[2010] UKPC 27
Privy Council Appeal No. 0084 of 2009

JUDGMENT

Leedon Limited
v
(1) Mr Ghanshyam Hurry
(2) Mr Roderick John Sutton
(3) MPL (I) Limited (in liquidation)
(4) DBS Bank Limited
(5) JPMP MPL Holdings Limited

From the Supreme Court of Mauritius

before

Lord Rodger
Lord Walker
Lord Brown
Lord Collins
Sir John Dyson SC

JUDGMENT DELIVERED BY
Lord Walker
ON

3 November 2010

Heard on 1 July 2010

Appellant
Michael Brindle QC

(Instructed by Maclay Murray & Spens LLP)

1st-4th Respondents
Antony Zacaroli QC
Rishi Pursem
(Instructed by Carrington & Associates)

5th Respondent
Sir Hamid Moollan QC

(Instructed by Streathers Solicitors LLP)

LORD WALKER:

Introduction

1. At the end of the hearing on 2 July 2010 the Board announced that the appeal would be dismissed for reasons to be given later. The Board now gives its reasons.

2. The appeal arose out of an unsuccessful joint venture between two companies incorporated in Mauritius, JPMP MPL Holdings Ltd ("JPMP") and Leedon Ltd ("Leedon"). JPMP was owned by Unitas (originally named JP Morgan Partners Asia Pte Ltd), a private equity investor. Leedon was owned by two brothers resident in Singapore, Mr Anthony Ser and Mr George Ser, who had long experience in the metal stamping industry (and in particular hard disk drives).

3. The corporate vehicle for the joint enterprise was MPL (I) Ltd ("MPL"), which had a wholly-owned subsidiary, Metalform International Limited ("MIL"). Both these companies were incorporated in Mauritius. MPL is now in compulsory liquidation. MIL had three wholly-owned trading subsidiaries, Metalform (Wuxi) Precision Engineering Co Ltd incorporated in the Peoples Republic of China, Metalform Asia Pte Ltd ("MFA") incorporated in Singapore and Metalform Asia (Thailand) Co Ltd incorporated in Thailand. These five companies form the Metalform Group.

4. The ownership, control and management of MPL was provided for by its constitution and by a shareholders' agreement dated 24 June 2004 ("the SHA") made between JPMP, Leedon, MPL, MIL and MFA. JPMP held 51% of the issued capital of MPL, designated as B preference shares and ordinary B voting shares. Leedon had the other 49%, designated as A preference shares and ordinary A voting shares. JPMP and Leedon subscribed about US$86.1m and about US$82.7m for their respective shareholdings. The bulk of these funds was lent by MPL to MIL, and passed on by MIL as equity or loan capital to MFA. MFA used these funds, and further syndicated funds advanced by a consortium of banks under a facilities agreement dated 28 June 2004, to purchase the business assets of a company named Holland Leedon Pte Ltd, owned by the Ser brothers. The purchase price was about US$267m. DBS Bank Limited ("DBS") is the security agent for the syndicated loans, which are secured on all the assets of the Metalform Group.

5. The financial position of the Metalform Group deteriorated sharply in 2005. There was a re-financing operation and an amended facilities agreement executed in or about June 2006. But MFA again defaulted and various notices of default and

acceleration were issued between August and November 2006. Receivers and managers were appointed by DBS on 3 November 2006. On 18 December 2006 DBS petitioned for MPL to be wound up, and on 22 January 2007 the Bankruptcy Court ordered MPL to be wound up and appointed Mr Ghanshyam Hurry (a partner in Moore Stephens) and Mr Roderick Sutton (a director in Ferrier Hodgson, Hong Kong) as liquidators.

The issues in the litigation

6. The issues in dispute in this appeal arise in the liquidation of MPL. They are concerned with a right of first offer conferred on Leedon by Clause 12 of the SHA. The first (and, in the event, the only) issue is whether this right was, on the true construction of the SHA, exercisable at all once MPL was in compulsory liquidation. If Leedon were to succeed on that preliminary point, other interesting and difficult issues would arise, as to whether the right was of a proprietary nature; whether (proprietary or not) it was capable of binding MPL in liquidation; and whether it was overridden by insolvency law as an impermissible fetter on the liquidators' powers.

7. Mr Brindle QC (for Leedon) candidly accepted, at the beginning of his submissions, that if he failed on the preliminary point of construction, the other issues simply do not arise. The Board concludes that the appeal does fail on this preliminary point, despite Mr Brindle's persuasive arguments to the contrary. It is not therefore necessary or appropriate to express any view on the other issues, on which the Board did not hear any oral submissions.

The SHA

8. The SHA is a lengthy and sophisticated commercial agreement, containing 24 clauses and 7 schedules. Counsel's arguments have, naturally enough, centred on clause 12, but the clause must be seen in the context of the agreement as a whole. Recital (D) is in these terms:

> "This Agreement sets out the terms on which [JPMP] and Leedon are willing to subscribe for Shares in [MPL] and regulates the respective responsibilities of the Shareholders towards the operation and management of the affairs of the Group, including [the business to be acquired by MFA]".

Clause 1 contains a large number of definitions and other provisions as to interpretation, including a definition of "Assets Sale":

> "'Assets Sale' means a sale by [MPL] or other member of the Group of all, or substantially all, of the Group's business, assets and undertaking, either by way of a share sale, an assets sale or combination of both."

Clauses 2 to 5 contain the basic provisions for the subscription for shares in MPL as already described, the constitution of the board of directors, and a requirement for the consent of Leedon to matters set out in Schedule 6 of the SHA (alteration of share capital, winding up, major disposals and acquisitions, and so on). Clause 6 contains mutual undertakings restricting competition in various ways. Clauses 7 to 9 contain complex provisions as to the share capital and participation in profits.

9. There follows a group of six clauses dealing with the rights of the two sets of shareholders, the term 'Investor' being used to refer to JPMP or its permitted transferees and the term 'Vendor Shareholder' being used to refer to Leedon or its permitted transferees. The headings of these clauses give an indication of their scope:

> Clause 10: Pre-emption Rights (Issue of New Securities)
>
> Clause 11: Pre-emption Rights (Right of First Offer)
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> Clause 12: Vendor Shareholder Pre-emption rights (Trade Sale)
>
> Clause 13: Tag-along Rights
>
> Clause 14: Drag-along Right
>
> Clause 15: Exit

10. Clause 11 contains various restrictions on share transfers followed (clause 11.5 to 11.8) by a right of first offer exercisable when the holder of shares in a class proposes to make a transfer. The right is exercisable within 30 days by other holders of shares in that class. It is important to note that ordinary A and ordinary B shares are defined as being in the same class, and so are A preference and B preference shares.

11. Clause 12 must be set out in full (except for clause 12.5, which is not concerned with pre-emption rights):

> "The Principal Vendor Shareholder shall have a right of first offer (the "Trade Sale Right") with respect to any proposed Assets Sale. In the event of a proposed Assets Sale, the Company shall send to the Principal Vendor Shareholder a written notice (the "Trade Sale Notice") prior to any third party being offered the shares and/or assets for sale. The Trade Sale Notice shall set forth the assets/shares being offered for sale, the price per share to be received and any other proposed terms and conditions relating to such Proposed Sale.
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> The delivery of a Trade Sale Notice shall constitute an offer, which shall be irrevocable for 30 days from the date of the Trade Sale Notice (the 'Trade Sale Notice Period'), by the relevant Group Company to transfer to the Principal Vendor Shareholder the assets/shares subject to the Trade Sale Notice (the 'Offered Business') on the terms and conditions set forth therein. The Principal Vendor Shareholder shall have the right, but not the obligation, to accept such offer to purchase all but not less than all of the Offered Business on the terms and conditions in the Trade Sale Notice by giving a written notice of its acceptance of such offer (an 'Acceptance Notice') to the Company prior to the expiration of the Trade Sale Notice Period. Delivery of an Acceptance Notice by the Principal Vendor shareholder to the Company shall constitute a contract between the Principal Vendor Shareholder and the relevant Group Company for the transfer of the Offered Business on the terms and conditions set forth therein. The failure of the Principal Vendor Shareholder to give an Acceptance Notice within the Trade Sale Notice Period shall be deemed a rejection of its Trade Sale Right with respect to the subject transfer.
>
> The closing of any sale of assets/shares between the relevant Group Company and the Principal Vendor Shareholder pursuant to this clause 12 shall take place within 15 days from the last day of the Trade Sale Notice Period.
>
> If the Principal Vendor Shareholder does not deliver an Acceptance Notice, the relevant Group Company shall have a period of 180 days from the last day of the Trade Sale Notice Period (the 'Asset Sale Transfer Period') during which the relevant Group Company shall have the right to transfer all, but not less than all, of the Offered Business to one or more bona fide third parties for a price equal to at least the price set forth in the Trade Sale Notice and otherwise on terms and conditions

> not more favourable to the third party than those set forth in the Trade Sale Notice provided that prior to or at completion of such transfer, the relevant Group Company shall deliver to the Principal Vendor Shareholder either (a) a copy of the terms and conditions of sale of the Offered Business agreed with such third party; (b) a letter signed by a Director (other than AS or GS) of the relevant Group Company setting out the principal terms and conditions of sale agreed with such third party; or (c) a letter signed by a Director (other than AS or GS) of the relevant Group Company whereby that Director confirms that the price of the Offered Business sold to such third party is equal to or at least the price set forth in the Trade Sale Notice and that the terms and conditions are not more favourable to the third party than those set forth in the Trade Sale Notice. If the relevant Group Company does not consummate the transfer of the Offered Business in the Asset Sale Transfer Period; it may not thereafter transfer the Offered Business except in compliance in full with all the provisions of this clause 12."

12. Clauses 16 to 24 contained further miscellaneous provisions. The only one calling for special mention is clause 24, which provided for the agreement to be governed by the law of Singapore, and for any dispute to be settled by arbitration in Singapore. But in practice these provisions have had no apparent influence on the litigation. There has been no evidence as to the laws of Singapore.

The course of the appeal

13. The issue of disposal of the group assets came before the Bankruptcy Judge (the Hon Mr G Angoh) on a motion by the liquidators for an order authorising them to sell MPL's shares in MIL by private treaty or tender, with consequential directions. Leedon lodged a lengthy notice of objection, raising seven objections *in limine litis* and a further six objections on the merits. One of the objections on the merits was that Leedon had a pre-emptive right over the assets of MPL. There was a three-day hearing at which the liquidators, Leedon, JPMP and DBS were represented by counsel.

14. In his written ruling the Bankruptcy Judge began by considering and disposing of various procedural objections. He then addressed the right of pre-emption, but referred to clause 11 of the SHA (relating to a transfer of shares in MPL) rather than clause 12 (relating to a sale of group assets). He also referred to some authorities including *British Eagle International Airways Limited v Cie. Nationale Air France* [1975] 1 WLR 758 as to the Court disapplying contractual provisions which run counter to the general policy of insolvency legislation. He then made an order giving the liquidators the authority and direction which they had asked for.

15. Leedon appealed to the Supreme Court (Yeung Sik Yuen CJ and Matadeen SPJ) which dismissed the appeal on 30 September 2008. The judgment of the Supreme Court referred to clauses 11 and 12 of the SHA and treated both as "concerned with a consensual share transfer by one shareholder to another." Mr Brindle has criticised that as the wrong approach. The Supreme Court considered that the procedure prescribed by clause 12 would not necessarily fetch the best offer for the liquidators, and did not apply to a liquidator's sale. The Supreme Court also relied on the alternative ground that a contractual provision could not limit or circumscribe the liquidators' powers. The judgment also dealt with other points which are no longer an issue.

16. Various events have occurred in the course of the litigation which might, in other circumstances, have called for consideration by the Board. But in view of the Board's decision on the issue of construction it would be an unnecessary complication to go into them.

The issue of construction

17. Mr Brindle was critical of the Supreme Court for having treated clause 12 (as well as clause 11) as concerned with a consensual sale between shareholders in MPL. The definition of "Assets Sale" is wide but is nevertheless concerned with the sale of assets of the Metalform Group, whether in the form of shares in MIL (or its subsidiaries) or in the form of business assets. It is not concerned, Mr Brindle emphasised, with the sale of shares in MPL (which are now almost certainly worthless).

18. That criticism has some force. But the reference in clause 12.1 to "a proposed Assets Sale" prompts the question: proposed by whom? The only plausible answer is that the proposal would have come from JPMP, if it had decided that it wished to withdraw from the joint venture and realise its investment (as the provisions for "Exit" in clause 15 show to have been very much in the parties' minds); and the proposal could be expected to be made at a time when JPMP and Leedon were the only persons interested in the future of the Group. In economic terms, therefore, the Supreme Court may have not been wholly mistaken in seeing clauses 11 and 12 of the SHA as directed to similar goals. It is also worth noticing that clause 15 (Exit) refers to an Assets Sale as one form (and perhaps the primary form) of "Exit" contemplated by the SHA.

19. Mr Zacaroli QC (appearing for the liquidators and DBS) submitted that clause 12 cannot have been intended to have any effect after MPL had gone into liquidation, with the result that MPL ceased to be the beneficial owner of its assets, which instead became subject to a statutory trust (*Ayerst v C & K (Construction) Ltd* [1976] AC 167,

176-177). He developed this submission by reference to the detailed and prescriptive requirements of clause 12. If they applied in a liquidation they would, he submitted, prevent the liquidator from carrying out the sort of rapid marketing exercise that would be essential in achieving a satisfactory realisation of the group assets. The thirty-day period specified in clause 12.2 would be a serious disadvantage in a situation in which existing customers and potential bidders might be fast losing confidence in the Metalform Group. The provisions of clause 12.4 would be far too inflexible when the terms of any disposal might have to be the subject of hard bargaining with different bidders (the provisions also refer to letters signed by directors, which would be inappropriate if the relevant company was in liquidation). There would also be uncertainty, if clause 12 applied during a liquidation, whether (in view of the definition of "Assets Sale") the liquidators could properly avoid its operation by piecemeal sales of assets.

20. These are the main points that Mr Zacaroli relied on in urging the Board to conclude that the application of clause 12 in a liquidation would be not merely inconvenient or burdensome (points that would go to a later issue in the appeal) but that it was so unthinkable as to be excluded as a matter of construction. The clause was directed to the joint venture while it was proceeding (as Recital (D) indicated). It was simply not directed to the possibility of a liquidation. Against that Mr Brindle, in a spirited reply, argued that there was no reason why the operation of clause 12 should be limited to what he referred to as a "solvent world". The points made against him went to inconvenience or difficulty, not to impossibility. It was not common ground, he added, that clause 12 (which also appears in articles 28-32 of MPL's constitution) was incapable of binding DBS, which had in any case stood back from the liquidation.

21. The point is in the end a short point of construction. The Board accepts the cumulative force of the principal points made by Mr Zacaroli. Clause 12 was simply not intended to apply in a liquidation. The appeal is therefore dismissed with costs.