IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC 97

Originating Summons No 1142 of 2021

In the matter of Section 215 of the Companies Act (Cap 50, 2006 Rev Ed)

And

In the matter of Verrency Holdings Limited

Between

(1) Portcom Pte Ltd
(2) Transworld Holdings PCC Limited
(3) Dempsey Capital Pty Ltd (as trustee for the Alium Alpha Fund)

… *Applicants*

And

(1) Verrency Group Limited
(2) Verrency Holdings Limited

… *Respondents*

JUDGMENT

[Companies — Takeovers — Section 215 of the Companies Act]
[Companies — Shares — Convertible notes – Units of shares]

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Portcom Pte Ltd and others
v
Verrency Group Ltd and another

[2022] SGHC 97

General Division of the High Court — Originating Summons No 1142 of 2021
Philip Jeyaretnam J
28 March, 11 April 2022

29 April 2022 Judgment reserved.

Philip Jeyaretnam J:

Introduction

1 A Singapore company wished to redomicile to Australia as this was a condition for a critical investor to provide much needed funds for its operations. One way to achieve this was to interpose an Australian company and then proceed with a share swap. Having received approval in respect of shares issued to the holders of convertible notes, but without the support of 45% of the body of shareholders as it stood prior to the issue of those new shares, the Australian company seeks to rely on the provisions of Companies Act s 215 (Cap 50, 2006 Rev Ed) (the "CA") to compulsorily acquire the shares held by those non-assenting shareholders. The questions for the court are first, whether the section has been complied with and secondly, if it has, whether it would be unfair to permit the Australian company to proceed with compulsory acquisition.

Facts

The parties

2 Portcom Pte Ltd ("Portcom"), Transworld Holdings PCC Limited ("Transworld") and Dempsey Capital Pty Ltd (as trustee for the Alium Alpha Fund) ("Dempsey") (collectively, the "applicants") are shareholders in the second respondent, Verrency Holdings Limited ("Verrency Singapore"), a public company incorporated in Singapore. The first respondent, Verrency Group Limited ("Verrency Australia"), is a company incorporated in Australia.

3 At present, Portcom, Transworld and Dempsey hold 0.047%, 0.345% and 0.118% of the shares in Verrency Singapore respectively.[1] Verrency Australia holds 98.11% of the shares in Verrency Singapore.[2] Verrency Australia has common directors with Verrency Singapore, including Mr David Cruzen Link ("Mr Link"). Mr Link was the founding director of Verrency Singapore and was CEO until 1 October 2021.[3]

4 Another relevant party is ML Norwood Investments Pty Ltd (as trustee for the ML Norwood Family Trust) ("Norwood"). Until 29 July 2021, Norwood was the largest shareholder of Verrency Singapore, with a shareholding of 45.855%. Mr Link's wife is the beneficial owner of Norwood.[4]

5 It is also relevant that Verrency Australia was incorporated on 28 June 2021.[5] Norwood was initially its sole shareholder.

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1 1st Affidavit of Stephen John Cummins ("SJC") at para 96.

2 SJC at para 97.

3 1st Affidavit of David Cruzen Link ("DCL") at para 8.

4 DCL at para 7.

5 DCL at para 37.

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Background to the dispute

6 This dispute concerns the intended takeover of Verrency Singapore by Verrency Australia. Verrency Australia seeks to rely on s 215 of the CA to compulsorily acquire the remaining shares in Verrency Singapore, including those of the applicants. The applicants contend that Verrency Australia is not entitled to do so. They seek in this application a declaration to that effect.

7 Prior to 29 July 2021, the applicants' shareholdings in Verrency Singapore were as follows:[6]

	Number of Shares	**% Shareholding**
Portcom	5,000,000	1.347%
Transworld	36,666,667	9.875%
Dempsey	12,499,999	3.367%
Total	54,166,666	14.589%

Portcom and Dempsey (via its predecessor) acquired their shares by subscribing for them for a total cash consideration of USD510,000 and USD1,250,000 respectively. Transworld was allotted its shares pursuant to a settlement deed which arose out of services provided to Verrency Singapore.[7]

8 Between October 2018 and January 2020, Verrency Singapore issued around 150 convertible notes to various parties (the "convertible notes"). The total value of these convertible notes was around USD10.2m.[8] While the holders

6 SJC at para 96.

7 SJC at paras 25–26.

8 DCL at para 13.

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of these convertible notes eventually became shareholders of Verrency Singapore and subsequently Verrency Australia, I will refer to them throughout as the convertible noteholders for convenience.

9 In June and July 2021, Verrency Singapore and Verrency Australia communicated separately with the applicants and with the convertible noteholders. I now highlight the notable correspondence.

Correspondence with the applicants

10 On 22 June 2021, Verrency Singapore sent a letter to the applicants and its other shareholders titled "Verrency Redomiciliation" (the "22 June Shareholder Letter").[9] In the 22 June Shareholder Letter, Verrency Singapore explained that it needed new capital to fund its operations and had been working to attract new investment. A term sheet had thus been executed with an Australian private equity fund for an AUD 5 million investment ("the Investment"), and there were some conditions which needed to be satisfied. Verrency Singapore therefore intended to do the following in "entirely separate and independent actions":

(a) convert the convertible notes to ordinary fully paid shares in Verrency Singapore;

(b) exchange shares and options in Verrency Singapore for shares in Verrency Australia on a like-for-like basis; and

(c) become a subsidiary of Verrency Australia.

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9 SJC at p 368.

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11 To achieve this, Verrency Singapore asked applicants to execute a "Share Swap Acceptance Deed", which would provide Verrency Singapore with a limited power of attorney to transfer the applicants' shares in Verrency Singapore to Verrency Australia, and to subscribe for shares in Verrency Australia on their behalf. The deadline for execution of the Share Swap Acceptance Deed was 29 June 2021. None of the applicants executed the Share Swap Acceptance Deed.[10]

Correspondence with the convertible noteholders

12 On 8 June 2021, the convertible noteholders received a letter from Verrency Singapore titled "Convertible Note Deed – Request for Variation" ("8 June CN Letter").[11] Like in the 22 June Shareholder Letter, Verrency Singapore explained that in line with the terms the Investment, Verrency Singapore would be:

(a) converting all convertible notes to ordinary shares in Verrency Singapore;

(b) exchanging all shares and options in Verrency Singapore with shares in Verrency Australia; and

(c) becoming a wholly owned subsidiary of Verrency Australia.

13 To this end, Verrency Singapore asked the convertible noteholders to approve a variation to their "Convertible Note Subscription Deeds", namely to provide a limited power of attorney to any director of Verrency Singapore to convert their convertible notes to ordinary shares in Verrency Singapore,

10 SJC at para 88.

11 SJC at p 309.

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transfer those shares to Verrency Australia, and then subscribe for shares in Verrency Australia. The convertible notes would be converted at a rate of 135.57340905 shares for USD1 of convertible note principal balance. These shares in Verrency Singapore would then be exchanged one for one with shares in Verrency Australia. The convertible noteholders were asked to execute a "Variation Notice Acceptance" by 16 June 2021.

14 On 23 July 2021, Verrency Singapore sent another letter to the convertible note holders titled "Convertible Note Variation – Improvement to Conversion Rate" (the "23 July CN Letter").[12] Under the 23 July CN Letter, the convertible notes would be converted at a rate of 858.6315911 shares for USD1 of convertible note principal balance instead. The convertible noteholders were asked to execute the Variation Notice Acceptance if they wished to accept the terms of the 8 June CN Letter on this new improved rate. All the convertible noteholders agreed, and executed their Variation Notice Acceptances before 29 July 2021.[13]

Conversion and share swap

15 On 29 July 2021, the directors of Verrency Singapore approved the conversion of all the convertible notes into ordinary shares in Verrency Singapore at the rate given in the 23 July CN Letter. They did so pursuant to the authority conferred on them by the duly executed Variation Notice Acceptances. Thus, 10,260,468,745 new shares in Verrency Singapore were issued to the

12 SJC at p 348

13 DCL at para 59.

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convertible noteholders (the "Conversion").[14] After the Conversion, the shareholdings in Verrency Singapore of the various parties were as follows:[15]

	Number of Shares	**% Shareholding**
Portcom	5,000,000	0.047%
Transworld	36,666,667	0.345%
Dempsey	12,499,999	0.118%
Total (Applicants)	54,166,666	0.51%
Convertible noteholders	10,260,468,745	96.51%

16 Then, on 4 August 2021, the convertible noteholders' shares in Verrency Singapore were swapped for shares in Verrency Australia on a one for one basis pursuant to the power of attorney in the Variation Notice Acceptance. Norwood's shares in Verrency Singapore were also swapped.[16] A total of 98.11% of shares in Verrency Singapore were swapped. The share swap was mandated by a share swap agreement dated 5 August 2021 ("Share Swap Agreement").[17]

17 On 6 August 2021, the applicants received a letter from Verrency Australia titled "Notice to Dissenting Shareholder", purportedly sent pursuant to CA s 215(1) ("6 August Notice").[18] The 6 August Notice was later reissued, first on 23 August 2021 and then again on 28 September 2021, to correct various

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14 DCL at para 67.

15 SJC at para 96 and DCL at para 67.

16 SJC at para 98, p 770–776.

17 DCL at para 65.

18 SJC at para 32.

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errors. The notice sent on 28 September 2021 ("28 September Notice") is the notice that the respondent now relies on for the purposes of s 215(1) of the CA. The 28 September Notice stated:[19]

> Beginning on June 8, 2021, [Verrency Australia] made offers to all the holders of ordinary fully paid shares in [Verrency Singapore]…
>
> …
>
> Up to August 4, 2021 (being a date within 4 months after the making of the offer in that behalf by [Verrency Australia]), the offer was approved by the holders of not less than nine-tenths in nominal value of the ordinary shares (other than shares already held at the date of the offer by, or by a nominee for, [Verrency Australia] or its subsidiary).
>
> [Verrency Australia] hereby gives you notice, in pursuance of section 215 of the Companies Act, that it desires to acquire the ordinary shares held by you in [Verrency Singapore].

18 On 12 November 2021, the applicants took out this application.

The parties' cases

The applicants' case

19 Section 215(1) of the CA states:

> **Power to acquire shares of shareholders dissenting from scheme or contract approved by 90% majority**
>
> **215.—(1)** Where a scheme or contract involving the transfer of all of the shares or all of the shares in any particular class in a company (called in this section the transferor company) to a person (called in this section the transferee) has, within 4 months after the making of the offer in that behalf by the transferee, been approved as to the shares or as to each class of shares whose transfer is involved by the holders of not less than 90% of the total number of those shares (excluding treasury shares) or of the shares of that class (other than shares already held at the date of the offer by the transferee, and excluding any shares in the transferor company held as

[19] SJC at para 38.

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> treasury shares), the transferee may at any time within 2 months, after the offer has been so approved, give notice in the prescribed manner to any dissenting shareholder that it desires to acquire the dissenting shareholder's shares; and when such a notice is given the transferee is, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given or within 14 days of a statement being supplied to a dissenting shareholder pursuant to subsection (2) (whichever is the later) the Court thinks fit to order otherwise, entitled and bound to acquire those shares on the terms which, under the scheme or contract the shares of the approving shareholders are to be transferred to the transferee or if the offer contained 2 or more alternative sets of terms upon the terms which were specified in the offer as being applicable to dissenting shareholders.

20 The applicants' case has two prongs. The first is that Verrency Australia has not fulfilled the requirements set out in CA s 215(1), that an offer made by Verrency Australia has been approved by the holders of not less than 90% of the shares in Verrency Singapore. It is therefore not entitled to rely on CA s 215(1) to compulsorily acquire their shares. The second prong is that a compulsory acquisition of their shares by Verrency Australia would be unfair, and the court should therefore not allow it.

21 The applicants first argue that Verrency Australia never made an offer to acquire their shares. The 22 June Shareholder Letter was not sent on behalf of Verrency Australia, nor did it purport to be. In any case, Verrency Australia had not even been incorporated on 22 June 2021. Thus, the 22 June Shareholder Letter was simply Verrency Singapore seeking approval on certain matters from its shareholders – it was not an offer from Verrency Australia to acquire their shares.

22 The applicants also argue that, even if the 22 June Shareholder Letter was an offer by Verrency Australia, Verrency Australia did not receive the 90% acceptance of its offer that is required under CA s 215(1). This is because, on

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22 June 2021, the applicants collectively held 14.589% of the shares in Verrency Singapore. Without their approval, the 90% threshold could not have been crossed.[20] The shares of the convertible noteholders cannot be counted for the purpose of determining whether the 90% threshold has been met. The shares issued pursuant to the Conversion must be disregarded by virtue of section 215(1C) of the CA, which provides that "shares that are issued after the date of the offer" are to be disregarded.[21]

23 Additionally, the applicants contend that Verrency Australia's acquisition of the shares in Verrency Singapore is unfair because the terms of the offers made to the applicants and to the convertible noteholders were vastly different.[22] In particular, despite the capital contribution of the shareholders (excluding the convertible noteholders and Norwood) being USD8.6m, their shareholding after the Conversion was only 3.2% as compared to the 95% of the convertible noteholders whose capital contribution was USD10.2m.[23] The conduct of Verrency Australia and Verrency Singapore throughout the process was also commercially unfair because of the limited information that the applicants were given.[24] Lastly, there would be prejudice to the applicants if the compulsory acquisition of their shares was allowed because they would lose their *locus standi* to pursue a minority oppression claim under s 216 of the CA in respect of the Conversion.[25]

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20 Applicants' Written Submissions at para 46.

21 Applicants' Written Submissions at para 49.

22 Applicants' Written Submissions at paras 58–59.

23 Applicants' Written Submissions at para 59(b).

24 Applicants' Written Submissions at paras 63–70.

25 Applicants' Written Submissions at paras 71–75.

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The respondents' case

24 The respondents, in their written submissions, relied on the 22 June Shareholder Letter as the offer made to the shareholders of Verrency Singapore for the purposes of s 215(1) CA.[26] However, at the hearing, after I expressed my concerns that the 22 June Shareholder Letter could not have been an offer made by Verrency Australia because Verrency Australia had not even been incorporated when it was sent, the respondents revised their position. They submitted that the offer for the purposes of CA s 215(1) was made to all shareholders of Verrency Singapore on 5 August 2021, when the Share Swap Agreement was signed. It was then pointed out that the offer could not have been made on 5 August 2021 because the 28 September Notice referred to 4 August 2021 as the date "within 4 months of making the offer in that behalf by [Verrency Australia]", and because on 5 August 2021 Verrency Australia had already acquired the shares that it currently holds in Verrency Singapore. The respondents revised their position once more. Their final position is that the offer was made by Verrency Australia to all shareholders of Verrency Singapore (including the convertible noteholders) when the Share Swap Agreement was implemented on 4 August 2021 upon Verrency Australia's shareholders' resolution, executed by Norwood as its then sole shareholder.

25 The respondents submit that the 90% threshold has clearly been met, since the Share Swap Agreement was approved by holders of 98.11% of shares in Verrency Singapore. The applicants cannot rely on CA s 215(1C) of the to exclude the convertible noteholders' shares, because s 215(1C) was actually enacted for the benefit of the acquiring company.[27] In any case, the convertible

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26 Respondents' Written Submissions at paras 30–32.

27 Respondents' Written Submissions at para 19.

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notes were always "shares" for the purposes of CA s 215(1) (even before the Conversion) and thus there is no question that they should count towards the total shares for the purposes of s 215(1).[28] The respondents do not dispute that the 90% threshold has not been met if the shareholding of the convertible noteholders is not counted.[29]

26 The respondents also argue that Verrency Australia's acquisition of Verrency Singapore would be fair. The reality is that Verrency Singapore was in dire financial straits in June 2021. Verrency Singapore had secured the Investment, but it was a term of the Investment that the debt held by the noteholders be converted into equity and that Verrency Australia be incorporated as the holding company of Verrency Singapore.[30] The option to convert lay solely with the convertible noteholders, and thus Verrency Singapore had to offer them attractive terms to ensure that they converted. In any case, the share swap was entirely separate from the Conversion. The Conversion was between the convertible noteholders and Verrency Singapore, and did not involve Verrency Australia in any way. As such, the conversion rate given to the convertible noteholders is irrelevant in assessing the fairness of Verrency Australia's one for one share swap offer to acquire the shares in Verrency Singapore.[31] It is also irrelevant that the applicants wish to commence a suit for minority oppression. It cannot be that the right of Verrency Australia to compulsorily acquire the applicants' shares is nullified by or subject to the applicants' intention to sue parties other than Verrency Australia.[32]

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28 Respondents' Written Submissions at para 15.

29 DCL at para 67.

30 Respondents' Written Submissions at paras 22–23, 49–50.

31 Respondents' Written Submissions 42–46.

32 Respondents' Written Submissions 47–48.

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Additional question raised by court

27 At the conclusion of the hearing, I offered counsel the opportunity to file written submissions on whether convertible notes are "units of shares" if the right of the holders to convert is not at a fixed or determinable price but at a price to be agreed with the company.

28 The point arose because the term "shares" in CA s 215 of the includes "units of shares", per s 215(8A). "Unit" is defined by CA s 4 as "any right or interest, whether legal or equitable, in the share… and includes any option to acquire any such right or interest in the share…"

29 I posed this question because the respondents contended, as noted at [25] above, that the convertible notes were always shares for the purposes of CA s 215(1) because they conferred a right to convert into shares on the holders. I doubted this proposition given that there was no price for conversion fixed at the time of issue of the notes, not even by reference to any formula or benchmark. Thus, it was only a right to seek to agree a price for conversion that arose shortly before the notes matured. While I expressed these doubts, I recognised that the question had not been fully explored in counsel's submissions and particularly wanted to give the respondents the chance to address it properly.

30 Only the applicants chose to avail themselves of this opportunity. Their submission in essence was that an "option to acquire a right or interest" under CA s 4 must be an option for a price that is either fixed in advance or determinable by a formula or by reference to a benchmark. A note with an unpriced conversion right, for which the price depends on subsequent agreement between the parties, would not amount to an option, because if the company did

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not agree on the price the right could not be exercised. An agreement to agree is unenforceable: *May and Butcher, Limited v R* [1934] 2 KB 17 at 20. Consequently, the convertible notes in this case, which contained only an unpriced right of conversion, were not units of shares for the purposes of CA s 215. The convertible noteholders did not possess a contractual right to acquire shares in Verrency Singapore, and therefore did not have a "right" or "interest" in those shares.

31 This was the answer I had anticipated, and I accept that it represents the correct analysis.

Issues to be determined

32 The issues are twofold:

(a) whether the requirements of CA s 215(1) have been met, in particular whether there was an offer made by Verrency Australia and if so whether that offer has been approved by 90% of shareholders; and

(b) if the requirements were met, whether the court should nonetheless disallow the compulsory acquisition on the ground of unfairness.

Issue 1: Whether the requirements of CA s 215(1) have been met

33 Section 215 of the CA enables the acquirer of a company to compulsorily purchase the shares of residual minority shareholders where its offer to shareholders has been approved by not less than 90% of shareholders of the same class. These buy-out rights mirror the sell-out rights contained in s 215(3) whereby residual minority shareholders may require the successful acquirer to purchase their shares. Buy-out rights can be traced back to the

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recommendations of the Greene Committee for the Companies Acts 1908–1917 in the UK almost a hundred years ago, and continue to pay an important role in facilitating takeovers and amalgamations where the vast majority of shareholders of a company agree. Nonetheless, as they permit compulsory acquisition, the provisions must be construed strictly.

34 Thus, in the English case of *Re Chez Nico (Restaurants) Ltd* [1991] BCC 736, the requirement that there be an offer under the broadly similar provisions of the UK Companies Act then applicable was construed to mean an offer "capable of being accepted by the shareholders so as to give rise to a contract (whether absolute or conditional)" (at 204 para d). As the acquirers in that case only invited offers from the shareholders that they could decide whether to accept, there was no offer within the statute.

35 I turn then to the question whether there was an offer made in this case that complies with CA s 215, before going on to the question of whether, if there was one, it was approved by 90% of shareholders.

Was there an offer made by Verrency Australia?

36 As I have noted at [24] above, the respondents initially relied on the 22 June Shareholder Letter as the offer for the purpose of CA s 215. This letter was issued even before Verrency Australia was incorporated. The respondents thereafter revised their position twice. Their second contention was that the offer was made to all shareholders of Verrency Singapore on 5 August 2021, when the Share Swap Agreement was signed, but they fell back ultimately to a third and final contention that the offer was made by Verrency Australia to all shareholders of Verrency Singapore (including the convertible noteholders) when the Share Swap Agreement was implemented on 4 August 2021 by the

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directors of Verrency Singapore pursuant to the powers of attorney granted by the approving shareholders.

37 Before considering the final position contended for, it is helpful to explain why the first and second positions failed.

38 In relation to the respondents' first position, reliance on the 22 June Shareholder letter as the offer was misplaced, for three distinct reasons:

(a) It was not issued for or on behalf of the intended acquirer, which was at that time not even in existence. It was sent by Verrency Singapore. Verrency Australia is identified, but there is no language purporting to express any agency relationship between Verrency Singapore and Verrency Australia.

(b) It was framed as a request to approve redomiciling to Australia under a share swap agreement via the interposition of an Australian holding company. It sought a power of attorney from the shareholder in favour of a director of Verrency Singapore, empowering that director to transfer the shareholder's shares to Verrency Australia and subscribe on the shareholder's behalf for the corresponding shares in Verrency Australia. Thus, it sought approval for Verrency Singapore to enter into an arrangement with Verrency Australia under which, at some point in the future, Verrency Australia would acquire the shareholder's shares in return for shares in itself. Approval by a shareholder would not of itself result in any contract by which the shareholder could compel Verrency Australia (even if already in existence) to take its shares.

(c) At that date, the convertible noteholders had not converted, and as I have accepted at [30] above, they could not be described at that time

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> as holding "units of shares". Thus, the applicants alone held more than 10% of the shares at that time, and their non-assent meant that 90% approval could not be achieved. In fact, the respondents accept that the 22 June Shareholder Letter at no point garnered even a majority of support from the shareholders as of that date. CA s 215(1C), introduced by amendment in 2014, made clear what was already implicitly the case as a matter of legal principle, that shares issued after the date of the offer are to be disregarded. I do not agree with the respondents that this subsection is only for the benefit of the offeror and so can be waived by it unilaterally. Plainly, the subsection is also for the benefit of the shareholders to whom the offer is made at the date of the offer. Moreover, it is not just for their collective benefit but for their individual benefit. Thus, all shareholders would have to agree to disapply CA s 215(1C) if it were not to apply. Of course, if all shareholders were prepared to do that they would no doubt be happy to approve the offer unanimously too, and there would be no need to count holders of shares issued after the date of the offer to achieve the requisite threshold anyway.

39 Turning to the respondent's second position, that the offer was made when the Share Swap Agreement was signed on 5 August 2021, this was abandoned once it was pointed out that based on Verrency Singapore's records the transfers took place the day before, on 4 August 2021. Thus, as of 5 August 2021, the only shareholders in Verrency Singapore (other than Verrency Australia, whose vote would have to be disregarded for the purpose of CA s 215(1)) were those who had not approved the share swap. But there was another fatal defect. The Share Swap Agreement was only signed by the parties to it or their agents. Verrency Australia and Verrency Singapore were both

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parties to it. The remaining parties were shareholders of Verrency Singapore (which by now included the convertible noteholders) represented by directors of Verrency Singapore.[33] The shareholders represented by the directors and thus party to the Share Swap Agreement were only those who had already agreed to the redomiciling and the share swap. They did not include the applicants. Thus, the Share Swap Agreement did not involve the applicants at all. It was not sent to them on 5 August 2021 and could not conceivably amount to an offer to the applicants for the purpose of CA s 215.

40 Further, even if it had been sent to them, it does not on the face of it contain an offer addressed to the applicants for their acceptance.

41 The third position taken by the respondents was that the offer took place the day before, when the Share Swap Agreement was approved by a written resolution of Verrency Australia's sole shareholder, Norwood ("4 August 2021 Resolution").[34] While this preceded the acquisition of the shares in Verrency Singapore by Verrency Australia (which took place later the same day), it was a resolution internal to Verrency Australia and like the Share Swap Agreement itself did not involve the applicants nor was it sent to them on 4 August 2021. Again, even if it had been sent to them, it does not on the face of it contain an offer addressed to the applicants for their acceptance.

42 The respondents accepted that an essential feature of an "offer" is that it is communicated to the offeree. They contended that while the 4 August 2021 Resolution had not been sent to the applicants, it had been communicated to them via the 22 June Shareholder Letter which indicated that such an offer was

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33 DCL paras 63 and 65.

34 DCL p 500–501.

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to be made at some point in the future. I cannot accept this contention. Informing someone that an offer will be made to them in future is not in itself communication of the future offer. What must be communicated is something capable of being accepted by the shareholders so as to give rise to a contract, whether absolute or conditional (see [34] above).

43 The respondents then argued that it would have made no difference if the 4 August 2021 Resolution had been sent to the applicants. In rejecting the 22 June Shareholder Letter, and in taking out this application, the applicants have made it clear that they would not have accepted the offer anyway. Practically, the failure to communicate the offer to them has caused no prejudice, because they are currently being asked to accept exactly the same terms. This contention, however, ignores the purpose of CA s 215. As I have stated at [33] above, the requirements of CA s 215 must be strictly construed because they permit compulsory acquisition of another's property. There is a reason for the requirement than an offer be made. When a shareholder receives an offer to acquire his shares intended to be relied on under CA s 215, it must be made clear that it is part of a general bid to acquire all the shares in the company. Only if that is clear will he know that if he wishes to reject it and avoid the operation of CA s 215(1) against him, he must find common cause with at least 10% of the shareholders (including himself) to reject the offer. If no offer is sent, whether on the assumption that it will be rejected or otherwise, the non-assenting shareholder loses the opportunity to organise opposition to the bid. Such a situation was described in *Re Chez Nico* at p 204:

> The only offers made by [the acquirers] were offers to receive offers from shareholders. How then can there be a compulsory acquisition on the terms offered by [the acquirers]?
>
> This conclusion does not simply reason on a legalistic interpretation of words. As [the shareholder] told me, and I accept, he was not aware when he received the letters of 15

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> June and 16 July that [the acquirers] were making a general bid for all the shares which they did not own…If he had known that he was facing a bid for all the shares he would have started to organise an opposition at a much earlier stage.

44 Accordingly, I hold that there was no offer made to the applicants for the purpose of CA s 215(1). Without an offer, the respondents are not entitled to rely on CA s 215(1) to compulsorily acquire the applicants shares.

Was the 90% threshold for approval met?

45 In view of my finding that there was no offer, the question of meeting the 90% threshold is moot.

Issue 2: Whether there was unfairness such that the court should not allow the compulsory acquisition of the applicants' shares?

46 This issue is also moot. In general, the question of unfairness should be addressed holistically and in the full context of the company's situation. However, it would not be appropriate for me to make any further observations given that the question of unfairness may be material to minority oppression proceedings that the applicants may commence.

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Conclusion

47 The applicants have satisfied me that the requirements of CA s 215 have not been met, specifically that there was no offer made within s 215(1). Accordingly, the respondents are not entitled to proceed under CA s 215(4). I will hear parties on costs.

Philip Jeyaretnam
Judge of the High Court

Vincent Leow, Xu Jiaxiong, Daryl and Nicholas Kam Xuan Wei (Allen & Gledhill LLP) for the applicants;
Bose Raja, Rajaram Murali Raja and Celine Liow Wan-Ting (K&L Gates Straits Law LLC) for the respondents.

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