IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 175

Originating Summons No 450 of 2016

Between

Ezion Holdings Limited

… *Plaintiff*

And

Teras Cargo Transport Pte. Ltd.

… *Defendant*

JUDGMENT

[Companies] — [Members] — [Rights]

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Ezion Holdings Ltd
v
Teras Cargo Transport Pte. Ltd.

[2016] SGHC 175

High Court — Originating Summons No 450 of 2016
Aedit Abdullah JC
10 August 2016

30 August 2016 Judgment reserved.

Aedit Abdullah JC:

Introduction

1 This case concerns the right of a shareholder of a company to financial information if the company has been dilatory in holding meetings. The Plaintiff, Ezion Holdings Limited, a shareholder of the Defendant, Teras Cargo Transport Pte Ltd, seeks an order under s 203 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act") for the Defendant's financial statements and accounts for the financial year ("FY") ending in 2015, though these have not yet been prepared and audited. Despite the best efforts of Counsel for the Plaintiff, I decline to grant the application.

Background

2 From the bar, the Court was informed that there are at present no other proceedings, including those under s 216 or 216A of the Act, pending in the Singapore courts. The Plaintiff's application for the financial statement and accounts of the Defendant is thus not in aid of any specific matter, as yet. Again from the bar, the Court was told that the Defendant had previously been owned by the Plaintiff, but was subsequently sold off with the Plaintiff remaining a minority shareholder.

3 The last audited accounts were for the financial year 2012. An annual general meeting ("AGM") had been held in July 2016, three months after the present application was filed, and there, the audited accounts and financial statements for FY 2013 were produced and queries were made.

4 In this case, no distinction arises between the rights of a shareholder and member. This judgment thus uses the terms interchangeably, except when examining the precise words in statutory provisions.

The Plaintiff's Case

5 The Plaintiff argues that the accounts and financial statements are how shareholders are able to look into the affairs of a company. Without these documents, shareholders would not know what is going on. If these documents disclose things going wrong, the shareholder could then ask for the underlying documents, and then consider other proceedings including a derivative action. A right to these documents should thus be a basic right: a shareholder should be treated fairly so as to protect his investments. It goes to the question of fair dealing.

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6 The Plaintiff points out that the last audited accounts that were issued were for FY 2012. Repeated requests had been made for FY 2013 and 2014, but these still have not been issued. No statements were given either for FY 2015. In fact, the AGM for FY 2013 was only called in July 2016, three months after the present application was filed. Queries about the Directors' report and audited financial statements for 2013 could not be answered by the Defendant's director at that AGM. No AGM has been called yet for 2014.

7 The Plaintiff argues that s 203 of the Companies Act confers a right on the shareholder to request a copy of financial statements and accounts. Section 203 does not require an audit before the laying of the documents. *Burdeny v K & D Gourmet Baked Foods and Investments Inc.* [1999] BCJ No 953 ("*Burdeny*"), a decision of the British Columbia Supreme Court, is cited as authority for the proposition that the court could order a company to produce its unaudited financial statements upon request by a shareholder. In addition article 122B of the Articles of Association of the Defendant confers a similar right.

8 The Plaintiff further argues that s 201 of the Act imposes a statutory duty on the directors to prepare proper accounts, and s 203 then entrenches the rights of the shareholders. This, it is said, is supported by the speech of a Member of Parliament, Mr Ong Teng Koon, at the Second Reading of the Companies (Amendment) Bill ("the Bill") on 8 October 2014, to the effect that transparency in the governance structure of the company is one of the essential objectives of the Companies Act: Singapore Parliamentary Debates, Official Report (8 October 2014) vol 92.

9 The Plaintiff contends that its rights could not be effectively enforced through a complaint to the relevant agencies that the Defendant failed to hold

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its AGMs in a timely fashion, as the failure to hold AGMs only leads to small fines, and nothing more: there is little incentive for the Defendant to comply.

The Defendant's Case

10 The Defendant relies on the wording of s 203 of the Act, and argues that a shareholder can only request for audited copies of financial statements that are to be put before the company in an AGM under s 203(1) of the Act, if the shareholder failed to receive one. The Defendant submitted that s 203(3) is concerned with a situation where a member is not provided with a copy of the audited financial statements ahead of a general meeting; the member could ask for such documents to make a decision on whether to approve these statements at the general meeting. This reading of s 203(1) and s 203(3) of the Act is reinforced by their similarity with their predecessor sections, in s 203(1) and s 203(2) of the Companies Act (Cap 50, 1994 Rev Ed) which appear in immediate sequence. Further, the Defendant also points out that the commentary on s 203 of the Act in *Woon's Corporations Law* vol 2 (LexisNexis, Looseleaf Ed, 2016, Issue 2) at paras 605-703 also treats this as a purely administrative provision. The Defendant argues that there is no basis as a matter of principle for the Plaintiff's application. *Burdeny*, cited by the Plaintiff, was really concerned with minority oppression, in which the court ordered the production of the company's financial statements in order to facilitate the valuation of the shares. The Defendant also submits that the Plaintiff's application pre-supposes that the financial statements have been drawn up, when they have not. The Defendant suggests that the Plaintiff's real complaint is that the Defendant is refusing to disclose the statements, an allegation for which there is no evidence; the Defendant takes the position that it had never refused to disclose its audited financial statements. The Defendant also points out that there are mechanisms under the Act to deal with late

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AGMs, and the Plaintiff should look to these. The Defendant submits that the present application is nothing more than a fishing exercise: the Plaintiff has not made any allegation as to wrongdoing by the Defendant. Section 203 of the Act cannot be used as a stepping stone for a s 216 application, and the Plaintiff should seek pre-action discovery if that were its intent.

The Decision

11 While the Plaintiff's predicament warrants sympathy, the Plaintiff's arguments could not prevail in the face of the plain language and the scheme of rights and obligations imposed by the Act. The cases and Parliamentary Debates cited by the Plaintiff do not assist its case. The application is thus denied.

Analysis

The Statutory Regime

12 The statutory regime created by the Act lays down specific rights and obligations for the company and its members or shareholders, but does not expressly provide for a member or shareholder (in the context of the present case, no real distinction is drawn between the two) to be given the financial statements before these have been prepared. In other words, the Act does not confer a broad right to financial information.

13 As has been argued by the Defendant s 203 of the Act is limited to financial statements already prepared for the purposes of a general meeting. Section 203 reads, in its relevant parts:

> Members of company entitled to financial statements, etc.
>
> 203.

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> —(1) A copy of the financial statements[…]which is duly audited and which (or which but for section 201C) is to be laid before the company in general meeting accompanied by a copy of the auditor's report thereon shall be sent to all persons entitled to receive notice of general meetings of the company.
>
> […]

Subsection (3), upon which the Plaintiff rests his application then specifies:

> — (3) Any member of a company (whether he is or is not entitled to have sent to him copies of the financial statements […]) to whom copies have not been sent and any holder of a debenture shall, on a request being made by him to the company, be furnished by the company without charge with a copy of the last financial statements […] together with a copy of the auditor's report thereon.

14 Sub-section (3A) makes an offence of non-compliance with subsections (1) or (3) by the company and every of its officers who is in default. Special provision is made for private companies that have dispensed with the need for AGMs.

15 Section 203 of the Act operates in tandem with s 201, which deals with AGMs. Section 201 reads, in its material portions:

> Financial statements and consolidated financial statements
>
> 201.—(1) The directors of every company shall, […] at least once in every calendar year at intervals of not more than 15 months, lay before the company at its annual general meeting the financial statements for the period since the preceding financial statements […] made up to a date —
>
> (*b*) in the case of any other company, not more than 6 months before the date of the meeting.
>
> […]

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16 The Registrar of Companies is empowered to extend the interval, if there is an application by the company or in relation to a specified class of companies: sub-section (4). Sub-section (8) requires that the financial statements be audited, and the auditor's report required by s 207 is to be attached or endorsed with the financial statements.The operation of s 203 accompanies the holding of AGMs laid down in s 201. Section 203 does not then give a right to general financial information: the financial information that is to be provided to a member is financial information tied to a general meeting.

17 The Plaintiff though argues for a broader reading of s 203(1), arguing that on the proper interpretation the accounts do not have to be audited and laid before a right arises to the statements. That reading however ignores the structure of s 203(1), which when leaving out the portion dealing with a parent company of a group reads,:

> A copy of the financial statements … which is duly audited and which (or which but for section 201C) is to be laid before the company

It is clear that the provision contemplates auditing having been done. The provision then continues:

> … in general meeting accompanied by a copy of the auditor's report thereon shall be sent to all persons entitled to receive notice of general meetings of the company …

The fact that a copy of the auditor's report reinforces the need for an audit to have taken place.

18 The Plaintiff also refers to the title of the section, which reads 'Members of company entitled to financial statements, etc.'. However, the title, header or marginal note to a section is not determinative of its contents: it

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is intended only to summarise the contents of sections for ease of reference, and is not always exhaustive or precise. Titles and marginal notes can and have been used in interpretation in some instances, such as in *Ratnam Alfred Christie v PP* [1999] 3 SLR (R) 685, and *Algemene Bank Nederland NV v Tan Chin Tiong* [1985-1986] SLR (R) 1154. However, as noted by the Court of Appeal in *Tee Soon Kay v AG* [2007] 3 SLR (R) 133 at [41], the marginal notes must be taken against the backdrop of the actual language used in the section:

> While we note that it is now well established that marginal notes can be used as an aid to statutory interpretation, ultimately, the meaning to be given to any statutory provision must be gleaned from *the actual statutory language as well as the context*. For example, if despite the marginal note of s 8 itself which reads, "Pensions, etc., not of right", s 8(1) had gone on to state the direct opposite, for example, that an officer has *a* right to a pension, the courts would derive little or no help from the marginal note which states the direct opposite of what was said within the provision itself.

Thus in the present case, the title of the section does not control or limit the operation of the plain words in the section. On the contrary, it is clear that it is just a very broad and incomplete summary of the contents of the section. The term 'etc.' in the title clearly indicates that this section governs many matters, and that the title was not intended to be exhaustive.

19 Furthermore, s 203 does not purport to expand members' rights except as it expressly mentions. The rights that are generally regarded as having been conferred on members are the right to vote and attend the general meetings, the right to payment of dividends if these are declared, and the residual balance in winding up after liabilities have been paid off. Various treatises and texts have tried to capture the essence of shareholder rights. In the local context, we have Hans Tjio, Pearlie Koh, Lee Pey Woan, *Corporate Law*

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(Academy Publishing, 2015) in which the learned authors state (at para 12.013):

> A share is a chose in action that gives its owner, the shareholder, a bundle of rights against the company that issued the share. Among other things, shareholders have their right to dividends when it is declared […] The right to vote is, however, still the most fundamental right of a member of the company […] Shareholders have various rights involving instances where their vote is binding. They can appoint and remove directors. They can also change the company's constitution. They may also have to approve certain transactions such as the case under section 160 of the Companies Act in respect of the disposal of the whole or substantially the whole of the company's undertaking or property. […]

The learned authors also then go on to include approval for the issuing of new shares for loans to directors and connected persons, and remedies against specific mischief.

20 The rights mentioned in the preceding paragraph are largely the shareholders' rights conferred under the Act. Beyond this, the shareholders do not generally figure in the running of the company – it is the directors who are tasked with doing so, with the assistance of management: see s 157A of the Act. It is the directors who have various rights relating to the management of the company, and these rights may be specified further in the Articles of Association of the company. Given this distinction between the roles of directors and members or shareholders, it is not surprising that the Act does not give an express right to members to general information.

21 The distinction between the roles and powers of directors as against shareholders or members underlines and puts in context the purpose of the provision of the reports under s 203 of the Act: it is to allow the members or shareholders to exercise their vote at general meetings, which is the usual

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occasion for the members to exercise their powers. It then follows then that members are entitled to the financial statements and accounts only as such reports need to be given for a general meeting.

22 What the Act currently provides in respect of the supply or access to financial information is in the form of the annual report, and the AGM. The Plaintiff's complaint obviously is that the Defendant has not held its AGMs or provided its annual reports for a number of years, leaving the Plaintiff blind as to the status of the Defendant's affairs. That lack of information does merit sympathy, but it is not a reason for me to override the express words of s 203. Furthermore, it cannot be said that the Plaintiff is left remediless - the scheme laid down by the Act provides for penalties for non-compliance with the requirement. While the Plaintiff argues that these penalties are low, I do not have actual evidence about the levels of fines imposed. The relevant agency, the Accounting and Corporate Regulatory Authority ("ACRA"), is not before me in these proceedings, and neither is the issue of whether the company is guilty of any offence. It would not be fair for me to comment further. And even if these penalties were low, such a fact again would not justify a departure from the express words of s 203.

23 The Plaintiff cited *Burdeny* as authority for the proposition that the Defendant could be ordered to produce the unaudited financial statements to the Plaintiff. The Plaintiff quoted the remarks of Levine J at [39]:

> There is no question that [the applicant] was entitled, as a shareholder of the company, to have access to the company's financial records (Company Act, section 171) and to receive the latest financial statements and auditor's report upon request (Company Act, Section 172(3)).

Section 172(3) of the British Columbia Company Act [RSBC 1996] Chapter 62 ("British Columbia Company Act"), in force at the time of *Burdeny,* reads:

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> Every company that is not a reporting company, on demand by a member […] of the company must furnish the member […] with a copy of the company's latest financial statement and the auditor's report on the financial statement.

24 Two things may be noted. Firstly, the wording of s 172(3) of the British Columbia Company Act, referenced in *Burdeny*, is clearly different from s 203(3) of the Act. The latter, as noted above, ties in the report with the Annual General Meeting. That is not present in the British Columbia provision: a requirement to send audited financial statements to shareholders before an AGM only applies to a 'reporting company': see s 172(1) of the British Columbia Act. In other words, the *Burdeny* case did not involve a provision in identical terms to s 203(3) of the Singapore Act. Secondly, it could have been argued that the reference to 'the latest' financial statements mentioned at [39] of *Burdeny* was a reference to the most recent statement actually prepared. The point was not argued before Levine J and indeed no argument was apparently taken with the issue of entitlement to reports. The focus of *Burdeny*, and presumably the arguments, was on the oppression suffered by the applicant there. In the face of all of this, *Burdeny* was not strong authority for the Plaintiff's arguments.

25 The Articles of Association of the Defendant could not assist the Plaintiff either. Article 122(B) which the Plaintiff refers to provides for a copy of every profit and loss account and balance sheet together with the auditor's report, to be sent to persons entitled to receive notice of an AGM not less than 14 days before the meeting. I accept the Defendant's argument that Article 122(B) imposes the same obligations as those under s 203 of the Act, and thus presents the same obstacles to the Plaintiff's application. I should also note that the Articles of Association were not adduced by affidavit, but a copy was

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given at the hearing. Counsel for the Defendant, to his credit, does not take issue with this.

26 The Plaintiff cites *Devlin v Slough Estates and ors* [1983] BCLC 497, an English decision, for the proposition that a shareholder has a right to accounts where the articles of association require the preparation and laying of the accounts in compliance of the Companies Act. However, it was also held in that case (at p 502) that the individual shareholder had no personal right to commence an action for any breach of that obligation as the duty was owed by the directors to the company and not to the individual shareholders. The Plaintiff also refers to *Over & Over Ltd v Bonvests Holdings Ltd and another* [2010] 2 SLR 776 for the proposition that shareholders have a right to be treated fairly, and to have their investments protected. *Lim Swee Khiang and another v Borden Co (Pte) Ltd and others* [2006] 4 SLR(R) 745 was similarly referred to for the proposition that fairness is to be expected. However, these cases are concerned with oppression of minority shareholders, and are not authorities supporting a free standing right for individual shareholders to obtain financial information.

27 As to the Plaintiff's reference above to the Parliamentary Debates during the Second Reading of the Bill on 8 October 2014, I note that Mr Ong Teng Koon's comment that "The third objective of this Bill is to achieve the correct balance between flexibility and transparency…" was made in the context of setting the stage for a discussion regarding dual class shares. Similarly, the references to the rights of shareholders in the rest of Mr Ong's speech were concerned with other areas of the Bill and not with the member's right to financial information.

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28 Mr Ong's speech thus could not assist in the interpretation of the provision. A Minister's speech in moving a bill may be useful in helping to interpret the provisions of that bill once it has been enacted as an Act of Parliament. The Minister's speech in such a context would be expected to indicate the objective of the enactment, and the purpose and intent of the provisions. In contrast, questions or speeches by Members of Parliament would not generally have the same effect; the individual Members may have their own specific areas of concern which may not be reflective of the intent of Parliament as a whole, so their speeches would not generally clothe the provisions of the Act with particular meanings. One possible exception would be where a Member proposes an amendment which is either accepted or rejected; in that case the Member's speech could be useful in interpreting the provisions if the amendment were passed, and even if it were not, any accompanying remarks in rejection may cast light on what was eventually enacted. In the present case, Mr Ong's speech was made as in support of the Bill. There did not appear to be any echo of the reference to transparency in the response of the Minister moving the Bill. The second reading speech did not actually go into this. The Speech by the Senior Minister of State for Finance, Mrs Josephine Teo, focused on other areas, and did not include clause 122, which was the clause amending s 203. Neither was there any engagement in Mrs Teo's response to the comments on transparency. Tellingly, in response to Mr Ong's question about what recourse shareholders had if the management and the board of directors were remiss in fulfilling their duties, Mrs Teo referred to the minority oppression action as a remedy. This puts paid to the Plaintiff's argument that the Act was intended to confer on shareholders the general right to financial information for the sake of transparency.

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29 Furthermore, the amendment introduced by the Companies (Amendment) Act 2014 (No. 36 of 2014), which was the Act resulting from the Bill, was insignificant in terms of altering the rights of the shareholder. This is seen in the following table of comparison between s 203 of the Act before and after the amendment:

The pre-amendment section	**The 2014 amendment**
—(1) A copy of every profit and loss account and balance-sheet of a company […], which is duly audited and which (or which, but for section 201C) is to be laid before the company in general meeting accompanied by a copy of the auditor's report thereon shall — […] be sent to all persons entitled to receive notice of general meetings of the company .	"(1) A copy of the financial statements or […], which is duly audited and which (or which but for section 201C) is to be laid before the company in general meeting accompanied by a copy of the auditor's report thereon shall be sent to all persons entitled to receive notice of general meetings of the company […]

Given there was no material change to s 203(1) of the Act through the Companies (Amendment) Act 2014, Mr Ong's statement is not relevant in interpreting the parts of the section that are in play in the present case.

30 In addition, even if Mr Ong's remark were relevant, its influence on interpretation would be limited. Extrinsic materials cannot override or substitute the text. As noted by Rajah JA in *PP v Low Kok Heng* [2007] 4 SLR (R) 183 at [52], the express literal wording of the provision cannot be wholly disregarded:

> More importantly, it is crucial that statutory provisions are not construed, in the name of a purposive approach, in a

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> manner that goes against all possible and reasonable interpretation of the express literal wording of the provision. This much is clear from the decision of Dawson J of the High Court of Australia in *Mills v Meeking* (1990) 91 ALR 16. In that case, Dawson J explained the effect of s 35(a) of the Interpretation of Legislation Act 1984 of Victoria (which is based on s 15AA of the Australian Act and corresponds to s 9A(1) of the Interpretation Act). He stated at pp 30–31:
>
> > The approach required by s 35 needs no ambiguity or inconsistency; it allows a court to consider the purposes of an Act in determining whether there is more than one possible construction. Reference to the purposes may reveal that the draftsman has inadvertently overlooked something which he would have dealt with had his attention been drawn to it and if it is possible as a matter of construction to repair the defect, then this must be done. However, if the literal meaning of a provision is to be modified by reference to the purposes of the Act, the modification must be precisely identifiable as that which is necessary to effectuate those purposes *and it must be consistent with the wording otherwise adopted by the draftsman. Section 35 requires a court to construe an Act, not to rewrite it, in the light of its purposes*. [emphasis added]

Alternatives for a member of a company

31 It may be thought that a shareholder or member is left with little protection without such a right to the company's financial information outside of an AGM. However, our present statutory regime balances the rights and obligations of a number of different parties, not only those of the shareholders or members, but also the directors and creditors. Shareholders have rights exercisable at meetings; they may also invoke common law or statutory derivative actions where the criteria for doing so are met. A claim of minority oppression is also often an effective remedy. An unqualified right to financial information of the company is conceivably a valuable one for shareholders. On the other side of the scale, such a right would probably impose additional burdens on the company and its directors. In the absence of a clear and strong ground, consonant with the statutory regime in place, it would not be

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appropriate for the courts to create such a right. Whether or not the statute should be amended to confer such a right is a matter for the relevant agency to consider. What may be thought a lacuna may only be in one aspect, but it may also be balanced out by other shareholder rights. Whether any change should be made to the present statutory regime is a matter for the relevant agencies to consider.

32 The Defendant suggested that the appropriate course of action is for the Plaintiff to seek pre-action discovery; I do not know whether that is a viable solution, and do not comment further. I also note that shareholders' agreements may sometimes be a viable second string, though this may not always be practical, and does not appear to be a solution that can be obtained by many shareholders.

33 It may be that in some instances, the failure to hold AGMs and provide the requisite financial information could amount to minority oppression. However, the present application was not framed in this way, and neither was any evidence adduced to that end.

Conclusion

34 A novel proposition is not to be rejected because it is novel. But where statutory rights are invoked a novel reading has to be supported by the clear words of the provision or, where the language is ambiguous or vague, by clearly telegraphed purposes.

35 One trusts that while the Defendant has succeeded in defending itself against this application, it would, in due course, direct its mind and effort to comply with its obligations to hold general meetings and provide its financial information.

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36 Costs will be fixed if not agreed.

Aedit Abdullah
Judicial Commissioner

Chew Yee Teck Eric and Li Shunhui Daniel (ECYT Law LLC) for the plaintiff;
Chew Kei Jin and Tham Lijing (Tan Rajah & Cheah) for the defendant.

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