STATE OF MICHIGAN

COURT OF APPEALS

MARK METRO, ROBERT F. WARDROP, II, DONALD TURNWALL, and NANCEE L. TURNWALL,

Plaintiffs-Appellants,

v

AMWAY ASIA PACIFIC LTD, NEW AAP LIMITED, STEPHEN A. VAN ANDEL, RICHARD M. DEVOS, JR., DOUGLAS L. DEVOS, and GOLDMAN SACHS & COMPANY[1],

Defendant-Appellees.

UNPUBLISHED
July 20, 2006

No. 258902
Kent Circuit Court
LC No. 03-005836-CZ

Before: Davis, P.J., and Sawyer and Bandstra, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting defendants summary disposition. At the relevant times, plaintiffs were minority shareholders in defendant corporation Amway Asia Pacific (AAP), which was incorporated in Bermuda and which primarily did business in Asia. The individual defendants were directors and controlling shareholders in that company. This case is controlled by Bermuda law. This case arose out of the contemporaneous admission of China into the World Trade Organization (WTO), which event was partially engineered by defendants, and defendants' decision to return AAP entirely to private ownership by forcibly repurchasing plaintiffs' shares pursuant to an amalgamation. The essence of plaintiffs' complaint is that the repurchase price for the shares was unfairly low given AAP's business purpose of direct marketing in China, which was significantly benefited by China's admission to the WTO. In a thorough and well-considered opinion, the trial court dismissed this case pursuant

[1] Plaintiffs conceded that their claims against Goldman Sachs are derivative of their claims against the remaining defendants. Because we affirm the trial court's determination that plaintiffs cannot prevail against the other defendants, it is unnecessary for us to consider any arguments pertaining to Goldman Sachs. "Defendants" refers only to the individual defendants unless otherwise specified.

to MCR 2.116(C)(8), finding that it is not cognizable under Bermuda law. We agree, and we affirm.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion brought under MCR 2.116(C)(8) should be granted only where the complaint is so legally deficient that recovery would be impossible even if all well-pleaded facts were true and construed in the light most favorable to the non-moving party. *Id*., 119. Only the pleadings may be considered when deciding a motion under MCR 2.116(C)(8). *Id*., 119-120. We review de novo as a question of law the determination of Bermuda law. MCL 600.2114a.

The first question that must be answered is whether the statutory remedy provided by Bermuda law, §106(6) of the Companies Act of 1981, is the *exclusive* remedy available to an aggrieved minority shareholder under Bermuda law. Plaintiffs did not attempt to avail themselves of that remedy. The Bermuda courts have not addressed this issue. We agree with the trial court that, if the Bermuda courts were to address the issue, they would find the statutory remedy exclusive.

Corporations are entirely creatures of law with no existence or properties outside the laws under which they are created. *Detroit Schuetzenbund v Detroit Agitations Verein*, 44 Mich 313, 315-316; 6 NW 675 (1880); *Louisville, C & CR Co v Letson*, 43 US 497, 558; 2 How 497; 11 L Ed 353 (1844). At common law, any major corporate alteration or transaction required unanimous approval of all shareholders, which had the effect of permitting a small handful to exercise a potentially crippling veto power over actions the majority perceived as beneficial. *Krieger v Gast*, 122 F Supp 2d 836, 841 (WD Mich, 2000). Many jurisdictions have solved this problem by enacting statutes conferring on the majority of stockholders the power to carry out their desired actions regardless, while simultaneously conferring on the minority the right to dissent from that action and demand the fair value of their stocks, as appraised by the courts, if necessary. *Id*.; see also *Porter v CO Porter Machinery Co*, 336 Mich 437, 454; 58 NW2d 135 (1953); and Fletcher Cyc Corp § 5906.10, pp 337-341 (Perm Ed). However, even between the various states in the United States of America, there is a split of authority whether appraisal is the *exclusive* remedy. Fletcher Cyc Corp § 7165.

Neither the Bermuda courts, nor other Commonwealth courts that the Bermuda courts would follow, have apparently never addressed whether §106 is, in fact, the exclusive remedy for a "shareholder who did not vote in favour of the amalgamation and who is not satisfied that he has been offered fair value for his shares" in that jurisdiction. In lieu of such authority, "when a tort action brought in this State is governed by the common or unwritten law of another State and the latter has not been declared by its courts of last resort with absolute certainty, we determine the rights of the parties according to the *lex fori*.[2]" *Bostrom v Jennings*, 326 Mich 146, 154; 40 NW2d 97 (1949), citing 14 Am Jur, Courts, § 88 (abrogated on other grounds in *Sexton v Ryder*

[2] *Lex fori* means "the law of the jurisdiction where the case is pending." Black's Law Dictionary (8th Ed), p 929.

Truck Rental, Inc, 413 Mich 406; 320 NW2d 843 (1982)). Likewise, if the suit is based on a statute of another jurisdiction, and that statute has not been construed by the courts of that jurisdiction, "we will construe it as we would a like statute of this state." *Id.*

In relevant part, §106 of Bermuda's Companies Act of 1981 provides as follows:

> (3) Each share of an amalgamating company carries the right to vote in respect of an amalgamation whether or not it otherwise carries the right to vote.
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> (4) The holders of shares of a class of shares of an amalgamating company are entitled to vote separately as a class in respect of an amalgamation if the amalgamation agreement contains a provision which would constitute a variation of the rights attaching to any such class of shares for the purposes of section 47.
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> (4A) The provisions of the bye-laws of the company relating to the holding of general meetings shall apply to general meetings and class meetings required by this section provided that, unless the bye-laws otherwise provide, the resolution of the shareholders or class must be approved by a majority vote of three-fourths of those voting at such meeting and the quorum necessary for such meeting shall be two persons at least holding or representing by proxy more than one-third of the issued shares of the company or the class, as the case may be, and that any holder of shares present in person or by proxy may demand a poll.
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> (5) An amalgamation agreement shall be deemed to have been adopted when it has been approved by the shareholders as provided in this section.
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> (6) Any shareholder who did not vote in favour of the amalgamation and who is not satisfied that he has been offered fair value for his shares may within one month of the giving of the notice referred to in subsection (2) apply to the Court to appraise the fair value of his shares.
>
> (6A) Subject to subsection (6B), within one month of the Court appraising the fair value of any shares under subsection (6) the company shall be entitled either—
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> (a) to pay to the dissenting shareholder an amount equal to the value of his shares as appraised by the Court; or
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> (b) to terminate the amalgamation in accordance with subsection (7).
>
> (6B) Where the Court has appraised any shares under subsection (6) and the amalgamation has proceeded prior to the appraisal then, within one month of the Court appraising the value of the shares, if the amount paid to the dissenting shareholder for his shares is less than that appraised by the Court the amalgamated company shall pay to such shareholder the difference between the amount paid to him and the value appraised by the Court.

Plaintiffs argue that the word "*may*," as it is used in §106(6), makes the appraisal remedy permissive. Nothing in the statute *requires* a dissatisfied shareholder to seek appraisal, and §8 of Bermuda's Interpretation Act[3] provides that "'may', in relation to any statutory provision whereby a power is conferred, shall be construed as permissive." Therefore, plaintiffs' construction is indisputably correct. However, plaintiffs take this analysis one step further and argue that, if the remedy is permissive, other remedies must *also* be permitted.

We disagree. The word "may" is generally permissive, but it can be a word of command, depending on the circumstances. *Mull v Equitable Life Assurance Society of the United States*, 444 Mich 508, 519; 510 NW2d 184 (1994); *Fink v City of Detroit*, 124 Mich App 44, 49; 333 NW2d 376 (1983). The permissive meaning of "may" would not apply if "there is anything in the subject or context of the statutory instrument inconsistent with that meaning." Interpretation Act, §20(b). Most significantly, a grant of discretion whether to do one thing does not constitute a grant of discretion to do any other particular thing. The *purpose* behind the statute is a one-to-one exchange of rights, under which the majority shareholders may take otherwise-blocked actions, and the minority shareholders may obtain compensation for their disapproval. "Such statutes are an obvious modification or abrogation of the common law, under which no appraisal rights were available" but under which minority shareholders could exercise "what may be a tyrannical hold upon the corporation." *Krieger*, *supra* at 841.

The Bermuda legislature has not expressed an intent to afford minority shareholders any additional recourse in exchange for giving up their common law right to veto an amalgamation. A recent treatise on the subject of Bermuda corporate law further indicates that §106(6) is the sole remedy available to a minority shareholder who dissents from an amalgamation. Bickley, Bermuda, British Virgin Islands and Cayman Islands Company Law, (2004 ed), §§ 10-6, 10-7, 10-8, pp 227-229. Therefore, plaintiffs only have the right, should they wish to pursue it, to have the Supreme Court of Bermuda evaluate the fair value of their shares and to be paid that value. Under the circumstances, "may" means plaintiffs are entitled to decide for themselves whether they wish to pursue this remedy. It does not mean that plaintiffs are entitled to choose between pursuing this remedy or some other, unspecified remedy.

Plaintiffs rely on several cases from the House of Lords interpreting Section 459 of the Companies Act of 1985.[4] We are unpersuaded. Presuming plaintiffs' experts are entirely correct, they stand for nothing more than the proposition that "the ability to bring an unfair prejudice petition is not a barrier to a shareholder's common law action." Legislatures may enact statutory remedies that by default supplement, rather than replace, the common law unless something else was clearly intended. *Marquis v Hartford Accident & Indemnity*, 444 Mich 638,

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[3] Bermuda's equivalent of Michigan's official rules of statutory construction, MCL 8.3 *et seq*.

[4] "A member of a company may apply to the court by petition for an order under this Part on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part of its members (including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial."

652-655; 513 NW2d 799 (1994). Because §106 was clearly intended to replace a common law framework, but §459 was not, the cases discussing §459 are irrelevant. Under Bermuda law, §106 appraisal by the Bermuda Supreme Court is the exclusive remedy for a minority shareholder aggrieved by a forced purchase by an amalgamating company of shares at a price the shareholder perceives as unfair.

We further note that, even if §106 was nonexclusive under Bermuda law, plaintiffs still could not prevail on their claims for breach of fiduciary duty. Section 97 of Bermuda's Companies Act of 1981 only establishes that officers owe a duty to the company, with no mention made of any other obligees. Plaintiffs concede that the leading case on the matter in the Commonwealth and particularly in Bermuda is *Percival v Wright* [1902] 2 Ch 421, which has never been overruled in Bermuda, and which stands for the principle that corporate directors only owe duties to the company, not to the individual shareholders. Bickley states that in Bermuda, "[d]irectors are responsible to the company, not to individual shareholders," citing *Percival*. Bickley, *supra* at § 7-03. Plaintiffs argue that, if presented with the question, the Bermuda courts would look to the persuasive precedent elsewhere in the Commonwealth and overrule *Percival*. There is some Commonwealth authority on which Bermuda could rely in crafting an *exception* to the rule in *Percival*. However, presuming Bermuda would choose to do so, we can find nothing suggesting that the general rule would be overruled entirely.

The leading criticism of *Percival* is found in *Coleman v Myers* [1977] 2 NZLR 225, a New Zealand case. *Coleman* was approved of in *Re Chez Nico (Restaurants) Ltd* [1992] BCLC 192, and in *Brunninghausen and Another v Glavanics* [1999] 32 ACSR 294. The *Coleman* court opined that *Percival* had been wrongly decided, but it noted that its rule was still applicable in the Commonwealth. *Coleman* declined to apply *Percival* on the ground that the facts of that case warranted an exception to stare decisis. *Re Chez Nico* and *Brunninghausen* also both concluded that *Percival* was still the leading authority, but they reasoned that an exception should exist under "special circumstances." The "special circumstances" require corporate directors to possess unique knowledge that was not readily accessible to the shareholders, that they obtained through their positions, and that would materially affect the price of shares in the company. If those "special circumstances" existed, the directors would then owe a fiduciary duty to the shareholders to refrain from profiting from that knowledge to the shareholders' detriment.

The facts of this case do not give rise to those "special circumstances," even if Bermuda adopted this hypothetical exception. The gravamen of plaintiffs' claim of breach of fiduciary duty is that defendants allegedly took three simultaneous actions: first, they engineered events so that China's entry into the WTO would coincide with the amalgamation; second, they concealed from plaintiffs the effect China's entry would have on AAP's share prices; and third, they used the amalgamation to lock AAP's share prices at an unfairly low price. The most significant allegation is that defendants withheld from them critical information about how China's entry into the WTO would affect AAP's profitability and, as a consequence, the "fair" price of AAP's shares. This allegation is untenable for several reasons.

First, it is a matter of long-standing public knowledge that WTO membership obligates members to provide relatively unimpeded market access for the benefit of other member nations. AAP was dedicated in large part to selling products in China, but it was precluded from doing so by local legal restrictions that would necessarily be removed on entry into the WTO. It would be obvious to a casual investor that AAP's profitability would likely be affected. But at the same

time, it defies logic to presume that the impact could be precisely predicted. AAP's sales method was banned in China due to "the demands of Chinese citizens," so there would be no guarantee AAP would actually see a significant increase in sales. Increased competition for the sales market in China could limit profitability. Defendants simply could not have predicted with certainty *how* much of an increased profit AAP would make after China's entry into the WTO. Plaintiffs' allegations that defendants withheld critical information must fail because the information either was public and readily accessible, or it was unknowable by anyone. Therefore, plaintiffs have not pleaded facts sufficient to bring them within the scope of the hypothetical exception to *Percival*.

Under Bermuda law, appraisal of a fair share price by the court pursuant to §106(6) was plaintiffs' exclusive remedy. Because plaintiffs failed to avail themselves of that remedy, they cannot maintain this cause of action. Even if §106(6) was nonexclusive, defendants did not owe plaintiffs a fiduciary duty under Bermuda law. And even if Bermuda relied on Commonwealth precedent to adopt an exception to the general fiduciary duty rule, the "special circumstances" required for such an exception do not exist here.

Affirmed.

/s/ Alton T. Davis
/s/ David H. Sawyer
/s/ Richard A. Bandstra