MOORE, BOSI, KELESI AND BEST INVESTMENT LTD -v- PACIFIC ENTERPRISES LTD

High Court of Solomon Islands
(Ward C.J.)
Civil Case No. 129 of 1991
Hearing: 31 July 1991
Judgment: 28 August 1991

J. Corrin for the Applicants
T. Kama for the Respondent

WARD CJ: This is a summons for an order under section 201 of the Companies Act that the respondent company is neither entitled nor bound to acquire the shares of the applicants in Property Development Company Ltd (PDCL) or any of them upon the terms of the Scheme dated 28th February 1991.

The applicants are the dissenting shareholders in PDCL. The respondent company, Pacific Enterprises Ltd (PEL), is the transferee company in a takeover bid for PDCL.

PEL was already the majority shareholder in PDCL when, on the 22nd February 1991, it acquired a substantial block of shares previously held by the Development Bank of Solomon Islands for $2.60 per share. That acquisition brought their shareholding (together with that of their nominee Mr Nuku) to 76%.

On 28th February PEL sent out a circular to the remaining shareholders offering to purchase their shares at $2.60 per share subject to acceptance by the requisite number under section 201.

Sent with that offer was a letter from the directors of PDCL which started:-

"*LETTER TO SHAREHOLDERS*

Your Board has been advised of the 'take-over' proposal of Pacific Enterprises Limited, whereby that Company is offering to purchase the whole of the issued shares in Property Development Company Limited not already held by them, for $2.60 per share.

Since two of the Directors of Property Development Company Limited, Messrs Kausimae and Nuku, are also Directors of Pacific Enterprises Limited, the offeree company, your Board has resolved to forward the offer to shareholders without specific comment or recommendations.

However, we can advise shareholders that the offer is similar to the purchase price paid by the offeree company for the recent purchase of the whole of the Development Company Bank of Solomon Islands holding of Property Development Company Limited shares, and that your Board is not aware of any transfer price for the Company's shares above this offer."

It then went on to urge the shareholders to read the documents carefully and give the matter their urgent attention. The passage underlined above was underlined in the letters sent out.

On 15th May PDCL advised PEL that, apart from the shares held by PEL, 90.65% in value and 75.76% in number of the shareholders had accepted the offer and, on the same day, a notice under section 201(1) was sent to the dissenting shareholders. On 13th June, just before the month allowed by section 201(1) had expired, the applicants filed a summons seeking an order otherwise.

The provisions of section 201 of the Companies Act are couched in almost identical terms to section 155 and section 209 of the 1929 and 1948 UK Companies Acts respectively. The section gives no guidance as to the basis on which the Court might intervene and prevent the compulsory acquisition of the shares of the dissenting members. However, a number of principles have been established in earlier English cases and upheld in recent cases.

It is clear that, where it is alleged the offer is unfair, the burden is on the applicant to establish the unfairness and the fact that 90% of the shareholders have accepted the offer should be taken as showing prima facie the offer was fair; per Maugham J. in *In re Hoare and Co. Ltd*(1933) All E.R. Rep 105. *In re Guerson, Oldham and Adams Ltd* (1967) 1 WLR 385 the principle was amplified by Plowman J. and is accurately expressed in the headnote;

"the test was one of fairness to the body of shareholders and not to individuals and the burden was on the applicants to prove unfairness and not merely that the scheme was open to criticism."

In describing the degree to which unfairness must be established, Plowman J. cited the test of Vaisey J. in *Re Sussex Brick Co. Ltd* (1960) 2 WLR Note @ 665, that it has to be shown affirmatively, patently, obviously and convincingly to be unfair.

"It must be affirmatively established that, notwithstanding the view of the majority, the scheme is unfair, and that is a different thing from saying that it must be established that the scheme is not a very fair or not a fair one: a

scheme has to be shown affirmatively, patently, obviously and convincingly to be unfair" @ 668.

One way in which such unfairness can be shown, as was explained by Vaisey J's judgment, is where there was intentional cheating or deception of the shareholders.

It has been held in more than one case that the mere fact a shareholder has not been given sufficient information does not in itself demonstrate unfairness; *Re Evertite Locknuts* (1945) 1 All E.R. 401 and *Re Press Caps* (1949) 1 All E.R. 1013. In the *Evertite case*, Vaisey J. referred to the complaint that the applicant had been given too little information by the transferor company, it was, he said, "perhaps a little meagre". He went on to say @ 403 -

"The difficulty I feel is that, if once it is conceded that a scheme of this kind can be upset merely for the reason that a shareholder is not given all the information which he might require or might expect from the directors of the transferor company, there would be no limit to the inquiry which would have to be set on foot as to the extent to which his demands for disclosure ought to be conceded."

In the present case the applicants allege unfairness has been clearly demonstrated as the result of a number of matters.

In general terms they claim that the relationship between two directors of PDCL, Nuku and Kausimae, and a director of PEL, Derrick, was such that the shareholders in PDCL were certainly misled as to the true position and, therefore, on whether to accept the offer.

On 20th February, two days before the purchase of the DBSI shares, PDCL had its Annual General Meeting for the year ending 30 June 1990. The minutes show that present were -

"D. Kausimae (Chairman)
I. Nuku (Director)
L. Eta representing the DBSI
B. Derrick representing PEL
and 6 members."

Amongst the six unnamed members were the first and third applicants, Moore and Kelesi. Derrick, despite his special reference was, of course, also a member.

There is a dispute between Moore and Derrick as to the accuracy of the minutes. What is clear is that Moore raised a number of objections during the meeting all of which were overruled or voted out. It is clear also that, more than once, the advice of Derrick was accepted rather than that of Moore.

One area of dispute relates to Moore's claim that he raised considerable objection to the form of the accounts presented. He questioned the lateness of the accounts and the fact that the proceeds of sale of a burned garage were not included. Neither did it show the financial details of a substantial motor dealer, United Enterprises Ltd (UEL)(managed by one of the directors of PDCL, Nuku) that had been purchased by a wholly owned subsidiary of PDCL. Moore suggests such matters made a very substantial difference to the value of the transferor company.

I have considered the evidence in the case and I prefer Moore's memory of the meeting to that of Derrick in any matters of dispute.

One of Moore's requests was that the accounts should be consolidated to show the motor dealer's position in the company. That suggestion was discounted by the Board on the basis that it was impracticable. Whether or not that was sufficient cause to avoid the requirements of section 144 I have not the evidence to decide but it is clear that the picture of the financial state of the company given by the accounts available at the Annual General Meeting was far from complete. When Moore tried expressly to discuss the accounts of UEL he was prevented by the Chairman.

Despite the fact the Annual General Meeting was out of time, the annual report for the same year was not available. It was only sent to shareholders in May 1991 despite the fact it had been signed by the directors on 27th March 1991.

If the directors of PDCL had known at the time of the Annual General Meeting of the impending takeover, as I am satisfied they did, they should have ensured that report was available or explained the situation more fully. Having failed to produce it in time, they should have been anxious to send it out as soon as possible. As can be seen from the documents, when it was signed on 27th March, the offer had been out for one month and had already been accepted by 32 of the remaining 100 shareholders. Surely, if the directors were bona fide they would have sent it out immediately but, instead, it was delayed another month during which Nuku was travelling the country speaking to shareholders. By 1st May a further 34 had accepted meaning that a total of 66 must have done so without the benefit of the annual report for the year ended June 1990.

When considering the state of knowledge of the directors both as to the purchase of the DBSI shares and the offer by PEL, it is noteworthy that, although the letter to shareholders from PEL was dated 28th February the letter sent with it from the Board of PDCL was dated 22nd February.

The two directors present at the Annual General Meeting (apart from the DBSI representative) were also directors of PEL. Their interest in that company, it is suggested, could have accounted for the unwillingness of PDCL to give a clear statement of the affairs of the company. Although Nuku and Kausimae did disclose their directorships in PEL in the letter of 22nd February and said they would therefore not make any recommendation, the use of underlining was, I am satisfied, intended to encourage acceptance by the shareholders.

Despite Nuku's evidence, the applicants suggest that he and Kausimae were more than just directors in PEL. They suggest they were deeply involved in a well planned scheme for the take over of PDCL by PEL and their actions showed they were trying to influence events to that end.

Nuku and Kausimae were two of four people purchasing shares in PDCL for some time as a syndicate called DESIK. At the time of the offer, the shareholders of PEL were PEL Trust 6001, Derrick (as Nominee) 1. Shortly after, PEL Trust had 6002 shares and the four members of the DESIK syndicate each had 750 shares.

By section 201, the requirement of acceptance by a proportion of the shareholders relates to holders of shares other than those held by the transferee company or its nominee. At the time of the offer, following the purchase of the DBSI shareholding, PEL and its nominee Nuku held 402,826 shares out of the total issued shares of 527,181. Of the remaining 124,357 shares, DESIK held 92,250, or 74%. Once DESIK agreed to the offer, PEL was well on the way to satisfying the requirements of section 201. In those circumstances, say the applicants, although DESIK was not a nominee of PEL, Nuku and Kausimae should have declared that interest by disclosing their part in DESIK. Alternatively, that involvement and the subsequent acquisition of shares in PEL show a considerable interest in persuading the remaining shareholders to accept the offer.

Once the offer was made, Nuku travelled to various parts of the country to explain, he said, the offer to shareholders and the ensure they acted in good time. He explained to the Court that a substantial number of the remaining shares were held by small rural investors and, as he had been in the company since its inception, he felt an obligation to ensure they understood. He denied vehemently any suggestion that he tried to influence them one way or the other. I didn't believe him. I am satisfied from the evidence as a whole that he was attempting to encourage acceptance of the offer.

The applicants also point to the involvement of Derrick. He is a business consultant and had been asked a number of times to advise PDCL on an ad hoc basis. The applicants suggest he was far more deeply involved than that and his involvement

meant he had access to information about PDCL denied to other shareholders and was able to influence the directors, in particular Nuku.

Some of Moore's complaints about Derrick are wide of the mark. The suggestion there is significance in the proximity of Derrick's office and the company's registered office is one. However there is no doubt he was involved a great deal. The initial shareholding of DESIK was acquired to a substantial extent by a loan from Derrick to the syndicate. Despite the innocence of such a transaction, Nuku denied it in the witness box but, when confronted with Derrick's evidence about it, said he had forgotten. Much of Nuku's evidence was slanted towards playing down Derrick's influence and explaining much away by his own lack of experience.

Only once in the history of PDCL was a dividend paid. The decision to make such a payment was taken at a meeting of the Board on 18th February 1991. At that meeting Derrick was present although no reason is given except that it was by invitation. Prior to that, in January, letters from Moore to PDCL requesting information and raising queries were replied to by Derrick on Nuku's behalf. The respondents admit that Derrick was involved at this time but urge it was proper and arose out of his consultancy. In the witness box, Derrick was able to explain his position clearly and confidently. Unfortunately he gave the Court a distinct feeling he was not being totally frank. On the evidence as a whole I am satisfied that Derrick was very closely involved with the directors of PDCL and I am not satisfied their conduct was entirely proper in relation to the offer. I feel they had an interest in the offer being accepted and encouraged acceptance. I do not think the statement in the letter of 22nd February gave a full or a sufficient indication of their true position. Their conduct at the Annual General Meeting and the manner in which they dealt with perfectly valid concern about the accounts suggests a willingness to suppress information from which the true position of the company could be ascertained. I feel the overall situation goes far beyond the lack of information in the *Evertite* and *Press Caps* cases.

The applicants also complain about the value of the offer. They suggest that, when all these matters are considered, the shares may be worth considerably more. In querying the value Moore does not say the value is too low, he complains he was not given sufficient information to be able to make a fair assessment. The respondents say that, in the circumstances here, the fact the DBSI accepted that figure was as good an assessment as they could have and, in accepting it, they acted in good faith.

Whether or not the price offered is correct I accept the respondents have shown it could be fair and that the basis of that was reasonable. On the other hand, the applicants have failed to demonstrate it was otherwise. However, in cases such as this,

the price is only one of a number of considerations in deciding whether or not the offer as a whole was fair. Considering all the matters raised by the applicants, does the Court accept this offer was, as a whole, clearly unfair to the shareholders as a body, bearing in mind, as I have just stated, that the price itself has not been proved to be unfair?

What are the principles on which the Court should act? English authorities suggest the Court should adopt the following approach:

1. The burden lies on the dissenting shareholders to demonstrate the need for the Court to order otherwise.

2. That burden is heavy because the acceptance by the vast majority of shareholders prima facie suggests the fairness of the offer and it is not for the Court to impose its own view of fairness.

3. The unfairness must be tested against the body of shareholders and not a few individuals. In many cases such matters as difficulty in obtaining information and the method of accounting may fall into this category and, if not considered to be unfair by the majority of shareholders, the Court will be slow to consider them grounds to order otherwise.

4. In the case of *In re Bugle Press* (1960) 3 All E.R. 791 it was held that, if the bidder is not entirely independent of the shareholders that accept the offer, the Court may have grounds to interfere.

The overall position is that the Courts in England do not easily interfere in commercial transactions carried out by people who choose to take part and who have the usual access to business information. In Solomon Islands the position cannot be considered in quite that light. This is not a situation where the investors in PDCL were experienced in matters of company business. It was accepted by both parties that the majority of shareholders were small investors from rural backgrounds. The amount of business information available and the means to acquire it is minimal or does not exist at all.

In such circumstances, the duty on the directors of the offeree company to their shareholders to be totally frank and forthcoming so as not to mislead is heavier than in a developed commercial environment. When deciding whether to exercise its discretion to order otherwise, this Court must bear that in mind and the relevance of the safeguard in section 201(1) to seek an order otherwise from the Court becomes greater.

Applying the principles established by English precedents but bearing in mind

the special conditions in Solomon Islands, I feel that the acceptance by the majority of shareholders carries less weight in demonstrating fairness than acceptance by a body of commercially experienced shareholders in England. Similarly, whilst I do not feel the transferor company has a duty to provide information additional to that required by the Companies Act, its duty not to mislead requires it to assist shareholders more in ascertaining the position. Equally I feel it must give a clearer indication of the relationships between the companies.

In this case, I do not feel the transferor company was sufficiently diligent in that duty. On the contrary, I am satisfied, its actions, set against the type of shareholder involved, were obstructive and did tend to give an imcomplete picture and thus to mislead. The transferee company is not of course a party to this case but its actions are especially pertinent because the directors included two members of the Board of the transferee company. I also consider that the involvement of the same directors in DESIK and the close relationship between them, DESIK and the transferor company with Derrick and the transferee company does demonstrate an overall unfairness that allows the Court to order otherwise.

I order therefore that PEL is neither entitled nor bound to acquire the shares of the applicants upon the terms of the offer of 28th February 1991.

Two matters remain.

The respondents tell the Court they have already completed the purchase of shares. If they have, that is in breach of the terms of section 201.

The respondent complains that the fourth applicant should not be a party because it was not a shareholder. The applicant claims to have purchased the shares of another shareholder, Saki, although the transfer has not been registered. The respondents produce documents to suggest a sale to them. I am satisfied BIL has sufficient interest to be properly joined as a party.

Costs to applicants.

(F.G.R. Ward)
CHIEF JUSTICE