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COMMENTARY ON THE SINGAPORE HIGH COURT CASE OF EZION HOLDINGS AND SHAREHOLDER ACCESS TO COMPANY FINANCIALS

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I. BACKGROUND

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 Ltd., had previously owned the Defendant, Teras Cargo Transport Pte Ltd., but had subsequently sold the majority of the shares and become a minority shareholder.[1]

The Plaintiff filed an application in 2016, seeking an order under s 203 of the *Companies Act* [the *Act*][2] for the Defendant's financial statements and accounts for the financial year [*FY*] ending in 2015, though these had yet to be prepared and audited.

The last audited accounts had been issued in the *FY* 2012 and an annual general meeting [*AGM*] had been held in July 2016, three months after the present application was filed, where the audited accounts and financial statements for *FY* 2013 were produced to the shareholders and queries were made.[3]

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[1] *Ezion Holdings Ltd v Teras Cargo Transport Pte Ltd* [2016] SGHC 175; [2016] 5 SLR 226 [*Ezion*] at [2].

[2] Cap 50, 2006 Rev Ed.

[3] *Supra* note 1, at [3].

The issue that arose was how s 203 of the *Act* should be read and whether the Plaintiff could request for and receive the unaudited financial statements for *FY* 2015.

II. DECISION

The Court denied the application by the Plaintiff[4] and held that the *Act* did not confer a broad right to financial information to a member or shareholder.[5]

The Court found that s 203 of the *Act* operates in tandem with s 201 of the *Act*, which deals with *AGM*s.[6] Therefore, s 203 did not give a right to general financial information, but rather, the financial information that is to be provided to a member is financial information tied to a general meeting.[7]

The Plaintiff argued for a broader reading of s 203 putting forward several reasons in support.

Argument #1

The Plaintiff argued that on the proper interpretation of s 203, the accounts do not have to be audited and laid, before a right arises to the statements.[8]

This argument was rejected as it ignored the structure of s 203(1), which reads: "A copy of the financial statements...which is duly audited and which (or which but for s 201C) is to be laid before the company."[9]

Argument #2

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[4] *Supra* note 1 at [11].

[5] *Ibid* at [12].

[6] *Ibid* at [15].

[7] *Ibid* at [16].

[8] *Ibid* at [17].

[9] *Ibid.*

The Plaintiff argued that the title of the section, which reads "Members of company entitled to financial statements, etc", supported a broad reading of s 203.[10]

However, the Court observed that the title of a section is not determinative of its contents and is only intended to summarise the contents of sections for ease of reference; such titles are thus not always exhaustive or precise.[11] It noted that although titles and marginal notes can and have been used in interpretation, according to the Court of Appeal at [41] in *Tee Soon Kay v AG*,[12] the marginal notes must be taken against the backdrop of the actual language used in the section.

In the present case, the title of the section was only a broad and incomplete summary of the contents of the section. The term "etc" in the title clearly indicated that this section governs many matters, and that the title was not intended to be exhaustive.

Argument #3

The Plaintiff cited *Burdeny v K & D Gourmet Baked Foods and Investments Inc* [*Burdeny*][13] as authority for the proposition that the Defendant could be ordered to produce the unaudited financial statements to the Plaintiff.

The court found that the wording of the section of the *British Columbia Company Act* cited was different from s 203 of the *Act*. Furthermore, the financial statement referred to in *Burdeny* were statements that had already been prepared and the focus of *Burdeny* had been on the oppression suffered by the applicant there. *Burdeny* was therefore distinguished and did not offer strong authority for the Plaintiff's arguments.[14]

Argument #4

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[10] *Ibid* at [17].

[11] *Ibid* at [18].

[12] [2007] 3 SLR(R) 133 at [41].

[13] [1999] BCJ No 953.

[14] *Supra* note 1 at [24].

The Plaintiff then relied on Article 122(B) of the Articles of Association [*AOA*] of the Defendant, which required that 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.

The Court held that the *AOA* of the Defendant could not assist the Plaintiff either, because it was restrained by the same obligations as s 203 of the *Act*.[15]

Argument #5

The Plaintiff also cited the speech made by Mr Ong Teng Koon at the second reading of the *Companies (Amendment) Bill* [the *Bill*] on 8 October 2014,[16] where the Member of Parliament had stated that "The third objective of this *Bill* is to achieve the correct balance between flexibility and transparency…". The Plaintiff advanced the argument that this comported with a shareholder's right to access financial information of the company.

The Court held that the speech could not assist in the interpretation of the provision because the it was concerned with other areas of the *Bill* and not specifically with the member's right to financial information.[17]

The court set out the conditions when a parliamentary speech could be useful in interpreting a provision:

> [where] a Member proposes an amendment which is either accepted or rejected…
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> the Member's speech could be useful in interpreting the provisions if the

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[15] *Ibid* at [25].

[16] *Parliamentary Debates Singapore: Official Report,* vol 92 at col 14 (8 October 2014) (Ong Teng Koon, Member of Parliament, Sembawang).

[17] *Supra* note 1 at [27].

> amendment were passed, and even if it were not, any accompanying remarks in rejection may cast light on what was eventually enacted.[18]

Argument #6

The Plaintiff cited *Devlin v Slough Estates Ltd*,[19] 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 *Act*.

The Court observed that in that case, at p502, it was held 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.[20]

Argument #7

The Plaintiff also cited *Over & Over Ltd v Bonvests Holdings Ltd*[21] and *Lim Swee Khiang v Borden Co (Pte) Ltd*[22] as authorities to support the argument that individual shareholders had a free-standing right to obtain financial information. However, both cases were concerned with the oppression of minority shareholders. *Over & Over Ltd v Bonvests Holdings Ltd* concerned an action for minority oppression by a plaintiff which had its interests disregarded; similarly, the statement by Chan Sek Keong CJ (as he then was) in *Lim Swee Khiang v Borden Co (Pte) Ltd* related to the enjoinment of the Courts to examine majority shareholders' conduct under s 216. As minority oppression under s 216 was not pleaded by the Plaintiff in the present case, the Court found that the aforementioned cases did not apply nor offer strong authority.

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[18] *Ibid* at [28].

[19] [1983] BCLC 497.

[20] *Supra* note 1 at [26].

[21] [2010] 2 SLR 776.

[22] [2006] 4 SLR(R) 745.

II. COMMENTARY

It is now clear that a shareholder of a company does not have a right to obtain financial information of a company. He is only entitled to audited financial records that are presented at *AGM*s.

The rights that shareholders possess include the right to vote, the right to dividends when it is declared, the right to appoint and remove directors and the right to alter the company's constitution. The management of the company is left to the directors to handle and the shareholders generally do not get involved in these matters. Since the shareholders do not participate in the management of the company, they do not need an unfettered right to financial information.[23]

However, if there have not been any *AGM*s held, or the *AGM*s have been postponed, the shareholder is left completely in the dark about the financial situation of the company in which he has invested.

In such a situation, the shareholder is left with a few options.

- First, he can wait for the *AGM* to be held and hope that the delay (however long) in viewing the audited accounts does not adversely affect him.
- Second, he can - as the court noted in the present case - make an application under s 216 of the *Act* for Minority Oppression.[24]

s 216 of the *Act* gives the court wide discretionary powers under which, if the majority is found to have acted unfairly, the court can direct or prohibit any act or cancel or vary any transaction or resolution under s 216(2)(a),[25] as well as regulate the conduct of the affairs of the company in the future under s 216(2)(b).[26]

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[23] *Ibid* at [19].

[24] *Supra* note 2, s 216.

[25] *Ibid*, s 216(2)(a).

[26] *Ibid*, s 216(2)(b).

Therefore, under s 216, the court could order that the minority shareholders be allowed to view the audited financial records.

However, s 216 of the *Act* is somewhat of a poisoned chalice. As cases involving requests for shareholder access to financials are prone to recurrence, the only realistic solution is often for one of the parties to exit the company. Shareholders seeking such access would may be daunted by the possibility of an order for them to sell their shares to another should the courts find that they are unable to co-operate. In extreme instances, the Court is also empowered to order the winding-up of the company under s 216(2)(e) of the *Act*,[27] even if the parties had not asked for such a result.

One can thus understand why minority shareholders may be hesitant to make a claim of minority oppression under s 216 of the *Act*.

In addition, these actions for shareholder access will fail if there are genuine reasons for postponing the *AGM*s, and the directors have acted fairly, honestly and diligently. In such a scenario, the shareholder has no other route to view the financial records of the company.

So, what does the minority shareholder do then?

A. *Should a minority shareholder have a right to financial information?*

As observed by the court at [31] in *Ezion*, "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."[28]

While an unqualified right to financial information of the company would benefit the shareholders immensely, such a right would probably impose additional burdens on the company and its directors.

B. *What is the solution for the Plaintiff in the present case?*

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[27] *Ibid*, s216(2)(e).

[28] *Supra* note 1 at [31].

In the present case, the Defendant had failed to present the Plaintiff with any financial statements of the company between the years 2012 and 2016 (a duration of 4 years). The former had only called an *AGM* to present the *FY* 2013 statements to the shareholders after the Plaintiff initiated its action in court in 2016. To add insult to injury, the Directors of the Defendant were not able to answer queries about the *FY* 2013 financial statements at their *AGM*.

One of the points made by the Plaintiff in the present case was that its rights could not be enforced through the relevant agencies as "the failure to hold an *AGM* only leads to small fines, and nothing more".[29] For instance, if a company fails to hold an *AGM*, "the company and every officer of the company who is in default shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $5,000 and also to a default penalty" according to s 175(4)(a) of the *Act*.[30]

A fine of this amount is, unfortunately, hardly a deterrent to a company that is sufficiently motivated to keep its minority shareholders in the dark with regard to financial information and – as observed above – s 216 of the *Act* presents other difficulties that may dissuade shareholders from raising actions for Minority Oppression.

While it is agreed that an unqualified right to information should not be given to shareholders, under the present state of affairs the shareholder is left at the mercy of the company with regard to financial information.

It is humbly submitted that minority shareholders require another avenue to gain access to the financial information of the company.

One possible suggestion is that an amendment could be made to the *Act*, giving the shareholders a fettered right to check the financial records of the company if an *AGM* has not been called within the time limit stipulated in the *Act*, and a reasonable period of time has passed.

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[29] *Ibid* at [9].

[30] *Supra* note 2, s 175(4)(a).