Bajumi Wahab and Others v Afro-Asia Shipping Company (Private) Limited and Others [2001] SGHC 91

Case Number	: OS 727/1996, CWU 162/1996
Decision Date	: 09 May 2001
Tribunal/Court	: High Court
Coram	: Choo Han Teck JC
Counsel Name(s)	: Haridass Ajaib and Randhir Ram Chandra [Haridass Ho & Partners] for the plaintiffs; Tan Cheng Han [instructed by Tan Cheng Yew & Partners] and the first defendants; Wong Meng Meng SC, Tan Kay Kheng and Emiley Yeow [Wong Partnership] for the second, third, fourth and fifth defendants
Parties	: Bajumi Wahab; Subha Asma Niljati; Sjahrul Ghozi Bajumi; Irfan Bajumi Wahab; Rosihan Nuch Bajumi; Surjati Dalima Bajumi; Rita Rosmida Bajumi; Sjaiful Bachri Bajumi — Afro-Asia Shipping Company (Private) Limited; Ng Giok Oh; Tan Choo Hoon alias Tan Cheng Gay; Tan Choo Suan; Tan Choo Pin

JUDGMENT:

Cur Adv Vult

Background

1. The nature of the dispute before me arose from a settlement agreement reached between the parties in the consolidated Companies Winding Up Petition 162 of 1996 and Originating Summons 727 of 1996. The parties in the consolidated matters may be categorized into three groups. The plaintiffs are members of the Bajumi family from Indonesia. The second to fifth defendants are members of the Tan family from Singapore. The first defendant is a company (the "Company") in which the Bajumi and Tan families own or control equal shares. Essentially, the Company has three principal assets. First, a major block of shares in Ssangyong Corporation Ltd, secondly, the leasehold interest in the building known as the Afro-Asia Building, and thirdly, a rubber plantation in Sumatra, Indonesia. The Company was founded by the patriarchs of the two families many years ago. The families now no longer share a common vision for the company and that gave rise to disputes which culminated in the two consolidated actions. On the date of the trial of the actions, namely 14 April 1998, the parties appeared by counsel to record a settlement in which the general intention was that the Bajumis from Indonesia would keep the Indonesian assets and the Tan family would take the Singapore assets (comprising the Ssangyong shares and the Afro-Asia Building). This necessitated a valuation of the assets for the purpose of one party buying over the others share. The parties were unable to agree as to how the order of court was to be carried out and that led their return to the court on 10 November 1998 to vary the orders of 14 April 1998. The original orders and subsequent variations were all made by consent. Consequently, both sides adduced valuation reports of the three assets that were so far apart that the dispute concerning the values of the three principal assets had to be resolved by this court.

2. In these proceedings the parties had, by consent, nominated three assessors (as independent assessors) to assist me in respect of each of the assets. Mr. Sajjad Akhtar (assisted by Mr. Andrew Grimmett) of Arthur Andersen, was appointed as assessor in respect of the valuation of the Ssangyong shares, and as co-assessor together with Dr. Chee Kheng Hoy of Lyman Agro, in respect of the valuation of the rubber plantation. Mr. Philip Leow (assisted by Ms Chiah Soo Ling) of Debenham Tie Leung, was appointed in respect of the valuation of Afro-Asia Building. The assessors are all highly qualified experts in their field, and I will say at the outset that they had discharged their duty and function most professionally and impartially; and I record the courts indebtedness to them especially for the immense amount of work they had so diligently put in, and in easing my way through the work of the valuation experts - work which is at times scientific and at times artistic.

3. Before I dwell on the valuations individually, it is necessary to set out the consent orders of 14 April and 10 November 1998. They are as follows:

Order of Court dated 14 April 1998

" AGREED TERMS OF SETTLEMENT

1. (a) The Tans will purchase the shares of the Bajumis in the Company [AFRO-ASIA SHIPPING COMPANY (PRIVATE) LIMITED the "Company"] at a fair value; AND

(b) The Bajumis will purchase the Companys and Tan Choo Suans shares in PTBRK [PT BUMI RAMBANG KRAMAJAYA] at a fair value, as set out below.

2. For the purposes of paragraph 3(c), the assets of the Company are as identified in the Consolidated Financial Statements of the Company as at the 31st of December 1996 but the IA shall establish the values upto today and such values shall exclude all sale proceeds (plus interest already accrued and still accruing) of the properties known as Nos 9 and 11 Cluny Park, the sale of which took place in 1993, but shall include the sum of S$500,000.

3. (a) The parties shall agree, within 7 working days from today, to the appointment of an independent auditor [IA] to be selected from either of KPMG Peat Marwick, Price Waterhouse or Arthur Andersen, failing which such IA shall be appointed by the court.

(b) Such IA shall be experienced in the valuation of shares in private companies, and shall act as an expert, and not as an arbitrator.

(c) Subject to paragraph 6 of this Order, the IA shall value the shares of the Company on a net tangible asset basis without discount of any kind.

(d) The IA shall value 17.4 million shares in Ssangyong Cement Singapore Ltd [i.e. all shares owned by the Company in Ssangyong Cement and listed on SES] by reference to the market values of these shares on the following dates:-

(i) October 1994;

(ii) August 1995;

(iii) February 1996;

(iv) July 1996 (date of the presentation of the OS/CWU);

(v) January 1998;

(vi) April 1998.

4. The IA shall within 7 working days of his appointment,

(a) appoint a real estate valuer [REV] to establish a fair value of the Afro-Asia Building;

(b) appoint a recognised expert or experts [RPE] experienced in the valuation of

rubber plantations who shall produce a report or joint report.

5. The REV shall:

(a) in the first instance be a valuer agreed to between the parties, but failing agreement within 3 working days from today, be appointed by the IA from any of the following organisations:

> Edmund Tie & Co. or Chesterton or the Sisv Services Pte Ltd;

(b) establish a fair value of Afro-Asia Building by reference to the market values of the Afro-Asia Building on the following dates:-

> (i) October 1994;
>
> (ii) August 1995;
>
> (iii) July 1996 (date of the presentation of the OS/CWU);
>
> (iv) April 1998;

Provided always that the value ascribed to the same shall take into consideration the potential of the building or any development thereof.

(c) submit his report to the IA within 30 days from the date of appointment.

6. The RPE shall:

(a) in the first instance be an expert or experts agreed to between the parties but failing agreement within 7 working days from today, be appointed by the IA;

(b) Establish a fair value of the 40% of the estate owned by the Company and the 10% owned by Tan Choo Suan.

In establishing the fair value of the plantation, the RPE shall:

(A) visit the site together with two family members each of the Tan and Bajumi families and establish as best as possible the area planted;

(B) submit a report (or joint report) to the IA within 90 days of appointment.

7. (a) Both the REV and the RPE shall hear and review such submissions (written or oral) including reports and such information and documents as may be submitted by the parties before submitting their own reports to the IA.

(b) The IA make such reasonable arrangements as may be necessary with the REV and RPE and the parties as will implement paragraph 7(a).

8. After reviewing the reports of the REV and the RPE, the IA shall fix a date whereby the parties may appear before him to allow them to present their submissions before he determines the price of the shares of the Company by way

of a speaking valuation. In determining the price of the shares of the Company, the IA shall not disturb the findings of the RPE or the REV.

9. The IA shall submit his report to the court within 120 days of appointment.

10. The parties are at liberty to address the Court on the fair value and the Court shall then establish a fair value for the shares.

11. The parties shall complete the sale and purchase within 30 days of the court accepting the IAs report and pronouncing an order based on the IAs report.

12. The costs and expenses of the IA, the REV and the RPE shall be borne equally by the Bajumis and the Tans.

13. The parties shall cooperate fully with the IA, the REV and RPE, and shall provide them or each of them with such information, date, documents and access to sites or information, as may be requested to enable the IA, the REV and the RPE to discharge their respective responsibilities.

14. Parties shall have liberty to apply.

15. When the IA, the REV or the RPE shall require any additional time, such additional time shall be granted by the parties, failing which the IA, the REV or the RPE shall give notice to both parties to apply to court for the necessary extension of time.

16. The Petition and the Originating Summons shall be stood over and all further proceedings stayed.

17. The parties shall forthwith procure the Company to stay Suit No. 2359 of 1996 pending the performance of the matters agreed herein and to discontinue the action thereafter.

18. The issue relating to costs of these proceedings shall be left for this Honourable Courts determination after the completion of this settlement, together with the costs of Suit No. 2359 of 1996. Any costs incurred by the Company in Suit No. 2359 of 1996 shall not be taken into account in determining the fair value of the Company's shares.

19. The issue as to entitlement of interest, if any, shall also be determined by this Honourable Court after the completion of this settlement."

Order of Court dated 10 November 1999

"1. The Agreed Terms of Settlement ("ATS") dated 14 April 1998 is modified as follows:-

(a) Clause 3(d) of the ATS is deleted and the following clauses inserted:-

> "3(d) The Plaintiffs and the 2nd to 5th Defendants (collectively called the Parties) shall appoint their own

auditor to prepare their report on the fair value of the 17.4 million shares in Ssangyong Cement Singapore Ltd (i.e. all shares owned by the Company in Ssangyong Cement and listed on the SES), if possible, by reference to the market values of these shares on the following dates:-

(i) October 1994;

(ii) August 1995;

(iii) February 1996;

(iv) July 1996 (date of the presentation of the OS/CWU);

(v) January 1998;

(vi) April 1998.

The Parties agree that:-

(i) the Parties respective reports shall be exchanged between the parties and filed in Court by 15 February 2000; and

(ii) There shall be a "Without Prejudice" meeting between the Parties respective auditors not later than 1 month after the exchange of reports, with a view towards the preparation of a joint report indicating the agreed evidence and the areas in issue ("the Shares Statement"), such Shares Statement to be submitted to the Court together with Counsels Submissions within 1 month from the date of the Without Prejudice meeting.

(b) Clause 4 of the ATS is deleted and the following clauses inserted:-

"4(a) The Parties shall appoint their own real estate valuer to prepare their report on the fair value of the Afro-Asia Building, if possible, by reference to the market values of the Afro-Asia Building on the following dates:-

(i) October 1994;

(ii) August 1995;

(iii) July 1996 (date of the presentation of the OS/CWU);

(iv) April 1998;

Provided always that the value ascribed to the same shall take into consideration the potential of the building or any development thereof.

The Parties agree that:-

(i) the Parties respective reports shall be exchanged between the Parties and filed in Court by 15 February 2000; and

(ii) there shall be a "Without Prejudice" meeting between the Parties respective real estate valuers not later than 1 month after the exchange of reports, with a view towards the preparation of a joint report indicating the agreed evidence and the areas in issue ("the Building Statement"), such Building Statement to be submitted to the Court together with Counsels Submissions within 1 month from the date of the Without Prejudice meeting."

4(b) The Parties shall appoint their own expert(s) experienced in the valuation of rubber plantations to prepare their report on the fair values of the 40% owned by the Company and the 10% owned by Tan Choo Suan of the rubber estate. The Parties agree that:-

(i) the Parties respective reports shall be exchanged between the Parties and filed in Court by 15 February 2000; and

(ii) there shall be a "Without Prejudice" meeting between the Parties respective experts not later than 1 month after the exchange of reports, with a view towards the preparation of a joint report indicating the agreed evidence and the areas in issue ("the Rubber Plantation Statement"), such Rubber Plantation Statement to be submitted to the Court together with Counsels Submissions within 1 month from the date of the Without Prejudice meeting."

(c) Clauses 5 to 8 of the ATS are deleted and the following clauses inserted:-

"5. The Parties shall thereafter appear before the Court on a date or dates to be appointed by the Court to address the Court on and for the Court to determine the issue of the respective fair values of the Ssangyong Shares, the

Afro-Asia Building and the rubber plantation estate.

6. In determining the respective fair values as aforesaid, the Court will be entitled to:-

(i) hear evidence from the Parties respective auditors, real estate valuers and rubber plantation experts;

(ii) consider the Shares Statement, the Building Statement and the Rubber Plantation Statement as well as the separate reports prepared by the Parties respective auditors, real estate valuers and rubber plantation experts.

7. The IA shall then proceed to determine the price of the shares of the Company by way of a speaking valuation. In determining the price of the shares as aforesaid, the IA shall not disturb the fair values determined by the Court for the Ssangyong Shares, the Afro-Asia Building and the rubber plantation estate."

(d) Clause 9 of the ATS be deleted and the following clause inserted:-

"8. The IA shall submit this report tot he Court within 1 month after the date on which the Court shall have determined the said fair values."

(e) Clause 12, 13 and 15 shall cease to be applicable with effect from the date of this Order save as regards the IA.

2. The terms of the ATS shall continue to bind the Parties, except to the extent varied by this Order either expressly or by implication.

3. The costs of this application are reserved for the Courts determination together with the issues of costs provided in Clause 18 of the ATS.

4. The Parties shall have liberty to apply."

The Ssangyong Shares

4. The Company holds 17.4 million shares in Ssangyong Cement Singapore Ltd. The issue between the parties lie in their disagreement over the agreed terms of settlement (as varied). The Bajumi family take the view that the consent order required the parties to produce a fair value of the shares by reference to the six dates specified in the variation order; and by this they understand to mean calculating the fair value by ascertaining the market value of the shares on the six dates and then deriving the average value. The Tan family, on the other hand, emphasized that the consent order requires the six dates to be taken into account only if that was possible. Counsel for the Tan family, Mr. Wong Meng Meng SC, submitted that it was impossible to have a fair value of the shares with reference to six different dates. He submitted that the expert valuer must first determine the

appropriate method for valuing the shares before proceeding to take into account the specifics such as the reference to the six dates. In short, his submission was that fair value ought not be interpreted as "market value". Consequently, Mr. Wong submitted that the "dividend yield" method used by his expert (Mr. Chan Ket Teck) was the correct approach. Mr. Chan was of the view that the rival approach (that of Dr. Low) is maintainable only if a huge discount of 40% is made to off-set the illiquidity of having 17.4 million shares on the market. Mr. Wong had a further criticism of using market price as an indicia for fair value. He said that even Dr. Low admitted that there were "wide fluctuations" in the price and that reflected a substantial price volatility. Mr. Chans dividend yield method based on a dividend yield of 10.44% thus produced the value of $17,922,000 or $1.03 a share. Dr. Lows method produced $64,140,605 or $3.69 a share. He also gave an alternative calculation with a weighted average which produced $63,853,024 or $3.67 a share. On the other hand, Dr. Low had two criticisms of the dividend yield method. First, he said that companies have in recent times been more reluctant to pay dividends; and secondly, that it is the desire for capital gains and not dividends that actuates investors.

5. It was not disputed that there is more than one way of evaluating the fair value of shares in a public company. No specific method was agreed between the parties save that in calculating the fair value, reference must be made to the six dates selected by the parties if possible. No reasons were given as to why these six dates were important. The question is, whether it is possible to assess the fair value of the shares "with reference to the six dates". Dr. Low testified that he had no difficulty understanding the consent order and was able to evaluate the fair value of the shares with reference to the six dates.

6. The first issue I have to determine, therefore, is whether it is possible to calculate the fair value of the shares with reference to the six dates. This term was included as part of the consent order so it must reasonably be assumed that the six dates are of some importance to the parties one way or the other. However, the defendants object to the disclosure of the significance of the six dates, and in this regard, they may have a valid point. They say that various events took place over those dates and these are highly contentious matters. Thus, the compromise reached in their agreed formula for division was to calculate the fair value of the shares not on any one of the dates (as should ordinarily be the case), but to do so with regard to all six dates. Although the defendants expert, Mr. Chan, was of the view that it was not possible to take the six dates into account, but if he was compelled to do so, he could do it, but only after factoring a 40% discount in the final result. This was necessitated by the illiquidity of the stock. No basis was given as to how he arrived at the rate of 40% although I will accept that such an exercise is largely arbitrary. I am of the view that a flat rate of 40% applied to the final result may be excessive. Applying, strictly, the dividend yield method over the period 1995 to 1997, Mr. Chan arrived at the value of S$17.904 million, rounded to S$1.03 a share. Dr. Low the plaintiffs expert, on the other hand, had no problems with the method proposed in the consent order. He took the market value of the shares and averaged them, after assigning various weights to the individual six dates, to arrive at his figure of S$62.614 million. Dr. Low took the subjective (and thus disputed) significance of the six dates (using information supplied by the clients) in calculating the weight to be assigned to those dates. I have no hesitation in finding that this would be wrong. However, Dr. Low had also proposed a simple, unweighted average of the market values of the shares over those six dates and he arrived at S$58.5445 million, rounded up to S$3.34 a share. He had to apply a volume-weighted share price for each of the six months as follows:

October 1994 - S$5.41

August 1995 S$3.96

February 1996 S$4.34

July 1996 S$3.79

January 1998 S$0.93

April 1998 - S$1.72

7. I am of the view that this alternative method of Dr. Low is preferable to Mr. Chans. The consent order of court requires the parties to have regard to the six dates, but since no information is supplied in respect of the significance of the six dates, no

special weight need be given to any of them, but they should not be ignored. Although the dividend yield method is an acceptable method of calculating the fair value of a companys shares, there are some negative aspects to this method. One of which is that many modern companies do not declare dividends in order to allocate the funds to other beneficial use. It appears that such was the case in respect of the company in question. Secondly, once the parties agree to calculate the fair value with reference to six dates, the overly flexible nature of the dividend yield method will have to be applied six times over, thereby exaggerating any inaccuracy in the process. Where the market value is freely available it is certainly reasonable to use that as a guide unless there are sufficiently compelling reasons against its use. In this case, I have no difficulty in applying the market values over the six dates. I have no difficulty with the volume weighted price for each of the six months. The opposing experts held widely differing views as to how much discount ought to be given to take into account the liquidity (or lack of it) when such a large block of shares is put on the open market. However, neither had considered the counter-balance of the power of control that the holder of this block of shares can wield. Taking these factors into account, and accepting that the actual discount rate is to a large extent arbitrary, I find that the fair value of the Ssangyong shares to be S$3.34 a share (or S$58,110,000.00).

The Afro-Asia Building

8. The agreement in respect of the valuation of the Afro-Asia Building was similar in principle to that concerning the Ssangyong shares. The only difference was that instead of having reference to six dates, the parties agreed to refer to four dates, as Mr. Wong quickly pointed out, "if possible". The dispute involved not only the question whether it was possible to have regard to the four dates in the valuation, but whether the valuation ought to be made with regard to the full potential of the building. The four dates stipulated under the consent order were October 1994, August 1995, July 1996, and April 1998. The expert valuer for the Bajumis family was Ms. Lydia Sng from the Knight Frank Pte Ltd. Ms. Sng adopted the comparable sales method as well as the residual land value method as the basis for her valuation, with each being used as "a check against the other". The market value as at each of these dates was $59,520,000, $74,120,000, $75,259,000, $56,150,000 respectively. The expert for the Tan family was Mr. Li Hiaw Ho from CB Richard Ellis Pte Ltd. He produced the valuation of the building as at April 1998 only and his valuation was $37,110,000. It will be seen at once that the valuations of Mr. Li and Ms. Sng differ substantially in respect of the April 1998 date alone.

9. Apart from the critical difference of Mr. Lis single date valuation and Ms Sngs four-date valuation, there was another important difference in the two approaches, namely that Mr. Li disregarded the full potential of the building whereas Ms. Sng took that into account in her valuation of 8 March 2000. That was the valuation put forward at trial and will be the one I would use to determine the strength of the plaintiffs case. It will be seen that the valuation of the Afro-Asia Building requires more art than the valuation of the Ssangyong shares although market value forms the backbone of the valuation in both instances. In the latter case, the market value was, in fact, a comparative market value and not the market value of the building itself as it was not put up for sale at the material times. For the same reasons as I have set out in respect of the Ssangyong shares, I am of the view that the single date valuation is not the correct approach. The parties had agreed to value the property according to the fair value, if possible, by reference to the market values of the building on the four dates they agreed upon and I am not persuaded that this would be impossible to do.

10. Mr. Li assessed the building in its existing state as at 14 April 1998 as S$37,000,000.00 (or about S$600 per square foot). This was on the basis that the development charge (or differential premium) is paid off. Mr. Li takes the value on the basis of the 53 years remainder of the 99-year lease. In my view, it is not reasonable to exclude the potential of the building in evaluating its fair value. In this case, there are two potential factors. First, the owner may top-up the lease to bring it back to a full 99-year lease, and secondly, to re-develop building. He might do either or both. Taking the potential into account is more difficult than it seems because it is a subjective appraisement. The new owner may decide that he would do neither. In this case, taking the existing condition of the building and the length of the remaining lease, it appears to me that a potential buyer will look towards redevelopment rather than be content to harvest the fruit of the planted tree until the end of the trees natural life. In this regard, I am of the view that Ms Sngs valuation of 8 March 2000 to be the more appropriate and reasonable of the two. Her valuation based on the average of the four dates is S$66,260,000.00. The court assessor, Mr. Leow, is in full agreement, but he cautioned

that Ms Sngs valuation is ostensibly flawed in one respect, namely that she had not taken the holding cost on the differential land premium into account. Hence, the estimated differential land premium must be deducted at the end of the computation for each of the four years. If that is taken into account, the valuation of Ms Sng will be adjusted to S$57,625,000.00. The courts assessor, Mr. Leow would have done a few things differently from the two opposing experts, but acknowledging the highly subjective nature of this exercise, he accepts my view that there should be no interference other than the one above. I, therefore, find that the fair value of the Afro-Asia Building to be S$57,625,000.00.

The Rubber Plantation In Indonesia

11. If the valuation of property is more art than science, the valuation of a rubber plantation borders on fortune-telling. Given the expertise of the two protagonist experts, Mr. Fernandez (for the Bajumis) and Dr. Wijesekera, the difference in their respective assessment was vast. Mr. Fernandez calculated the value to be US$3.5 million whereas Dr. Wijesekeras calculations came to US$66 million. The difficulties of valuing the plantation are manifold. First, there are various methodologies that may be used for the valuation. In this case, however, both experts had used the discounted cash flow method. Even so, deep discrepancies opened up between them over the factors to be taken into account, and also the individual assessment of each of these factors vary greatly. For example, Mr. Fernandez used a discount factor of 20% whereas Dr. Wijesekara used a discount factor of 10%. Secondly, the quality of trees planted, the infra-structure of the land, the quality of rubber produced and manufactured, planting and production costs, and the future demand and price of rubber have all to be taken into account. Plantations differ also in the manner in which they are run, and in this regard, those in Sri Lanka are acknowledged to be among some of the better run ones in the world. To complete the picture, however, I find that the plantation in question appears to be a well managed one. The wide, well tarred roads within the plantation shown in the photographs produced at trial also give a fairly clear picture of this impression.

12. The first duty of the court is to satisfy itself that the person put forward as an expert in his field is indeed one. In this case, Mr. Fernandez and Dr. Wijesekera each holds an impressive list of paper certification and experience. I need not recite the list save to say that their paper credentials were not challenged. Mr. Wong made a vigorous submission that Mr. Fernandez had "disqualified himself as an expert", but I am unable to agree with that view. I think that Mr. Fernandezs words that he did not think himself an expert was taken out of context. He clearly meant that he was not an accountant by training as Dr. Wijesekara is. Mr. Fernandez is an expert in estate valuation with particular experience in the valuation of rubber plantations in Malaysia. Dr. Wijesekera is a chartered accountant by training, but has experience in the valuation of rubber plantations in Sri Lanka. The experts competency is, naturally, enhanced by the quantity and quality of his research, and the study he undertakes. There is no special category of expert known as the "valuation expert on rubber plantations". The persons appointed to assist the court is a team consisting of an agronomist and an accountant. There are, therefore, many routes to qualify as an expert in the valuation of rubber plantations, and I have no difficulty in accepting Mr. Fernandez and Mr. Wijesekara as experts in this field although they each have their strengths and weaknesses. While Mr. Fernandez is familiar with the state of rubber plantations and the rubber industry in Malaysia, Dr. Wijesekara is familiar with that in Sri Lanka. There can be little doubt that the conditions of this industry vary greatly in different countries and a sound knowledge of what goes on in the country in question is important. Intimate knowledge of details such as the fact and effect of the presence of squatters in the vicinity of the plantation affect the valuation of yield, for instance. Mr. Fernandez had made a site inspection of the plantation in question but Dr. Wijesekara did not. Quite apart from the individual mannerism, style, and personality of the witness which, in varying degree, may add to or detract from the overall confidence the court may repose in his testimony, the substance and quality of an experts evidence is best approached with the summary of the duties and responsibilities of an expert, as set out by Cresswell J in the *Ikarian Reefer* [1993] 2 Lloyds rep 68, 81, firmly and constantly in mind. I will here set out the relevant portion.

> "1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation (*Whitehouse v Jordan,* [1981] 1 WLR 246 at p. 256, per Lord Wilberforce).

2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise (see *Polivitte Ltd v Commercial union Assurance Co. Plc.,* [1987] 1 Lloyds Rep. 379 at p. 386 per Mr. Justice Garland and *Re J*, [1990] FCR 193 per Mr. Justice Cazalet). An expert witness in the High Court should never assume the role of an advocate.

3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (*Re J* sup.).

4. An expert witness should make it clear when a particular question or issue falls outside his expertise.

5. If an experts opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one (*Re J* sup.). In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report (*Derby & Co Ltd and Others v Weldon and Others, The Times,* No. 9, 1990 per Lord Justice Staughton).

6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other sides experts report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.

7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports (see 15.5 of the Guide to Commercial Court Practice)."

To these salutations, I need only add that in discharging his duty the expert is required to make reasonable appraisement of reasonable factors. Often, he cannot be proved right; and he must thus gain acceptance of his opinion by the depth of his research, the soundness of his analysis and arguments, and the honesty and impartiality in which he presents his views.

13. The plantation in question is in Palembang, Sumatra. The clear evidence shows that sometime in 1990 the parties (with PT Bumi Rambang Kramajaya) acquired a site of some 10,000 hectares of land for the purposes of establishing the plantation. However, according to Mr. Fernandezs report, this portion of which I have no difficulty in accepting, only 2,133.22 hectares have been planted with rubber trees with varying ages of three to nine years. There is a plantable reserve of 3,586.63 hectares. Roads and buildings take up 384.90 hectares; while 1,204.84 hectares is swampland; and 3,140.42 hectares were occupied by villagers.

14. The various factors that were considered by the parties experts are individually assessable and I, therefore, considered each item to determine which of the two views, if they differ, is the more reasonable. I then take into account the whole, and whether any factor had been omitted or required adjustment. On that basis, I shall proceed as follows.

Date of Valuation

15. Dr. Wijesekera used April 1998, the date of the order of court, as the date of valuation whereas Mr. Fernandez used March 2000, which was the date he commenced his valuation. In the absence of any agreement or indication by the parties to the contrary, I am of the view that the date of valuation ought to be the date of the order of court and find that the date for valuation should be April 1998. Dr. Wijesekera took the period of valuation to be from 1990 to 2020 while Mr. Fernandez took the period as 1999 to 2029. In view of the lease granted to the plantation to be 30 years, I am of the view that the proper period should be from 1990 to 2020. It is noted that there is no dispute that the field was first planted in 1990 and the year of commencement of production was 1996.

Production Costs

16. These would include the costs of tapping and collection; upkeep and maintenance; and general charges. Dr. Wijesekera did not set out sufficiently all his detailed assumptions in his report and evidence. Mr. Fernandez is of the opinion that the costs would be Rp1,600 per kg; Rp300,000 per hectare; and Rp300,000 per hectare respectively. I am of the view that the assessment of the costs of tapping and collection to be on the high side and will therefore adjust the figure to Rp700,000 per hectare.

Capital Expenditure

(a) Factory, Building And Installation

17. Dr. Wijesekara presented figures from US$44,000 in 1990 to US$2.65 million in 2006 whereas Mr. Fernandez regarded the period from 1990 to 1994 as irrelevant for consideration, and estimated Rp300 million for the period 2000 to 2004. In this regard, I am of the view that there should be no relevance for the period 1990 to 1994 as capital for this period is part of sunk cost. In respect of the period 2000 to 2004 I am content to accept Mr. Fernandezs assessment of Rp300 million.

(b) Transportation, Equipment, Roads, And Bridges

18. I agree with Mr. Fernandez that these costs are irrelevant for the period 1990 to 1997 as they are part of sunk cost, but some amount must be factored for the period 1998 to 2004 and in this regard, I am of the view that the figures estimated by Mr. Fernandez to be reasonable.

(c) Land Licence Fee

19. I am of the view that the Land Licence Fee is not relevant for assessing the fair value of the plantation as it is also a sunk cost in 1989/1990.

(d) Planting Cost And Planting Programme

20. Dr. Wijesekeras estimate so far as the planting cost is concerned from the first to fifth year is not supported by sufficient details, and I am of the view that Mr. Fernandezs estimate to be reasonable. So far as the cost of the planting programme from 1995 to 2008 is concerned, I am of the view that Dr. Wijesekeras estimate to be a little high and, therefore, I accept Mr. Fernandezs values in this regard.

Revenue

21. There is a great measure of arbitrariness when it comes to assessing the revenue from the plantation. Insofar as the actual revenues were not available, I have used adjusted World Bank figures. From the year 2006 to 2009, I have used the simple average from the year 2005 to 2010 World Bank prices. From 2011 to 2020 I have used the prices determined for the year 2010. The rubber price in US Dollar per kg are set out in Appendix I to this judgment. The average yield per hectare of planted area is set out in Appendix II to this judgment.

Working Capital

22. I have calculated the working capital simply by taking the average of the figures used by Dr. Wijesekera (Mr. Fernandez did not provide any figures) as being the fairest in the circumstances, and in the absence of hard evidence.

Residual Value

23. Dr. Wijesekara valued the trees at US$3 each in his assessment of the residual value. Thus, on the assumption of 2.6m tress, he worked out the residual value as between US$7 to US$8 million. After consultation with my assessors, I am of the view that this is grossly excessive. Although Dr. Wijesekara may have adopted a "recognised formula" as Mr. Wong submitted, but formulae are only feasibly applied if realistic figures are used. In this regard, I am of the view that the residual value per tree shall be calculated as between US$0.50 to US$0.60 for 400 hectares of trees.

Discount Factor

24. This is by far the most significant factor. The discrepancy between Dr. Wijesekeras 10% and Mr. Fernandezs 20% accounts for a large proportion of the difference in valuation. Mr. Fernandez applied a discount rate of 10% to 15% in his valuations of Malaysian plantations, but in his view, the financial and economic factors in Indonesia differ from the case of plantations elsewhere. Each plantation must be assessed on its own. In his study, Mr. Fernandez reported that a discount rate of 23% had been used in an Indonesian plantation. He had discussions with other ASEAN (Association of South East Asian Nations) based plantation valuation experts in which the general opinion was that a discount rate of 20% to 25% is fair so far as Indonesian plantations are concerned. I note Mr. Wongs objection and criticism especially when the other experts are not available for cross-examination. However, it is accepted that an expert is entitled to take into account what would otherwise be hearsay evidence because the nature of an experts function necessarily prohibits any restraint on his research and methodology. In the end, it is the testifying expert who must stand by his final report and be cross-examined on it. There is virtually nothing in substance to support a discount rate of 10% in respect of a plantation in Indonesia. I am more inclined towards Mr. Fernandezs assessment but 20% may just be on the extreme end. I will, therefore, adjust the rate down to 17%. This discount is arrived at after taking into account the potential of developing the estate into a world class plantation. This assumption has been made on largely speculative factors such as the future production, costs, and revenue. The discount must also reflect not only the track record but known uncertainties and circumstances, and the assumption of marginal impact on prices. The subjectivity of applying the discount rate may itself be a cause of concern to the potential investor, and that is something that cannot be ignored. I am of the view that Dr. Wijesekeras rate was much too conservative while Mr. Fernandezs was just a little too extravagant.

Size Of plantation

25. Ordinarily, the size of a plantation is purely a question of fact and is answered easily enough. In this case, some confusion arose because there was no evidence of a proper survey, and furthermore, some indirect and unsubstantiated evidence as to the possibility of additional hectares being acquired. I accept the evidence of the Izin Lokasi letters issued by the Indonesian government in determining the size of the plantation land. The size so determined is about 10,450 hectares.

Fair Value

26. Having regard to all the above, I come to the finding that the fair value of the plantation to be US$17.54 million, of which it must be noted that 40% belongs to the Company and 10% to Mr. Tan Choo Suan.

Costs

27. I will hear the parties on the question of costs at a later date if parties are unable to agree costs between themselves.

APPENDIX I

(Revenue)

Price	Year
1.504	1996
1.128	1997
0.819	1998
0.73	1999
0.815	2000
0.86	2001
0.904	2002

0.948	2003
0.948	2004
0.992	2005
1.047	2006 2009
1.102	2010 2020

APPENDIX II

(Average Yield Per Hectare of Planted Area)

Price	Year
1996	118
1997	298
1998	479
1999	718
2000	838
2001	971
2002	972
2003	956

2004	894
2005	906
2006	924
2007	968
2008	1020
2009	1157
2010	1288
2011	1430
2012	1568
2013	1701
2014	1773
2015	1818
2016	1825
2017	1847
2018	1851
2019	1856

2020 1864

Choo Han Teck

Judicial Commissioner

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