In The Supreme Court of Bermuda

CIVIL JURISDICTION
(COMMERCIAL COURT)

2018: No. 359

BETWEEN:

(1) ANNUITY & LIFE RE LTD
(2) POPE ASSET MANAGEMENT LLC

Plaintiffs

- and -

KINGBOARD COPPER FOIL HOLDINGS LIMITED
JAMPLAN (BVI) LIMITED
KINGBORD LAMINATES HOLDINGS LIMITED
EXCEL FIRST INVESTMENT LIMITED
KINGBOARD CHEMICAL HOLDINGS LIMITED

Defendants

RULING

Application to strike out part of the Amended Statement of Claim

Date of Hearing: **28 April 2021**
Date of Ruling: **29 June 2021**

Appearances: **Keith Robinson and Sam Stevens, Carey Olsen Bermuda Limited, for the Plaintiffs**

Jeffrey Elkinson, Conyers Dill & Pearman, for the Defendants

RULING of Mussenden J

Introduction

1. This matter came before me by Summons dated 22 October 2020 in respect of an application by the Defendants to strike out paragraph 12A of the Plaintiffs' Amended Statement of Claim ("**ASoC**") pursuant to Order 18, rule 19(1) of the Rules of the Supreme Court 1985 ("**RSC**") on the grounds that: (a) it discloses no reasonable cause of action; (b) it is scandalous, frivolous or vexatious; and (c) it is otherwise an abuse of the process of this Court. The application is supported by the First Affirmation of Norman Hau dated 29 September 2020 ("**Hau 1**") together with its Exhibit NH-1.

2. The Plaintiffs oppose the application. They rely on the First Affidavit of William Paul Wells dated 30 November 2020 together with its Exhibit WPW-1 and the Affidavit of Chui Lijun dated 30 November 2020, exhibiting the Expert Report prepared by Chui Lijun dated 30 November 2020 marked as Exhibit CL-1.

Background

3. These proceedings arise out of a long-running and complex litigation between the parties involving claims of minority shareholder oppression, which claims came before the Bermuda Court of Appeal in Civil Appeal No. 24 of 2015 ("**Antecedent Litigation**"). Subsequent to the Court of Appeal's Ruling, in April 2018 the parties entered into an agreement to settle the Antecedent Litigation ("**Settlement Agreement**"), the First and Second Plaintiffs agreeing on 3 April 2018 and the Defendants affixing their signatures on 5 April 2018. These proceedings relate to actions taken by the Defendants in Singapore which the Plaintiffs allege trigger a right to be paid further monies pursuant to the terms of the Settlement Agreement.

4. Clause 7 of the Settlement Agreement ("**Clause 7**"), which the Defendants say was substantially drafted by the First Plaintiff, provided that in certain circumstances there could be further entitlements due to the Plaintiffs:

> *"7. FURTHER ENTITLEMENT IN THE EVENT OF CERTAIN TRANSACTION*
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> *In the event that any of Kingboard Respondents [*the Second to Fifth Defendants*], the Company [*the First Defendant*], or any of their Affiliates (as defined above in Clause 4) enters into a transaction within 12 (twelve) calendar months from the date herein to the effect that the ordinary shares of the Company are offered to be purchased or are issued at a price exceeding S$0.45 per ordinary share, the Purchasers shall pay the Petitioner* [the First Plaintiff] *and Pope* [the Second Plaintiff] *respectively an additional payment of an amount which equals to:*
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> *(Transaction price per ordinary share – S$0.45) x number of ordinary shares being sold under this Agreement (i.e. 17,361,000 in the case of the Petitioner* [the First Plaintiff]*; and 20,928,344 in the case of Pope* [the Second Plaintiff]*)".*

5. On 22 October 2018 the Plaintiffs filed a Specially Indorsed Writ of Summons against the Defendants alleging, *inter alia*, that the Defendants had failed to pay to the Plaintiffs amounts due to the Plaintiffs under Clause 7 by reason of, they allege, a transaction entered into by the First and/or Fourth Defendant within 12 (twelve) calendar months of the Settlement Agreement.

6. On 27 November 2018 the Defendants filed their Defence and the Plaintiffs filed their Reply on 10 December 2018.

7. On 4 April 2019, the Fourth Defendant, Excel First Investments Limited (the "**Offeror**") issued an announcement, notifying that it intended to make a voluntary unconditional cash offer (the "**Offer**") for all the issued and paid-up ordinary shares of a par value of US$0.10 each in the capital of the First Defendant (the "**Offer Announcement**").

8. On 18 April 2019 the Offeror issued an offer document setting out the terms and conditions of the Offer (the "**Offer Document**"), which was despatched to the shareholders in the First Defendant (together with the Form of Acceptance and Authorisation for Offer Shares and Form of Acceptance and Transfer for Offer Shares).

9. On 16 May 2019 the Offeror issued an announcement titled "Close of the Offer" and "Final Level of Acceptances of Offer" (the "**Close of the Offer Announcement**"), stating that the Offer closed at 5:30pm on 16 May 2019, and "*valid acceptances to the Offer, amount to an aggregate 710,738,549 Shares, representing approximately 98.37% of the total issued Shares*".

10. On 21 May 2019 the Offeror issued an announcement titled "Update in relation to Close of the Offer Announcement" (the "**Update Announcement**"), stating that "*the number of valid acceptances of Offer Shares received was 75,838,928 Offer Shares, representing approximately 10.50% of the entire issued share capital of the company*".

11. On 27 November 2019 the Plaintiffs amended their Specially Indorsed Writ of Summons. The Amendments incorporated in the ASoC now included the addition of paragraph 12A, as follows:

> *"Further, on 4 April 2019 (and therefore, under a year since the Settlement Agreement and Release was executed and exchanged), the First Defendant issued a document announcing the Fourth Defendant's "Voluntary Unconditional Cash Offer" in which the price was "S$.60 in cash for each Offer Share" constituting the First and/or the Fourth Defendant's entry into transactions to the effect that the ordinary shares of the Company are offered to be purchased or are issued at a price exceeding S$0.45 per ordinary share within the meaning of Clause 7 of the Settlement Agreement and Release. On 16 May 2019 the Fourth Defendant announced that it has received acceptances in respect of 75,248,928 ordinary shares."*

The Defendants' application to strike out

12. The Defendants submit that paragraph 12A should be struck out for several reasons. They state in reading Clause 7 it is a plain and obvious case that there is no realistic possibility of the Plaintiffs having a cause of action based on its terms as pleaded by them in paragraph 12A of the ASoC. They submit that the Plaintiffs are seeking to gain a significant benefit of approximately US$5 million based on the claim in paragraph 12A of the ASoC.

13. First, they submit that Clause 7 can only be engaged if the Defendants (or their Affiliates) entered into "*a transaction ... to the effect that the ordinary shares of the Company are offered to be purchased or are issued at a price exceeding S$0.45 per ordinary share*" within 12 calendar months of the date of the Settlement Agreement (the "**12 Calendar Month Period**"). The Plaintiffs plead that the relevant end date for the 12 Calendar-Month Period is 5 April 2019.

14. The Defendants submit that the evidence shows that:

    a. The "transaction" alleged by the Plaintiffs (an announcement by the Fourth Defendant that "*it intends to make a voluntary unconditional cash offer"*) references an Offer Document dated 18 April 2019 and did not take place within 12 calendar months as referenced in Clause 7.
    b. Clause 7 does not apply in respect of the "transaction" alleged in paragraph 12A; and
    c. A "transaction" cannot be an announcement to make an offer – it is not an action of passing or making over a thing from one person to another.

15. Second, the Defendants submit that Clause 7 is not ambiguous and the relevant documents should be read based on their plain and clear meaning under Bermuda law for several reasons as follows:

    a. In respect of the Offer being made pursuant to the regime under the Singapore Code on Takeovers and Mergers ("**the Takeover Code**"), the Defendants submit that the

Takeover Code is not legally binding, has no legal effect on the law of Bermuda, is non-statutory, and offers no assistance in determining the ordinary meaning of the words in the Settlement Agreement;

b. The Defendants submit that the language used throughout the Offer Announcement, for example "*will be*", and "*intends to*" makes clear that it was merely an announcement of the intention to make an 'Offer', as defined in the Takeover Code, in the future;

c. The Offer Announcement makes express reference to the clear and distinct Offer Document "*to be issued by the Offeror ...*" which also contained references to other information that would be included in and with the Offer Document, significantly the forms of acceptance and approval;

d. The Defendants stress that in the absence of the notification to the offerees of the full terms and conditions of the "Offer", the primary condition of an offer is not met and that no 'transaction" could have been entered into on 4 April 2019 and thus the very earliest possible date on which any transaction could have occurred was 18 April 2020 – the date when the full terms and conditions were communicated to the First Defendant's shareholders;

e. The Defendants also rely on the language of the Offer Document itself, particularly where it states "*This Offer Document contains the formal offer by the Offeror, for the Offer Shares on the terms and subject to the conditions set out in the this Offer Document"* and *"The Offer will be made for all the Offer Shares, subject to the terms and conditions set out in this Offer Document ...*"; and

f. The "Offer" was not open for acceptance by the First Defendant's shareholders until after the Offer Document had been despatched, as the Offer Document stated that the Offer is "*open for acceptance by Shareholders for a period of 28 days after the Despatch Date ...*", that Despatch Date having been defined in the Offer Document as "18 April 2019".

16. Third, the Defendants submit that Ms. Chiu's evidence is irrelevant to this Application in that the issue before the Court is one of fact and interpretation in accordance with Bermuda law. They argue that expert evidence cannot supplant the Court's interpretation of a

Bermuda law agreement. In respect of the Court's consideration of expert evidence of foreign law, they cited several cases as set out below, urging that the Court itself should examine the views expressed in Ms. Chui's report against its own reading of the document and the Takeover Code, to the effect that the Court is entitled to decide that the meaning and legal effect of the Takeover Code is different from that stated in her report. Further, they submit that in any event, the expert opinion is not an opinion of foreign law, but is an opinion of facts.

a. In *MCC Proceeds Inc. v Bishopsgate Investment Trust* [1999] CLC 417 where the English Court of Appeal held:

> *"13. But the foreign law may be written in the English language; and its concepts may not be so different from English law. Then the English judge's knowledge of the common law and of the rules of statutory construction cannot be left out of account. He is entitled and indeed bound to bring that part of his qualifications to bear on the issue which he has to decide, notwithstanding that it is an issue of foreign law. There is a legal input from him, in addition to the judicial task of assessing the weight of the evidence given.*
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> *19. He is entitled, indeed bound, to contribute his own legal skill and experience in reaching his conclusion, so much so that he may, in a suitable case, form his own view of the meaning of a statute which the expert witness tells him is the governing foreign law, even if the expert's opinion as to its meaning is different from his own …"*

b. In *Shenzhen Development Bank Co. Ltd v New Century Int'l (Holdings) Ltd. and another* HCA 2976/2001, the Hong Kong Court of First Instance held in the context of a summary judgment application that "*the court is not bound to accept that the views of an expert are credible. The Court is entitled to examine the views of the expert against the primary source of foreign law*." In *Broadsino Finance Co Ltd v Brilliance China Automotive Holdings Ltd* [2005] Bda LR 12, the Court of Appeal held that the same approach is applicable to deciding a strike-out application as is applicable to a summary judgment application.

17. Fourth, the Defendants also submit that there were relevant issues that Ms. Chui failed to address in coming to her opinion, as set out below. By failing to address these issues, Ms. Chiu confuses the matters rather than bringing clarity, and therefore, such omissions are critical in determining the weight that the Court should give to her opinion.

    a. The meaning of the term "Offer" as used in the Takeover Code is not the same as a legally binding offer in the law of contract. In the Takeover Code, Offer is defined as "*Offer includes, wherever appropriate, take-over and merger transactions, howsoever effected, including reverse take-overs, schemes of arrangement, trust schemes, amalgamations, partial offers and also offers by a parent company for shares in its subsidiary. But offers for non-voting non-equity capital do not come within the Code*". Thus, rather than used as a legal term, its specific application is to "take-over and merger transactions". Therefore, there was no contractual offer, nothing to accept, and in the absence of offer and acceptance, there is no contract and therefore no transaction.

    b. Although Rule 4 of the Takeover Code provides that there may be no withdrawal of an "offer" once the offeror has announced a firm intention to make an offer, it does not confer any rights on the offeree or third parties to enforce performance by the Offeror, as it is a regulatory requirement only with a non-legal binding nature. It is a regulatory regime administered by the Securities Industry Council ("**SIC**") and it is not a legally binding set of rules which gives rise to legal rights and obligations.

    c. The provision against withdrawal of an offer under Rule 4 of the Takeover Code exists in the interest of market regulation. It is not intended to transform a mere announcement of a firm intention to make an "Offer" as defined in the Takeover Code to a Contractual Offer with the remedies that such an action could have, such as an action for breach of contract. They complain that Ms. Chiu fails to provide any case authority on this point.

    d. The language of the Takeover Code makes clear that an announcement can be made of a "proposed or possible offer". "*Offer period*" is defined in the Takeover Code as "*the period from the date when an announcement is made of a proposed or*

possible offer (with or without terms) until the date such offer is declared to have closed or lapsed".

The Plaintiffs' Response

18. The Plaintiffs oppose the application for several reasons as set out below. They submit that the start point is that in listing on the SGX, companies agree to be subject to the Singapore Securities and Futures Act ("**SFA**") and the rules of the exchange, including the Takeover Code. The Takeover Code is issued by the Singapore Monetary Authority pursuant to sections 139 and 321 of the SFA, and it is administered by the SIC. The Takeover Code provides a regulatory framework for, among other things, the primary listing of a corporation's equity securities, including take-over or mergers of companies listed on the SGX.

19. First, the Plaintiffs submit that under the Takeover Code, the Offer Announcement constituted the making of an offer by the Fourth Defendant to purchase all of the issued and paid-up ordinary shares of the First Defendant other than those which were owned, controlled or agreed to be acquired by the Fourth Defendant (or by parties acting in concert or deemed to be acting in concert with the Fourth Defendant in relation to the offer).

20. Second, in making the offer on 4 April 2019 the Fourth Defendant, in compliance with the mandated process for take-over offers under the Takeover Code, entered into a transaction to take-over and delist the First Defendant from the SGX within 12 months of the Settlement Agreement. This had the effect that the ordinary shares of the First Defendant were offered to be purchased at a price exceeding S$0.45 per ordinary share. Thus, the Purchasers' liability to further compensate the Plaintiffs pursuant to Clause 7 was therefore triggered on 4 April 2019.

21. The Plaintiffs reject the following assertions by Mr. Hau: (a) the contention that the Offer Announcement was not the Offer but was simply an announcement of a future, albeit imminent, intention to make the Offer; (b) the implication that the Offer was not in fact

made until 18 April 2019, which was more than 12 months after the date of the Settlement Agreement, when the terms and conditions in the Offer Document were despatched to the First Defendant's shareholders; and (c) the contention that the Defendant's liability under Clause 7 was not triggered by the Offer Announcement.

22. The Plaintiffs submit that the Court should rely on the Plaintiffs' expert report, in particular the expert's uncontested conclusions, namely: (a) under the Takeover Code an offer to take-over a company listed on the SGX should be regarded as having been made on the date of the announcement of the offer; (b) the default position in relation to take-overs under the Takeover Code is that, absent exceptional circumstances, offers must be completed once announced; and (c) the Offer made by the Fourth Defendant by way of the Offer Announcement could not have been withdrawn without the consent of the SIC and such consent is unlikely to have been given on the facts of this case. Also, the expert's opinion, in drawing the conclusion that the Offer was made in the Offer Announcement which makes reference to prospective acts, is supported by the statements to the shareholders in the Offer Document, which also use phrases reflecting prospective acts, such as "*the Offer will be made*", "*the Offer Shares will be acquired*" and the "*Offeror intends to make the Offer*". This has the effect of undermining the Defendants' assertion that the Offer was not made until the Offer Document was despatched on 18 April 2019. Therefore, the use of such statements in both the Offer Announcement and the Offer Document cannot be determinative of when the Offer was made.

23. Further, the Plaintiffs submit that the "transaction" in this case was the take-over and de-listing from the SGX of the First Defendant by the Fourth Defendant and its concert parties. The first stage, pursuant to the General Principle 6 and Rule 3 of the Takeover Code required the Fourth Defendant formally to announce the offer to the market. Thus, the Offer Announcement immediately commenced the "Offer Period" which is defined as "*the period from the date when an announcement is made of a proposed or possible offer (with or without terms) until the date such offer is declared to have closed or lapsed.*" Ms. Chui's expert opinion is that the Fourth Defendant's Offer could not be withdrawn without the consent of the SIC, granted only in exceptional circumstances, on the basis that it would

have been unlikely that the SIC would have granted its consent in the circumstances. Pursuant to Rule 22 of the Takeover Code, once an offer was announced then the Fourth Defendant was required to despatch the Offer Document to shareholders no later than 21 days from the date of the Offer Announcement. Therefore, by making the Offer Announcement, the Fourth Defendant made the Offer on 4 April 2019, bound itself into a transaction to take-over and de-list the First Defendant, such that the Purchasers' liability under Clause 7 was triggered.

24. Third, the Plaintiffs submit that even if the Offer Announcement did not constitute the Offer, then the Purchasers' liability under Clause 7 was still triggered on 4 April 2019 in any event because the Offer Announcement constituted the mandatory first step in a transaction to take-over and de-list the First Defendant which was (i) entered into by the Fourth Defendant within 12 months of the Settlement Agreement; and (ii) effected by the Offer. They submit that the Offer Announcement inevitably led to the consummation of the transaction envisaged by the Offer.

25. Fourth, in the alternative, if the Court finds that the meaning of the words used in Clause 7 is ambiguous, then based on the evidence to be adduced at trial, the parties intended for the Purchasers to be liable to compensate further the Plaintiffs in the event that any of the Defendants or their Affiliates made an offer within 12 months of the date of the Settlement Agreement to purchase the shares of the First Defendant at a price above S$0.45 per ordinary share. Therefore, the Offer Announcement was an offer that triggered the Purchasers' liability to the Plaintiffs under the clause. The Plaintiffs urge the Court to exercise significant caution in deciding the application when it is not yet in possession of all relevant facts and circumstances surrounding the drafting of Clause 7.

26. The Plaintiffs submit that under Bermuda law, the relevant principles of contractual interpretation can be found in the cases of *Air Care Ltd v Wyatt Sellyeh* [2015] Bda LR 32 and *The Corporation of Hamilton v The Bermuda Electric Light Company Limited* [2018] Bda LR 99, with both judgments relying on the well-known speech of Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896:

"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (see Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd [1997] 2 WLR 945

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made

linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in The Antaios Compania Neviera SA v Salen Rederierna AB [1985] 1 AC 191, 201:

"... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."'

27. The Plaintiffs submit that in light of all the surrounding facts and circumstances leading to the execution of the Settlement Agreement, it will be clear that Clause 7 contains a term that the Purchasers were to be liable to further compensate the Plaintiffs in the event any of the Defendants or their Affiliates made an offer within 12 months of the date of the Settlement Agreement to purchase the ordinary shares of the First Defendant for more than S$0.45 per ordinary share. They submit that the only evidence before the Court as to the relevant facts and circumstances surrounding the inclusion of Clause 7 is contained in the First Affidavit of Mr. Wells, the President and CEO of the Second Plaintiff, whilst no evidence to assist with ascertaining the meaning and effect of Clause 7 has been submitted by the Defendants. Therefore, the Court is not in a position at this interlocutory stage to form a definitive view of the proper construction of Clause 7, rather both parties will need to submit fulsome evidence which would be tested at trial when the trial judge will then need to decide which construction should be preferred.

The Law on Striking out

28. RCS Order 18, rule 19(1)(a) provides that:

"Striking Out pleading and indorsements

"The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that—

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

29. As stated in the White Book commentary at 18/19/10:

"A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleadings are considered (per Lord Pearson in Drummond-Jackson v British Medical Association [1970] 1 W.L.R. 688. So long as the statement of claim or particulars (Davey v Bentinck [1893] 1 QB 185) discloses some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak, and not likely to succeed, is no ground for striking it out ..."

30. The law on strike-out was summarised by the Court of Appeal in *Broadsino Finance Co Ltd v Brilliance China Automotive Holdings Ltd* [2005] Bda LR 12 where Stuart-Smith JA stated as follows:

"There is no dispute as to the applicable principles of law. Where the application to strike-out on the basis that the Statement of Claim discloses no reasonable cause of action (Order 18 Rule 19(a)), it is permissible only to look at the pleading. But where the application is also under Order 18 Rule 19(b) and (d), that the claim is frivolous or vexatious or is an abuse of the process of the court, affidavit evidence is admissible. Three citations of authority are sufficient to show the court's approach. In Electra Private Equity Partners (a limited partnership) v KPMG Peat Marwick [1999] EWCA Civ 1247, at page 17 of the transcript Auld LJ said: 'It is trite law that the power to strike-out a claim under Order RSC Order 18 Rule 19, or in the inherent jurisdiction of the court, should only be exercised in plain and obvious cases. That is particularly

so where there are issues as to material, primary facts and the inferences to be drawn from them, and where there has been no discovery or oral evidence. In such cases, as Mr Aldous submitted, to succeed in an application to strikeout, a defendant must show that there is no realistic possibility of the plaintiff establishing a cause of action consistently with his pleading and the possible facts of the matter when they are known….. There may be more scope for an early summary judicial dismissal of a claim where the evidence relied upon by the Plaintiff can properly be characterised as shadowy, or where the story told in the pleadings is a myth and has no substantial foundation. See eg Lawrence and Lord Norreys (1890) 15 Appeal Cases 210 per Lord Herschell at pages 219–220'. In National Westminster Bank plc v Daniel [1994] 1 All ER 156 was a case under Order 14 where the Plaintiff was seeking summary judgment, but it is common ground that the same approach is applicable. Glidewell LJ, with whom Butler-Sloss LJ agreed, put the matter succinctly following his analysis of the authorities. At page 160, he said: 'Is there a fair and reasonable probability of the defendants having a real or bona fide defence? Or, as Lloyd LJ posed the test: 'Is what the defendant says credible'? If it is not, then there is no fair and reasonable probability of him setting up the defence'."

31. In *Electra Private Equity Partners* referred to by Stuart-Smith, JA in *Broadsino*, the Court stated:

"… the Court should proceed with great caution in exercising its power of strike-out on such a factual basis when all the facts are not known to it, when they and the legal principle(s) turning on them are complex and the law, as here, is in state of development. It should only strike out a claim in a clear and obvious case. Thus, in McDonalds's Corp v. Steel [1995] 3 Al ER 615 at 623,Neill LJ, with whom Steyn and Peter Gibson LJ agreed, said that the power to strike out was a Draconian remedy which should be employed only in clear and obvious cases where it is possible to say at the interlocutory stage and before full discovery that a particular allegation was incapable of proof."

32. Auld LJ's observations in *Electra Private Equity Partners* were quoted with approval by Hellman J in *Kingate Global Fund Limited (In Liquidation) v Kingate Management Limited* [2016] Bda LR 4. Hellman J also quoted the above passages from the judgment of Stuart-Smith in *Broadsino* with approval and made the following additional point:

> *"… a strike out application should not become a mini-trial on the documents. See eg Wenlock v Moloney [1965] 1 WLR 1238 per Dankerts LJ at 1244 A-C, with whom Diplock LJ (as he then was) agreed at 1244 D-E:*
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> *But this summary jurisdiction of the court was never intended to be exercised by a minute protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge and to produce a trial of the case in chambers on affidavits only, without discovery and without oral evidence tested in cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power."*

Analysis on Plaintiff's Application for strike out

33. In my view the Defendants' application to strike out paragraph 12A of the ASoC should not be granted for several reasons. First, a central issue is whether there was a transaction that engages Clause 7. In my view, it is not plain and obvious whether or not there has been a transaction for the reasons set out below. The Defendant submits that there was no transaction whilst the Plaintiff submits that there was a transaction – both arguments based on the determination of whether there was an 'offer'.

34. Second, in my view, it is not plain and obvious whether or not there was an offer as a result of the Offer Announcement. The Defendants urge that the documents should be read based on their plain and clear meaning under Bermuda law and, that in doing so, the Court should not rely on the Takeover Code and should not rely on the expert opinion of Ms. Chiu, which they submit is not an opinion of foreign law in any event. Therefore, on this basis, the Court should accept that the Offer Announcement was simply an announcement of the intention

to make an "Offer" in the future. In my view, this argument is attractive as a start point, as I am inclined to give some weight to the 'plain and obvious' test in that the language and wording used at various places in the Offer Announcement identifying events to take place in the future including the despatch of the Offer Document with the "terms and conditions" and the relevant forms of acceptance and approval of the offer. Similarly, I am inclined to give some weight to the 'plain and obvious' test in that language used in the Offer Document itself, including that it "*contains the formal offer …on the terms and subject to the conditions set out in this Offer Document*" and that the "Offer" is "*open for acceptance by Shareholders for a period of 28 days after the Despatch Date …*", such Despatch Date being defined as 19 April 2019, leading to a conclusion that that it was not possible for any "transaction" to have been entered into before that date, on 4 April 2019 or otherwise.

35. Third, in my view, the weight that I am inclined to give, however, is undermined at this stage by the arguments of the Plaintiffs that there was an offer and therefore there was a transaction. I am attracted to the Plaintiffs' submission that in compliance with the mandated process for take-over offers under the Takeover Code, the Offer Announcement dated 4 April 2019 constituted the making of an offer by the Fourth Defendant within 12 months of the Settlement Agreement. I am also attracted to the submissions that even if the Offer Announcement did not constitute the "Offer", then the Purchasers' liability under Clause 7 was triggered in any event on 4 April 2019 because the Offer Announcement constituted the mandatory first step in a transaction, entered into by the Fourth Defendant, within 12 months of the Settlement Agreement, to take over the First Defendant. My view also applies to the Plaintiffs' alternative case that if the Court finds the meaning of the words used in Clause 7 is ambiguous, then the parties intended for the Purchasers to be liable to further compensate the Plaintiffs in the event any of the Defendants or their Affiliates made an offer within 12 months of the Settlement Agreement, and the Offer Announcement was an offer that triggered the Purchasers' liability.

36. In applying the principles of contractual interpretation as set out in *Air Care Ltd v Wyatt Sellyeh* and *The Corporation of Hamilton v The Bermuda Electric Light Company Limited*, with both judgments relying on the well-known speech of Lord Hoffman in *Investors*

Compensation Scheme Ltd v West Bromwich Building Society, this seems to be the kind of case where the factual matrix will need to be reviewed in order to ascertain the meaning of the document in the context of business commonsense, as envisaged by Lord Diplock in *The Antaios Compania Neviera SA v Salen Rederierna AB* when he said *"if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."* In light of these arguments, my view is that the weight I gave to the Defendants' arguments is significantly undermined such that in applying the principles set out in *Broadsino Finance Co Ltd v Brilliance China Automotive Holdings Ltd* it is not plain and obvious that paragraph 12A should be struck out.

37. Fourth, although the Defendants invite the Court to ignore the expert opinion of Ms. Chiu as it is not relevant to this application, in my view, in light of the draconian effect of striking out paragraph 12A, I am inclined at this stage to consider the expert opinion of the foreign law to inform my views as to whether the test for striking out is met. In following *MCC Proceeds Inc. v Bishopsgate Investment Trust*, it is open for the Court to consider the expert opinion of foreign law, but that is always subject to the Court's own legal input and the judicial task of assessing the weight of the evidence.

38. Ms. Chiu's expert report sets out in her section "Preliminary Comments" that "*The Code is issued by the Monetary Authority of Singapore pursuant to Section 321 of the SFA … [and that] it is administered by the SIC… The Code does not have the force of law but the SIC is empowered to invoke sections (including public censure) as it may decide in relation to breaches of the Code.*" Further, she sets out the provisions of section 140 of the SFA that prohibits persons from making or announcing takeovers in certain circumstances and makes such conduct an offence with penalties of fines and imprisonment. She also sets out various sections of the Takeover Code and gives her expert opinion on significant issues such as (a) the date the offer would be regarded as having been made was on the date of the announcement of the offer; (b) once announced the offer must be completed save for exceptional circumstances; (c) an offer could not be withdrawn without the consent of the SIC, which is only ever granted in exceptional circumstances; and (d) that there is prospective language used in both the Offer Announcement and the Offer Document.

Additionally, the Offer Document at section 16.2 states "*The Offer, this Offer Document, the FAA and/or the FAT, and all acceptances of the Offer and all contracts made pursuant thereto and actions taken or made or deemed to be taken or made thereunder shall be governed by, and construed in accordance with, the laws of the Republic of Singapore."*

39. In my view, at this stage, I am inclined to attach some weight to the expert opinions about the interpretation of the SFA and the Takeover Code. At this stage, in applying the principles set out in *Broadsino Finance Co Ltd v Brilliance China Automotive Holdings Ltd*, the expert opinion on these issues leads me to the view that it is not a plain and obvious case to strike out paragraph 12A as Singapore law and the Takeover Code is a matter of fact, for trial.

40. Fifth, the Defendant submits that there are relevant issues that Ms. Chui fails to address in coming to her opinion as set out above including the difference between a "contractual offer" and an offer under the Takeover Code, that the Takeover Code is regulatory in nature thus not conferring rights on parties to enforce performance by the offeree and the Rule 4 provision against withdrawal exists in the interests of market regulation. However, I find further support at this stage in Ms. Chiu's expert opinion that the Takeover Code defines the "Offer Period" as "*the period from the date when an announcement is made of a proposed or possible offer (with or without terms) until the date such offer is declared to have closed or lapsed.*"

41. My view also applies to the submission that Rule 22 of the Takeover Code mandated a timetable for any take-over offer once announced and the Fourth Defendant was required to despatch the Offer Document to shareholders no later than 21 days from the date of the Offer Announcement. Again, at this stage, the expert opinion on these issues leads me to the view that it is not a plain and obvious case to strike out paragraph 12A as Singapore law and the Takeover Code is a matter of fact, for trial.

42. Sixth, in light of the above reasons, I am minded to adopt the approach of Hellman J in *Kingate Global Fund Limited (In Liquidation) v Kingate Management Limited* where he quoted passages from *Broadsino* but also added the point that "… *a strikeout application*

should not become a mini-trial on the documents …". In my view, in applying the principles set out in *Electra Private Equity Partners (a limited partnership) v KPMG Peat Marwick*, this appears to be a case where there are issues as to material, primary facts and the inferences to be drawn from them and where there should be discovery and oral evidence as urged by the Plaintiffs particularly as to the relevant facts and circumstances that surround the drafting of Clause 7, contractual law, securities law, Singapore law and Bermuda law.

43. On that basis, my position is that I agree with the Plaintiffs that the Court is simply not in a position at this interlocutory stage to form a definitive view on the proper construction of Clause 7 and that both parties will need to submit evidence to be tested at trial in order for the trial judge to decide which construction should be preferred in light of the totality of the evidence.

44. Seventh, following the principles set out in *Electra Private Equity Partners*, I am inclined to proceed with great caution in exercising the Court's power of strike-out on the present factual basis when all the facts are not known to the Court. Further, in following *McDonalds's Corp v. Steel*, I am of the view that I should decline to exercise the draconian remedy of the power to strike-out at this stage and before full discovery as it is not possible to say that the claim in paragraph 12A is incapable of proof.

Conclusion

45. For the reasons above, I decline the Defendants' application to strike out paragraph 12A of the Plaintiff's ASoC pursuant to Order 18 rule 19(1) of the RSC on the basis that it is not a plain and obvious case for strike-out and also that there exists a fair and reasonable probability of the Plaintiffs having a real or bona fide claim under the amended paragraph 12A.

46. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs and/or damages, I direct that in respect of the Defendants' Summons dated 22 October 2020 to strike out paragraph 12A of the ASoC, that costs shall follow the

event in favour of the Plaintiffs against Defendants on a standard basis, to be taxed by the Registrar if not agreed;

Dated 29 June 2021

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HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT