2013-HC-DEM-CIV-APL-40

IN THE FULL COURT OF THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE ON APPEAL FROM A JUDGE OF THE SUPREME COURT (IN CHAMBERS) IN SUIT NO. 33-SA OF 2001

CIVIL APPEAL NO. 40 OF 2013

BETWEEN:

GUYANA STOCKFEEDS INCORPORATED

Appellant

-and-

NATIONAL INDUSTRIAL AND COMMERCIAL INVESTMENTS LIMITED

Respondent

The Honourable Justices Navindra Singh and Jo-Ann Barlow, Puisne Judges.

Mr. Robin Stoby S.C. representing the Appellant.

Messsrs. Ashton Chase O.E., S.C. and Edward Luckhoo S.C. representing the Respondent.

Heard April 29th, May 27th , October 7th and November 11th 2016.

DECISION

BACKGROUND

During the period February 1997 to January 1998 Robert Badal acquired approximately 50.3% of the shareholding in Guyana Stockfeeds Incorporated (hereinafter referred to as Stockfeeds), the Appellant herein, by purchasing shares from the Government of Guyana.

At the time that Mr. Badal would have acquired this controlling interest in Stockfeeds, the National Industrial and Commercial Investments Limited (hereinafter referred to as NICIL), the Respondent herein, held approximately 38% of the shareholding in Stockfeeds.

By notice dated August 28th, 2000 the Directors of Stockfeeds gave notice of their intention to convene a shareholders' meeting of the shareholders of Stockfeeds to increase the share capital of Stockfeeds, such meeting to be held on September 25th, 2000.

The shareholders' meeting was duly convened on September 25th, 2000 and one John Worrell, the Executive Secretary of NICIL attended the said meeting in the capacity as the representative of the shareholder NICIL.

At the meeting ALL of the shareholders present voted in favor of a resolution authorizing an increase of Stockfeeds' share capital by the creation of ninety nine million three hundred thousand (99,300,000) ordinary shares thereby bringing the share capital of Stockfeeds to one hundred million (100,000,000) ordinary shares.

At the said shareholders' meeting it was also unanimously resolved that every shareholder was going to be given the opportunity to purchase four (4) new ordinary shares for every one (1) ordinary share held at the close of business on September 26th, 2000 at an issue price of fifteen dollars ($15.00) per share.

Subsequent to this meeting, a document titled "INFORMATION MEMORANDUM" was circulated to all shareholders explaining, inter alia, the terms and procedure for acceptance of the "4 for 1 rights issue".

Four shares were provisionally allotted to each shareholders for every one that that shareholder held and it was clearly stated in the "INFORMATION MEMORANDUM" that the document demonstrating acceptance of the "4 for 1 rights issue" provisional allotment had to be "*lodged on or before 14:00 hrs on December 15, 2000 with the Company Secretary at the Company's office at Farm, East Bank Demerara*" using the form prepared for such purpose and attached to the "INFORMATION MEMORANDUM".

The shares allotted under the "4 for 1 rights issue" were issued in December 2000.

In January 2001, at the Annual General Meeting of Stockfeeds, the Shareholders passed a resolution approving a bonus issue of twenty four (24) shares for each share held to the shareholders of Stockfeeds.

The issues raised by NICIL, in order of chronological occurrence, are as follows;

ISSUE I

Did the "Notice of Extra Ordinary General Meeting" to "***approve a resolution increasing the Company's authorized share capital***" dated August 28th, 2000 fail to comply with the **Companies Act 1991** of the Laws of Guyana and therefore a nullity?

LAW

Companies Act 1991, section 5, subsections (4) and (5)

Companies Act 1991, Fourth Schedule, Part I, sections 4 (a) and 6 (1)

Companies Act 1991, Fourth Schedule, Part IV, sections 14 (1) (a) and 17

Companies Act 1991, section 112 (2)

Companies Act 1991, section 113

FACTS

By notice dated August 28th, 2000, (exhibited at page 24 of the appellate record of proceedings), the Directors of Stockfeeds gave notice of their intention to convene a shareholders' meeting of the shareholders of Stockfeeds to increase the share capital of Stockfeeds, such meeting to be held on September 25th, 2000.

The shareholders' meeting was duly convened on September 25th, 2000 and one John Worrell, the Executive Secretary of NICIL attended the said meeting in the capacity as the representative of the shareholder NICIL (this is undisputed and lawful in accordance with **Section 130 of the Companies Act 1991**).

NICIL's contentions are that the following contravened the **Companies Act 1991**:

(1) The "Notice" was given less than one month before the meeting which was held on September 25th, 2000;

(2) The "Notice" does not state that the resolution is an extraordinary resolution;

(3) The amount of the increase and the basis of the increase was not made known.

ANALYSIS (1)

Companies Act 1991, Fourth Schedule, Part I, Section 4 (a) provides;

"*With respect to the share capital of a company, the articles of incorporation of the company may be amended only -*

to change any maximum number of shares which the company is authorized to issue"

Companies Act 1991, Fourth Schedule, Part I, Section 6 (1) provides;

"*No amendment of a kind referred to in paragraph 4 shall be made in the articles of incorporation of a company unless not earlier than one month before the alteration or addition is made, a meeting of the holders of shares of the class in question is held and a resolution approving the alteration is passed at the meeting by a majority comprising at least three-quarters of the votes cast.*"

The requirement is clearly that the meeting and the resolution must be done at least one month before the increase **NOT** that the notice for such a meeting be given one month in advance.

What would have been required in this case is that the alteration/ addition not be made earlier than one month after the meeting and the resolution, to wit, not earlier than October 25th, 2000.

There is no evidence of when the Secretary of Stockfeeds did what was necessary to give effect to the resolution, whether it was before October 25th, 2000.

The earliest date that we have on the record for which these shares "could" have been put into effect is November 27th, 2000, that being the date that the "4 for 1 Rights Issue" offer opened, which is more than two months after the meeting and the resolution.

ANALYSIS (2)

In a round about manner NICIL, through its submissions to this Court claim that Article 66 of the Articles of Association of Stockfeeds was breached in that the "Notice" did not state that the resolution was an extraordinary resolution.

The Court is not in possession of this Article 66; it does not form part of the Appellate record of proceedings and in fact does not appear to have been evidence in the hearing before Justice Jainarayan Singh.

Nevertheless, what is required under **Section 6 (1)** is "*a majority comprising at least three-quarters of the votes cast.*"

What is required is at least three-quarters of the votes cast, whether the resolution is called "***majority***", "***special***" or "***extraordinary***" is simply a matter of semantics.

The undisputed fact is the resolution was passed unanimously which satisfies the legal requirement for the resolution to be passed.

ANALYSIS (3)

Section 112 (2) of the Companies Act 1991 provides;

"*Notice of a meeting of shareholders at which special business is to be transacted must state -*

(a) *the nature of that business in sufficient detail to permit the shareholder to form a reasoned judgment thereon; and*

(b) *the text of any special resolution to be submitted to the meeting*"

Section 113 of the Companies Act 1991 provides;

"*A shareholder and any other person who is entitled to attend a meeting of shareholders may in any manner waive notice of the meeting; and the attendance of any person at a meeting of shareholders shall be a waiver of notice of the meeting by that person unless he attends the meeting for the express purpose of objecting to the transaction of any business on the grounds that the meeting is not lawfully called.*"

The "Notice" clearly stated that the purpose of the meeting was to approve a resolution increasing the Company's authorized share capital.

Considering the fact that the person representing NICIL at the meeting was John Worrell, the Executive Secretary of NICIL, it indeed would be difficult for this Court to make a finding that Mr. Worrell would not have been able to appreciate the nature of the business to be transacted at the meeting.

It may indeed have been desirable that the amount of the capital increase be stated in the "Notice", however, failure to so do in the circumstances of this case cannot be said to make the "Notice" invalid and void.

In any event Mr. Worrell's attendance at the meeting without objection, a legal right available to him under the **Companies Act 1991, Section 113 and Fourth Schedule, Part IV, sections 14 (1) (a) and 17**, is a waiver with respect to any "Notice" requirement not complied with **and** to the business transacted at that meeting.

Further, the fact that the "Notice" can be waived by attendance without objection demonstrates that any deficiency or perceived deficiency with respect to the contents of the "Notice" would similarly be waived by attendance without objection.

CONCLUSION

In view of the foregoing the Court finds that the "Notice of Extra Ordinary General Meeting" to "*approve a resolution increasing the Company's authorized share capital*" dated August 28th, 2000 was in compliance with the **Companies Act 1991** of the Laws of Guyana and therefore valid.

ISSUE II

Was the "4 for 1" Rights Issue in December 2000 *ultra vires* the Memorandum and Articles of Association and by extension also the objects of the Appellant company and consequently null and void?

ANALYSIS

The Memorandum and/ or Articles of Association of the Appellant company (Stockfeeds) do not form part of the Appellate record of proceedings and in fact does not appear to have been tendered into the evidence in the hearing before Justice Jainarayan Singh.

In the absence of a written decision from Justice Jainarayan Singh and the Memorandum and/ or Articles of Association of the Appellant company (Stockfeeds) being part of the evidence at the hearing, there really cannot be any justification or even explanation as to how Learned Trial Judge could have concluded that the "4 to 1" Rights Issue of December 2000 was *ultra vires* such Memorandum and/ or Articles of Association and therefore null and void.

CONCLUSION

In the circumstances orders (b) and (e) of the Order of Justice Jainarayan Singh dated September 29th, 2008 must be vacated.

ISSUE III

Was the "4 for 1" Rights Issue in December 2000 ultra vires the Companies Act 1991 and consequently illegal, null and void?

LAW

Companies Act 1991, Division D, sections 33, 285, 287, 295, 296 and 531.

FACTS

The shareholders of Stockfeeds having unanimously voted to increased its share capital and this having been done, the directors then decided to offer its shareholders the opportunity to purchase four shares for every one that such shareholder held as of September 26th, 2000 labelled the "4 for 1" Rights Issue.

It is undisputed that an Information Memorandum was circulated to the shareholders of Stockfeeds explaining *inter alia* the procedure for acceptance of the new shares.

NICIL's contention is that the issue of the shares without a prospectus is void.

ANALYSIS

Section 285 (c) of the Companies Act 1991 defines the term prospectus as follows;

"*prospectus includes, in relation to any company, any notice, prospectus, or other document that -*

(i) invites applications from the public, or invites offers from the public, to subscribe for or purchase; or

(ii) offers to the public for subscription or purchase, directly or through other persons,

any shares or debentures of the company or any units of any such shares or debentures of the company."

Section 287 of the Companies Act 1991 provides;

"*(1) Subject to subsection (2), no person shall issue any form of application for shares or debentures unless -*

(a) a prospectus, as required by this Division, has been registered with the Registrar; and

(b) a copy of the prospectus is issued with the form of application or the form specifies a place in Guyana where a copy of the prospectus can be obtained.

(2) Subsection (1) ***shall not apply if*** *the form of application referred to is issued in connection with shares or debentures that* ***are not offered to the public or intended for the public***."

It is clear that the requirement for a prospectus to be issued only becomes applicable if the shares are being offered to the public.

The Information Memorandum is unequivocal that the offer is to shareholders of the company. One would think that "4 for 1" is self explanatory, to wit, you have to have 1 before you can exercise your right to any.

Senior Counsel for NICIL argues that the statement in the Information Memorandum,

"*In the event that any of the 2,256,000 shares being offered are not taken up by the company's shareholders after any allotment of excess shares, the Company proposes to allot such shares at the sole discretion of the Board of Directors.*"

demonstrates that the shares can be taken up by the public, in that the Directors are given wide latitude in their allotment of any left over shares, which must necessarily include allotment to the public.

This conclusion does not logically follow the statement since the Information Memorandum lays out that each shareholder is offered four sharers for every one that they hold and the shares were so provisionally allotted. Should the entire provisional allotment allotment to a shareholder/s not be taken up by a shareholder/s then the shares not taken up, (referred to as "**excess shares**" in the Information Memorandum), would be sold to **the shareholders of Stockfeeds** who are willing to purchase those shares. The shareholders of Stockfeeds being the only class of persons entitled to apply to purchase those shares, which application would have been made by a shareholder at the time that that shareholder was accepting the whole of their provisional allotment.

Should there still be shares not taken up after those two processes are complete then the Board of Directors can allot the remaining shares at their discretion. If at that time the Board of Directors choose to offer those shares to the public for sale, **then,** a prospectus would be required. In fact by virtue of **Section 295 (1) of the Companies Act 1991** should that have occurred then the document by which the offer of sale to the public was made would have been deemed to be the prospectus.

Further, the non occurrence of the events set out in **Section 295 (2) of the Companies Act 1991** contradicts NICIL's argument and conclusion in this regard.

Senior Counsel for NICIL made passing reference to **Section 296 of the Companies Act 1991** in their written submissions which I find is not relevant to the determination of this issue.

Senior Counsel for NICIL also argues that any issue of shares by a public company is an issue to the public.

There is no legal support for this contention and in fact **Section 531 of the Companies Act 1991** makes it clear that any offer or invitation would not be treated as an offer or invitation to the public if in all the circumstances it is not calculated the shares would become available for subscription or purchase by persons other than those receiving the offer or invitation.

Section 33 of the Companies Act 1991 provides for the pre-emptive rights of shareholders **if provided for** in the articles of the company. As stated before the Articles of Stockfeeds do not form part of the evidence in this case and so cannot form a part of the consideration in this determination, but it must be said that, in my opinion, the pre-emption rights of existing shareholders ought to be statutory. In my opinion directors should be prevented from issuing shares to new shareholders or otherwise alloying shares in a way which dilutes the rights of existing shareholders.

CONCLUSION

The "4 for 1" Rights Issue in December 2000 was not *ultra vires* the **Companies Act 1991**.

In the circumstances orders (c) and (d) of the Order of Justice Jainarayan Singh dated September 29th, 2008 must be vacated.

ISSUE IV

Was the issuance of Bonus Shares by the Appellant Company in 2001 ultra vires the Memorandum and Articles of Association of the Appellant company and in contravention of the Companies Act 1991 and consequently illegal, null and void?

ANALYSIS

As stated before, the Memorandum and/ or Articles of Association of the Appellant company (Stockfeeds) do not form part of the Appellate record of

proceedings and in fact does not appear to have been tendered into the evidence in the hearing before Justice Jainarayan Singh.

In the absence of a written decision from Justice Jainarayan Singh and the Memorandum and/ or Articles of Association of the Appellant company (Stockfeeds) being part of the evidence at the hearing, there really cannot be any justification or even explanation as to how Learned Trial Judge could have concluded that the Bonus Shares issued by Stockfeeds in 2001 was *ultra vires* such Memorandum and/ or Articles of Association and therefore null and void.

NICIL has not advanced any proposition or highlighted any section of the **Companies Act 1991** that the issue of the Bonus Shares has contravened.

Senior Counsel for NICIL argue that if the "4 for 1" Rights Issue was unlawful null and void then the issue of the Bonus Shares would be invalid. A sound proposition.

CONCLUSION

Since it has been determined in the foregoing that the "4 for 1" Rights Issue in December 2000 was not *ultra vires* the **Companies Act 1991**, then it follows that the issue of the Bonus Shares is valid.

In the circumstances orders (h) and (i) of the Order of Justice Jainarayan Singh dated September 29th, 2008 must be vacated.

ISSUE V

Did the Appellant Company's Directors breach their fiduciary obligations to the Respondent Shareholder by not informing the representative of the Respondent that it intended to issue Bonus Shares after the Rights Issue was taken up by the shareholders?

FACTS

The shareholders having unanimously agreed to increase the share capital of Stockfeeds at the meeting held on September 25th, 2000, a meeting which one

John Worrell, the Executive Secretary of NICIL attended in the capacity as the representative of the shareholder, NICIL, the board of directors then decided to offer its shareholders the opportunity to purchase four shares for every one that such shareholder held as of September 26th, 2000 labelled the "4 for 1" Rights Issue.

NICIL's contentions are that at the time that the "4 for 1" Rights Issue was offered to the shareholders, the board of directors **harbored the intention** to "gift" Bonus Shares to its shareholders immediately after the Rights Issue was taken up.

NICIL, argues that it was imperative that the directors of Stockfeeds inform the shareholders, which includes NICIL, of this intention since it was their fiduciary duty to the shareholders to so do and failure to so do is a breach of this fiduciary duty which voids the "4 for 1" Rights Issue.

LAW

Companies Act 1991, section 96

Re Chez Nico (Restaurants) Ltd. [1992] B.C.L.C. 192 @ 208

Peskin & Milner *v* Anderson & Ors [2001] 1 B.C.L.C. 372 @ 379

ANALYSIS (1)

There is absolutely no evidence that the board of directors or for that matter any director **harbored an intention** to "gift" Bonus Shares to its shareholders at any time after the Rights Issue was taken up.

Senior Counsel for NICIL has argued strenuously to this Court that the fact that the "4 for 1" Rights Issue was completed in December 2000 and the decision to issue Bonus Shares was made "immediately after" at the Annual General Meeting of Stockfeeds in January 2001, the only reasonable inference to be drawn is that the Directors intended to issue Bonus Shares immediately after the "4 for 1" Rights Issue was taken up.

CONCLUSION (1)

It is not possible for the Directors of Stockfeeds to know which shareholders would have taken up their allotted shares from the "4 for 1" Rights Issue, so how is it exactly that this clandestine calculated move by the Directors to diminish the shareholding of NICIL supposed to work? Did the Directors know that NICIL was not going to take up the "4 for 1" Rights Issue offer?

It's not a logical inference to be drawn because it calls for speculation and therefore it is not a reasonable inference to be drawn.

ANALYSIS (2)

Obviously, if it cannot be established that the Directors harbored the intention to issue Bonus Shares at the time that they launched the "4 for 1" Rights Issue then the proposition that Directors breached their fiduciary duty to the shareholders by failing to inform the shareholders of this intent cannot succeed.

Nevertheless, as a matter of completeness, let us examine this fiduciary duty.

A general perusal of the **Companies Act 1991**, and particularly **section 96**, makes it clear that the statutory duties owed by Directors are to the Company and since the **Companies Act 1991** does not create duties by Directors to Shareholders individually, that issue is left to the common law; a position that is endorsed in **Gower and Davies' Priniciples of Modern Company Law, Eighth edition, section 16-5** and also clearly stated in **Essentials of Canadian Law, The Law of Partnerships and Corporations, Second Edition @ page 271**;

"*The duty is owed to the corporation, not to the shareholders or to any other stakeholder or group of stakeholders.Thus, in each case, the content of the duty will be defined by reference to the interests of the corporation in the circumstances.*"

It has been recognized in the English Courts that in certain special circumstances a fiduciary duty can arise between directors and shareholders.

This position was expressed by Browne-Wilkinson V.-C. in **Re Chez Nico (Restaurants) Ltd.** [1992] B.C.L.C. 192 @ 208;

"*Like the Court of Appeal in New Zealand, I consider the law to be that in general, directors do not owe fiduciary duties to shareholders but owe them to the company: however, in certain special circumstances fiduciary duties, carrying with them a duty of disclosure, can arise which place directors in a fiduciary capacity vis-à-vis the shareholders.*"

The position was expressed with more clarity by Mummery LJ in **Peskin & Milner *v* Anderson & Ors** [2001] 1 B.C.L.C. 372 @ 379;

"*The fiduciary duties owed to the company arise from the legal relationship between the directors and the company directed and controlled by them. The fiduciary duties owed to the shareholders do not arise from that legal relationship. They are dependent on establishing a* ***special factual relationship*** *between the directors and the shareholders in the particular case. Events may take place which bring the directors of the company into direct and close contact with the shareholders in a manner capable of generating fiduciary obligations, such as a duty of disclosure of material facts to the shareholders, or an obligation to use confidential information and valuable commercial and financial opportunities, which have been acquired by the directors in that office, for the benefit of the shareholders, and not to prefer and promote their own interests at the expense of the shareholders.*"

Mummery LJ went on to explore a few circumstances where it may be said that a "**special factual relationship**" existed, such as where an agency relationship is created or exists between the director/s and shareholder as where the shareholder entrusted the director to sell his shares or in a small family company where the shareholders relied on the directors for information and advice.

It is difficult to envisage a relationship giving rise to such a duty in a large company and moreso in the circumstances of this case, where the shareholder that is complaining is also a large corporate body, a body that was incorporated in 1990 with its primary objectives being to subscribe for, take or otherwise acquire,

hold and manage the Government of Guyana's shares in any company or other corporate body.

CONCLUSION (2)

The Directors did not breach any fiduciary duty owed to NICIL since a fiduciary duty in the context of the this case did not exist between the Directors and NICIL.

ANALYSIS (3)

NICIL argues that the issuing of the Bonus Shares after the "4 for 1" Rights Issue secured for the majority shareholder, Mr. Robert Badal, greater control over Stockfeeds by diminishing the percentage shareholding of NICIL.

This argument is as illogical as it is farcical. The issuing of the Bonus Shares is not the event that changed the nature of NICIL's shareholding but rather NICIL's refusal to buy into the "4 for 1" Rights Issue.

Simple mathematical deductions shows that if 2,256,000 shares were being offered under the "4 for 1" Rights Issue, then at that time there must have been 564,000 shares issued.

At that time the undisputed evidence is that Mr. Robert Badal held 50.3% of the shares, to wit, 283,692 shares and NICIL held 38% of the shares, to wit, 214,320 shares.

Under the "4 for 1" Rights Issue, Mr. Robert Badal would have gained 1,134,768 shares taking his shareholding to 1,418,460 and NICIL having opted not to take up their allotment would have still had 214,320 shares.

Mr. Robert Badal and the other shareholders (the holders of 11.7% of the shares before the issue) would further have been entitled to apply for the excess shares, which as it turned out would have been the shares that NICIL refused to take.

It is at the point of accepting or refusing the allotment under the "4 for 1" Rights Issue that the ratio of shareholding changed. It is a mathematical fact that the subsequent increase of all shareholding by a factor of 24 can only increase the

number of shares held by each shareholder but not the percentage of the shareholding that each shareholder has.

Therefore any intention or the existence of any intention to issue Bonus Shares is irrelevant and disclosure of such information is immaterial since it cannot logically play a part in NICIL's decision making process as to whether or not to take up its allotment in the "4 for 1" Rights Issue.

This is the principle of pre-emptive rights of shareholders and it would certainly seem that every step of the way the Directors of Stockfeeds made sure that each shareholder was given their pre-emptive right, from the "4 for 1" Rights Issue to the issue of Bonus Shares.

CONCLUSION (3)

It has not been established in any way that the Directors of Stockfeeds had a fiduciary duty to the shareholder NICIL or that there was in fact any breach of any fiduciary duties by the Directors of Stockfeeds.

In the circumstances order (a) of the Order of Justice Jainarayan Singh dated September 29th, 2008 must be vacated.

Based on the foregoing, ALL of the Orders made and granted by Justice Jainarayan Singh in Action No. 33 S/A of 2001 on September 29th, 2008 are hereby vacated and this Appeal is allowed in totality.

It is further ordered that the Respondent do pay to the Appellant costs fixed in the sum of $300,000.00 (three hundred thousand dollars).

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Justice N. A. Singh