In The Supreme Court of Bermuda

COMMERCIAL COURT

CIVIL JURISDICTION
2014: No. 56

BETWEEN:-

(1) NITIN T MEHTA
(2) MFP-2000, LP

Plaintiffs

-and-

(1) VIKING RIVER CRUISES LIMITED
(2) VIKING CAPITAL LIMITED
(3) MISA INVESTMENTS LIMITED

Defendants

RULING ON APPLICATION FOR SUMMARY JUDGMENT

(In Chambers)

Date of hearing: 22nd September 2014
Date of ruling: 29th October 2014

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

Mr David Chivers QC and Mr Christian Luthi, Conyers Dill & Pearman, for the Defendants

Introduction

1. The Plaintiffs apply for summary judgment against the First Defendant ("the Company") in respect of their claim for payment *pro rata* of a dividend which it has declared ("the Dividend"). The application is brought pursuant to Order 14 of the Rules of the Supreme Court 1985 ("RSC"). It is opposed by all three Defendants.

2. The First Plaintiff ("Mr Mehta") is and was at all material times the registered holder of 70,375 series G1 preference shares and 37,500 series G2 preference shares in the Company.

3. The Second Plaintiff ("MFP") is and was at all material times the registered holder of 80,757 series A ordinary shares and 6,679 series G2 preference shares in the Company.

4. At all material times the Second Defendant ("Viking Capital") and Third Defendant ("MISA") held not less than 95% of the series A ordinary shares in the Company.

5. The Defendants assert that at all material times MISA held not less than 95% of the preference shares in the Company. This assertion is disputed by the Plaintiffs, but for purposes of this summary judgment application I shall proceed on the basis that it is correct.

6. On 4th October 2011, Viking Capital and MISA served a notice on MFP under section 103(1) of the Companies Act 1981 ("the 1981 Act") of their intention to acquire MFP's series A ordinary shares in the Company. The notice was dated 29th September 2011. MFP applied to the Court under

section 103(2) of the 1981 Act to appraise the value of the shares ("the First Section 103 Application").

7. Following a contested hearing, the Court has circulated among the parties a draft judgment appraising the value of the shares, but this will not be handed down until the conclusion of the substantive hearing of the other actions ("the Consolidated Actions") brought by the Plaintiffs against the Viking group of companies ("the Group") and Torstein Hagen ("Mr Hagen"). Mr Hagen is the Chairman and a director of the Company. The Plaintiffs say that he controls the Group.

8. The Dividend was declared by the Company on 24th September 2012. The resolution, as recorded in the minutes of the Board of Directors, reads as follows:

> DIVIDEND
>
> (a) RESOLVED that, subject to receipt of confirmation that the Company shall, after payment of a dividend, be able to pay its liabilities as they fall due, a dividend up to the maximum amount of US$26,000,000 (twenty six million United States dollars) be declared to be Members of record as at 9.00 a.m. on the date hereof, payable pro rata their holdings in the Company as soon as practicable; and
>
> (b) WHEREAS by notice given under Section 103 of the Companies Act 1981 dated 29 September, 2011, the Company and MISA Investments Ltd. gave notice to acquire 80,757 Ordinary Shares of the Company held by MFP 2000 LP, and on 28 October 2011 MFP 2000 LP exercised its appraisal right, pursuant to Section 103:
>
> BE IT NOW RESOLVED that sums representing the dividend declared at 3(a) above be paid into a separate account pending resolution of the appraisal proceedings.

9. That same day, MISA served a notice on the Plaintiffs under section 103(1) of the 1981 Act of its intention to acquire their preference shares in the Company. The notice was dated 20th September 2012. For purposes of this summary judgment application I shall proceed on the basis that the notice was valid, although its validity is disputed. I shall also proceed on the

assumption that it was given after the Dividend was declared, although that assumption is not necessarily correct.

10. The Plaintiffs have applied to the Court under section 103(2) of the 1981 Act to appraise the value of the shares ("the Second Section 103 Application"). The Second Section 103 Application forms part of the Consolidated Actions.

11. Three days later, on 27th September 2012, the Company, by a further resolution of its directors, resolved to increase the Dividend from US$ 26 million to US$ 28,108,515.50.

12. The Plaintiffs submit that as registered shareholders they are entitled to receive their *pro rata* share of the Dividend, and will remain so irrespective of whether Viking Capital and/or MISA decide to purchase their shares at the price fixed by the Court.

13. The Company disagrees. It has issued an interpleader summons under RSC Order 17 seeking an order that it should hold the Dividend payable on the Plaintiffs' shares in a specified bank account, to be distributed to the person(s) who are ultimately entitled to them at the conclusion of the appraisal process.

14. Viking Capital and MISA support the Company's application for interpleader relief. They contend that if they elect to purchase the Plaintiffs' shares (or rather, on their analysis, unless they elect not to purchase them) at the values fixed by the Court then they will be entitled to the Dividend payable on those shares. In the event that the application for summary judgment does not succeed, they seek directions for the filing of a defence and counterclaim.

Summary judgment

15. The provisions of RSC Order 14 are well known. Where a statement of claim has been served on a defendant and the defendant has entered an appearance in the action, a plaintiff may apply for judgment on the ground that the defendant has no defence to all or part of a claim included in the

writ. A defendant may show cause against an application for summary judgment by affidavit or otherwise to the satisfaction of the Court. What the defendant must show is that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of all or part of that claim. The Court may give the defendant leave to defend all or part of the action either unconditionally or on such terms as it thinks fit.

16. As the commentary to the 1999 edition of the White Book states at 14/4/9:

> The power to give summary judgment under Ord. 14 is "intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment, and where therefore it is inexpedient to allow a defendant to defend for mere purposes of delay" (Jones v Stone [1894] AC 122). As a general principle, where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a *bona fide* defence, he ought to have leave to defend (Saw v Hakim (1889) 5 TLR 72; Ironclad, etc v Gardner (1892) 4 TLR 18; Ward v Plumbley (1890) 6 TLR 198; Yorkshire Banking Co v Beatson (1879) 4 CPD 213; Ray v Barker (1879) 4 Ex D 279).
>
> Leave to defend must be given unless it is clear that there is no real substantial question to be tried (Codd v Delap (1905) 92 LT 519, HL); that there is no dispute as to facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment (Jones v Stone [1894] AC 122; Thompson v Marshall (1880) 41 LT 729, CA; Jacobs v Booth's Distillery Co (1901) 85 LT 262, HL; Lindsay v Martin (1889) 5 TLR 322).

17. A defendant may show cause "*by affidavit or otherwise*". But where the defendant seeks to set up a defence on the facts then, save in exceptional or obvious cases, the Court will generally require an affidavit before being satisfied that he should have leave to defend. See the commentary to the 1999 edition of the White Book at 14/4/4. As that commentary states at 14/4/5:

> The defendant's affidavit must "condescend upon particulars," and should, as far as possible, deal specifically with the plaintiff's claim and

affidavit, and state clearly and concisely what the defence is, and what facts are relied upon to support it.

18. It has been said that leave to defend should be given where a difficult question of law is raised. See Campbell v Vickers [2002] Bda LR 3, SC, *per* Meerabux J at page 3, citing Electric Corporation v Thompson-Houston 10 TLR 103. On the other hand, there will be cases where the Court has heard full argument on the question and where the facts necessary to resolve it are not in dispute. In such cases, if there is no reasonable doubt that the question should be resolved in favour of the plaintiff, who would in that event be entitled to judgment, then, absent a compelling reason to the contrary, the Court should in my judgment grasp the nettle and decide the question at the summary judgment stage.

Bye-laws

19. Payment of dividends is governed by the Company's bye-laws. By reason of section 16 of the 1981 Act, these are binding upon the Company and its members. The relevant bye-law is 4.4(b).

> Income
>
> (i) Subject to Bye-law 4.4(b)(iv), Ordinary Shares and Non-Voting Ordinary Shares shall entitle the Members holding the same to receive such dividends as the Board may from time to time declare on the Ordinary Shares and Non-Voting Ordinary Shares proportionately according to the numbers of such shares held.
>
> (ii) Subject to there being reasonable grounds for believing that the Company is, and will after the payment be, able to pay its liabilities as they become due, and that the realisable value of the Company's assets will not thereby be less than the aggregate of its liabilities and its issued share capital and share premium accounts, each Preference Share shall entitle the Member holding the same to receive a Preferential Dividend which, if declared and paid in any financial year, shall be paid within 6 months from the end of that financial year.

20. The salient point is that on the face of the bye-laws the person entitled to receive a dividend payment in respect of a share is the member holding that share. It is not disputed that the members of a company are the persons whose names are registered as shareholders in its register of members. See In re DNick Holding plc [2013] 3 WLR 1316 Ch D *per* Norris J at para 18.

Statutory scheme

21. Entitlement to dividend payments falls to be construed within the context of section 103 of the 1981 Act.

> (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.
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> . . . . .
>
> (6A) Where the purchaser is entitled and bound to acquire shares pursuant to subsection (1) or has determined in accordance with subsection (3)(a) to proceed to acquire all the shares involved at the price fixed by the Court, on the expiration of one month from the date on which the notice was given, or, if an application to the Court to appraise the value of the shares to be purchased is then pending, from the date that application has been disposed of, the purchaser may—
>
> (a) transmit a copy of the notice to the subject company together with an instrument of transfer executed on behalf of the shareholder by any person appointed by the purchaser and on its own behalf by the purchaser; and
>
> (b) pay or transfer to the subject company the amount or other consideration representing the price payable by the purchaser for the shares which by virtue of this section the purchaser is entitled to acquire, whereupon the subject company shall register the purchaser as the holder of those shares.

22. It is common ground that service of a notice under section 103(1) gives rise to a statutory right and obligation on the part of the majority shareholder to buy and the minority shareholder to sell the shares that are the subject of the notice.

23. John Brisby QC, counsel for the Plaintiffs, submits that if a minority shareholder applies to the Court under section 103(2) for an appraisal then these mutual rights and obligations will come to an end. However a fresh set

of mutual rights and obligations to buy and sell the shares will arise if and when the majority shareholder takes such action as may be necessary under section 103(3)(a) to acquire all the shares involved at the price fixed by the Court.

24. The majority shareholder could do this by using the mechanism in section 103(6A). I am inclined to agree with Mr Brisby that, as suggested by the phrase "the purchaser *may*", the majority shareholder is not required to use this mechanism in order to exercise its right under section 103(3)(a), although in many cases the majority shareholder will no doubt find it convenient to do so. I am fortified in this view by the fact that section 103(6A) was inserted by section 20 of the Companies Amendment (No 2) Act 2011 with effect from 18th December 2011. Prior to that date, majority shareholders had to use other means to acquire the minority's shares following appraisal.

25. There is another point of construction arising under section 103(6A). I think it likely that the phrase "*on the expiration of one month … from the date that application has been disposed of*" contains a drafting error, and should, in order to give effect to the legislative intent, be construed as reading: "*on the expiration of one month … or … within one month from the date that application has been disposed of*". Otherwise the majority shareholder would be unable to use the section 103(6A) mechanism until after the expiry of the month permitted for the acquisition of the shares by section 103(2)(a).

26. David Chivers QC, counsel for the Defendants, submits that a majority shareholder, having served notice under section 103(1), will continue to have the right and obligation to buy the shares unless and until, pursuant to section 103(3)(b), it cancels the notice given under section 103(1).

27. Section 103 is silent as to what happens if, within one month of the Court appraising the value of the shares, the majority shareholder fails to exercise either option under section 103(3). On the Defendants' analysis, the majority shareholder would retain the right to acquire the shares (possibly subject to exercising that right within a reasonable time). This is on the

basis that the legislature did not intend the majority's failure to comply with the statutory time limit to invalidate an election made out of time. It is at least arguable that the minority shareholder (possibly subject to doing so within a reasonable time) would have a reciprocal right to compel the majority shareholder to buy the shares at the price fixed by the Court. On the Plaintiffs' analysis, the notice given under subsection (1) would be deemed to be cancelled.

28. Auld JA, giving judgment, reported at [2014] CA (Bda) 1 Civ, on an appeal against an interlocutory ruling on the First Section 103 Application ("the Interlocutory Appeal"), warned at para 20 that it would be wrong to equate the statutory relationship under section 103 with the incidents of a contract at common law. Nonetheless the law of contract provides a helpful analogy to crystallize the difference between the parties.

29. Whereas Mr Brisby submits that section 103(3)(a) gives the majority shareholder a right equivalent to an option to buy the minority's shares, Mr Chivers submits that giving notice under section 103(1) gives rise to a set of rights and obligations analogous to a statutory contract which the majority shareholder may rescind by cancelling the section 103(1) notice under section 103(3)(b).

Cases on dividend payments

30. There are no decided cases dealing with entitlement to dividend payments under section 103. However the parties submit that cases dealing with contractual and equitable rights to dividend payments provide persuasive analogies.

31. The Plaintiffs rely on Kidner v Kidner [1929] 2 Ch 121, Ch D as authority for the proposition that the person who is entitled to payment of a dividend on a share is the registered shareholder at the date when the dividend was declared.

32. In April 1922 Mr Kidner was given the option of purchasing all the shares in a company. In June 1928 the company declared a dividend, payable in three instalments in July 1928, November 1928 and February 1929. In July 1928 Mr Kidner exercised his option to purchase all the shares. In November 1928 (and before the November instalment of the dividend was paid) the purchase was completed.

33. On a summons taken out to determine the rights of the parties, Eve J held that Mr Kidner was not entitled to any part of the dividend payment – including the two instalments which had not been paid at the date of completion – because he was not the registered shareholder at the date when the dividend was declared. The learned judge stated at 126:

> The declaration of the dividend … created a debt owing by the company to the trustees as the registered shareholders. It is true that no steps could have been successfully taken to enforce payment until the due date for payment of each instalment arrived, but none the less the title to that dividend was in my opinion determined by the declaration, and the mere fact that the payment was postponed does not operate to deprive those who were the holders of the shares at the date of the declaration of their right to each instalment of that debt. I come to the conclusion therefore that the transfer did not vest in Mr. Kidner the right to claim and retain payment of the two last instalments of that dividend. That dividend remains where it was when it was declared, and belongs to the estate.

34. Mr Brisby submits that the salient point about Mr Kidner was that he was not the registered shareholder when the dividend was declared. Moreover, he had not at that date exercised his option to purchase the shares. He submits that Mr Kidner was in both respects in an analogous position to the majority shareholders in the instant case.

35. Not so, says Mr Chivers. He submits that the case is merely authority for the propositions that when a dividend is declared it creates a debt, and that the person who is entitled to payment of that debt is the person who was entitled at the date of the declaration. He further submits that as the dividend was declared before Mr Kidner exercised his option, the case has nothing to say about whose claim to the dividend, as between an option holder who has

exercised his option or the registered shareholder, has priority. Mr Chivers invites me to conclude that by serving a notice under section 103(1) the majority shareholders in the instant case, unlike Mr Kidner, have analogously exercised their option to purchase the shares in question.

36. Mr Chivers submits that the case of Black v Homersham (1874) 4 Ex D 24 is of greater assistance, and that it offers by way of analogy a persuasive approach to the construction of section 103.

37. The claimants purchased shares in a company at auction on various dates from 1st August 1877 to 20th August 1877. They paid a deposit when the contract for sale was made and the balance of the purchase price upon completion, which took place on 29th August 1877.

38. The shares purchased by one of the claimants were transferred to him on 24th August 1877 but the shares purchased by the remaining claimants were not transferred to them until the completion date. Meanwhile, on 28th August 1877 the company declared a dividend for the half year which ended on 30th June 1877.

39. The defendant was the registered shareholder both on 30th June 1877 and, except for the shares transferred on 24th August 1877, on the date when the dividend was declared.

40. The issue for the court was who, as between the claimants and the defendant, was entitled to the dividend. It found for the claimants. Kelly, CB stated at 25:

> I am clearly of opinion that the completion of the purchase has relation back to the time when the contract was made, which vested from that moment the right to the shares in the purchasers. They purchased the shares on that day and at that time, and at their then value, and when they paid the remainder of the purchase money at the time fixed for completion they had a complete title to the shares as they bought them on the 1st of August. It is a different case from that of real property, and the suggested analogy does not, in my opinion, hold.

41. Cleasby, B agreed, and at 25 gave a policy justification for this decision:

> I think it would be very strange if the matter were determined otherwise; for we know that the value of such property falls immediately a dividend is paid. The purchaser bought at the value before dividend, and if he does not receive it, he will be paying so much more for his shares than he bargained for.

42. Mr Chivers submits that, by parity of reasoning, a purchaser under section 103 is entitled to payment of any dividend declared after that purchaser gave notice to the minority shareholder under section 103(1). Thus, he submits, entitlement to the dividend relates back to the time when the section 103(1) notice was given.

43. Mr Brisby seeks to distinguish Black v Homersham on the grounds that the plaintiffs in that case each paid a deposit when the contract was made, whereas under section 103 the majority shareholders are not required to do so. However there is no suggestion in the judgment of either Kelly, CB or Cleasby, B that payment of a deposit was material to their reasoning.

44. Black v Homersham was approved in Richards v Wimbush [1940] 1 Ch 92, Ch D. The purchaser exercised his option to buy some shares. Subsequent to the sale a dividend was declared. There was no suggestion that by that date the purchaser's name had not been entered on the company's register as the holder of the shares in question. Nonetheless the vendor claimed to be entitled to that part of the dividend which related to a period prior to the sale. The court held that the vendor had no such entitlement. Morton J stated at 99:

> What the purchaser agrees to buy is the shares with all the rights which these shares confer in respect of the capital of the company and in respect of the profit earned up to the date of the sale. This is well illustrated by the case of Black v Homersham. … The purchaser has bought the tree, and with it the fruits that are ripening on the tree.

45. As the facts of Richards v Wimbush are far removed from the instant case the authority is of limited assistance. Although the image of the fruit ripening on the tree does provide a pithy metaphor.

46. Under a contract for the sale of shares, the beneficial ownership of the shares passes to the purchaser, subject to a vendor's lien, and the vendor holds the shares on trust for the purchaser pending completion. See Musselwhite v C H Musselwhite & Son Ltd [1962] Ch 964, Ch D, *per* Russell J at 987; and Sainsbury Plc v O'Connor [1991] 1 WLR 963, EWCA, per Nourse LJ at 978 E – G, applying Parway Estates Ltd v Inland Revenue Commissioners 45 TC 135 and Lysaght v Edwards (1876) 2 Ch D 499.

47. The contract is specifically enforceable. Whether this is because the purchaser is the beneficial owner of the shares, which seems to me the more logical analysis, or alternatively whether, as suggested in Sainsbury Plc v O'Connor by Lloyd LJ (as he then was) at 972 C and Nourse LJ at 978 D, the purchaser is the beneficial owner of the shares because the contract is specifically enforceable, is a "chicken and egg" sort of question which I need not attempt to resolve.

48. The holder of an option to purchase shares, once he has exercised that option, also becomes their beneficial owner. Put another way, he is entitled to obtain specific performance of the option to purchase. See London and South Western Railway Co v Gomm (1882) 20 Ch D 562 *per* Jessel MR at 581 (by parity of reasoning, as the option in that case was to repurchase land); and Pena v Dale [2004] 2 BCLC 508, Ch D *per* HH Judge Behrens (sitting as a judge of the High Court) at para 129.

49. However an option holder cannot claim specific performance until he has exercised his option. Prior to that time, beneficial ownership remains in the vendor. See Sainsbury Plc v O'Connor *per* Lloyd LJ at 972 C – D and Nourse LJ at 978 H – 979 A. As Nourse LJ stated at 979 H, the grantor of an option which has not been exercised retains much more than a mere legal shell of ownership.

50. For example, in Musselwhite the Court held, as stated in the headnote summary, that an unpaid or partly-paid vendor of shares remaining on the register of shares after the execution of the contract for sale retained, in relation to the purchaser, the right to decide how to exercise the voting rights in respect of those shares.

51. It was common ground in Musselwhite that in the case of land the vendor retains a right to possession and to the rents and profits of the land up to the date fixed for completion. In Sainsbury Plc v O'Connor Nourse LJ stated *obiter* at 978 D – E that, by parity with contracts for the sale of land, where the purchaser obtains beneficial ownership of the shares the vendor remains entitled to any dividends accruing before completion.

52. His Lordship did not cite any authority for this observation. It appears inconsistent with Black v Homersham, which was not cited in argument. The Court was referred to both these cases in Harrison v Thompson [1992] BCC 962, EWCA. Scott LJ, giving the judgment of the Court, stated at 969 G – H:

> There has been much debate before us as to whether or not post 1 March 1988 the appellant retained the rights to dividends on his shares. Mr Cullen contended that he did not, and cited Black v Homersham (1878) 4 ExD 24 . Mr Evans-Lombe contended that he did, and cited a passage from the judgment of Nourse LJ in Sainsbury plc v O'Connor [1991] 1 WLR 963 at p. 978. My instinctive response would be the same as that of Nourse LJ, namely, that the vendor of the shares retained, until completion, the right to dividends. But it is not, in my opinion, necessary for us to express a concluded opinion since it is common ground that the point is, in relation to this company, wholly theoretical.

53. Mr Brisby submits that in the present case Viking Capital and MISA are not entitled to the Dividend as they cannot presently exercise a right analogous to specific performance to obtain the transfer of the shares. No appraisal has been completed (the ruling on the First Section 103 Application is in draft form), no price has been fixed, and none has been paid.

54. Mr Brisby further submits that even if Viking Capital and MISA were entitled to exercise a right analogous to specific performance they would not be entitled to the dividend as the share transfer has not been completed and the Plaintiffs therefore remain the registered shareholders.

55. Mr Chivers, on the other hand, submits that a majority shareholder who has served a section 103(1) notice acquires by analogy a right equivalent to the

beneficial ownership of the minority's shares, subject to the vendor's lien. He submits that this right confers on the majority the further right to any dividend declared on those shares following service of the section 103(1) notice.

Policy

56. As stated by Auld LJ at para 26 of the Interlocutory Appeal, section 103 has as its dominant purpose the facilitation of ready corporate restructuring whilst also providing fair treatment to minority shareholders. The parties on each side submit that this purpose would not be furthered by the construction of that section favoured by the parties on the other, which would, they submit, tend to produce arbitrary and unfair results.

57. Assume that the Plaintiffs are right and that entitlement to dividends is dependent upon registered ownership. This would mean that where the minority shareholder has sought an appraisal, the purchaser's entitlement to any dividends declared after giving notice under section 103(1) would depend upon whether the dividend was declared before the purchaser acquired the shares at a price fixed by the court. It would be arbitrary, Mr Chivers submits, if entitlement were dependent upon such an accident of timing.

58. Mr Brisby replies that there would be nothing arbitrary or unfair about holding that a purchaser is not entitled to dividends declared on shares before he has definitively elected to buy them and for which he has not yet paid.

59. Mr Chivers further submits that, if the purchasers were not entitled to any dividend declared on the minority's shares after the section 103(1) notice was given but prior to completion, the loss of the dividend would be a cost to the purchasers and a benefit to the minority in excess of the appraised value of the shares. Thus, to borrow from the language of the law of restitution, the minority would be unjustly enriched.

60. Mr Brisby replies that the possibility of future dividend payments is something that the Court will take into account when appraising the value of the shares, as it has done in the draft appraisal on the First Section 103 Application. There the appraised value of the Company was reduced to reflect the fact that a minority shareholder does not have the control necessary to compel the declaration of dividends.

61. Mr Brisby submits that the fact that the dividend declared on 24th September 2012 was not reasonably foreseeable on 4th October 2011, ie the valuation date, is nothing to the point. It is merely one of a number of things that have happened since the valuation date which may have affected the value of the Company, the net result of which happens to be that the Company's value has increased.

62. He could further submit that it would be wrong to regard a dividend payment to the minority as part of the price paid by the majority. The minority's right to the dividend derives from its pre-existing status as a registered shareholder and is unconnected to the purchase.

63. These submissions are representative rather than exhaustive of the points made by the parties. They illustrate that the competing policy considerations tend to cancel each other out. The giving of the section 103(1) notice and registered ownership both provide a rational basis for determining entitlement to a dividend.

Concurrent actions

64. The claim for payment of a Dividend is one of the Consolidated Actions. Another is an action brought on a Petition alleging oppression by Mr Hagen and another member of the Group, Viking Cruises Limited ("Viking Cruises") (together, "the Respondents"). The Petition is currently in draft amended form, which I shall take as an accurate statement of the case which the Petitioners wish to advance.

65. The Petitioners, who are the Plaintiffs in the present case, seek an order that the Respondents purchase their shares in the Company at their fair value, to reflect the damage said to be caused to their shares by the Respondents' allegedly oppressive conduct.

66. The Petitioners allege that the Dividend was paid on a *pro rata* basis to all other shareholders of record in the Company save for the Petitioners. They allege that Viking Capital's *pro rata* entitlement to the Dividend (through its subsidiary, MISA, and its direct shareholding in the Company) exceeded the amount owed by Viking Capital to the Company under a US$24 million loan that the Company had made to Viking Capital. The Petitioners allege that Mr Hagen caused Viking Capital to use the proceeds of the Dividend to which it was entitled to discharge the debt.

67. The purpose of the loan, the Petitioners allege, was to allow Viking Capital to purchase further shares in the Company so that it could invoke the procedures under section 103 of the 1981 Act and expropriate the Petitioners' shares. The Petitioners allege that the loan was made for an improper purpose and it is part of the allegedly oppressive conduct of which they complain.

68. The Petitioners allege that, in breach of the Company's bye-laws, Mr Hagen caused the Company to withhold the payment of the Dividend from the Petitioners despite the fact that they were the shareholders of record at the date of the declaration of that Dividend and therefore, on the Petitioner's case, entitled to the payment of their *pro rata* share of it. The Petitioners allege that such conduct was oppressive to them, particularly in circumstances where the proceeds of the Dividend paid to MISA and Viking Capital were used to discharge the said loan.

69. The draft amended Petition notes that the Petitioners have commenced a claim against the Company for the payment of their *pro rata* entitlement to the Dividend and that they will seek to have it listed to be heard at the same time as the trial of the Petition. That claim is, of course, this one. As mentioned above, both this claim and the action on the Petition form part of the Consolidated Actions.

70. Obviously, the Plaintiffs could not obtain payment of the Dividend twice: once on the instant application and once on the Petition. But that is not what they are seeking. They do not claim payment of the Dividend on the Petition but rather rely on its being withheld as forming part of a pattern of oppressive conduct. There is no inconsistency in their doing that while seeking payment of the Dividend on the instant application.

71. Despite Mr Chivers' eloquent submissions to the contrary, the fact of the Petition would therefore present no obstacle to the Court granting the Plaintiffs' application for summary judgment.

Mistake

72. The Defendants seek leave to serve amended Defences in which they plead that if the Plaintiffs are entitled to the Dividend even if the majority elects to purchase the Plaintiffs' shares, then the Dividend was declared on a mistaken basis, namely that the Company's resolution of 24th September 2012 was lawful and effective, and that consequently the declaration of Dividend is void or voidable at the behest of the Defendants. The leave sought is hereby granted.

73. The Defendants rely on the equitable doctrine of mistake. The doctrine was considered recently by the UK Supreme Court in Pitt v Holt [2013] 2 AC 108. Lord Walker, giving the judgment of the Court, provisionally concluded that there must be a causative mistake of sufficient gravity, and that this test will normally be satisfied only when there is a mistake either as to the legal character or nature of a transaction, or as to some matter of fact or law which is basic to the transaction. The Court must be satisfied that, viewed objectively, and with an intense focus on the facts, it would be unconscionable, or unjust, to leave the mistake uncorrected. "*The Court may and must form a judgment about the justice of the case*". These factors must be considered in the round. See paras 122 and 124 – 128.

74. I am satisfied that in the present case the mistake was of sufficient gravity. What is at issue is (i) whether it was causative, ie whether, the Company,

had it realised that the Plaintiffs would be entitled to the Dividend payable on their shares, would have declared one; and (ii) if so, whether it would be unjust to leave the mistake uncorrected.

75. The Defendants' case on causation is hampered by the fact that they have not adduced any evidence from which the Court can properly infer that the mistake was causative. The Defendants have submitted draft pleadings which aver that it was causative, but these are not verified by a statement of truth, and they have not filed any affidavits averring that had the true legal position been known the Dividend would not have been declared. The Defendants rely on the Company's resolution of 24th September 2012. But this is merely evidence that there was a mistake, not that it was causative.

76. As stated above, on the Plaintiffs' case, which is not disputed on this point, the *pro rata* share of the Dividend paid to the majority shareholders was used to repay a loan to the Company. Mr Hagen accepted during the hearing of the First Section 103 Application that as of March 2012 he was not in a position to secure repayment of the loan by August 2012, which was when it originally fell due. Mr Brisby submits that therefore Mr Hagen needed the Dividend to clear the debt.

77. Mr Chivers points out that by the time the Dividend was declared the term of the loan had been extended to 2013. Who is to say, he asks rhetorically, that it would not have been extended again?

78. Mr Chivers further submits that it is clear from the evidence filed in the Consolidated Actions that Mr Hagen has at all material times been keen to minimise the amount paid to the Plaintiffs by the Company. In those circumstances, he submits, it is plausible that Mr Hagen would have ensured that there was no Dividend payment, or that it was delayed pending the resolution of any section 103 application.

79. These are questions, Mr Chivers submits, which can only be resolved through factual inquiry at trial. However the Defendants' failure to address them evidentially at this stage means that their case on causation, while not

implausible, remains speculative and lacking in detail. I am tempted to use the word "*shadowy*".

80. A further question which the Defendants have failed to address through evidence or in their pleadings is whether, if the Court were to order rescission, the Viking Capital and MISA would be able to repay their share of the Dividend. If *restitutio in integrum* is not possible then rescission is, as the Plaintiffs submit, a "non-starter".

81. Turning to the justice of the case, I agree with the Plaintiffs that if, under the section 103 mechanism, they are entitled to the Dividend as a matter of law, then it cannot be unjust for them to receive and retain what the legislature has intended them to have. This is all the more so as the Plaintiffs are not analogous to volunteers but have purchased their shares.

82. Indeed, one of the prime purposes of a company is as a vehicle to earn profits for distribution by way of dividend to its members. Consequently, the directors have a duty to consider how much of its profits they can properly distribute in that way. See the judgment of Harman J in Ex parte Glossop [1988] 1 WLR 1068 Ch D, a case on minority oppression, at 1075 D – F and 1076 B – F. As the learned judge stated at 1075 F:

> But as a matter of concept, it seems to me, it must be capable of being an improper conduct of the affairs of a company to retain in the company for the greater growth and glory of the company profits which could with entire propriety and commercial ease be paid out to members in dividends for the benefit of members.

83. Harman J noted at 1076 H – 1077 A that the power to declare dividends is fiduciary, and must not be exercised for any "*bye –motives*". He relied for this proposition on the judgment of Lord Wilberforce in Howard Smith Ltd v Ampol Petroleum Ltd [1974] AC 821 at 835.

84. In the present case, applying Glossop, it would on the face of it have been unjust for the Company *not* to have declared the Dividend. Particularly if its reason for not doing so was the bye-motive of not benefitting the minority.

85. I conclude that the doctrine of mistake would not provide a good reason for refusing summary judgment. Although I have regard to the lack of evidence as to causation, what I find conclusive is consideration of the justice of the case.

Conclusion and disposition

86. I return to Auld JA's above-mentioned admonition when giving judgment on the Interlocutory Appeal that it would be wrong to equate the statutory relationship under section 103 with the incidents of a contract at common law. Although I accept that the case law suggests fruitful ways of thinking about the section the Court should focus on the words of the statute.

87. Auld JA summarised the effect of section 103 at para 25 of his judgment on the Interlocutory Appeal:

> In the Court's view … 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 the minority shares.

88. The key phrase for present purposes is "*subject to compliance with it*". Section 103(3) confronts the majority shareholders with a choice. They can elect to acquire the shares at the price fixed by the Court or alternatively to cancel the notice given under section 103(1). Until that choice has been made – and section 103(3) is predicated on the assumption that it will be made – the majority shareholders' entitlement to the shares is only provisional. If they elect to acquire the shares at the price fixed by the Court then their entitlement becomes definite.

89. I am satisfied that the legislature did not intend that the majority shareholders should be entitled to any dividend on the shares declared before they make their election. Entitlement to the dividend may indeed "relate back", but, if so, it relates back in the case of an appraisal to the majority shareholders' election under section 103(3) and not to the service of the notice under section 103(1).

90. This analysis is congruent with all the authorities which were cited to me. In none of them was the purchaser entitled to a dividend declared before he had made a definite as opposed to provisional commitment to purchase the shares.

91. The application for summary judgment therefore succeeds in that the Plaintiffs are entitled to payment of their *pro rata* share of the Dividend in the amount of US$1,269,591. I am satisfied that there ought not for some other reason to be a trial of that aspect of the Plaintiffs' claim. I give judgment accordingly.

92. Bye-law 16.1 of the Company's bye-laws provides that no unpaid dividend shall bear interest as against the Company. However Mr Chivers informed me that upon declaration of the Dividend the Company paid the sum of US$1,269,591 into an interest bearing account. I find that the Plaintiffs are entitled to the interest that has accrued on that sum.

93. As to the interpleader summons, I therefore direct that within 14 days the Company pay the sum of US$1,269,591 to the Plaintiffs together with the accrued interest.

94. The Plaintiffs' claim for summary judgment included a claim for tax losses allegedly incurred by the Plaintiffs on account of the late payment of the Dividend. The amount claimed was an additional US$92,462. Whereas the Plaintiffs have filed evidence in support of this figure, the Defendants have not filed any evidence in reply. Although I accept that they could have done so, it is fair to say that this aspect of the Plaintiffs' claim was not the focus of the hearing.

95. I shall therefore adjourn the Plaintiff's application for summary judgment with respect to their alleged tax losses to a date to be fixed, to give the Defendants an opportunity to file evidence in reply if so advised. I shall leave it to the parties to agree a timetable for service of further evidence and skeleton arguments, agree a time estimate, and apply to the Registry for a hearing date. There shall be liberty to apply.

96. Due to the likely cost of a hearing dealing solely with tax losses, particularly if leading counsel are involved, relative to the amount at stake, the Plaintiffs may prefer to leave the determination of that issue to be dealt with at the trial of the Consolidated Actions. If the parties are able to reach agreement on any amount due to the Plaintiffs with respect to tax losses, so much the better.

97. I shall hear the parties as to costs.

Dated 29th October 2014

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Hellman J