IN THE MATTER BETWEEN

Rudy Rijckaert	**Plaintiff**

AND

SMTC Global Inc.	**First Defendant**
Hj Ibrahim Ahmad Bin Darvest Mohd Deen	**Second Defendant**
Aznizan Bin Hussien	**Third Defendant**

(High Court of Brunei Darussalam)
(Civil Suit No.81 of 2013)

Before Judicial Commissioner James Findlay In Chambers.
Date of hearing: 27th January, 2014.
Date of Handing Down Judgment: 28th January, 2014.
Mr Philip Yong Teck Fatt and Ms Nani Zuraila Bte Hj Ismi of Messrs H E P Law Office for the Plaintiffs.
Mr Nava Palaniandy and Mr Tan Chee Huie of Messrs Ahmad Isa & Partners for the Defendants.

JUDGMENT AND DRAFT ORDER

Findlay, J.C.:

The plaintiff obtained an injunction against the defendants on 16 December 2013. The defendants now apply to vary the terms of that injunction.

The matter first came before me on 6 January 2014 when I made some interim orders. Some further affidavits have been filed since then and the matter is now back before me as the adjourned return day.

There is no point in dealing with the plaintiff's complaints in respect of which he sought the injunction in detail at this stage because it emerged during the course of the hearing today that the only sensible course to take to conclude this matter was for the second and third defendants to purchase the plaintiff's shares in the first defendant. Somewhat half-heartedly, Mr Fong did suggest that perhaps the plaintiff should buy out the second and third defendants, but those

defendants are, on any view of the matter, the majority shareholders and have the majority on the board of directors. They have complete control and it is logical and sensible that they are should buy out the plaintiff.

The other reason why I need not deal with those complaints in detail is that, if I should agree with the plaintiff and consider setting aside the decisions about which he complains, this would be futile because the second and third defendants could make the same decisions again, but on the basis that they could not be challenged. My understanding of the law is that the court should not make any order that would be futile because the second and third defendants could easily cure by any defects in the decisions because they have complete control as majority shareholders and as a majority of the Board.

There are, however, three aspects on the injunction that concern the plaintiff in particular.

Firstly, the plaintiff was removed as a director. The plaintiff wants me to order his reinstatement. I do not believe that I should do this. Whatever defects there were in that removal are easily curable. If I were to order his reinstatement, I would be interfering in the operation of the first defendant and the operation of the first defendant is the function of the Board, not mine. An order for his reinstatement could be nullified by the Board again removing him and that would make a nonsense of my order.

Secondly, the plaintiff wants the injunction continued so that he has access to the documents and records of the first defendant. In view of the fact that the order I contemplate would allow the valuer of the plaintiff's shares full access to all the documents and records of the first defendant and the duty to hear the plaintiff on such matters, I do not feel that I should make such an order. This also applies to the provision of copies of documents to the plaintiff. The valuer will have full access and I see no need for the plaintiff to be provided with copies.

Thirdly, the plaintiff wishes to have some kind of control or oversight regarding the first defendant's bank account. Again, I believe that the valuer will be able to examine the operations of the bank account and detect any irregularities. I see no need for the plaintiff to have this supervision.

The defendants have agreed that the money paid by the second and third defendants for the issue of the new shares should be set aside pending the outcome of this litigation. I so order.

Order 4 of the injunction regarding disposal of the first defendant's assets is varied as requested by the defendants. Their proposals seem entirely reasonable. The valuer will be able to ascertain if there are any irregularities in the payments proposed.

The defendants seek a new order that the plaintiff do not interfere with first defendant's business. I do see how the plaintiff could interfere. He has no power to do so. This amendment sought by the defendants is refused.

Order 5 of the injunction is no longer relevant.

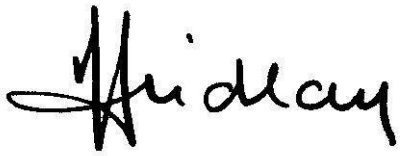
Orders 6 and 7 of the injunction regarding the plaintiff's position as a director of the first defendant are struck out for the reasons I have already given.

Otherwise, the injunction will remain in force until further order.

As I have said, the obvious course to settle this matter is to order that the second and third defendants purchase the plaintiff's shares for a price reached by an independent valuer. I set out below a draft order for comment by counsel.

> It is ordered that the second and third defendants purchase the plaintiff's shares in the first defendant at a price to be set by (an independent valuer - a chartered accountant – agreed by the parties or appointed by the court). The plaintiff may, within 30 days, subscribe to, pay for and have allocated to him the same number of shares allocated to the second and third defendants.
>
> The valuer shall have access to and the power to examine all books, accounts, documents, transactions and records of the first defendant.
>
> The valuer make question any director or employee of the first defendant regarding any record or transaction of the first defendant.
>
> The valuer shall receive and consider any submissions or information from any shareholder.
>
> The valuer may refer any problem or question encountered by him to the court.
>
> The valuer's fees and expenses shall be paid . . .

If the matter is settled on this basis, there remains the question of costs. To decide that matter would require a detailed examination of the merits of the plaintiff's complaints and the defendants' responses. I hope that can be avoided.



JAMES FINDLAY
Judicial Commissioner

BETWEEN

Rudy Rijckaert	**Plaintiff**

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SMTC Global Inc.	**First Defendant**
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(High Court of Brunei Darussalam)
(Civil Suit No.81 of 2013)

Before: Judicial Commissioner James Findlay In Chambers
Date of Hearing: 13th February, 2014.
Date of Handing Down Judgment: 17th February, 2014.

Mr Philip Fong Yeng Fatt and Ms Nani Zuraila Hj Ismi of Messrs H E P Law Office for the Plaintiff.
Mr Tan Chee Huie (M/S Ahmad Isa & Partners) for the Defendants.

Case cited in the Judgment:

Re Bird Precision Bellows Ltd 2 W.L.R. 869

J U D G M E N T

Findlay, J.C.:

Since my judgment of 28 January 2014, counsels have been working on a draft order to settle this matter. A great deal of progress has been made and I am grateful to counsel for their efforts in this direction. There remain some areas of disagreement which it is my task to determine.

It is convenient, as counsel have done, to work on the basis of the draft order prepared by counsel for the plaintiff. I have signed this draft for the purposes of identification only.

The first issue is the identity of the valuer. The defendants favour KPMG Corporate Advisory Sdn. Bhd., whereas the plaintiff is undecided between KPMG and Price Waterhouse Coopers. Mr Fong asked for two weeks for the plaintiff to decide. I really do not see the need for this. No reasons were

advanced for the plaintiff's indecision on this aspect of the matter. It is better, I think, that this matter be decided now rather than leaving the decision open for further consideration. KPMG is a well recognised firm of good reputation and I see no good reason why it should not be able to do this job competently. The plaintiff's draft identify a specific person as valuer, but I think it better to leave the nomination as the firm to cope with possible changes of personnel.

The next issue is the inclusion by the plaintiff in paragraph 5 of the draft order of "There is no discount for the lack of marketability and minority shareholding of the shares." As I understood Mr Tan, the defendants do not challenge this in principle, but say this should be left to the valuer with expert knowledge. I do not see in the terms of reference of KPMG any clear statement that they would proceed to value the shares on the basis proposed by the plaintiff, although, perhaps, there are hints of this in paragraph 3.7 of the terms of reference.

There are difficulties in leaving the matter on the basis of ascertaining a "fair market value" of the shares. What is the market? If the market is taken as what an outsider would pay for the shares, this would, to my mind, not be "fair". The truth is that an outsider would pay very little for this minority shareholding, even if he were to consider buying it at all. If, on the other hand, the market is the existing shareholders, the fair value would be what the shares are worth to them; that is, a proportion of the total value of the assets of the company reflected in the number of shares held by the plaintiff.

As Mr Fong has pointed out, this pro rata approach is supported by the case of In ***Re Bird Precision Bellows Ltd*** **2 W.L.R. 869** in which Nourse J. said –

> "On the assumption that the unfair prejudice has made it no longer tolerable for him to retain his interest in the company, a sale of his shares will invariably be his only practical way out short of winding up. In that kind of case, it seems to me that it would not merelynot be fair, most unfair, that he should be bought out on the fictional basis applicable to a free election to sell his shares in accordance with the company's articles, or indeed on any other basis which involved a discounted price. In my judgment the correct course would be to fix the price pro rata according to the value of the shares as a whole and without any discount . . . "

Nourse J. makes it clear later in his judgment (Page 878 D) that this approach is not limited to the unfair prejudicial conduct type of case, but also applies to "where there has been an agreement for the price to be determined by the court without any admission as to such conduct."

As the judgment makes clear, contrary to Mr Tan's submission, although the amount of any discount may be a matter for the valuer to determine, the

question of whether there should be any discount is a question of law for the court.

With respect, I agree with this approach. Indeed, I think I raised this point peripherally during the first hearing.

I believe the direction to the valuer should be "to fix the price pro rata according to the value of the shares as a whole and without any discount" and the draft order should be amended accordingly.

The next point of disagreement is in relation to an audit. The plaintiff's draft order includes a provision that the company's accounts should be audited. Mr Tan maintains that this is not necessary. However, KPMG seem to think that an audited account, or something like it, is necessary. Paragraph 3.4 of their terms of reference say that they will be provided with "audited and/or management accounts." I am not sure what management accounts are, but it seems to me that audited accounts should be the starting point from which the valuers will work.

Accordingly, I agree that my order should require an audit and it would seem convenient and sensible that KPMG should also carry out the audit.

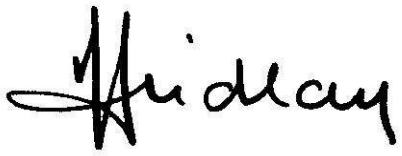
The next point is in relation to provisions in the plaintiff's draft order that the valuer would be empowered to make enquiries of relevant persons of the first defendant, its subsidiaries "and/or unincorporated joint ventures", "to ascertain whether there are any fraudulent and/or unauthorized payments and "to investigate any disputed transactions that will have an impact on the value".

Mr Tan argues that these powers are unnecessary and would be burdensome to the valuer. I am inclined to agree with this, but, in any event, I am sure that, with the audit and the other powers of the valuer, any suspicious transactions will come to light and the plaintiff would have his remedies if he has been prejudiced by such transactions.

What the plaintiff's draft order envisages here is some kind of forensic investigation and KPMG's terms of reference make it clear that their valuation would not contemplate this.

Otherwise, Mr Tan has no argument about the terms of the order. Accordingly, I order in terms of the draft I have signed, with the amendments that appear from this judgment.

I commend the parties and their counsel for reaching a sensible solution to a problem that could easily have degenerated into protracted and expensive litigation.



JAMES FINDLAY
Judicial Commissioner