Hoban Steven Maurice Dixon and Another v Scanlon Graeme John and Others [2007] SGCA 12

Case Number : CA 64/2006

Decision Date : 21 March 2007

Tribunal/Court : Court of Appeal

Coram : Belinda Ang Saw Ean J; Chan Sek Keong CJ; Andrew Phang Boon Leong JA

Counsel Name(s) : Rohan Harith (Shook Lin & Bok) for the appellants; Tito Shane Isaac and P Padman (Tito Isaac & Co) for the respondents

Parties : Hoban Steven Maurice Dixon; Vivaldi Investments Ltd — Scanlon Graeme John; Stanley Adam Zagrodnik; Bulkpak Pte Ltd

Civil Procedure – Judgments and orders – Circumstances in which court order becomes inoperative – When supervening event negating mechanism by which court order to be implemented

Civil Procedure – Judgments and orders – Principles applicable to interpretation of court order – Whether interpretation to give effect to parties' intentions – Whether interpretation to be in conformity with established principles of law or practice

Companies – Shares – Valuation of shares – Expert appointed by court order to value shares in company to determine pricing mechanism for purchase/sale of such shares – Court order containing condition allowing judge to adjust expert's valuation taking into account any "non-pecuniary material circumstances" – Valuation of shares unfavourable to parties seeking to sell shares to exit company – Such parties inviting judge to adjust valuation on ground of minority oppression – Judge declining to intervene – Whether grounds for court to enhance valuation of such shares existing

21 March 2007 Judgment reserved.

Chan Sek Keong CJ (delivering the judgment of the court):

1 This is an appeal against the decision of the trial judge given on 29 May 2006 in the re-trial of Suit No 679 of 2003, in which he refused to make an adjustment to the expert's valuation of the shares in Bulkpak Pte Ltd ("the Third Respondent").

Background

2 Steven Maurice Dixon Hoban ("the First Appellant") is the former managing director of the Third Respondent, a company that he co-founded sometime in or about September 1996. Vivaldi Investments Ltd ("the Second Appellant") is the First Appellant's holding company for his shares in the Third Respondent. Graeme John Scanlon ("the First Respondent") and Stanley Adam Zagrodnik ("the Second Respondent") are currently directors and shareholders of the Third Respondent.

3 As at 28 September 2006, the Third Respondent's issued capital of 2,140,000 shares was held as follows: 30% by the Second Appellant and 70% collectively by the First and Second Respondents and/or their nominee, one Lai Mang Hong ("Lai"). All the shareholders have also made various loans to the Third Respondent at various times, the amounts of which, excluding accrued interest, are as follows:

	Shareholders' loan (US$)	Loan convertible to shares at 0.5:1 (S$)	Construction loan convertible to shares at 1:1 (S$)
Appellants	240,000	4,000	-
The First Respondent	280,000	150,000	-
The Second Respondent	280,000	147,200	-
Lai	-	698,800	251,980

4 The Third Respondent and its subsidiaries (namely, PT Bulkpakindo, an Indonesian company, and Bulkpak Ltd, an English company) are involved in the production of custom-made flexible intermediate bulk containers ("FIBCs"). FIBCs are commonly utilised to transport a wide range of solids and semi-solids, including polymers, agrochemicals, minerals, foodstuff, pharmaceuticals, chemicals and building materials.

Proceedings before the trial judge

5 The appellants' original claim was for certain reliefs by reason of minority oppression on the part of the First and Second Respondents under s 216 of the Companies Act (Cap 50, 1994 Rev Ed) ("the liability issue"). The alleged acts of oppression by the First Respondent and/or the Second Respondent included the following:

(a) progressively and systematically excluding the First Appellant from the management of the affairs of the Third Respondent;

(b) completely disregarding the First Appellant's rights and interests as a shareholder;

(c) pursuing a carefully crafted campaign to dilute the appellants' shareholdings in the Third Respondent; and

(d) colluding to mislead the First Appellant with regard to information concerning the proposed sale of shares of the existing shareholders of the Third Respondent to prospective purchasers and conducting the sale of shares negotiations in a manner detrimental to the interests of the First Appellant.

The respondents denied all these allegations.

6 When the trial commenced, the trial judge inquired of counsel for the parties whether their clients were serious about litigating their dispute or were only concerned with finding an exit mechanism for the appellants from the Third Respondent. In the latter case, it would only be a matter of pricing the Second Appellant's shares in the Third Respondent ("the subject shares"). After taking clients' instructions, counsel agreed that "the liability issue need no longer be ventilated. The sole

issue remaining is the pricing mechanism for the purchase/sale of the [subject shares]": see the grounds of decision of the trial judge reported at [2005] 2 SLR 632 ("the first trial GD") at [5].

7 Following this, the parties agreed on the terms of reference for the valuation of the subject shares, and the appointment of an expert to do the valuation. The parties also agreed that the expert's valuation would be final. However, the parties could not agree on the following six issues:

(a) the date on which the subject shares should be valued;

(b) whether withholding tax should be taken into account;

(c) whether an *ex gratia* payment of $450,000 to the First Respondent was appropriate;

(d) the appellants' claim for compensatory damages;

(e) whether the subject shares should be valued on a minority basis; and

(f) costs.

8 As a result, the trial judge, after hearing various testimonies and arguments on these issues, made the following orders on 7 June 2004 ("the June 2004 Order"):

(a) [T]hat the parties proceed forthwith with the appointment of an expert in accordance with their agreement dated 1st June 2004. The terms of the agreement shall take into account that the valuation of the [subject] shares is on a pro-rata basis without any discount being made for a minority interest;

(b) *The court shall make a decision on whether there should be any further adjustment to the valuation of [the subject] shares … upon receipt of the expert's report*. Parties are at liberty to make *farther [*sic*] submissions* to the court within seven (7) days of their receipt of the expert's report, requesting for an adjustment to the valuation of the subject shares to *take into account any other non pecuniary material circumstance(s)*;

(c) Upon being notified by the court of its final assessment of the value of the subject shares, [the First and Second Respondents] shall have fourteen (14) days to decide whether they intend to *purchase* the subject shares at the value assessed by the court:

(i) in the event [the First and Second Respondents] agreed [*sic*] to *purchase* the subject shares within the period stipulated, they shall complete the transaction within two (2) months from the date of acceptance;

(ii) in the event that [the First and Second Respondents] decide not to *purchase* the subject shares and the parties fail to agree on any other mechanism for the disposal of the subject shares within seven (7) days from the date [the First and Second Respondents] indicate their intention not to purchase same, either party may at any time thereafter apply to the court for [the Third Respondent] to be wound up;

(d) For the purposes of his valuation, the expert shall not take into account the sum of $450,000 granted to [the First Respondent] vide [*sic*] a resolution dated 26th February 2003. The said resolution is hereby declared to be null and void;

(e) There shall be no adjustment to the company's accounts and/or valuation to take into

account [the Third Respondent's] agreement to pay for the withholding tax of [the First Respondent] in the sum of approximately $60,000. The said agreement shall stand;

(f) The date of valuation of the subject shares by the expert, shall be the 7th of June 2004;

(g) The court may, from time to time, make such other directions as may be appropriate for the valuation of the subject shares and/or for the implementation of the sale mechanism of the subject shares, pending as well as after the receipt of the expert's report;

(h) The issue of costs is reserved for further argument after the issues pertaining to the disposal of the subject shares are resolved;

(i) Parties are at liberty to apply.

[emphasis added]

9 The appointed expert, Mr Ong Yew Huat of M/s Ernst & Young, then proceeded with the valuation and submitted his report dated 24 September 2004 which valued the subject shares at nil value. The relevant portion of the report reads:

In arriving at the valuation of [the Third Respondent], it is important to note that the Net Asset Value of [the Third Respondent] as at 31 May 2004 is in deficit, ie. *negative US$23,867*. However, this is after taking into account shareholders' (shareholders of [the Third Respondent]) loans and directors' loans of US$1,677,698 to PTB, a wholly owned subsidiary of [the Third Respondent]. If the shareholders and directors continue to expect these liabilities to be payable by PTB, *the fair market value of 100% of the issued share capital of [the Third Respondent], as at 7 June 2004 would be nil*.

On the assumption that the shareholders and directors treat their loans to PTB of US$1,677,698 as equity for the purpose of this valuation, the fair market value of 100% issued share capital of BPL would be *US$398,631.*

[emphasis added]

10 Not surprisingly, the appellants were dissatisfied with the valuation and they invited the trial judge to review the expert's findings and/or modify his conclusions pursuant to para (b) of the June 2004 Order (see [8] above). The appellants argued that: (a) the expert had relied on suspect evidence; and (b) the court had wide discretionary powers under s 216(2) of the Companies Act to award compensatory damages. The respondents' reply to the claim for compensation was that since there was no finding of oppression, the court had no power to consider such compensation. The appellants then invited the court to hear evidence on the liability issue.

11 The trial judge, however, declined to consider the liability issue as the parties had earlier agreed not to ventilate it. He also held that the power under s 216 of the Companies Act could only be exercised upon a finding of oppressive conduct. He further held that, in the absence of fraud or some patent error, it would be wholly inappropriate for the court to interfere with the expert's report as the parties had expressly agreed that the expert's valuation would be final. The parties were then ordered to bear their own costs of the trial: see the order of court dated 6 December 2004 in the first trial GD.

12 Dissatisfied with the trial judge's decision, the appellants appealed. *This court held that the*

liability issue could no longer be litigated and that the expert's valuation was final: see Civil Appeal No 129 of 2004. However, this court held that the trial judge had not exercised his discretion in terms of para (b) of the June 2004 Order as to whether the valuation report by the expert dated 24 September 2004 needed to be adjusted after he had heard evidence with respect to non-pecuniary material circumstances, as was required of him. This court accordingly remitted the case back to the trial judge for this purpose. The trial judge's order on costs was set aside, with the direction that the trial judge should make a new costs order after the rehearing.

13 Consequent upon the remission of the case, the parties presented further evidence to the trial judge. The appellants introduced fresh evidence from two new witnesses, namely Mr William Crothers and Mr William Habergham, independent third parties who had been separately negotiating with the First and Second Respondents to purchase the subject shares. However, this new evidence was used by the appellants' counsel in persistently arguing that there was oppressive conduct on the part of the First and Second Respondents. Not surprisingly, the trial judge found that there was no basis to vary the valuation report: see the order of court dated 29 May 2006 and his grounds of decision ([2006] SGHC 136) ("the re-trial GD"). In coming to his decision, the trial judge clarified (at [12] of the re-trial GD) the scope of para (b) of the June 2004 Order as follows:

> What was the intention underlying the proviso? Was it to permit a re-examination of the circumstances leading to the initiation of the proceedings? Clearly not. When the proviso was included, it was plain to me that the parties had agreed not to revisit the issues leading to the breakdown in their relationship, the subsequent operations of the company or the abortive attempts to find purchasers for the company and/or its shareholders. *The **sole** remaining issue to be resolved was the valuation of the shares, without regard to any existing allegations of fault raised by the parties. It was neither contemplated nor intended that their prior disagreements and allegations would be re-ventilated for the purposes of the valuation and/or any adjustment thereof.* The proviso was included for the sole purpose of conferring on the court the power to take into account "any ***other*** non-pecuniary circumstances" that were unrelated to the parties' ***existing differences***, in the event the valuer or the parties could point to the existence of such circumstances prevailing at the date of the valuation. Hence the word "other" that prefaces "non-pecuniary circumstances". This proviso was never intended to provide a back door for either of the parties to re-open old wounds. [original emphasis in bold italics; emphasis added in italics]

It must necessarily be implied from the trial judge's refusal to adjust the expert's valuation (despite being asked twice to do so) that the nil valuation was the court's final assessment of the subject shares.

14 For the avoidance of doubt, the trial judge also made a finding that, on the evidence, the First and Second Respondents had not consciously injured or mismanaged the Third Respondent: see the re-trial GD at [13]. As to costs, it was ordered that the appellants pay the respondents their costs to be taxed if not agreed for the re-trial. No order as to costs was made in respect of the initial hearing: see the re-trial GD at [15].

The appeal

15 The appellants' arguments, as set out in their case and skeletal arguments, all of which the respondents have opposed, are as follows:

(a) Whether the liability issue had been excluded and/or waived by the appellants at the trial;

(b) Whether the trial judge had erred in failing to exercise his discretion to modify the valuation of the subject shares by the expert, on the basis that the liability issue had been waived and could not be litigated; and

(c) Whether certain evidence in the form of non-pecuniary material circumstances should have been taken into account by the trial judge in deciding whether to adjust the valuation of the subject shares by the expert.

16 At the commencement of this appeal, counsel for the appellants maintained that the appellants had not waived the liability issue. However, after we indicated that the liability issue was no longer open for litigation in view of the previous decision of this court, counsel proceeded with the appeal on the basis that the trial judge had again failed to exercise his discretion under para (b) of the June 2004 Order in that he had not taken into account the various offers made by third parties to buy the shares of the First and Second Respondents in the Third Respondent and also the offers of the First and Second Respondents to buy the subject shares. These offers per share ranged as follows: $3.00, $2.56, $1.50, $1.40, $1.10, $1.00, $0.98 and $0.27, from May 2000 to November 2002. Counsel argued that these offers demonstrated that, in spite of the financial state of the Third Respondent, the subject shares obviously had a value. It was also argued that the trial judge functioned as the final arbiter of the "fair value" of the subject shares and not the court-appointed valuer, *ie*, the expert, citing the cases of *Dynasty Pty Ltd v Coombs* (1995) 13 ACLC 1,290, *Re Dalkeith Investments Pty Ltd* (1985) 3 ACLC 74 and *Yeo Hung Khiang v Dickson Investment (Singapore) Pte Ltd* [1999] 2 SLR 129. That was the reason why the trial judge had reserved to himself a discretion under para (b) of the June 2004 Order to make such adjustment as he thought fit to the expert's valuation, *taking into account any other non-pecuniary material circumstance(s)*.

17 The respondents, however, submitted that these offers were no longer relevant as they were made a few years before the date of the valuation and were no more than negotiations which did not come to fruition. Accordingly, they should be ignored. It was also argued that the valuation of the subject shares by the expert was final, as the appellants had agreed.

18 In our judgment, the appellants have not raised any arguments that had not been considered by the trial judge at the second hearing where he clarified that *his* intention in inserting the proviso in *his* order was for the sole purpose of conferring on the court the power to take into account "any *other* non-pecuniary circumstances" that were unrelated to the parties' *existing differences*, in the event the expert or the parties could point to the existence of such circumstances prevailing at the date of the valuation. In providing this clarification, the trial judge also ruled out the possibility of treating the various abortive offers to purchase the shares of the shareholders who are not parties to this action as being non-pecuniary in nature as well as being unrelated to the parties' existing differences. For this reason, any argument that these offers are relevant is bound to fail.

19 It is clear to us from the court records that the trial judge had conducted a full hearing to determine whether there was any legal basis on which he could adjust the valuation of the subject shares by the expert. He exercised his discretion not to do so after considering the evidence and arguments of counsel for the parties. Given the legal and factual matrices in which this case has proceeded, we are unable to say that the trial judge was wrong in not adjusting the valuation of the subject shares.

20 Accordingly, we affirm the trial judge's finding that, on the basis of the expert's report, which the parties have agreed is final, the subject shares have nil value. It follows that this appeal against the decision of the trial judge not to exercise his discretion to adjust the nil value of the subject shares must fail.

Further submissions

21 After the second hearing, the trial judge affirmed his previous order, but made no other consequential order in relation to the subject shares. This implicitly meant that it would be open to the First and Second Respondents to decide whether or not to exercise the option to purchase the subject shares at nil value in accordance with the terms of the June 2004 Order. This right was suspended by this appeal, but since we have affirmed the trial judge's order, the right of election of the First and Second Respondents would revive from the moment we declare our finding in this appeal. We would expect them to elect to "purchase" the subject shares at nil value, the effect of which would be that the Second Appellant would have to transfer its shares to the "purchasers" without any monetary consideration.

22 This is an outcome which would be so exceptional that we reserved judgment on whether it was correct and, given its likely consequences, whether the appellants had really contemplated such an outcome and whether they had agreed to it when they agreed to the terms of the exit mechanism. Why would the Second Appellant have agreed to bind itself to sell the subject shares at *any price* while the First and Second Respondents were not prepared to agree to bind themselves to purchase at any price? There is also an apparent inconsistency, if not irrationality, in the court outcome in that if the appellants had proceeded with their case based on oppression, *and had lost*, they would have retained ownership of the subject shares. We felt that this issue might not have crossed the minds of the parties or even that of the trial judge when he made the June 2004 Order in those terms.

23 Accordingly, we invited counsel for both parties to submit written arguments on the following question:

> Whether the expert's nil valuation of the [subject] shares ... has, as a matter of interpretation, rendered the [June 2004 Order] inoperative, considering the parties' intentions leading to the said order, and the use of the word "purchase" when referring to the options open to the [F]irst and [S]econd [R]espondents upon the court making a final assessment of the value of the [subject] shares.

The premise on which we asked this question was that if the said order was *inoperative*, the parties to this action would be restored to their legal positions prior to the making of the June 2004 Order as if the order had never been made.

The parties' submissions

The appellants' submissions

24 The appellants have filed two separate submissions, one by the First Appellant in his own capacity after having filed a notice of intention to act in person and in place of his existing solicitors on 27 February 2007. The Second Appellant has also filed a separate submission through its solicitors. We will consider them jointly as their arguments are essentially the same.

25 In relation to the nil valuation, the appellants contend that the expert's nil valuation did *not* render the June 2004 Order inoperative for the following reasons:

> (a) The parties' intentions leading up to the June 2004 Order was that, upon receipt of the expert's valuation, it would be up to the trial judge to decide (i) the quantum of compensatory damages payable, and (ii) after taking into account all the non-pecuniary circumstances dealt with in the trial, the fair monetary value for the shares to be purchased by the respondents.

(b) Hence, even if the valuation was nil, the June 2004 Order remained operative because the trial judge had retained for himself the power to adjust the value of the subject shares.

(c) After the trial judge's refusal to make any adjustment to the value of the subject shares at the first hearing, the appellants had appealed to this court which, after hearing the parties, remitted the case back to the trial judge to determine whether he should or should not make any adjustment to the nil valuation. Hence, the nil valuation could not have made the June 2004 Order inoperative.

(d) At the second hearing, the trial judge could have exercised his discretion to vary the expert's nil valuation in the light of "non-pecuniary material circumstances" and have ascribed a fair value to the subject shares, but was wrong in not doing so.

(e) As the trial judge had failed to make the adjustment, this court should do so on the ground that the First and Second Respondents had, by their mismanagement of the Third Respondent, devalued the subject shares to nil value. This, according to the appellants, constituted the "non-pecuniary material circumstances" under which this court can adjust the nil valuation.

26 In relation to the use of the word "purchase" in the June 2004 Order, the appellants have submitted that the trial judge had not contemplated a situation where the subject shares would be acquired for no monetary consideration, having regard to his intention to provide an equitable and workable exit mechanism to facilitate the appellants' exit from the Third Respondent. This mechanism would involve obtaining a valuation from the expert and having the court affix a final value to the subject shares.

The respondents' submissions

27 The respondents also submitted that the expert's nil valuation did *not* render the June 2004 Order inoperative, but for different reasons:

(a) The parties had expressly agreed that the expert's methods and findings were to be treated as "final and binding". Specifically, the purpose of the valuation was to form the basis of an exit mechanism to divorce the parties in dispute from their shareholding relationship. Although the trial judge had reserved for himself a power to adjust the expert's valuation, the parties had really selected the terms of their own bargain at arm's length and were adequately represented by solicitors throughout the negotiation process.

(b) As such, this court should look at the expert's nil valuation as one possible outcome (indeed the most likely outcome) of the bargain that the parties had reached for themselves. In the event, given that the expert valuation was nil, the "losing" party (*ie*, the appellants) should not be allowed to complain and effectively resile from the bargain.

(c) It was also submitted that this court should recognise that the true value of the subject shares was *negative* and not nil. Therefore, if the expert had not ascribed a nil valuation for the purposes of the transfer, the appellants would in fact have had to *pay* the First and Second Respondents to take over the subject shares. However, despite this negative value, the First and Second Respondents nonetheless agreed to take over the subject shares as they were the only parties personally exposed to financial risks such as bank guarantees and mortgages, and it made practical sense for them to have control of the Third Respondent.

28 In relation to the use of the word "purchase" in the June 2004 Order, the respondents accepted that there are authorities which suggest that there must be some consideration. However, the respondents submitted that the word "purchase" was used "generously" in the June 2004 Order and was not intended to imply the need for consideration. In this respect, the respondents pointed out that there was a "very real risk" that the subject shares would be valued at nil or even negative value before the valuation was undertaken. As such, it would be a "gross injustice" for this court, in reliance of the word "purchase" as indicative of the need for consideration, to impose a *positive* value on the subject shares which really had "substantial negative value". In the alternative, it was submitted that consideration was in fact provided by the respondents "in view of their acceptance of shares actually valued in the negative for a nil value and their waiver of rights of a hearing on the merits".

29 Ultimately, the respondents submitted that it would be "grossly unjust" to them for this court to consider afresh whether the June 2004 Order was inoperative, especially since they had at every stage met the burden cast upon them by the appellants.

Analysis of the parties' submissions

30 Our summary of the submissions of the parties shows both sides have argued, for different reasons, that the nil valuation of the subject shares did not render the June 2004 Order inoperative. The appellants' reason is that the trial judge had the power, and was expected, to adjust the nil valuation in order to give a fair value to the subject shares. The reason given by the respondents is that both the parties were aware of and had accepted the risk of a nil valuation and this court should not now exercise its discretion to ascribe a *positive* value to the subject shares. Neither side appears to have appreciated the implication of a positive answer to our question, which would be that the June 2004 Order would not take effect, with the result that the parties would be restored to the *status quo ante* and the appellants would be free to litigate the issue of oppression. If they did, they have not articulated it. That would explain why the appellants continued to argue that the trial judge was wrong in not adjusting the nil valuation and that this court should do so, and the First and Second Respondents continued to argue that the trial judge was correct in not adjusting the nil valuation, and it would be a great injustice to them if this court were to do so.

31 However, the purport of the question should have been clear enough since the question of whether the June 2004 Order would remain operative was tied to the meaning of the word "purchase" in the order. In other words, the question was, really, if this court were unable to reverse the trial judge's decision not to adjust the nil valuation, would such a valuation make the said order inoperative since it was, on its face, predicated upon a "purchase" which, as case law suggests, implies that monetary consideration be given. The First and Second Respondents understood this aspect of the question perfectly well as they argued that the word "purchase" was used "generously" in the proceedings, and should be interpreted to mean "acquire".

32 In our view, the argument that the word "purchase" was used generously is not supported by the evidence. As far as we can determine from the evidence, it has only been used in the June 2004 Order in relation to the option given to the First and Second Respondents to acquire the subject shares at a price to be valued by the expert and adjusted by the court. It is reasonably clear to us that the trial judge chose to use the word "purchase" because he had assumed that the subject shares had some commercial value and that the First and Second Respondents should pay a fair price for them in order to allow the appellants to exit the Third Respondent. This was the motivation behind his proposal that the issue of oppression should not be litigated. The trial judge could not have envisaged that the June 2004 Order could have resulted in a gift of the subject shares to the First and Second Respondents, or in an unimaginable outcome if the order were construed literally, *viz*, a

reverse buyout under which the appellants would have to pay the First and Second Respondents to "purchase" the subject shares.

33 Of course, the First and Second Respondents would argue, and they have done so, that this eventuality was foreseen by them and that was what they had agreed to. They say that this would not be an unfair outcome as they had assumed a greater proportion of the liabilities of the Third Respondent as guarantors of the loans made to the Third Respondent. It was therefore only fair that they should have full control and ownership of the subject shares. In our view, there is something in this argument but we are not prepared to accord it such weight as to justify the acquisition of the subject shares without any payment. The fact is that the First and Second Respondents had incurred these liabilities voluntarily prior to these proceedings. The argument might have some substance if the subject shares were partially paid-up shares, in which case, the acquirers' liability for contribution to the unpaid capital would provide the consideration or price for the purchase of the shares. This is not the case here.

34 It is therefore necessary for us to consider the question we have posed to the parties in the light of the evidence before us, and to this we now turn.

Whether the June 2004 Order is inoperative

Parties' intentions

35 The terms of the June 2004 Order relevant to the issue under consideration are found in its para (c): see [8] above. The entire tenor of para (c) of the June 2004 Order is that of a sale and purchase of the subject shares at a value to be assessed by the court. Although the Second Appellant's agreement to *sell* its shares to the First and Second Respondents is not explicitly stated, it is implicit in the option given to the First and Second Respondents to *purchase or not to purchase* the shares *at a value* which has been assessed by the court.

36 As we recounted earlier, the appellants have argued that they had never intended for the subject shares to be given away *gratis*. Specifically, the First Appellant in his written submissions has submitted that an agreement must be a meeting of minds and that there was no meeting of minds here between the parties because of the ambiguity of the exit mechanism and the terms of the June 2004 Order, which has also resulted in an apparent misunderstanding of the true intentions of the parties by the trial judge. In this regard, the First Appellant has argued that he had always intended that the trial judge's power to adjust the expert's valuation should be exercised to take into account his entitlement to compensatory damages. This explains his obsession with taking this issue up before us in spite of the fact that this court had ruled in an earlier appeal that the issue of compensatory damages had been abandoned by the appellants in favour of the exit mechanism. However, implicit in the First Appellant's arguments on the question posed is that he would never have accepted the exit mechanism if he had known that he would have to give away the subject shares to his alleged oppressors.

37 What then was really the bargain between the parties? Since the submissions of the parties on this issue represented largely their subjective interpretation of the terms of the bargain, it is necessary for this court to adopt the tried and tested approach of focusing on the objective facts. The objective facts are as follows:

(a) The appellants had commenced action against the First and Second Respondents for oppression and for a buyout order.

(b) The trial judge felt that as the issue was really one of the valuation of the subject shares to facilitate a buyout, there was no reason for the parties to make accusations and counter-accusations in public if the dispute could be amicably settled by means of an equitable exit mechanism for the appellants.

(c) Both parties accepted the trial judge's proposal and hurriedly drew up the terms of appointment of the expert to value the subject shares.

(d) The parties could not agree on six issues relating to the matters the expert could or could not take into account in valuing the subject shares, as a result of which the trial judge conducted a six-day hearing to resolve these issues.

(e) The resolution of these issues was then incorporated into the June 2004 Order which provided for a number of the disputed issues, but not the claim based on compensatory damages. It was clear from the terms of the order that the issue of oppression would not be litigated. Hence, there was no provision in the order for compensatory damages.

(f) The June 2004 Order gave an option to the First and Second Respondents to *purchase* the subject shares at a value that would be adjusted by the trial judge after studying the expert valuation. The word "purchase" was used three times in three separate paragraphs of the order.

(g) After studying the valuation report, the trial judge declined to make any adjustment to the nil value of the shares at the end of two separate hearings.

Meaning of the word "purchase"

38 Given the factual matrix as constituted by these objective facts, it is abundantly clear that the trial judge contemplated or intended that the word "purchase", which he had used three times, to mean "purchase using money or its equivalent" and not "acquire without payment". He was using the word "purchase" in its ordinary sense as understood in business as this was a business transaction between business people. The word connotes that money has to be paid or consideration be given for the subject shares. Case law has recognised the ordinary meaning of the word "purchase" in such a context. For example, in *Robshaw Brothers Ltd v Mayer* [1957] Ch 125, the court had to consider the meaning of the expression "sale or purchase" in O 14A of the former English Rules of the Supreme Court. It was held that the words meant *prima facie* a sale or purchase *for money*, and therefore could not apply to a contract for the transfer of property for which there had been *no monetary consideration*. In our view, this is a reasonable interpretation of the trial judge's intention as any exit mechanism that would allow the subject shares be given away free could not be an *equitable* mechanism, as he had intended it to be. In our view, this must be so, if consideration is given to the fact that if the appellants had proceeded with their action for oppression, *and had lost,* they would still have been entitled to keep the subject shares.

39 Our view of this issue is consistent with existing case law. It is well established that where a court order is intended to substantially give effect to the parties' intentions, it would be relevant to consider these intentions even when giving consideration to the express wording of the order. This was the case in *David Freud Ltd v Vickbar Ltd* [2006] EWCA Civ 1622 ("*David Freud Ltd*"), in which the English Court of Appeal had to construe the meaning of the expression "outstanding accruals" which the appellant had been ordered to pay to the respondent under the terms of a Tomlin order. In that case, following a dispute between the shareholders of the second appellant relating to, *inter alia*, the amount due to the respondent for management fees, the respondent (which held the shares of the shareholder who desired to exit the second appellant) presented a petition seeking to order the

first appellant to buy out its shares in the second appellant. In the event, the proceedings were compromised by a Tomlin order which ordered the buy-out sought by the respondent for precisely half the market value that the joint expert had attributed to the entire share capital of the second appellant. It further ordered the second appellant to pay "outstanding accruals" to the respondent in the sum of approximately £10,000. The true construction of the phrase led to court proceedings and the Central London County Court found for the respondent and ordered that a sum of £21,945 be payable. On appeal, the appellants argued that the true construction of the expression "outstanding accruals" in the Tomlin order had a narrow accountancy meaning in that it referred to the management services provided to the second appellant by the respondent which remained un-invoiced at the settlement date. In this respect, they submitted that the respondent had invoiced the second appellant wholly or partly in advance. The appellants further maintained that "approximately £10,000", as expressed in the Tomlin order, were words of limitation and not mere description. The English Court of Appeal upheld the lower court's finding that the expression "outstanding accruals" did not bear its narrow accountancy meaning since that interpretation would result in nothing at all being payable. In coming to this conclusion, the court also considered the parties' intentions, in that the mere fact that the clause was included in the order was enough to suggest that the parties must have thought that *something* was going to be payable. Further, the words "approximately £10,000" were not words of limitation. The expression was no more than a label which the parties had attached to the liability intended to be imposed by the expression "outstanding accruals".

40 By analogy with *David Freud Ltd*, the use of the word "purchase" in the June 2004 Order and the terms of the option to purchase given to the First and Second Respondents must imply that the parties and even the court thought that the subject shares had some value and that they should be subject to acquisition at that value. In our view, this is a reasonable interpretation of the word "purchase", bearing in mind that it was the intention of the trial judge to provide an *equitable* exit mechanism for the appellants. It bears repeating that at the first hearing for the adjustment of the nil valuation, even the First and Second Respondents had urged the trial judge to adjust the value of the subject shares to $0.1295 per share, instead of allowing it to remain at nil valuation.

Interpretation of court order

41 In *Sujatha v Prabhakaran Nair* [1988] SLR 648, I articulated, in a different context, the principle applicable to the interpretation of court orders. At 652, [16], I said:

> [W]here an order of court is capable of being construed to have effect in accordance with or contrary to established principles of law or practice, the proper approach, in the absence of manifest intention, is not to attribute to the judge an intention or a desire to act contrary to such principles or practice but rather in conformity with them.

In our view, this principle is applicable to the interpretation of the June 2004 Order. It would be wholly unreasonable and unjust to attribute to the trial judge an intention that in circumstances where the subject shares are valued at nil value, the Second Appellant is under an obligation to effectively give away its shares to the First and Second Respondents. Such an interpretation would not be consistent with the intention and the express terms of the June 2004 Order. Adopting a contrary interpretation would also go against the weight of decisions that have interpreted the expression "purchase" to have its ordinary meaning of acquiring ownership of a thing for money or for valuable consideration when used in an ordinary commercial context. There could be no sale or purchase of a thing as ordinarily understood in a legal or commercial context if no monetary consideration, whatever the amount might be, was given for the sale or purchase of the thing. It is implicit in the "purchase" of shares that money or its equivalent must be paid for them before such an act can qualify as a purchase.

The June 2004 Order rendered inoperative by nil valuation

42 The result of our analysis of the objective facts and the law is that because the subject shares have been valued at nil value (as affirmed twice by the trial judge), and because we have no legal basis to interfere with his decision (see above at [19]), the June 2004 Order cannot be implemented. It has become inoperative.

43 This is not an unusual occurrence even with respect to court orders that need to be worked out or are in the nature of Tomlin orders. Such orders normally provide a mechanism to implement the order. If the mechanism, for some reason or other, cannot be used by reason of a supervening event, then the order cannot be implemented. In *Haw Par Bros (Pte) Ltd v Dato Aw Kow* [1972-1974] SLR 183, this court granted the respondent's auditor an order permitting him to inspect the appellant company's accounts on the basis that the respondent was a director of the company. Before the inspection could take place, the respondent ceased to be a director of the appellant. It was held that the court order ceased to have effect as it was granted on the basis of the respondent being a director. In our view, the principle applied in that case is applicable to the June 2004 Order in the present case.

Conclusion of appeal

44 For the reasons given above, we dismiss the appeal with costs against the trial judge's decision not to adjust the nil valuation of the subject shares. We also affirm the trial judge's order that the parties will pay their own costs for the first hearing. There will be the usual consequential orders.

Power of court to make consequential order arising on appeal

45 In view of our finding that the June 2004 Order cannot be implemented according to its terms, we need to consider how we can give effect to it, and whether we have the power to make an appropriate consequential order. In our view, we have the power to do so pursuant to ss 37(5) and 37(6) of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) ("SCJA") and O 57 rr 13(3) and 13(4) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("ROC"). Sections 37(5) and 37(6) of the SCJA provide as follows:

> (5) The Court of Appeal may draw inferences of facts, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.
>
> (6) The powers in this section may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and such powers may also be exercised in favour of all or any of the respondents or parties, although the respondents or parties have not appealed from or complained of the decision.

Order 57 rr 13(3) and 13(4) of the ROC further provide that the power to "make such further or other orders as the case requires" may be exercised even though no notice of appeal has been given in respect of any particular part of the decision of the court below or by any particular party to the proceedings in that court, or no ground for allowing the appeal or for affirming or varying the decision of that court is specified in any of the Cases filed pursuant to O 57 r 9A or r 10 of the ROC.

46 Accordingly, we declare that the June 2004 Order has become inoperative by reason of the legal fact that the subject shares could not be purchased by the First and Second Respondents at nil

value. This means that the parties are restored to the *status quo ante*, as if the June 2004 Order had never been made.

47 We are fully conscious of the fact that our ruling will disappoint both parties, but in our view this is the inevitable outcome given the terms of the June 2004 Order that the Second and Third Respondents were to have the option to purchase the subject shares and that they were not to acquire them without compensation to the owners thereof. However, we hope that this unexpected result, coming after more than two years of acrimonious dispute between the parties, will encourage them to put their differences aside and negotiate a settlement amicably.