

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

No.22 of 1975

O N A P P E A L
 FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

LEE KEE CHOONG

Appellant

- and -

1. EMPAT NOMBOR EKOR (N.S.) SDN BHD
2. EMPAT NOMBOR EKOR BHD
3. LIM CHOOI SENG
4. CHOONG WAH TAT
5. NG MEE FAH
6. LEE KUEN CHIN (f)

Respondents

CASE FOR THE APPELLANT

RECORD

1. This is an appeal from the Judgment and Order of the Federal Court of Malaysia (Gill, C.J., Ali, F.J., and Ong Hock Sim, F.J.) dated respectively the 8th January 1975 and 1st October 1974 which dismissed an appeal by the Appellant from a Judgment and Order of the High Court in Malaya at Kuala Lumpur (Mohammed Azmi J) dated 4th March 1974 whereby he dismissed the Appellant's application for an order that a valuation report of Price, Waterhouse and Company, Chartered Accountants, which had been made in the circumstances hereinafter mentioned, be rejected on the ground that the valuation was wholly erroneous and misconceived

pp.60-67
 pp.53-59

pp.18-21

2. On 5th July 1973 on a petition presented by the Appellant in the High Court in Malaya at Kuala Lumpur (Companies winding up Petition No.3 of 1973), a consent order was made by the Kuala Lumpur High Court whereby it was ordered that all the shares of the Appellant and his brother, Lee Kee Min, in the First Respondent Company (hereinafter called "the Company") be purchased by any or all of the remaining contributories of the Company (who are the other Respondents to this Appeal) "at a fair and just price to be assessed by a firm of independent Chartered Accountants to be approved by the Court."

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pp.1-2

3. By Summons-in-Chambers dated 6th August 1973, the Appellant applied, inter alia, for an Order that Price Waterhouse and Co. be approved to determine the fair and just price of the shares of the Appellant and his said brother as aforesaid, and that Price Waterhouse and Co. be at liberty to have access to all bills, papers, vouchers, accounts and other documents of the Company which they considered relevant for the purpose of carrying out the valuation of the said shares.

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pp.3-5

4. In support of the said Summons, the Appellant affirmed that neither he nor the first Respondent had had any dealings with Price, Waterhouse and Co; and that being completely unknown to all parties concerned and having (as he was informed and verily believed) chartered accountants of long experience and standing, the said firm were suitable to be so approved.

5. Price Waterhouse and Co. were not acceptable to the Respondents, who proposed the firm of Peat, Marwick Mitchell and Co. Nevertheless the Kuala Lumpur High Court on 10th September 1973 made an order in the terms of the Appellant's said Summons-in-Chambers.

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6. By a letter dated 1st December 1973 Price Waterhouse & Co. after referring to the said order of 10th September 1973, informed the Appellant's solicitors that they valued the shares of the Appellant and of his said brother in the Company at 184 Malaysian Dollars per share on the basis of information which they derived from an examination of the following documents:

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(a) The memorandum and articles of association of the Company.

(b) Photocopies of the audited accounts of the Company for the following periods:

(i) Period from 29th January 1969 (date of incorporation) to 31st December 1969.

(ii) Year ended 31st December 1970.

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(iii) Year ended 31st December 1971.

(iv) Year ended 31st December 1972.

- (c) Copy of the unaudited accounts of the Company for the eight months ended 31st August 1973 submitted by the Company's accountant, Mr. Ch'ng Cheng Aun.

7. Price Waterhouse & Co. declined a request from the Appellant that they should give particulars of the basis and mode of their valuation and on 22nd January 1974 another firm of chartered accountants, Robert Lim, Kwong & Co. in a letter of that date to the Appellant's Solicitors, valued the shares of the Appellant and his said brother at 657 Malaysian Dollars per share. They said they had arrived at this figure by valuing the Company as a going concern and their letter started as follows:- "We refer to the interviews we had with your clients and from the information given by them we have made the valuation of their holdings in the Company. Our valuation which is based on the Company as a going concern is subject to the following :-

- (a) substantiation of the information submitted by your clients;
- (b) no material fluctuations in the accounts for eight months to 31st August 1973, as compared to past periods (the 31st August 1973 accounts were not presented to us for examination).
- (c) There are extraordinary matters other than those disclosed to us which would affect our valuation.

The audited accounts presented to us for inspection were the photocopies in respect of the following periods:-

- (2) Period from 29th January 1969 (date of Incorporation) - 31st December 1969;
- (b) Year Ended 31st December 1970
- (c) Year Ended 31st December 1971
- (d) Year Ended 31st December 1972"

8. By a further Summons-in-Chambers dated 4th February 1974 the Appellant applied to the Kuala Lumpur High Court for an order that the valuation of Price Waterhouse & Co. be rejected and that such

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other order be made as to the valuation of the shares as that court might deem fit.

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9. In paragraph 4 of an affidavit dated 2nd February 1974 in support of this further Summons to which he exhibited the above-mentioned valuations by Price Waterhouse and by Robert Lim Kwong and Co., the Appellant stated that he was dissatisfied with the Price Waterhouse valuation for the following reasons:-

- "(a) the said valuation is purported to be based on the audited accounts of the Company the accuracy of which I challenged in the proceedings; 10
- (b) the audited accounts do not show the receipt of the premium for the shares;
- (c) the audited account under the column expenditure also includes the monies paid by the Company to selling agent which should have been treated as part of the profits; 20
- (d) the audited accounts do not show the unclaimed prize monies which should be charged to the profits;
- (e) the independent chartered accountants have refused to disclose the basis of their valuation and it appears that they valued the share on the basis of a winding-up and not as a going concern which should be the proper basis;
- (f) On the basis of a going concern the valuation should be no less than \$6.00 for each share of \$1.00" 30

The reference in (f) above to \$6.00 was a misprint for \$600.

p.12
ls.17-29

10. In his said affidavit the Appellant further stated that in the circumstances he was advised and believed that the Price Waterhouse valuation was "wholly erroneous and misconceived and ought to be rejected" (paragraph 6) and that in order to determine the fair and just price of the shares of the Company "the special audit of the Company's accounts ought to be had and all improper expenditure and bonuses to directors and agents be 40

taken as part of the profits. The premium paid on the shares and the unclaimed prize monies should also be taken to be part of the profits and the shares valued as a going concern."

The Appellant accordingly asked for the Price Waterhouse valuation to be rejected and that the Court should order a special audit of the Company's accounts and for the shares to be valued as a going concern.

10 11. In opposing this application, one Chew Him Fah, the General Manager of the Second Respondent Company (which is the largest shareholder in the Company), stated in an affidavit in answer of 22nd February 1974 that Price Waterhouse and Co. had been appointed as the independent valuers at the insistence of the Appellant, that the Second Respondent Company accepted their valuation, that the accounts on which the Price Waterhouse valuation was based had been duly audited, that 20 neither the Appellant nor his said brother had objected to the accounts which were presented and passed at the annual general meeting each year, and that Robert Lim Kwong and Co. had not stated how they arrived at their valuation of 657 Dollars per share, nor had they given reasons as to why the Price Waterhouse valuation was erroneous. Chew Him Fah also said of paragraph 4 of the Petitioner's affidavit of 2nd February 1974 (referred to in paragraph 9 above) that "the matters 30 alleged therein are irrelevant and have no bearing on the valuation of the shares, and the Petitioner's opinion of the value of the shares cannot be accepted against the opinion of the experts"

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p.18 l.13

40 12. The Appellant's said further summons was heard by Mohammed Azmi J on 4th March 1974. After pointing out that the application was for the Price Waterhouse valuation to be rejected on the ground that it was "wholly erroneous and misconceived", he dismissed the application with costs on the following grounds:

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- (1) Since the appointment of Price Waterhouse and Co. was made at the instance of the Appellant who had vouched for their experience and impartiality, it was unjust that the Appellant should reject their valuation as wholly erroneous and misconceived.
- (2) The Appellant's opinion of the value of the shares could not be accepted against the

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expert opinion of Price Waterhouse and Co., the experts whom he himself had chosen.

- (3) The fact that the valuation made by Robert Lim, Kwong and Co. gave a higher price to the shares did not constitute sufficient ground for allowing the Appellant's application. In the absence of any specific allegation of partiality, or any improper conduct on the part of Price Waterhouse and Co. the Appellant should be bound to accept the valuation of these experts as fair and just.

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13. The Appellant respectfully submits that all of the three above reasons are wrong:-

As to (1) above, there is nothing "unjust" in challenging a valuation as erroneous and misconceived even if the Accountants who made the valuation (whose experience and impartiality is not challenged) were appointed at the instance of the Appellant.

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As to (2) above, the Appellant did not seek to give his opinion as to how the shares should be valued; he only gave reasons (see paragraph 9 above) as to why the Price Waterhouse valuation was erroneous.

As to (3) above, the learned trial judge erroneously held that the valuation of Price Waterhouse was binding "in the absence of any specific allegation of partiality or improper conduct." It is submitted that the true test is that a valuation can be impeached on the grounds of fraud, mistake, miscarriage or wholly erroneous principle. In this connection, the Appellant submits that a highly excessive difference between the price given by two different valuers is sufficient ground for interference.

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14. On 16th March 1974 the Appellant appealed to the Federal Court of Malaysia against the decision of the High Court at Kuala Lumpur. At the hearing of the appeal on 30th September 1974 before the Federal Court (Gill, C.J., Ali, F.I., and Ong Hock Sim J.J.) the Appellant sought to adduce further evidence under Section 69 of the Judicature Act 1964 further to and in amplification of his claim that the audited

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accounts of the Company did not show the receipt of the premiums on the shares (see reason (b) set out in paragraph 9 above). The purpose of adducing this further evidence was to set out the circumstances under which the premiums on the shares were paid. The Appellant had been unable to put this evidence before the Courts below because his case depended on being able to produce the originals of various cheques which he said were relevant to the determination of a fair and just price of the shares in that they confirmed that there was a premium of 200 Malaysian dollars per share which was not stated in the accounts of the Company. The originals of the cheques could only be produced by the issuing of sub-poenas to the officers of the relevant banks and this could not be done because the Kuala Lumpur High Court did not adjourn their proceedings into open court.

p. 50 l.3

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15. By a majority, the Federal Court, it is submitted wrongly, refused to allow the Appellant to adduce further evidence on the grounds that the order appealed from was a final order and not an interlocutory order and that the further evidence was available to the Appellant when the application to set aside the Price Waterhouse valuation was made.

p.52 ls.9-16

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16. On the merits of the Appeal the Appellant contended that the learned High Court Judge had misdirected himself in dismissing the Appellant's application on the three grounds which he had stated and which are set out in paragraph 12 above. The other grounds of appeal were that the Learned Judge failed to attach sufficient importance to the valuation of Robert Lim, Kwong & Co.; that he failed to appreciate the fact that the Price Waterhouse valuation was so inadequately small that it could only have been arrived at on the erroneous principle that the Company was not a going concern; that he failed to appreciate that the audited accounts of the company were inadequate and that the appellant had challenged their accuracy in the Petition for winding-up; and that Price Waterhouse and Co. had erred in principle in basing their valuation on those accounts alone.

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17. On 1st October 1974 the Federal Court of Malaysia dismissed the Appellant's appeal with costs for reasons which were subsequently embodied in a written judgment dated 8th January 1975. After outlining the facts and reviewing the

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relevant authorities, the said judgment stated the Court's reasons for dismissing the appeal as follows:-

p.67 ls.17-
ls.35

"Price Waterhouse did not state in their valuation report the reasons which had led them to arrive at their valuation. There were no directions to them as to whether they were to value the shares on a going concern basis or on the basis of a break-up valuation. There was nothing to suggest on what basis Robert Lim, Kwong & Co. arrived at their very much higher valuation of the shares. The order appointing Price Waterhouse directed that all the relevant accounts and books of the Company were to be made available to them. This was done, and quite clearly their valuation was based on all the accounts, the accuracy of which had never been challenged by the Appellant

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In all the circumstances of the case we could find no justification to go behind the valuation report or allow any further inquiries to be made as to the correctness or otherwise of such valuation."

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18. The Appellant respectfully submits that all the above reasons are wrong because:-

- (a) the Federal Court erred in saying that there was nothing to suggest on what basis Robert Lim, Kwong and Co. arrived at their very much higher valuation of the shares since they stated in their letter of 22nd January 1974, referred to in paragraph 7 above, that they had made their valuation on a going concern basis;
- (b) the Federal Court erred in saying that the accuracy of the accounts had never been challenged by the Appellant having regard to reason (a) set out in paragraph 9 above;
- (c) that in view of the excessive difference between the two valuations the Federal Court failed to draw the irresistible inference that Price Waterhouse and Co. must have based their valuation on a break-up-basis;
- (d) that there was no, or no sufficient, evidence to justify the Federal Court's finding that all the relevant accounts and

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books of the Company had been made available to Price Waterhouse and Co.;

10 (e) that the Price Waterhouse valuation should be set aside because it was apparent on the face of the valuation that it has been made under a mistake and/or on an erroneous principle and/or that there had been a miscarriage of justice because the shares had been valued solely on the basis of the documents there mentioned and without any enquiry into other matters which were relevant in order to arrive at a "just and fair" valuation, including in particular:

(i) whether or not the Company was and was likely to continue to be a going concern

(ii) the current value of the Company's assets

20 (iii) whether in recent years any shares had been issued or transferred at a premium and if so the amount of such premium and how it had been arrived at

(iv) whether any such premium was shown in the Company's audited accounts

30 (v) the extent to which bonuses to the Company's directors and agents and unclaimed prize monies had been debited to profits and whether for the purpose of a share valuation the amounts so debited ought not to have been treated as part of the profits of the Company

40 (f) That in any event as Price Waterhouse and Co. had been appointed to determine a "just and fair" valuation of the shares pursuant to a consent order made on a contributory's petition as an alternative to, and to avoid, a possible winding up of the Company, the Federal Court were wrong in assuming that a just and fair valuation could have been arrived at solely upon the basis of the books and accounts of the Company or otherwise than upon the basis that the Company was and would continue to

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be a going concern

19. The Appellant respectfully submits that this Appeal should be allowed with costs, that the valuation of Price Waterhouse and Co. be rejected and that the case be remitted to the High Court in Malaya at Kuala Lumpur for such other order to be made as to the valuation of the shares as the Court may deem fit for the following among other:

REASONS

- (1) BECAUSE the Trial Judge's three reasons for dismissing the Appellant's application were wrong for the reasons given in paragraph 13 above. 10
- (2) BECAUSE the Court of Appeal's grounds for dismissing the Appellant's Appeal were wrong for the reasons given in paragraph 18 above.
- (3) BECAUSE in view of the marked difference between the respective valuations of Price Waterhouse and Co. and Robert Lim Kwong and Co., the Courts below erred in concluding that the Price Waterhouse valuation could have been made on anything other than a wholly erroneous basis and/or on a break-up basis which in the circumstances of this case could not produce a "fair and just" price. 20
- (4) BECAUSE the Federal Court erred in excluding the further evidence which the Appellant sought to adduce under Section 69 of the Judicature Act 1964. 30
- (5) BECAUSE the judgments and reasons of the Courts below are wrong.

MICHAEL WHEELER

EUGENE COTRAN

No.22 of 1975

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LEE KEE CHOONG Appellant

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BHD
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4. CHONG WAH TAT
5. NG MEE FAH
6. LEE KUEN CHIN (f) Respondents

CASE FOR THE APPELLANT

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