



**IN THE SUPREME COURT OF BERMUDA
COMMERCIAL COURT**

2006: No. 30

BETWEEN:

ALLISON THOMAS

1st Plaintiff

-And-

RICARDO SWAN

2nd Plaintiff

-And-

FORT KNOX BERMUDA LIMITED

1st Defendant

-And-

TROY SYMONDS

2nd Defendant

-And-

SHARI POE

3rd Defendant

-And-

PHILIP BUTTERFIELD

4th Defendant

REASONS FOR DECISION

Date of hearing: July 3, 2007

Date of Reasons: July 5, 2007

Mr. Mark Diel, Marshall Diel and Myers, for the Plaintiff

Mr. Kevin Taylor, Appleby, for the Fourth Defendant

Introductory

1. The Plaintiffs' Specially Indorsed Writ of Summons was issued on January 30, 2006. On March 7, 2006, the Fourth Defendant issued a Summons to strike-out the Writ and Statement of Claim, an application which was adjourned. By Summons dated April 17, 2007, the Plaintiffs applied for leave to amend their Statement of Claim. Both applications were initially listed before me for effective hearing on July 3, 2007.
2. I granted the Fourth Defendant's strike-out application, and refused the Plaintiffs' application for leave to amend, and indicated that I would give short reasons for this decision later. These Reasons are now given.

The Plaintiffs' claim against the Fourth Defendant and the strike-out application

3. The Plaintiffs' primary case is that the Plaintiffs and the Second Defendant formed the First Defendant together and operated the Company as a quasi-partnership. These parties were all employed by the Company in the second half of 1999. It is then alleged that the Third Plaintiff was employed as a manager in December 2000 and, without corporate approval, purportedly obtained a convertible debenture from the Company. In October 2005, it is alleged that the Fourth Defendant voted (through a proxy issued to the Second Defendant) at a Board meeting with the Second and Third Defendant to approve the issuance of shares to the Third Defendant. The Third Defendant, it is alleged, was permitted to exercise her debenture rights, both early and at an undervalue, without any or any adequate confirmation that the debts which she claimed to have incurred on behalf of the Company had been incurred. This was a fraud by the Second and Third Defendant designed to dilute the Plaintiffs' shareholding in the company, and to transfer control to the Second and Third Defendants. After the Plaintiffs had set out their concerns in writing, a further Board meeting was convened for the purpose of ratifying the decisions taken at the earlier meeting.
4. The following pleas, relevant to the Fourth Defendant, are then made:

“33. The Fourth Defendant was present by telephone at the meeting of 24th October and despite the concerns raised voted with the Second and Third Defendants to ratify the decision of the 17th October meeting to accept the Third Defendant's offer.

34. The Second, Third and Fourth Defendants in so doing were in breach of their duties to the First Defendant Company as directors.”
5. No case of fraud is pleaded against the Fourth Defendant, merely ordinary breach of duty owed as a director to the Company. The Fourth Defendant, through his Counsel's original Skeleton Argument, submitted that the action was liable to be struck-out on the following grounds:
 - (a) no reasonable cause of action on behalf of the Plaintiffs was disclosed, because only a breach of duty to the Company was alleged;
 - (b) the Plaintiffs could only sue on behalf of the Company through a derivative action based on an alleged fraud on a minority, but no such claim was advanced against the Fourth Defendant;
 - (c) even if any duty was owed by the Fourth Defendant as a director to the Plaintiffs as shareholders, Bye-Law 127 indemnified the Fourth Defendant against claims for breaches of duty which did not involve fraud. And no fraud was alleged on his part.
6. In my judgment, it was plain and obvious that the Plaintiff's claim was liable to be struck-out on these grounds, and Mr. Diel sensibly accepted that his clients' case stood or fell on the strength of their application for leave to amend.

The Plaintiffs' leave to amend application and the Fourth Defendant's objections thereto

7. The Plaintiffs' proposed amendments to the Statement of Claim read as follows:

*“33. The Fourth Defendant was present by telephone at the meeting of 24th October and despite the concerns raised voted with the Second and Third Defendants to ratify the decision of the 17th October meeting to accept the Third Defendant's offer **and thereby diminish the First and Second Plaintiffs' shareholding in the First Defendant for the benefit of the Second and Third Defendants.***

*34. The Second, Third and Fourth Defendants in so doing were in breach of their duties to the First Defendant Company as directors **and to the First and Second Plaintiffs as members of the First Defendant and further thereby either perpetuated or adopted the said fraud on the minority in relation to the Plaintiffs.***

8. Although the title to the action was not sought to be amended to state that the Plaintiffs were suing on behalf of themselves and the Company, the proposed amendments appear to be designed to assert (a) a derivative claim against the Fourth Defendant for breach of his duties to the Company, and (b) a particularized fraud claim against the Fourth Defendant for breach of an unspecified duty owed to the Plaintiffs as shareholders of the Company.

9. The Fourth Defendant's Amended Skeleton Argument firstly submitted that as a matter of law directors owed no duty to shareholders. Reliance was placed on the following dictum of Dillon LJ in *Multinational Gas and Petrochemical Co.-v-Multinational Gas and Petrochemical Services Ltd. et al* [1983] 1 Ch. 258 at 288F:

“The directors stand in a fiduciary relationship to the company, as they are appointed to manage the affairs of the company and they owe fiduciary duties to the company though to the creditors...or to individual shareholders.”

10. The Plaintiffs' Counsel could not challenge the validity of this submission. The next line of attack was the contention that the proposed amendments did not contain the essential elements for a legally tenable derivative claim. It was submitted on behalf of the Fourth Defendant, in reliance on *'Mayson, French & Ryan on Company Law'*¹ :

“A decision not to sue in respect of a wrong done to a company (or, equivalently,...to ratify the wrong) is a fraud on the minority (that is, the member or members who wish to take the action) if the wrong is of a fraudulent character or beyond the powers of the company...and the persons sought to be sued use their own influence over the company (for example, as directors or major shareholders) to prevent the company from suing them.”

11. Mr. Taylor in his Skeleton Argument submitted that the proposed amendments were not legally valid for the following reasons. Firstly, there was no allegation of any fraudulent act on the Fourth Defendant's part. Secondly, it was not alleged that the Second and Third Defendant influenced the Fourth Defendant so as to assert control over the Company. The two factions were, according to the original pleading, equally divided at the Board level with the Fourth Defendant effectively exercising a casting vote. And thirdly, even if there was a bare allegation of fraud, such allegation was not particularized as required by Order 18 rule 12 of the Rules of the Supreme Court.

¹ 2005-2006 edition, at page 618.

12. Mr. Diel did not seek to suggest that he should be afforded a further opportunity to cure the proposed amendments, and had no meaningful response to the cogent attack made on the proposed re-amendments. He was bound to concede that even his quasi-partnership plea could not be asserted against the Fourth Defendant to support the existence of some duty on his part towards the Plaintiffs as shareholders.
13. In my judgment, the central flaw with the proposed amendments was that they were in substance personal claims, based on allegations of damage to the Plaintiffs rather than to the Company, dressed up as a derivative claim. And even if some damage to the Company could be established, there was no credible suggestion that any case of fraud against the Fourth Defendant (in connection with the decision to ratify the share issue) could ever be made out.
14. It was plain and obvious that the claim in its amended form against the Fourth Defendant was completely lacking in substance and liable to be struck-out, and accordingly leave to amend was refused.

Conclusion

15. For the above reasons, the Plaintiffs' claim against the Fourth Defendant was struck-out and their application for leave to amend was refused.

Dated this 5th day of July, 2007

KAWALEY J.