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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.
>
> 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.

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IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 169/88//

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA

VS.

CURTIS LAMBERT

Mr. D. Chuck for applicant

Mr. Lloyd Hibbert for Crown

April 17 & May 15, 1989

MORGAN, J.A.:

On 21st July, 1988 at the Clarendon Circuit Court, May Pen before Bingham, J. and a jury the applicant was convicted of the murder of Dwight Cousins and sentenced to death. We refused his application for leave to appeal that conviction and promised to give our reasons later, as is the present practice in respect of convictions for murder.

The facts are these. One Donald Brown and a friend were standing on the road at Race Course, Clarendon, opposite a bar on the night of 1st July, 1987 at approximately 8:00 p.m. The deceased rode a bicycle passing them at a distance of about two chains. Brown called to the deceased who turned around his bicycle and rode towards them, riding in the middle of the road. The applicant then appeared from behind a light post, held the deceased at the back of the neck with his right hand and stabbed him in his back using a sharp long knife which he held in his left hand. The deceased, who was unarmed, fell from his bicycle bawling out "Jesus Christ me dead. Skipper stab me, mi a go dead". The applicant attempted to stab the

deceased a second time as he lay on the ground but the witness Donald and his friend rushed at him whereupon the applicant ran. They chased him for some distance, but he evaded them.

The supporting witness, Trevor Brown, not only recounted a similar account of the stabbing but said that he saw the applicant standing alone by a telegraph pole, with his hands behind him, prior to the incident and saw him emerge from behind that post when he stabbed the deceased. He pointed out to the Court the distance he stood from the deceased which was estimated at twelve feet.

Dr. Bhatt, who performed the post-mortem examination on the body, found a single stab wound 1" by ½" on the lower back and concluded that death was due to shock and haemorrhage as a result of this injury.

The applicant in his defence said he went out to sea to fish that evening at 5:00 p.m. with two other men and did not return until 6:00 a.m. He called a witness in support.

The single issue in the case was that of identification. It was accepted that both witnesses and accused knew each other well for a period of fifteen to twenty years as they had all attended the same school. As to the lighting, there was evidence of a hundred-watt light bulb on the piazza of the bar and light which emanated from a house facing the bar some fourteen yards from the incident. In fact, defence Counsel elicited from the witness in cross-examination that it was moonshine - full moon and that he saw the face of the applicant for about five minutes. Such evidence of identification indicated that there was sufficient opportunity for the witnesses to see and make out the applicant who was well known to them. The learned trial judge directed the jury in more than ample terms on the issue of identification and having pointed out the strength of the evidence adduced, also indicated the weaknesses in that there were areas of differences between both eye-witnesses, thereby indicating that they had to satisfy themselves that the witnesses were credible. These areas were where Donald said that

one other person only was present and that he did not see Trevor, whereas Trevor said that he saw Donald and two other persons. These were not unresolved discrepancies as Trevor explained that the third person was standing away from Donald. It was also for the jury to conclude that Trevor was indeed there but Donald did not see him.

There is no basis on which the direction could be faulted and this was acknowledged by learned Counsel who appeared for the applicant.

We have ourselves examined the evidence adduced and think the verdict fully supported the evidence.

In the circumstances the application for leave to appeal was refused.