Hoban Steven Maurice Dixon and Another v Scanlon Graeme John and Others [2006] SGHC 136

Case Number : Suit 679/2003

Decision Date : 31 July 2006

Tribunal/Court : High Court

Coram : V K Rajah J

Counsel Name(s) : Suhaimi bin Lazim and Rohan Harith (Shook Lin & Bok) for the plaintiffs; Tito Shane Isaac and P Padman (Tito Isaac & Co) for the defendants

Parties : Hoban Steven Maurice Dixon; Vivaldi Investments Ltd — Scanlon Graeme John; Stanley Adam Zagrodnik; Bulpak Pte Ltd

Companies – Oppression – Valuation of minority shares – Parties agreeing to deal solely with valuation of shares – Plaintiffs contending court should take into account earlier alleged oppression in deciding whether to adjust value of shares – Whether court having unfettered discretion to re-examine allegations despite proviso in court direction – Section 216 of the Companies Act (Cap 50, 1994 Rev Ed)

31 July 2006

V K Rajah J:

1 The first plaintiff is the former managing director of the third defendant, a company that he co-founded sometime in or about September 1996 ("the Company"). The second plaintiff is a company founded by the first plaintiff for the purpose of holding shares in the Company. As at 18 May 2004, the second plaintiff held 30% of the Company's issued capital, *ie*, 642,000 shares out of an issued capital of 2,140,000 shares.

2 The Company and its subsidiaries (namely, PT Bulkpakindo, a company incorporated in Indonesia and Bulkpak Ltd, a private limited company incorporated in the United Kingdom) are involved in the production of custom-made flexible intermediate bulk containers ("FIBCs"). FIBCs are commonly utilised to transport a wide range of solids and semi-solids, including polymers, agrochemicals, minerals, foodstuff, pharmaceuticals, chemicals and building materials.

3 The first and second defendants are currently directors cum shareholders of the Company. The first defendant also happens to be the executive chairman of the Company. As at 18 May 2004, the first and second defendants and/or their nominees collectively held 70% of the Company's issued capital, *ie*, 1,498,000 shares out of an issued share capital of 2,140,000 shares.

4 In essence, the plaintiffs' case against the first and second defendants is founded on a claim of minority oppression by the first and/or second defendants ("the liability issue"). The claim is brought under the umbrella of s 216 of the Companies Act (Cap 50, 1994 Rev Ed) ("s 216"). The plaintiffs charge the defendants with having systematically disregarded their rights and rely on a broad litany of purported misdemeanours on the part of the defendants. The defendants in turn deny that there is any basis to ground any claim(s) of oppression, discrimination or undue prejudice. Counter allegations have been hurled at the first plaintiff by both the first and second defendants, portraying him as an "unprincipled opportunist".

5 Prior to the commencement of the hearing, the parties informed the court that "the liability issue need no longer be ventilated. The *sole issue* remaining is the pricing mechanism for the purchase/sale of the second plaintiff's share in the Company" [emphasis added] ("the liability agreement"): see *Hoban Steven Maurice Dixon v Scanlon Graeme John* [2005] 2 SLR 632 at [5].

Accordingly, there was therefore no determination by the court as to whether a case of oppression had been established by the plaintiffs. In short, both parties had agreed to cast aside their rancour and deal solely with the valuation of the current market value of the company's shares with a view to implementing a buy-out arrangement.

6 The parties then settled the precise terms of reference for an expert to settle the "fair market value of the shares". It was agreed that the expert's valuation would be final. There were six ancillary issues, relevant for the purposes of valuation, which the parties could not resolve. After adjudicating upon these issues, I directed the parties to proceed with the appointment of the expert in accordance with their agreement dated 1 June 2004. I also simultaneously made the following direction ([2005] 2 SLR 632 at [8]):

> The court shall make a decision on whether there should be any further adjustment to the valuation of the 2nd plaintiffs shares in the 3rd Defendant ("subject shares") upon receipt of the expert's report. Parties are at liberty to make further submissions to the court within seven (7) days of their receipt of the expert's report, requesting for an adjustment to the valuation of the subject shares to *take into account any other non pecuniary material circumstance(s)*… [emphasis added]

7 The expert finalised his report on 24 September 2004 and concluded:

> In arriving at the valuation of [the Company], it is important to note that the Net Asset Value of [the Company] as at 31 May 2004 is in deficit, ie. negative US$23,867. However, this is after taking into account shareholders' (shareholders of [the Company]) loans and directors' loans of US$1,677,698 to [PT Bulkpakindo], a wholly owned subsidiary of [the Company]. If the shareholders and directors continue to expect these liabilities to be payable by [PT Bulkpakindo], *the fair market value of 100% of the issued share capital of [the Company], as at 7 June 2004 would be nil*.
>
> On the assumption that the shareholders and directors treat their loans to [PT Bulkpakindo] of US$1,677,698 as equity for the purpose of this valuation, the fair market value of 100% issued share capital of [the Company] would be US$398,631.
>
> [emphasis added]

8 The plaintiffs disagreed with the expert's report and invited me to vary the expert's conclusion by taking into account "other non-pecuniary circumstances". It was contended that the court could still make a finding that there had been oppressive conduct and/or grant relief under s 216. I declined to do so, both in light of the liability agreement that recognised and acknowledged that fault was no longer an issue and also because the power under s 216 can only be exercised upon a finding of oppressive conduct. In addition, I was not persuaded that there was in fact any evidence that might qualify as "any other non-pecuniary circumstances". Dissatisfied with my decision, the plaintiffs chose to appeal.

9 The Court of Appeal declined to re-open the issue of oppression or set aside the expert's finding. It decided instead to remit the decision for me to re-consider whether there should be an "adjustment to the valuation of the subject shares to take into account any other non-pecuniary material circumstance(s)".

10 When the parties re-appeared before me, I gave them leave to adduce fresh evidence to determine whether there were indeed relevant "other non-pecuniary material circumstances" that

might justify an adjustment of the expert's report.

11 The plaintiffs maintained that the court had an unfettered jurisdiction to take into account any and all "non-pecuniary material circumstances" that were excluded from the expert's purview including all allegations preceding the liability agreement. Plaintiffs' counsel rehashed the very same arguments that were initially made to the court in relation to the first and second defendants' conduct. The plaintiffs relied on two witnesses, namely, William Crothers and William David Robert Habergham. Significantly, the first plaintiff himself chose not to testify – in contradistinction to the first defendant who did. In essence, the evidence dwelled largely on the first and second defendants' abortive attempts to dispose of the company's shares.

12 I now turn to the plaintiffs' principal contentions. Does the court retain an unfettered discretion to re-examine the circumstances leading to the parties' disputes in order to assess their respective rights and wrongs in considering whether or not to adjust the share value? In my view, the answer clearly is "no". The parties had, by the precise terms of the liability agreement, resolved not to take into account any prior incidents or circumstances. It ought to be emphasised that it was the court itself and not the parties that incorporated the proviso in the directions. What was the intention underlying the proviso? Was it to permit a re-examination of the circumstances leading to the initiation of the proceedings? Clearly not. When the proviso was included, it was plain to me that the parties had agreed not to revisit the issues leading to the breakdown in their relationship, the subsequent operations of the company or the abortive attempts to find purchasers for the company and/or its shareholders. The *sole* remaining issue to be resolved was the valuation of the shares, without regard to any existing allegations of fault raised by the parties. It was neither contemplated nor intended that their prior disagreements and allegations would be re-ventilated for the purposes of the valuation and/or any adjustment thereof. The proviso was included for the sole purpose of conferring on the court the power to take into account "any *other* non-pecuniary circumstances" that were unrelated to the parties' *existing differences*, in the event the valuer or the parties could point to the existence of such circumstances prevailing at the date of the valuation. Hence the word "other" that prefaces "non-pecuniary circumstances". This proviso was never intended to provide a back door for either of the parties to re-open old wounds. The plaintiffs were clearly unable to establish in such a context the existence of any "other" relevant non-pecuniary circumstances in these proceedings.

13 Purely for the avoidance of doubt, I also find that the evidence fails to establish that the first and/or second defendants consciously injured or mismanaged the third defendant. Why would they be even so inclined? They were after all the majority shareholders. It was patently in their interests to obtain the best possible price for the shares. I am persuaded that the first and second defendants were genuinely interested in the sale of the shares and did not scuttle purchase offers purely out of pique to spite the plaintiffs. The lengthy negotiations and discussions more than bear this out. As I noted earlier, it is highly significant that the first plaintiff chose not to testify. Could it be that he was not prepared to have his allegations and hypotheses scrutinised and subjected to cross-examination?

14 Regrettably, the plaintiffs have yet again resorted to reprising the alleged oppressive circumstances under the dubious guise that they are "other non-pecuniary circumstances". This is inappropriate and nothing more than another attempt to resile from the liability agreement.

15 In the result, I declined to vary my original determination and dismissed the plaintiffs' invitation to vary the expert's valuation. The defendants were awarded the costs of the resumed hearing.