In The Supreme Court of Bermuda

CIVIL JURISDICTION

COMMERCIAL COURT

2011: No. 191

IN THE MATTER OF FULL APEX (HOLDINGS) LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 1981

BETWEEN:

(1) ANNUITY & LIFE RE LTD.

(2) MADAM LOH YEW @ LAU AH MOI

(3) KOH TZE CHIAT

Petitioners

-and-

(1) FULL APEX (HOLDINGS) LIMITED

(2) FULL EXCELLENT LIMITED

(3) GUAN LINGXIANG

(4) LIANG HUIYANG

Respondents

RULING ON STRIKE-OUT APPLICATION

(In Chambers)

Date of Hearing: January 27, 30, 2012
Date of Ruling: February 6, 2012

Mr. Christian Luthi, Conyers Dill & Pearman Limited,
for the 1st Respondent ("the Company")

Mr. Andrew Martin, Mello Jones & Martin, for the 2nd -4th Respondents
("the Majority Shareholders")

Mr. John Riihiluoma and Mr. Martin Ouwehand, Appleby Limited,
for the Petitioners

Introductory

1. The Company was incorporated in Bermuda on April 5, 2002. It became listed on the Singapore Stock Exchange ("SGX") on in June 2003. Mr. Guan and Ms. Liang Huiyang, directly and through the 2nd Respondent, own approximately 64% of the Company. The 3rd and 4th Respondents are married and serve as Chairman and Vice-Chairman, respectively, of the Company's Board.

2. The 1st Petitioner ("Annuity") is a subsidiary of Pope Asset Management LLC ("Pope"). By March 2011, Pope owned an approximately 13% stake in the Company. Annuity first became a registered shareholder in or about April 2006; according to its own evidence, this registration occurred at the direction of Pope to enable Annuity to qualify as a petitioner for the purposes of the present proceedings.

3. The 2nd and 3rd Petitioners are mother and son. The 3rd Petitioner has no shares registered in his own name, although he beneficially owns shares via the Central Depositary System ("CDP") through which shares are traded on the SGX. The 2nd Petitioner petitions on the basis of shares transferred to her in her own name by her children in May 2011, although she first acquired shares in the Company in or about 2004 held in the name of the CDP.

4. The Petition was presented on June 21, 2011. The Respondents challenge the standing of the Petitioners on the following grounds:

    (a) the Petitioners were not registered shareholders for six months before the Petition was presented as required by section 163(1)(a) of the Companies Act 1981 (all three Petitioners);
    (b) the 3rd Petitioner was not a registered shareholder when the Petition was presented, nor even a registered shareholder at the date of the hearing of the strike-out application.

5. The Respondents also apply to strike-out the Petition on the following additional principal grounds:

    (1) the Petitioners cannot complain about matters which occurred before they acquired their qualifying shareholding in the Company;
    (2) the Petitioners cannot complain about the 2009-2010 delisting proposal and/or the related manipulation of accounts allegations because the proposal was successfully blocked by Pope at a special general meeting on February 25, 2010 held according to SGX rules;
    (3) the Petitioners cannot complain about the Full Development Ltd. ("FDL") transaction being at an undervalue, because no sustainable case of oppression and/or unfair prejudice is pleaded;
    (4) the Petitioners cannot complain about the Company's failure to provide an explanation, because no sustainable case of oppression and/or unfair prejudice is pleaded;
    (5) the Petitioners' pattern of buying shares is inconsistent with their alleged concerns and demonstrates a collateral purpose or an abuse of process.

The Petitioners' standing to petition

Does section 163(1) (a) apply to section 111 petitions?

6. The Petition is presented under section 111 of the Companies Act 1981 ("*Alternative remedy to winding-up in cases of oppressive or prejudicial conduct*") and contains no prayer for a winding-up order. The Court is empowered under section 111(2) as follows:

> "*(2) If on any such petition the Court is of opinion—*
>
> *(a) that the company's affairs are being conducted or have been conducted as aforesaid; and*
>
> *(b) that to wind up the company would unfairly prejudice that part of the members, but otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up,*
>
> *the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise.*"

7. The right of petition is conferred by section 111(1) on: "*Any member of a company who complains…*"[1] [emphasis added]. Section 19 (1) of the Act provides that all subscribers to a company's memorandum of association and (2) "[e]*very other person who agrees to become a member of a company, and whose name is entered in its register of members, shall be a member of the company.*" This definition of "*member*" extends to the Act generally, "*unless the context otherwise provides*": section 2(1). Section 111 is found in Part VIII of the Act ("INVESTIGATION OF THE AFFAIRS OF A COMPANY AND PROTECTION OF MINORITIES"). There is no obvious basis for displacing the generally applicable definition of member in section 111 or Part VIII.

8. Section 163 is found in Part XIII of the Act ("WINDING UP"). Section 163 provides in salient part as follows:

> "***Applications for winding up***
> *163 (1) An application to the Court for the winding up of a company shall be by petition, presented either by the company or by any creditor or creditors, including any contingent or prospective creditor or creditors, contributory or contributories, or by all of those parties, together or separately:*
>
> *Provided that —*
>
> > *(a) a contributory shall not be entitled to present a winding up petition the shares in respect of which he is a contributory, or some of them, either were allotted to him or have been held by him and registered in his name, for at least six months during the eighteen months before the commencement of the winding up, or have devolved on him through the death of a former holder...*"

9. "Contributory" is a term of art, used in the context of Part XIII of the Act, for a member in relation to a company being wound-up: sections 158-159. Section 163(a) of the Act, according to its terms, imposes a special standing requirement for a "*contributory*" who wishes to "*present a winding up petition*": the holding of shares "*registered in his name, for at least six months before the commencement of the winding up*". A straightforward reading of these provisions plainly suggests that section 163(a) applies to winding-up petitions alone.

10. Nevertheless, Mr. Martin (whose submissions were supported by Mr. Luthi) made the ambitious submission that section 163(a) applied not just to winding-up petitions, according to its express terms, but to section 111 minority shareholder petitions as well. He was bound to concede that there was no authority in support of this argument, although:

    (a) Section 111 is based on section 210 of the 1948 Companies Act (UK) (now section 459 of the 1995 Companies Act (UK)); and

[1] The Registrar of Companies may also petition.

(b) Section 163(1)(a) is based on section 224(1)(a)(ii) of the Companies Act 1948 (UK) (now section 124(2)(b) of the Insolvency Act 1986).

11. Mr. Riihiluoma suggested it was unsurprising that no authority existed for such an improbable submission.

12. In fact, indirect authority is merely consistent with the natural and ordinary meaning of the relevant statutory words. The Judicial Committee of the Privy Council first considered section 111 of the Act in *Bermuda Cablevision Ltd.-v- Colica Trust co. Ltd* [1998] A.C. 198 and Lord Steyn (at page 210D) stated: "*Section 111 is a self-contained remedial measure with its own in-built safeguards*". In *Kistefos Investments Holdings Ltd.-v-Lily Chiang and Pacific Investments Holdings Limited*, Supreme Court of Bermuda 2001: 86, Judgment dated October 18, 2001, Storr J (Acting) struck-out the prayer for winding-up included in a section 111 petition following an analysis based on the hypothesis that section 111 constituted an entirely discrete legal remedy. This decision was upheld by the Court of Appeal: [2002] Bda LR 50.

13. The clearest authority supportive of the Petitioners' position on the non-applicability of the contributory standing rule under section 163(1)(a) is *Re a company* [1986] BCLC 391. In this case the standing of the petitioner to seek minority shareholder relief and a winding-up order was directly in issue. Hoffman J's separate treatment of these two issues was clearly based on the assumption that there were two discrete requirements: (a) being a registered member for minority shareholder oppression relief; and (b) being a registered contributory for six months as regards winding-up relief.

14. I find that the standing requirements contained in section 163(1)(a) of the Companies Act 1981 do not apply to petitions presented under section 111 which only seek relief by way of alternative to a winding-up order.

Does the 3rd Respondent have standing to petition despite having no shares registered in his name?

15. The 3rd Petitioner has no standing to petition as he had no shares registered in his name as required by section 111(1) of the Act as read with section 19 (2). He is not, for these purposes, a "member". His claim is accordingly struck-out.

16. Mr. Riihiluoma invited the Court in this event to expressly grant leave for the 3rd Petitioner to apply to be re-joined to the Petition should he subsequently acquire the requisite status. I see no justification for prejudging at this stage any future application that may be made in this regard.

Is the Petition liable to be struck-out because the allegations made about matters which pre-dated their status as registered members are unsustainable?

17. Section 111 provides as follows:

> "*(1) Any member of a company who complains that the affairs of the company are being conducted or have been conducted in a manner oppressive or prejudicial to the interests of some part of the members, including himself, or where a report has been made to the Minister under section 110, the Registrar on behalf of the Minister, may make an application to the Court by petition for an order under this section.*" [emphasis added]

18. In *Bermuda Cablevision Ltd.-v- Colica Trust Co. Ltd* [1998] A.C. 198, the argument that the petitioner's prior knowledge of matters which occurred before it became a member debarred it from advancing its complaints was expressly rejected by the Judicial Committee. Mr. Luthi in his oral submissions sought to sidestep this authority by complaining not of prior knowledge, but of a lack of any sufficient nexus between the prior conduct complained of and the subsequently acquired interests of the Petitioners. Assuming in the Respondents' favour that this issue is distinguishable from the prior knowledge point considered by the Privy Council in *Bermuda Cablevision Ltd.*, there can still be no universally applicable legal objection to complaints about past events. As Lord Steyn opined in that case (at page 212 A-B): "*By its express terms section 111 covers both past and future conduct*".

19. Whether the facts and matters complained of and occurring before the Petitioners became qualified as members in Companies Act terms impact on the Petitioners to a sufficient extent to entitle them to obtain the relief which they seek goes to the merits not the sustainability of the Petition. These questions involve the determination of highly contentious facts (or, in many instances, highly contentious disputes about what inferences may fairly be drawn from undisputed primary facts). It is also legally arguable that the Court may take into account the fact that Annuity is *de facto* a nominee of Pope, which was at all material times a beneficial owner of shares in the Company: *Lloyd-v-Casey and others* [2002] 1 BCLC 454 at paragraph [50].

20. The Petition is not liable to be struck-out on the ground that the matters complained of pre-date the acquisition of the Petitioners acquiring shares registered in their own names.

Is the delisting proposal allegation liable to be struck-out on the grounds that the proposal was blocked and has no prospect of being passed again?

21. I accept the Respondents' submission that the delisting proposal and share value suppression allegations cannot constitute actionable heads of unfair prejudice because (a) the Company advanced the proposal subject to shareholder approval, (b) adhered to the relevant SGX rules requiring 90% approval and an independent fairness opinion, and (c) accepted that the proposal was validly defeated when Pope used its 10% plus voting power. The following passage from the judgment of Peter Gibson LJ in *Re Legal Costs*

Negotiators Ltd.[1999] BCC 547 at 551 which was cited by Mr. Luthi sets out the principles upon which I rely:

> "*As Oliver LJ said in Re Bird Precision Bellows Ltd. (1985) 1 BCC 99,467 at p.99, 471; [1986] Ch 658 at p. 669D, the very wide discretion conferred on the court to do what it considered fair and equitable is 'in order to put right and cure for the future the unfair prejudice which the petitioner has suffered at the hands of the other shareholders of the company'. If the matters complained of have been put right and cured and cannot recur, it is hard to see how the court could properly grant relief.*"

22. However this was the Respondents' fall-back position. Their main complaint was that the allegation that the privatization offer was deliberately timed before a year of bumper earnings in 2010 so as to depress the share price was highly speculative and improbable having regard to the fact that the Company had reputable management including independent directors and respected auditors. It also fell short of alleging fraud or even a breach of fiduciary duty, while implying potentially criminal misconduct without any particularity. I agree that for these further reasons the delisting complaint is unsustainable and bound to fail to the extent it is relied upon as a free-standing ground of unfair prejudice.

23. I have considered whether I should decline, in the exercise of my discretion, to strike-out paragraphs 24 to 33 altogether. Mr. Riihiluoma suggested that the Petitioners ought to be permitted to rely on the matters complained of as background, supportive of any sustainable pleas they make. The difficulty with this suggestion is that the relevant averments would only be potentially relevant if the Petitioners were able to prove misconduct which is not adequately pleaded and presently only insinuated, for instance:

    (a) "*By timing the announcement to take the Company private in the first quarter of 2010, management offered a low price based on historical financial results. The recent financial results demonstrate that the Majority Shareholders were likely aware of how much better operations would be during 2010…*" (paragraph 32);

    (b) "*While a fairness opinion was provided, the offer price made to the minority shareholders was at a significant discount…*" (paragraph 33).

24. From the Wells Affidavit sworn in opposition to the strike-out application, it seems possible that expert evidence might establish that the fairness opinion was deficient. Proof of this would take the petition no further. There is no suggestion that Annuity will also be able to adduce evidence capable of proving that the directors and/or or the majority shareholders procured the Independent Financial Advisers to produce a report which understated the true value of the Company's shares. Assuming that the Petitioners might be able to establish simply that the Majority Shareholders timed their privatization offer so as to enable themselves to buy at the lowest possible price, to my mind such

conduct would neither be capable of demonstrating any propensity for want of probity nor capable supporting any sustainable pleas of actionable unfair prejudice.

25. The costs which would likely be incurred in exploring these matters even as background supporting allegations would in my judgment likely be grossly disproportionate to their significance to the case as a whole. I accordingly I grant the Petitioners strike-out application in relation to paragraphs 24 to 33 of the Petition pursuant to Order 18 rule 19, as read with Order 1A of the Rules of the Supreme Court. This aspect of the decision is not intended in any way to affect any references in paragraphs 34 to 46 to the delisting proposal.

The FDL Transaction

26. The nub of the FDL Transaction complaint is that the Company in 2010 sold 22% of the subsidiary which in 2009 produced 98% of the Company's profits at a price based on a valuation of the Company's own shares which was 30% of its then trading value. Although the rationale for the sale was that the buyer was a strategic investor, no tangible evidence for assessing the strategic value of the investor, a Mr. Mai, is said to exist. Mr. Riihiluoma submitted that the transaction was structured in such a way as to fall outside the SGX threshold for shareholder approval "by a whisker". The Petition alleges that the transaction, having regard to the Company's explanations for it, was commercially irrational and accordingly unfairly prejudicial to the Petitioners as minority shareholders.

27. Distilling the Respondents' submissions to their essence, it was contended that these complaints were no more than impermissible challenges to the commercial judgment of the Company's management, advanced by Petitioners who were willing to hint at but not explicitly allege fraud or any other want of probity. As I indicated in the course of Mr. Luthi's argument against a Petition primarily presented by the subsidiary of Pope, these complaints (somewhat ironically) brought to mind the following words of the poet Alexander Pope, oft-quoted by judges considering similar submissions:

> "*Willing to wound, and yet afraid to strike,*
> *Just hint a fault, and hesitate dislike…*"[2]

28. Precisely what constitutes unfair prejudice in the context of a Bermudian company which is listed on an overseas stock exchange which is not alleged to have acted in breach of its express internal or external regulatory rules will ordinarily raise difficult questions of law and fact of potential public importance because of the implications for the management of the numerous such companies established here. The Court needs to strike a careful balance between affording minority shareholders a fair hearing of their complaints and avoiding the risk of exposing solvent public companies regulated by reputable foreign stock exchanges to undue harassment from frivolous claims. Which side of the line a

[2] Epistle to Dr. Arbuthnot.

marginal case such as the present one falls on will, however, very rarely be appropriate to determine at the strike-out stage.

29. It is clear that in appropriate circumstances, "*a court hearing a petition is entitled to consider, not only whether or not a company's Articles or Bye-laws have been breached, but also whether those conducting the affairs of the company have acted unfairly towards a member or members even though acting strictly within their legal powers*": Storr J (Acting), *Kistefos Investments Holdings Ltd.-v-Lily Chiang and Pacific Investments Holdings Limited*, Supreme Court of Bermuda 2001: 86, Judgment dated October 18, 2001 (at pp. 10-11), a decision dismissing a strike-out application which was upheld by the Court of Appeal for Bermuda [2002] Bda LR 50.

30. *Kistefos* was also a case where the transaction under attack on a section 111 petition was said to have been carried out at an undervalue as well as being structured so as to avoid the relevant stock exchange's minority shareholder protections. However the petition in that case apparently set out particulars of all the key allegations "*specifying the manner in which it says the particular transaction is oppressive*…" (Judgment, page 5).

31. In the course of argument, Mr. Riihiluoma made it clear that the crucial legal tenet of his clients' case was that the impugned transaction was not approved by the Company's management acting in the best interests in the Company-in other words, that there had been breach of fiduciary duty on the Company's part[3]. In this respect, the transaction breached the implied bargain between the shareholders and the Company to the effect that the Company's powers would be exercised *bona fide* in the interests of the Company.

32. Formulated in this manner, this complaint was more clearly a sustainable unfair prejudice allegation, taking into account the comparatively low threshold of sustainability a claimant must meet to survive a strike-out application according to principles which are too well settled to be repeated here.

33. However, I accept Mr. Martin's submission that sufficient particulars of the wrongdoing ought to be pleaded; this is necessary so that the Respondents and the Court can fairly understand the precise nature case being advanced and to confirm that a sustainable case can indeed be advanced. Having regard to the Petition as presently drafted, the contents of the Wells affidavit sworn in opposition to the strike-out application and counsel's arguments, I find that the Petitioners ought to be given a further opportunity of advancing an adequately pleaded claim in respect of the FDL Transaction.

[3] There is no need to directly assert any specific case against the majority shareholders themselves, as distinct from the Company they *de facto* and/or *de jure* control: Hollington, '*Shareholders' Rights*', 4th edition (Thomson/Sweet & Maxwell: London, 2004), paragraph 8-10.

34. Rather than striking-out paragraphs 34 to 46 of the Petition, I would grant leave to the Petitioners to amend the Petition in a form further particularizing the FDL claim, on such terms as may be directed if not agreed[4].

The Company's Failure to Provide an Explanation

35. The essential complaint that, although Pope was able to successfully requisition a special general meeting ("SGM") and question Mr. Guan about the FDL Transaction, "*Pope's representatives received no satisfactory answer*" does not disclose a reasonable case of unfair prejudice. There is no express or implied general duty owed by a Company to its shareholders to provide answers to queries about the Company's affairs which are objectively or subjectively "satisfactory". If any such duty exists, it was not identified by counsel in the course of argument. No finding that the information furnished by the Company about the FDL Transaction, before or in the course of the present proceedings, was inadequate can be sensibly made independently of a finding that the transaction itself was to some extent misconceived.

36. Without prejudice to the Petitioners' right to rely on evidence in relation to the SGM in support of its FDL Transaction claim, paragraphs 47 to 52 of the Petition are struck out as a free-standing ground of unfair prejudice.

The Petitioners' buying patterns evidence an abuse of process

37. The recent purchases of the Company's shares made by the Petitioners were largely explained as formal changes made to the registered shareholder name for the purposes of commencing the present proceeding. This strike-out ground was not substantiated.

Summary

38. The 3rd Petitioner is not a "member" qualified to present a petition under section 111 of the Companies Act 1981. All his claims are struck-out.

39. As regards the 1st and 2nd Petitioners, the Attempted Privatization pleas (paragraphs 24-33 are struck-out altogether on the grounds that they are unsustainable. So far as the Company's Failure to Provide an Explanation pleas are concerned (paragraphs 47 to 52), these averments are struck-out insofar as they are relied upon as an independent ground for seeking relief for unfair prejudice.

40. Although the FDL Transaction ground is liable to be struck-out for want of particularity, the Petitioners are granted leave to amend to cure the deficiencies upon such terms as may be directed by the Court or otherwise agreed.

[4] As neither the Court nor the Respondents have seen the proposed amendments, it would be wrong absent agreement to grant leave outright though it is to be hoped that a formal application for leave to amend will not be required.

41. I will hear counsel as to costs and as to the form of order required to give effect to this Ruling.

Dated this 6th day of February, 2012 _____
KAWALEY J