IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 112

Civil Appeal No 45 of 2020 and Summons No 81 of 2020

Between

(1) Bjornar Feen also known as Bjoernar Feen
(2) Feen Marine Pte Ltd
(3) Viking Inert Gas Pte Ltd
(4) Scanjet Feen IGS Pte Ltd
(5) Feen Marine Scrubbers Pte Ltd

… *Applicants / Appellants*

And

Viking Engineering Pte Ltd

… *Respondent*

In the matter of Originating Summons No 1324 of 2019

In the matter of the Order of Court dated 9 April 2018
(HC/ORC 3010/2018) made in HC/Suit No 294 of 2017

Between

(1) Bjornar Feen also known as Bjoernar Feen
(2) Feen Marine Pte Ltd
(3) Viking Inert Gas Pte Ltd
(4) Scanjet Feen IGS Pte Ltd
(5) Feen Marine Scrubbers Pte Ltd

… *Plaintiffs*

And

Viking Engineering Pte Ltd

… *Defendant*

Civil Appeal No 46 of 2020

Between

Bjornar Feen also known as Bjoernar Feen

… *Appellant*

And

Viking Engineering Pte Ltd

… *Respondent*

In the matter of Suit No 294 of 2017

Between

Viking Engineering Pte Ltd

… *Plaintiff*

And

(1) Bjornar Feen also known as Bjoernar Feen
(2) Feen Marine Pte Ltd
(3) Viking Inert Gas Pte Ltd
(4) Scanjet Feen IGS Pte Ltd
(5) Feen Marine Scrubbers Pte Ltd

… *Defendants*

GROUNDS OF DECISION

[Companies] — [Oppression] — [Minority shareholders]
[Professions] — [Valuer] — [Judicial review of valuation]

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Court of Appeal — Civil Appeals Nos 45 and 46 of 2020 and Summons No 81 of 2020
Andrew Phang Boon Leong JA, Tay Yong Kwang JA and Belinda Ang Saw Ean J
19 October 2020

17 November 2020

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

Introduction

1 The appeals in CA/CA 45/2020 ("CA 45") and CA/CA 46/2020 ("CA 46") were against the decision of the High Court judge ("the Judge") in *Viking Engineering Pte Ltd v Feen, Bjornar and others and another matter* [2020] SGHC 78 ("the GD"), concerning whether the Judge had erred in refusing to set aside a court-ordered valuation made by an independent valuer that was appointed by the consent of the parties.

2 In the proceedings below and in these appeals, the appellants contended that the valuation should be set aside because the independent valuer materially departed from his instructions and the valuation was in manifest error. Having

carefully considered the evidence and the parties' submissions, we dismissed the appeals and CA/SUM 81/2020 ("SUM 81"), the appellants' application in CA 45 to adduce a competing valuation report. We now provide the detailed grounds for our decision.

Background facts

3 The first appellant in CA 45 and the appellant in CA 46 is Mr Bjornar Feen ("Mr Feen"). Mr Feen and the respondent in the appeals, Viking Engineering Pte Ltd ("Viking Engineering"), were joint venture partners in Viking Inert Gas Pte Ltd ("VIG").

4 Viking Engineering commenced a claim based on minority oppression in HC/S 294/2017 ("S 294") against Mr Feen, VIG, and three companies that Mr Feen controlled, namely, Feen Marine Pte Ltd ("Feen Marine"), Scanjet Feen IGS Pte Ltd ("Scanjet Feen"), and Feen Marine Scrubbers Pte Ltd. In S 294, Viking Engineering alleged, among other things, that Mr Feen had diverted VIG's business opportunities to Feen Marine and Scanjet Feen. In this judgment, we refer to the defendants in S 294 collectively as "the Defendants". In S 294, Viking Engineering sought relief under s 216 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Companies Act") in the form of a buyout order or, in the alternative, a winding-up order.

5 Viking Engineering subsequently applied in HC/SUM 4101/2017 ("SUM 4101") for summary judgment, seeking an order that Mr Feen purchase its 30% shareholding in VIG ("the Shares"). The Judge found that oppression had been made out. On 9 April 2018, she ordered Mr Feen to purchase Viking Engineering's Shares at a price to be determined by an independent valuer ("the Buyout Order"), on the following terms:

(a) An independent valuer was to be appointed by agreement within 14 days of 9 April 2018 (para 2(a)).

(b) The valuer was to ascertain the fair value of the Shares as at 9 April 2018 on a going concern basis (para 2(b)), without applying a discount to account for the fact that the Shares were a minority shareholding (para 2(c)).

(c) The valuer "shall have regard to any and all financial information and records" of VIG as the valuer "may deem necessary, relevant or desirable for the purposes [of] ascertaining the purchase price or otherwise for carrying out the … order" (para 2(d)).

(d) The valuer was to adjust the purchase price of the Shares on the assumption that VIG had undertaken all the business that was diverted away from it to any one or more of the Defendants (para 2(e)). The adjustments were to be made on the following bases (para 2(f)):

(i) the valuer was only to take into account the business of inert gas systems and exhaust gas cleaners (para 2(f)(i));

(ii) all goodwill and revenue earned by the other Defendants in respect of the aforesaid business was to be attributed to VIG, unless that goodwill or revenue arose from a contract that would have been physically impossible for VIG to have earned (para 2(f)(ii)); and

(iii) the valuer was to give regard to the financial information and records of the other Defendants as the valuer "may deem necessary, relevant or desirable for the purposes of ascertaining

the purchase price or otherwise for carrying out the … order" (para 2(f)(iii)).

(e) By agreement, Mr Feen would bear the costs of the valuation exercise (para 2(g)).

(f) The parties had liberty to apply (para 2(h)).

6 Mr Richard Hayler ("Mr Hayler") of FTI Consulting (Singapore) Pte Ltd ("FTI") was appointed by the parties' agreement on 8 June 2018. He subsequently circulated a letter of engagement dated 13 June 2018 ("the LOE") to the parties. The parties signed and returned the LOE. Mr Hayler finalised a valuation report ("the FTI Report") around 2 November 2018, following delays by the Defendants in providing the documents that he had requested. The FTI Report was released to the parties around 29 July 2019.

7 In the FTI Report, Mr Hayler determined that as at 9 April 2018, VIG was valued at $44m. This figure was the average of the valuations obtained using: (a) a discounted cash flow ("DCF") analysis of VIG's revenue; and (b) a comparative analysis taking into account the share valuations of two listed companies. The FTI Report correspondingly valued the Shares at $13.2m.

8 On 16 September 2019, Viking Engineering applied in HC/SUM 4610/2019 ("SUM 4610") for an order pursuant to O 45 r 6(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the ROC") that Mr Feen pay $13.2m for the Shares within 7 days of the order. On 22 October 2019, the Defendants filed HC/OS 1324/2019 ("OS 1324") to seek a declaration that the FTI Report was not final and binding, or that it be set aside or otherwise disregarded.

The proceedings and the decision below

9 In the proceedings below, the parties agreed that the FTI Report was an expert determination and that, applying the principles in the Singapore High Court decision of *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2009] 2 SLR(R) 385 ("*Oriental Insurance*") at [47], it could only be set aside on the following three grounds:

(a) where the expert materially departed from instructions;

(b) where there is a manifest error in the expert's determination that justly requires judicial intervention; or

(c) there was fraud, corruption, collusion, dishonesty, bad faith, bias, or the like.

10 The Defendants relied on the first two grounds in OS 1324. The Judge found that Mr Hayler had acted within the scope of his instructions under the Buyout Order and the LOE, both of which afforded him a wide discretion (see the GD at [33], [39] and [48]). She also found that the Defendants' submissions on manifest error, which relied on an expert report by KPMG Services Pte Ltd ("KPMG"), only raised differences in expert opinion. These did not constitute manifest error (see the GD at [72], [76] and [79]). The Judge accordingly dismissed OS 1324. With regard to SUM 4610, Viking Engineering did not submit on O 45 r 6(2) of the ROC in the light of the Judge's indication that she would set the purchase price of the Shares in accordance with the valuation in the FTI Report. The Judge ordered Mr Feen to purchase the Shares at $13.2m (see the GD at [85]).

The issues to be determined

11 CA 45 was the Defendants' appeal against the Judge's dismissal of OS 1324. In CA 46, Mr Feen's case was that the Judge should not have exercised her discretion under O 45 r 6(2) of the ROC to make the order in SUM 4610. In our view, there were three issues in the present appeals:

(a) first, whether the Defendants should be granted leave to raise a new argument in CA 45 to challenge the validity of the Buyout Order;

(b) second, if the Buyout Order was valid, the grounds on which any valuation made pursuant to it may be challenged; and

(c) third, whether the FTI Report should be set aside.

Our decision in CA 45 and CA 46

Issue 1: Leave to raise a new argument challenging the validity of the Buyout Order

12 The Defendants sought leave under O 57 rr 13(3) and 13(4) of the ROC to raise a new legal argument in CA 45 that the Buyout Order was invalid because Viking Engineering ought to have availed itself of the buyout provisions in VIG's articles of association ("VIG's Articles") before commencing S 294. The Defendants submitted that as Viking Engineering did not take this course of action, its commencement of S 294 was an abuse of process.

13 We did not accept this submission for the following reasons. In the first place, the "extended" doctrine of *res judicata* barred this issue from being raised. This doctrine applies to points that were not previously decided because they were not raised in earlier proceedings, even though they could and should

have been raised in those proceedings (see the decision of this court in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporate Advisory Pte Ltd and others, other parties) and another appeal* [2015] 5 SLR 1104 at [102]). The inquiry is directed to whether, having regard to the substance and reality of the earlier action, an issue reasonably ought to have been raised (see the Singapore High Court decision of *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 at [53]). In our judgment, the answer to this question was in the affirmative. Viking Engineering's application in SUM 4101 was for the court to enter summary judgment in S 294 pursuant to O 14 r 1 of the ROC. Any submission that the commencement of S 294 was an abuse of process should have been ventilated at that stage but was not.

14 In any event, we were not persuaded by the merits of the Defendants' new legal argument. The Defendants relied on this court's statements in *Ting Shwu Ping (administrator of the estate of Chng Koon Seng, deceased) v Scanone Pte Ltd and another appeal* [2017] 1 SLR 95 ("*Ting Shwu Ping*") that the existence of a shareholder exit mechanism in a company's articles may affect the exercise of the court's jurisdiction under s 216 of the Companies Act in the following ways (at [75]):

> (a) it can negate any unfairness arising from shareholder disputes or exclusion – unfairness has to be assessed in light of the shareholder's ability to exit the 'unfair situation' under the procedure provided for in the articles;
>
> (b) it may render the application an abuse of process because the existence of a viable alternative gives rise to the question whether the shareholder has a collateral purpose in bringing a winding-up petition for the same share buy-out remedy available; but
>
> (c) the court has a residual discretion to assess if the procedure laid down in the articles is itself unfair …

The Defendants submitted, on this basis, that since Viking Engineering had consented *qua* shareholder to the buyout provisions in VIG's Articles, the Buyout Order was "wrong in law" because it had circumvented "the agreement between Mr Feen, VIG and [Viking Engineering] in [VIG's Articles]".

15 In our judgment, the buyout provisions in VIG's Articles that the Defendants referred to are part of a common set of articles in privately held companies that provide existing shareholders with a *right of first refusal* when another shareholder wishes to sell his shares in the company. As we pointed out at the hearing of the appeals, these articles were relevant only *in the absence of court action* and did not require a minority shareholder to seek a buyout by way of a company's articles *before* it commenced court proceedings to exit the company. It was accordingly open to Viking Engineering to commence a minority oppression action under s 216 of the Companies Act to obtain a court-ordered buyout if it wished.

16 We were also not persuaded by the Defendants' reliance on the statements in *Ting Shwu Ping* (see [14] above). Seen in their proper context, those statements do not indicate that the existence of alternative remedies is *determinative* of whether a shareholder may commence an s 216 action. Rather, as we stated in *Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters* [2018] 2 SLR 333, while the presence of and reliance upon any available alternative remedy is inextricably tied to the ultimate inquiry into the commercial fairness or otherwise of the defendant's conduct (at [163]), whether an action for relief from oppression under s 216 may be pursued depends on the relevance and suitability of the alternative remedies in question, and whether they are adequate and appropriate in bringing an end to the prejudicial state of affairs complained of (at [162] and [165]).

17 In this regard, counsel for Viking Engineering, Mr Mahesh Rai s/o Vedprakash Rai ("Mr Rai"), observed that while Viking Engineering *could* have invoked Art 29 of VIG's Articles to offer to sell the Shares to Mr Feen, VIG's Articles did not require the valuation of the Shares to take into account the effect of the oppressive conduct that formed the subject of S 294. A valuation of the Shares that accounted for the business that Mr Feen had diverted away from VIG was a remedy that was available only under s 216(2) of the Companies Act, which permits the court to make any orders that bring an end to or remedy the matters complained of. Accordingly, having found that the oppression that Viking Engineering complained of had taken place, the Judge ordered that the independent valuation of the Shares was to take into account the value of the business diverted (see [5(d)] above). In the circumstances, we disagreed that there was any abuse of process occasioned by Viking Engineering's commencement of S 294. Under VIG's Articles, Viking Engineering could not have obtained a buyout of the Shares in a manner that remedied the oppression that it had suffered. In any case, there was no indication that Mr Feen was willing to purchase Viking Engineering's Shares pursuant to VIG's Articles at the material time.

18 For these reasons, we did not grant the Defendants leave in CA 45 to raise a new legal argument challenging the validity of the Buyout Order.

Issue 2: Grounds for challenging the court-ordered valuation

19 We turn to the second issue, namely, the grounds on which the court-ordered valuation could be challenged. The Judge considered the Defendants' action in OS 1324 on the basis that the FTI Report was an "expert determination" and that, applying the principles in *Oriental Insurance* ([9] *supra*) at [47] and in the Singapore High Court decision of *Poh Cheng Chew v*

K P Koh & Partners Pte Ltd and another [2014] 2 SLR 573 ("*Poh Cheng Chew*") at [36], the valuation could only be set aside on limited grounds, namely, where there was: (a) material departure from instructions; (b) manifest error; or (c) fraud, collusion, partiality and the like (see the GD at [14]). As we have mentioned, this was also the position that the parties took in their submissions below.

20 *Oriental Insurance* and *Poh Cheng Chew* are cases where the parties agreed to resolve their disputes through *expert determination*, a mode of alternative dispute resolution. Where parties contractually provide for their dispute to be resolved in this manner and consequently appoint an expert by contract, the Singapore High Court has explained that judicial intervention is only justified where "necessary to uphold the parties' contractual bargain" (see *Poh Cheng Chew* at [37]). In this connection, the Judge considered the arrangement between the parties to be contractual in nature, especially in relation to the LOE (see the GD at [64]).

21 In our judgment, although Mr Hayler was appointed by consent, his appointment was not wholly contractual; rather, it was made pursuant to the Buyout Order and as part of the *litigation process*. The need to give effect to the parties' contractual bargain therefore does not form the basis for the court's jurisdiction to review Mr Hayler's valuation. Instead, the basis for judicial intervention in the context of cases like the present arises from the court's powers under s 216(2) of the Companies Act to make any order to "[bring] to an end" or to "remedy" the matters complained of.

22 Subject to the overriding principle that the court is to fix the minority's shares at a price that is fair, just and equitable as between the parties, the court's determination of what is fair, just and equitable may be contained in the terms

of reference framed by the court for an independent valuer (see the Singapore High Court decision of *Poh Fu Tek and others v Lee Shung Guan and others* [2018] 4 SLR 425 ("*Poh Fu Tek*") at [32]). In some cases, the court may provide that the valuation is to be final and binding (see the Singapore High Court decision of *Lim Chee Twang v Chan Shuk Kuen Helina and others* [2010] 2 SLR 209 at [150(e)], where the valuation of the independent valuer was ordered to be "final and binding, save in the case of manifest error"). In other cases, the court may include terms in the buyout order expressly reserving to itself the discretion to depart from the valuation of the independent valuer (see the Singapore High Court decision in *Yeo Hung Khiang v Dickson Investment (Singapore) Pte Ltd and others* [1999] 1 SLR(R) 773 at [7(c)] and the Singapore Court of Appeal decision in *Hoban Steven Maurice Dixon and another v Scanlon Graeme John and others* [2007] 2 SLR(R) 770 at [8(b)]).

23 In the present case, there was no term in the Buyout Order that provided that the valuation of the independent valuer was to be final and binding. Where the parties have not appealed against the Buyout Order in the terms that the fair value of Viking Engineering's Shares was to be determined by an independent valuer appointed by agreement, and where the parties in fact appointed the independent valuer by consent, we accepted that the principles in *Oriental Insurance* ([9] *supra*) ought to apply *by analogy*. The court can intervene if the valuation is not in accordance with the terms of reference, or if the valuation is patently or manifestly in error. However, the court will be slow to find that the valuation is in error, since by delegating the task of valuation to an expert, the court has taken the position that the matter is best left to the expert (see also the decision of this court in *NK v NL* [2010] 4 SLR 792 at [6], in relation to court-ordered and court-appointed expert valuations in the family law context). That

the court should not readily overturn court-ordered valuations also promotes the public interest in the finality of litigation.

24 Without expressing a conclusive view, it also seemed to us that the legal position will be the same where the court has appointed an independent valuer *without* the consent or agreement of the parties, subject to the precise terms on which the independent valuer was appointed. As this issue was not crucial to the decision in the present proceedings, we left this question to be decided in a future case when it arises directly for determination.

Issue 3: Whether the FTI Report should be set aside

25 Having clarified the legal basis on which the court may intervene in respect of the valuation in the FTI Report, we considered the merits of the Defendants' contentions in CA 45 that the FTI Report should be set aside. In this regard, the Defendants submitted that Mr Hayler had materially departed from his instructions in two key respects, that these material departures also amounted to manifest errors in the FTI Report, and that, in any event, the Judge ought to have exercised her discretion under s 216(2)(*d*) of the Companies Act to adjust the valuation reached in the FTI Report.

26 We considered the Defendants' submissions in turn. The Defendants first submitted that in so far as Mr Hayler was permitted under the LOE to rely on assumptions to arrive at his valuation, this was inconsistent with paras 2(d) and 2(f)(iii) of the Buyout Order, which, respectively, required him to "have regard to any and all financial information and records of [VIG]" and to give "regard … to the financial information and records of [the Defendants]". We disagreed with this interpretation of these terms in the Buyout Order. Seen in full, paras 2(d) and 2(f)(iii) of the Buyout Order only required Mr Hayler to

have regard to such financial information as was *necessary* for him to carry out the valuation (see above at [5(c)] and [5(d)(iii)]). Beyond this, Mr Hayler's overall mandate under para 2(b) of the Buyout Order to ascertain the fair value of the Shares did not stipulate what specific information he was to have regard to. In our judgment, this meant that the determination of what financial information was *necessary* for the valuation was a matter entirely within Mr Hayler's discretion. Accordingly, to the extent that Mr Hayler considered that it was possible for him to rely on assumptions to value VIG and the Shares, this fell within his discretion under the Buyout Order. We therefore did not consider that his reliance on assumptions was a departure from the terms of reference in paras 2(d) and 2(f)(iii) of the Buyout Order.

27 The Defendants next submitted that Mr Hayler materially departed from his instructions when he relied on assumptions to adjust VIG's valuation to account for the business that Mr Feen had diverted away from VIG to any one or more of the Defendants. The Defendants contended that paras 2(e) and 2(f) of the Buyout Order required Mr Hayler to have regard to the "actual value" of the business diverted. Again, we did not agree with the Defendants' interpretation of the Buyout Order. Notwithstanding the fact that Mr Hayler stated that he was not able to identify "the exact dates, amounts, and the entities involved" in relation to the business diverted from VIG to the other Defendants, the Buyout Order did not require Mr Hayler to have regard to the "actual value" of business diverted. On the contrary, paras 2(e) and 2(f) of the Buyout Order gave Mr Hayler a wide discretion to make the necessary adjustments when carrying out the valuation (see above at [5(d)]).

28 At the hearing, counsel for the Defendants, Mr Ramesh Bharani s/o K Nagaratnam, further drew our attention to specific information that Mr Hayler had allegedly failed to take into account in his assessment of the

business that Mr Feen had diverted from VIG. This information concerned: (a) VIG's financial statements from 2016 to 2018; (b) the suspension of VIG's contract with STX Offshore & Shipbuilding Co Ltd in 2016; and (c) the "blacklisting" of VIG by a third party, Navig8 Ship Management Pte Ltd ("Navig8"), due to allegations of racism against VIG. The latter two incidents were raised in a letter dated 7 September 2018 that the Defendants' previous solicitors sent to Mr Hayler ("the 7 September Letter").

29 As against this, Mr Rai assisted us by referring to portions of the FTI Report that showed that the Defendants' contentions were not entirely accurate. With regard to VIG's financial statements from 2016 to 2018, Mr Hayler stated that he had based his assessment of VIG's "revenue from 2014 to 2018 on VIG's unaudited financial statements". Although he had concerns as to the veracity of the unaudited financial statements, he concluded based on the financial statements in question that business had been diverted away from VIG from 2016. We were also satisfied that Mr Hayler had properly considered the Defendants' submissions in the 7 September Letter – in the FTI Report, he addressed the Defendants' key arguments in the letter and noted, in particular, that they had failed to provide adequate evidence in support of the alleged blacklisting by Navig8. Considering the evidence in the round, we accepted that Mr Hayler had considered the relevant evidence before him as he was required to do under para 2(e) of the Buyout Order.

30 Moreover, quite apart from the specific arguments run, we considered that there had been a consistent and deliberate lack of co-operation on the Defendants' part in respect of the valuation process (see the GD at [51] and [52]). In particular, Mr Hayler had requested for the parties to provide him with various documents. It was because the Defendants did not provide him with the requested information that he proceeded to rely on assumptions in his valuation

of VIG. Furthermore, in an e-mail sent to the parties' solicitors on 15 July 2018, Mr Hayler had notified the parties that he would commence the valuation of VIG and the Shares in the absence of the requested information. The Defendants' solicitors at the time had replied by e-mail on 18 July 2018 to state that they would be "be seeking directions from the Court as to how best to proceed in the interests of all concerned". However, no directions were sought (see the GD at [56] and [58]). In these circumstances, it did not lie in the mouth of the Defendants to rely on their own failure to provide the requested information and their failure to co-operate, so as to set aside the FTI Report on the basis that Mr Hayler had proceeded with the valuation.

31 We turn to the issue of manifest error. The Defendants' submissions on this issue in CA 45 were predicated on this court finding that Mr Hayler had materially departed from his instructions. As we dismissed that ground of appeal, this basis for finding that the FTI Report was in manifest error also fell away.

32 The final argument put forward by the Defendants in CA 45 concerned the Judge's alleged failure to exercise her discretion under s 216(2)(*d*) of the Companies Act to adjust Mr Hayler's valuation. The Defendants relied on the Singapore High Court's statements in *Poh Fu Tek* ([22] *supra*) that the court in a s 216 action has the flexibility to adjust an expert's valuation "to arrive at a value which is fair and just in the particular circumstances of the case" (at [27]). Moreover, it is the court's duty to assess the reasonableness of an expert's opinion by considering "whether it is logical in its own context, whether it is justified by the facts on which it is based, and whether it is compromised by any other evidence including an opposing opinion" (at [34]). The Defendants submitted that the Judge had failed to qualitatively and quantitatively assess the

reasonableness of the valuation despite being presented with an opposing expert report from KPMG.

33 In our judgment, the court's statements in *Poh Fu Tek* did not assist the Defendants. In *Poh Fu Tek*, both sides had adduced expert evidence on the value of the shares to be bought out, and it was in the context of determining which expert's evidence should be preferred that the Singapore High Court had to weigh the reasonableness of the opinions that the experts had expressed (at [56]). Here, however, para 2(b) of the Buyout Order provided that the "fair value" of the Shares was to be ascertained by the independent valuer appointed by the parties. Questions of weighing the expert's evidence on the basis of its reasonableness did not enter into play. Beyond this, we were satisfied that the Defendants did not raise any valid basis upon which we could conclude that Mr Hayler's valuation of the Shares did not result in a value that was fair and just, or upon which we ought to prefer KPMG's evidence over that adduced by Mr Hayler.

34 We turn now to Mr Feen's appeal in CA 46. Mr Feen's submissions mainly concerned the Judge's alleged wrongful exercise of her discretion under O 45 r 6(2) of the ROC. In our judgment, since the Judge did *not* make her order in SUM 4610 under O 45 r 6(2) of the ROC (see above at [10]), CA 46 could not be allowed on this basis. We nevertheless considered the substance of Mr Feen's submissions to determine if he had raised any valid grounds to set aside Mr Hayler's valuation. Although Mr Feen did not submit specifically on manifest error, he contended that the FTI Report was "fundamentally flawed" because Mr Hayler relied on assumptions as part of his valuation and because the FTI Report included other errors, which KPMG had highlighted. We have already explained why we did not agree with the former contention. We now

set out the other alleged errors in the FTI Report that Mr Feen relied upon, and which the Defendants also raised in OS 1324:

(a) VIG's revenue was valued using a compound annual growth rate of 20%, which was erroneously arrived at and unrealistic;

(b) the 15% discount rate applied in the DCF analysis was too low;

(c) the comparative analysis was based on companies that were not comparable to VIG; and

(d) FTI's methodology of valuing VIG by adopting the average of the valuations under the DCF analysis and the comparative analysis was inconsistent with International Valuation Standards Council guidelines.

35 In our judgment, we saw no reason to disagree with the Judge's determination that these alleged "errors" only amounted to differences in opinion between experts on the valuation of VIG. This did not rise to the threshold of a manifest error or patent error by Mr Hayler that warranted judicial intervention.

36 For the foregoing reasons, we did not think there were any grounds to set aside the FTI Report. We therefore affirmed the Judge's decision to dismiss OS 1324 and her order for Mr Feen to purchase the Shares at $13.2m.

Our decision in SUM 81 of 2020

37 Finally, we considered the Defendants' application in SUM 81 to adduce a competing valuation report. In our judgment, as there were no grounds to set aside the FTI Report, there was no need to consider a competing valuation report. We accordingly dismissed SUM 81.

38 For completeness, we observed that the Defendants had sought in SUM 81 to justify the relevance of the competing valuation report partly on the basis of the Judge's observation that while KPMG had criticised Mr Hayler's analysis, it did not attempt to put a competing valuation before the court (see the GD at [82]). In our view, given that the Judge had, by then, found that there was no basis to set aside the valuation in the FTI Report, there was, strictly speaking, no longer any need to consider any competing valuations put forward by an opposing expert. We would respectfully suggest that it may perhaps be best for the courts not to make observations of this nature in future cases once they are satisfied that there is no manifest error in the disputed valuation or any other reason to set aside the valuation of a single valuer. Furthermore, in the present case, allowing an opposing expert's valuation to be admitted into evidence would have meant that the court would have regard to two valuations – effectively resulting in one valuation being relied upon by each side – and this would have contradicted the term in the Buyout Order that provided for the valuation of the Shares by a *single* valuer.

39 We also make a few brief remarks in respect of the Judge's observation that instead of bringing an application in OS 1324 to set aside Mr Hayler's valuation, the more appropriate means for the parties seeking to set aside the expert determination would have been through an application within S 294 to seek the court's directions under the Buyout Order (see the GD at [84]). In the absence of full submissions on this issue, we express the provisional view that in so far as the Defendants were concerned during the valuation exercise that Mr Hayler did not have access to the information necessary to complete the valuation, the Defendants could have made the appropriate applications pursuant to the "liberty to apply" clause in para 2(h) of the Buyout Order.

Indeed, this was a course of action that they had considered at the time (see above at [30]).

40 Nevertheless, it should be borne in mind that a "liberty to apply" order is only intended to *supplement* the main orders in form and convenience so that the main orders may be carried out, and may not be used to vary the order of the court (see the Singapore High Court decision in *Anwar Siraj and another v Teo Hee Lai Building Construction Pte Ltd* [2014] 1 SLR 52 at [47]). That being said, it also seemed to us that where the court reserves to itself the discretion to vary the buyout order, variation can be sought on that basis and the grounds for such variation would not be limited to those in *Oriental Insurance* ([9] *supra*). In the end, judges, counsel and parties in cases dealing with court-ordered buyouts under s 216 of the Companies Act should bear in mind that the terms of the buyout order should be carefully framed in such a manner that ensures that the shares are ultimately valued at a price that is fair, just and equitable as between the parties and that enables the oppression complained of to be adequately remedied.

Conclusion

41 For the reasons set out above, we dismissed the appeals in CA 45 and CA 46 and the Defendants' application in SUM 81. Having regard to the parties' respective cost schedules, we awarded Viking Engineering costs in the amount of $45,000 (all-in). The usual consequential orders applied.

Andrew Phang Boon Leong Judge of Appeal	Tay Yong Kwang Judge of Appeal	Belinda Ang Saw Ean Judge

Ramesh Bharani s/o K Nagaratnam and Ong Ying Ting Eunice (RBN Chambers LLC) for the appellants in Civil Appeal No 45 of 2020 and the appellant in Civil Appeal No 46 of 2020;
Mahesh Rai s/o Vedprakash Rai and Yong Wei Jun Jonathan (Drew & Napier LLC) for the respondent in Civil Appeals Nos 45 and 46 of 2020.
