

A COMPANY SECRETARY OWES A DUTY TO TAKE REASONABLE CARE TO THE INTENDED TRANSFEREES OF SHARES

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Does a Company Secretary owe the intended transferee of shares a duty of care as to the adjudication and transfer of the shares? The High Court had to answer this question in the recent case of *Yee Teck Fah and Anor v Wong Ngiap Lim and Anor* [2020] MLJU 2088 (“**Yee Teck Fah**”).

The Case in Short and its Significance

In *Yee Teck Fah*, Lee Chee Meng (“Lee”) was the managing director and the registered shareholder holding 17,910,000 ordinary shares (“**Shares**”) of the company, Worthy Builders Sdn Bhd (“**Company**”).

The Company had instructed the Company Secretary to effect a transfer of the Shares to the intended transferees. Before the transfer could be carried out, Lee gave the Company Secretary instructions to stop the transfer. Lee alleged that the transfer was fraudulent. The Company did not carry on with the transfer of shares.

The intended transferees then sued the Company Secretary, claiming that there was:

- (1) a contract between them and the Company Secretary and that this contract had been breached; or
- (2) alternatively, that the Company Secretary owed them a duty of care in carrying out the transfer and had breached that duty when he failed to proceed with the transfer.

In short, the High Court dismissed the contract argument. However, the High Court held that the Company Secretary owed a duty of care to the intended transferees to properly carry out the instructions to adjudicate, transfer and register the Shares. In this case, the Court found that the Company Secretary had not breached this duty.

As further set out below, this decision also has implications when read together with the Guidelines Relating to Practising Certificate for Secretaries under Section 241 of the Companies Act 2016 (“**Practising Certificate Guidelines**”).

Background Facts

In April 2018, the Company Secretary (“Cosec”) of the Company was instructed to adjudicate, stamp and register the transfer of shares from the registered shareholder, Lee, to the beneficial shareholders. Lee was the registered shareholder of 17,910,000 ordinary shares of the Company (“**Shares**”), representing 99.5% of the total shareholding.

The beneficial shareholders, Yee Teck Fah and Yee Mi Kenn (“Yee Teck Fah and son”), were lawyers acting for the Company through the law firm Messrs Yee Teck Fah & Co (“YTF & Co”). From the correspondence, it appeared that steps had been put into motion by both Lee and the beneficial shareholders for the share transfer. YTF & Co forwarded the share transfer documents to the corporate secretarial firm (“GE”). However, for reasons which are unclear, the transfer was not effected in 2018.

In March 2019, YTF & Co wrote to GE, stating that Yee Teck Fah and son were the beneficial owners of the Company's relevant shares. They instructed GE to ensure that the Company's Annual Return properly reflected Yee Teck Fah and son as the beneficial owners of those shares. Lee instructed GE to proceed with this.

In May 2019, YTF & Co instructed GE to attend to the transfer of the shares immediately. GE then issued an invoice to YTF & Co for the work done in relation to the transfer. Up until this point, there was no indication to GE that there was any dispute as to the beneficial ownership of the shares.

In June 2019, Lee lodged a police report against Yee Teck Fah, alleging that he had never agreed to Yee Teck Fah and son having any interests in the shares. Lee claimed that the transfer was fraudulent and that the shares were supposed to be held on trust for him. Lee then wrote to GE to instruct GE not to carry out the transfer. The police further instructed the Cossec not to proceed with the transfer.

Yee Teck Fah and son sued the Cossec claiming that there was a direct contract between them and the Cossec in relation to the transfer and that the Cossec had breached the terms of that contract in not proceeding with the transfer. Alternatively, Yee Teck Fah and son claimed that the Cossec owed them a duty of care in carrying out the transfer and that the Cossec had breached that duty when he failed to proceed with the transfer.

Decision of the High Court

On the claim that there was a contract existing between Yee Teck Fah and son and the Cossec, the High Court held that on the evidence, there was no such contract. The fact that the GE invoice was issued to and paid by YTF & Co did not inevitably give rise to creating a contract, as claimed by Yee Teck Fah and son. The Court further accepted the Cossec's evidence that the invoice had been mistakenly issued to YTF & Co.

In any event, even if there was a contract created, it was a contract between YTF & Co and GE and not with the Cossec personally. There would further have been no obligation under such a contract to proceed with the transfer in the event of an objection or contrary instructions received from the Company and/or Lee. Thus, even if there was such a contract, there was no breach of the contract. The contract would be premised upon the assumption that the transfers would be without any challenge to the ownership of the shares. This would be a necessary term implied into the contract.

As for the claim based on negligence, the High Court decided the following. The Cossec did owe a duty of care to Yee Teck Fah and son as the intended beneficial owners of the shares to carry out the instructions to adjudicate properly, transfer, and register the shares. It was foreseeable that any act or omission of the Cossec in carrying out these instructions might cause Yee Teck Fah and son to be deprived of their interests in the shares. As the person instructed to effect the transfers, the Cossec was expected to take into account the interests of Yee Teck Fah and son as beneficial owners. The High Court disagreed with the contrary argument that the Cossec merely owed a duty of care to the Company and no others.

However, the High Court found that the Cossec had not been negligent in stopping the transfer, as there was a dispute in relation to the beneficial ownership of the shares. This was a necessary step taken pursuant to instructions from the police.

Comments

The High Court decision in *Yee Teck Fah* has established that Company Secretaries can owe a duty of care to third parties, such as the intended transferees of shares. Thus, Company Secretaries should exercise proper skill and care when carrying out the steps to effect transfers of shares to the intended transferees.

This decision also cements that a Company Secretary does not merely owe a duty of care to the company. There are situations where the law will find that a Company Secretary can owe this duty to take reasonable care to other third parties involved in the corporate process.

We can also apply this decision along with the Practising Guidelines. Paragraph 28 of the Practising Certificate Guidelines sets out that a Company Secretary's duty is to act honestly and use reasonable diligence. The duty applies to situations involving, among others, meetings of directors, meetings of shareholders, and advising the board of directors. It must likely mean that a Company Secretary would owe a duty to the directors and shareholders in such situations. The Company Secretary must take reasonable care when discharging such a duty.

References:

- *Yee Teck Fah and Anor v Wong Ngiap Lim and Anor* [2020] MLJU 2088
- *Guidelines Relating to Practising Certificate for Secretaries under Section 241 of the Companies Act 2016*

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