause 10.6 of the Articles to be present at that meeting;

6. The meeting may pass the Resolution notwithstanding the absence of any director appointed by a Major Shareholder within the meaning of that expression at Clause 10.10 of the Articles;

7. That the Resolution should be a resolution of the directors of the company notwithstanding the absence of any director appointed by a Major Shareholder within the meaning of that expression in the definition of Resolution of Directors at Clause 1.1 of the company’s Memorandum of Association, and;

8. Pursuant to the Court's power under Section 184I of the Business Companies Act 2004 as amended, the Articles be amended so that for the purpose of the meeting only the requirements of notice, attendance and quorum and the definition of resolution are as set out in this order and not as set out in the Memorandum and Articles.

[21] And under the grounds of the application, it is said to be an application that is made under Section 1841 of the Act. And under that it says that the Court has power for an application being made under the Act to make such orders as it considers are just and equitable including without limitation orders altering the Memorandum and Articles of Association of a company. This is, of course, an interim application, but Mr. McMaster stressed to me that what is sought is only a temporary amendment to the Articles to enable those Resolutions to be passed.

[22] The proposed Resolutions were slightly modified from those attached to the Notice of Application, but they were essentially the following:

The first Resolution was that the Articles of Association of Samman should be amended as follows. And then there was an amendment proposed to Article 103 of the Articles of Samman changing the quorum requirement that there had to be at least one FSE director and one CBRE director present at any meeting of the Board.

Secondly, an amendment to Article 106A which provides that resolutions can only be passed at a Board Meeting if there's one director from each 'Major Shareholder' So deleting those requirements that each director do attend. And in Article 104, that there has to be 10 business days' notice of the meeting so the meeting can be called at short notice. Resolution B says:

"Without prejudice to A", that is the amendments to the articles, "Michael Murray Pierce is hereby authorised to pass on behalf of Decent Management Limited and as the sole

shareholder of Samman a written Resolution in the above-called suit on behalf of 65A of the Articles.

And then in C: "Provided that the Resolution of A is passed subject to...the following condition, should the Eastern Caribbean Supreme Court so order in the future and from the moment of such order, the articles shall be further amended so as to reinstate the words removed by the amendment at A".

[23] So what is said is that this is only a temporary amendment. And should the Applicants lose their claim at the end of the day, it's committed to changing the Articles back to their original form.

[24] So what is sought is amendments to both Decent's Articles temporarily for the purposes of passing the Board Resolution, but also amendments to the articles of Samman.

Conclusions

[25] The application is made, as I said, pursuant to the powers of the Court under section 184I and it's asking the Court essentially to override the special quorum requirements of Decent's Articles so that Decent can then amend the quorum requirements of Samman's Articles in order to change the Board of SHTQ. If the Court were to order this, in particular at an interim stage, it would be an extraordinary intervention by the Court into the carefully crafted bargain between the parties, the full terms of which bargain have yet to be determined by the Court but which will potentially change forever, it seems to me, the agreed structure between the parties.

[26] It will be fairly obvious by now that I am not going to be prepared to make the order that the Applicants seek. This is for the following reasons:

1. These are unfair prejudice proceedings under Section 184I. It is well known that the context of such proceedings is the underlying agreements and understandings between the shareholders governing the conduct of the company's business. While actual shareholders agreements and the articles are the best evidence of the terms of the relationship, these can be overlain with equitable considerations taken from unwritten understandings and practices. Indeed in the Applicants' reply submissions, Mr. McMaster has sought to argue in a number of places that FSE is not entitled to rely on its strict legal rights in relation to quorum, because equity would regard that as not being done in good faith and contrary to the purpose of those quorum requirement provisions. He accepts, therefore, that the articles are overlain by considerations of equity. Furthermore, I would say that his argument somewhat begs the question as to the actual purpose of those quorum provisions;

2. Clearly the Shareholders Agreement governed the relationship between the shareholders throughout the Group and the quorum provisions, directorships and the reserved matters requiring FSE and CBRE approval were all embedded in one form or another in the respective companies' Articles of Association, albeit with some wrinkles that may in due course need to be sorted out;

3. Any matters in the Shareholders Agreement that were not so embedded, Mr. McMaster for the Applicants says are now of no effect because the Shareholders Agreement terminated in 2015. He says, not unreasonably, that that was the bargain that the shareholders signed up to and that included its termination in 2015. However, does that mean some important issues changed upon termination of the Shareholders Agreement? The difficulty is that the Shareholders Agreement shaped the articles that were incorporated to embed certain provisions and that makes the Shareholders Agreement important for the parties' interpretation of and exercise of rights under the Articles. For the time that the Shareholders Agreement was in existence, that must be right and it informed the way the parties saw their relationship. I do not believe that that just came to an end in 2015. In order to understand how the articles are to be

interpreted and the purpose of certain provisions, such as the quorum provisions, together with the determination of an unfair prejudice claim, it seems to me to be important to take into account what the Shareholders Agreement says, even if it is no longer binding;

4. Contained within the Shareholders Agreement are a whole series of provisions relating specifically to Deadlock. These are contained within clause 16 of the Shareholders Agreement and provides as follows in 16.1:

"A deadlock shall be deemed to have occurred when:

(A) a resolution of the Board or any Committee of the Board for the transaction of a particular item of the business of the Board or such Committee cannot be passed after two successive attempts;

(B) a resolution of the 'Major Shareholders' for the transaction of a particular item of business of any Group company cannot be passed after two successive attempts, or;

(C) a general meeting of 'Major Shareholders' or a meeting of the directors of any Group company cannot be convened because of the absence of the requisite quorum after two successive attempts."

So that is the definition of Deadlock and it incorporates a situation where the quorum provisions are being used to prevent decisions being taken. And then the provision in clause 16 goes on to deal with what happens when a Deadlock is deemed to have occurred including the principles of the 'Major Shareholders' to get together to try and resolve that matter. And then if that is not possible, for it to go to mediation or ultimately for arbitration.

So the Shareholders Agreement specifically provided for the situation where a shareholder is using the quorum provisions to prevent business being transacted. That means that the parties envisaged that happening. In the context of interpreting whether the quorum provisions are being abused, as the Applicants say they are, it is essential to see how those provisions were viewed by the parties. It is clear that the parties anticipated FSE or CBRE refusing to attend meetings if they wanted to block something and provided for a mechanism to deal with that. It maybe that the Applicants are correct that the mechanism in the Shareholders Agreement is no longer available to be used by the parties to resolve such a deadlock, but I do not believe that the purpose of the quorum provisions as set out in the Articles and as understood by the parties changed when the Shareholders Agreement terminated. I do not see that the use of quorum provisions as the only way to prevent something that would otherwise be an abuse of the reserved matters provisions can be an abuse sufficient to merit an interim injunction when that very behavior was anticipated;

5. There is also an arbitration agreement in the Shareholders Agreement that Mr. Ferrer wishes to rely on and he says that his client will be applying for a stay. That seems to me to be less of a compelling argument in the light of the termination of the Shareholders Agreement and it having no direct impact on the interpretation of the Articles;

6. Mr McMaster, relied on the Opera Photographic Ltd case [1989] 1 Weekly Law Reports at 634, a decision of Mr. Justice Morritt (as he then was) which dealt with the abuse of quorum provisions. However, I point out the following distinguishing features of that case:

First, it concerned a member's meeting and was an application under section 371 of the Companies Act 1985 which gives the Court direct power to convene a meeting of shareholders and to direct the disapplication of quorum provisions. (There is an equivalent provision for that in section 86 of the BVI Companies

Act, but the Applicants have decided not to go down that route of a members meeting).

Secondly, it was not therefore an unfair prejudice petition, and;

Thirdly, there does not appear to have been a Shareholders Agreement or any specially designed quorum provisions in that case. There were no veto rights and the Applicant had the right in that case as a 51% shareholder to remove the other director which was being blocked by the non-attendance of the member plus depriving any shareholders meeting of the quorum;

7. Seven, the quorum provisions have been carefully worked out by the parties and were important - see the reference to them in the definition of resolutions. Any amendment to the quorum provisions are reserved matters requiring the consent of both major shareholders. The only substantive relief on the claim itself is for an amendment to be made to the Articles of Decent. A temporary amendment is sought on this interim application. It seems to me that FSE is entitled to object to and indeed veto any such amendment;

8. I consider that FSE has an arguable case that:

Firstly, an amendment to the Articles of Samman requires its consent. That would be consistent with the intention to replicate the reserved matters down through the structure. CBRE's reliance on the illogical reference to the consent of the “shareholder” rather than the Major Shareholders in Samman's Articles is opportunistic in my view.

Secondly, the requirement for FSE to have one director on the Board of SHTQ. Again, it seems to me to be illogical that FSE is not entitled to any representation on the Board of SHTQ and CBRE is taking advantage of the fact that SHTQ's Articles only refer to three directors being appointed by Samman. This is the Applicants' doing that which they complain FSE is doing, namely relying on their

strict rights under the Articles without taking into account the intended purpose of those Articles and the Shareholders Agreement and the intention that the structure should be replicated down the structure. CBRE have accepted an FSE director for some time and that is an indication that this was part of the actual deal between the parties. It is arguable in my view that CBRE's ultimate goal of removing FSE's director and gaining control of SHTQ would be a breach of the agreement between the shareholders;

9. Nine, if FSE is right, then CBRE is taking advantage of the precise wording in the respective articles to override the clear intent of the parties to replicate the same provisions throughout the structure. There is some justification for using the quorum provisions where the other shareholder is potentially abusing the bargain between the parties. It may be the only way to protect the rights that that party says it has under the agreement. And as I have said, a party using the quorum provisions to block resolutions appears to have been recognised as a possibility from the outset.

10. Ten, I also have doubts as to whether I have jurisdiction to make the order that the Applicants seek. Mr. McMaster says that Section 184I is very different to the English provision currently contained in Section 994 of the Companies Act 2006. In Re a Company (No. 4715 of 1986) at [1987] 1 Weekly Law Reports 585, Mr. Justice Scott, as he then was, said that there was no power to grant interim relief on an unfair prejudice petition because the section stated, "if the Court is satisfied that a petition under this part is well founded", the Court could only be so satisfied after a trial. Section 184I says differently however. It says:

"If, on an application under this section, the Court considers that it is just and equitable to do so..."

And Mr. McMaster relied on this distinction. Mr. McMaster will also show me a case in which his firm was involved, Hingrow Ltd. v. Technibel Worldwide, an

order of Mr. Justice Bannister in which he ordered the appointment of a director at an interim application in unfair prejudice proceedings. However, I do not derive much assistance from that case as I have seen from the transcript that there was no consideration as to whether the power actually exists under section 184I and the Court was largely driven by the fact that the company was then in breach of section 109(4) in not having any directors at all. The fact that section 184B (3) specifically provides for the Court having power to make interim orders perhaps suggests that no similar power exists under section184I, although I note what Mr. McMaster says in his reply submissions, that this may be due to the wording in section 184B(1). Nevertheless I have my doubts as to whether I have jurisdiction, but as I am not going to be making the order anyway, I do not have to decide this conclusively.

11. Eleven, I should say that it seems to me that if I were to have granted this relief to the Applicants, they would have effectively got their final relief. They would have changed the Board of SHTQ and stopped the loan going ahead and maybe started further proceedings in the PRC. There would be little incentive on them to take it through to a trial just to get a permanent change to Decent's Articles. That being so, I am also unsure as whether the American Cyanamid principles apply to this application and whether the Applicants would need a stronger case on the merits;

12. Twelve, the Applicants have, in fact, argued based on the Manchester Corp v. Connolly case that this is a case where there is no defence and so they are entitled to an interim injunction without reference even to the usual American Cyanamid considerations. That seemed to me a quite unrealistic submission. While I have obviously concluded that there is a defence to these proceedings and that, therefore, the Applicants are not in Manchester Corp. v. Connolly territory, I also think that they have to show that they have a stronger case than would otherwise be necessary under the American Cyanamid principles.

13. Thirteen, finally I would just like to say that this matter was far too factually complex to be properly resolved on an interim basis, certainly in a three-hour hearing. Nevertheless I have resolved this matter without much reference to the underlying dispute and I have not decided on the basis that there was too much factual dispute.

[27] So by way of conclusion, I am not persuaded that I should grant any interim relief to the Applicants. I consider that the relief being sought by Applicants constitutes an extraordinary interference in the affairs of a whole corporate structure, with only the top company being a BVI company but the interim relief having a permanent effect on the operating company in the PRC and would grant control over it contrary to, or at least arguably contrary to the underlying agreements between the corporators. While I understand the concerns and fears of the Applicants at what they perceive to be a wholly improper course of action being pursued in the PRC, I do not think it is for this Court to so dramatically affect the constitution of the Board of SHTQ or to alter the bargain agreed between the shareholders. This application is, therefore, dismissed.

[28] The Claimants/Applicants to pay the First Defendant's costs of this application in any event.

Honourable Justice Michael Green, QC [AG]

Commercial Court Judge

By the Court

Registrar