IN THE SUPREME COURT OF NEW ZEALAND

SC 75/2010
[2010] NZSC 152

BETWEEN	NEVILLE FONG AND JUNE CHONG Applicants
AND	CHRISTOPHER SHANE WONG AND ANGELA KIM FONG Respondents

Court: Blanchard, McGrath and William Young JJ

Counsel: P W G Ahern for Applicants
A F Grant for Respondents

Judgment: 13 December 2010

JUDGMENT OF THE COURT

The application for recall is dismissed with costs of $2,500 to the respondents.

REASONS

[1] We have been invited to recall our earlier judgment[1] dismissing the applicants' application for leave to appeal to this Court. The recall application is advanced on the basis that our judgment did not engage appropriately with one of the applicants' arguments. As will become apparent, we accept that we did not accurately capture that argument in our earlier judgment. But we are, nonetheless, satisfied that the right result was reached and accordingly we dismiss the recall application.

[2] The argument in question was that the expression "fair value" in s 149(1) of the Companies Act 1993 is not tied to the professional valuation standard of "fair value" but rather is just an objective standard which is to be applied by the court.

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1 *Fong and Chong v Wong and Fong* [2010] NZSC 120.

Accordingly counsel maintains that the result of a professional valuation of "fair market value" could be, and in this case was, a "fair value" for the purposes of s 149. That argument is advanced on the basis that s 149 does not prescribe exclusive use of a particular professional valuation standard.

[3] In our original leave judgment we mischaracterised the applicants' argument. We recorded it as being that the concepts of "fair value" and "fair market value" are the same. This was not correct. Rather it was that in this case, a fair market value approach produced a result which met the statutory test of "fair value". And we also accept that this was the applicants' case in the High Court and Court of Appeal.

[4] The Court of Appeal plainly understood the argument.[2] But it saw difficulty in reaching a conclusion that the transaction as structured had led to a price that represented fair value when this was inconsistent with the views of the valuers whose opinions[3] were before the High Court. The applicants' complaint was that in taking this approach, the Court was confusing the professional valuation standard of fair value with the statutory test. For reasons which follow, we disagree.

[5] In cases such as the present, where the shareholders in a closely held quasi-partnership company have fallen out, the primary alternative to one shareholder purchasing the other's shareholding is a court ordered winding up; this on the basis of either oppression[4] or the just and equitable ground.[5] In the event of a winding up, the assets of a company are distributed in strict proportion to shareholdings. Where relationships between shareholders have broken down, one cannot usually exclude the other from the management of the company without making an offer to acquire that other shareholder's shares for a value which is determined on a pro rata basis, that is, without a discount for minority interest.[6] This is because such a discount would usually not be fair as between vendor and purchaser in terms of:

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2 *Fong and Chong v Wong and Fong* [2010] NZCA 301 at [35].

3 In the form of the reports of the valuer who valued the shares but did not give evidence and the evidence of Mr Hagen.

4 See s 174 of the Companies Act 1993, and particularly s 174(2)(a) and (g).

5 Under s 241(4)(d) of the Companies Act.

6 See the speech of Lord Hoffmann in *O'Neill v Phillips* [1999] 1 WLR 1092 at 1107 (HL) which was cited with approval in *M Yovich & Sons Ltd v Yovich* (2001) 9 NZCLC 262, 490 (CA) at [47]–[49].

(a) the alternative (ie winding up);

(b) what each gains and gives up on the transaction; and

(c) the quasi-partnership nature of the underlying relationship.

The price established by such a valuation process is customarily referred to as "fair value".

[6] A fair value will sometimes include a discount for minority interest. It all depends on the circumstances. Indeed, Mr Hagen accepted at trial[7] that this was so. But he concluded that in this case a discount was not appropriate. In its revised report,[8] PricewaterhouseCoopers (PwC) observed that "fair market value" was a different standard of value to "fair value" and that application of the fair value standard was likely to result in a different figure from that struck in its valuation.

[7] There may be scope for argument as to what if any difference there is between "fair market value", "fair value" and "market value" – arguments which in practice may depend on the relevant legislative or contractual context. Some of the relevant case law is reviewed in the judgment of the New South Wales Court of Appeal in *MMAL Rentals Pty Ltd v Bruning*.[9]

[8] Against this background, there is an awkward element of circularity in the applicants' argument. Statutory and contractual price fixing provisions in relation to shares in closely held companies often adopt one or the other of the expressions "fair market value" and "fair value". The valuation practices which have developed around these expressions are not free standing methodologies but rather represent the efforts of professional valuers to produce valuations which conform to the relevant statutory or contractual requirements. When the legislature chose to use the expression "fair value" in s 149, it plainly had valuation practice in mind and must have envisaged a value which was fair as between vendor and purchaser.

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7 See [16] of the Court of Appeal judgment.
8 Quoted in [12] of the Court of Appeal judgment.
9 *MMAL Rentals Pty Ltd v Bruning* [2004] NSWCA 451, (2004) 63 NSWLR 167.

[9] The reality is that PwC did not seek to establish a figure which was fair in the required sense whereas Mr Hagen did and his evidence on this point was unchallenged. Indeed, given the family and quasi-partnership nature of the company and the associated provisions in the company's constitution,[10] there was no obvious basis for a discount; and this despite the rejection of the oppression arguments.

[10] The case on this issue was fairly and squarely before the High Court and Court of Appeal and we see no credible basis upon which the conclusion of the Court of Appeal could be successfully impugned.

Solicitors:
Morrison Kent, Auckland for Applicants
Glaister Ennor, Auckland for Respondents

[10] Under the constitution the vendor had rights which were broadly equivalent to those of a 50 per cent shareholder and the valuation standard provided in respect of the pre-emptive purchase provisions was "fair value".