

BRITISH VIRGIN ISLANDS
EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO: BVIHC (COM) 2011/03

BETWEEN:

H.R.H PRINCE FAISAL BIN KHALID BIN ABDUL AZIZ AL SAUD

Claimant/Counter Defendant

and

PIA INVESTMENTS LIMITED

Defendant/Counter Claimant

Appearances: Mr Michael McParland and Mr Jack Husbands for the Claimant
Mr Stephen Moverley Smith QC and Mr Andrew Thorp for the Defendant

JUDGMENT

[2011: 18, 25 July]

(Claimant holding 10% of Defendant's issued share capital – Defendant giving notice to Claimant under section 176 Business Companies Act, 2004 ('BCA') redeeming Claimant's shares – parties subsequently entering into Protocol to determine at what value shares to be redeemed – whether Protocol void as contrary to public policy – whether Claimant's shares to be valued without discount for minority interest or lack of marketability – sections 176 and 179 BCA considered)

- [1] **Bannister J:** This is a claim by HRH Prince Faisal Bin Khalid Bin Abdul Aziz Al Saud ('Prince Faisal') for relief in respect of a notice served on him under section 176 of the Business Companies Act, 2004 ('the BCA') by the Defendant company ('the Company') requiring redemption of his ten per cent holding in the Company.

Background

- [2] The basic facts can be set out quite shortly. In 1979 Prince Faisal and Pakistan International Airlines Corporation ('PIAC') entered into a joint venture to own and operate hotels, using the Company, which had previously been formed in Sharjah (but was subsequently continued into the BVI), as the vehicle. At some point the Company purchased (through subsidiaries) the Roosevelt Hotel in Manhattan and the Hotel Scribe in Paris. A shareholders agreement was entered into which was to govern the parties' relationship. That agreement contained a right of first refusal, providing that if one of the joint venturers wished to sell its shares to a third party it had first to offer them to the other on the same or better terms. It was buttressed by provisions in the Company's Memorandum and Articles of Association (a) subordinating the Memorandum and Articles to the shareholders agreement and (b) providing that the Company could not redeem a member's shares without his consent.
- [3] Such process was instituted by Prince Faisal in November 2005 and resulted in his disposing of 98% of his holding to PIAC for US\$67.7m (approximately US\$173 per share and valuing the Company, on a purely arithmetical basis, at some US\$138m). It appears that the reason for the retention of the 2% (8,000 shares) was driven partly by US tax considerations and partly in order to avoid a breach of a covenant contained in the mortgage over the Roosevelt Hotel.
- [4] On 10 March 2007 Prince Faisal served a notice on PIAC under the shareholders agreement in respect of 7,200 of his remaining 8,000 shares. It appears that on the previous day he had entered into some sort of arrangement for the sale of those shares to an entity called Alpha Capital Cayman Limited ('Alpha') for a total of US\$8.6m (or US\$1,194 per share and, as a matter of nothing more than arithmetic, valuing the Company at some US\$955m).
- [5] It appears that PIAC was not interested in acquiring the 7,200 shares at this price. Instead, they resolved to arrange for the Company's board to amend its Articles of Association by removing the provisions subordinating them to the shareholders agreement and making redemption possible without the relevant member's consent. It is not suggested that these amendments were invalid.

[6] On 13 April 2007 the Karachi office of KPMG, apparently acting on the instructions of PIA Investments Limited, attributed a Net Asset Value to the Company of some US\$136m which, after allowance made for a minority interest, meant that each share, on a *pro rata* basis, was worth US\$160.

[7] On 18 April 2007 PIAC instructed the Company pursuant to subsection 1 of section 176 to redeem all 8,000 of Prince Faisal's outstanding shares for US\$60 per share (or US\$480,000 for the holding). That notice was given by the Company to Prince Faisal on 24 April 2007. Section 176 provides as follows:

'Redemption of minority shares

176. (1) Subject to the memorandum or articles of a company,

- (a) members of the company holding 90 per cent of the votes of the outstanding shares entitled to vote; and
- (b) members of the company holding 90 per cent of the votes of the outstanding shares of each class of shares entitled to vote as a class,

may give a written instruction to the company directing it to redeem the shares held by the remaining members.

- (2) Upon receipt of the written instruction referred to in subsection (1), the company shall redeem the shares specified in the written instruction irrespective of whether or not the shares are by their terms redeemable.
- (3) The company shall give written notice to each member whose shares are to be redeemed stating the redemption price and the manner in which the redemption is to be effected.'

[8] On 27 April 2007 Prince Faisal notified the Company, by his attorney Motasim F Hajaj ('Mr Hajaj'), that he dissented from the redemption. He demanded payment of fair value for the shares pursuant to section 179(1) of the BCA, which is in the following terms:

'179.(1) A member of a company is entitled to payment of the fair value of his shares upon dissenting from

- (a) a merger, if the company is a constituent company, unless the company is the surviving company and the member continues to hold the same or similar shares;
- (b) a consolidation, if the company is a constituent company;
- (c) any sale, transfer, lease, exchange or other disposition of more than 50 per cent in value of the assets or business of the company, if not made in the usual or regular course of the business carried on by the company, but not including
 - (i) a disposition pursuant to an order of the Court having jurisdiction in the matter,
 - (ii) a disposition for money on terms requiring all or substantially all net proceeds to be distributed to the members in accordance with their respective interests within one year after the date of disposition, or
 - (iii) a transfer pursuant to the power described in section 28(2);
- (d) a redemption of his shares by the company pursuant to section 176; and
- (e) an arrangement, if permitted by the Court.'

[9] A further notice was served on 6 June 2007, designed to meet certain objections which had been made by Walkers on behalf of Prince Faisal to the first notice. The purchase price was unchanged. Similar notices of dissent were served on behalf of Prince Faisal by Walkers. What should then have happened was for the procedures and processes envisaged and provided for by subsections (8) and (9) of section 179 to be worked through.

'Rights of dissenters

....

- (8) Within 7 days immediately following the date of the expiration of the period within which members may give their notices of election to dissent, or within 7 days immediately following the date on which the proposed action is put into effect, whichever is later, the company or, in the case of a merger or consolidation, the surviving company or the consolidated company shall make a written offer to each dissenting member to purchase his shares at a specified price that the company determines to be their fair value; and if, within 30 days immediately following the date on which the offer is made, the company making the offer and the dissenting member agree upon the price to be paid for his shares, the company shall pay to the member the amount in money upon the surrender of the certificates representing his shares.

- (9) If the company and a dissenting member fail, within the period of 30 days referred to in subsection (8), to agree on the price to be paid for the shares owned by the member, within 20 days immediately following the date on which the period of 30 days expires, the following shall apply:
- (a) the company and the dissenting member shall each designate an appraiser;
 - (b) the two designated appraisers together shall designate an appraiser;
 - (c) the three appraisers shall fix the fair value of the shares owned by the dissenting member as of the close of business on the day prior to the date on which the vote of members authorising the action was taken or the date on which written consent of members without a meeting was obtained, excluding any appreciation or depreciation directly or indirectly induced by the action or its proposal, and that value is binding on the company and the dissenting member for all purposes; and
 - (d) the company shall pay to the member the amount in money upon the surrender by him of the certificates representing his shares.'

[10] This did not happen. The reason appears to have been tied in with the tax problem which I briefly mentioned above. Since Prince Faisal had disposed of 49% of the issued share capital of the Company in 2005, he could not make further disposals within the following three years without risking a charge to US tax which, if he did not pay it, would fall to be paid by the Company and which could be secured by a lien in favour of the Internal Revenue Service secured on the Roosevelt Hotel. Meanwhile (and although the number and amount of such dividends is in dispute) Prince Faisal continued to be paid dividends by the Company for the Company's years ended 31 December 2007 and 2008.

[11] Desultory negotiations for the acquisition by the Company of Prince Faisal's remaining shares appear to have taken place during 2009, but matters were brought to a head when a further section 176(1) notice was served on Prince Faisal on 11 March 2010 for an aggregate redemption price of US\$409,000 (or approximately US\$51 per share). Although the validity of this notice was challenged, on the grounds that the procedures provided for by subsection 179(8) and (9) had yet to be worked through in respect of the notice of 6 June 2007, notice of dissent was given without prejudice to that contention.

[12] On 1 April 2010 Mr John Alexander, an adviser to Prince Faisal. ('Mr Alexander') suggested that the parties enter into a protocol agreement to complete the appraisal process in relation to the 2007 notice. A revised version of such a protocol arrangement which had previously been submitted to Mr Alexander by the Company for consideration was returned to the Company with his suggested amendments. A major outstanding issue was the date to be taken for redemption (i.e. whether it should be June 2007 or March 2010).

[13] ON 11 May 2010 there was a meeting in Dubai between Dr Samie (for the Company) and Mr Alexander and Mr Hajaj for Prince Faisal. It was agreed to cut the Gordian knot by taking an average of valuations taken by reference to June 2007 and March 2010. On 11 June 2010 Mr Alexander emailed Dr Samie in the following terms:

'Dear Dr Samie,

We have been instructed by Mr. Motasim Hajaj, who by virtue of [HRH's] Power of Attorney is his duly authorised representative, to advise you that for the purposes of compulsory redemption under [BCA], HRH has no objection to the valuation of [the Shares] in accordance with the following proposed process:

1. HRH Appraiser: Hajaj & Associates, P O Box 4579, Jeddah 21412, Saudi Arabia. Tel: +966 2 6672631; Fax: +966 2 6672482
Email: Motasim@hajaj.biz
2. PIAIL Appraiser: TBA
3. Dates of valuation: 13th June 2007 and 11th March 2010
4. Basis of valuation: An average of the fair value of the Shares as at close of business on each of the dates of valuation
5. Confidentiality: HRH appraiser and PIAIL appraiser shall be bound by a confidentiality agreement.
6. Information: Upon email request by PIAIL appraiser and/or HRH appraiser, all documentation and information requested will be provided by PIAIL and/or HR simultaneously to HRH and PIAIL appraiser by email or fax.
7. Valuation deadline: Each appraiser will fix the value within 30 days from start date of appraisal (start date to be agreed)

8. Valuation consultation: HRH and PIAL appraisers shall jointly agree a final valuation within 15 days from Valuation deadline and should the value determined by each appraiser be within a range of not more than 10% of each other's value then HRH and PIAL appraisers will agree to divide the difference in value by half and agree this amount as the unanimous value.
9. Valuation failure: Upon failure by HRH and PIAL appraisers to agree a final fair value within 15 days from Valuation deadline, HRH and PIAL appraisers will refer each of their valuations to a third appraiser to be appointed by the President for the time being of the Institute of Chartered Accountants of England and Wales at the request of HRH and/or PIAL. The third appraiser shall have no past or present business connection (whether direct or indirect) with HRH, PIAL or PIAC and present business or other connection (whether direct or indirect) with the HRH appraiser or the PIAL appraiser.
- The third appraiser will independently make a final decision as to the value of the shares.
10. Jurisdiction: This process shall be governed by the laws of the British Virgin Islands (BVI) and the Courts of the BVI shall have exclusive jurisdiction in relation to any dispute arising out of or connected with this process.
11. Costs of valuation: Costs of valuation shall be borne as follows:
- a) cost of HRH appraiser to be borne by HRH
 - b) cost of PIAL appraiser shall be borne by PIAL
 - c) cost of third appraiser, if appointed, shall be borne by HRH and PIAL in equal shares

Kindly provide the name of the PIAL appraiser together with a draft confidentiality text for our consideration and then, upon HRH and PIAL agreement, signature by HRH and PIAL appraisers.

HRH appraiser stands ready to commence the process and we await your response.

Kind regards,

John Alexander
For Hajaj & Associates'

- [14] I shall refer to the terms set out in Mr Alexander's email as 'the Protocol.' A minor amendment was agreed on 22 June and on 29 June 2010 the Company notified Mr Hajaj that its appraiser was Ms Julia Wallace-Walker. An extension for completion of the appraisals to 11 August 2011 was agreed on 29 July 2011. On 12 August 2010 Ms Wallace-Walker gave her appraisal as US\$91,490 (US\$11.4 per share). On 14 August 2010 Mr Hajaj gave his appraisal as US\$.5m (US\$812.5 per share).
- [15] On 8 September 2010, attempts to agree a joint approach having failed, the Company asked the President of the Institute of Chartered Accountants for England and Wales ('ICAEW') to appoint a third appraiser. An application was also made on behalf of Prince Faisal on 8 September 2011, but on terms that certain pre-conditions would be observed in carrying out the valuation, the principal one of which was that the appointed appraiser should not apply a minority discount in valuing Prince Faisal's shares. If that term was not agreed to, then it was said that ICAEW was without jurisdiction to make the appointment. In the event, the President decided (in a rather confusing letter) to treat the application as joint and on 29 September 2011 notified the Company that Mr James Eales of Ernst & Young Europe LLP ('Mr Eales') had been appointed as the third appraiser. As I understand it, Mr Eales has commenced, but has yet to complete his work.

Does the Protocol bind the parties?

- [16] I think that logically the first question which I have to decide is whether the Protocol binds the parties. Subject to one point raised by Mr McParland, who appeared together with Mr Jack Husbands for Prince Faisal, I have no doubt that it does. It is self evident from the narrative of events which I have set out above that all the elements of a concluded agreement are present. Mr McParland's point is that section 179 is a complete statutory code for the protection of dissenters and that as such it cannot be contracted out of. He relied upon **Johnson v Moreton**¹, where the House of Lords held that an agricultural tenant could not, by contract, give up his right to apply to an agricultural tribunal against the operation of a notice to quit served by his landlord. The reasoning proceeded upon the footing that the relevant provisions of the Agricultural Holdings Act 1948, were designed to protect the national interest by promoting efficient farming and that that

¹ [1980] AC 37

object would be undermined if tenants could be persuaded (or leant on) to give up their statutory protection.

[17] It does not seem to me that by agreeing, in effect, to go to arbitration as to the price to be paid for his shares Prince Faisal was giving up anything. The measure of valuation, fair price, was the same as that set out in the statute. Instead of the sort of impasse which could arise if the three appraisers appointed under section 179 failed to agree Prince Faisal obtained – although he has chosen not to avail himself of it - certainty rather than confusion by entering into the Protocol.. The mechanism provided by the BCA for the valuation of dissenters' shares is merely machinery for establishing a price. If a particular dissenter prefers other machinery, he is not, as I see it, giving up some protection which he would have had under the BCA but does not get under the private agreement. He is merely choosing a different route to achieve the same end.

[18] Nor do I believe that it can be said that subsection 179(9) of the BCA is some integral part of the financial fabric of the Territory such that to permit persons to contract out of it would damage the well being of the Territory as a financial centre. Nor is it part of any statutory apparatus underpinning the financial integrity of the Territory or operating to prevent financial or economic abuse. It is no more and no less than a statutorily available method for the valuation of redeemed shares. There is no policy reason why parties *sui juris* should not adopt an alternative method if they choose to do so.

[19] In my judgment, therefore, Prince Faisal is bound by the Protocol. There was some discussion at the hearing whether, despite the fact that no such order had been sought by Prince Faisal I should, if I came to the conclusion that the Protocol bound the parties, give some indication as to the manner in which the valuer should approach paragraph 4 and, in particular, whether I (a) could or (b) should offer guidance upon the meaning to be attributed to the expression 'fair value of the Shares'.

[20] I was referred to some authority upon the point. In **Norwich Union Life Insurance Society v P&O Property Holdings Limited**² the Court of Appeal of England and Wales held on the true

² [1993] 1 EGLR 164

construction of the relevant agreement that the matters upon which a ruling had been sought by one of the parties were peculiarly within the remit of the expert to decide and that unless both parties concurred in making an application to the Court for clarification, the Court would not interfere. A similar case³ was decided the other way by that Court on the grounds that the matters which the valuer had to decide involved matters of law upon which it was appropriate for the Court to express its opinion. The cases appear to me to involve some fine distinctions, but for present purposes I think it is sufficient if I say that in my judgment the words 'fair value of the Shares' do not require legal analysis. They are words of plain English and the valuer will apply them accordingly.

Section 179(1)

- [21] These conclusions make it unnecessary for me to decide what meaning is to be given to the words 'fair value' in section 179(1). But in deference to the impressive submissions made to me by Mr McParland upon the point I think I should add a few, necessarily *obiter*, words.
- [22] Mr McParland submitted, basing himself in the main upon a number of United States authorities, but relying also on decisions of Commonwealth Courts, that the term 'fair value' in compulsory redemption provisions should mean a value computed without applying a discount because the holding being acquired is a minority holding or because it is unmarketable. There can be no doubt that there is an impressive body of authority which holds, in the jurisdictions referred to, that no minority or marketability discount should be applied in valuing shares compulsorily redeemed in reliance upon provisions similar to those of section 176.
- [23] So far as concerns section 179(1), it is to be noticed that it has application in no less than five different situations. It does not seem to me to be self evident that what might be fair in one such situation would be fair in another, so that I would expect the expression 'fair value' of being at least capable of giving rise to a different approach depending upon the precise circumstances in which it was being applied.

³ **National Grid Company PLC v M25 Group Ltd** (Chani 98/0414/3) (21 December 1998)

- [24] Secondly, there is a number of different components to the establishment of a fair value, of which the question whether or not to apply a discount is only one. For example, there is the selection of a valuation approach which is fair. That will depend upon a judgment based upon the nature of the business and, perhaps, its viability. It may be fair in one case to use an assets based valuation and in another to apply a price/earnings approach. It may be inconsistent with the adoption of an assets based approach to apply any discount at all.
- [25] Next, it seems to me that the word 'fair' in this context must mean 'fair to both parties.' Even where a shareholder is being expropriated pursuant to statutory machinery, the use of the word 'fair' demonstrates, in my judgment, that the valuation must not favour one party at the expense of the other. It is far from obvious to me that where shares are expropriated in these circumstances an undiscounted valuation will necessarily provide the right solution in every single case. In this case, for example, Prince Faisal deliberately turned himself into a minority shareholder. No doubt he had excellent reasons for doing so, but I do not see why, in those circumstances, it is *necessarily* fair that he should be paid out on a non-discounted basis. I can see good arguments why he should be but an argument is not the same thing as a universal rule.
- [26] Accordingly, had it been necessary for me to decide the point, I would have refused to put any gloss on the words 'fair value' where they appear in subsection 179(1). The legislature chose not to do so and in those circumstances I do not think it is for the Court to do so, either.

Conclusion

- [27] I shall therefore declare that the parties are bound by the Protocol. Mr Moverley Smith QC also invited me to declare that in calculating any sum payable to Prince Faisal under the Protocol, the Company is entitled to set off the dividends that have been paid to Prince Faisal since June 2007. The Protocol is silent upon the point. Dr Samie gave evidence on the matter, but I have to say that

I was not persuaded that that evidence proved upon the balance of probabilities that any such agreement had been entered into between the parties. I refuse, therefore, to declare that the Company is entitled to make any such deduction.

Commercial Court Judge
25 July 2011