REWA CO-OP DAIRY COMPANY LTD & ANOTHER V SHARON JULIE ANNE MCKENZIE & OTHERS

[2001] FJCA 11

BY: SUNITA BOIS-SINGH[*]

SUMMARY OF THE FACTS

This case is an appeal from the decision of Justice Byrne of the High Court of Fiji on 30th July 1998. On 29th January 1998 there was an originating summons in the High Court at Suva, naming the company Rewa Dairy as the defendant. In this proceeding (No. 77 of 1998) the plaintiffs sought an injunction inter alia seeking to restrain the company from appointing or electing any new directors unless and until the issues raised by the originating summons had been determined. However, the High Court did not issue such an order.

The appeal is related more to the subsequent originating summons (No. 129 of 1998) taken out by the present respondents on 23rd February 1998. The summons sought a declaration that Article 77 of the Company's Constitution was valid and an order for the reconvening and completion of the company's 1997 Annual General Meeting (AGM). The resolutions proposed that for the purposes of the meeting, Article 77 be suspended and Article 73 modified to enable the Chair to decline any demand for a poll. It also proposed that Article 77 should be amended so that every member was entitled 'to vote once only' and that two additional directors be elected.[1] The 1997 AGM was held on 30th January 1998. In relation to the agenda item relating to the election of new directors, the Chair did not allow voting to proceed on the basis that the matter was *sub judice* before the High Court (through civil case no. 77 of 1998).

At an earlier stage in the progress of the two sets of proceedings the respondents applied for their consolidation. The appellants opposed, arguing that the actions were not between the same parties, that different solicitors were involved and that the issues were unrelated. They however, had no objection to the actions being heard consecutively by the same judge. The appellants requested that the hearing be adjourned so that the two actions could be dealt consecutively at the same hearing. Later, the action under matter no. 77 of 1998 was dropped by the plaintiffs.

The trial judge decided against the consolidation and gave his judgement without any adjournments for parties to make further submissions. He ordered that the AGM be resumed no later than 22 August 1998. The appellants hope that the Court of Appeal will turn the decision of the trial judge in relation to the consolidation of the cases and the decision of the judge to not allow further submissions.

CLAIM

The appellants claim was that the only issue before the judge was the issue of Justice Byrne giving his decision without adjournment as requested by the appellants. The appellants contended that the issuance of the judgment without allowing counsel to make further submissions was tantamount to a breach of natural justice by the High Court. It was also claimed that both appellant and respondent had wanted some

form of consolidation of the two claims and/or a concurrent hearing. On these grounds the appellants prayed that the decision of Justice Byrne of the Fiji High Court be overturned.

OUTCOME

The appeal was dismissed with costs.

LEGAL PRINCIPLES

Ratio Decidendi

- When the argument of the appellants for the adjournment of the case had failed the appellants had no reasonable expectation to make further submissions. The only issue left was whether the election of directors should proceed.
- Section 133 of the Companies Act made it mandatory to hold an annual general meeting.
- The dissatisfaction with the terms of voting Articles or the presence of an issue of interpretation of the Articles or of a proposal to amend them, by themselves cannot afford a sufficient ground for not carrying out the mandate in the Act and the Articles of Association of the Company to conduct an Annual Meeting which also includes in its agenda the election of directors. It makes no difference whether the challenge to the Articles was done orally, by letter or by the institution of legal proceedings. The adjournment of a company meeting is a discretionary matter for the Chair but issues or challenges of the kind mentioned cannot justify significant postponement of the meeting or election unless of course a court so orders.

Obiter Dicta

- It is a bold and almost invariably an inappropriate step to assume there is no need for a hearing because there is nothing to be said however, the Court of Appeal accepted that nothing further could have been said by the two counsel when the trial judge gave his decision.

COMMENTARY

Voting rights

Shareholders in a company have some rights and liabilities arising out of their shares. Normally shareholders rights fall in three categories. These are dividends, return of capital on winding up and attendance at meetings and voting. So far as voting is concerned this is a comparatively recent development, for, it was long felt that members' voting rights should be divorced from their purely financial interests in respect of dividend and capital, so that the equality in voting should be between members rather than between shares.[2] A stage intermediate between these two ideas was reflected in the *Companies Clauses Act* 1845 UK, which was used in Fiji before independence. Under s75 of this *English Companies Act*, in the absence of a contrary provision in a special statute every shareholder had one vote for every share up to ten, one for every additional five up to a hundred and one for every ten thereafter, thus weighting the voting in favour of the smaller holders. It is now recognised that if voting rights are to vary, separate classes of shares should be created so that the different number of votes can be attached to the shares themselves and not to the holder.

In this case one of the arguments (through an originating summons no. 129 of 1998 in the High Court) was in relation to the voting rights conferred by Article 77 of the Articles of the company. It would have been interesting to see what the court would have decided on this issue if this matter was pursued to the end by the respondents. The proposed resolution in relation to Article 77 as mentioned in the affidavit was

to amend Article 77 to provide every member a chance to 'vote once only' and that two additional directors be elected. This would have radically changed Article 77 of the Company's Constitution as it stood.[3] The issue of Article 77 was one of the main focus of the originating summons (129 of 1998) that is why when the respondents dropped it the trial judge decided that there was no need for further delay as the only other issue left before the court was that of the elections of the directors. However, because both counsel did not have anything new to add at that point, the judge took the liberty to say that no further submissions were required and that the company should hold an AGM.

Annual General Meeting (AGM)

A registered company can hold meetings so long as it is in conformity with the provisions of the statute or the company's constitution. A company can hold a general meeting, a board of directors meeting or a meeting relating to the company's affairs such as amalgamation or dissolution.[4] The size and nature of the company determines the frequency of holding the general meeting of the board of directors. In the countries of the USP region it is a statutory requirement that a registered company hold an annual general meeting once a year and not more than 15 months must elapse between one annual general meeting and the next.[5] In the present case it was the concern of the High court and later the Court of Appeal of Fiji that the requirement of holding an AGM was breached by the company.

The AGM is the one occasion when members can be sure of having an opportunity of meeting the directors and of questioning them concerning the accounts, on their report and the company's financial position and future prospects. It is a meeting where normally a proportion of the directors retire and some of the Directors' positions are open for re-election or replacement. In the AGM, members can exercise their only real power over the board – that of dismissal. An AGM is not restricted to the above matters as it is a general meeting and anything that can be done at a general meeting (such as consideration of a special resolution or extra-ordinary resolution) can be undertaken at the AGM. It may also afford members an opportunity of moving resolutions on their own account which they may want to do at a general meeting but are not able to bring about in the context of other meetings. Due to these reasons, the AGM is important to the members. It is at the AGM that the directors of the Company can be held accountable for their actions during the past year whether they want it or not. In the present case, the Court of Appeal agreed with the High Court that the adjournment of a company meeting is a discretionary matter for the Chair. Still, it also held that notwithstanding the discretionary powers of the Chair to (temporarily adjourn the AGM), issues or challenges of the kind mentioned in the summons could not justify the significant postponement of the meeting or election unless a court ordered so. Significant postponement of the meeting that the judge refers to in this case is the 1997 AGM which was held on 30 January 1998 that had on the agenda an item relating to the election of new directors. However, due to protests that that matter was *sub judice* the AGM was postponed without any future date being reset for its recommencement. The trial judge ordered that the AGM be resumed no later than 22 August 1998.

The writer agrees with the decision of the courts on this issue as an AGM should be held as required by the Company's constitution. If there are to be delays or postponements of such meetings then it should be only be by an order of a court; otherwise directors and majority shareholders of companies could avoid AGMs where they have to respond to inquiries of minority shareholders. It is at AGMs that directors have to give their report and also a report of the financial status of the company. Without the AGM, minority shareholders may not have access to such reports.

Natural Justice

Counsel for both parties in the present case raised breach of natural justice and fairness when the trial judge did not adjourn the case as requested by them but decided to deliver his judgment. The *audi alteram partem* rule states that the other party must be given an opportunity to present his arguments. In the

present case the Court of Appeal held that the parties had had various opportunities through subsequent written submissions to present all their arguments and that when the matter under action no. 77 of 1998 was dropped there was nothing further to argue about.

Natural justice does not require that an opportunity to respond to adverse charges or allegations must take any particular form. It is not always necessary that a hearing be held and that oral evidence be given. It may be sufficient if an opportunity to respond in writing is allowed, provided that it is adequate. See the case of *Talasasa v United Church*[6] which deals with this issue.

This writer agrees with the Court of Appeal that in the present case the parties had been given enough time and opportunities to present all their arguments in relation to all the issues before the trial judge. That when one of the major issues was dropped there was no need to postpone the hearing to allow further submissions, after all the case had been adjourned several times to allow the parties to have more time for submissions.

Moreover, the inordinate delay by the company in not holding the AGM was partly responsible for the High Court's decision not to grant adjournment. This is because the company was at default by not holding the AGM. It also had a bearing on the subsequent dismissal of the appeal as the law requires that 'he who comes to court must come with clean hands.'

It was the shareholding structure of the company that made it difficult to hold the meetings on a regular basis. The way the shareholding was structured it didn't allow substantial opposition to any stand that might be taken by the majority shareholders. Therefore, it could be said that the drafting of the articles relating to shares was not good as it allowed too much power to the majority shareholders. The attitude of the directors did not help either as there were possibly 'under the table' dealings or misfeasance by them which contributed to the inability of the company to convene a meeting. The questions to ask is why was there no move to have an AGM or move to dissolve the company or petition the company's registrar to inspect the company? Unfortunately what had occurred in this case did not set a good precedent as regards the accountability of a company to its shareholders.

[*] Graduate Assistant in Law, University of the South Pacific.

[1] Article 77 of the Company's Constitution provides that 'every member shall be entitled to vote in accordance with the total amount subscribed by him in payment for shares at the end of the month preceding the date of the meeting at which he is to vote and in accordance with the following table:

> For each $140 subscribed up to $200-one vote
> For each $100 subscribed in excess of $200 and up to $1000 – one vote
> For each $500 subscribed in excess of $1000 – one vote'

[2] See ss7-89 of *the Company's Act cap 248* Fiji and the dictum of Farwell J *in Borland's Trustee v Steel [1901] 1 Ch 279* for a definition of shares and the voting rights arising out of the shares.

[3] See 1 above for the voting rights conferred by Article 77 of the Company's Constitution.

[4] See ss124, 141 and 143 of the *Company's Act cap 176* of Solomon Islands for types of meetings a company can hold.

[5] See for eg section 141 of the *Companies Act* Tuvalu.

[6] *High Court*, Solomon Islands, Civil case no. 10/1993 (unreported) (26/02/03).