

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

CLAIM NO: BVIHC (COM) 2010/0080

BETWEEN:

BENJAMIN PING-YAO LIAO

Claimant

and

UPBEAT GLOBAL LIMITED

Defendant

Appearances: Mr Andrew Willins for the Claimant
The Defendant did not appear

JUDGMENT

[2011: 28 June, 11 July]

(Defendant company held by members of two families (the Liao family and the Chen family) equally – Liao family having four board members and Chen family three – in February 2010 Claimant receives copy of minutes of purported shareholders meeting allegedly remove Claimant's father as Chairman of board and to amend and restate the Defendant's Memorandum and Articles of Association to provide that no board resolution valid unless assented to by Chen Chi-Chen, the head of the Chen family and that no resolution of members valid unless approved by 75% of those entitled to vote – Claimant alleging that no Liao family shareholder received notice of the meeting – instead being sent envelopes filled with irrelevant material unrelated to the Defendant company – whether Liao family shareholders given notice of the meeting – whether resolutions valid – whether later resolutions passed in reliance on the amended and restated Memorandum and Articles of Association validly passed)

- [1] **Bannister J [ag]:** In these proceedings the Claimant, who is the holder of 4,000 shares in the capital of the Defendant company ('Upbeat'), claims that the removal of his father, Tung-Hang Liao, as Chairman of the board and legal representative of Upbeat's wholly owned Chinese subsidiary and the adoption of restated and amended Memorandum and Articles of Association of Upbeat

pursuant to a supposed members' resolution were nullities and of no effect because, to put it shortly, fifty per cent of the members of Upbeat, including himself, were deliberately not given any notice of the 'meeting' at which the supposed resolutions to effect these changes were passed. The hearing took place on 28 June 2010, when I gave judgment for the Claimant. These are my reasons.

Background

[2] Upbeat was incorporated in the British Virgin Islands on 21 June 2005 under the name Flamesfield Ltd. It was designed to be the holding company through which two families, the Liao family, to which the Claimant belongs, and the Chen family, would participate in a joint venture of running a hotel in Shanghai. Upbeat held all the shares of a Chinese registered Wholly Foreign Owned Entity, referred to as 'SHHC', which owned the hotel. Upbeat's share capital was US\$50,000, of which members of the Liao family (and two associated companies) held 25,000 shares and members of the Chen family held the remaining 25,000. The Articles of Association had fairly common form regulations dealing with meetings of members. More than fifty per cent could requisition a meeting. A quorum for a meeting was one third. Seven days notice was to be given of meetings of members and there was the standard provision that the inadvertent failure of the directors to give notice of a meeting to a member or the fact that a member had not received 'the notice' did not invalidate the meeting. Voting was by way of simple majority on a show of hands. Decisions of the board were to be decided on a majority of votes, with the Chairman having a casting vote. A quorum was one third and directors were entitled to not less than three days notice of meetings. Before the events in question, the board consisted of four Liao family members and three Chen family members.

[3] Relations between the two families appeared to have soured by late 2009. On 19 January 2010 the Claimant discovered that Upbeat's registered agent had been changed as a result of a consent resolution of directors dated 30 December 2009. The Claimant had been given no notice of the intention to pass any such resolution. In early 2010 the Claimant received a document described as the minutes of a meeting of the shareholders of Upbeat purportedly held on 23 March 2009 ('the 23 March 2009 resolution'). The resolution removed Tung-Hang Liao as Chairman and as legal

representative of SHHC and adopted restated and amended Memorandum and Articles of Association, which were subsequently filed with the Registrar of Corporate Affairs on 11 May 2009. The Liao shareholders deny having received notice of any such meeting.

- [4] The restated and amended Memorandum and Articles of Association provided, in short, that a resolution or written resolution of directors must be passed or adopted by not less than three directors, of whom which one must be Chen, Chi-Chen ('Mr Chen'), apparently the senior member of the Chen family shareholders. A resolution of members must be passed with a seventy five percent majority of those entitled to vote.
- [5] The Claimant issued these proceedings on 29 June 2010, seeking declarations that the changes purportedly made by the 23 March 2009 resolution were of no effect. The claim seeks ancillary and similar declarations relating to various subsequent resolutions purportedly passed in reliance of the restated and amended Memorandum and Articles of Association, but since it is common ground that that will necessarily follow if I find against the 23 March 2009 resolution, I do not think that it is necessary for me to go into these later disputed resolutions in detail or at all.
- [6] Upbeat's defence, which in the circumstances is effectively that of the Chen directors, denies that the Liao shareholders were not given notice of the 23 March 2009 meeting (i.e. avers that they were) and goes on to plead that a notice dated 26 February 2009 was sent to each of the Liao shareholders at the addresses set out in Upbeat's register of members convening a meeting on 23 March 2009 at an address in Harcourt Road, Hong Kong. The defence went on to plead that each notice was couriered by DHL, being delivered to the respective shareholders (other than Goodport Development Company Ltd¹ ('Goodport')) on dates between 2 and 4 March 2009.
- [7] The evidence of the Claimant and of the other Liao shareholders is that DHL packets were indeed received at the addresses given in the register of members between those dates (the addresses were not the same in each case as the residential address of the particular shareholder) but that the envelopes which they contained did not contain either notices of a meeting of Upbeat or copies

¹ delivery failed because the company had moved

of the proposed amended and restated Memorandum and Articles of Association but, instead, promotional material from a company selling organic waste disposal equipment.

[8] Mr Chen did not serve a witness statement. Instead his Solicitor, Mr Michael Pringle ('Mr Pringle'), made a statement dated 30 March 2011 exhibiting a 42 paragraph unsigned witness summary introduced by the words: '[Mr Chen] will state as follows:' This document, so far as relevant, includes narrative to the effect that Maples and Calder Hong Kong drafted the restated and amended Memorandum and Articles of Association. Mr Pringle said that Mr Chen would say that he prepared an envelope for each member, to contain the notice of the 23 March 2009 meeting and wrote on them the members' addresses, which Mr Pringle said that he would say he obtained from the addresses reflected in the register of members, which he had obtained from the registered agent's representative in Shanghai. He then handed the envelopes, sealed, to a Ms Wang, a legal assistant with the Shanghai firm of Hansen & Partners, who, he says, were acting for him, with instructions to arrange for them to be couriered by DHL to the various members.

[9] Upbeat served a witness statement from Ms Wang. It says that at the relevant time (late February 2009) she was a paralegal with Hansen & Partners. She says that she drafted the notice for the 23 March 2009 meeting and on 23 February 2009 sent it, together with the draft restated and amended Memorandum and Articles of Association to Mr Chen at his office. She says that on 26 February 2009 Mr Chen attended at the offices of Hansen & Partners and handed her seven sealed envelopes, telling her what they contained and telling her to send them to the seven Liao shareholders at addresses which, she says, he gave her. She says that the following day she went to the Pudong, Shanghai offices of DHL and put each of the seven envelopes which Mr Chen had given her into a DHL envelope. She says she filled in the waybill for each. She says that each 'reflected' Mr Chen as shipper. She gave as shipper's address and telephone number the address of her private apartment and its telephone number, so that she could be contacted if need be as the person responsible for dispatching the documents. She says that at the suggestion of a DHL employee she inserted the word 'Xmas' in the space for inserting a reference.

[10] For reasons which will become apparent in a moment, neither Mr Chen nor Ms Wang gave evidence at trial, so that the matters which I have just summarized are not part of the evidence in

the proceedings. I have set them out in order to explain Upbeat's position as it appeared to be before trial.

- [11] There is no dispute that these packages, with the exception of that sent to Goodport, reached the registered addresses of each of the Liao shareholders. The issue for trial was whether, as Mr Pringle said that Mr Chen proposed to say, they contained notices of the 23 March 2009 meeting and of the proposed restated and amended Memorandum and Articles of Association or whether, as the Claimant's witnesses gave evidence at trial, they were stuffed with marketing material for a company in the organic waste disposal business.

Procedural history

- [12] On 13 December 2010 and by consent I directed that witness statements be exchanged by 21 January 2010, with documents relied upon attached. Trial was to be listed for two days within a window between 22 February and 11 March 2011.
- [13] The Claimant's evidence was ready by 13 December 2010 and extensions of time for service of Upbeat's evidence was extended by agreement until 12 February 2011. On 24 February 2011 the Claimant applied for Upbeat to be debarred from adducing evidence unless its witness statements were served by (as things turned out) 16 March 2011. On 9 March 2011 I ordered that the defence be struck out unless Upbeat served its evidence by 30 March 2011 and fixed 17 May 2011 as the trial date. On 28 March 2011 Upbeat applied on short notice for the proceedings to be stayed indefinitely until Mr Chen recovered from the effects of an alleged renal transplant which he was said² to have undergone on 23 March 2011.
- [14] The application was dealt with on 29 March 2011, when I dismissed it. That resulted in Mr Pringle's statement of 30 March 2011 which I referred to in paragraph [8] above.

² I put it in these terms because the Court has never been supplied with any sworn medical evidence as to Mr Chen's state of health or about the procedures which it has been asked to accept that he has undergone

[15] On 19 April 2011 Upbeat made another application on short notice asking for the trial to be adjourned for six months on the grounds of Mr Chen's alleged ill health. I stood the application over for the Claimant to have the opportunity for its own medical expert to examine Mr Chen before I dealt with the application. Predictably, that examination was blocked. When the application came back and with considerable reluctance I felt compelled to grant an adjournment. So the trial was postponed to 28 June 2011.

[16] Barker Adams, Mr Pringle's firm, had ceased to act for Upbeat some time before 8 June 2011, when Harneys came on to the record. On 23 June 2011 I gave further directions for trial, which included the arrangements to be made for evidence to be taken by videolink in the two locations where the respective party's witnesses were going to gather – Taipei in the case of the Claimant and Shanghai in the case of Upbeat. On 27 June 2011 Harneys were given permission to come off the record. Appleby, who act for the Claimant, were not contacted subsequently by any lawyers seeking to come on to the record for Upbeat.

The trial

[17] The trial commenced at 9 am on Tuesday 28 June 2011. Upbeat had no legal representative in Court and was thus *prima facie* precluded from appearing.³ No lay person attempted to approach the Court on behalf of Upbeat to persuade me to listen to representations on its behalf otherwise than from Counsel, an application which I would of course have considered had it been made. I was informed by Mr Willins, who appeared, as before, for the Claimant that while the videolink to the agreed venue in Shanghai was connected, the only images revealed were of a darkened and empty room. It was clear that Upbeat had decided to play no part in the trial, which accordingly proceeded, as it had to, in Upbeat's absence.

[18] Mr Willins then led the Claimant's evidence. I emphasise that, for obvious reasons, none of the Claimant or his witnesses was cross examined and I have taken that into account in reaching my conclusions of fact. The Claimant gave evidence in fluent English. He confirmed the contents of his witness statement. He describes how he became aware only in the spring of 2010 of the

³ CPR 69B. 4(4)

minutes of the supposed meeting of 23 March 2009 and how a list of the directors of Upbeat was provided on 2 March 2010. He then described the attempts of the two faction to establish control of Upbeat – the Liao family relying on its original Memorandum and Articles of Association and the Chen family relying on the purported amended and restated Memorandum and Articles of Association. As I have already said, it had been agreed between the two sides at a time when both were legally represented that if I find that the amended and restated Memorandum and Articles of Association were not validly adopted, then all later resolutions purportedly based upon them must fall away. There is therefore no need for me to lengthen this judgment by going into the details of this subsequent struggle.

[19] The Claimant gave evidence that he did not receive notice of the meeting. I shall describe later the evidence which proves that a DHL packet addressed to him at his registered address in Pasadena, CA, was received at that address on 3 March 2009 and was signed for by his sister Hui Zu Liao, known as Sabrina, whose home it was. The Claimant said that had he received notice of the meeting of 23 March 2009 he would have attended it and voted against the proposals. I accept that evidence.

[20] The next witness was Tung-Hang Liao, the Claimant's father, who, although not a member of Upbeat, was its Chairman and the legal representative of SHHC. His two witness statements were written in English. He told me that there had been an original Chinese version of the statements which had then been translated into English and that while he could read English, he needed an interpreter for the purposes of examination. The interpreter was sworn. I was not satisfied that the witness was able properly to recall the contents of his two witness statements, so I required that Mr Willins examine him in chief. His evidence, as so elicited, showed that he lived in Taipei, although he used Sabrina's address for correspondence. He told me, rather unnecessarily, since he was not then a member of Upbeat, that he had not received notice of the 23 March 2009 meeting and that had he done so he would (despite not being entitled to vote at it) have voted against. He appeared to consider himself as having fifty percent of Upbeat, apparently attributing all the Liao shares to himself. He gave evidence that he had been told of a raid in November 2009 at the premises of SHHC and that, when told about it by the General Manager, he instructed him to seek legal assistance. He subsequently sought legal assistance from BVI lawyers and I infer that it was

at his instance that Samuels Richardson were instructed and began the inquiries which eventually resulted in the alleged meeting of 23 March 2009 coming to light.

[21] I found that Mr Tung-Hang Liao gave his evidence truthfully, but I got no assistance from what he said in resolving the area of dispute in this matter – which is whether the Liao members of Upbeat received notice of the meeting of 23 March 2009.

[22] The next witness was Sabrina Liao. She gave her evidence in English. She confirmed the contents of her witness statement, thus evidencing the fact that she is a member of Upbeat and that on 3 March 2009 a packet addressed to her sister Peggy was delivered to her Pasadena address and signed for by her (Sabrina). Sabrina opened the packet, even though it was addressed to her sister and found it to contain marketing material from an organic waste disposal business. She saw from the accompanying waybill that it was from Shanghai, although there was no company name on the waybill and the reference and sender's signature shed no light upon matters. She says that she was not assisted by the fact that the sender's name was given as Chen, since the name is very common in China and Taiwan. Nothing she saw led her to believe that the packet had any connection with Upbeat.

[23] Minutes after receiving the package Sabrina emailed Peggy. The combination of the name of Ms Wang (given as 'Ray' on the air waybill) and the name Mr Chen as sender apparently gave rise to the thought that the sender might be Peggy's then boyfriend Ray Ma, but when telephoned to see if the packet had anything to do with him he denied it. Peggy then instructed Sabrina to throw the thing away, which Sabrina did.

[24] On the following day, 4 March 2009, Sabrina received a further three DHL packets, one addressed to the Claimant, one to Jonathan Liao ('Jonathan') and the other to herself, each containing material identical to that included in the packet addressed to Peggy. Sabrina emailed Peggy again that evening saying that the three further packets had arrived. Sabrina says, understandably, that she was disturbed that some unknown person who had the full names and addresses of the recipients (including her own transliterated from the Chinese, in which form it appeared only on her Taiwanese passport) but who misspelt the name 'Jonathan' should be sending them this sort of

material at some expense via DHL. After some further speculation, which I do not need to record, Sabrina contacted her mother about it, but the mystery remained unsolved.

- [25] The next witness was Jonathan Liao. He gave his evidence in English and confirmed the contents of his witness statement, which denied that he had received any notice of the 23 March 2009 meeting.
- [26] Both Sabrina and Jonathan confirmed that had they received notice of the meeting they would have attended and voted against the resolutions.
- [27] Mr Willins put into evidence witness statements whose makers had not been required to attend for cross examination. A witness statement of Bak Soo Ha, the general manager of Fortune Deers Enterprises Pte Limited ('Fortune Deers') of Orchard Plaza, Singapore deals with the DHL package delivered by DHL on 2 March 2009 to Goang Shu Hamg (Singapore) Pte Ltd ('Goang'). Goang is a Liao company and a member of Upbeat. It was administered by Fortune Deers. The packet was signed for by 'Tan' and Mr Ha identifies that person as Casey Tan, who has confirmed to Mr Tan that she does not remember seeing a DHL package. Mr Ha says that had the packet contained a formal notice ((such as a notice of general meeting) it would have been brought to his attention and he would have discussed it with Goang's shareholders. He is satisfied that he did not do so and concludes from that that therefore no such notice was ever received by him or his staff.
- [28] The witness statement of Dennis Wu was put into evidence. Mr Wu is the son of another member of Upbeat, Kwang-I Wu. In this case the DHL packet was signed for by 'the doorman' at the building where Dennis Wu resides and which is his father's registered address, but which his father no longer uses as his principal residence. He says that had a packet been delivered addressed to his father, he would usually telephone him to ask him whether he would like it opened. Mr Wu says that he recalls receiving a DHL packet containing advertising material. He says it stands out in his memory because he could not understand why anyone should send such material by DHL. He cannot recall what happened to this material. He has since been shown a copy of the purported notice of general meeting. He says that that was the first occasion upon which he saw the

document and that had he seen it when it is alleged to have been delivered he would have brought it to his father's attention.

[29] Mr Willins put in a witness statement from Peggy Liao. She confirms the contents of Sabrina's witness statement and says that had she received the notice she would have attended the meeting and voted against. She also confirms the authenticity of the emails sent by her which form part of the chain upon which Sabrina relies in her witness statement.

[30] The upshot is that there is evidence from each of the individual Liao shareholders, with the exception of Kwang-I Wu, denying receiving the notice. In the case of the Claimant, Jonathan and Peggy Liao, there is the evidence of Sabrina, who received the deliveries of what would have been relied upon by Upbeat, had it appeared at trial, as notices of the 23 March 2009 meeting, that the packets whose delivery she acknowledged contained advertising material and not notices of a meeting or draft amended and restated Memorandum and Articles of Association. Each of the Claimant, Sabrina, Jonathan and Peggy confirms that had they received notice of the meeting they would have attended and voted against the proposals. In the case of Goang, there is evidence that had a notice of general meeting been received at the offices of Fortune Deers, Mr Wa would have brought it to the attention of the shareholders of that company. The evidence of Mr Wu confirms receipt of promotional material via DHL, which corroborates the evidence of Sabrina. Even though there is no evidence of likely reaction from the directors of Goang or from Kwan-I Wu it beggars belief that, if either had received such a notice, they would not have attended the 23 March 2009 meeting and voted against the proposals.

[31] I am quite satisfied by the evidence which I have summarized above that the account given by the Claimant and his witnesses is true. That evidence is inherently credible, because it is impossible to envisage that, upon receipt of notices proposing that de facto control of Upbeat be handed to Mr Chen and his family, the Liao shareholders would each have decided to let the supposed meeting go by default. The evidence that would presumably have been led by Upbeat, to the effect that Mr Chen took it upon himself to fill seven envelopes with notices of the meeting and copies of the restated and amended Memorandum and Articles of Association envelopes away from prying eyes and then handed them over to a paralegal employee of the Chen family's lawyers to send off by

DHL is inherently improbable. The matter is clinched by the refusal of Mr Chen to attend trial and support his version of events.

[32] I therefore find as a fact that no notice of the 23 March 2009 general meeting was given to the Claimant or to any of the other Liao members of Upbeat (including Goodport, because even though the packet addressed to Goodport was returned unopened, it must be inferred that its contents did not differ from those of the other packets which, it is proved to my satisfaction, contained only promotional material for organic waste disposal products). I am satisfied that this failure to give notice was deliberate and not inadvertent and that it formed part of a crude ruse on the part of Mr Chen to manufacture evidence to support his contention that the Liao shareholders of Upbeat had received notice of the meeting but had failed to attend and vote.

[33] It follows that the meeting was a nullity, as were the resolutions supposed to have been passed at it. The amended and restated Memorandum and Articles of Association were thus not validly adopted, with the consequence that Upbeat's Memorandum and Articles of Association are and at all times since its incorporation have been those dated 21 June 2005, and a copy of which is to be found at pages 1 to 18 (inclusive) of Trial Bundle 3. It further follows that all resolutions of Upbeat or of its board of directors purported to have been passed in reliance upon the supposed amended and restated Memorandum and Articles of Association supposedly adopted and the invented meeting of 23 March 2009 are equally to be treated as invalid.

A handwritten signature in black ink, appearing to be 'H. J. J.', written in a cursive, flowing style.

Commercial Court Judge

11 July 2011

