

8: 12.94



IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CAUSE NO: 271/92

ORDERS

BETWEEN :

KLAS SUNE GUNNAR JONASSON
(on behalf of himself and all other shareholders of Rio Number Two Ltd. and Rio Number three Ltd. except First, Second, Third and Fourth Defendants)

CIRCULATE AND	
DATE	BY
23/12	MU
25/2	GA
23/12	GA
10/1	GA
9/2	MBC.
14/2	SAW
FOR ACTION	

- (1) STURE INGEMAR SVANSTROM
- (2) STIG HERMAN SANNE
- (3) JAN-OTTO BENGT BERGLJUNG
- (4) JAN TADEUSZ KOLODZIEJ
- (5) TIGRIS MARINE LTD
- (6) EUPHRATES MARINE LTD
- (7) RIO NUMBER TWO LT
- (8) RIO NUMBER THREE LTD
- (9) CAMPBELL, NOMINEES LIMITED
(as registered holder of shares held as nominee for the first, Second, Third, and Fourth Defendants in the Seventh and Eight Defendants)

- (10) CAMPBELL NOMINEES LIMITED
(as registered holder of shares held as nominee for Klas Sunne Gunnar Jonasson in the Seventh and Eighth Defendants)

Mr. Antonio Bueno Q.C. with Mr. Timothy Shea for the applicants/defendants 1 to 8.

Mr. Leo-Rhynie Q.C. with Mr. Alden McLaughlin for the plaintiffs/respondents.

Defendants 9 and 10 do not appear.

Schofield J.



This is an application to strike out the action pursuant to rule 41 of the Grand Court (Civil Procedure) Rules and / or under the inherent jurisdiction of the Court. The application is based on a narrow point, it being contended by the defendant that the plaintiff has no locus standi to bring the action.

The plaintiff is the beneficial owner of 15.11% of the shares of Rio Number Two Ltd and Rio Number Three Ltd (defendants 7 and 8). Defendants 1 to 4 are the directors of those two companies and between them beneficially own 51.02% of the companies' shares. Campbell Nominees Ltd (CNL), who have been named as defendants 9 and 10, are the registered members and thus the legal owners of all the shares in the companies, including those beneficially owned by the plaintiff. The plaintiff claims-wrong doing by defendants 1 to 4 arising out of certain transactions relating to two vessels and he also contends that profitable charters and contracts were wrongfully diverted from defendants 7 and 8. The plaintiff brings the action on behalf of himself and all other shareholders of Rio Number Two Ltd and Rio Number Three Ltd and he asserts his claim on behalf of the two companies. This is therefore a derivative action.

Where a wrong has been done to a company prima facie the proper plaintiff is the company itself. However a plaintiff may bring a derivative action if it falls within certain exceptions to this rule. This was laid down in Foss v Harbottle (1843) 2 Hare 461. As was stated by the English Court of Appeal in Prudential Assurance Co. Ltd. v Newman Industries Ltd and others (No2) [1982] 1Ch 210-21

The classic definition of the



rule in Foss v Harbottle is stated in the judgment of Jenkins L.J. in Edwards v Halliwell [1950] 2 All E.R. 1064 as follows. (1) The proper plaintiff in an action in respect of a wrong alleged to be done to a corporation is, prima facie, the corporation .

(2) Where the alleged wrong is a transaction which might be made binding on the corporation and on all its members by a simple majority of the members, no individual member of the corporation is allowed to maintain an action in respect of that matter because, if the majority confirms the transaction, cadit quaestio; or, if the majority challenges the transaction, there is no valid reason why the company should not sue (3) There is no room for the operation of the rule if the alleged wrong is ultra vires the corporation, because the majority of members cannot confirm the transaction. (4) There is also no room for the operation of the rule if the transaction complained of could be validly done or sanctioned only by a special resolution or the like, because a simple majority cannot confirm a transaction which requires the concurrence of a greater majority. (5) There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case the rule is relaxed in favour of the aggrieved majority, who are allowed to bring a minority shareholders' action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their



grievance could never reach
the court because the
wrongdoers themselves, being
in control, would not allow
the company to sue.

In the instant case the plaintiff alleges that the wrongdoers are in control of the company. His problem is that CNL, the registered owner of the shares, refuses to take any action in relation to the wrong doing and has declined to bring these proceedings in its name. In an attempt to properly constitute these proceedings the plaintiff has joined CNL as a defendant. The short point taken by the defendants 1 to 8 is that, the registered shareholders not having chosen to bring this derivative action, it is not permissible for the beneficial owner to do so. It is argued that it is a cardinal principle of Cayman company law that a company ought not to be concerned with any beneficial or security interest behind its shares. Section 37 of the Companies Law (Revised) says:

"37 The subscribers of the memorandum of association of any company shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company shall be entered as members on the Register of members hereinafter mentioned, and every other person who has agreed to become a member of a company and whose name is entered on the register of members, shall be deemed to be a member of the company.



For good measure Article 11 of the Articles of Association of Rio

Number Two Ltd and Rio Number Three Ltd (being in the same terms) read :-

"Except as required by law, no person shall be recognized by the Company as holding any shares upon any trust, and the Company shall not be bound by or be compelled in any way to recognize (even when having notice thereof) any equitable, contingent, future or partial interest in any share or any interest in any fractional part of a share or (except only as by the Articles or by law otherwise provided) any other rights in respect of any share except an absolute right to the entirety thereof in the registered holder or in the case of a share warrant in the bearer of the warrant for the time being."

Mr. Bueno for defendants 1 to 8 (very persuasively argued) that the action should be struck out because the plaintiff, the mere beneficial owner as opposed to the registered owner of shares in the two companies, was not competent to bring the action in that he had no locus standi: He cited three Australian authorities of Maas and anor v McIntosh and others [1987] 28 SR (NSW) 441, Hooker Investments Pty-Ltd v Email Ltd and ors (1986) 10 A.C.L.R. 443, and Fulloon and anor v Radley and ors (1991) 9 A.C.L.C. 1,434 to support his contention.

However we have our own Court of Appeal decision of Schultz v Reynolds and Newport Ltd 1992 -1993 CILR 59 in which Zacca P. and Georges J.A. (Kerr J.A. concurring) both stated that in a case where the registered shareholder of a company refuses to bring a derivative action the



beneficial owner of the shares is entitled to bring the action if he joins the registered shareholder as a defendant. The head-note of the report adequately states the facts:-

The appellant brought an action against the first respondent in the Grand Court for breach of trust. The appellant alleged that D had agreed to pay her US\$500,000 for certain business services she had performed for him. A company (the second respondent) was formed and the money deposited in an account in its name at the Canadian Imperial Bank of Commerce ("CIBC"). The shares in the Company were held by a nominee shareholder Commerce Management Services ("CMS"), jointly for the benefit of the appellant and D. CMS, wholly-owned subsidiary of CIBC, managed the affairs of the new company, the directors of which were the first respondent (a trust officer with CIBC) and four other local employees of CIBC. They were also the subscribers to its memorandum of association. The first respondent explained that the purpose of this arrangement was to ensure that, should the appellant predecease D, any sums to the credit of the account would accrue to him but as long as she was alive the funds would be hers and under her control. Nonetheless the printed nominee agreement form allowed "any one/all of the beneficial owners" to authorize the transfer of the shares.

The appellant suspected that



the money was no longer in the account and discovered that the first respondent, acting on instructions from D, had transferred the money to another account in D's name. She brought the present proceedings on behalf of the company against the first respondent for breach of trust and, since it was a derivative action, she also named the company as a defendant.

The first respondent applied for the action to be struck out on the grounds that the appellant had no locus standi and her statement of claim disclosed no cause of action. The Grand Court (Malone, C.J.) held that there was an arguable case that she was entitled to sue on the company's behalf but nevertheless struck out the statement of claim for disclosing no cause of action.

The plaintiff in that case had to overcome two obstacles, namely that she was not the registered owner of the shares in the company which was the proper plaintiff, being the beneficial owner of them only, and further that she was one of two joint beneficial owners and had failed to join her co-owner. The Court of Appeal held that the plaintiff overcame neither obstacle and that she had no locus standi to bring the action.

After quoting a passage from Great W. Ry. Co. v Rushout (1852), 5 DeG) (a) and Sm 290 Zacca P. had this to say:

The Companies Law (Revised) recognizes only members who



are registered. The appellant has no voting rights and as a beneficial owner of the shares has no rights under the Law. The instant case can therefore be distinguished from the Great W. Railway case.

In my view it is only CMS, the registered shareholders of Newport Ltd, who can institute an action against Newport Ltd. The appellant as a beneficial owner of the shares, is not entitled to bring a derivative action against Newport Ltd.

Another hurdle for the appellant is that she is a joint beneficial holder of the shares with Dupre. She must therefore act jointly with Dupre and cannot pursue the action on her own. In *Williams v British Gas Corp.* (1980)41 P.C.R.106) it was held that one of two joint tenants cannot commence proceedings without the aid of the other.

Again, in *Re Exchange Travel (Holdings) Ltd* ([1991] BCLC728) it was held that joint shareholders could only act together. Does not link to any decision the judge had to make. Only CMS needed to be a plaintiff not Dupre. Obviously they would not consent to be joined as plaintiffs. The learned Chief Justice was therefore in error in holding that there was an arguable case as to the appellant's right to bring this action. No reliance should have been placed on the case of *Bagshaw v Eastern Union Ry Co.* (1849) 7 Hare 114).

Georges J.A. in a supporting judgment said:-



The Chief Justice rejected the submission that the appellant had no locus standi. He relied on a statement in *Bagshaw v Eastern Union Ry Co.* (1) that the holder of a "scrip" in a company had an "inchoate right to become a registered holder of the perpetual stock" and for that reason could sue on its behalf. It was emphasized in that case (7 Hare at 130, 68 E.R. at 53) that it was not argued that-

"the holders of scrip certificates in the perpetual stock had not such an interest in the application of the capital of the company as was necessary to enable them to maintain a bill properly framed, to prevent a misapplication of the capital of the company."

The only issue was whether such persons could represent both scrip holders and holders of regular stock. The statement was, therefore, obiter and was made without the benefit of argument.

There is some further support in *Stena Fin. BV v Sea Containers Ltd.* ([1989] LRC (Comm)641) In that case, however, the plaintiff had become a registered shareholder by the date of hearing. The authority cited, *Great W. Ry. Co. v Rushout* (10), had decided that the beneficial owner of shares could sue if he joined the registered shareholder as a defendant.

In this case, however, there is an additional complication. The plaintiff, though a beneficial owner, is a joint beneficial owner with Dupre. It is clear law that although



as between themselves joint tenants and joint owners had separate rights, as against everyone else they were in the position of a single owner. There was absolute unity between them. Together they formed one person and could not commence proceedings without the aid of the other or others. As regards joint shareholders this principle was recently restated by Harman, J. in *Re Exchange Travel (Holdings) Ltd* (7)(1991) BCLC at 735) to the effect that-"joint tenants of a share are joint covenanters and can only act together...."this suit is, therefore, not properly constituted in the absence of CMS and Dupre as plaintiffs. Neither would, of course, consent to be joined as plaintiffs. Consequently, they should have been named as defendants.

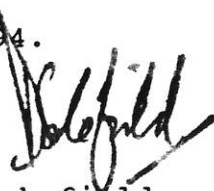
Mr. Bueno argued that in the circumstances of that case, where the plaintiff had joined the registered shareholder neither as plaintiff nor defendant the statements of their Lordships that the registered owner of the shares should have been joined as a defendant were obiter. He also argued that the case of Great W. Ry Co. v Rushout is not authority for the proposition that the beneficial owner of shares could sue in a derivative action if he joined the registered shareholder as a defendant. It was a decision, he argues, which was made very much on its own peculiar facts and is not authority for the general proposition which seems to have been extracted from it.

However attractive I may find Mr. Bueno's arguments Georges J.A.



particularly, stated the proposition that a minority shareholder seeking to bring a derivative action may do so if he falls within the exception to the rule in Foss v Harbottle and joins the registered shareholders as defendants if they refuse to take action themselves with such force that I do not consider that it is for me to say other than it represents the state of the law in Cayman at the present time. That being so I dismiss the application with costs.

Dated this 8th day of December, 1994.



D. Schofield
Judge

