BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.8 OF 2003

BETWEEN:

[1] PUSSERS LIMITED
[2] CHARLES S. TOBIAS

Appellants

and

CITCO BANKING CORPORATION N.V.

Respondent

Before:

The Hon. Mr. Brian Alleyne, SC — Justice of Appeal
The Hon. Mr. Michael Gordon, QC — Justice of Appeal
The Hon. Mr. Ian D. Mitchell, QC — Justice of Appeal [Ag.]

Appearances:

Mr. Paul Webster, QC with Ms. Vanessa King for the Appellants
Mr. Sydney Bennett, QC with Mr. Richard Rowe for Respondent

2004: June 11;
September 20.

JUDGMENT

[1] GORDON, J.A.: Pussers Limited, the first Appellant, (hereinafter Pussers) is a limited liability company incorporated in the British Virgin Islands. In March 1994, the relevant time for the purposes of this judgment, Pussers had just under 50 shareholders and voting warrant holders holding between them 1,921,217shares and warrants (248,000 share warrants) of $1.00 par value.

[2] On the 4th March 1994 there was held an Annual General Meeting of Pussers at which were present in person or by proxy 1,532,712 shares and voting warrants or 79.8% of the total entitled to vote. At that meeting, two resolutions among others, were proposed and passed, the first to alter the Articles of Association of Pussers

to authorise the creation of 200,000 of Class B ordinary shares similar in all respects to the ordinary class A shares of the company save that each class B share "shall possess fifty votes at any general meeting of the shareholders of the company", and the second to convert "200,000 shares of the Class A ordinary shares of the company owned or controlled by the Chairman of the Company, Mr. Charles Tobias [the second Appellant] ….into 200,000 shares of the new class B ordinary shares of the Company".

[3] At the very meeting at which those resolutions were passed a Mr. Fred Cuppy, who had earlier been elected as a director of Pussers, raised the question of whether the two resolutions which had been passed were properly before the meeting, since notice of them had not been included in the notice convening the meeting and the resolution or the purport thereof was not known to shareholders at the time they gave their proxies to permit others to vote in their stead at the meeting. As a result Pussers sent out a notice of an Extraordinary General meeting of shareholders to ratify and confirm the resolution adopted at the meeting of March 4th, 1994.

[4] That extraordinary General Meeting was duly held on March 16, 1994 and at that meeting there were present 1,371,104 shares and voting warrants out of the same total as above, or 71.37 percent of the shares and voting warrants entitled to vote. The resolution was put to the meeting and the minutes record that of the votes cast, 86.2 per cent voted in favour of the resolution.

[5] The Respondent was at the relevant time the holder of 172,729 class A ordinary shares in Pussers. The Respondent felt aggrieved by the amendment of the Articles of Association and some eight months later filed a Writ of Summons and subsequently a Statement of Claim. In the Statement of Claim the Respondent pleaded that the resolutions were not passed bona fide for the benefit of Pussers, but rather in the interests of the second Appellant and that the resolutions were oppressive of the Respondent. In the prayer of the Statement of Claim the

Respondent sought "A Declaration that the Resolutions purportedly passed at the Extraordinary General Meeting of the Company held on March 16 1994 were oppressive of the Plaintiff (Respondent) and all the other holders of Class A ordinary shares in the Defendant Company (Pussers)". The prayer further sought certain ancillary orders flowing directly from the Declaration prayed for.

[6] At the trial the Respondent advanced the argument that the procedure followed by Pussers in the passing of the Resolution on March 16, 1994 was defective. The learned trial Judge appears to have entertained the argument by the Respondent on this issue, though based on the pleadings I would not have, but found that the Resolution was passed with proper attention to form and procedure. As the Respondent has not filed a counter-notice in this appeal, little more need be said about this.

[7] The Appellants have raised 11 grounds of appeal in their belt and braces approach. However, the point at issue in this case is a narrow one, though its determination is of significant effect on corporate governance.

[8] I start by drawing a distinction between the actions of directors and the shareholders of a company in the context of the exercise of their powers. In Howard Smith Ltd v Ampol Petroleum Ltd[1] Lord Wilberforce said the following at page 837E:

> "The constitution of a limited company normally provides for directors, with powers of management, and shareholders, with defined voting powers having power to appoint the directors, and to take, in general meeting, by majority vote, decisions on matters not reserved for management. Just as it is established that directors, within their management powers, may take decisions against the wishes of the majority shareholders, and indeed that the majority of shareholders cannot control them in the exercise of these powers while they remain in office (Automatic Self-Cleansing Filter Syndicate Co. Ltd. v. Cuninghame [1906] 2 Ch. 34), so it must be unconstitutional for directors to use their fiduciary powers over the shares in the company purely for the purpose of destroying an existing majority, or creating a new majority which did not previously exist. To do so is to

[1] [1974] A.C. 821

> interfere with that element of the company's constitution which is separate from and set against their powers."

[9] If I might paraphrase, a director's duty is fiduciary whereas a shareholder is entitled to act from self-interest. Gower's Principles of Modern Company Law[2] puts it thus:

> "Scattered throughout the reports are statements that members must exercise their votes 'bona fide for the benefit of the company as a whole', a statement which suggests that they are subject to precisely the same rules as directors. But it is clear that this is highly misleading, and that the decisions do not support any such rule as a general principle. On the contrary it has been repeatedly laid down that votes are proprietary rights, to the same extent as any other incidents of the shares which the holder may exercise in his own selfish interests even if these are opposed to those of the company"

The same concept was expressed in Peter's American Delicacy Co Ltd v Heath[3], an Australian case, in these terms:

> "The power of alteration [of Articles] is not fiduciary. The shareholders are not trustees of one another, and unlike directors, they occupy no fiduciary position and are under no fiduciary duties. They vote in respect of their shares, which are property, and the right to vote is attached to the share itself as an incident of property to be enjoyed and exercised for the owners personal advantage."

[10] A shareholder's entitlement to act from self interest is, however, not an unrestricted right, or to put it another way, a majority may not trammel rough-shod over a minority. The original statement of the principle involved came in Allen v Gold Reefs of West Africa Limited[4] per Lindley M.R.

> "The power thus conferred on companies to alter the regulations contained in their articles is limited only by the provisions contained in the statute and the conditions contained in the company's memorandum of association. Wide, however, as the language of section 50 is, the power conferred by it must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must also be exercised…bona fide for the benefit of the company as a whole"

[2] 4th Edition at page 614-615
[3] (1939) 61 CLR 457
[4] [1900] Ch 656 at p.671

[11] A degree of confusion has arisen in the cases subsequent to the Gold Reef case which, in my view, has arisen due to the Courts initially taking Lindley M.R.'s statement "bona fide for the benefit of the company as a whole" as a positive requirement rather than one negative test. As Dixon J said in the American Delicacy Co case "The reference to 'benefit as a whole' is but a very general expression negativing purposes foreign to the company's operations, affairs and organizations".

[12] The Courts have struggled to refine and define the limits of the test as laid down by Lindley M. R. For example, in Shuttleworth v Cox Bros.& Co.(Maidenhead) Ltd et al[5] Bankes L.J said:

> "So the test is whether the alteration of the Articles was in the opinion of the shareholders for the benefit of the company. By what criterion is the Court to ascertain the opinion of the shareholders upon this question? The alteration may be so oppressive as to cast suspicion on the honesty of the persons responsible for it, or so extravagant that no reasonable men could really consider it for the benefit of the company. In such cases the Court is, I think, entitled to treat the conduct of the shareholders as it does the verdict of a jury, and to say the alteration of a company's articles shall not stand if it is such that no reasonable men could consider it for the benefit if the company".

And again in Crumpton v Morrine Hall Property Ltd[6].

> It seems to me that the truth is that the courts in each generation or in each decade have set up a line up to which shareholders have been allowed to go in affecting the rights of other shareholders by alterations of Articles of Association, but beyond which they have not been allowed to go. It seems to me that no amount of legal analysis or analytical reasoning can conceal the fact that the decision has in the past turned, and must turn ultimately, on a value judgment formed in respect of the conduct of the majority – a judgment formed not by any strict process of reasoning or bare principle of law, but upon the view taken of the conduct."

[5] [1927] 2 K.B. 9
[6] (1965) NSWR 240

And finally the acknowledgment of defeat in this regard was enunciated in Clemens v Clemens Bros Ltd and another[7] where Foster J sitting in the Chancery Division said:

> "I have come to the conclusion that it would be unwise to try to produce a principle since the circumstances of each case are infinitely varied. It would not, I think assist to say more than that in my judgment Miss Clemens is not entitled as of right to exercise her votes as an ordinary shareholder in any way she pleases. To use the words of Lord Wilberforce, that right 'is…subject to equitable considerations…which may make it unjust...to exercise [it] in a particular way.'"

[13] Learned Queens Counsel for the Respondent urged the Court to uphold the reasoning of the learned trial Judge when he held at paragraph 46 of his judgment:

> "While it is understandable that it may be desirable that superior voting power be conferred to preserve confidence in management in my view the measure went too far to the extent of being extravagant. It is not within my purview to speculate what formula would fall short of oppression suffice it to say that the resolution fails to pass the test of being bona fide for the benefit of the company as a whole".

[14] In this case the reason offered at the Annual General Meeting and at the Extraordinary Meeting by the second Appellant for seeking the passage of the complained of resolution, as recorded in the Minutes of that meeting were three in number. Firstly, the Chairman of the meeting, the Second Appellant, stated that Pussers was in the process of making a private placement of shares and that certain key investors of the group he anticipated taking up the placement had made it clear that they would only invest in Pussers if he had unquestioned control. Secondly, the bankers of Pussers were prepared to extend to Pussers a significant line of credit provided he, the Chairman, remained in "tight control" of Pussers and that he personally guarantee the repayment of the loans. This, he stated he was prepared to do provided he had the assurance that he would remain in control of Pussers. The third reason offered by the Chairman was that he and his family had loaned half a million dollars to Pussers which was now due and payable and that he was not prepared to leave that money in Pussers unless he had absolute control over the company.

[7] [1976] 2 All ER 268

[15] At the Extraordinary General meeting some twenty shareholders or warrant holders submitted proxies appointing the second Appellant to be their proxy and to exercise their vote. It is to be noted that the notice summoning the meeting contained, if not the exact wording of the resolutions, the substance thereof. In other words, a Court could come to no other conclusion than that the shareholders who either attended in person or by proxy knew what was the import of the resolutions that were being proposed. As stated above, 86.2 percent of the votes cast were in favour of the resolutions. As I read the Share Register of Pussers exhibited in the Court below, no one shareholder had fifty percent of the issued shares, though the learned trial Judge found that the second Appellant held 28 percent of the ordinary shares directly and "indirectly commanded over 50%" what ever that latter phrase means. What I believe to be a reasonable inference is that the 251,717 votes recorded in the minutes as opposed to the resolution belonged to the Respondent or associated companies of the Respondent, namely Citco Trust Corporation and Citco Financial Services Inc. To put it another way, apart from the Citco shares, all other shares or warrants that were voted at the meeting were voted in favour of the Resolutions.

[16] The Court must now revert to the test as enunciated in Shuttleworth's case, namely: "So the test is whether the alteration of the Articles was in the opinion of the shareholders for the benefit of the company. By what criterion is the Court to ascertain the opinion of the shareholders upon this question?" The learned trial Judge, it seems to me, did find that an increase in voting power in the second Appellant would be a desirable end. At paragraph 46 of his judgment he says:

> "While it is understandable that it may be desirable that superior voting power be conferred to preserve confidence in management..."

Where, however, the learned trial Judge went wrong in principle was when he attempted to step into the commercial arena to determine that notwithstanding the

desirability of increased voting power in the Chairman he said:

> "...in my view the measure went too far to the extent of being extravagant. It is not within my purview to speculate on what formula would fall short of oppression, suffice it to say that the resolution fails to pass the test of being bona fide for the benefit of the company as a whole."

[17] In the circumstances I would allow the Appeal with costs both in the Appeal and in the Court below to the Appellants. Costs were fixed at $27,000.00 in the Court below and there was no appeal against quantum. Thus following the guide of Part 65 of the Civil Procedure Rules I would allow the sum of $18,000.00 in this Court.

[18] One final word before I conclude; the Appellants would do well to remember, that notwithstanding the enormous power given to the Second Appellant by the shareholders, an abuse of this power could well give rise to an action of a derivative nature.

Michael Gordon, QC
Justice of Appeal

I concur.

Brian Alleyne, SC
Justice of Appeal

[Sgd.]

I concur.

Ian D. Mitchell, QC
Justice of Appeal [Ag.]