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

Petitioners

-v-

(1) FULL APEX (HOLDINGS) LIMITED

(2) FULL EXCELLENT LIMITED

(3) GUAN LINGXIANG

(4) LIANG HUIYANG

Respondents

RULING

(In Chambers)

Date of Hearing: August 29, December 5, 2012
Date of Ruling: December 14, 2012

Mr. Martin Ouwehand, Appleby (Bermuda) Ltd,
for the Petitioners

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

Ms Fozeia Rana-Fahy, MJM Ltd, for the 2nd -4th Respondents
("the Majority Shareholders")

Introductory

1. The Company applies by Summons dated June 25, 2012 "*for an Order permitting and/or authorizing the Company taking an active role in the present litigation*". The "present litigation" is a minority shareholder oppression application.

2. The Petition was initially presented on June 21, 2011. Following my Ruling dated January 16, 2012 when certain portions of the Petition were struck-out, the Petitioner amended its Petition. Directions were given for the filing of pleadings. The present application was initially argued on August 29, 2012. It was adjourned generally with liberty to restore after the Company had filed its Defence. The primary rationale underlying this adjournment was so that the Court would be in a better position to appraise the contention that the present litigation was not simply an ordinary shareholder dispute but one in which the Company had an independent position to advance.

3. Having filed its Defence, the Company revived the present application which requires the Court to consider, probably for the first time, whether the starting assumption that the Company should play no active role during the substantive adjudication of a shareholder dispute should be modified.

4. This question arises in relation to a company which is not a quasi-partnership but in the context of a company which (a) is listed on a foreign stock exchange, (b) has shareholders who were not represented before the Court, and (c) for present purposes acting by its independent directors.

The Pleadings

5. The Petition alleges that the Majority Shareholders own 64.73%[1] of the Company's shares and the 1st Petitioner owns a more than 10% stake. It appears that the 2nd Petitioner's stake is less than 1%. Accordingly approximately 20% of the Company's shareholders are not parties to the present proceedings.

[1] The Company's position is that this shareholding is 64.3%: Defence, paragraph 5.

6. The Petition complains about the so-called FDL Transaction which was announced on October 22, 2010 and is alleged to have merged three subsidiaries which in 2009 generated 98% of the Company's profits. The sale of 22% of FDL to a company owned by an admitted business acquaintance of the Company's Executive Chairman, Mr Guan, is alleged to have been on un-commercial terms which unfairly diluted the value of the Petitioner's shareholding. The transaction was structured in such a way as to bypass Singapore Stock Exchange ("SGX") protections for minority shareholders. It is also alleged that "*the Company's directors have breached their fiduciary duty to act in good faith in the best interests of the Company*" (paragraph 45). In support of the principal complaints about the FDL transaction, it is complained that the Company provided no or no satisfactory explanation.

7. In the Defence of First Respondent to Amended Petition, the Company alleges in response that (a) the SGX Listing Rules did not require shareholder approval based on the 31 December 2009 audited accounts, (b) there was no conflict of interest involved in the FDL Transaction because no director or substantial shareholder had any pre-existing relationships with the purchaser or its principal; and (c) the transaction was at fair value and the share price based on arms' length negotiations and took into account benefits accruing from the use to which the purchase monies could be put.

8. The Defence of the 2nd to 4th Respondents avers that although the recommended proportion of independent directors is one third, two of the five board members are independent and that the impugned decisions were made by all members of the Board (paragraph 4).

9. In the Fourth Tan Affirmation, the establishment of an independent committee of the Board of Directors to instruct solicitors in relation to the present proceedings is explained.

10. In the Fifth Tan Affirmation, it is stated that the main reason the Company seeks to play an active role in the litigation is the risk that findings might be made on issues that the Majority Shareholder could address in a different way which would adversely affect the Company's SGX listing status. It is acknowledged that the FDL Transaction has now been reversed and that it might be argued at the hearing of the Petition that the complaints are academic. It is also conceded that no direct breach of the listing rules is relied upon in the Petition. However it is contended that the Company has a distinctive role to play in advancing the argument that it "*has acted in accordance with the letter and spirit of the listing rules.*"

Legal findings: principles applicable to authorising the Company to play an active role in a shareholder dispute

11. Mr Ouwehand for the Petitioner submitted that unless the Court was to apply a new test as to when a company's funds could be expended upon a shareholder dispute, the Company's application ought properly to be dismissed. He relied heavily on this Court's analysis of the law in *Westport Trust Company Ltd-v- Paragon Trust Ltd et al* [2010] Bda LR 35. The principles I approved in that case were the following:

> "*16. The proposition that a company ought not expend its funds save for legitimate corporate purposes was supported as a broad general principle by reference to the principle articulated in Pickering-v- Stephenson (1872) L.R. 14 Eq 322 at 340, 'that the governing body of a corporation, that is in fact a trading partnership, cannot, in general, use the fund of the community for any purpose other than those for which they were contributed.' However, the narrower principle of the impropriety of a company expending its funds to respond to a section 111 petition was supported by a number of dicta, most robustly the following observations of Harman J in Re a Company No. 004502 of 1988, ex parte Johnson [1991] BCC234 at 236-237:*
>
> > *' The train of authority being well established, it seems to me quite clear that, if it is shown that directors of a company have been causing the company's money to be spent on financing the company's resistance either to a 'pure' sec. 459 petition or, according to Plowman J in Re A &BC Chewing Gum and myself in Re Hydrosan, in financing the company's resistance to a member's winding-up petition based on the just and equitable ground, the court should prevent such expenditure. Such expenditure is a misfeasance, there is no excuse for it in law and it is not a question of an arguable case being raised showing that it may be right to permit misfeasances. Misfeasances are not matters that are permitted by the courts and there is no question of an arguable case at all.'*
>
> *17. Implicit from a reading of the earlier portions of Harman J's judgment is that the company's participation at its own expense is not justified where it is "a nominal party to the sec 459 petition, but in substance the dispute is between two shareholders": per Hoffman J in Re Crossmore Electrical and Civil Engineering Ltd. (1989) 5 BCC 37 at 38. The question of whether or not 'in substance the dispute is between two shareholders' clearly turns on the facts of each case, a point which the principal authority relied upon by Mr. Marshall clearly illuminated. The following principles apply to deciding whether a company's participation in the English equivalent of our own section 111 petition, according to Lindsay J in Re a company (No. 1126 of 1992) [1994] 2 BCLC 146:*

> *'Firstly, there may be cases (although it is unlikely nowadays when wide objects clauses are the norm) where a company's active participation in or payment of its own costs in respect of active participation in a s459 petition as to its own affairs is ultra vires in a strict sense.*
>
> *Secondly, leaving aside that possible class, there is no rule that necessarily and in all cases such active participation and such expenditure is improper.*
>
> *Thirdly, that the test of whether such participation and expenditure is proper is whether it is necessary or expedient in the interests of the company as a whole (to borrow from Harman J in ex p Johnson).*
>
> *Fourthly, that in considering that test the court's starting point is a sort of rebuttable distaste for such participation and expenditure, initial scepticism as to its necessity or expediency. The chorus of disapproval in the cases puts a heavy onus on a company which has actively participated or has so incurred costs to satisfy the court with evidence of the necessity or expedience in the particular case. What will be necessary to discharge that onus will obviously vary greatly from case to case.*
>
> *Fifthly, if a company seeks approval by the court of such participation or expenditure <u>in advance</u> then, in the absence of the most compelling circumstances proven by cogent evidence, such advance approval* [is very unlikely]*.''*
>
> 18. *... I find the above statement of principles to be highly persuasive and the fourth point to be of particular relevance to the present case. The starting point is for this Court to be sceptical about the need for the Company's participation.*"

12. That case was a classic quasi-partnership dispute with no issues in controversy which independently impacted on the company as opposed to the two shareholder protagonists. The degree of scepticism about the need for the company's involvement in what is obviously a shareholder dispute will logically be greater than in a factual matrix where the demarcating lines between narrow shareholder and wider company interests are more blurred. In a similar case, *Power-v-Ekstein* [2010]NSWSC 137[2], to which the Petitioners' counsel also referred, Austin J nevertheless opined as follows:

[2] (2010) 77 ACSR 302.

> "*[120] It also seems to me that a company has a legitimate interest in responding to a challenge to the validity of its decision-making, and hence the Companies should be permitted to respond to the plaintiff's allegations about failure to comply with constitutional provisions about rotation of directors leading to an absence of directors. That argument does not just affect the directors; it affects the integrity of the company and the interests of its members as a whole, by challenging the validity of its corporate actions.*"

13. Mr Luthi heavily relied upon *Trojan Equity Ltd –v- CMI Ltd et al* [2011] QSC 346 and, *inter alia*, the following dicta in McMurdo J's's Judgment:

> **"[27]***At this point some circumstances should be noted. The first is that unlike many oppression proceedings, not all of the members of the company are on one side or the other of the record. The Company's issued capital consists of 33,752,634 ordinary shares which are held by 1,271 members together with 28,005,311 class A shares which are held by 1,119 members. More than 99 per cent of the ordinary members, holding nearly 46 per cent of the ordinary shares, are not parties. More than 99 per cent of the class A members, holding 80.5 per cent of the class A shares, are not parties. Accordingly, there are many shareholders who are at least potentially affected by the outcome of these proceedings, at least insofar as relief is claimed against the Company. This is not a case of the kind in Pickering v Stephenson, where Sir John Wickens V-C said:*
>
> > *'It seems to me that where a quasi partnership of this sort is divided into a majority and a minority who differ on the question of internal administration, and litigation results from the difference, it is contrary to the spirit of the partnership to pay the expense of the litigation out of the general fund…'*
>
> *Shareholders who are not parties have an interest in the outcome as shareholders, such that a proper participation in the proceedings by the Company would serve a legitimate purpose as distinct from merely assisting one side of the dispute against the other.*
>
> *[28]Trojan argues that it can be appropriate for a company whose affairs are the subject of oppression proceedings to be heard on the appropriate form of relief, but not to participate in the preceding litigation by which an entitlement to relief is determined. In other words, it is suggested that the Company be permitted to participate only after the facts have been found. That approach has support in some of the authorities. However, the proceedings involve allegations which it is in the Company's interest to contest. For example, there is an issue as to the proper construction of the constitution of the*

> *Company, specifically in its provision for dividends to be paid to class A shareholders. The Company has a clear interest in the outcome of that issue. There are other issues for which the Company, as a listed public company, has a proper interest in the findings to be made as well as in the ultimate relief, because of the potential for those findings to affect the market for its shares. For example, the Company has pleaded to allegations concerning its financial position at various times, the conduct of and results of voting at meetings of the Company, the use of company resources, the validity of decision-making by its directors and whether it has complied with requirements of the Corporations Act.*"

14. I reject the suggestion made by the Petitioners' counsel to the effect that this decision represented a departure from established English principles recognised by this Court as being applicable to this area of the law. Vinelott J's decision in *Re a Company No. 007281 of 1986* (1987) 3 B.C.C 375 on what parties ought to be joined deals with a different proposition of joinder which does not arise in the present case. Mr Luthi also rightly distinguished the present case where independent directors are involved from the situation where all directors are nominees of the majority shareholder. In the latter case, the evidential threshold for demonstrating the existence of independent interests will be higher than where no independent directors are involved: *Re a Company (No. 1126 of 1992)* [1994] 2 BCLC 146 at 157a.

15. The test for determining whether a company should expend its funds on actively participating in a minority shareholder oppression petition is ultimately a simple one. It entails determining whether such involvement is in the interests of the Company as a whole having regard to the nature of the allegations raised and their impact (if any) on interests other than those of the disputing shareholders, being interests which the Company can legitimately claim the right to represent. In the case of a publicly listed company where public shareholders are not before the Court, a shareholder dispute which impugns the integrity of the Company's decision-making processes will often, potentially at least, engage such wider interests.

Findings: merits of the Company's application

16. I find that it is in the interests of the Company as a whole that the Company play an active role in the further conduct of the Petition with a view to addressing any corporate governance issues arising from the Amended Petition which might fairly impact upon the Company's status as a listed company and the interests of public shareholders not before the Court. This role ought properly to be a narrow one primarily limited to dealing with issues the other Respondents are not dealing with at all or, alternatively, refining points made by the other Respondents to add a distinctive gloss which the Company feels should be added to them. The following key factors support this conclusion:

(1) the Company is listed on the SGX and there are public shareholders (with a stake of around 20%) who are not presently before the Court;

(2) the Company had at all material times independent directors and its role in the present proceedings is being directed by independent directors;

(3) this Court cannot take judicial notice of foreign regulatory law in the same way that it can of local regulatory law. The Company's view of the SGX position, to the extent that it may be relevant, potentially carries a greater significance than if the Company was regulated solely by Bermudian law.

17. In these circumstances I reject the suggestion that the role of the Company is too ill-defined or that the appropriate course for the Company to take would have been to consult the public shareholders. I also take into account the fact that any abuse of the permission now granted to the Company to participate in the litigation can likely be dealt with, to some extent at least, by way of costs.

Conclusion

18. The Company is entitled to an Order permitting it to take an active part in the present proceedings within the parameters set out in this Ruling, in particular paragraph 16 above.

19. Unless any party applies by letter to the Registrar within 28 days to be heard as to costs, I would make the following Order:

(a) the Petitioners shall pay the Company's costs of the present application, to be taxed if not agreed;

(b) the costs as between the Petitioners and the 2nd to 4th Respondents shall be in the cause.

Dated this 14th day of December, 2012 _____

IAN RC KAWALEY CJ