THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVAP2018/0032

BETWEEN:

CLAUDE ANTHONY

Appellant/Applicant

and

AUTO HUB LTD.

Respondent

ANUHCVAP2018/0034

BETWEEN:

AUTO HUB LTD.

Appellant/Respondent

and

CLAUDE ANTHONY

Respondent/Applicant

Before:

The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal
The Hon. Mr. Mario Michel — Justice of Appeal
The Hon. Mr. Paul Webster — Justice of Appeal [Ag.]

Appearance:

Mr. Hugh Marshall Jr. with him Ms. Kema M. L M. Benjamin for the applicant

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2019: March 12; 14.

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Civil Appeal — Leave to appeal — Company Law — Management of company — Section 58 of the Companies Act — Derivative claims — The rule in Foss v Harbottle — The effect of the Marshall's Valve case

REASONS FOR DECISION

[1] WEBSTER JA: On 12th March 2019, we heard two applications by the applicant, Claude Anthony ("Mr. Anthony"), for leave to appeal against the orders of the learned master, delivered on 12th September 2018. The learned master's orders dismissed Mr. Anthony's applications to strike out the counterclaim filed by the respondent, ("Auto Hub Ltd.") in the matter Claude Anthony v Auto Hub Ltd[1] and the claim form and statement of claim filed by Auto Hub Ltd in the matter Auto Hub Ltd. v Claude A**nthony and the People's** Insurance Company Limited.[2] The applications for leave to appeal were intituled ANUHCVAP2018/0032 and ANUHCVAP2018/0034 respectively. On 14th March 2019, we dismissed the applications for leave to appeal and promised to give reasons for our decision and we now do so.

Appeal number ANUHCVAP2018/0032 **–** Background

[2] Auto Hub Ltd is a company incorporated and carrying on business in Antigua (hereinafter "the Company"). Mr. Anthony is the majority shareholder of the Company, holding 55% on the issued shares. Mr. Eddison Browne holds 35% of the shares and Mr. William Shouten 10%. Messrs. Browne and Shouten are the directors of the Company and are referred to in this judgment as "the Directors". Mr. Anthony was also a director of the Company but it appears from a note in the Master's order that he was removed as a director on 8th September 2016. His status as a director is not material to the consideration of the issues in this matter.

[3] On 10th October 2016, Mr. Anthony commenced proceedings against the Company for mesne profits for the rental of premises owned by him. The Company filed its defence to the claim and a counterclaim alleging that Mr. Anthony fraudulently misappropriated a significant sum of money from the Company and breached his fiduciary duties owed to the Company.

[1] Claim No. ANUHCV 2016/0495.
[2] Claim No. ANUHCV 2017/0325.

[4] On 1st September 2017, Mr. Anthony applied to strike out the counterclaim. The application for leave to appeal with supporting affidavit and the submissions of Mr. Hugh Marshall Jr. counsel for Mr. Anthony, disclosed that the grounds for the strike out application were that the counterclaim was an abuse of process and it was initiated by the minority shareholders without the authorisation of the board of directors, or the court.

[5] In coming to her decision to dismiss the strike out application, the learned Master found, as a matter of law, that directors are responsible for the management of companies incorporated under the Companies Act, 1995 ("the Act"), and as a matter of fact, that the defence and counterclaim were filed by the Company through its directors. As such the counterclaim was not an abuse of process of the court. Mr. Anthony was dissatisfied with the Master's decision and applied for leave to appeal to this Court.

The Application

[6] Applications for leave to appeal are made under CPR 62.2 without notice to the intended defendant and are usually dealt with by a single judge of the Court of Appeal on paper in chambers. In this case the single judge referred Mr. Anthony's application to the full Court for an oral hearing. The application was heard on 12th March 2019.

[7] In order to succeed on an application for leave to appeal the applicant must satisfy the Court that the appeal has a realistic, rather than a fanciful, prospect of succeeding, or that there are other compelling reasons why the appeal should be heard.[3]

[8] The grounds of application before this Court are summarised as follows:

(i) In dismissing the strike out application, the Master erred in law by failing to consider and judicially apply or take into account the Rule in Foss v Harbottle.[4]

[3] Per Edwards JA in The Attorney General of Grenada and others v Andy Redhead Civil Appeal No. 10/2007 (delivered 17th June 2005, unreported) at para15.
[4] (1843), 2 Hare 461.

(ii) The Master erred by failing to identify the counterclaim as a derivative action and the mandatory requirement of section 239 of the Act to obtain the leave of the Court to bring such an action.

(iii) The Master erred in law by considering the provisions of the Act relating to the general governance of a company. These provisions do not surpass the principles contained in the Rule in Foss v Harbottle.

[9] Mr. Marshall supported the grounds of the application by reference to the case of M**arshall's Valve Gear** Company, Limited. v Manning, Wardle & Co., Limited[5] ("hereinafter the Marshall's Valve case") to the effect that Mr. Anthony, as the majority shareholder of the Company, had the ultimate say as to whether a claim can be initiated in the Company's name. We will deal with this case in detail below but for now we say briefly that it stands for the proposition that in certain circumstances a majority shareholder of a company can control and effectively overrule the actions and decisions of the board of directors.

[10] We will deal with the grounds of the application in two categories: Firstly, the grounds listed as (i) to (iii) above, under the heading Foss v Harbottle and derivative claims, and secondly, the effect of the Marsha**ll's Valve case**.

Foss v Harbottle and derivative claims

[11] It is trite law that when a wrong is done to a company, the company, and not its shareholders, is the proper person to seek redress for the alleged wrong. Applied to this case, Mr. Marshall submitted that the Company is the only person who can seek redress for the alleged fraud committed on the Company. This is the time-honoured rule in Foss v Harbottle. There are exceptions to the rule. The one that is potentially applicable to this case is that a minority shareholder can apply to the court for leave to bring an action in the name of the company to address the alleged wrong. This procedure has evolved into the derivative action and is now contained in section 239 of the Act. The

[5] [1909] 1Ch 267.

complaining minority shareholder must apply under the section for leave to bring the action in the name of the aggrieved company. According to Mr. Marshall, the Directors, as minority shareholders, purported to bring the counterclaim as a derivative action in the name of the Company without applying for leave under section 239 with the result that the counterclaim was improperly brought and should be struck out.

[12] The difficulty with the argument above is that the minority shareholders are also either the entire board of directors of the Company, or the majority of two out of three, if Mr. Anthony's claim that he is still a director is correct. No finding is made on this point. The Master made two important findings on the issue of who commenced the counterclaim. First, she found that the Company filed its defence and counterclaim "…through its directors" and secondly, that "The directors whom are also minority shareholders are not impeded by their latter status as minority shareholders from acting in the capacity as directors for the company." The net effect of these findings is that the counterclaim was filed by the Company acting by the Directors, in their capacity as directors. This is an unimpeachable finding of fact by the Master based on the material that was before her. The result is that the counterclaim was filed by the Company in its own name and was not a derivative claim filed by the minority shareholders who happen to be the directors of the Company. Therefore, there was no need to comply with the requirements of section 239 of the Act. This finding disposes of the grounds of the application dealing with the rule in Foss v Harbottle and derivative actions set out as items (i) and (ii) in paragraph 8 above.

[13] Mr. Marshall's other submission on the filing of the counterclaim is that the Master erred in referring to the governance provisions in section 17 of the Act in the preamble to the order. Section 17 of the Act, insofar as it is relevant, reads:

> "(1) A company has the capacity, and, subject to this Act, the rights, powers and privileges of an individual.
>
> …
>
> (3) It is not necessary for a by-law to be passed to confer any particular power on a company or its directors."

It is correct that the Master need not have referred to this section on the issue of management, but no harm was done by the reference. What is important and quite clear is that the Master also had the provisions of section 58 of the Act in mind when she was settling this part of her order. The reference to section 17 is in the sixth paragraph of the preamble to the order. The paragraph reads;

> "However because a company is a legal abstraction it is only capable of acting through its human servants and agents. Section 17 of the Companies Act in recognition of this has mandated that the(sic) subject to any unanimous shareholder agreement, the Directors are responsible for the management of the company. Consequently these powers are unlimited unless circumscribed a by unanimous shareholder agreement or otherwise by statute. [See Canadian Jorex Ltd v 477749 Alberta Ltd ABCA 330] Professor Andrew Burgess in the book Commonwealth Caribbean Company Law also endorses this view and states that 'the power conferred on directors to manage the affairs of the company by the Act is complete. It includes not only those powers which are expressly stated in the Act but also all residual powers necessary for the management of the company's business and affairs.'"

The wording of this paragraph comes very close to summarising the content of section 58 of the Act and it is obvious that the Master had this provision in mind when she was considering the directors' management powers under the Act.

[14] Section 58 is found in Division D of the Act under the heading "Management of Companies." The section deals directly with management of companies by the directors. The marginal note to the section is "Duty of directors to manage company" and the section reads –

> "Subject to any unanimous shareholders agreement, the directors of a company shall
>
> (a) exercise the powers of the company directly or indirectly through the employees and agents of the company, and
>
> (b) direct the management of the business and affairs of the company."

This is direct statutory authority, conferring the power to manage companies incorporated under the Act on the board of directors. The section is subject to any unanimous shareholders agreement but there is no evidence that the shareholders

of the Company had a shareholders agreement. On general company law principles, the section is also subject to any limiting provisions in the by-laws. We were not provided with a copy of the by-laws and there was no suggestion by counsel that they contain any limiting provisions.

[15] In our opinion the Master did not err in considering the management provisions of the Act dealing with the general governance of a company. Quite the contrary. Having found that the defence and counterclaim were filed by the Company by the Directors, she was bound to consider their powers under the Act to manage the Company.

[16] Mr. Marshall submitted further that the common law principles in the rule in Foss v Harbottle surpass the governance provisions in the Act. He did not provide the Court with any authorities to support his very novel submission. Section 58 is primary legislation written in very clear language. It takes precedence over the principles emanating from the rule in Foss v Harbottle. All rules of corporate governance must be read as being subject to the section. That must have been the clear intention of the lawmakers in Antigua and Barbuda when they enacted section 58 of the Act.

The effect of the **Marshall's Valve case**

[17] Mr. Marshall used the Marshall**'s Valve case** in two ways. In the notice of application for leave to appeal he used the case to say that the Directors, acting as the minority shareholders, could not have brought the counterclaim. Only Mr. Anthony could have done so as the majority shareholder. We have already dealt with and disposed of this submission. The counterclaim is not a minority shareholders action. It was filed by the Company acting by its directors.

[18] Mr. Marshall's alternative position, which came out of his oral submissions, was that the Master erred in not striking out the counterclaim because Mr. Anthony, as the majority shareholder, could override the Directors' decision, made in their

capacity as directors, to file the counterclaim. This submission requires this Court to examine the balance of power between the shareholders and directors of a company incorporated under the Act to see whether, and if so, in what circumstances, the majority shareholders of a company can overrule the decisions of the directors.

[19] Before analysing the decision in the **Marshall's Val**ve case and other authorities on the balance of power issue, it is useful to make two preliminary points. The first is that we have not had the benefit of seeing the by-laws of the Company. As stated above, Section 58 of the Act, and similar legislation in the Eastern Caribbean and in England, confers the power to manage a company on the directors. There is usually an article or by-law that reflects section 58 of the Act. In some companies the management power is restricted by the by-laws, but in the absence of such restrictions the directors are in charge of the management of the company. As stated above, counsel has not suggested that there are any provisions in the Company's bylaws that limit or restrict the Directors' powers to manage the Company's affairs.

[20] The other preliminary observation is to note that the directors of a company owe fiduciary duties to the company and must act in the best interest of the company. Shareholders have no such duties and can act in their own interest as shareholders. Therefore, it is not surprising that the responsibility for protecting a company's interest is usually vested in the directors. This is what section 58 achieves.

[21] In the **Marshall's Valve case** the four directors of the company were also its shareholders. One of the four held the majority of the shares. The majority shareholder became concerned that a rival company was infringing the company's patent and was desirous of commencing a claim against the rival company. The other three directors, who had interests in the rival company, refused to sanction a claim by the company against the rival company. Nonetheless, the majority

shareholder commenced the claim in the name of the company against the rival company. The other directors applied by motion in the name of the company to strike out the claim on the ground that the claim was filed without proper authority. Neville J. held that the majority shareholder had the right to control the actions of the directors and struck out the motion. He said at page 273-274;

> "I think, that I ought not to interfere with the progress of the present action, because it is brought with the approval of the majority of the shareholders in the company, and, upon the decisions which I have referred to, they are the persons who are entitled to say, aye or no, whether the litigation shall proceed."

[22] The Marshall's Valve case was decided in 1908. Previously, in 1906, the English Court of Appeal came to the opposite conclusion in Automatic Self-Cleansing Filter Syndicate Company, Limited v Cuninghame[6]. The Court of Appeal rejected arguments that the directors are agents of the shareholders and must therefore follow their instructions. The Court of Appeal confirmed that the board of directors is the organ of the company that is responsible for managing its affairs. The shareholders powers are limited to altering the articles (by-laws) to take powers of management away from the directors, or removing them from office.

[23] In November 1908, the month following the **Marshall's Valve case**, a similar issue regarding the balance of power in a company came before the Court of Appeal in Salmon v Quin & Axtens, Limited[7]. In that case the company was in the process of acquiring property but could not secure the required directors' resolution to do so because one of the directors, whose signature was required, refused to sign the directors' resolution. The shareholders in general meeting passed the required resolution. The Court of Appeal held that the resolution was inconsistent with the management article in the articles of association and thus was of no effect. The Court of Appeal approved and followed the decision in the

[6] [1906] 2 Ch. 34.
[7] [1909] 1 Ch. 311.

Automatic Self-Cleansing case. Their decision was approved by the House of Lords.

[24] Finally, in Breckland Group Holdings Ltd v London and Suffolk Properties Ltd and others [8] Harman J followed the traditional view in the line of cases starting with the Cuninghame case and went on to cast doubt on the decision in the **Marshall's** Valve case. After reviewing both lines of authority Harman J said -

> "Thus one has in my view observations which are not stated to be expressly overruling Neville J's decision but are inevitably wholly in conflict with it. I would cite only briefly also the well-known decision in John Shaw & Sons (Salford) Ltd v Shaw [1935] 2 KB 113 at 134, [1935] All ER Rep 456 at 464, where Greer LJ observed:
>
> > 'A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by directors, certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles ...'"[9]

[25] This brief review of some of the relevant authorities confirms the traditional view of the balance of power in a company, including a company incorporated under the Act. This view is conveniently summarised in the passage by Greer LJ, set out in the preceding paragraph and is, in substance, what the lawmakers set out to achieve in section 58 of the Act. We are not persuaded that the decision in the **Marshall's Valve case** should be followed in Antigua and Barbuda. If the case is to be followed in this jurisdiction, it should only be in a situation where the directors fail to act on an important matter of management, or there is no board of directors capable or willing to make a decision. The majority may then be able to step in and fill the vacuum created by the inactive or non-existent board. An example of this is the M**arshall's** Valve case itself, where the majority of the board of directors, who

[8] [1989] BCLC 100.

[9] Breckland Group Holdings Ltd v London and Suffolk Properties Ltd and others [1989] BCLC 100at p 105.

were interested in the rival company, failed to take action to protect the company's patent. We have not been referred to any case where the very limited principle in the **Marshalls's valve case** has been used to override a management decision taken by the directors.

[26] There is no allegation of incapacity, unwillingness or inability to act in this case. Auto Hub Ltd was sued by Mr. Anthony and the directors were obviously satisfied that the Company should defend the claim and bring a counterclaim against Mr. Anthony. Not only were they entitled to do this, but they were duty bound, in accordance with their fiduciary duties, to act to protect the Company's interest. This is the paradigm case for the traditional view of company management. If Mr. Anthony, as the majority shareholder with no fiduciary duties to the Company, had what was in effect a veto power over the directors' powers, he could withdraw the Company's defence to his claim and the counterclaim against him. The counterclaim involves allegations of fraud against him. It is our view that there is great wisdom in the traditional view of company management as set out in the cases and section 58 of the Act.

[27] The application for leave to appeal did not meet the threshold of the intended appeal having a realistic prospect of succeeding, and there was no other compelling reason why the appeal should be heard. For all of the above reasons we dismissed the application for leave to appeal in ANUHCVAP2018/0032.

Appeal number ANUHCVAP2018/0034

[28] The application for leave to appeal in ANUHCVAP2018/0034 is almost identical to the application in ANUHCVAP2018/0032 which we refer to in this part of the judgment as "the related application." The factual background is a little different. The claim in the lower court was initiated by the Company against Mr. Anthony and the People's Insurance Company Limited. The claim alleged fraud and misappropriation of the Company's property, breach of trust and breach of fiduciary duties by the defendants. Mr. Anthony responded to the claim by filing an

application to strike it out on the same grounds as alleged in the application to strike out the counterclaim in the related application. The Master dismissed the strikeout application for the same reasons that she dismissed the application in the related application. The application for leave to appeal against the Master's decision is on the same grounds as in the related application.

[29] For all of the reasons set out above in relation to the in the related application, this application for leave to appeal was also dismissed.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Mario Michel
Justice of Appeal

By the Court

Chief Registrar