Conyers Dill & Pearman

OFFSHORE CASES

OCTOBER 2014

BERMUDA

SUPREME COURT

Nitin T Mehta (2) MFP-2000, LP -v- (1) Viking River Cruises Limited (1) Viking Capital Limited (3) MISA Investments Limited [2014] SC (Bda) 86 Com (29 October 2014)

SUMMARY JUDGMENT - ORDER 14 OF THE SUPREME COURT RULES - ENTITLEMENT TO DIVIDEND DECLARATION - SECTION 103 OF THE COMPANIES ACT 1981

The Plaintiffs applied for Summary Judgment against the First Defendant (the "Company") in respect of a claim for payment, pro rata, of a dividend which the Company had declared (the "Dividend"). The application was brought pursuant to Order 14 of the *Rules of the Supreme Court, 1985* ("RSC").

The First Plaintiff ("Mr. Mehta") and the Second Plaintiff ("MFP") are, and were at all material times, the registered holders of preference shares and ordinary shares in the Company. At all material times the Second Defendant ("Viking Capital") and Third Defendant ("MISA") held not less than 95% of the series A ordinary shares in the Company.

On 4 October 2011, Viking Capital and MISA served a notice on MFP under Section 103(1) of the *Companies Act, 1981* (the "Act") of their intention to acquire MFP's series A ordinary shares in the Company. The notice was dated 29 September 2011. MFP applied to the Court under Section 103(2) of the Act to appraise the value of the shares (the "First Section 103 Application"). The Dividend was declared by the Company on 24 September 2012. That same day, MISA served a notice on the Plaintiffs under Section 103(1) of the Act of its intention to acquire their preference shares in the Company. The notice was dated 20 September 2012. The Plaintiffs had applied to the Court under Section 103(2) of the Act to appraise the value of the shares.

The Plaintiffs submitted that as registered shareholders they are entitled to receive their pro rata share of the Dividend, and will remain so entitled irrespective of whether Viking Capital and/or MISA decided to purchase their shares at the price fixed by the Court. The Company disagreed and issued an interpleader summons under RSC Order 17 seeking an order that it should hold the Dividend payable on the Plaintiffs' shares in a specified bank account, to be distributed to the person(s) who are ultimately entitled to them at the conclusion of the appraisal process.

Viking Capital and MISA supported the Company's application for interpleader relief. They contended that if they elected to purchase the Plaintiffs' shares (or rather, on their analysis, unless they elected not to purchase them) at the values fixed by the Court then they will be entitled to the Dividend payable on those shares.

There are no decided cases dealing with entitlement to dividend payments under Section 103. However the parties submitted that cases dealing with contractual and equitable rights to dividend payments provide persuasive analogies. In this regard, it was common ground that service of a notice under Section 103(1) gives rise to a statutory right and obligation on the part of the majority shareholder to buy and the minority shareholder to sell the shares that are the subject of the notice.

The Plaintiffs relied on *Kidner -v- Kidner* [1929] 2 Ch. 121, Ch D as authority for the proposition that the person who is entitled to payment of a dividend on a share is the registered shareholder at the date when the dividend was declared. The Defendants submitted that the case of *Black -v- Homersham* (1874) 4 Ex D 24 was of greater assistance offering, by way of analogy, a persuasive approach to the construction of Section 103 whereby the purchaser is entitled to payment of any dividend declared after it gave notice to the minority shareholder under Section

103(1). The Defendants asserted that the right of the purchaser was equivalent to the beneficial ownership of the minority's shares, subject to the vendor's *lien*.

Additional arguments were outlined by both sides which the Judge considered was illustrative of the competing policy considerations which ultimately tended to cancel each other out. In summary, the Judge noted that the giving of the Section 103(1) notice and registered ownership both provide a rational basis for determining entitlement to a dividend.

The Judge held that the Court should focus on the words of the statute. Section 103(3) confronts the majority shareholders with a choice. They can elect to acquire the shares at the price fixed by the Court or alternatively to cancel the notice given under Section 103(1). Until that choice has been made — and Section 103(3) is predicated on the assumption that it will be made — the majority shareholders' entitlement to the shares is only provisional. If they elect to acquire the shares at the price fixed by the Court then their entitlement becomes definite.

The Judge was satisfied that the legislature did not intend that the majority shareholders should be entitled to any dividend on the shares declared before they make their election. Entitlement to the dividend may indeed "relate back" but, if so, it relates back in the case of an appraisal to the date of the majority shareholders' election under Section 103(3) and not to the date of the service of the notice. The Judge noted that such an analysis was congruent with all the authorities which were cited and that in none of them was the purchaser entitled to a dividend which had been declared before he had made a definite as opposed to provisional commitment to purchase the shares.

This decision is the subject of an appeal.