THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Port of Spain

Claim No. CV 2017-03151

In the Matter of the Securities Industry Act 1995

And Securities Industry (take over) By-Laws 2005

AND

In the Matter of an Application by Trinidad Cement Limited

Pursuant to By-Law 26

Of The Securities Industry (take over) By-Laws 2005

To fix the fair value of Shares in Readymix (West Indies) Limited

BETWEEN

Trinidad Cement Limited

Claimant

AND

Peter Permell

Defendant

Before the Honourable Madam Justice Eleanor Joye Donaldson-Honeywell

Delivered on November 22, 2019

Appearances

Ms. Catherine Ramnarine instructed by Mr. Miguel Vasquez for the Claimant

Mr. Ronnie Bissessar instructed by Mr. Varin Gopaul-Gosine for the Defendant

Judgement

A. Introduction

1. The subject matter of this Claim is the fixing of the fair value of the Defendant, Mr. Peter Permell's, shares in Readymix (West Indies) Ltd ("*Readymix*") by the Court. This follows on a prior Written Ruling on October 5, 2018, as well as several case management decisions and Orders.

2. The Claimant Trinidad Cement Limited ("TCL") having acquired 90% of the shareholding in Readymix was mandated by **Rule 26 of the Securities Industry (Take-Over) By-Laws, 2005** ("the By-Laws") made under the **Securities Industry Act, 1995** to file this Claim when the Defendant declined their offer price for his shares.

B. Background

3. The full factual matrix of the Claim is set out in the prior Ruling in this matter. In summary, the pleaded case for the Claimant ("TCL") was that the fair value was $11.00 (or US$1.62) per share, which was the sum offered to 495 minority shareholders in TCL's March 27, 2017 Take-Over Bid. In the Claimant's Statement of Case, at paragraph 18, the case advocated was for the fixing of the fair value as at their alleged fair value offer date, March 27, 2017. The Claimant remained constant in advocating for this approach up to February 2019.

4. The Defendant, in rejecting this offer verbally at an AGM, by formal Notice dated July 31, 2017 as well as by media publications and in his pleaded defense, averred that $11.00 (US$1.62) was not a fair value for each of his (then) 31,781 Readymix shares. He elected to require the Claimant to purchase his shares at a price fixed by the Court. This election was made as of right pursuant to By-Law 26(4).

5. Under By-Laws 26(5)-(11) the Court was empowered to appoint an appraiser to

assist in fixing a fair value of the Defendant's shares. BDO Trinidad Ltd ("the appraiser" or "the expert") was appointed by the Court to conduct a valuation of the fair value of the Defendant's shares in Readymix. Detailed reasons for the selection of BDO were set out in an attachment to a case management Order dated February 4, 2019.

6. By letter dated January 29, 2019 and emailed to the Court on the same date, counsel for the Defendant informed the Court that parties had not agreed to the joint instructions to be prepared for the Appraiser. However, the Defendant's counsel attached his own draft, which included an instruction that the assessment of the fair value must be determined as at August 29, 2017, the date the Fixed Date Claim was filed by the Claimant.

7. The Claimant responded, by email dated February 1, 2019, insisting that "*the effective valuation date should be the 26th March, 2017, the date that the Offer was initially made to Readymix Shareholders*." Counsel for the Claimant expressed a willingness to provide further submissions on this point if the Court required same.

8. It was in light of the strong positions by each side advocating that specific different dates were applicable for fixing the value of the Shares, that by Order dated February 4, 2019, they were directed to issue joint instructions to the appraiser requiring that the fair value of the shares be assessed as at both dates. The understanding was, that armed with these two valuations to assist the Court, submissions could later on be heard from the parties, if necessary, as to which of the two dates should be used for the Court to fix the value.

9. The anticipated written submissions have now been filed as parties were unable to come to an agreement, even after receipt of the expert's report. These submissions and the two issues raised therein form part of the material to be considered by the Court in fixing the fair value of the shares.

C. Issues

10. Overall, the issue to be determined by the Court is what fair value of the shares should be fixed?

11. The first issue raised by the parties in submissions for consideration by the Court in fixing the fair value is; what is the appropriate date as at which the Court should fix the fair value of the Readymix Shares?

12. The second issue is one raised by the Defendant as to whether interest from the date of that appropriate date should also be ordered by the Court as part of fixing the fair value?

D. Consideration of the Submissions

Appropriate Date

13. This issue of the appropriate date arose as a point of contention between the parties just after the appointment of the expert to assist the Court with the fixing of the fair value of the shares. Parties undertook to jointly draft the instructions to the expert. Either side contended for a different date at which the shares should be appraised. This contention threatened to delay the proceedings.

14. In order to ensure that all angles were covered, the parties were directed to jointly issue instructions to the expert, including a direction that the appraisal should be done for the two separate dates. These instructions were settled by the Court by order dated January 14, 2019. It was agreed that after completion of the appraisal the Court would hear submissions from the parties, if necessary, as it relates to their contended appropriate dates.

15. The appraisal was completed on July 12, 2019. The expert's findings were against the Claimant in that, whether the March 27 2017 offer date or the August 29, 2017

Claim filing date was used for fixing fair value, the offer of $11.00 (US$1.62) made to the Claimant was lower than a fair value. The expert assessed the fair value of each Readymix share as being:-

- $12.65 as at 26th March 2017; and
- $13.42 as at 29th August 2017

16. In an unexpected turnaround, the submissions filed by the parties now seek to have the Court fix the Fair Value as at a date neither party put forward previously. That date is July 31, 2017, the date the Defendant gave formal Notice of his election to reject the Claimant's offer and have the Court fix a fair value. That date has not been the subject of the costly assessment exercise conducted by the expert.

17. The initial protagonist of the new date was the Claimant. Counsel for the Claimant argued that in the absence of express legislative guidance the issue of the valuation date "seems to be set in the common law, as being the date on which the minority shareholder (or security holder) gives notice to the majority shareholder that it has elected to ask the Court to fix the fair value of its shares in the subject company."

18. In support of this submission the Claimant cited Canadian case law, contending that the case of ***Manning v Harris Steel Group*** **(1986) 7 BCLR (2d) 69** involved a similar fair value assessment of shares in a company subject to a takeover, in which certain minority shareholders argued that the takeover price was inadequate.

19. In coming to its determination, the Court in **Manning** held that the general position is that the fair value date of assessment was, generally, the last date on which the minority shareholder can opt to elect to accept the offeror company's offer, or to notify the offeror company that it wishes to have the fair value fixed by the Court. At Paragraph 13, the Court held as follows:

" … *I am satisfied the appropriate date is the date of the expiration of the period*

within which the dissenting shareholders (offeree) can elect to demand payment of the fair value of his shares, not the date of the takeover bid."

20. Surprisingly the Defendant has, in submissions filed by his Attorneys, agreed that the date now suggested by the Claimant is correct in law. However, in the absence of any expert assessment as to the value on that July 31, 2017 date, the parties suggest different approaches to the Court fixing the value.

21. The Claimant submits, that since the Court has not had the assistance of an expert appraisal of the share value as at the July 31, 2017 date currently advocated for by the Claimant, the Court should "set a fair value that represents a pro-rated figure between March 26, 2017 and August 29, 2017, to arrive at a valuation as of the 31st July, 2017." The Claimant admits that this approach will not result in a "specifically assessed and/or set share valuation" but they contend that it represents the fairest assessment.

22. The Defendant submits two alternate approaches. The first, stated at paragraph 20 of closing submissions, is that the Court fix the value as at the date they had been contending for all along i.e. August 29, 2017.

23. The second is that the Court use, what they now agree to be the correct date in law, namely July 31, 2017. In so doing however, the Defendant says the Court should fix the value by treating the expert's two valuations as a range from March 26 to August 29, 2017. According to the Defendant, by applying this approach, the Court should find that the fair value is closer to the August 29 value "*if only because the 29 day period between the actual valuation date of 31st July, 2017 and BDO's valuation date of 29th August, 2019 is de minimis*".

24. Furthermore, they say, the Claimant has not identified any material event between July 31 and August 29 to suggest that the valuation would have markedly changed between those dates.

25. At the outset, my position is that there is no evidential, scientific or knowledge driven basis for the Court to fix the value as at a date other than the dates for

which expert appraisal has been provided. The Court will not now arbitrarily fix the value as at the new date proposed by the Claimant, without any established or objective basis for arriving at a value as at that date.

26. Instead the fixing of the fair value will be set at one of the two dates assessed by the expert. This is the only practical option to be taken in keeping with the overriding objective at **Rule 1.1(2) of the Civil Proceedings Rules, 1998 (as amended)** of dealing justly with the case. Dealing justly includes even-handedness, saving expense, proportionality, expedition and allotment of appropriate court resources.

27. The Claimant had, at the time of finalization of instructions to the expert, indicated a willingness to make submissions in support of March 27, 2017 as the date at which the fair value of the shares was to be fixed. That then proposed date was accordingly made the subject of the expert appraisal by the court appointed expert.

28. In closing submissions, having complied with an order that the Costs of this appraisal were to be borne by the Claimant, the Claimant resiled from its initial stance. The submissions were entirely in support of the fixing of the fair value as at a new date, July 31, 2017, a date in relation to which the expert assistance had not been provided.

29. If not for the need to minimize wasted cost/time of the parties and ensure that the most effective use is made of Court's resources, an alternate approach would have been considered. A further order extending these proceedings could have been made, that at the cost of the Claimant a further assessment by the expert be commissioned to provide a basis for assessing the value on the new date proposed by the Claimant. This could perhaps, only have been considered if the Claimant were to undertake to pay interest to the Defendant on the value of the shares from the date of the first expert assessment to final determination.

30. In the absence of any pleadings, evidence or expert assistance for fixing the fair value of the shares as at the July 31, 2017 date now proposed by the Claimant, it

is my finding that the fair value of the shares should be fixed as at the date they filed the Claim which was August 29, 2017. I will fix the value at $13.42 based on the expert assistance provided by BDO Trinidad Ltd. to the Court.

31. In so deciding, I recognize, as submitted by both sides, that the Court is not bound to accept either of the two values assessed by the expert. However, in my view the expert's report is well reasoned and provides the full scientific basis for the valuation.

32. Neither side challenged the findings of the expert as to the value on either of the two valuations dates examined. The latter valuation date is in my view more appropriate for fixing the value of the shares. This is so because it comes after the July 31 date when the Defendant gave formal notice of his election. The period from then to the date of filing was entirely in the control of the Claimant. The Claimant filed the Claim on August 29, 2017 and in the circumstances the said date is the most just to be used in fixing the value of the shares.

Interest

33. The Defendant's submission that a fair rate of interest should be applied on the share value, conservatively in the range of 2% to 3% from the valuation date to the date of payment, was neither pleaded nor supported by evidence, law or expert opinion.

34. The Defendant in closing submissions admits that there is no express provision in the By-laws as to whether interest is payable to a dissenting shareholder in a take-over bid. Those By-laws provide the legislative framework for the instant Claim.

35. However, it is contended by the Defendant that the Court can refer to **Section 212 of the Companies Act Chapter 81:01** ("the Companies Act") in relation to interest. That section governs the authority of the Securities Commissions, at its discretion to allow dissenting offeree's a reasonable rate of interest.

36. Further the Defendant cites Canadian, Cayman Islands and United States of America cases of ***Abraham v Interwide Investments Limited*** **[1985] Carswell 145**, ***RFG Private Equity Limited and Ors v Value Creation Inc*** **[2017] ABQB 178**, **FSD 14 of 2016** ***In the Matter of Shanda Games Limited*** and ***Cede & Co., Inc. et al v Medpointe Healthcare*** in support of its submission that interest has been awarded in similar circumstances.

37. The Claimant, in its Reply submissions, disagreed that the Defendant is entitled to interest. The Claimant's arguments, which were fully set out with supporting authorities in the submissions, are summarised as follows:

    a. The By-laws do not expressly provide for the entitlement and/or jurisdiction of the Court to award interest to a security holder. This contrasts with the Companies Act Section 212 provision of interest but that provision was enacted before the passing of the By-laws.

    b. If it had been Parliament's intention that the share-holding offeree under By-law 26 would be entitled to interest or that the Court could in its discretion make such an award, that provision would have been included in the later enacted By-laws. In the absence of such an express statutory provision, the Defendant cannot rely on the Companies Act to impute a right into the By-laws.

    c. In any event, Section 212 states that the Commission "*may … (c) allow … a reasonable rate of interest*." The award of interest, even if that legislation were applicable, is therefore not an entitlement but the exercise of a discretion by the Court.

    d. In the absence of express statutory authority, the Court does not have jurisdiction to award interest in a matter such as this. Even the High Court's general jurisdiction to award interest is limited. It is created by **Section 25 of the Supreme Court of Judicature Act, Chap. 4:01** which gives the Court the power to award interest in proceedings involving the recovery of any

debt or damages. Section 25 states:

> "*In any proceedings tried in any Court of record for recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment…*"

e. The instant case does not involve the recovery of a debt or damages from the Claimant but involves a matter in which the Court is to fix the fair value of the Readymix Shares. There being no legislation providing for the award of interest, the Court does not have statutory jurisdiction to make such an order.

f. In common law as well, the Canadian, Cayman Islands and United States of America cases cited by the Defendant are inapplicable. This is so because interest was awarded in those cases based on express statutory provisions that are not present in the legislative framework governing this matter. The Claimant cited the earlier Ruling delivered on October 5, 2018 in **Trinidad Cement Limited v Peter Permell**. It had been held there that in the absence of similar provisions in the By-laws, the Alberta Business Corporations Act is irrelevant and has no bearing on the Trinidad and Tobago legislation.

38. There is merit to these submissions by the Claimant. Having considered the submissions on both sides, and bearing in mind the absence of pleadings or evidence in support of an award of interest, the award of interest sought by the Defendant will not be made.

E. Order

39. It is hereby ordered that the fair value of the Defendant's shares in Readymix (West Indies) Limited is $13.42.

40. The Claimant having succeeded in one aspect of this decision, as it relates to the denial of an award of interest, 75% of the cost of the Claim is to be paid to the Defendant by the Claimant in an amount to be assessed by the Master if not agreed.

AND IT IS FURTHER ORDERED that:

41. The costs of the preliminary point determined on 5th October, 2018 be determined by a Master in Chambers if not agreed.

42. Liberty to Apply.

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Eleanor Joye Donaldson-Honeywell

Judge

Assisted by: Christie Borely JRC 1