



IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

NEUTRAL CITATION NUMBER : [2025] CIGC (FSD) 20

CAUSE NO. FSD 384 OF 2024 (IKJ)

IN THE MATTER OF SECTION 46 OF THE COMPANIES ACT (2023 REVISION)

BETWEEN:

YEUNG KA MAN

(As joint and several RECEIVER appointed over shares and related rights of GLORY CLASS VENTURES LIMITED in Op Multi Strategies Investment Fund)

Plaintiff

AND

OP MULTI STRATEGIES INVESTMENT FUND

Defendant

IN COURT

Before: The Hon. Justice Kawaley

Appearances:

Mr Corey Byrne of Ogier for the Plaintiff

Heard: The Defendant did not appear

Date of decision: 31 January 2025

Draft Ruling Circulated: 26 February 2025

Ruling Delivered: 11 March 2025

250312 In the matter of Yeung Ka Man – FSD 384 of 2024 (IKJ) - Ruling

Originating Summons for rectification of the register-enforcement of security over shares-execution of undated security documents held in escrow prior to event of default- enforcement of transfer instrument by receiver-relevant date for determining authority of debtor's agent to execute security documents- Companies Act (2023 Revision), sections 46, 81

REASONS FOR DECISION

Background

1. The application for rectification of the register in this case, despite being ultimately unopposed, raised an important point of law relevant to the ability of secured creditors to enforce their security over shares in Cayman Islands companies. When the duly authorised officer of a borrower which subsequently defaults executes undated security documents which are only dated and relied upon after an event of default has occurred, at what point in time should the officer's authority be assessed? The practice of requiring a party providing security over shares to execute an undated instrument of transfer for the secured creditor to date and rely upon should the need arise appeared to me to be a common one. It seemed surprising that no local authority on the point could be found.
2. By an Originating Summons dated 19 December 2024, Yeung Ka Man of Alvarez & Marsal (in her capacity as joint and several receiver appointed over shares and related rights of Glory Class Ventures Limited in OP Multi Strategies Fund) (the "Plaintiff") sought the following primary relief:
 - “1. *OP Multi Strategies Investment Fund ("OP Fund") shall, within seven days of the date of any order made pursuant to this Originating Summons, do all such acts (including but not limited to using its best endeavours to procure the registered agent to OP Fund, Maples Corporate Services Limited and/or the Manager of OP Fund, Oscar and Partners Capital Limited ("Oscar Partners"), to take any such action as is required) and sign all necessary documents to:*
 - (a) *rectify the Register of Members of OP Fund to show that:*
 - i. *Glory Class Ventures Limited ("Glory Class") has ceased to be a member of OP Fund; and the Plaintiff is the registered shareholder of 19,923.399 ordinary shares in OP Fund previously held in the name of Glory Class (the "Mortgaged Shares"); and*

(b) *provide the Plaintiff with a true copy of the updated Register of Members of the OP Fund reflecting the Plaintiff as the owner of the Mortgaged Shares.”*

3. On 31 January 2025, having heard counsel for the Plaintiff, I granted an Order in terms of paragraph 1 of the Originating Summons and additionally:

“2. *In the event that paragraph 1 is not complied with within seven days of service of this Order (in accordance with paragraph 4 below), the Plaintiff is authorised to instruct Maples and/or Maples Fund to:*

(a) *rectify the Register of Members of OP Fund in accordance with paragraph 1(a) above; and*

(b) *provide a true copy of the updated Register of Members of the OP Fund reflecting the Plaintiff as the owner of the Mortgaged Shares.*

3. *The rectification as set out above shall take effect as from 5 July 2024 as the date on which the Shares were transferred to the Plaintiff pursuant to the Instrument of Transfer dated 5 July 2024.*

4. *This Order shall be served by the Plaintiff on: (a) (b) OP Fund at its Cayman registered office at Maples Corporate Services Limited, PO Box 309, Umland House, South Church Street, George Town, Grand Cayman, Cayman Islands by hand delivery; Glory Class at its BVI registered office c/o Vistra Corporate Services Centre, Wickhams Cay II, Road Town, Tortola, VG1110, British Virgin Islands by hand delivery.*

5. *Each party will bear their own costs of the Summons.”*

4. These are the reasons for that decision.

The factual matrix

5. On 6 April 2020, Hongkong and Shanghai Banking Corporation Limited (“HSBC”) made a loan to Sino-Ocean Capital Holding Limited, a Hong Kong company (the “Borrower”). In or about 2023, HSBC obtained further security in the form of an Equitable Mortgage dated 6 April 2023 over shares in the Defendant owned by a BVI subsidiary of the Borrower’s parent company (“Glory Class”). The essence of what was agreed was that if an “Enforcement Event”

occurred, HSBC would be entitled to assume title over the secured shares and appoint receivers to act on behalf of Glory Class for enforcement purposes.

6. Clause 5 (a) of the Equitable Mortgage provides as follows:

“(a) *The Mortgagor shall, on the date of this Deed, shall deposit with the Mortgagee, or as the Mortgagee directs) the following:*

...

(iii) *undated instrument(s) of transfer in respect of the Shares, executed in blank by or on behalf of the Mortgagor...*”

7. Clause 5 (b) provides that if 5 (a) (iii) is not complied with on the date of the Deed, it shall be complied with within 10 Business Days thereafter. Clause 5 (c) provides that if a director who has executed an instrument of transfer resigns, a replacement instrument shall be provided within 10 Business Days of the resignation. In the event, by a Unanimous Written Resolution of Glory Class’s Board of Directors dated 6 April 2023, director Chan Ka Man was authorised to execute an undated instrument of transfer in favour of HSBC (the “Undated Transfer Instrument”), and he did so. The Undated Transfer Instrument signed by Mr Chan was provided to HSBC on or around the time of execution of the Equitable Mortgage as a closing deliverable.
8. The Equitable Mortgage is governed by Cayman Islands law (clause 25). Glory Class as Mortgagor expressly confers a power of attorney on the “*Mortgagee, every Receiver...*” and authority to, *inter alia*:

“(a) *sign, seal, execute, deliver and complete all... deeds and documents and do all acts and things which the Mortgagee may consider to be necessary, advisable or desirable to:*

(i) *perfect or improve its security over the Mortgaged Property,*

(ii) *to carry out any obligation imposed on the Mortgagor by this Deed...*”

9. According to the First Affirmation of Claire Oxley, HSBC’s Deputy Head of Credit, on 10 January 2024 the Borrower was asked to repay the more than US\$52 million due under the loan and when it failed to do so an Event of Default under the Equitable Mortgage occurred. On 25 March 2024, HSBC (under a deed of appointment governed by Hong Kong law) appointed Ms Wing Sze Tiffany Wong and the Plaintiff as Receivers to enforce the Equitable Mortgage over

the secured shares. The First Affirmation of the Plaintiff explained the enforcement steps taken by the Receivers and concluded that the Borrower's parent and Glory Class "*demonstrated a clear pattern of intentional unwillingness to engage substantively with the Receivers*" (paragraph 16). On 5 July 2024, the Receivers executed the Undated Transfer Instrument and then attempted to procure the registration of the Receivers' title to the mortgaged shares in the register of the Defendant. Initially Glory Class was asked to effectuate the transfer of title to the mortgaged shares; however, their lack of responsiveness resulted in the Receivers approaching the Defendant itself.

10. Objections raised on behalf of the Defendant included¹ the point that the director who had signed the Undated Transfer Instrument was no longer a director when the Receivers sought to rely on the document. Their Hong Kong lawyers, Jingtian and Gongcheng in a letter dated 8 August 2024 wrote:

“5. *Regarding the Instrument of Transfer, we note that it was executed by a person named Chan Ka Man ('Chan') purportedly as a director of Glory Class Ventures Limited ('Glory Class'). However, according to our client's records, as of the date of the Instrument of Transfer (i.e. 5 July 2024), Chan is no longer a director of Glory Class. As such, it appears that Chan did not possess the necessary authority or capacity to execute the Instrument of Transfer on behalf of Glory Class, and the Instrument of Transfer is invalid.*

6. *Assuming Glory Class has appointed a new director in place of Chan, Clause 5 (c) of the Share Mortgage provides that:- 'The Mortgagor shall, within ten (10) Business Days of the date of resignation of any director of the Mortgagor who executed any item listed in Clauses 5(a)(iii) and 5(a)(iv) executed by another duly appointed director of the Mortgagor, together with a certified copy of the updated register of directors of the Mortgagor.'"*

11. Eversheds, the Receivers' Hong Kong lawyers' summary dismissal of the validity challenge by letter dated 13 November 2024 only provoked a holding response from Jingtian and Gongcheng. It was simply contended that the Undated Transfer Instrument was validly

¹ The other suggestion previously made that the Receivers required recognition from the Hong Kong Court to pursue rectification did not appear to me to call for any reasoned consideration in the context of the present proceedings.

executed because it was sufficient to establish that authority existed when the officer executed it in undated form. The Defendant ultimately decided not to oppose the rectification application.

12. I was readily satisfied that the Undated Transfer Instrument had been executed by a duly authorised officer of Glory Class. The important point of legal principle was whether it was necessary to explore the authority position of the director who originally executed the Undated Transfer Instrument as of the date when the Receivers dated the instrument with a view to enforcing the rights it conferred.
13. It appeared to me at first blush to be wholly inconsistent with the commercial efficacy of the Equitable Mortgage for it to become unenforceable because of a change of status of a director after a duly authorised undated instrument had been executed along with the Deed itself.

Governing legal principles

14. No controversy turned on the statutory jurisdiction the Court was required to exercise to rectify the register in the context of an unopposed application. Section 46 of the Companies Act (2023 Revision) provides most importantly as follows:

“Remedy for improper entry or omission of entry in register

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 a party to such proceeding is to have that person’s name entered in or omitted from the register...”*

15. Mr Byrne on behalf of the Plaintiff placed various instructive authorities before the Court to demonstrate the approach the Court should follow to the application overall. A clear and concise summary of the law relevant to the present case was found in *Project Pather-v-Comerica Bank* 2018 (2) CILR 543 where Smellie CJ set out, *inter alia*, the following established principles:
- *“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.’”*
16. The only issue which had been raised by the Defendant before the hearing, but not pursued in positive opposition at the hearing, was whether the terms of the Equitable Mortgage required the Plaintiff to establish that the officer of the Mortgagor who executed the Undated Transfer Instrument as part of the security arrangements was also an officer at the time when the security was executed and dated by the Receiver.
17. If this proposition was correct, it seemed to me and I observed in the course of the hearing, the whole rationale for the well-established commercial practice of undated instruments of transfer being executed as at the date of the relevant security agreement and then being dated by the secured creditor if the need for enforcement subsequently arose would be rendered nugatory. The fundamental purpose of the practice is to avoid the need for the mortgagee to seek the cooperation of the mortgagor at the enforcement stage when experience suggests mortgagees cannot be relied upon to adopt cooperative stances.
18. Mr Byrne submitted that Mr Chan’s status as a director when the Undated Transfer Instrument was subsequently dated for enforcement purposes was irrelevant because the Mortgagor’s

Unanimous Board Resolution by its terms was expressed to be “*conclusive evidence for all purposes of the approval of any such amendment or addition and the final terms thereof on by or behalf of the Company*”. Reliance was also placed on the persuasive authority of *Re Armstrong Brands Ltd (in administration)* [2016] BCC 657 where it was held that the relevant date for determining authority was when the officer signed, not when the document was subsequently dated and relied upon.

19. In *Re Armstrong*, the question was whether a charge had been duly executed on behalf of a company when it had been signed by a director before the loan transaction was consummated by which time the director was no longer a director. HH Judge Purle QC (sitting as a High Court Judge) found that the charge had been validly executed having regard to section 44(2) of the Companies Act 1986 (UK) and board minutes which clearly authorised the director to sign the loan and security documents in anticipation that they would be contemplated later.
20. In the present case, the facts and law were far simpler because there was no doubt that the substantive document (the Equitable Mortgage) was signed and took effect as a deed when Mr Chan was still a director. The Undated Transfer Instrument was merely an ancillary enforcement document which was always intended to be signed before it was relied upon at some future date (if at all). Section 103 (4) of the BVI Business Companies Act provides that a document executed by a company as a deed shall be validly executed if:
 - “(b) *it is expressed to be, or is expressed to be executed as, or otherwise makes clear on its face that it is intended to be, a deed and it is executed by a person acting under the express or implied authority of the company...*”
21. Similar provision is made by section 81(a) (ii) of the Companies Act (2023 Revision). These statutory provisions were not in my judgment engaged, because the critical question was not the validity of the Equitable Mortgage, which clearly was executed as a deed, but rather the Instrument of Transfer, which on its face was not intended to be executed as a deed.
22. The pivotal question was one of contractual rather than statutory interpretation: did the Equitable Mortgage, construed in the light of the Unanimous Board Resolution (which authorised Mr Chan to sign the Undated Transfer Instrument before it was completed for enforcement purposes later) contemplate that further authority needed to be conferred at the enforcement stage if Mr Chan was no longer a director? This question provides its own obvious answer, save in a parallel Universe in which security documents are drafted in favour of

mortgagors rather than mortgagees and are designed to be difficult rather than straightforward to enforce.

23. As regards the legal principles governing contractual interpretation, which are now tacitly rather than explicitly applied absent legal controversy, an oft cited and authoritative summary is found in the judgment of Lord Neuberger in *Marley-v-Rawlings* [2015] AC 129 where he said:

“19. *When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions...*”

24. The Equitable Mortgage provided critically as follows:

- (a) when an Enforcement Event occurs, the security was to be “*immediately enforceable*” (clause 9.1);
- (b) the Mortgagor would provide a signed Undated Transfer Instrument as part of the security arrangements (clause 5 (a));
- (c) if a Receiver is appointed, the Receiver would be an agent of the Mortgagor, empowered to, *inter alia*, act as owner of the Shares (clause 11); and
- (d) the Mortgagee was irrevocably appointed as the Mortgagor’s attorney empowered to, *inter alia*, deliver and/or complete all acts the Mortgagor was required to perform under the Equitable Mortgage.

25. Accordingly, as one would expect, the Equitable Mortgage expressly contemplated that either the Receiver or the Mortgagee could exercise all powers of the Mortgagor and date and execute the Undated Transfer Instrument . Implicitly, the entitlement to do so would only arise when an Event of Default occurred. As the Receivers’ attorneys argued in advance of the hearing and the Defendant ultimately sensibly agreed not to contest, whether or not the director who

originally signed the Undated Transfer Instrument was still a director when its execution was completed by the Receivers the following year was entirely irrelevant. Although the Deed contained a clause which required the Mortgagor to provide further authorisation if an authorised officer was replaced, this provision cannot sensibly be construed as intended to invalidate a signature previously affixed to a transactional document by a duly authorised officer of the mortgagor. The Deed expressly empowered the Mortgagee or the Receiver to exercise powers conferred on the Mortgagor on the latter's behalf when the need to enforce the deed arose.

26. The Plaintiff/Mortgagee in substance won the legal argument as to the merits of its entitlement to a rectification remedy in correspondence out of Court. However, the precise legal basis of its victory was less than clear because it was easier to reach an instinctive conclusion based on experience that the Instrument of Transfer was valid and enforceable than it was, in the absence of any local authority, to justify that conclusion in coherent legal terms. In my judgment, the answer lay in interpreting the terms of the contract having regard to its commercial purpose. Both terms and purpose were easily discernible and understood in all the circumstances of the present case.

Conclusion

27. For these reasons on 31 January 2025, I granted the Order sought rectifying the register to replace the name of the Mortgagor Glory Class with the name of the Plaintiff in respect of the mortgaged shares in the Defendant.



THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT