



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO. FSD 132 OF 2020 (MRHJ)

**IN THE MATTER OF SECTION 46 OF THE COMPANIES LAW (2020 REVISION)
AND IN THE MATTER OF THE GRAND COURT RULES 1995, ORDER 102(2)(1)(B)
AND IN THE MATTER OF GEOPAY HOLDING LIMITED**

BETWEEN:

- (1) ZHONGZHI CAPITAL (HK) COMPANY LIMITED**
- (2) DRAGON OCEAN DEVELOPMENT LTD**

PLAINTIFFS

AND

- (1) GEOPAY HOLDING LIMITED**
- (2) GEOSWIFT HOLDING LIMITED**

DEFENDANTS

OPEN COURT

Appearances:

Mr. James Clifford and Ms. Victoria King of Ogier for the Plaintiffs
Mr. Peter Sherwood and Mr. Nigel Smith of Carey Olsen for the
Second Defendant

Before:

The Hon. Mme Justice Margaret Ramsay-Hale

Heard:

9 September 2020

Draft Judgment

Circulated:

23 October 2020

Judgment Delivered:

28 October 2020

HEADNOTE

Companies - rectification of register - section 46 Companies Law (2020 Revision) - applications pursuant to the Companies Law - GCR O.102 r.2 (1) (b) - applications to be made by originating summons, under section 46 of the Companies Law, for an order for rectification of the register of members of a company - whether legal title to shares were validly passed under share transfer instrument.



JUDGMENT

Introduction

1. By Originating Summons dated 17 June 2020, the Plaintiffs, Zhongzhi Capital (HK) Company Limited ("**ZZHK**") and Dragon Ocean Development Ltd ("**Dragon**") seek orders that the register of members of the First Defendant, Geopay Holding Limited ("**Geopay**"), an exempted company incorporated in the Cayman Islands, be rectified to reflect their names as shareholders in place of the Second Defendant, Geoswift Holding Limited ("**Geoswift**") pursuant to section 46 of the **Companies Law (2020 Revision)** and Order 102, Rule 2 (1) (b) of the Grand Court Rules 1995.

Background

2. Geoswift Asset Management Limited ("**GSAM**"), is a payment technology company founded in 2010 which provides customised cross-border payment solutions between China and other countries around the world. Geoswift, Geopay and GSAM are part of the Geoswift group of companies. Geoswift, which is incorporated in the British Virgin Islands, holds 96.77% of the shares of Geopay.
3. ZZHK, a company incorporated under the laws of Hong Kong, and ZZCI Corporate Services Limited ("**ZZCI**"), a company incorporated under the laws of Hong Kong, are longstanding investors in the Geoswift Group. ZZHK is a 15% shareholder of GSAM via a PRC incorporated company called Changzhou Jinjiang Zhongzhuo Investment Centre (Limited Partnership) ("**Jinjiang**").
4. In or about May 2017, Geoswift and Geopay agreed that Geoswift should enter into a share purchase agreement to acquire the entire issued share capital of PayEase Beijing (HK) Limited ("**PEBL**") and PayEase (Hong Kong) Limited ("**PEHKL**") ("**the PayEase Acquisition**"). The share purchase agreement was made on 12 December 2017.
5. On 7 September 2017, ZZHK and Geoswift entered into a loan facility agreement under which ZZHK provided a loan in the sum of US\$64 million to enable Geoswift to fund the PayEase acquisition by Geopay (the "**ZZHK Loan Agreement**"). The ZZHK Loan Agreement was secured by way of a Security Agreement Over Shares dated 7 September 2017 over Geoswift's 67.368% shareholding in Geopay, which represented 6,302 fully paid ordinary shares (the "**ZZHK Share Charge**").
6. Also on 7 September 2017 ZZCI and Geoswift entered into a loan facility agreement (the "**ZZCI Loan Agreement**") under which ZZCI provided Geoswift with a loan in the sum of \$31,000,000. The purpose of the ZZCI Loan was also to enable Geoswift to fund Geopay's acquisition of PEBL



and PEHKL. The ZZCI Loan was secured by way of a Security Agreement Over Shares charge also dated 7 September 2017 over its 32.636% shareholding in Geopay (the "**ZZCI Share Charge**"). Geoswift's 32.636% shareholding in Geopay represented 3,053 fully paid ordinary shares.

7. On 7 March 2019, Geoswift defaulted on the loans so secured and the default is continuing.
8. In this application, ZZHK asserts that, under the terms of the Loan Agreement, it is now entitled to be registered as shareholder of the charged shares in Geopay. It is joined by Dragon, a company incorporated under the laws of the British Virgin Islands, which seeks to enforce its putative right, as ZZCI's assignee under an Assignment and Assumption Deed made on 31 March 2020 (the "**Assignment**"), to have its name entered on Geopay's register of members ("**ROM**") as shareholder of the charged shares under the ZZCI Share Charge.

The Agreements

9. Following the Plaintiffs' lead, I set out, in summary, the details only of ZZHK's loan agreement which is in the same terms as the ZZCI Loan Agreement.
10. ZZHK's Loan Agreement for US\$64 million and the ZZHK Share Charge over Geoswift's shareholding in Geopay (together the "**ZZHK Finance Documents**") which secured the loan were both signed by Geoswift's then Director, Qu Xiao Chuan.
11. Under clause 5.2(a) of the ZZHK Share Charge, the following security deliverables, executed by Geoswift pursuant to its obligations under the Finance Documents, were provided to ZZHK:
 - a. An undated share transfer certificate (the "**ZZHK Share Transfer**") in respect of the charged shares, duly executed by Qu Xiao Chuan;
 - b. The ZZHK Share Certificate and a certified copy of Geopay's Register of Members ("**ROM**")
 - c. An irrevocable appointment of proxy and irrevocable power of attorney in respect of the shares charged which duly authorised ZZHK to vote at all general meetings and sign written resolutions of Geopay and which acknowledged it was irrevocable by reason of being coupled with the interest of ZZHK as chargee of Geopay's shares;
 - d. A letter of authority from Geopay's directors in respect of Geopay's signed but undated written resolutions, authorising ZZHK to date, deliver and give full effect to and otherwise complete the undated written resolutions referred to above while an event of default is continuing signed by Qu Xiao Chuan as Sole Director of Geopay.
 - e. An irrevocable deed of undertaking and confirmation from Geopay to ZZHK (the "**ZZHK Undertaking**") pursuant to the ZZHK Share Charge in which Geopay, *inter alia*,



- (i) “for valuable consideration”, gave an unconditional undertaking to register any and all share transfers in favour of ZZHK in its ROM if there was a continuing default;
 - (ii) confirmed that it had instructed its registered office provider to make an annotation in the ROM in respect of the ZZHK Share Charge and the security interests created thereby;
 - (iii) confirmed that the ROM provided to ZZHK was a certified copy of the original and that Geopay would not redesignate or recreate the ROM or maintain it with any other person other than its registered office provider in the Cayman Islands, which was and remains *Vistra* (Cayman) Limited Corporation (“**Vistra**”);
 - (iv) undertook, *inter alia*, that it would not change its registered office or registered office provider without ZZHK’s prior consent in writing or as otherwise expressly provided for in the Finance Documents, unless and until Geopay delivered to ZZHK a new letter agreement made between Geopay, Geoswift, ZZHK and the new service provider, in the same terms as the letter agreement between the Geopay, Geoswift, ZZHK and *Vistra* (see below paragraph g);
 - (v) confirmed that it had not issued, and undertook not to issue, a restrictions notice which would affect the security assets, at any time prior to the time when all amounts payable by Geoswift had been irrevocably paid in full and all facilities which might give rise to secured liabilities had terminated; and
 - (vi) undertook that it would not issue any replacement share certificate in respect of any of the charged shares prior to the time when the amounts payable by Geoswift had been irrevocably paid in full and all facilities which might give rise to secured liabilities had terminated.
- f. Written resolutions of the Directors of Geopay (i) approving the transfer by Geoswift Holding Limited of the charged shares to Zhongzhi Capital (HK) Company Limited (ii) resolving that the original ROM be updated to record the transfer of the charged shares to ZZHK and, if the original ROM was not retained by Geopay, resolving that the copy ROM be so updated; and (iii) resolving that a copy of the updated ROM be provided to ZZHK.
- g. A Letter Agreement addressed to *Vistra* by Geopay and Geoswift in respect of Geopay’s **Agreement re Register of Members of the Company** which states at paragraph 2:

“At any time after the Chargee notifies you in writing that an Event of Default has occurred.....you are authorised and entitled to rely upon the instructions of the Chargee to register the Chargee or its nominee ... as the registered holder of the shares pursuant to the Charge (provided that the Chargee delivers to you a duly completed and executed transfer form together with the relevant share certificates (if any) in respect of the shares being transferred)...”



12. Feng Xiao, managing director of ZZ Capital Management Limited, the holding company for ZZHK, in his affirmation in support of the application explains that the purpose of the Letter Agreement, which was addressed to Vistra, was to establish an agreement between ZZHK, Geopay and Geoswift, that Vistra would update the ROM in the event of default, notwithstanding any other agreement between Vistra and Geopay and/or Geoswift.
13. The ZZHK Share Charge also provides that Geoswift shall not permit the ROM to be maintained outside of the Cayman Islands or by a service provider other than Vistra without the prior consent of ZZHK, in writing, or as otherwise expressly provided in the ZZHK Finance Documents.
14. The ZZHK Share Charge provides that the security created in favour of ZZHK shall be immediately enforceable on, and at any time after, the occurrence of an event of default which is continuing. Consistent with its rights under the ZZHK Share Charge, ZZHK contacted Vistra by email on 15 March 2019, to advise that there was an event of default as Geoswift had failed to repay the loan and that Vistra was entitled to rely on ZZHK's instructions to register ZZHK as the holder of Geopay's shareholdings in substitution for Geoswift, pursuant to the ZZHK Share Charge over those shares. The Letter Agreement between ZZHK and Geopay and Geoswift addressed to Vistra, the Share Transfer which had been countersigned by ZZHK and dated 11 March 2019 and the written Resolution of the Directors of Geopay that the original ROM be updated to record the transfer of the charged shares to ZZHK and a copy provided to ZZHK were attached to the email for reference.
15. Vistra refused ZZHK's request on the grounds, *inter alia*, that ZZHK was not the 'principal client' for Geopay, that Geopay had instructed it to decline ZZHK's request, that Vistra was only the registered office and did not provide corporate, secretarial or legal services to Geopay and was not, in any event, able to make any changes to the ROM because, as it transpired from further email correspondence between ZZHK and Geopay's agents, the ROM was maintained by the Zhong Lun Law Firm.
16. In April 2019, negotiations commenced between Geoswift and ZZHK on repayment of the loan. Geoswift indicated that it anticipated receiving some \$50 million from a Shanghai investment fund. As the negotiations for the investment by the Shanghai fund were taking longer than expected, Geoswift entered into negotiations with a German fund seeking an investment of approx. Euro 200 million which would permit it to pay off not only the loan made by ZZHK, but also the smaller loan made by ZZCI to Geoswift in the sum of \$31 million on similar terms and with the same security deliverables as those executed and provided to ZZHK under its Share Charge. The security for the ZZCI loan to Geoswift was a Share Charge over 32.636% of Geoswift's shareholding in Geopay, representing 3053 shares in Geopay.
17. Nothing came of the promises to pay and ZZHK commenced these proceedings to have the register of members rectified to reflect that it is the shareholder in place of Geopay as to 6302 fully paid ordinary shares and was joined by Dragon which seeks to be registered as a

shareholder in place of Geoswift pursuant to the Deed of Assignment under which ZZCI assigned its rights under their loan agreement and Share Charge to Dragon.

The Law

18. The application is made pursuant to section 46 which provides a remedy for an improper entry or omission of entry in the register of members:

“46. If the name of any person is, without sufficient cause, entered in or omitted from the register of members of any company, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved or any member of the company or the company itself may, by motion to the Court, apply for an order that the register be rectified; and the Court may either refuse such application with or without costs to be paid by the applicant or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application or petition, and any damages the party aggrieved may have sustained. The Court may, in any proceeding under this section, decide any question relating to the title of any person who is a party to such proceeding to have that person’s name entered in or omitted from the register, whether such question arises between two or more members or alleged members, or between any members or alleged members and the company, and generally, the Court may, in any such proceeding, decide any question that it may be necessary or expedient to decide for the rectification of the register.

Provided that the Court may direct an issue to be tried, on which any question of law may be raised.”

19. The scope of section 46 has been recently considered by this Court in several recent decisions:
20. In the case of *Project Panther Limited v Comerica Bank and Trust N.A. (as personal representative of the estate of Nelson)* [2018 (2) CILR 543], Smellie CJ stated:

“17. The principles applicable to an application for rectification have been helpfully identified by counsel. They are manifold and well-established as a matter of English (Cayman) law. In summary, and as far as relevant to the present application, they may be summarized as follows:

It is, of course, settled that jurisdiction to order rectification of the register of a company incorporated in the Cayman Islands is vested exclusively in the Cayman Islands court irrespective of whether the register is kept outside the jurisdiction.

The summary remedy provided by the section (and initiated by originating summons) will usually be appropriate but ought not to be used where the case is particularly





complex, where the rights of third parties intervene or where the applicant relies on allegations of misrepresentation or fraud which ought to be clearly set out in pleadings or where the applicant seeks further relief other than rectification.

Where the company has notice of a dispute it may itself apply to the court for an order under the section.

The court's power to order rectification is discretionary.

The power to remove the name of a person which is entered on the register of members "without sufficient cause" has been widely construed. The jurisdiction to order rectification is not restricted to cases where a person has been entered on the register improperly, but extends to all cases where the entry was without sufficient cause.

In other words, it is not necessary for the applicant to show any deliberate wrongful act or fault by the company - it is sufficient to show that the register of members is incorrect because an entry has been omitted or made in error.

When the court entertains the application, it is bound to go into all the circumstances of the case, and to consider what proper reasons the applicant has to call for its interposition and the purpose for which relief is sought. In short, as s.46 explicitly recognizes, it should have regard to the "justice of the case."

Where the court orders the removal of a person's name from the register of members on an application for rectification of the register on the basis that the person has never been a member of the company, the order may operate retrospectively and not just from the date of the order."

21. In SC Global Vision Fund SPC v Oasis Buono Ltd (Grand Ct. FSD No 39 of 2020, July 8th, 2020, Unreported) Kawaley J, considering competing applications for rectification and for a stay in favour of arbitration, said this:

"8. An application for rectification of the register is not designed to determine substantive disputes about share ownership. It is designed to correct the register when, in light of a transfer of shares, the register no longer accurately reflects who the legal owner of the shares is. This is established by...Nilon Ltd. v Royal Westminster Investments [2015] 3 All ER 372 (PC) where Lord Collins opined as follows:

"[51] In the view of the Board, proceedings for rectification can only be brought where the applicant has a right to registration by virtue of a valid transfer of legal title, and not merely a prospective claim against the company dependent on the conversion of an equitable right to a legal title by an order for specific performance of a contract. ..."

"9. A case for rectification under section 46 may be legally made out when the applicant can demonstrate that an agreement for the transfer of the disputed shares in its favour



has been completed. As McMillan J held in *Cannonball Plus Fund Ltd v Dutchess Private Equities Cayman Fund Ltd*¹....

“51. In terms of paragraph 51 of the Nilon decision, Mr. Lowe is in effect saying that in light of the administrator’s action a valid transfer of title has already taken place, and that the Plaintiff has not merely a prospective claim against the Defendant on the conversion of an equitable right to a legal title, but a great deal more than a prospective claim: the transfer had been completed....”

“10. It was common ground that the pivotal question to be decided in relation to the Plaintiff’s application under section 46 of the Law was whether or not, in the words of McMillan J, ... ‘a valid transfer of title has already taken place.’”

Discussion and Decision

ZZHK

22. There is no issue that a share transfer is permitted under Geopay’s Articles of Association. Article 8 provides that,

“The instrument of transfer of any share shall be in writing and shall be executed by or on behalf of the transferor and the transferor shall be deemed to remain the holder of a share until the name of the transferee is entered in the register in respect thereof.”

23. There is a restriction on transfers of shares in Article 9 which provides that the Directors may, in their absolute discretion, decline to register any transfer of shares, thus preventing legal ownership of the shares to be transferred to a transferee.

24. This restriction does not apply, however, where the shares that are to be registered are secured shares. Article 10 A instead provides that,

“Notwithstanding anything contained in these Articles, the Directors shall:

- (a) promptly register any transfer of:*
 - (i) secured Shares following the enforcement of any Encumbrance pursuant to the terms of the relevant Encumbrance. ...*
- (b) ...*
- (c) not suspend or unreasonably delay registration of any transfer of Secured Shares...made pursuant to paragraph (a) above.”*

25. Encumbrance is defined in the Articles as

“any mortgage, pledge, lien, charge, hypothecation, encumbrance or other security interest, security agreement or other security arrangement of any kind over all or a part

¹ FSD 185/2016



of the issued share capital of the Company in favour of any Secured Party the existence of which has been notified to the Company and including, but not limited to, each Share Charge”

and so captures the Finance Documents on which ZZHK relies.

26. The only issue is whether the Share Transfer executed by Geoswift and dated subsequent to Geoswift’s default, in accordance with the ZZHK Loan Agreement is, per the Board in *Nilon*, a valid transfer of title giving ZZHK an immediate right to registration in Geopay’s ROM.
27. There is no dispute between Geoswift as the registered member and chargor of its shares in Geopay and ZZHK as to the validity of the executed Share Transfer.
28. The only dispute, if it may be properly so-called, is as to the validity of Geopay’s written resolution approving the transfer of shares to ZZHK. Mr. Qu, the sole Director of Geopay (at the relevant time) who signed the written resolution, suggests in his evidence that the resolution is not valid as he was no longer a director of Geopay on 9 March 2019, the date which ZZHK applied to the resolution by Mr Qu when it sought to exercise its rights under the ZZHK Share Charge.
29. Mr. Clifford who appeared on behalf of the Plaintiffs submitted, in response, that if the sole Director properly approved a formal resolution, as indicated by his signature, then the resolution is effective unless it can be shown that Geopay’s Articles require that resolutions be dated. Mr. Sherwood, who appeared for Geoswift, did not suggest otherwise.
30. The relevant Articles dealing with the proceedings of Directors support Mr. Clifford’s submission that the date affixed to the document by ZZHK is irrelevant to the binding nature of the resolution on Geopay. Article 88 provides that,

“The quorum necessary for the transaction of the business of the Directors may be fixed by the Directors...PROVIDED ALWAYS that if there shall at any time be only a sole Director the quorum shall be one.”

And Article 94 that,

*“...A resolution in writing ...signed by all the Directors **for the time being** ...shall be as valid and effectual as if it had been passed at a meeting of the Directors ...duly convened and held.”*

31. Mr. Sherwood’s further objection to ZZHK’s application for rectification is that ZZHK addressed themselves to Vistra which does not, and was not required to, keep the register of members and had refused to engage with the Directors of Geopay. He submits that a stock transfer form in



isolation - not presented to the Directors of Geopay - is not effective as the transfer can only be registered after it has been presented to the Directors. Mr. Clifford's short riposte was that delivery of the Finance Documents to Geopay's registered office - Vistra - was delivery to Geopay and its Directors. Again, I concur.

32. ZZHK plainly has a right to registration by virtue of a valid transfer of legal title. No cause has been shown by Geopay for omitting to enter ZZHK in their ROM, contrary to Article 10A which requires them to register such transfer of shares promptly and I make an Order requiring that the Register be rectified to reflect ZZHK as shareholders of 6, 302 ordinary shares in place of Geoswift Holding Limited.

ZZCI/DRAGON

33. Mr. Clifford contends that the submissions on behalf of ZZHK apply equally to Dragon but the evidence on which Dragon relies does not establish that Dragon, like ZZHK, has a valid legal title to the shares which Geopay has failed to acknowledge.
34. Dragon has not presented an executed share transfer certificate to Vistra with the other security deliverables in an attempt to enforce its rights under the Assignment. Indeed, it appears from the evidence supporting Dragon's application, as Mr. Sherwood submits, that Dragon considers that it does not have the transfer documentation and ancillary documents necessary to transfer legal title in the shares from Geoswift to itself. In particular, in the "Notice of Assignment" dated 8 June 2020 which was sent to Geoswift, Dragon requests that Geoswift provide it with *"updated executed deliverables addressed to Dragon Ocean pursuant to the terms of the Share Charge."*
35. In the cover email attaching the "Notice of Assignment" from ZZCI to Geoswift, dated 11 June 2020, ZZCI requests that, *"[w]ith regard to the shares of Geopay Holding Limited ("Geopay") charged by Geoswift to ZZCI (the "Assigned Assets"), ... Geoswift and Geopay to assist Dragon Ocean in exercising the Assigned Assets and complete any variation filing procedures in relation to the Assigned Assets"*.
36. I am unclear as to the nature of the assistance there being sought by ZZCI, but I am clear that it is not a request for Dragon to be registered in Geopay's ROM in place of Geoswift nor could it be, as Dragon did not have then - or now - an executed share transfer giving it a valid title to shares.
37. Mr. Clifford suggests that ZZCI might be joined to the application for rectification if it were adjourned, but it is clear, from Feng Xiao's affirmation, that ZZCI did not take any steps to enforce its security before assigning its rights under the Finance Documents to Dragon. In his evidence, Mr. Feng speaks only to the timeline of events following the non-payment of the ZZHK

loan² and the email correspondence he exhibits relate to the efforts of ZZHK to have Vistra recognise the ZZHK Share Charge and register the charged shares in its name.

38. As ZZCI did not present a duly executed share transfer certificate with the other security deliverables to Vistra after Geoswift's default, ZZCI itself would not be entitled to an order for rectification, as the remedy lies only where there has been an omission, without sufficient cause, to register a person with an immediate right of registration. It is a matter for the chargee when it chooses to enforce its security. It cannot be said that Geopay omitted to register ZZCI as a member in the circumstances where ZZCI did not seek to enforce the Share Charge.
39. In light of my findings, I need not deal with Geoswift's challenge to the validity of the Assignment, the grounds of which are not, at first glance, persuasive and could have been dealt with in this application.
40. Dragon's claim as set out in paragraphs 2, 3 and 4 of the Summons is dismissed.
41. I will hear Counsel on costs.



THE HON. JUSTICE MARGARET RAMSAY-HALE
JUDGE OF THE GRAND COURT

² Paragraphs 31 to 37