IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 262

Suit No 125 of 2014

Between

(1) Koh Keng Chew
(2) Koh Oon Bin
(3) Koh Hoon Lye

… *Plaintiffs*

And

(1) Liew Kit Fah
(2) Liew Chiew Woon
(3) Pang Kok Lian
(4) Soh Kim Seng
(5) Soh Soon Jooh
(6) Poh Teck Chuan
(7) Samwoh Corporation Pte Ltd
(8) Samwoh Resources Pte Ltd
(9) Samwoh Infrastructure Pte Ltd
(10) Samgreen Pte Ltd
(11) Samwoh Marine Pte Ltd
(12) Samwoh Shipping Pte Ltd
(13) Resource Development Holdings Pte Ltd
(14) Highway International Pte Ltd
(15) Sam Land Pte Ltd
(16) Sam Development Pte Ltd

… *Defendants*

GROUNDS OF DECISION

[Companies] — [Oppression] — [Minority shareholders] — [Valuation of shares] — [Discount on minority shares]

Koh Keng Chew and others
v
Liew Kit Fah and others

[2018] SGHC 262

High Court — Suit No 125 of 2014
Chua Lee Ming J
16 April 2018, 5 July 2018

28 November 2018

Chua Lee Ming J:

Introduction

1 The plaintiffs hold 28.125% of the shares in the 7th to 16th defendants. They brought this action under s 216 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act") against the 1st to 6th defendants, who hold the remaining 71.875% of the shares. On 29 July 2016, I delivered my judgment in which I gave an order for the 1st to 6th defendants to purchase the shares of the plaintiffs in the 7th to 16th defendants: *Koh Keng Chew and others v Liew Kit Fah and others* [2016] 4 SLR 1208.

2 The plaintiffs and the 1st to 6th defendants agreed on, and appointed, the independent valuer to determine the price of the plaintiffs' shares. However, the parties could not agree on (a) the reference date for the valuation of the shares, (b) the framework for the valuation process and (c) whether the valuer

should issue a reasoned valuation. On 23 January 2017, I gave certain directions as to the reference date for the valuation of the shares and the valuation process; I also decided against a reasoned valuation: *Koh Keng Chew and others v Liew Kit Fah and others* [2018] 3 SLR 312.

3 Further disputes arose between the parties. The 1st to 6th defendants, as the purchasers, took the position that the value of the plaintiffs' shares should be discounted for two reasons:

(a) the shares lack control because they are minority shares; and/or

(b) the shares lack marketability because, being shares in privately held companies, they are subject to share transfer restrictions.

The plaintiffs disagreed. The valuer requested the parties to obtain my directions as to whether any of the discounts should be applied to his valuation of the plaintiffs' shares.

4 On 5 July 2018, I directed that the value of the plaintiffs' shares is *not* to be discounted for either of the above reasons. The 1st to 6th defendants have appealed against my decision.

5 As a preliminary point, I note that the 1st to 6th defendants have used the expression "lack of marketability" to refer to the fact that the shares are subject to share transfer restrictions. It seems to me that the expression "lack of marketability" has a broader meaning. A lack of marketability suggests that it is more difficult to sell the shares. It is true that share transfer restrictions give rise to a lack of marketability in that such restrictions make it more difficult to sell the shares compared to, for example, listed shares. However, the lack of control can also give rise to a lack of marketability. It is more difficult to sell

minority shares because such shares have no influence on the company or say in the management of the company. In these grounds of decision, I shall refer to the effect of share transfer restrictions as a "lack of free transferability".

The law

6 An investor who takes up a minority shareholding in a privately held company does so knowing full well that he does not have the voting power to influence the management or direction of the company. He would have no legal remedies arising from the *mere* fact that the directors and/or the majority shareholders disagree with him. If, arising from such disagreement, he decides to exit his investment in the company, he would have to accept that his minority shares may not be as marketable as he would have liked and that the sale price that he can expect to get may be discounted for lack of control and lack of free transferability. He can, of course, also choose not to sell his shares. Either way, he has no legal remedy.

7 However, if he can establish one or more of the grounds set out in s 216(1) of the Act, then the remedies under s 216(2) are available to him. The grounds under s 216(1) are, generally speaking, oppression, disregard of interests, unfair discrimination and prejudice. Under s 216(2), the Court is empowered to "make such order as it thinks fit" with a view to bringing to an end or remedying the matters complained of.

8 One of the remedies that is commonly sought is a buyout order under which the delinquent shareholder (or the company) may be ordered to purchase the innocent shareholder's shares. Unsurprisingly, the typical innocent shareholder is a minority shareholder since the majority shareholder has the voting power to effect change in the company.

9 It is well established that in making a buyout order under s 216(2) of the Act, the court has a wide and unfettered discretion to reach a just and equitable result: Margaret Chew, *Minority Shareholders' Rights and Remedies* (LexisNexis, 3rd Ed, 2017) ("*Minority Shareholders' Rights*") at para 4.303. See, also, Hans Tjio, Pearlie Koh & Lee Pey Woan, *Corporate Law* (Academy Publishing, 2015) at para 11.095. With respect to the price of the shares, the role of the court is "merely to determine a price that is fair and just in the particular circumstances of the case": *Yeo Hung Khiang v Dickson Investment (Singapore) Pte Ltd and others* [1999] 1 SLR(R) 773 at [72]. Whether or not a discount is to be factored into the valuation would therefore depend on the court's assessment of the relative equities of the case: *Minority Shareholders' Rights* at para 4.304.

10 In many cases, courts have expressly provided that a discount for minority shareholding should not be factored in the valuation: *Minority Shareholders' Rights* at para 4.302 and the cases cited at footnote 873. In my view, there are good reasons for this.

11 First and foremost, where a buyout order has been made under s 216(2), fixing the price for the shares *pro rata*, according to the value of all the shares in the company as a whole, is generally fair: see *In re Bird Precision Bellows Ltd* [1984] 1 Ch 419 ("*In re Bird*") at 430; *O'Neill v Phillips* [1999] 1 WLR 1092 at 1107D–E. As a starting point, this makes good sense. The buyout order is a remedy that provides the innocent shareholder an exit from his investment in the company. It is only fair that in exiting his investment in the company, he should recover the full value of his interest in the company. Adjustments to the value can then be made if it can be shown that such adjustments are necessary to achieve a just and equitable result. With respect to discounts, this means that the party asserting that a discount should be applied has to satisfy the court that

applying the discount would be fair and equitable in the circumstances of the case.

12 Second, a discount for lack of control reflects the realities of a freely negotiated transaction, *ie*, a transaction between a willing seller and a willing buyer. In contrast, a buyout order under s 216(2) is an exercise of the coercive power of the court: *Poh Fu Tek and others v Lee Shung Guan and others* [2018] 4 SLR 425 at [38]. In proceedings under s 216, the innocent shareholder is forced to seek an exit because of the majority shareholder's conduct and, as already mentioned, the buyout order is a remedy that allows him to exit his investment in the company. In this context, it would be most unfair that the minority shareholder should be bought out on the fictional basis of a willing seller and willing buyer: *In re Bird* at 430. Further, even as between a willing seller and willing buyer, such discounts, whilst common, are nevertheless still a matter of negotiation.

13 The injustice that results from subjecting a buyout order under s 216(2) to the fiction of a freely negotiated commercial transaction becomes stark when one considers an order for the minority to buy out the delinquent majority, which, although rare, is also possible under s 216. In a freely negotiated commercial transaction, majority shares can command a premium. However, it would be most unfair that the delinquent majority should receive a premium for their shares pursuant to a buyout order under s 216(2): see *In re Bird* at 430.

14 Third, applying a discount to a minority shareholding gives the delinquent shareholder a reward which he does not deserve: see *Re Blue Index Ltd; Murrell v Swallow and others* [2014] EWHC 2680 (Ch) ("*Re Blue Index*") at [26]. This would be inconsistent with the purpose of the buyout order which is to provide a remedy for the innocent shareholder.

15 I should emphasise that the fundamental principle remains throughout that a buyout order under s 216(2), and any terms attached to it, must be just and equitable. There is no general rule that there can never be a discount for lack of control. However, as the cases clearly demonstrate, a discount for lack of control cannot be justified as being just and equitable simply on the ground that it is common in transactions between willing sellers and willing buyers. What is just and equitable is to be tested against the specific facts of each case, bearing in mind that the buyout order is a remedy that lets the innocent shareholder exit his investment in the company.

16 In my view, the above reasons apply with equal force to the question of a discount for lack of free transferability. Such a discount too cannot be considered just and equitable simply on the ground that it is common in transactions between willing sellers and willing buyers.

17 The 1st to 6th defendants referred me to *Thio Syn Kym Wendy and others v Thio Syn Pyn and another* [2018] SGHC 54 ("*Thio Syn Kym*") at [30] and [32] for the proposition that a discount for lack of free transferability (referred to in that case as "non-marketability") should apply save in exceptional cases. I do not think that *Thio Syn Kym* goes that far. In that case, the Court decided to leave the question of whether to apply a discount for lack of free transferability to be determined by the independent valuer. It was in this context that the Court did not "foreclose the possibility that in an exceptional case, the circumstances may warrant an order by the court that no discount be applied in order to remedy the unfairness to the minority that would otherwise result."

18 In my view, the Court in *Thio Syn Kym* clearly recognised the overriding principle that the buyout order, and the application of discounts, must be fair. In deciding to leave the question of a discount for lack of free transferability to the

valuer, the Court must have concluded that it was the fair thing to do on the facts of *that* case.

19 The plaintiffs referred me to Nourse J's judgment in *In Re Bird* at 431 and submitted that there is a strong presumption that no discount should be applied where a buyout order is made in a quasi-partnership. Some of the statements by Nourse J in *In Re Bird* may suggest such a presumption. However, as the Court in *Re Blue Index Ltd* tried to explain (at [22]–[23]), Nourse J was not drawing a distinction between a quasi-partnership and a non quasi-partnership, but was drawing "a distinction between the general case where it was unfair to treat the wronged petitioner as a willing seller and therefore for the price to be fixed on a discounted basis, and the exceptional case where it was fair to do so because (for example) he had acquired his shares at a discounted price."

20 For my part, I have no doubt that the mere fact that the case involves a quasi-partnership is not a determining factor as to the general applicability of a discount for a minority shareholding: see *Re Blue Index* at [24]–[25]. *Re Blue Index* was applied in *Re Addbins Ltd; Ashdown v Griffin* [2015] EWHC 3161 (Ch). In my view, the question remains whether applying a discount would be just and equitable on the facts. As a matter of principle, this question must apply equally to both quasi-partnership and non quasi-partnership cases.

21 I would add that, in my view, the fact that an innocent minority shareholder had bought his shares at a discounted price, does not by that fact alone mean that it would necessarily be fair and equitable that his shares should be sold at a discounted price pursuant to an order made under s 216(2). All the facts and circumstances of the case must be considered.

22 In conclusion, in my view,

(a) the overriding principle when making a buyout order under s 216(2) of the Act is that the order, including the application of any discount for lack of control or lack of free transferability, must be just and equitable;

(b) as a starting point, the price for the shares that are subject to the buyout order should be fixed *pro rata* according to the value of all the shares in the company as a whole;

(c) the party asserting that a discount should be applied has to show that applying the discount is just and equitable on the facts of the case;

(d) a sale of shares pursuant to a buyout order under s 216(2) is a sale under compulsion. Therefore, applying a discount whether for lack of control or for lack of free transferability cannot be considered to be just and equitable merely on the ground that such discounts are common in freely-negotiated commercial transactions; and

(e) whether a case involves a quasi-partnership is not a determining factor as to the general applicability of a discount for a minority shareholding.

Applying the law to the facts

23 The plaintiffs commenced this action under s 216 of the Act against the 1st to 6th defendants. Although the 1st to 6th defendants did not admit the plaintiffs' allegations of oppressive conduct, they agreed with the plaintiffs that the relationship of mutual trust and confidence between the parties had broken

down and that a parting of ways had become inevitable. The parties also agreed a buyout by one side was necessary and appropriate.

24 The dispute between the plaintiffs and the 1st to 6th defendants was over who should buy out whom. Each side wanted to buy out the other. The parties therefore asked this court to decide who should buy out whom. After a trial on this single issue, I found that the 1st to 6th defendants were not unfit to exercise control of the company and that therefore the usual order that the majority buys out the minority sufficed as a remedy for the minority. In the circumstances, I decided that the 1st to 6th defendants (the majority shareholders) should buy out the plaintiffs (the minority shareholders).

25 The parties had agreed to the buyout order being made on the basis that s 216(2) of the Act had been invoked. In my view, the principles discussed above were relevant and applicable to this case. As I had ordered a buyout of the plaintiffs' shares, the plaintiffs were entitled to their shares being valued without any discount unless the 1st to 6th defendants could show that applying discounts for lack of control and/or lack of free transferability would be just and equitable.

26 The 1st to 6th defendants argued that the purpose of a valuation exercise is to determine the "fair value" of the shares under valuation and that the valuer should take into account commercial realities. However, as discussed earlier, a buyout pursuant to s 216(2) is not a freely negotiated commercial transaction. The buyout order that I made was an order made in the exercise of the court's coercive power pursuant to s 216(2). In fact, in this case, whichever way I decided, it was clear that the selling parties would not be willing sellers. "Commercial realities" was not sufficient reason to justify applying a discount to the plaintiffs' shares for lack of control and lack of free transferability.

27 The 1st to 6th defendants also argued, relying on *Thio Syn Kym*, that the question of whether a discount should be applied for lack of free transferability, should be left to the valuer to decide. I have explained my understanding of the decision in *Thio Syn Kym* in [18] above. More importantly, in the present case, the valuer had expressly requested the parties to seek the court's directions as to whether discounts for lack of control and lack of free transferability should be applied. In my view, the approach taken by the valuer was correct. It is for the court to decide what is just and equitable. The 1st to 6th defendants did not show why it would be just and equitable to leave the question of a discount for lack of free transferability to the valuer.

Conclusion

28 For the above reasons, I directed that discounts for lack of control and lack of free transferability were not to be applied to the valuation of the plaintiffs' shares.

Chua Lee Ming
Judge

Lim Wei Lee and Daniel Tan Shi Min
(WongPartnership LLP) for the plaintiffs;
Patrick Ang, Jared Kok and Chai Wei Han
(Rajah & Tann Singapore LLP) for the 1st to 6th defendants.