

BERMUDA

COURT OF APPEAL

(1) MFP-2000, LP -v- (1) Viking Capital Limited (2) Misa Investments Limited [2014] CA (Bda) 1 Civ (22 July 2014)

SECTION 103 OF THE COMPANIES ACT, 1981 - MINORITY SHAREHOLDER - DEFINITION OF HOLDER AND PURCHASER

On 29 September 2011, Viking Capital Ltd & Misa Investment Ltd (“V&M”), 95% majority holders of the relevant ordinary shares in Viking River Cruises Ltd. (“VRC”), gave a Section 103(1) notice to MFP-2000 to purchase its 2.4% minority holdings of ordinary shares in VRC. Following the activation by that notice of the appraisal process, V&M transferred all of their 95% majority holdings to an associated company, Viking Cruises Ltd (“VC”). In the resultant re-structuring of V&M and its associated companies, VC emerged as the holders of virtually all of VRC. In short, the 95% majority shareholders of VRC transferred all their shares in it to themselves under another corporate name.

Section 103(1) of the *Companies Act, 1981* identifies the start of a mechanism described in the remainder of the section by which holders of a 95% majority of shares or class of shares, on service of a notice on the remaining minority holders, may compulsorily purchase the latter’s shares, subject to entitling them all to the same terms. On V&M’s case, 95% majority holders, responsible for initiating such a process, may have recourse to the mechanism for which it provides, whether or not thereafter they, the 95% majority holders, retain their holdings. On MFP’s case, V&M, having divested themselves of their 95% majority holdings following service of the notice on which they rely, had no *locus standi* to resort to Section 103.

The issue turned on the respective meanings of, and relationship between, the words ‘holders’ and ‘purchasers’ in Section 103(1).

The Judge at first instance ruled that, notwithstanding the transfer by V&M to VC of their 95% majority holdings in VRC during the appraisal period, V&M, as ‘purchasers’ within the

meaning of that word in Section 103, remained entitled to acquire MFP’s shares at a price to be fixed by the Court. The conclusion of the first instance judgment was that: “... *Section 103 provides a mechanism whereby the holders of not less than 95% of the shares in the company can purchase the shares of the minority. That means the holders of not less than 95% of the shares at the date when a Section 103 notice is given. The majority need not retain their shares until the minority shares have been acquired or the notice cancelled*”.

The Court of Appeal agreed and held that the word ‘purchasers’ cannot sensibly refer to persons or bodies who were not 95% majority shareholders responsible for activation of the Section 103 processes in question. In summary, 95% majority holders who give notice under Section 103 may proceed to purchase remaining minority holdings subject to and by means of appraisal if invoked, even if they or some of their numbers, have in the meantime divested themselves voluntarily or involuntarily of all or part of their holdings.

In the view of the Court of Appeal, the structure and wording of Section 103 obliges and entitles 95% majority holders who have served a Section 103(1) notice to acquire the remaining minority holdings, whether or not they remain 95% majority holders at the time of any appraisal invoked by the minority holders. Section 103(1)’s opening words, “*The holders... hereinafter in this Section referred to as the ‘purchasers’, simply presage the mechanism set out in the remainder of the provision by which they, the ‘holders’ responsible for giving the notice, become and remain entitled, until completion of the appraisal process and subject to compliance with it, to acquire the minority shares*”.

The above conclusion would be sufficient in itself to resolve the appeal in favour of V&M. However, the Court of Appeal added that it agreed with the First Instance Judge's observations that Section 103 has as its dominant purpose the facilitation of ready corporate restructuring while also providing fair treatment to minority holders.

Accordingly, the Court dismissed MFP's appeal and held that V&M remained entitled under their Section 103(1) notice to acquire MFP's shares at a price yet to be fixed.

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