

JUDGMENT SUMMARY

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| Neutral Citation | [2022] ADGMCFI 0009 |
| Case Number | ADGMCFI-2020-015 |
| Name of Case | AC Network Holding Limited & Others v Polymath Ekar SPV1 & Others |
| Judge | Justice William Stone SBS KC |
| Date Issued | 15 November 2022 |
| Catchwords | Shareholders' dispute; "Drag Along" procedure in shareholders' agreement; Whether sale of shares to a bona fide purchaser on arm's length terms; Validity of Drag Along Notice; Inducing breach of contract; Unlawful means conspiracy; Remedies of rectification or damages; Date of assessment of claim; Valuation of company at date of breach; Expert evidence of value; Precedent and English judicial decisions. |
| Cases Cited | <p>Wood v Capita Insurance Services Limited [2017] AC 1173</p> <p>Mansworth v Jelley [2002] EWHC 442 (Ch)</p> <p>Midland Bank Trust v Green, [1981] AC 513 at 528D-G</p> <p>Kawasaki Kishen Kaisa Ltd v James Kemball Ltd [2021] 3 All ER 978 (CA)</p> <p>Allen v Pollock [2020] QB 781 (CA)</p> <p>Kuwait Oil Tanker Co v Al Bader (No 3), [2000] 2 All ER (Comm) 271</p> <p>Meretz Investments NV v ACP Ltd, [2008] Ch 244 (CA)</p> <p>JTS BTA Bank v Ablyazov (No 14), [2020] AC 727</p> <p>Racing Partnership v Done Bros Ltd [2021] Ch 233</p> <p>Al-Nehayan v Kent [2018] 1 CLC 216</p> <p>Alcoa Minerals of Jamaica Inc v Broderick [2002] 1 AC 371, at 377G-378D</p> <p>Johnson v Agnew [1980] AC 367 (at 400H-401B)</p> <p>Smith New Court Securities Ltd v Scrimgeour Vickers Ltd [1997] AC 254 (at 265H-267G)</p> <p>County Personnel (Employment Agency) Ltd v Alan R</p> |

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| | <p>Pulver & Co [1987] 1 WLR 916, at 925-6</p> <p>Bunge SA v Nidera BV [2015] 3 All ER 1082</p> <p>Shanda Games Ltd v Maso Capital Investments Ltd [2020] UKPC 2</p> |
| Legislation and Authorities Cited | Application of English Law Regulations 2015 |
| Executive Summary | <p>This judgment considered a shareholders' dispute regarding a "<i>Drag Along</i>" notice. The Court found the notice invalid because the share acquisition was not made by a bona fide purchaser nor on arm's length terms. The Claimants were awarded damages, assessed at the breach date when the company's value was determined to be US\$3 million. Individual shareholdings would be valued with a minority discount.</p> |
| Overall Summary | <p>Background</p> <p>This Abu Dhabi Global Market ("ADGM") Court of First Instance (Commercial & Civil Division) judgment primarily concerns a dispute between minority shareholders (the Claimants) and majority shareholders (the Defendants) of Ekar Holding Limited ("Ekar"), a car-sharing company. The core issue was whether a "<i>Drag Along Notice</i>" ("Drag Notice") issued on 27 April 2020, which resulted in the compulsory acquisition of the Claimants' shares for a nominal US\$1.00, was valid.</p> <p>Ekar was founded by Mr. Hedberg and Mr. Bhusari in 2015. Ekar was consolidated under Ekar Holding Limited in October 2019, and a Shareholders' Agreement ("SHA") was signed. The Claimants, a group of minority shareholders including AC Network Holding Limited, AC Pool Holding Limited, Khalil Mohamed Binladin, Dalia Khalil Binladin, and Horizon Light Investments LLC, alleged the notice was invalid. The Defendants included Polymath Ekar SPV1, Polymath Ekar SPV2, Vilhelm Nikolai Paus Hedberg, Ravi Nagesh Bhusari, Ali Hashemi, Lux 2 Invco ("Lux"), Clara Formations Limited, and Ekar Holding Limited. Mr. Ali Hashemi was identified as the central figure, effectively controlling Lux and the Polymath entities.</p> <p>The onset of the Covid-19 pandemic severely impacted Ekar's car-leasing business, causing revenue to cease while costs continued, pushing the company to the brink of insolvency with only two weeks of cash remaining by April 2020. Shareholders held urgent meetings in April 2020 to discuss emergency funding. A significant divergence emerged between Mr. Mansour (the CEO of Audacia Capital Limited which wholly owned the First and Second Claimants), who proposed a US\$6 million capital injection, and Mr. Hashemi, who insisted on a minimum of US\$10 million. Mr. Hashemi's proposal passed with the support of Mr. Hedberg and Mr. Bhusari.</p> <p>On 27 April 2020, without warning to the Claimants, the Company Secretary, Mr. Bhusari, with the agreement of Mr. Hashemi and Mr.</p> |

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| | <p>Hedberg, sent the Drag Notice. The notice, issued by Polymath 1 & 2, Mr. Hedberg, and Mr. Bhusari (as "Selling Shareholders"), compelled the Claimants ("Called Shareholders") to transfer all their shares to Lux for US\$1.00. Mr. Hedberg resigned as CEO on 30 April 2020 to ensure his shares were counted towards the majority required for the Drag Notice. Despite the Claimants' immediate protests and legal advice, the transfers were approved and executed on 3 May 2020, effectively extinguishing the Claimants' shareholding.</p> <p>Analysis</p> <p>Validity of the Drag Notice</p> <p>The Court considered several arguments regarding the validity of the Drag Notice and associated claims. The Claimants raised four independent breaches of the SHA.</p> <ol style="list-style-type: none"> 1. Non-compliance with pre-emption provisions (Clause 13): The Claimants argued that the drag-along procedure should first be subject to pre-emption rights. The Court rejected this, finding that Clause 17.10 of the SHA explicitly states that transfers under a duly served Drag Notice are not subject to Clause 13. The Court emphasized applying "<i>business common sense</i>" and reading the contract as a whole, concluding that the drag-along procedure stands "<i>proud of and distinct</i>" from the pre-emption provisions. 2. Lack of prior 75% approval: The Claimants contended that the sale required "<i>Shareholder Majority Consent</i>" (75%) as a "<i>Reserved Matter</i>." The Court dismissed this, agreeing with the Defendants that this requirement applies to actions taken by the Company, not to the exercise of specific shareholder rights like the Drag Along option, which only requires a simple majority (>50%) under Clause 17.1. 3. Mr. Hedberg's entitlement to exercise the Drag Along Option: The Claimants argued Mr. Hedberg's shares could not be included in the majority due to a four-year "<i>lock-in</i>" provision (Clause 10.7). The Court found that Mr. Hedberg's resignation as CEO, though sudden, was genuine and intended to allow his shares to be counted. The restriction ceased upon his resignation, and even if there was a breach, it would not invalidate the Claimants' obligation to transfer their shares. This objection was rejected. 4. Sale not to a bona fide purchaser on arm's length terms: This was the Claimants' most persuasive point. The SHA required the "<i>Proposed Purchaser</i>" (Lux) to be bona fide and the offer to be on "<i>arm's length terms</i>". <ul style="list-style-type: none"> o The Court found that Mr. Hashemi was "<i>running the show and pulling the strings</i>" for Lux, which was a wholly-owned subsidiary of Polymath Holdings, making him effectively "<i>standing on both sides</i>" of the transaction. The Drag Notice was issued without warning and was a "<i>self-serving and cynical</i>" maneuver, calculated to benefit only Mr. |
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| | <p>Hashemi by gaining full control of Ekar and ejecting minority shareholders. The Court concluded Mr. Hashemi did not act in "<i>good faith</i>".</p> <ul style="list-style-type: none"> ○ Regarding "<i>arm's length terms</i>," the Court determined that Lux's offer of US\$1.00 for the entire company was nominal and did not represent its market value, even considering Ekar's financial difficulties. An arm's length transaction implies independent parties, which was not the case here. Therefore, the sale could not be characterized as arm's length. ○ Conclusion on Validity: The Court held that the purported sale of the Claimants' shares was not made to a bona fide purchaser who had made an offer on arm's length terms. Consequently, the Drag Notice served on 27 April 2020 was <i>invalid</i> and constituted a contractual breach by the First to Fourth Defendants. <p>Personal Claims against Mr. Hashemi: The Claimants asserted claims for inducing breach of contract and unlawful means conspiracy.</p> <ul style="list-style-type: none"> • Inducing breach of contract: This tort requires knowledge and intent to induce a breach. The Court found no evidence that Mr. Hashemi knew his actions would cause a breach, noting he had sought and received legal advice from CMS indicating the Drag Notice was lawful. This claim was dismissed. • Unlawful means conspiracy: This tort's requirement for knowledge of unlawfulness is a "<i>dissonance</i>" in English law, and the ADGM Court is not bound by English Court of Appeal precedents. The Court adopted the view that knowledge of unlawful means should be a requirement, or at least that no liability arises if the alleged conspirator believed they were legally entitled to act as they did. As Mr. Hashemi had obtained legal advice and believed his actions were lawful, this claim was also dismissed. <p>Two counterclaims were raised by the Defendants: one for counter-restitution (dismissed as Claimants elected for damages) and another by Ekar alleging the Claimants induced a breach of the Watar SPA (a joint venture agreement). The Court dismissed this counterclaim due to a lack of "<i>cogent evidence</i>".</p> <p>Remedies:</p> <ul style="list-style-type: none"> • Rectification or Damages: The Claimants elected to pursue damages, not rectification, at the conclusion of the hearing. • Date for Assessment of Damage: The Court addressed whether damages should be assessed at the "<i>breach date</i>" (27 April 2020) or the "<i>trial date</i>" (September 2022). The Court agreed with the Defendants that the default "breach-date rule" should apply, rejecting the Claimants' arguments for a trial date valuation. It reasoned that a later date would provide an "<i>undeserved windfall</i>" |
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| | <p>for the Claimants, who had not contributed to Ekar's post-Drag Notice funding or assumed subsequent risks.</p> <ul style="list-style-type: none"> • Valuation of Ekar as at 27 April 2020: The Court weighed the expert evidence from Mr. Cottle (Claimants' expert, using Discounted Cash Flow, valuing Ekar at US\$18.7M to US\$39.8M) and Mr. Davie (Defendants' expert, using transaction comparables, valuing Ekar at nil to US\$2.6M). The Court preferred Mr. Davie's approach as more "realistic and relevant" for a start-up that had never been profitable and was in dire financial straits during the pandemic. It concluded that the notional value of the entire share capital of Ekar as at 27 April 2020 was US\$3 million. • Valuation of Claimants' Individual Shareholdings: The Court determined that individual shareholdings of the Claimants would be valued as minority shareholdings, with a discount, rejecting the Claimants' argument against such a discount. Expert witnesses were directed to reconvene and assess individual shareholdings based on this finding. <p>Conclusion</p> <p>The Court ultimately ruled that the Drag Notice issued on 27 April 2020 was invalid due to the purchase not being made by a bona fide buyer or on arm's length terms. The Court assessed the share capital of Ekar Holding Limited as at 27 April 2020 at US\$3 million. The Claimants, having elected for damages, will receive compensation based on this valuation, with their individual minority shareholdings subject to a discount. Personal claims against Mr. Hashemi for inducing breach of contract and unlawful means conspiracy were dismissed. Similarly, the Defendants' counterclaims were dismissed. The experts were ordered to reconvene and assess the value of the Claimants' individual shareholdings in light of the Court's valuation and the application of a minority discount.</p> |
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This statement is not intended to be a substitute for the reasons of the Court or to be used in any later consideration of the Court's reasons.