IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT No. C.L. H. 047 of 1989

BETWEEN	RAYMOND HADEED	PLAINTIFF
A N D	DONOVAN CRAWFORD	FIRST DEFENDANT
A N D	KENNETH SHERWOOD	SECOND DEFENDANT
A N D	NEVILLE ROCHE	THIRD DEFENDANT
A N D	KENNETH BROWN	FOURTH DEFENDANT
A N D	CENTURY NATIONAL BANK	FIFTH DEFENDANT

Dr. L. Barnett and A. Dabdoub for Plaintiff

D. Scharschmidt and Andrew Rattray for 1st 3rd and 4th Defendants

W. Chin-See, Q.C., and John Vassell for 2nd Defendant

Miss Hillary Phillips and Mrs. Denise Kitson for 5th Defendant

Tried: 12th May, 1989

CHESTER ORR J.

JUDGMENT

Miss Phillips for the 5th Defendant has taken a preliminary objection that the plaintiff has no locus standi. The Attorneys for the other defendants support the objection. The objection is now confined to the summons before me.

A brief history of the matter is apposite.

The plaintiff as also the 1st and 2nd defendants are shareholders and Directors of the 5th defendant, a public company carrying on the business of a Commercial Bank.

The 3rd defendant is a Director and employee of the company.

Article 81 of the Articles of Association of the company provides that the number of Directors shall be determined by the company in General meetings from time to time, and until so determined, shall be not less than two nor more than seven.

Article 99 gives the Directors power to appoint Directors. There is a dispute concerning ownership of shares in the company.

On the 8th March, 1989 the plaintiff obtained an Injunction

restraining Musson (Jamaica) Ltd., from transferring 30,000 shares to any other person than the plaintiff.

On the same day, the first defendant obtained a similar Injunction against Musson(Jamaica) Ltd. in respect of 30,000 shares and also restraining Mr. Blades a Director from inter alia, participating in any action calculated to change the composition of the Board of Directors before the registration of the shares in the name of the first defendant.

On the 14th March, 1989, the Directors with the exception of Mr. Blades, at a meeting of the Board, purported to elect the fourth defendant, Mr. Brown to the Board of Directors and removed Mr. Henriques as Chairman and appointed the first defendant, Mr. Crawford in his stead. The plaintiff alleges that no notices were given of the intention to make these appointments.

The basis of the objection is that the plaintiff's case does not fall within any of the exceptions to the rule in Foss v Harbottle.

It was submitted that the plaintiff does not claim an infringement of a personal right, does not allege a fraud on the minority by the majority, the acts complained of are not ultra vires the company, the action was not a derivative action and that the company was the proper plaintiff.

The matters complained of viz, the election of a Director and replacement of the Chairman were provided for in the Article and even if done in an irregular manner, were matters of internal administration.

Dr. Barnett submitted that the plaintiff was not precluded from bringing the action. The rule in Foss v Harbottle has been subjected to qualifications, expanding exceptions and reformations.

If the action taken constitutes an abuse of power or is not in the bona fide interest of the company, or leads to a situation in which the justice requires, a shareholder can seek the assistance of the Court.

In the instant case the plaintiff sought relief on the basis of bad faith, improper motive, breach of the company's regulations and of his contractual rights as a member. He submitted that the plaintiff had a personal claim as well as a right to bring a derivative action.

Several authorities were cited and reference made to various text books, all of which I have considered.

In this case, the plaintiff has no personal right which he seeks to vindicate. He himself has not been removed as a Director nor does he allege that he suffered any loss as a result of the actions of the Directors.

The dictum of James, L.J. in MacDougall v. Gardiner 1875 1 Ch 13 at 22 is applicable to this case -

> "Everything in this bill, as far as I can see, if it is wrong is a wrong to the company, because every meeting that it called must be for some purpose or other - it must be for the purpose of doing or undoing something which is supposed to accrue for the benefit of the company. Whether it ought to have been done, or ought not to have been done, depends upon whether it is for the good of the company it should have been done, or for the good of the company it should not have been done; and, putting aside all illegality on the part of the majority, it is for the company to determine whether it is for the good of the company that the thing should be done, or should not be done, or left unnoticed.
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> The whole question comes back to a question of internal management; that is to say, whether the meeting ought or ought not to be held in a particular way, whether the directors ought or ought not to have sanctioned certain proceedings which they are about to sanction, whether one director ought or ought not to be removed, and whether another director ought or ought not to have been appointed."

The learned authors of Palmer's Company Law, 24th Ed. state at at par. 65-11.

> "There are dicta in the cases from the earliest times that there may be a further exception of a very general nature to the rule in Foss v Harbottle, namely that the rule will be relaxed where the interests of justice so require. This suggested exception seems to have been made the basis of the decision of Vinelott J. in Providential Assurance Co. Ltd. v Newman Industries (No. 2) but the Court of Appeal in that case stated (in a dictum since the suit was no longer a derivative one) that "it was not convinced that this exception is a practical test."

I decline to apply this test to the instant case.

The plaintiff has failed to establish that the action falls within the proper boundaries of the exception to the rule in Foss v Harbottle.

The preliminary objection is upheld and the summons dismissed.

Costs to defendants. Certificates for Counsel.

Leave to Appeal granted.