IN THE CAYMAN ISLANDS COURT OF APPEAL

Civil Appeal No. 21 of 1999
Grand Court Cause No. 439 of 1999

BETWEEN:

LUIS ROBERTO DEMARCO ALMEIDA

Appellant

- and -

CVC/OPPORTUNITY EQUITY PARTNERS, LTD.
and
OPPORTUNITY INVEST II INC.

Respondents

BEFORE: The Rt. Honourable Mr. Justice E. Zacca, President
The Rt. Honourable Mr. Justice T. Georges, Justice of Appeal
The Honourable Mr. Justice I. Rowe, Justice of Appeal

Mr. Seamus Andrew instructed by Walkers for the Appellant.
Mr. Jeremy Walton instructed by Hunter & Hunter for the Respondents.

April 27th 2000; August 17th 2000

JUDGMENT

ZACCA, P.

This is an appeal from an order of Graham J. whereby he imposed an injunction upon the appellant from presenting a winding up petition against the first respondent. This order followed an inter partes hearing.

The appellant in cause 439 of 1999 sought to wind up the first respondent company under section 94 of the Companies Law (1998 Revision). The directors included the appellant. The second respondent was the holder of 96 % of the shares and the appellant was the holder of 1 %

of the shares in CVC/Opportunity. The second respondent provided investment management services to the first respondent.

There is also another action in cause 389 of 1999 brought by the first respondent against the appellant. It is an agreed fact that the appellant was dismissed by the first respondent company on February 4th 1999 and excluded from the management of the company.

A draft petition was before Graham J. The appellant claimed that he was entitled to 3.5 % of the value of the mutual fund which was estimated to be worth about $1,200,000,000.00, although he only owned one share in the company.

A dispute arose as to the value of the appellant's share. At first the company alleged that the share was only worth $1.00. Subsequently the company offered to pay the appellant a sum which was equivalent to what would be due to him on a liquidation. This offer was rejected by the appellant as being wrong in principle.

On this appeal the appellant is seeking a discharge of the injunction to allow him to have a full hearing of the petition.

In his written reasons for his order made on July 29th 1999, the Grand Court Judge concluded:

(1) that the petition was being presented for the improper purpose of forcing a settlement and would therefore be an abuse of the process of the Court; and,

(2) there was an alternative remedy available to the appellant in the offer by the respondents to pay to him the amount he would receive in the liquidation of the first respondent.

Mr. Andrew, for the appellant, submitted that there was a real dispute as to the value of the appellant's share which was to be calculated at 3.5% of the value of the company. He argued that the value of the share should be calculated on the basis of the value of the company as a going concern, and that the difference between that value and a liquidation valuation would be substantial.

Mr. Walton, for the respondent, submitted that the judge was not in error because there was an alternative remedy available to the appellant in the offer made by the respondent to purchase his share, which offer was a bona fide and fair offer.

It appears that the trial judge was of the opinion that if the company were wound up, then the appellant would only be entitled to a share in the liquidation. He concluded that if an offer was made to purchase the shares at a liquidation value, this would be a bona fide and fair offer, and would amount to an alternative remedy to presentation of the petition to wind up the respondent company.

However, the appellant has argued that the share is worth more than the liquidation value and therefore there is a real dispute as to the value of his share. No valuations were before the trial

judge. He did not attempt to value the shares, nor could he have done so without evidence. This of course could be done at the hearing of the petition.

In O'Neill and another v. Phillips and others [1999] 1 W.L.R. 1092, Lord Hoffman, at page 1105, said:

> "Mr. Ralls, who appeared for Mr. Phillips, submitted that even if his conduct had been unfairly prejudicial, the petition should have been dismissed because he had made an offer to buy the shares at a fair price, which was the whole of the relief to which Mr. O'Neill would have been entitled. In view of the conclusion I have reached about the absence of unfair prejudice, with which I understand your Lordships agree, this point does not need to be decided. Nevertheless, the effect of an offer to buy the shares as an answer to a petition under section 459 is a matter of such great practical importance, that I would invite your Lordships to consider it.
>
> The petition was presented on January 22nd 1992 and points of defence were delivered on March 16th 1992. The points of defence contained no offer to buy, but asked that Mr. Phillips, or the company, should be "at liberty" to buy the shares "at a fair value to be fixed by the Court upon such basis as to the Court shall seem just and equitable and depending upon its finding in respect of the various issues between the parties disclosed on the pleadings herein". This plainly contemplated that the petition would go to full hearing and be decided on its merits. There was then considerable delay and a number of interlocutory hearings. On November 28th 1994, pursuant to an undertaking given to the Court, Mr. Phillips made an offer in terms scheduled to a consent order of that date. The offer as to purchase at a price to be agreed or, in default, fixed by a chartered accountant as valuer on the basis that the value was one quarter of the fair value of the entire issued share capital. The offer was rejected on various grounds, one being that it made no provision for Mr. O'Neill's costs. The result was that the petition went to a full hearing. The judge, who dismissed the petition, did not find it necessary to deal

with the offer. The Court of Appeal accepted the argument that Mr. O'Neill was justified in requesting it because it did not provide for his costs.
In my opinion the Court of Appeal was right."

At page 1107:

"In the first place, the offer must be to purchase the shares at a fair value ... secondly, the value, if not agreed, should be determined by a competent expert ...thirdly, the offer should be to have the value determined by the expert or an expert ...fourthly, the offer should, as in this case, provide for equality of aims between the parties. Both should have the same right of access to information about the company which bears upon the value of the shares and both should have the right to make submissions to the expert, though the form (written or oral) which these submissions may take should be left to the discretion of the expert himself".

In the case of Re a Company No. 003096 of 1987, (1988) 4 B.C.C. 80, an application was made to strike out a petition to wind up a company. Gibson J. at page 81 had this to say:

"The application to strike out, as appearing from the notice of motion, is made on the grounds that the petition discloses no reasonable cause of action, or is frivolous or vexatious or otherwise an abuse of the process of the Court, or ought to be struck out under section 125(2) of the Insolvency Act 1986. It is trite law that an application to strike out will fail unless it is plain and obvious that the petition will not succeed. If the Court, on a review of the material that has properly been put before it, finds that there are facts in dispute which are or may be material to a determination in the petitioner's favour of the petition, then it must let the petition go to trial. On the other hand, if the facts which must be taken to be true or (where evidence is admissible) are established by evidence which is not disputed, lead the Court to the clear view that the petition is

bound to fail, then it would be pointless to allow the petition to go to a hearing and thereby protract the uncertainty that hangs over the company."

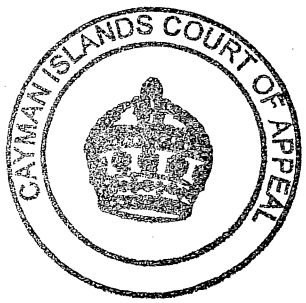
In Re a Company (1983) B.C.L.C. 151, in an application to strike out a petition for a winding up, the court was required to consider whether the minority shareholder had unreasonably refused an offer by the majority shareholders to purchase his shares.

In Re a Company No. 003843 of 1986, (1987) 3 B.C.C. 624, the Court held that it is manifestly unreasonable for the petitioners to continue to press for a winding up order that would give them a financial remedy but would inevitably result in a later payment of a lesser sum than could be obtained from the offer that had been made.

It is accepted that a petition to wind up a company will be struck out if there is no dispute as to the value of the shares and if a fair offer has been made to purchase the shares of a minority shareholder. In Re a Company No. 003843 of 1986 there was no dispute that the offer made would be equivalent or more than the shareholder would have received on a winding up.

On the appeal before us, the appellant contends that there is a real dispute as to the value of his share. The Grand Court judge did not hear evidence as to the value of the shares. He could not therefore have concluded that the offer was a fair offer. The question arises as to whether the offer made by the respondent is a fair offer. It is not sufficient to say that the offer made would be equivalent or more than the liquidation value.

The appeal is allowed with costs to the appellant, and the matter is remitted to the Grand Court for the hearing of the petition. The judge can then hear evidence as to whether there is a real dispute as to the value of the shares and whether the offer made is a fair one. If it is, then the trial judge may consider whether the petition should be struck out.



Georges, J.A.

I agree.

Rowe, J.A.

I agree.