The Court of Appeal for Bermuda

CIVIL APPEAL No 1 of 2014

Between:

(1) MFP-2000, LP

Appellant

-v-

(1) VIKING CAPITAL LIMITED
(2) MISA INVESTMENTS LIMITED

Respondents

Before: **Zacca, P.**
Auld, J.A.
Baker, J.A.

Appearances: Mr. John Brisby QC, Mr. Delroy Duncan, Trott & Duncan, for the Appellants
Mr. David Chivers QC, Mr. Christian Luthi, Conyers Dill & Pearman, for the Respondents

Date of Hearing: **10 June 2014**
Date of Judgment: **22 July 2014**

JUDGMENT

Auld, JA
Introduction

1. This appeal concerns the application to undisputed facts of Section 103 of the Companies *Act 1981* ("*the Act*"). Section 103 is one of a number of provisions in Part VII of the *Act* under the heading, *Arrangements, Reconstructions, Amalgamations and Mergers,* and appears under the cross-heading, *Holders of 95% of shares may acquire remainder*.

2. Section 103(1) provides:

> "The holders of not less than ninety-five per cent of the shares or any class of the shares in a company (hereinafter in this section referred to as the "purchasers") may give notice to the remaining shareholders or class of shareholders of the

> intention to acquire their shares on the terms set out in the notice. When such a notice is given, the purchasers shall be entitled and bound to acquire the shares of the remaining shareholders on the terms set out in the notice unless a remaining shareholder applies to the Court for an appraisal under subsection (2).
>
> Provided that the foregoing provisions of this subsection shall not apply unless the purchasers offer the same terms to all holders of the shares whose acquisition is involved."

3. Section 103(1) identifies the start of a mechanism described in the remainder of the section by which holders of a 95% majority of shares or class of shares, on service of a notice on the remaining minority holders, may compulsorily purchase the latter's shares, subject to entitling them all to the same terms. On Viking Capital Ltd's & Misa Investment Ltd's ("*V & M*") case, 95% majority holders responsible for initiating such a process may have recourse to the mechanism for which it provides, whether or not thereafter they, the 95% majority holders, retain their holdings. Here, on *MFP's* case, *V & M*, having divested themselves of their 95% majority holdings following service of the notice on which they rely, have no *locus standi* to resort to section 103. The issue turns on the respective meanings of, and relationship between, the words "holders" and "purchasers" in section 103(1) and its important proviso, as they apply to *V & M* and *MFP* on the facts here.

4. Section 103(2) provides:

> "(2) Any shareholder to whom a notice has been given under subsection (1) may within one month of receiving the notice apply to the Court to appraise the value of the shares to be purchased from him and the purchasers shall be entitled to acquire the shares at the price so fixed by the Court."

Under this provision any minority shareholder to whom a section 103(1) notice has been given may within a month of its receipt apply to the Court for an appraisal of his shares the subject of the notice which, when fixed by the Court, entitles the 95% majority holders to acquire the shares at the fixed price. The procedure of appraisal adopted by the Court for fixing of price is not set by *the Act* nor prescribed by regulation. There is no right of appeal from its

decision.[1] The procedure may take some time while the 95% majority holders and remaining minority holders take issue with each other before the Court as to the proper valuation of the minority shares. Here, the process, involving many of the trappings of a complex commercial civil dispute, is still incomplete after some 2½ years of extensive discovery, exchange of expert and other evidence and interlocutory proceedings.

5. Section 103(3) reads:

> "Within one month of the Court appraising the value of any shares under subsection (2) the purchasers shall be entitled either- (a) to acquire all the shares involved at the price fixed by the Court; or (b) cancel the notice given under subsection (1)."

Under this provision, within a month after the Court's appraisal and fixing of the price of the shares, the 95% majority holders –referred to in the subsection as "the purchasers" may choose whether to acquire all the minority shares at the fixed price in the section 103(1) notice or to withdraw their offer.

6. *MFP* maintains that the word "purchasers" at this stage of the process does not refer to 95% majority "holders" who, after having given a section 103(1) notice, have transferred to others all or some of their 95% holdings during the appraisal process, as *V & M* have done here. *MFP* maintains that only those transferees may invoke its provisions by giving a fresh section 103(1) notice – which they have not done. *V & M* maintain that the word "purchasers" can only refer to them as the "holders" and "purchasers" respectively identified and referred to in their notice when given, both of which characteristics, they maintain, invest them with a unique and continuing *locus standi* in the proceedings.

7. Section 103(4), which we need not set out, provides for a circumstance where, before appraisal and fixing of price under section 103(3) the "purchasers" anticipate or ignore that process by acquiring any minority shares at a lower price than that eventually fixed in the appraisal process. In that event, the

[1] S. 103(5)

provision binds them to the pay such minority shareholder(s) the difference between the two figures, or cancel the section 103(1) notice and return the shares in return for repayment of the purchase price. *V & M* have not engaged that provision here.

8. The clear intention of these provisions is to facilitate ready – and often necessarily speedy - corporate re-structuring by virtually wholly owned companies for commercial purposes. This could consist, for example, of amalgamation with associated or other companies and/or for raising urgently needed finance,[2] while also having regard to the interests of minority shareholders who might otherwise be unfairly disadvantaged by such compulsory removal of their holdings.

The Facts

9. There are no material disputes of fact. On 29th September 2011 *V & M*, 95% majority holders of the relevant ordinary shares in Viking River Cruises Ltd. ("*VRC*"), with a view to raising additional finance by way of a bond issue, gave a section 103(1) notice to *MFP* to purchase its 2.4% minority holdings of ordinary shares in *VRC*. Following the activation by that notice of the appraisal process with a view to fixing the price, *V & M* transferred the whole of their 95% majority holdings to an associated company, Viking Cruises Ltd ("*VC*"). In the resultant re-structuring of *V & M* and its associated companies, *VC* emerged as the holders of virtually all of *VRC*. In short, the 95% majority shareholders of *VRC* transferred all their shares in it to themselves under another corporate name.

10. In February 2014, some 2 ½ years after activation by *V & M* of the ensuing appraisal process between it and *MFP*, and as part of it, they appeared before Hellman J for him to fix the price for acquisition by *V & M* of *MFP's* minority shares in *VRC*. They sought first his ruling on a preliminary point raised by *MFP*. The point was whether *V & M*, having by then transferred their 95%

[2] See para. 26 below

majority shareholdings in *VRC* to *VC*, were still "holders" and "purchasers", as described in section 103(1), and, as such and subject to the provisions of section 103(2) and (3), entitled to acquire *MFP's* minority holding at a price yet to be fixed.

11. *MFP* contended that the Court had no jurisdiction to conduct the appraisal hearing with a view to fixing a price for their minority shares because, by then *V & M* were no longer "holders" of the 95% shareholdings in *VRC*, and hence no longer to be referred to as "purchasers" within the meaning of section 103.

12. *V & M's* response was that their subsequent disposal of their majority holding before completion of the appraisal process did not, on as a matter of statutory construction, disentitle them from continuing with the process.

The Judge's Ruling on the Preliminary Point

13. The Judge, in para. 29 of his Ruling, opined that "[i]f section 103 is read in isolation and without regard to contextual factors, … *MFP's* construction is the one which best fits the language of the text. … it gives weight to every word". He added:

> "29. In adjudicating between these rival constructions I find myself returning to the themes of language and context. … [*V & M's*] construction requires me to read into the definition of "*purchasers"* the qualification that they are the holders of not less than 95% of the shares at the date when notice is given, whereas the legislature could have stated that qualification in express terms. (Although I do not consider that reading the section in this way would require me to rewrite it.) Moreover, if the section is read as giving rise to a statutory contract, … [*MFP's*] construction deals more persuasively with the nuances of such a contract as it relates to sections 103 (2) and (3). Further, I accept that the Court is well equipped to deal with any attempts by recalcitrant majority shareholders to avoid their obligations to acquire the minority's shares, which may arise under … [*MFP's*] construction."

14. However, the Judge, after consideration of what he regarded as a balance of conflicting statutory and other contextual and policy considerations, ruled in

favour of *V & M's* construction. He did so primarily on account of potential prejudice that would flow from *MFP's* construction to the clear commercial purpose of section 103, of ready and speedy facilitation of corporate reconstruction and financing. He said:

> "30. But I must also consider the statutory context. Section 103 lies within Part VII of the 1981 Act, which is headed "*Arrangements, Reconstruction, Amalgamations and Mergers*" … The dominant purpose of all these provisions is to facilitate corporate restructuring. … [*V & M's*] construction of section 103 is the one which gives best effect to that purpose. There is no obvious commercial reason why a purchaser, having served a section 103 notice, should be required to retain at least 95% of the shares before the appraisal process has been concluded. Conversely, there is no economic prejudice to the minority shareholder if, at the date of appraisal or purchase, the purchaser no longer holds at least 95% of the shares or indeed any shares. As to the uncertainty promoted by the possibility of concurrent section 103 notices, that is an issue with which the Court will have to deal as and when it arises. But it is an issue which is capable of resolution.
>
> 31. As to broader policy considerations, I bear in mind that Bermuda is an offshore jurisdiction, which seeks to provide a legislative environment that is friendly to international business.

15. Accordingly, the Judge ruled that, notwithstanding the transfer by *V & M* to *VC* of their 95% majority holdings in *VRC* during the appraisal period, they, as "purchasers" within the meaning of that word in section 103, remained entitled to acquire *MFP's* shares at a price to be fixed by the Court. His conclusion, in para. 32 of his Ruling, after having regard to the language of the section, its statutory context and "broader policy considerations" albeit, as he said, "not all point[ing] in the same direction", was that:

> "… Section 103 provides a mechanism whereby the holders of not less than 95% of the shares in the company can purchase the shares of the minority. That means the holders of not less than 95% of the shares at the date when a section 103 notice is given. The majority need not retain their shares until the minority shares have been acquired or the notice cancelled."

Construction of Section 103 on its own wording

16. As to the wording of section 103(1) considered on its own, Mr. John Brisby QC, for *MFP*, submitted that the term "purchasers" refers only to persons who are holders of the 95% majority shares at the time both of giving notice and of appraisal. It does not refer, he maintained, to 95% majority holders who are no longer "holders" at the time of the appraisal process to which it gives rise. Notwithstanding his own warning of the need for caution when resorting to a statutory heading as an aide to construction of a provision to which it relates, he relied on the generality of the cross-heading to section 103, *Holders of 95% of shares may acquire remainder,* suggesting that it supports his contention. He drew attention to the absence of any provision in section 103(1) that only 95% majority "holders" who retain their holdings throughout the process may rely on the notice. By the same token, the Court interpolates, it also does not provide that 95% majority shareholders who dispose of their holdings before or during the appraisal process lose the right to complete the process.

17. Mr. David Chivers QC, for *V & M*, submitted that the term "purchasers" in section 103(1) identifies the person or persons who, having satisfied the provision's opening criteria of having given due notice under it, are and remain identifiable as would-be "purchasers" of the minority holdings until completion of the appraisal mechanism activated by the notice. He maintained that the word "purchasers" as used throughout the remainder of the provision, refers to the 95% majority "holders" who have given the notice, not that they have remained holders until completion of the process. It follows, he submitted, that *V & M* as the givers of the notice and the "purchasers" under section 103 retain their entitlement subject to its obligations, and the minority shareholders remain subject to its requirements and entitled to its protection, regardless of any transfer of the majority holdings in the meantime.

18. In the Court's view, and contrary to the initial inclination of Hellman J in paragraph 29 of his Ruling, the respective meanings of the words "holders" and "purchasers" in section 103 are clear. They accord with the intention of the

legislature to enable holders of virtually all shares or classes of shares in a company responsible for the notice and the mechanism activated by it to give full effect to that reality while ensuring fair treatment of minority shareholders as to price. The cross-heading to section 103, *Holders of 95% of shares may acquire remainder* - no doubt for the sake of brevity – refers only the notifying 95% majority's entitlement compulsorily to acquire the shares of minority holders, not also to its provisions for continuing protection of the interests of the latter. Such a heading is of limited assistance on the matter of construction; see *Bennion, Statutory Interpretation (6th ed.*), Section 255, pp 694 – 695.

19. In our view, it follows that the wording of section 103(1) and succeeding subsections entitles *V & M*, as the 95% majority holders at the time of service of their section 103(1) notice on *MFP*, to rely on its provisions even though they have disposed of their majority shareholding before completion of the appraisal process. The word "purchasers" cannot sensibly refer to persons or bodies who were not 95% majority shareholders responsible for activation of the section 103 processes in question. Put shortly, 95% majority holders who give notice under section 103 may proceed to purchase remaining minority holdings subject to and by means of appraisal if invoked, even if they, or some of their number, have in the meantime divested themselves voluntarily or involuntarily of all or part their holdings.

20. More generally, Mr. Brisby's various submissions and examples of possible difficulties and - contrary to the Judge's Ruling - uncommercial outcomes, fall away. They wrongly equate a statutory relationship, as here, with the incidents of a contract at common law. It is dangerous to focus on the word, "purchasers" in this context as other than a convenient adjunct to the word "holders" responsible for and at the time of the notice.

Wider Contextual and Commercial Policy Considerations

21. Mr. Brisby, fortified by the Judge's initial inclination that the plain wording of section 103 alone favoured *MFP's* construction, invited the Court to consider a

variety of possible circumstances and issues not present here, which, he submitted, should also have led the Judge to favour *MFP*'s case under the second as well as the first head. Given the Court's firm construction of the words of the provision considered on their own, it is not necessary to spend much time on wider contextual and policy considerations. Nevertheless, in justice to the submissions of both Mr. Brisby and Mr. Chivers on this aspect, we comment briefly on it, if only to provide further reassurance for the outcome.

22. Mr. Brisby put before the Court a number of possible factual complications and issues - none of which is present here - which, he suggested, would rebut *V & M's* case under this heading. Foremost of those possibilities, to which he attributed much importance, was one of competing, consecutive section 103(1) notices where original 95% majority holders serve a notice, then transfer all or part of their majority holdings.

23. The possibility for such a conflict and need for its resolution in any particular case, as Mr. Chivers pointed out, could only arise if transferees of all or some of the majority holdings serve a fresh section 103(1) notice. As he submitted, such a scenario is a highly unlikely candidate for conflict between two parties in a commercial and corporate setting such as this where, typically, much is at stake, both for transferor and transferee of a company's shareholdings. It would be a fundamental consideration for both to resolve such a potentially damaging complication when negotiating a transfer and agreeing its terms. The Court agrees with Mr. Chivers' rhetorical question, "Why would or should the draftsman of section 103 have made provision for such an uncommercial, nay fanciful, contingency?" And why should its absence sensibly colour the provision in its normal application so as to give it an effect that its structure and wording plainly do not permit?

24. Mr. Chivers also pointed to a further unhappy and uncommercial consequence that would flow from Mr. Brisby's proposition, namely that it would enable the notifying 95% majority holders to nullify their legislative obligation to purchase

the remaining shares by the simple expedient of disposing of sufficient of their holdings to bring their total holdings below the 95% holdings threshold.[3] He referred also to the many uncertainties and potential conflicts that would arise from *MFP's* construction as between multiple holders making up the 95% majority collectively responsible for a section 103 notice, in the event of one or more of them subsequently disposing of their individual interests during activation of the provision's mechanism where appraisal follows or does not. He submitted, rightly in the Court's view, such uncertainties or conflicts could not arise on *V & M's* construction, where their joint and several rights and obligations under the section crystallise at the point of giving notice and continue until the effluxion of the appraisal process, if any.

Conclusions

25. In the Court's view, and consistently with the Judge's over-all Ruling, the structure and wording of section 103 oblige and entitle 95% majority holders who have served a section 103(1) notice to acquire the remaining minority holdings, whether or not they remain 95% majority holders at the time of any appraisal invoked by the minority holders. Section 103(1)'s opening words, "The holders … hereinafter in this section referred to as the 'purchasers'", simply presage the mechanism set out in the remainder of the provision by which they, the "holders" responsible for giving the notice, become and remain entitled, until completion of the appraisal process and subject to compliance with it, to acquire the minority shares.

26. The above conclusion would be sufficient in itself to resolve the appeal in favour of *V & M.* However, we add that we agree with the Judge's observations in paragraph 30 of his Ruling, and repeat our view expressed in paragraph 8 above, that section 103 has as its dominant purpose the facilitation of ready corporate restructuring whilst also providing fair treatment to minority holders.

[3] Even while retaining shares already purchased under the notice, for which eventuality section 103(4) provides (see para. 7 above), and for which anti-avoidance provisions in section 36 of the *Conveyancing Act 1983* or recourse to common law principles in this statutory context could have no sensible application.,

Mr. Chivers identified a number of obvious impediments that could arise from *MFP's* construction to both or either of those statutory purposes. He instanced, for example, a need to issue further shares to avoid breaching bank covenants or to reduce an interest burden, or exercise of share options or convertible warrants, or other measures, such as a debt for equity swap, any of which could reduce the level of majority holdings below 95%. Such troublesome contingencies, whether instigated, voluntarily or involuntarily, by all or some of the 95% majority holders or others, could readily frustrate the commercial operation and purpose of the provision. The 2 ½ years delay in the uncompleted appraisal process here is a good example of how, on *MFP's case,* 95% majority holders could be required to "freeze" possibly critical and commercially urgent re-structuring proposals by having to retain their holdings until completion of the process, or face removal of their section 103 entitlement because of involuntary reduction of their holdings in the meantime.

27. The Court agrees with the Judge's views that there is no obvious commercial reason – but powerful commercial reasons against - why 95% majority holders, having served a section 103 notice, should be required to retain at least 95% of the shares before conclusion of the appraisal process. And there is no economic prejudice to minority shareholders where the majority have, in the meantime, voluntarily or involuntarily, divested themselves of all or part of their holdings to a third party. We add that, on the Judge's and our construction, there is no realistic possibility of competing, consecutive section 103(1) notices, certainly not such as could disturb the primacy of the statutory process activated by the first notice or following its conclusion, to leave any factual basis for giving statutory effect to a transferee's notice.

28. Following disposal by 95% majority holders responsible for the notice of all or part of their holdings, the legislature cannot sensibly have intended to deny them recourse to its provisions should they still seek it, or to release the minority from their liability to sell their shares or their section 103 entitlement to a fair price for them. It is or should normally be immaterial to the latter that all or part of the 95% majority shareholdings have by then passed into other

hands, whether by deliberate divestment or a diminution of the holdings outside the control of the majority holders.

29. Accordingly, the Court dismisses *MFP's* appeal, and holds that *V & M* remain entitled under their section 103(1) notice to acquire *MFP's* shares at a price yet to be fixed by the Hellman J.

Signed

Auld, JA

Signed

Zacca, P

Signed

Baker, JA