In The Supreme Court of Bermuda

CIVIL JURISDICTION

COMMERCIAL COURT

2011: No. 255

IN THE MATTER OF KINGBOARD COPPER FOIL HOLDINGS LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 1981, SECTION 111

BETWEEN:

ANNUITY & RE LIFE LTD

Petitioner

-v-

(1) KINGBOARD CHEMICAL HOLDINGS LIMITED

(2) JAMPLAN (BVI) LIMITED

(3) KINGBOARD LAMINATES HOLDINGS LIMITED

(4) EXCEL FIRST INVESTMENT LIMITED

(5) KINGBOARD COPPER FOIL HOLDINGS LIMITED

Respondents

RULING ON STRIKE-OUT APPLICATION

(In Chambers)

Date of Hearing: January 13, 2012
Date of Ruling: January 16, 2012

Mr. Jeffrey Elkinson and Mr. Ben Adamson, Conyers Dill & Pearman Limited,
for the Respondents/strike-out applicants

Mr. John Riihiluoma and Mr. Martin Ouwehand, Appleby Limited,
for the Petitioner/strike-out respondents

Introductory

1. The Petitioner, a Bermuda company, together with its non-party parent, Pope Investments LLC, a Delaware company, ("Pope"), owns an approximately 10% minority stake in the 5th Respondent, also a Bermuda company ("the Company"). The 1st Respondent ("Kingboard Chemical"), a Caymanian company, is the ultimate parent company in the Kingboard Group. It appears to control the Company through its interests in the other Respondents.

2. The Company makes copper foil which is used in the manufacture of circuit boards or laminates. It primarily sold its products to other members of the Kingboard Group. In 1999 the Company made its Initial Public Offering and became listed on the Singapore Stock Exchange.

3. Pope first invested in the Company in November, 2006. The Petitioner acquired its shares from Pope in 2009. Pope has recently acquired further shares in the Company, after the occurrence of the events of which the Petitioner complains in this section 111 of the Companies Act 1981 Petition. The complaints fall into two broad categories:

    (a) as set out in the original Petition filed on August 3, 2011, the Company's management (acting on behalf of the majority shareholders) failed to honour or confirm that it was honouring representations made in the IPO Prospectus designed to ensure that the business conducted with related parties was not prejudicial to the rights of minority shareholders. These broad allegations were found to be too speculative to warrant pre-action discovery in support of a minority shareholder prejudice claim by the High Court of Singapore in 2010; and

(b) as set out in the draft[1] Amended Petition, by way of amendment, the Company's management (acting on behalf of the majority shareholders) caused a wholly-owned subsidiary to subvert the minority shareholders' right to approve major related-party transactions through the Harvest License Agreement of August 2011. Under the License Agreement, the Company's entire assets and operations were transferred to Harvest on uncommercial terms. This transaction had the effect of sidestepping the resolution passed by minority shareholders including the Petitioner and Pope to terminate the Company's mandate to sell the vast majority of its products to the Kingboard Group.

4. By a Summons issued on August 31, 2011, the Respondents applied to strike-out the Petition on the grounds that:

(1) the Petition is frivolous, vexatious and/or otherwise an abuse of the process of the Supreme Court; and

(2) it discloses no reasonable cause of action as against the Respondents or at all.

5. The draft Amended Petition was served on September 21, 2011, after the strike-out application was issued but before the evidence in support of it was filed. The strike-out application was supported by the Affidavit of Mr. Cheung Kwok Wa, the Chairman of the 3rd Respondent ("Laminates"), and by the First and Second Affirmations of Mr. Cheung Kwok Ping, an Executive Director of the Company. The application was opposed by the Second Affidavit of William P. Wells.

Principles applicable to strike-out applications

6. Order 18 rule 19 of the Rules of the Supreme Court as read with rule 159 of the Companies (Winding-Up) Rules 1982 apply to petitions under section 111 of the Companies Act: *Chiang and Pacific Challenge Holdings Ltd.-v- Kistefos Investment AS* [2002] Bda LR 50 (Court of Appeal for Bermuda) at page 7. This was a case where the central complaint was the sale of a significant asset at an undervalue to a related party. Sir James Astwood (P.) held at page 11 of the Court's judgment upholding Storr AJ :

[1] The hearing proceeded on the basis that leave to amend had been granted on September 23, 2011, despite the somewhat ambiguous terms of the Order drawn up on that date in this regard.

"*We agree with the judge's approach to the strike out application. He will come to his final conclusion when he has heard the evidence tested in cross-examination as to whether the conduct complained of amounts to conduct which is oppressive and/or unfairly prejudicial to the interests of some part of the members of the company including Kistefos.*

We concluded that the judge had not erred and that the petition should be allowed to proceed to trial. In our view, sufficient facts are pleaded in the petition to indicate to the Company and Chiang what the allegations are which are asserted against them. In our opinion if these allegations are established, the judge could infer that the conduct complained of has been proved.

The application to wind up the Company was, in our opinion, the remedy of last resort. Kistefos wish to divest themselves of their shares and if a fair or reasonable offer is made to them by the Company or Chiang to purchase their shares, no doubt they will accept it. We adopt as applicable to this case the words from the judgment of Sir Richard Scott, V.C. in the case of Re a Company and others [1997] 1BCLC 479 at p. 491 :

> '*...it seems to me clear that the retention in the petitions of a prayer that the companies be wound up is a source of potential damage to the companies. If those with whom the companies do business are led to believe that the winding-up orders may be made against the companies, it is easy to accept that damage to their trading prospects may follow. This risk of damage might have to be accepted if there were a real prospect that the judge who heard the petitions might conclude that in the circumstances winding-up orders should be made. But since, as I have concluded, there is no real possibility that may happen, it seems to me that the risk of the damage to which I have referred is an additional reason why the prayers for winding-up orders should be struck out.'* "

7. In the present case the Petitioner has carefully avoided including a prayer for a winding-up order in the Petition; so no heightened concern about the damage the continuance of these proceedings might cause to the Company as a solvent and trading listed company exists. In the *Kistefos* case, the Court of Appeal also approved the petitioner's reliance on:

> "*…in re H.R. Harmer Ltd [1959] 1WLR 62 (C.A.) and the dictum of Jenkins LJ at p. 84 when he cited with approval the judgment of Roxborough LJ in these terms:*
>
> > *'But I would just observe in passing that [Section 111] does not say 'who complains of acts of oppression'; it says 'that the affairs of the company are being conducted in a manner oppressive.' In other words, I think it invites attention not to events considered in isolation but to events considered as part of a consecutive story: and it is because I take that view that I have not dealt (and do not propose to deal) with each of the items I have enumerated one by one it remains in my view, a question for the court to decide on the whole story, as revealed in the evidence, whether the affairs of the company are being … conducted in a manner oppressive to some part of the members.*"

8. That said, Mr. Elkinson was right to point out that the Court should be astute to avoid section 111 petitions being used to assert improper pressure on a listed company with a view to achieving a commercial gain. It is always necessary, on a strike-out application such as the present one, to carefully ascertain whether the complaints are sufficiently tenable to warrant putting the respondents to the time and expense of a full hearing on the merits.

9. In the Bermudian offshore context, however, the Court must also balance a pragmatic respect for the actual or potential role the courts and/or regulators in the jurisdiction where the respondent company's commercial activities are based with an appreciation of the primary responsibility this Court has to adjudicate corporate governance complaints asserted against companies incorporated here.

10. These additional considerations will ordinarily be, and are in the present case, subsumed under the umbrella of the recognised principles applicable to striking-out proceedings generally and minority shareholder oppression petitions in particular.

Does the Petition fail to disclose a reasonable cause of action?

The broad complaints about the transfer pricing issue

11. The main complaint made in the pre-amended Petition was that the Company's copper foil was being sold to affiliates of the majority shareholders at an undervalue contrary to (a) representations made to minority shareholders during the IPO process, and (b) management's duty to act in the best interests of all shareholders, including the minority.

12. This was said by the Respondents to disclose no reasonable cause of action on two main bases. Firstly, it was said that the financial analysis that the price charged to the Kingboard Group was illegitimate based on an analysis of the profit margins of the Company and Laminates was speculative. Secondly it was submitted that the Petitioner had a remedy which it had, belatedly, successfully deployed at the 2011 AGM: voting against the mandate the Company required from shareholders (excluding the conflicted majority) on the terms on which sales to the related parties would take place.

13. In my judgment these complaints, standing by themselves, did not disclose a reasonable cause of action because the Petitioner (and other minority shareholders) at all material times possessed the power to regulate the terms upon which the related transactions took place. The SGX Rules prohibited the majority from voting on this issue. It is unsurprising that the Singapore High Court declined to grant pre-action discovery on the grounds that no arguable minority prejudice or oppression claim had been disclosed.

14. However, the decision to strike-out falls to be determined in the light of the Amended Petition and the related allegations made about the Harvest License Agreement.

Laminates' offer to purchase the Company's shares at a deflated price

15. This was one of two allegations which it was submitted in Mr. Elkinson and Mr. Adamson's Submissions (at paragraph 19) was "*unsustainable on the most cursory analysis and should be struck out.*"

16. It was alleged that Laminates sought to purchase the Company's shares at a deflated price through a scheme of arrangement which was voted down by minority shareholders. The Respondents submitted that Laminates' actions were not attributable to the Company: *Re Astec (BSR) plc.* [1999] BCC 59 at 70C. Jonathan Parker J observed in this regard:

> "*Section 459 relates, and relates only, to the affairs, acts or omissions of the company. Thus, in cases where the company has a controlling shareholder a distinction must be made between the affairs of the company and the affairs of the controlling shareholder; between acts and omissions (actual or proposed) of the*

company, and acts or omissions of the controlling For the purposes of s.459 it is the company's affairs, acts and omissions which alone are material."

17. I agree that this complaint discloses no reasonable cause of action and ought to be struck out, for the additional reason that the attempted purchase was admittedly rebuffed in any event.

The Petitioner's attempt to investigate

18. Paragraphs 48 to 50, looked at in isolation, do not disclose a tenable allegation of oppression. They do form part of a narrative which must be considered together with the broader pricing transfer complaints and the Harvest License Agreement Complaints.

The Harvest License Agreement

19. It is alleged in the Amended Petition that, *inter alia*:

> "*60. Further, the purported effect of the License Agreement is to circumvent the consequences of the refusal of the minority shareholders to pass Resolution 8 and enable transactions with interested persons to continue without a Shareholders Mandate pursuant to Chapter 9 of the Listing Rules...*"

20. The Petitioner's case is that once the minority shareholders refused to approve the terms on which the Company's products were sold to the Kingboard Group, the majority shareholders devised a mechanism to bypass the minority shareholder's SGX-based veto altogether. The Amended Petition clearly discloses a reasonable cause of action, when the original transfer-pricing complaints and the subsequent License Agreement allegations are read as a composite narrative.

21. The relevant allegations are accordingly not liable to be struck-out on the grounds that they disclose no reasonable cause of action.

Is the Petition liable to struck-out on the grounds that it is frivolous, vexatious or otherwise an abuse of process?

22. Having regard to the facts that are common ground, in my judgment it is impossible to fairly conclude that the transfer-pricing complaints combined with the License Agreement complaints are plainly unsustainable. Mr. Riihiluoma was not being hyperbolic in characterising the License Agreement as one of the most unusual legal documents he had ever seen.

23. It is arguably oppressive to the minority to respond to their legitimate blocking of a mandate seeking their approval of the terms upon which the Company would contract with the majority's Group to rearrange the Company's operations, *without the minority's assent*, so that such approval was no longer required.

Conclusion

24. Save that paragraphs 46 to 47 are struck-out as disclosing no reasonable cause of action, the strike-out application is dismissed. The application would have succeeded *in toto* but for the amendments notified to the Respondents on September 21, 2011.

25. Unless either party applies by letter to the Registrar to be heard as to costs, I would award the Petitioner its costs of the application after September 21, 2011 when it served its Draft Amended Petition, and award the Respondents their costs up to and including September 21, 2011.

Dated this 16th day of January, 2012 _____
KAWALEY J