



In The Supreme Court of Bermuda
COMMERCIAL COURT

CIVIL JURISDICTION
2011: No. 405

In the matter of section 103 of the Companies Act 1981

BETWEEN:-

MFP-2000, LP

Applicant

-and-

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

Respondents

RULING ON PRELIMINARY POINT

(In Court)

Date of hearing: 3rd – 6th February 2014

Date of ruling: 7th February 2014

Mr John Brisby QC, Mr Delroy Duncan and Ms Nicole Tovey, Trott & Duncan,
for the Applicant

Mr Narinder Hargun and Mr Christian Luthi, Conyers Dill & Pearman, for the Respondents

Introduction

1. Under section 103 of the Companies Act 1981 (“the 1981 Act”), the holders of not less than 95% of the shares in a company can issue a notice (“a section 103 notice”) to acquire the shares of the remaining shareholders on the terms set out in the notice, or, if any of the remaining shareholders applies to the Court, at a price to be set by the Court.
2. I am asked to rule on a preliminary point as to whether, having served a section 103 notice, the holders are entitled to acquire the remaining shares if, before acquiring them, they cease to hold not less than 95% of the shares in the company.
3. Unless the context requires otherwise, all references in this judgment to the sections of a statute are references to the 1981 Act.
4. The point has arisen in this way. The Respondents gave notice to the Applicant under section 103(1) of their intention to acquire the Applicant’s ordinary shares in Viking River Cruises Limited (“the Company”) at a price specified in the notice. The notice was dated 29th September 2011 and the Respondents received it on 4th October 2011.
5. The Respondents had the right to issue the notice because they held more than 95% of the ordinary shares in the Company.
6. By an originating summons dated 28th October 2011, which was issued pursuant to section 103(2), the Applicant applied to the Court to appraise the value of its shares.
7. On 24th September 2012 the Respondents transferred all of their shares in the Company to a company called Viking Cruises Ltd (“VCL”).
8. The point thus arising is whether the Respondents, who no longer hold more than 95% of the ordinary shares in the Company, are still entitled under

section 103(2) to acquire the Applicant's shares at a price to be fixed by the Court. The Respondents submit that they are: the Applicant, who takes this preliminary point, submits that they are not.

Section 103

9. Section 103 is headed "*Holder of 95% of shares may acquire remainder*". It provides in material part:

(1) The holders of not less than ninety-five per cent of the shares or any class of 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.

(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.

(3) 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).

(4) Where the Court has appraised any shares under subsection (2) and the purchasers have prior to the appraisal acquired any shares by virtue of a notice under subsection (1) then within one month of the Court appraising the value of the shares if the price of the shares they have paid to any shareholder is less than that appraised by the Court they shall either—

- (a) pay to such shareholder the difference in the price they have paid to him and the price appraised by the Court; or
- (b) cancel the notice given under subsection (1) and return to the shareholder any shares they have acquired and the shareholder shall repay the purchasers the purchase price.

Holders

10. It is not disputed that in section 103(1) “*holders*” means “*members*”, ie persons whose names are registered as shareholders in the company’s register of members. Thus the section is not dealing with any beneficial interests which may arise. On this point I was referred in argument to In re DNick Holding plc [2013] 3 WLR 1316 Ch D, where the Court was required to construe the meaning of “*the holders*” of a company’s issued share capital for the purposes of section 98 of the Companies Act 2006 (“the 2006 Act”). Norris J held at para 18 that as a matter of company law:

... a “shareholder” or “the holder of a share” (the terms are interchangeable) is one (and only one) whose name is registered in the register of members. There would in my view have to be an extremely strong reason to read the expression “the holders of not less in the aggregate than 5% in nominal value of the company’s issued share capital” in a sense different from that indicated by the orthodox understanding of company law.

11. Norris J went on to state that the 2006 Act proceeded entirely upon this basis and cited various provisions to prove his point. Some, at least, have counterparts in the 1981 Act. Eg section 19 of the 1981 Act provides that a prerequisite for membership of a company is the entry of one’s name in its register of members. Section 65 provides that every company shall keep a register of its members which, in the case of a company having a share capital, shall include a statement of the shares held by each member.

Purchasers

12. “*Purchasers*” are defined in section 103(1) as the holders of not less than 95% of the shares or any class of shares in a company. Mr Brisby QC, who appears for the Applicant, submits that this means the holders from time to time of not less than 95% of the shares. In other words, if the purchasers cease to hold 95% of the shares or any class of shares in the company they cease to be purchasers within the meaning of section 103 and therefore lose their entitlement to acquire the shares of the remaining shareholders.
13. Mr Hargun, who appears for the Respondents, disagrees. He submits that “*purchasers*” means the holders of not less than 95% of the shares at the date when the section 103 notice is given. Once notice is given, he submits, a “*statutory contract*” comes into effect which confers on the majority shareholders the rights and obligations set out in the remainder of the section. Thereafter, Mr Hargun submits, it matters not whether the majority shareholders continue to hold not less than 95% of the shares. They will remain subject to the rights and obligations which section 103 confers upon purchasers.
14. Mr Brisby retorts that if that is what the legislature had intended the legislature would have made that intention clear by deleting the words “(*hereinafter in this section referred to as the ‘purchasers’*)” in section 103(1) and inserting a sentence such as: “*For the purposes of this section, any such holders giving any such notice are hereinafter referred to as the ‘purchasers’*”. Thus the relevant part of section 103(1) would have read:
 - (1) The holders of not less than ninety-five per cent of the shares or any class of shares in a company 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. For the purposes of this section, any such holders giving any such notice are hereinafter referred to as the “purchasers”.
15. As to the statutory contract point, Mr Brisby accepts that one will be concluded under section 103(1) from the date on which notice is given *unless* a remaining shareholder applies to the Court for an appraisal under

subsection 2 and *provided* that the purchasers offer the same terms to all holders of the shares whose acquisition is involved. Thus whether a statutory contract has been concluded under section 103(1) will only be known retrospectively.

16. If a remaining shareholder to whom a section 103 notice applies has been given does apply to the Court to appraise the value of the shares to be purchased, then, Mr Brisby submits, the most that the purchasers have acquired is an option, exercisable within one month after the date of appraisal, to acquire the shares at a price to be determined by the Court. If the purchasers decide to acquire all the shares involved at the price fixed by the Court then, at the date of acquisition, a statutory contract will be concluded. If the purchasers decide instead to cancel the notice given under subsection (1) there will be no statutory contract.
17. Both sides contend that the construction favoured by the other side will create difficulties and lead to undesirable results. Mr Brisby gives the example of 2 shareholders. One holds 96 shares, representing 96% of the shares in the company, and the other holds 4 shares, representing the remaining 4% of the shares in the company. The 96% shareholder serves a section 103 notice on the 4% shareholder. The 4% shareholder applies to the Court for an appraisal. Before the appraisal takes place, the 96% shareholder sells each of his 96 shares to a different purchaser. There are now one shareholder holding 4% of the shares in the company, 96 shareholders holding one share each, and the original 96% shareholder holding nothing at all. The 4% shareholder is now the largest shareholder in the company. By what policy reason, Mr Brisby asks rhetorically, should the 0% shareholder be permitted to expropriate the shares of the 4% shareholder? He rightly reminds me that as section 103 permits the expropriation of property it must be construed strictly.
18. Mr Brisby develops his example further. Prior to the appraisal the 96 shareholders get together and issue a section 103 notice of their own. The 4% shareholder decides not to contest it. There are now two competing section 103 notices. Under section 103(1) the new majority shareholders are

“*entitled and bound*” to acquire the minority shares. But the Court has yet to appraise the value of the shares for the purposes of the first section 103 notice. By what principle is the Court to decide which notice takes priority? The 1981 Act doesn’t say.

19. I explored both scenarios with Mr Hargun. He submits that there is nothing objectionable about the first scenario. The policy of section 103 – or, in more commercial terms, its “selling point” – is, he submits, that the holders of not less than 95% of the shares in a company should be able to buy out the minority, not that companies should be 100% owned by one shareholder or group of shareholders. Provided that the holders have given a section 103 notice, he submits, it matters not whether they do so before or after they have ceased to hold not less than 95% of the shares. It makes no difference to the minority shareholder. All that matters is that the majority shareholders hold not less than 95% of the shares when the notice is given.
20. Mr Hargun submits that there is a sound commercial reason for this. In the context of international companies, restructuring of shares is a common and necessary occurrence, eg for tax reasons or in accordance with the wishes of lending institutions. It would, he submits, be remarkable if, once notice had been given, a company could not be restructured until the minority shares had been acquired. Particularly where the purpose of the acquisition is to facilitate the restructuring. As the instant case bears witness, where the minority shareholder seeks an appraisal by the Court, months or years may pass before the appraisal takes place. To restrain corporate restructuring until after the appraisal would, Mr Hargun submits, make section 103 commercially unattractive. This would be unlikely to accord with the legislative intent in an offshore jurisdiction such as Bermuda, where the economy is heavily dependent on international business.
21. Mr Brisby replies, in effect, that it is not unreasonable that majority shareholders who stand to benefit from a compulsory sale should be subjected to the burden of retaining their majority shareholding until the sale has taken place or the section 103 notice has been cancelled. He notes that the appraisal procedure under section 103 is summary and that there is no

right of appeal. Hence the appraisal procedure should normally be quite expeditious. He submits that the length of time which the application for an appraisal has taken to reach a substantive hearing in this case is exceptional and largely attributable to the Respondents' reluctance to comply with their disclosure obligations.

22. Mr Brisby further submits that what is of greater concern to the business community is certainty. Business people want to be able to take commercial decisions based on legislation which makes clear what the outcome will be if any actions which they may wish to take are tested in Court. He submits that the construction for which the Applicant contends ("the Applicant's construction") satisfies this requirement whereas the construction for which the Respondents contend ("the Respondents' construction") does not. Eg the Respondents' construction gives rise to the possibility of competing section 103 notices.
23. As to that possibility, Mr Hargun submits that the practical solution is that the first notice should have priority. In Mr Brisby's example, the court would no doubt have regard to the price offered by the 96 shareholders when appraising the fair value of the shares belonging to the 4% shareholder. Mr Brisby submits that there are difficulties with this solution as, in that example, the second majority shareholder would have full beneficial ownership of the minority's shares and the right and obligation to acquire legal ownership of them whereas the original majority shareholder would have, at most, a mere equity until he exercised his option to acquire the shares. I need not resolve the point, which does not arise on the facts of this case. Suffice it to say that, if the Respondents' construction is correct, where there are two section 103 notices there will be uncertainty as to which will prevail until such time as the issue is resolved by the Court.
24. Mr Brisby points out that the possibility of two – or more – concurrent section 103 notices may raise practical problems for the purchasers of a majority shareholding. If they then wish to issue a section 103 notice, how are they to know whether the previous majority shareholders – or their predecessors in title – have already issued one? The answer, Mr Hargun

suggests, is by making adequate enquiries before acquiring the majority shareholding.

25. As to undesirable results, Mr Hargun submits that if “*purchasers*” means the holders from time to time of not less than 95% of the shares, majority shareholders who are “*bound*” by section 103(1) to acquire the shares of the remaining shareholders on the terms set out in a section 103 notice can evade that obligation should they so choose, eg because the market for the shares collapses, by disposing of their own shares, perhaps to other companies which they control.
26. By parity of reasoning, Mr Hargun submits, if the remaining shareholders do not want to sell to the majority shareholders then, if the Applicant’s construction is correct, they can defeat the section 103 notice by the simple expedient of transferring their shares to others.
27. Mr Brisby gives both points short shrift. As to the reluctant purchasers under section 103(1), he submits that the minority shareholders would be creditors of the majority shareholders, and points out that the courts have had a statutory power to avoid transactions to the detriment of creditors since the days of Elizabeth I. In Bermuda, those provisions are to be found in sections 36A to 36F of the Conveyancing Act 1983 (“the 1983 Act”). Their effect is that if the majority disposed of sufficient shares that they ceased to hold not less than 95% of the shares in the company, and did so with the dominant purpose of evading their obligation to purchase the minority’s shares, and at an undervalue, then that disposition would be voidable at the instance of the minority. The 1983 Act would not apply if the majority did not dispose of their shares at an undervalue. But in those circumstances the minority could no doubt claim damages from the majority for breach of the statutory contract.
28. As to the reluctant sellers, Mr Brisby submits that they would remain shareholders within the meaning of section 103, and therefore bound to sell their shares insofar as required by the mechanism set out in that section, unless and until another name or names were entered on the register in their place. This could only happen with the authority of the board of directors,

which would in practice be controlled by the majority. It is therefore most unlikely, Mr Brisby submits, that the minority could evade their statutory obligation to sell to the majority.

Conclusions

29. In adjudicating between these rival constructions I find myself returning to the themes of language and context. If section 103 is read in isolation, without regard to contextual factors, the Applicant's construction is the one which best fits the language of the text. As Mr Brisby submits, it gives weight to every word. The Respondents' 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, in my judgment the Applicant'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 the Applicant's construction.
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*". It is one of several sections, along with section 102 ("*Power to acquire shares of shareholders dissenting from scheme or contract approved by majority*") and section 106 ("*Shareholder approval*") which provide for the compulsory sale of shares. The dominant purpose of all these provisions is to facilitate corporate restructuring. The Respondents' construction of section 103 is the one which best gives 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.
32. The sole object of statutory interpretation is to arrive at the legislative intention. See Bennion on Statutory Interpretation, Fifth Edition, page 469. In construing that intention I have regard to the language of the section, its statutory context, and broader policy considerations. These interpretative factors do not all point in the same direction. However, having weighed them carefully, I find in favour of the Respondents. 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.
33. Accordingly, I find that the Respondents, albeit they no longer hold more than 95% of the ordinary shares in the Company, remain entitled under section 103(2) to acquire the Applicant's shares at a price to be fixed by the Court.
34. I shall hear the parties as to costs.

Dated 7th February 2014

Hellman J