In The Supreme Court of Bermuda

CIVIL JURSDICTION
(COMMERCIAL COURT)

2010: NO. 88

IN THE MATTER OF SECTIONS 106(2) and 106(6) OF THE COMPANIES ACT 1981

AND IN THE MATTER OF DUFRY SOUTH AMERICA LTD

AND IN THE MATTER OF AN AMALGAMATION AGREEMENT BETWEEN DUFRY SOUTH AMERICA LTD, DUFRY HOLDINGS & INVESTMENTS AG, AND DUFRY AG

BETWEEN:

ARTHA MASTER FUND, LLC

Plaintiff

-and-

DUFRY SOUTH AMERICA

Defendant

RULING
(In Chambers)

Date of Hearing: March 21, 2011

Date of Ruling: March 24, 2011

Mr. John Wasty, Appleby, for the Plaintiff
Mr. Paul Smith and Mr. Christian Luthi,
Conyers Dill & Pearman, for the Defendant

Introductory

1. The present action, commenced by Originating Summons dated March 15, 2010, seeks "*the appraisal by the Court of the fair value of Plaintiff's common shares in the Company*".

2. The Plaintiff declined to accept the Company's assessment of the fair value of its shares ("the DSA Shares") for the purposes of a Merger and Amalgamation Agreement dated February 11, 2010 ("the Agreement"). Instead, the Plaintiff invoked its statutory right to seek the Court to appraise the fair value pursuant to section 106(6) of the Companies Act 1981.

3. On May 20, 2010, I gave directions for the filing of expert evidence with liberty to apply on discovery and other pre-trial matters. On August 6, 2010, the Defendant issued a Summons seeking further directions. I ordered directions in relation to this Summons on or about August 12, 2010 by consent. Due to delays in the preparation of a transcript of the May 20, 2010 hearing, the Defendant's Summons could not be heard until the beginning of this week. The Defendant sought the following relief:

    (a) For the avoidance of doubt, leave to rely upon two experts each;
    (b) Leave to adduce expert valuation evidence as to the value of (uncontroversially) the DSA Shares and (controversially) the Dufry AG ("DAG") shares.
    (c) Security for costs;
    (d) Discovery of all documents relating to the Plaintiff's acquisition of specified investments in the Company on or after January 10, 2010 and sale of DAG shares on or after March 23, 2010.

4. After hearing argument from Mr. Smith, I resolved issue (a) in favour of the Defendant as a result of Mr. Wasty's sensible (albeit belated) concession. After hearing argument from both counsel on issue (c), I found that the Defendant was in principle entitled to security for costs from the Plaintiff under Order 23 of the Rules. I adjourned the application as regards the quantum of such security after indicating that in the absence of cogent evidence of the Plaintiff's impecuniosity, such costs should be limited to the additional costs attributable to enforcing any costs order abroad. After hearing both counsel on issue (d), I decided that the Defendant was entitled to discovery limited to the timing, pricing and amounts of the relevant DSA purchases and DAG sales.

5. I reserved judgment on (b), the scope of expert evidence issue, indicating that I would deliver judgment on this issue together with reasons for my decision on the security for costs issue.

Reasons for determining that the Defendant is entitled to obtain security for costs

6. The application for security for costs was only explicitly based on the fact that the Plaintiff was resident abroad. The Plaintiff filed no evidence in response and contended that on legal grounds its foreign domicile alone could not justify making the Order sought under Order 23. Mr. Smith invited the Court to infer that the Plaintiff must be impecunious and Mr. Wasty, after the Court signified its intention of ordering security, sought an opportunity to satisfy the Defendant that his client was, in effect, "good for the money". On this basis, the application for security for costs was adjourned.

7. Order 23 rule 1 of the Rules provides in salient part as follows:

> "***23/1 Security for costs of action, etc.***
> *1 (1) Where, on the application of a defendant to an action or other proceedings in the Court, it appears to the Court—*
>
> *(a) that the plaintiff is ordinarily resident out of the jurisdiction...*
>
> *(b)... or*
>
> *(c)... or*
>
> *(d)...*
>
> *then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just.*
>
> *(2)...*
> *(3)...*"

8. The Defendant sought security firstly on the grounds that "*it is now and historically has been the general rule of practice to require a foreign plaintiff to give security for costs*" (Outline Submissions, paragraph 28). Reliance was placed on *Aeronave SPA –v-Westland Charters* [1971] 1 WLR 1445. In addition, the Court was invited to take into account a number of discretionary factors, including the fact that (a) there was no high likelihood that the Plaintiff would succeed; (b) the Plaintiff was a hedge fund which (i) was likely to have a fluid asset position and which (ii) had refused to supply evidence of its ability to meet any costs order.

9. Mr. Smith acknowledged in his oral argument that the historical practice of ordinarily granting applications for security for costs as against foreign plaintiffs had been modified as a result of the English post-Human Rights Act 1998 position, without referencing any local authorities in this regard. This required an interpretation of the security for costs provisions of Order 23 in a way which did not discriminate against foreign plaintiffs on the grounds of their place of origin. The relevant principle is generally considered to derive from the English Court of Appeal decision of *Nasser-v-United Bank of Kuwait*

[2002] 1 WLR 1868, upon which the Plaintiff's counsel also relied. Mance LJ held that the English rule empowering the Court to order any plaintiff not resident in England or any other Lugano Convention State was based on the implicit premise that plaintiffs not so resident would be more difficult to enforce costs orders against. Construing the relevant rule in a manner which was not discriminatory meant that security for costs could only be ordered to mitigate any additional difficulty in enforcement flowing from the plaintiff's residence 'abroad' in the requisite sense. Where a plaintiff was so impecunious that requiring security would stifle a claim, this might give rise to a further ground for not ordering security at all, Mance LJ held.

10. Gross J considered the proper approach to security to costs in *Texuna International Ltd.-v-Cairns Energy Plc.* [2004] EWHC 1102(Com), to which the Defendant's counsel also helpfully referred. This case added the refinement that the Court can take into account without formal evidence varying degrees of difficulty of enforcement which may objectively arise in deciding at what level security should be fixed. At the lower end of the scale would be jurisdictions where reciprocal enforcement legislation existed (e.g. applicable Commonwealth countries); at the higher end would be jurisdictions where enforcement would be so difficult as to border on impossible. In cases at the higher end, the implications of foreign enforcement might mean that security for the full amount of the defendant's costs might be required.

11. Mr. Smith further submitted that inability to pay was a factor which could be taken into account under Order 23 even though (unlike under the CPR) this was not a freestanding ground for requiring security for costs to be given.

12. Mr. Wasty did not take serious issue with these submissions. However, he sought an opportunity to satisfy the Defendant of his client's ability to meet any costs order if the Plaintiff was liable to pay security. He invited the Court to conclude that security ought not in principle to be ordered following the approach adopted by the Canada Business Corporations Act legislation which expressly displaces the normal security for costs rules from appraisal proceedings. Section 190(18) of the Canadian Act provides: A dissenting shareholder is not required to give security for costs in an application made under subsection (15) or (16). The rationale for this ouster was said to be that the right conferred on companies to acquire shares was an intrusive one and dissenting shareholders ought to be freely able to seek their statutory appraisal relief from the Court.

13. As meritorious as the Canadian legislative policy may be in displacing the security for costs rules from the amalgamation context, such policy has not been given effect to by Bermuda's Legislature. The likelihood that a security for costs order will impair access to the Court is to some extent reduced under the Bermuda dissenting shareholder appraisal action scheme by the fact that decisions of this Court are *prima facie* final under section 106(6C) of the Bermuda Act. This means that the total costs entailed will ordinarily be limited to first instance proceedings alone. Moreover, the right of access to the Court is constitutionally protected by section 6(8) of the Bermuda Constitution, so Order 23 must be construed and applied so far as possible in a way which is consistent with the Plaintiff's constitutional rights. Moreover because of the anti-discrimination provisions of

section 12 of the Constitution discussed below, the full amount of the security for costs applicant's costs will rarely (if ever) be required to be posted.

14. I express no opinion at this stage on Mr. Wasty's suggestion that the discretion as to costs conferred by section 106(6D) is intended to be exercised in a different manner to the Court's discretion under Order 62 of the Rules.

15. In addition, the Court must apply Order 23 in a manner consistent with section 12 of the Constitution, which provides in material part as follows:

> "*12 (1) Subject to the provisions of subsections (4), (5) and (8) of this section, no law shall make any provision which is discriminatory either of itself or in its effect.*
>
> *(2) Subject to the provisions of subsections (6), (8) and (9) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.*
> *(3) In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.*"

16. Section 12(2) of the Bermuda Constitution prohibits the Court from treating any person, which I take, construing the term "*person*" broadly, to include both natural and artificial persons, in a discriminatory manner. Section 6 of the UK Human Rights Act 1998, enacted 30 years later (as read with article 14 of the Convention), follows a similar approach. This is unsurprising, as section 12 of our Constitution is based on, while the Human Rights Act 1998 (UK) gives effect to, article 14 of the European Convention on Human Rights. In broad-brush terms, therefore, the English cases cited by counsel on the interaction between statutory security for costs provisions and the non-discrimination provisions of article 14 are highly persuasive for the purposes of Bermuda law.

17. However, the starting point for any analysis of the Bermuda law position must be, despite counsel's abbreviated submissions, the position under Bermuda law. In this regard, it is important to remember that section 12 of our Constitution contains caveats and exceptions which are not spelt out in article 14. The Convention provision itself does not create a freestanding right not to be discriminated against (although this is achieved for the purposes of UK domestic law through section 6 of the 1998 Act); article 14 merely provides as follows:

> "*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social*

> *origin, association with a national minority, property, birth or other status.*"

18. Section 12 of the Bermuda Constitution provides various express exceptions to the right not to be subjected to discriminatory treatment, the most pertinent of which for present purposes is the following. Section 12(4)(d) (as read with section 12(5)) provides that it is not discriminatory for the purposes of section 12(1) or (2) if a law makes provision:

> "*whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.*"

19. Thus the English position appears to be that security for costs may only be ordered if there are grounds over and above residence abroad for requiring security. The Bermudian position is that one must consider whether foreign litigants may be subjected to the disability of being required to furnish security on the grounds that such disability is, having regard to the "*nature*" of the restriction or "*special circumstances*" pertaining to foreign litigants (or particular categories of such), "*reasonably justifiable in a democratic society*". The fact that additional costs may be incurred through enforcing a costs award overseas, would clearly constitute a special circumstance applicable to all foreign plaintiffs who are nationals of (or who have assets located in) countries in relation to which no reciprocal enforcement of judgment regime exists.

20. I was willing to assume for present purposes, based on the English case law, that ordering such foreign litigants to post security to cover such additional costs meets the constitutional reasonable justifiability test. For similar reasons, I would endorse the views of Gross J in *Texuna International Ltd.-v-Cairns Energy Plc.* [2004] EWHC 1102(Com) (transcript, paragraph 23(xi)) to the effect that where enforcement abroad would be near impossible, the quantum of costs would potentially not be limited to the additional costs of enforcement overseas.

21. For these reasons I was satisfied that this Court clearly had the discretion to require the Plaintiff to provide security. Two further points by way of postscript are required.

22. Firstly, it might be possible for a defendant to argue in future cases, based on a more comprehensive review of international legislative practice with respect to security for costs, that the English approach referred to above is overly narrow and that the very "*nature*" of the security requirement imposed on foreign litigants is "*reasonably justifiable in a democratic society*".

23. Secondly, in signifying my decision that security for costs should be ordered, I expressed the provisional view that, absent clear evidence of "impecuniosity", the quantum of such security would likely be limited to the additional costs of enforcing any costs order the

Defendant might obtain against the Plaintiff in Delaware. My use of the term "impecuniosity" was, on reflection, unfortunate.

24. Mr. Smith merely relied upon Gross J's opinion (at paragraph 26) that "*impecuniosity may both add to the burdens of enforcement and encourage the Claimant to resist enforcement.*" This economic factor, assuming that the Court is concerned with impecuniosity falling short of insolvency, appears only clearly to be relevant to the question of whether or not security should be ordered; not necessarily to the question of how much should be required to be secured. On the other hand, while the Plaintiff's insolvency is clearly not a ground for ordering security under Order 23 as it is under the English CPR, this Court does possess the inherent jurisdiction to require a third party which is funding a claim brought by an insolvent plaintiff to post security for costs: *Phoenix Global Fund Ltd and Phoenix Capital Reserve Fund Ltd v Citigroup Fund Services (Bermuda) Ltd and the Bank of Bermuda Ltd* [2007] Bda. LR 61.

25. I should have stated that unless there were to be clear evidence of the Plaintiff's *insolvency (*as opposed to "impecuniosity"), the measure of the amount to be secured will likely be limited to the additional costs of enforcement abroad.

The scope of the expert evidence

26. The present action seeks relief pursuant to, *inter alia*, the following subsections of section 106 of the Companies Act 1981:

> "*(6) Any shareholder who did not vote in favour of the amalgamation and who is not satisfied that he has been offered fair value for his shares may within one month of the giving of the notice referred to in subsection (2) apply to the Court to appraise the fair value of his shares.*
>
> *(6A) Subject to subsection (6B), within one month of the Court appraising the fair value of any shares under subsection (6) the company shall be entitled either—*
>
> > *(a) to pay to the dissenting shareholder an amount equal to the value of his shares as appraised by the Court; or*
> >
> > *(b) to terminate the amalgamation in accordance with subsection (7).*
>
> *(6B) Where the Court has appraised any shares under subsection (6) and the amalgamation has proceeded prior to the appraisal then, within one month of the Court appraising the value of the shares, if the amount paid to the dissenting shareholder for his shares is less than that appraised by the Court the amalgamated company shall pay to such shareholder the difference between the amount paid to him and the value appraised by the Court.*
>
> *(6C) No appeal shall lie from an appraisal by the Court under this section.*"

27. Notwithstanding the terms of section 106(6C), it is at a minimum strongly arguable that any party to an appraisal action who contends that their constitutional fair trial (or other) rights have been contravened in the course of a trial under section 106 may seek redress

under section 15 of the Constitution from this Court. Nevertheless, I am mindful that there is a strong likelihood that this Court's decision on the merits (if not any purely interlocutory rulings, which are not stated to be non-appealable) is likely to be final.

28. At the initial directions hearing, the present controversy was first raised. The Plaintiff contended that the only issue for the expert evidence to address was the fairness of the valuation placed by the Defendant on its own shares for the purposes of the amalgamation. Thus, the DSA Shares fell to be appraised, having regard to the formula adopted for computing the merger consideration as contained in Clause 2 of the Partial Settlement Agreement concluded on March 19, 2010 by the parties after the present dispute was first joined ("the PSA"):

> " *The Parties agree that for the purposes of the Artha Appraisal action the fair value of DSA's shares as determined by DSA is the market value in United States Dollars ("US$") of the Merger Consideration, on the Payment Date taking into account the Extraordinary Dividend. The Parties further agree that market value is the closing price listed on Bloomberg of the Dufry AG shares on the day before the Payment Date ("Market Value"), at the foreign exchange rate for conversion of Swiss Francs into US$ by reference to the website of the European Central Bank (www.ecb.int) euro Foreign exchange reference rates on the Payment Date (dividing one EUR rate by the other...)*"

29. The PSA resolved the relief sought under paragraphs 1 and 2 of the Plaintiff's Originating Summons and resulted in the Plaintiff abandoning a threatened application to restrain the consummation of the amalgamation and, despite being a dissenter, receiving the right to payment of the Defendant's assessment of the fair value for its shares on the same date as other DSA shareholders. One complaint was that the Agreement was invalid because DSA had not assigned a value for its shares. The "Merger Consideration", according to Recital B to the PSA was as follows: "*for every 4.10 common shares in DSA ...1.00 new registered shares* [sic] *in DAG*". Accordingly, Mr. Wasty submitted, the obvious purpose of clause 2 of the PSA was to fix the Defendant's valuation of the DAG shares, leaving outstanding for determination at trial an assessment of whether this formula in fact constituted a fair basis for valuing the Plaintiff's DSA Shares.

30. Mr. Smith persuasively argued that the Court should direct the experts to address the fair value of both the DSA and DAG shares. This was because (a) the two values were inextricably intertwined, (b) the Court would want to know if the Plaintiff had in fact received a windfall as the true value of the DAG shares was far higher than the figure upon which the Merger Consideration was based, and (c) the Court should err on the side of having access to more evidence than less in any event. The latter point echoed my own earlier reasons for, perhaps somewhat precipitously, ruling that the Plaintiff should disclose particulars of, *inter alia*, the price received for the sale of its DAG shares. The significance of point (b) and, to a lesser extent, point (c) as well, is sharply muted by the discovery order that I have made. If, which is far from clear, any windfall the Plaintiff may have obtained is relevant to the appraisal exercise to be carried out, such facts can be taken into account.

31. The crucial question is whether or not clause 2 of the PSA fixed for the purposes of the present action the fair value assigned by the Defendant to the DSA Shares by reference to the detailed formula for computing the value of the Merger Consideration by reference to the Market Value of the DAG shares on the day before the Payment Date. In my judgment it is impossible to sensibly construe clause 2 of the PSA in the way the Defendant contends, for the reasons Mr. Wasty submitted on the Plaintiff's behalf. In the absence of clause 2, the appraisal exercise would have entailed considering de novo the DAG as well as the DSA position.

32. I find that the scope of the expert evidence should be limited to the issue of the fair value of the DSA Shares, to be contrasted with the fair value as determined by the Defendant using the formula set out in clause 2 of the PSA. The task of the Court is to determine whether its appraisal of the fair value is greater than the Defendant's assessment or not.

Conclusion

33. For the above reasons, I (a) found on March 21, 2011 that the Defendant is entitled to seek security for costs in amount to be fixed by the Court if not agreed, and (b) now find that the expert evidence should be limited to an appraisal of the fair value of the DSA Shares. Unless either party applies by letter to the Registrar to be heard as to costs within 14 days, the costs of the Defendant's application shall be in the cause.

Dated this 24th day of March, 2011 _____
KAWALEY J