Hoban Steven Maurice Dixon and Another v Scanlon Graeme John and Others [2005] SGHC 62

Case Number : Suit 679/2003

Decision Date : 30 March 2005

Tribunal/Court : High Court

Coram : V K Rajah J

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

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

Companies – Oppression – Parties agreeing not to pursue issue of oppression in court – Whether court having jurisdiction to grant relief under s 216(2) of the Companies Act where no finding of oppression made – Section 216 Companies Act (Cap 50, 1994 Rev Ed)

Companies – Shares – Valuation of shares – Court invited to determine pricing mechanism for purchase/sale of plaintiff company's shares in defendant company – Expert appointed to value defendant company's shares – Valuation unfavourable to plaintiffs – Whether grounds for court to enhance valuation of such shares existing

30 March 2005

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, portraying him as an "unprincipled opportunist". It is as plain as a pikestaff from the affidavit evidence that the relationship between the parties is beyond repair.

The hearing

5 Prior to the actual commencement of the hearing, I met with counsel and enquired whether they seriously intended to pursue the liability issue or whether they would merely be dealing with an equitable exit mechanism for the parties from the Company. Upon taking clients' instructions, counsel confirmed 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". Counsel then requested for time to finalise the terms of reference pertaining to the appointment of an accounting expert to value the shares in the Company. It bears emphasis that as a consequence of this agreement, there was no determination by the court on the issue of whether a case for oppression had been made out by the plaintiffs.

The expert's terms of reference

6 The parties subsequently reached an agreement on the precise terms of reference for the court-appointed valuer. From the list of nominees proposed by both parties, I appointed Mr Ong Yew Huat ("Mr Ong"), a senior partner of Ernst & Young, as the accounting expert for the purposes of valuing the Company's shares. It also bears mention that Mr Ong was the preferred nominee of the plaintiffs. The salient terms of his appointment provided that:

> (i) the valuation be carried out on the basis of a notional market value assuming the shares in the 3rd Defendants ("the shares") were freely transferable at the time of the market valuation.
>
> …
>
> (vii) *The expert shall use such method as he deems appropriate to determine fair market value of the shares. The Court will fix the valuation date*.
>
> (viii) The expert shall be at liberty to decide proper procedures to receive evidence and documents from both parties.
>
> (ix) *The expert's valuation and any decision on procedures leading up to valuation shall be final*.
>
> [emphasis added]

7 However, on six issues (all of which were relevant for the purposes of the valuation), the parties could not reach an agreement. They were:

(a) the valuation date to be applied;

(b) whether withholding tax should be taken into account in the valuation exercise;

(c) whether an *ex gratia* payment of $450,000 to the first defendant was appropriate;

(d) the plaintiffs' claim for compensatory damages;

(e) whether the defendants' shareholdings ought to be valued on a minority basis; and

(f) costs.

8 After considering the affidavit evidence, the witnesses, oral evidence and the parties' submissions on these issues, I determined that:

a) … the parties proceed forthwith with the appointment of an expert in accordance with their agreement dated 1st June 2004. The terms of the agreement shall take into account that the valuation of the shares is on a pro-rata basis without any discount being made for a minority interest;

b) 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 farther [*sic*] 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);

c) Upon being notified by the court of its final assessment of the value of the subject shares, the 1st and 2nd Defendants shall have fourteen (14) days to decide whether they intend to purchase the subject shares at the value assessed by the court:

i) in the event the 1st and 2nd Defendants agreed to purchase the subject shares within the period stipulated, they shall complete the transaction within two (2) months from the date of acceptance;

ii) in the event that the 1st and 2nd Defendants decide not to purchase the subject shares and the parties fail to agree on any other mechanism for the disposal of the subject shares within seven (7) days from the date the 1st and 2nd Defendants indicate their intention not to purchase same, either party may at any time thereafter apply to the court for the 3rd Defendant to be wound up;

d) For the purposes of his valuation, the expert shall not take into account the sum of $450,000 granted to the 1st Defendant vide a resolution dated 26th February 2003. The said resolution is hereby declared to be null and void;

e) There shall be no adjustment to the company's accounts and/or valuation to take into account the 3rd Defendant's agreement to pay for the withholding tax of the 1st Defendant in the sum of approximately $60,000. The said agreement shall stand;

f) The date of valuation of the subject shares by the expert, shall be the 7th of June 2004;

g) The court may, from time to time, make such other directions as may be appropriate for the valuation of the subject shares and/or for the implementation of the sale mechanism of the subject shares, pending as well as after the receipt of the expert's report;

h) The issue of costs is reserved for further argument after the issues pertaining to the disposal of the subject shares are resolved;

i) Parties are at liberty to apply.

The parties have not taken issue with these orders/directions and there is no appeal in respect of any of them.

The expert's report

9 Mr Ong finalised his report on 24 September 2004. After reviewing all the material circumstances, he concluded:

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

10 Not surprisingly, the plaintiffs were dissatisfied with Mr Ong's conclusions and invited me to review his findings and/or modify his conclusions. They strenuously sought to make out a case for the court to enhance the valuation. At the resumed hearing on 3 December 2004, Mr Suhaimi, counsel for the plaintiffs, invited the court to make an express finding establishing oppressive conduct on the part of the first and second defendants apropos the plaintiffs, thereby entailing relief pursuant to s 216. He ventured to suggest in the alternative that even in the absence of any finding of oppression, the court was still empowered to exercise the powers conferred on it by s 216. He finally argued that the Company should, on equitable grounds, be wound up. I disagreed with all of his contentions and declined to interfere with Mr Ong's findings. The plaintiffs have appealed against my refusal to modify Mr Ong's findings and/or to wind up the Company. I shall now deal with each and every one of the contentions raised by the plaintiffs.

Relief under s 216

11 It would be helpful at this juncture to set out the provisions of ss 216(1) and 216(2). They stipulate that:

> (1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister may apply to the Court for an order under this section on the ground —
>
> > (*a*) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or
> >
> > (*b*) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).
>
> (2) *If* on such application *the Court is of the opinion that either of such grounds is established* the Court may, with a view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and, without prejudice to the generality of the foregoing, the order may —

(*a*) direct or prohibit any act or cancel or vary any transaction or resolution;

(*b*) regulate the conduct of the affairs of the company in future;

(*c*) authorise civil proceedings to be brought in the name of or on behalf of the company by such person or persons and on such terms as the Court may direct;

(*d*) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;

(*e*) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or

(*f*) provide that the company be wound up.

[emphasis added]

12 It is amply clear from the provisions of s 216(2) that the power of the court to grant relief is predicated upon the court being "of the opinion that *either of such grounds is established*" [emphasis added]. This obviously refers to the two grounds set out in ss 216(1)(a) and 216(1)(b) respectively. It is therefore axiomatic that the court cannot exercise or assume any jurisdiction to grant relief pursuant to s 216(2) unless a petitioner has established a case of oppression and/or discriminatory and/or prejudicial conduct.

13 Notwithstanding this plain meaning of s 216(2), Mr Suhaimi adamantly contended that the Court of Appeal decision in *Yeo Hung Khiang v Dickson Investment (Singapore) Pte Ltd* [1999] 2 SLR 129 provided resounding authority for the proposition that in any proceedings where s 216 was invoked, the court could grant compensatory damages regardless of whether a case of oppression had been established. This is a startling proposition, to say the least. Counsel has, in my view, attempted to add another dimension to the decision that cannot possibly stand the test of scrutiny.

14 In that case the trial judge had, after considering the valuer's report, decided to enhance the value of the shares. In enhancing the value, the trial judge took into account the benefits and growth which would have accrued to the subject company but for the oppressive act(s). In dismissing the appeal the Court of Appeal incisively observed at [71]:

> There is no doubt that s 216(2) of the Act, as similar provisions in other Commonwealth jurisdictions, is a wide-ranging section. In the words of Vincent J in *Re Bodaibo Pty Ltd* the section gives the court appropriately extensive discretionary power to effect justice in the particular circumstances of individual cases. *As such, we were of the view that the court has the discretion to enhance the share value in a minority oppression case and that the learned judge did not err in doing so*. [emphasis added]

15 It is correct that the appellants in that case had complained, *inter alia*, that the trial judge had erred in his findings by taking into account allegations of wrongdoings and oppression despite the fact that the petition had not been heard on its merits. To that extent, it might appear, at first blush, to have some superficial similarity to the present proceedings. What Mr Suhaimi regrettably refused to acknowledge is that the relevant circumstances of that particular case were altogether quite different (at [53]):

> … A look at the background facts showed that the petition was stayed *and the application*

was in fact heard on the basis that oppression was assumed to have been established. It was also for this reason that the respondents agreed at the hearing … to pay … costs of the petition, subject to submissions as to quantum. [emphasis added]

16 This passage very clearly puts in context why the trial judge in that case rightly exercised his jurisdiction pursuant to s 216.

17 In these proceedings the parties had, at the outset, resolved to set aside their grievances on liability and blameworthiness in an attempt to narrow down their differences. They expressly agreed at the outset not to try the liability issue. As a consequence, there was neither any trial on the plaintiffs' allegations of oppression nor any findings on the issue by the court. The matters that the court was called upon to resolve were purely tangential factual matters and discrete legal issues that were not premised upon any finding of oppression on the part of the first and second defendants. Counsel for the plaintiffs were content to take this course of action with the full knowledge that the court was making no determination on the liability issue. It appeared to me that counsel for both parties were, at least at that juncture, supremely confident that the accounting expert would arrive at a decision that was favourable to their clients and that the outcome of the expert's report would financially vindicate their respective client's positions. I was nonplussed that after the receipt of Mr Ong's report, Mr Suhaimi attempted to reopen the liability issue. This was well past the eleventh hour and he was blatantly attempting to have a second bite at the cherry. Clearly, when the terms of reference were earlier agreed upon between the parties, he must have been aware of the legal position apropos s 216. As a result, I categorically rejected his belated attempt to reopen the liability issue. As emphasised earlier, Mr Ong was the plaintiffs' preferred nominee as expert. He prepared his report objectively and thoroughly. The plaintiffs' attempts to criticise his well-prepared and carefully-reasoned report are misguided and, in the ultimate analysis, without any substance.

The expert's report

18 There is yet another reason why I was not inclined to question Mr Ong's findings. The parties had expressly agreed that his valuation "shall be final". In the absence of fraud or some patent error it would be wholly inappropriate for me to have intervened in these circumstances. This, coupled with the parties' earlier agreement on the liability, issue dictate that even if I had the discretion to modify Mr Ong's valuation, there are no legitimate grounds on which I can do so.

Costs

19 On the issue of costs, both parties contended that an order of costs should be made in their favour. It transpired that on 17 March 2004, the defendants attempted in an open letter to resolve the matter by mediation. They proposed that an accountant value the shares and that the parties thereafter submit sealed bids for shares they did not own. The highest bidder would secure the right to purchase the opposing parties' shares. The plaintiffs rejected such a proposal. Although the defendants subsequently made two further offers to settle the matter, nothing meaningful transpired thereafter.

20 In the light of the parties' agreement not to pursue the liability issue, I am of the view that the proper order for costs in these proceedings is for the respective parties to bear their own costs. In this connection, I have also taken into consideration the fact that there was an earlier direction dictating that the parties proportionately share the costs of the accounting expert, in proportion to their shareholdings in the Company.

Expert's report upheld.