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Foss Vs Harbottle

Sujata Roy

Protection of Minority Shareholders:

Sections:

S. 359 in case of division of companies, you have an ad hoc requirement that minority shareholders must be protected.

S.81

The notion of the extraordinary resolution (s. 135)

S.129 holding of egm by 1/10

S 134 right to demand a poll

S. 161, statement by person ceasing to hold office as auditor

Shareholder Remedies:

There are three types of actions which a shareholder may bring:

- (i) **A personal action**, where a personal individual right has been infringed;
- (ii) Where the same personal right of a number of shareholders has been infringed, then **a representative action** may be brought on behalf of a group.
- (iii) **The Derivative Action**, brought by a member of a company where the wrongdoers are in control and prevent the company itself from suing.

Re: Derivative Action

- This is allowed only in exceptional circumstances since the general rule is that in an action regarding a wrong done to the Company, the plaintiff should be the Company itself. – Rule in Foss vs Harbottle.
- *** The Derivative Action is an exception to Foss vs Harbottle
- The Court must be satisfied that the plaintiff is a proper person to bring the case;
- The Courts must also be satisfied that that person's conduct has not been tainted to bar equitable relief;
- The Court must be satisfied that there has not been any unacceptable delay in bringing the action
- Where a derivative action is brought the entire proceeds go to the company and not to the shareholder.

Vide Towers vs African Tug Co (1904) 1 CH 558, CA; Nurcombe vs Nurcombe (1985) 1 ALL ER 65, (1985) WLR 370, CA.

Foss vs Harbottle (1843)

The rule in Foss vs Harbottle is made up of two limbs, as summed up in Edwards Vs Halliwell (1950) 2 All ER 1064 CA:

If a wrong is done to a company, it is the company alone which can decide to sue and that decision shall be made by majority.
(Quote Farrar 9.382 ref 1.)

Obviously the majority may be the wrongdoers themselves and therefore exceptions to the rule have been developed.

There are four exceptions to this rule:

- (i) where the transaction is ultra vires or illegal;
- (ii) where the transaction requires the sanction of a special majority (vide *Edwards vs Halliwell* (1950) 2, All ER 1064, CA) and *Quin & Axtens Ltd. vs Salmon* (1909) AC442, HL.
- (iii) Where the transaction infringes the personal rights of the shareholders; and
- (iv) Where the transaction amounts to a fraud on the minority.

Re (iii) Personal rights may arise from the articles, from statute or from a separate shareholders agreement.

With regards to articles the courts have in the past interpreted the articles restrictively as to what constitutes a personal right and not every breach of articles is deemed to constitute a breach of a personal right. Many authors have argued against this and argued that save for clauses regarding internal procedures all breaches of other articles should be a breach of a personal right.

Authors have also suggested that a breach of a directors fiduciary duty gives the shareholder a personal cause of action. This came about in *Re a Company* (No 005136 of 1986) [1987] BCLC 82., here a shareholder alleged that directors had breached their fiduciary duties by using their power to allot shares for an improper purpose. (till here on 21/3/07) Quote Farrar p. 386 ref. 2.

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Re (iv) Fraud on the Minority

This is the most clear exception to the rule.

The action is a derivative one, brought by shareholder o.b.o. company. Two elements must be satisfied:

- A) Fraud on the Minority;
- B) He must establish wrongdoer control which prevents company itself from bringing an action in its own name.

A) Fraud on the Minority

Fraud is here interpreted widely – abuse or misuse of power and includes:
Appropriation of corporate property – *Cook vs Deeks* [1916] 1 AC 554;
Self serving Negligence – *Daniels vs Daniels* [1978] Ch 406;
Abuse of power.

B) Wrongdoer Control

Two cases:

Prudential Assurance Co Ltd vs Newman Industries Ltd (No 2) [1980] 2 All ER 841 at 875.

Smith & Croft (No 2) [1988] Ch 114.

WINDING UP ON JUST AND EQUITABLE GROUND

214. (1) A company shall be dissolved and consequently wound up in the following cases -

(a) the company has by extraordinary resolution resolved that the company be dissolved and consequently wound up by the court;

(b) the company has by extraordinary resolution resolved that the company be dissolved and consequently wound up voluntarily.

(2) In addition to the modes of dissolution referred to in subarticle (1) -

(a) a company **may** be dissolved and wound up by the court in the following cases -

(i) if the business of the company is suspended for an uninterrupted period of twenty-four months;

(ii) the company is unable to pay its debts; and

(b) a company **shall** be dissolved by the court in the following cases -

(i) the number of members of the company is reduced to below two and remains so reduced for more than six months:

Provided that this paragraph shall not apply to single member companies specified in article 212(3);

(ii) the number of directors is reduced to below the minimum prescribed by article 137 and remains so reduced for more than six months;

(iii) the court is of the opinion that there are grounds of sufficient gravity to warrant the dissolution and consequent winding up of the company;

Under English law this is the “just and equitable remedy”.

Grounds are:

Quasi-partnership – *Re Yenidje Tobacco Co Ltd.* [1916]

Lack of Probity on the part of the Directors - *Loch vs John Blackwood Ltd.* [1924]

Loss of Substratum (impossible to achieve purpose for which Co. was set up. – *Re German Date Coffee Co* [1882],

EBRAHIMI vs Westbourne Galleries Ltd.

SECTION 402 (S. 459 in UK)

Some English Cases:

- *Re Carrington Viyella Plc* [1983]
- *Re R A Noble & Sons (Clothing) Ltd*[1983]
- *E London School of Electronics Ltd* [1986]
- *Re Cumana Ltd.* [1986]
- *Re Precision Bellows Ltd* [1984]
- *Re A Company* (No 002612 of 1984) [1985]

Date 14/02/2005
Court CIVIL COURT, FIRST HALL
Judiciary AZZOPARDI JOSEPH
Parties MIZZI GORDON ET vs GRECH DR. JOHN C. ET
Judgement Type FINAL JUDGEMENT
Keywords Socjeta` kummercjali, azzjonijiet oppressivi, ingusti u diskriminatorji □ locus standi mehtieg
Summary Ma jistax ikun li azzjonist ta' kumpanija jistitwixxi proceduri kontra kumpanija li taghha m'huwiexazzjonist fuq il-bazi li hu azzjonist ta' socjeta' li hija membru ta' dik il-kumpanija.

Date 08/07/2004
Court CIVIL COURT, FIRST HALL
Judiciary MICALLEF JOSEPH R.
Parties CALLEJA JOSEPH PRO ET NOE vs CALLEJA VINCENT
Judgement Type PARTIAL SENTENCE
Keywords Socjeta` kummercjali, azzjonijiet oppressivi, ingusti u diskriminatorji - Socjeta` kummercjali, protezzjoni ta` azzjonisti minoritarji
Summary L-artikolu 402 tal-Kap 386 jitkellem dwar liema huma c-cirkostanzi li fihom huwa moghti lil xi membru ta' kumpanija l-jedd li jressaq azzjoni ghall-harsien ta'azzjonist ta' kumpanija kontra pregudizzju mhux gust. L-imsemmi artikolu jispecifica li l-proponent irid ikun membru ta' kumpanija, u jispecifica li l-procedura tinbeda b'rikors. Il-ligi ma tippreskrivi l-ebda regola ohra ta' forma tal-att gudizzjarju mehtieg. Il-kelma "membru" hija mfissra bhala li tghodd fiha persuna li tista' legalment tirrapprezenta l-interessi ta' membru mejjet, persuna li tkun legittimament wirtet (b'testament jew ab intestato) ishma fil-kumpanija u wkoll nominee licenzjat li jkollu f'ismu ishma fil-kumpanija f'isem u fl-interessi ta' persuna ohra;

L-azzjoni msemmija fl-artikolu 402 hija miruta mill-azzjoni mahsuba fl-artikolu 459 tal-Companies Act 1985 tar-Renju Unit u hija meqjusa bhala rimedju statutorju maghruf bhala l-"unfairly prejudicial remedy". Il-kliem uzat fid-dispozizzjoni relattiva tal-istatut Britanniku jixxiebah hafna ma' dak uzat fl-artikolu 402 li, madankollu, rega' gie mibdul f'dawn l-ahhar zminijiet;

Flimkien mal-kumpanija, hemm ghadd ta' persuni ohrajn li jistghu jigu intimati biex iwiegbu l-pretensjoni ta' azzjonist imgarrab.

Tali azzjoni ma hijiex azzjoni esklussiva, imma wahda li hija mahsuba ghall-ghoti ta' rimedju li jista' jkun wiehed li jindirizza l-ilment partikolari f'qaghdiet partikolari. Kif inghad "The fact that the petitioner could have brought a derivative action with respect to the alleged conduct does not preclude him seeking relief under the unfairly prejudicial provision";

Date 24/04/2003
Court CIVIL COURT, FIRST HALL
Judiciary MICALLEF JOSEPH R.
Parties MIXKUKA LTD vs MANGION GEORGE PRO ET NOE
Judgement Type PARTIAL SENTENCE

Keywords

Socjeta` kummercjali, derivative action - il-kumpanija trid tigi citata bhala konvenuta - Citazzjoni, meta l-premessi jew it-talbiet ma jaghmlux referenza ghal wiehed mill-konvenuti

Summary

Azzjoni derivattiva ssir minn azzjonista ta' kumpanija biex issewwi xi ingustizzja li tkun saret lill-kumpanija li taghha huwa membru (normalment din trid tikkostitwixxi ghamil li jgarrq bl-azzjonisti minoritarji).

Azzjonista jista', f'cirkostanzi eccezzjonali, ikollu dritt li jiftah kawza biex ihares l-interessi tal-kumpanija li fiha jkollu sehem, ukoll jekk azzjoni bhalha hija normalment tal-kumpanija: u li, f'kaz bhal dan, jista' jharrek fil-vesti personali tieghu ta' azzjonist lill-istess kumpanija li fiha huwa membru. Fil-kazijiet kollha, tqies li l-azzjoni derivattiva kienet wahda ta' natura partikolari, u ghalhekk kienu japplikaw ghalha regoli mfasslin ghan-natura eccezzjonali taghha;

Minhabba n-natura ghal kollox partikolari tal-azzjoni mibdija (u tac-cirkostanzi specjali li fiha kawza bhalha tista' titressaq) il-kumpanija nnifisha li fl-interess taghha ssir l-azzjoni trid tabilfors titqies bhala "legittimu kontradittur" fis-sens li tkun taghmel parti mill-atti. Issa huwa maghruf ukoll l-ebda persuna ma tista' titqies li ressqet azzjoni minghajr ir-rieda taghha u li, f'kaz li jsir hekk, dik il-persuna tista' titlob li tinheles milli tibqa' izjed fil-kawza. Ladarba f'cirkostanzi bhal dawk ta' azzjoni derivattiva ma kienx mistenni li l-kumpanijainnifisha tibda l-azzjoni, l-ghazla wahdaniya li tibqa' hija li titressaq bhala mharrka;

Peress li l-azzjoni derivattiva hija moghtija biss lil azzjonist minoritarju u fl-interess li jisfida xi ghamil li jkun gab hsara lill-kumpanija li jaghmel minnha, awturi ohrajn jghidu li l-azzjonisti minoritarji jagixxu f'isimhom proprio u tas-socji minoritarji l-ohra. Normalment il-kumpanija tkun konvenuta flimkien mad-diretturi jew l-azzjonisti maggoritarji.

Kull azzjoni siewja ghandu jkollha turija cara tal-kawzali u t-talbiet fil-konfront ta' kull parti mharrka, u dan sabiex tali parti tkun f'qaghda li tista' tiddefendi ruhha kif imiss mill-pretensjonijiet tal-parti attrici.

Tista' tingala' kwestjoni ta' nullita' tal-Att tac-Citazzjoni fejn ikun hemm izjed minn imharrek wiehed. Tista' tezisti nullita' f'kaz ta' pluralita' ta' partijiet imharrkin, imma dan isehh biss metal-parti attrici, bl-istess citazzjoni tesperixxi kontra diversi persuni diversi azzjonijiet jekk ikunu skonnessi ghal kollox bejniethom, b'mod li ggib maghha inkompatibilita' bejn it-talbiet imressqin fil-konfront ta' whud mill-imharrkin ma' talbiet ohrajn imressqin fil-konfront ta' ohrajn.

Il-fatt wahdu li l-partijiet imharrkin ikollhom interess guridiku (fi grad) differenti fil-konfront taghhom mal-parti attrici, ma huwiex xi haga li xxejjen is-siwi tal-gudizzju. Dak li huwa mehtieg hu li l-imharrek ikollu l-interess guridiku ta' kontradittur ghall-pretensjonijiet attrici, fi grad jew iehor.

In-nuqqas ta' tharis ta' element mehtieg f'att gudizzjarju huwa wiehed mic-cirkostanzi mahsuba fil-ligi biex tintlaqa' l-eccezzjoni tan-nullita' tal-att jekk ikun gab lill-parti li titlob in-nullita' pregudizzju li ma jistax jissewwa jekk mhux bit-thassir tal-att gudizzjarju li jkun. Id-dikjarazzjoni ta' nullita' tal-atti gudizzjarji hija sanzjoni radikali li ghandha tintuza eccezzjonalment biss u meta ma jistax isir mod iehor.

Jekk l-ebda kawzali jew l-ebda talba fic-citazzjoni ma jidher li taghmel stat fil-konfront ta' wiehed mill-konvenuti, jezisti

rimedju procedurali li mhux it-thassir tal-att gudizzjarju, ossia billi jinheles milli jibqa' fil-kawza bla ma l-att jithassar. In-nuqqas ta' tharis formali, ghalhekk, ma jkunx nissel fil-parti eccipjenti pregudizzju li ma jistax jitnehha jekk mhux bid-dikjarazzjoni li l-att gudizzjarju ma jiswiex.

Date	31/01/2003
Court	OF APPEAL (CIVIL, SUPERIOR)
Judiciary	DE GAETANO VINCENT - CAMILLERI JOSEPH D. - FILLETTI JOSEPH A.
Parties	ELLUL PHILOMENA vs ELLUL CHARLES PRO ET NOE
Judgement Type	FINAL JUDGEMENT
Keywords	Socjeta` kummercjali, azzjonijiet oppressivi, ingusti u diskriminatorji - Socjeta` kummercjali, protezzjoni ta` azzjonisti minoritarji - Socjeta` kummercjali, tnehhija ta` direttur - Socjeta` kummercjali, dritt ta` azzjonist li jkun rapprezentat fuq il-bord tad-diretturi
Summary	<p>L-artiklu 402 tal-Att dwar il-Kumpanniji jipprovdi li:</p> <p>"Kull membru ta' kumpannija li jilmenta li l-affarijiet tal-kumpannija jkunu tmexxew jew qed jitmexxew jew aktarx jitmexxew b'mod li, jewli xi att jew ommissjoni tal-kumpannija kienu jew huma jew x'aktarx se jkunu, oppressivi b'mod mhuxgust diskriminatorji kontra, jew b'mod mhux gust ta' pregudizzju, ghal membru jew membri jew b'mod li jkunu kontra l-interessi tal-membri in generali, jista' jaghmel rikors lill-qorti ghal ordni tahtdan l-artikolu".</p> <p>Dawn il-provedimenti huma ta' salvagwardja u ta' protezzjoni ghall-azzjonisti ta' socjeta` kummercjali, b'mod partikolari ghal dawk li huma minoritarji. Ir-rimedji li johorguminn dawn il-provedimenti huma mghotija lill kull azzjonist ta' socjeta` kummercjali. Kull azzjonist, anke jekk hu minoritarju, ta' socjeta` kummercjali, anke jekk hi pubblika, jista' jitlob li jinghataw l-ordnijiet kollha necessarji u opportuni, f'kaz li jirnexxielu jipprova illi minhabba l-gestjoni tal-istess socjeta` huwa qed isofri jew ukoll jista' jsufri xi pregudizzju ta' natura oppressiva, ingusta jew diskriminatorja. Tali gestjoni tista' tirreferi semplicement ghal xi att specifiku jew xi ommissjoni tal-kumpannija. Il-pregudizzju jista' jirreferi ghall-azzjonist li qed jippromuovi l-proceduri, ghal xi azzjonist iehor jew ghall-interessi in generali tal-azzjonisti.</p> <p>In vista ta' dan kollu jista' jinghad li hu bizzzejjed li l-azzjonista jipprova li huwa qed isofri jew eventwalment jista' jsufri xi pregudizzju minhabba xi agir tas-socjeta` li taghha huwa jippossjedi xi ishma. Ma hemmx ghalfejn li huwa jipprova li huwa zgur li ser isofri xi pregudizzju fil-futur. Tali prova tista' ssir fuq bazi ragjonevoli ta' probabbilita`.</p> <p>Inoltre, skond dak li hemm provdut fis-sub-artikolu (3) tal-istess artikolu 402, il-Qorti tista' tipprocedi biex taghmel kull ordni necessarja u opportuna skond dawn il-provedimenti, jekk jirrizulta li l-ilment tal-azzjonista hu sewwa bbazat u jekk il-Qorti thoss li huwa ekwu u gust li tghamel hekk.</p> <p>Fil-Ligi Ingliza (ara Art 459 tal-Companies Act, 1985) jinstab rimedju simili li hu maghruf bhala "The Unfair Prejudice Remedy". Il-Qorti ta' l-Appell Ingliza stabbilit fil-kaz "in Re Saul D. Harrison & Sons plc ([1995]) 1BCLC 14)" il-linji ta' gwida dwar kif kellu jkun l-operat biex ikun jista' jigi kkwalifikat bhala, "unfairly prejudicial" (fit-test tal-Ligi Maltija din il-frazi hi tradotta "b'mod mhux gust ta' pregudizzju").</p>

Wiehed kellu, fl-ewwel lok, jara jekk dak l-operat kienx jew le skond l-istatut tal-kumpannija. Izda fl-applikazzjoni tal-imsemmija dispozizzjoni - ispirata fuq principji ta' ekwita` aktar milli minn drittijiet strettament legali - il-Qorti tiehu in konsiderazzjoni l-aspettattivi legittimi ("legitimate expectations") li r-rikorrent jista' jkollu u li sikwiet ikunu ferm aktar wiesgha mid-drittijiet strettament legali li johorgu mill-istatut tas-socjeta`. Dawn l-aspettattivi legittimi jitwiendu minn xi relazzjonijiet personali partikolari bejn l-azzjonisti. Fil-kaz Ebrahimi vs Westbourne Galleries Ltd. ([1973] AC 360) Lord Wilberforce elenka numru ta' sitwazzjonijiet fejn dan ir-rimedju jista' jinghata (ara ibid proprio 379), sitwazzjonijiet dawn li x'aktarx jinstabu f' kumpaniji zghar privati li ta' sikwiet jissejju "quasi partnerships", fosthom is-segwenti:-

(i) an association formed or continued on the basis of a personal relationship, involving mutual confidence - this element will often be found where a pre-existing partnership has been converted into a limited company;

(ii) an agreement, or understanding, that all, or some (for there may be "sleeping members") of the shareholders shall participate in the conduct of the business;

(iii) restriction upon the transfer of the members' interest in the company - so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere".

Hawnhekk, il-kumpannija in kwistjoni kienet giet kostitwita bejn mara (ir-rikorrent) u ragel (l-intimat) mizzewgin. Ir-ragel kellu l-maggoranza ta' l-ishma. Sussegwentement, meta nqalghu disgwidi matrimonjali ir-ragel ipprova li inter alia jeskludi lill-martu mit-tregija tal-kumpannija in kwistjoni.

Il-Qorti ta' l-Appell irriteriet li din is-socjeta` kienet tikkwalifika bhala "quasi partnership" fejn il-mara kellha interessi u aspettattivi legittimi li jmorru oltre u 'l hinn mis-sinifikat tal-"memorandum and articles" tas-socjeta` in kwistjoni. Certament wahda mill-aspettattivi taghha kienet ma tigix imcahhda minn partecipazzjoni fit-tmexxija tas-socjeta` sempliciment ghaliex il-fiducja reciproka spiccat minhabba d-disgwid matrimonjali u r-relattivi proceduri gudizzjarji ta' separazzjoni personali li hemm pendenti bejnha u zewgha.

L-artikolu 402 hu ispirat mhux minn koncetti legalisticiizda minn principji ta' ekwita` u gustizzji li jirrikonoxxu l-interessi u l-aspettattivi legittimi li mmorru oltre mill-kelma tal-istatut tas-socjeta` jew addirettura tal-ligi stess.

Konsegwentement il-Qorti sabet li kien hemm lok ghall-applikazzjoni tal-Art. 402 fil-konfront tad-decizjoni lill-appellat ha li jelimina lill-martu minn Direttur. Decizjoni din li tkun evidentement "unfairly pregiudicial" fil-konfront tal-mara li kellha dritt, bis-sahha tal-aspettattivi legittimi taghha, li fis-sitwazzjoni matrimonjali li kienet tinstab fiha, tissalvagwardja l-interessi taghha u mhux tkun kostretta li thalli l-gestjoni tal-interessi taghha fis-socjeta` jkunu determinati kwazi unikament minn zewgha.

Il-Qorti ghandha poteri deskrezzjonali vasti hafna ghal dak li jirrigwardja r-rimedji li tista' tipprovdi meta tara li ghandha taghti harsien lill-azzjonist kontra pregudizzju mhux gust.