RUDY RIJCKAERT ... **Appellant**

AND

SMTC GLOBAL INC ... **1st Respondent**

HJ IBRAHIM AHMAD BIN DARVESH MOHD DEEN ... **2nd Respondent**

AZNIZAN BIN HUSSEIN ... **3rd Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 3 of 2014)

Before: Mortimer P, Davies and Burrell JJ A.
28th May, 2014

Agreement between parties after suggestion by trial judge – Agreement in accordance with suggestion nevertheless agreement – Inviting judge to resolve some questions – Subsequent agreement embodied in order.

Ms Wong Mew Sum (M/S Abrahams Davidson & Co) for Appellant
Mr Navasiwayam Kanasam a/I Palaniandy and Mr Tan Chee Huie (M/S Ahmad Isa & Partners) for Respondent

Davies, J.A.:

This was an appeal against a judgment of a Judicial Commissioner of 28 January 2014. Prior to the hearing of this appeal the Court wrote to the parties requesting them to submit argument to the Court on whether this action has been compromised by agreement between the parties following the judgment of the primary judge of 28 January, 2014. Accordingly, on the hearing of this appeal on 8 May, after hearing argument on this question from the appellant this Court dismissed this appeal with costs and informed the parties that we would give our reasons for that dismissal at a later date. These are those reasons.

Essential to the appellant's success in this appeal was an understanding of what the learned judge decided on that date and, in particular, what he did not decide; and what he decided on 17 February, 2014. Before coming to that question it is necessary to say something about the history of this action.

The action was commenced by writ dated 16 December of 2013. In that writ the plaintiff appellant relevantly alleged that he was a 33.3% shareholder and director of the first respondent, a Brunei company; that the second and third respondents were also each 33.3% and 33.4% shareholders respectively in the company; that the third respondent

was the son-in-law of the second respondent; and that the appellant and the second and third respondents were the only shareholders and directors of the first respondent. The appellant then alleged oppressive conduct on behalf of the majority shareholders against him as a minority shareholder, such conduct consisting of –

a. Issuing interim dividends amounting to US$500,000 on 18 November 2003 to themselves but not to the appellant

b. Passing a director's resolution on 3 December 2013 for a purported rights issue potentially diluting the plaintiff's shares in the company

c. Passing a purported shareholders resolution on 5 December 2013 for the removal of the appellant as a director of the first respondent

d. Making unexplained payments to the third respondent from the company's bank account and

e. Denying the appellant access to the company's documents and records.

The appellant then sought declarations that the above distribution of dividends, payment of interim dividends, the rights issue and removal of the appellant as a director of the company were null and void. He also sought orders that the appellant be appointed as one of the bank signatories on the company's bank account and that the appellant be allowed to appoint an alternative director, an injunction against the respondents from disposing of any shares of the wholly-owned subsidiaries of the first respondent and damages.

The above facts and the relief sought were expanded somewhat in the appellant's statement of claim to which it is unnecessary to refer here.

On 17 December 2013 the appellant sought and was granted ex parte injunctions against the respondent. The orders granted included –

1. An order that immediate access be granted to the Plaintiff (as a director of the SMTC Global) and his agents to the SMTC Global's documents/records including but not limited to bank statements, corporate documents, registers and financial records (the *"SMTC's Company Records"*) to inspect and take copies of the same.

2. A mandatory injunction for the 1st, 2nd and/or 3rd Defendants and officers of the 1st Defendant to provide the said SMTC's Company Records forthwith to the Plaintiff's solicitors in Brunei, M/S HEP Law Office, and for the Plaintiff's solicitors to take copies of the same;

3. An order that the Plaintiff be appointed as one of the bank signatories of the SMTC Global's Standard Chartered Bank Account (USD account no. 87001-037392-00, and EUR account no 93-001-037392-00) and that the Plaintiff be made a signatory whose approval is required for every instruction relating to SMTC Global's Standard Chartered Bank Accounts;

4. Subject to (3) above, an order restraining the 1st, 2nd, and 3rd Defendants from parting with, selling, charging or in any other way disposing of any of the assets of SMTC Global or any of its subsidiaries without the prior written consent of the Plaintiff, in particular,

    a) SMTC Global's Standard Chartered Bank Account (USD account no 87001-037392-00, and EUR account no 93-001-037392-00);

    b) The shares of the wholly or partially owned subsidiaries of SMTC Global;

5. No shares of SMTC Global shall be allotted pursuant to the purported Board of Directors' Meeting dated 3 December 2013. If shares have been allotted, that no rights associated with such shares be exercised by the 2nd or 3rd Defendants;

6. An injunction to restrain the 2nd and 3rd Defendants from taking any steps to remove the Plaintiff as a director of SMTC Global and that any actions taken pursuant to the Extraordinary General Meeting on 5th December 2013 be null and void;

7. If the Plaintiff is removed from the Company's Register of Directors pursuant to the Extraordinary General Meeting on 5th December 2013, that the Plaintiff be reinstated as a director of SMTC Global.

By a summons filed 4 January, 2014, the respondents then sought to set aside or vary those injunctions by the following orders:

1. An Order that immediate access be granted to the Plaintiff (as a director of the SMTC Global Inc) or his attorney to the SMTC Global Inc's document/records including but not limited to bank statements, corporate documents, registers and financial records (the "SMTC Global Inc's Company Records") to inspect and take copies of the same.

2. Pending the outcome of the above matter, an order restraining the 1st, 2nd and 3rd Defendants from parting with, selling, charging or in any other way disposing of any of the assets of SMTC Global Inc or any of its subsidiaries without the prior written consent of the Plaintiff; in particular,

    a) SMTC Global Inc's Standard Chartered Bank Account (USD account no 87001-037392-00, and EUR account no 93-001-037392-00) ("the said bank accounts"); and
    b) The shares of the wholly or partially owned subsidiaries of SMTC Global Inc.

    Provided that SMTC Global Inc may release payments, with prior notice but without prior written consent of the Plaintiff, of the following:-

(i) Salary or payment to the Training Contractors who have conferred their trainer's service, which in total shall not be more than USD60,000.00 per month;

(ii) Payment of USD30,000.00 per month to PT SMTC Indonesia;

(iii) Payment of up to BND1,8 million to support the joint venture project of SMTC Global (Brunei) Sdn Bhd; and

(iv) SMTC Global Inc's CEO's travelling and other related expenses which shall not exceed USD20,000.00 per month.

3. The Plaintiff shall not interfere the operation or business activities of subsidiaries or other related companies of SMTC Global Inc.

4. Pending the outcome of the above matter, no rights associated with shares of SMTC Global Inc allotted pursuant to the Board of Directors' Meeting dated 3rd December 2013 shall be exercised by the 2nd or 3rd Defendants.

That summons came before the Judicial Commissioner on 6 January 2014 when the learned judge made some interim orders. It then came before him again on 27 January 2014. It is the nature of the judgment dated 28 January 2014, which followed from that hearing, which is the primary question before this Court. In the course of giving his reasons for judgment the learned judge said:

> *"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 [counsel for the plaintiff] 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 should buy out the plaintiff."*

It should be added that, by the time of the hearing on 27 January, 2014 the evidence appeared to establish that relations between the shareholders had completely broken down. And that seems to have been agreed because the learned judge asked:

> *"Why examine why breakdown when parties agree breakdown?"*

If, as this question seems to indicate, the parties agreed that relations between them had irretrievably broken down, the above statement from the reasons for judgment appears to be correct. It is plain, as a matter of law, that the relief which the appellant sought, even if it were otherwise appropriate to grant it, would provide only a temporary solution to this breakdown. However it is unnecessary, in order to decide this appeal, to decide whether or not that statement was correct.

There is a dispute between the parties as to whether, on 27 January, the parties agreed to a buyout by the second and third respondents of the appellant's shares in the first

respondent. We do not find it necessary to resolve that dispute. What is clear is that, at that hearing, the appellant proposed that the appellant buy out the respondents' shares (the judges reasons of 28 January) and that there was discussion about valuation (the judge's notes) which must have been in connection with a sale of shares. It may well be that these occurred only after the judge had expressed the above opinion but it is unnecessary to decide that.

The learned judge then went on deal with three matters of relief sought by the appellant and, in each case, refused to grant the relief sought. First, he refused to order the appellant's reinstatement as a director. There was no point, he said, in ordering this because, even if he had been improperly removed he could still be legally removed by the second and third respondents. That seems correct.
The second and third matters, that the appellant continue to have access to the records of the first respondent and that he have some control or oversight of the first respondent's bank account, the judge thought would be unnecessary if an order were made for a buyout, given the powers which the valuer of the shares would have for that purpose. The judge then dealt with some other of the injunction orders and concluded this aspect of his reasons by ordering that, otherwise, the injunction would remain in force until further order.

The judge then returned to the question of a buyout and said:

> *"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."*

He then set out a draft form of order appropriate for such purpose and concluded:

> *"If the matter is settled on this basis, there remains the question of costs."*

In those passages the learned judge was not making an order for sale and purchase of the plaintiff's shares. He was, first, restating his strong view that the best course to settle the dispute between the parties was such an order and, second, setting out an appropriate form of order which could be made if the parties agreed on that course.

But it is important to say that, if there had been no such agreement, no order for purchase would, or indeed could have been made. Consequently, if the appellant had been dissatisfied with the orders made and refused on 28 January and was not prepared to so agree, he could have then appealed against those orders. But he did not do so. On the contrary, by his conduct he took up the learned judge's suggestion.

The parties returned before the learned judge on 3 February and counsel for the appellant announced that broad agreement had been reached on terms of a draft order for sale by the appellant of his shares to the respondents. This was plainly the draft which, in his judgment of 17 February, the judge said he had signed for the purpose of identification only. On 3 February it appeared that the principal area of dispute was as to the method of valuation, one of the matters resolved by the judge on 17 February.

In his judgment of 17 February the judge said, opening his reasons for judgment:

> *"Since my judgment of 28 January 2014, counsel 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."*

It appears from the learned judge's notes that that was, indeed, the way the matter had proceeded before him on 13 February. Counsel for the appellant, referring to that draft, stated the questions on which the parties could not agree, leaving the decision on those questions to the court (*"Leave to Court"*, apparently attributed to counsel for the appellant). These areas of disagreement were resolved by the judgment of 17 February.

Accordingly the parties resolved the dispute in this action by agreement in accordance with the terms of the above draft order as amended by the learned judge's orders of 17 February. The learned judge so ordered:

> *"In terms of the draft I have signed, with the amendments that appear from this judgment."*

It is implicit in such agreement and order that it superseded the injunctions granted on 16 December, 2013 as varied by orders made on 28 January, 2014. That is made clear by the perfected order dated 10 March, 2014.

The appeal was therefore dismissed.

Mortimer, P.

Davies, J.A. **Burrell, J.A.**