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IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0048 OF 1998(S)
(High Court Civil Action No. 0129 of 1998S)

BETWEEN:

REWA CO-OPERATIVE DAIRY COMPANY LIMITED

First Appellant

RAM CHAND, MICHAEL HARNESS, ANTHONY COMPAIN, SAM SPEIGHT, ILAITIA TUISESE, RATU EPELI KANAIMAWI, APTAR SINGH AND PRITHVI RAJ

Second Appellants

AND:

SHARON JULIE ANNE MACKENZIE, MARK ADRIAN, THOMAS GATWARD AND DIANNA CAROL SHIRLEY JOHNSONT/A GATWARD FARMING PARTNERSHIP

First Respondents

JAGINDAR SINGH, NIR GYAN SINGH, KASHMI SINGH, KAMAT JIT SINGH AND BALBIR SINGH T/A J SINGH & SONS

Second Respondents

Coram: Eichelbaum JA, Presiding Judge
Tompkins JA
Smellie JA

Hearing : Tuesday, 13 November 2001, Suva

Counsel : Mr H K Nagin for the Appellants
Mr R K Naidu for the Respondents

Date of Judgment : Thursday, 22 November 2001

JUDGMENT OF THE COURT

Article 16 of the Articles of the appellant Rewa Co-operative Dairy Company Ltd (the company) provides:

> "Each person supplying dairy produce shall, in respect of the financial year of the Company in which he is so supplying, be required to hold such number of shares as may from time to time be fixed by the directors, but being not more than one share for every one pound of butterfat obtained or obtainable from the dairy produce supplied or expected by the directors to be supplied during that financial year."

Article 77 provides:

> "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 $1,000 – one vote
> For each $500 subscribed in excess of $1,000 – one vote"

The Articles make provision, in common form, for voting at general meetings on a show of hands unless a poll is demanded (Article 73). Voting may be in person or by proxy.

On 29 January 1998 Ram Achal and three other dairy farmers took out an Originating Summons in the High Court at Suva naming the company as defendant. In this proceeding (No 77 of 1998) the plaintiffs sought an injunction restraining the company from appointing or electing any new directors unless and until the issues raised by the Originating Summons had been determined, but no such order has ever been made. The proceeding also sought the following declarations:

> *"(a) That the provision of the Fair Trading Decree 1992 where it is inconsistent with the provisions of the Co-operative Dairies Act Cap 119 has application despite the provisions of section 9(1) of the Co-operative Dairies Act Cap. 119.*

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(b) That the application and use of Articles 15, 19 and 77 of the Consolidated Articles of Rewa Co-operative Dairy Company Limited by its Board and Management amounts to conduct oppressive to minority interest within the said Company.

(c) That articles 15, 19 and 77 of the Consolidated Articles of Association of Rewa Co-operative Dairy Company Limited individually or collectively breach section 27 of the Fair Trading Decree 1992

(d) That the failure by the Board of Directors of Rewa Co-operative Dairy Company Limited to utilise Article 31 of its Consolidated Articles to bring about equalisation of shares is in breach of section 27 of the Fair Trading Decree 1992 and in addition is conduct oppressive to minority interest within the company.

(e) The method used in the conversion and declaration of dividends and consequential allocation of shares from the profits of the Company Rewa Co-operative Dairy Company Limited, earned as a result of Government of Fiji's assistance subsidy or preferences is contrary to public policy and therefore lawful."

This appeal relates to a subsequent Originating Summons, No 129 of 1998, taken out by the present respondents on 23 February 1998. They are significant shareholders in the company, which was named as first defendant. The Summons sought a declaration that Article 77 was valid, and an order for the re-convening and completion of the company's 1997 Annual General Meeting (AGM). The affidavit in support referred to a "concerted attack" on the Articles as being undemocratic and unfair to small farmers, and to uncertainty as to the effect of some of the Articles. It also referred to an Extraordinary General Meeting of the company held on 19 December 1997. The resolutions proposed included that for purposes of the meeting, Article 77 was to be suspended, and Article 73 modified to enable the Chair to decline any demand for a poll. Further resolutions proposed the amendment of Article 77 to provide that every member be entitled "to vote once only" on any matter, and that two

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additional directors be elected. It was proposed that the method of election was to be one of the following, namely the status quo according to the Articles, or by each shareholder exercising one vote, or the implementation of a ward system.

At the Meeting, the Chair ruled that the resolutions relating to Articles 77 and 73 were to be put to the vote on the basis of "one farm, one vote". While both resolutions gained a majority of votes, they were not carried, because the Chair ruled they were special resolutions requiring a 75 % majority. The resolution relating to the election of additional directors was adjourned for further consideration.

The 1997 AGM was held on 30 January 1998. When the agenda item relating to the election of new directors was reached, the Chair announced that because there was an action in the High Court relating to the issue of voting (that is, No77 of 98, which had been commenced the previous day), voting could not proceed, as in his opinion the matter was *sub judice*. Despite protests the chair did not allow voting for new directors to proceed.

In an affidavit in reply, the Chair of the company deposed that there was general dissatisfaction among the company's members as to the method of voting prescribed by the Articles. Management was looking at fresh Articles for members' consideration. As to the AGM he agreed that he did not proceed with the election of new directors having regard to the presence of Action No 77 of 1998.

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At an earlier stage in the progress of the two sets of proceedings, the respondents applied for their consolidation. The present appellants filed an affidavit in opposition, saying the actions were not between the same parties, different solicitors were involved, and the issues were unrelated. It does not seem that this application was brought to a hearing.

The judgment of Byrne J now under appeal was given on 30 July 1998. Under a heading "Dates of hearing and submissions" it records the dates 12 and 30 June and 8 July 1998. To ascertain what was before the Court it is helpful to refer to the written submissions included in the Record. First were submissions by counsel for the defendants (now appellants) filed on 30 June 1998. After referring to the history they stated:

> *.....it was quite apparent that both actions are related and separate decisions in relation to each action would be undesirable and may lead to two conflicting decisions.*

Counsel went on to state that the company had objected to consolidation, but had no objection to the actions being heard consecutively by the same Judge. Counsel pointed out however that No 77 of 1998 had not yet been assigned a hearing date. After quoting from an affidavit sworn by Ms McKenzie counsel said it seemed that the plaintiffs, too, were of the view that the two actions should be dealt with together. The general thrust of the submission was that the hearing should be adjourned so that the two actions could be dealt with consecutively at the same fixture.

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The plaintiffs' submissions in response were dated 8 July 1998. Appellants' counsel has drawn attention to the fact that these were backed "Submissions....in respect of adjournment". These stated first, that the plaintiffs were prepared not to proceed on the Article 77 issue if the company was going to make "some movement" on that issue. However, they regarded the question of the AGM as a separate matter that needed to proceed. The submissions made this point forcefully, referring to the shareholders' basic right to elect their directors. The submissions concluded:

It is submitted that no adjournment should be granted. The issue of the AGM can be dealt with separately and should be. Furthermore, it is submitted there should be an order for costs forthwith in favour of the Plaintiffs to reflect the lack of merit in Defendants' application, which Plaintiffs say is only to delay.

Annexed to the Submissions was a copy of a letter sent by Plaintiffs' solicitors to the company's solicitors dated 10 June, which made the point that the adjourned AGM was regarded as a separate matter from the Article 77 issue. This letter stated:

Unless we have an unequivocal and binding assurance from the company that the AGM will be reconvened no later than 26 June 1998, we shall seek such orders tomorrow.

Next is a submission, filed on 23 July 1998, by counsel for one of the second defendants, Sam Speight. This submitted that No 129 of 1998 should be heard immediately

after No. 77. It also referred to ongoing discussions with a view to resolving the differences affecting the company. Without saying as much, this seemed to amount to a plea for an adjournment.

In response, there was a further submission for the plaintiffs, dated 24 July. In it counsel said there had been only one meeting to try to resolve the issues. The submission reiterated the theme that there was no reason for holding up the completion of the AGM. As noted, the judgment was issued on 30 July 1998. There was no further hearing, following the last of the written submissions. The judgment stated that "now before the Court" was an Originating Summons seeking the declarations claimed. It referred to the "almost snail-like" progress of No. 77 of 1998, which had been before a Deputy Registrar or a Judge on 7 occasions and had been adjourned to 29 July for mention. No attempt had been made to set that proceeding down. We interpolate that further evidence provided by leave for purposes of the appeal showed that three years on, No. 77 remained in a similar state, and that the AGM had never been resumed.

Reverting to the judgment, after referring to the course taken at the AGM His Lordship referred to the hearing before him on 12 June and the written submissions received subsequently in which the defendants had requested an adjournment for the purpose of having the two sets of proceedings heard by the same Judge. Stating he could not accept this submission, His Lordship said the actions sought different relief, and that to accede to the Defendants' submissions would cause unnecessary harm to shareholders, who ought to have their rights to vote on the election of directors and any other matters which had arisen. He

pointed out that section 133 of the Companies Act made it mandatory to hold an annual general meeting. In his view there was no reason to delay the resumption of the meeting any longer. He made an order directing that the resumed meeting was to take place no later than 22 August 1998.

It seems that after preparing the judgment to this point, His Lordship was made aware of the submissions filed on behalf of Sam Speight. He directed that the Plaintiffs have leave to reply, which as already noted their counsel did immediately. Having read the further submissions His Lordship saw no reason to amend the view taken earlier. He ended the judgment in these terms:

> ....time has run out for the present Board. In my judgment there has been too much procrastination by that Board already; I am not prepared to let it indulge itself any longer.

Notice of Appeal was filed on 12 August 1998. For reasons unknown to us, the Record was not certified until 12 June 2001. In submissions in support of the appeal counsel stated that the proceedings under No. 77 of 1998 impugned the validity of the voting Articles, and until such time as the Court had resolved the issue, it would not be fair to proceed to the election of office bearers. Referring to No. 129, counsel said that since this also raised issues about Article 77, separate decisions in relation to the two sets of proceedings would be unreasonable, and the two should be heard one after the other by the same Judge. This was the basis for the request for an adjournment when the present case came before Byrne J on 12

June 1998. Given that the respondents no longer wished to proced with the article 77 issue, these contentions are no longer relevant.

Counsel submitted that the only issue before Byrne J was whether the proceeding should be adjourned. This was the only point to which submissions were directed. The Judge however issued a final judgment dealing with the merits. He should have given the opportunity for further submissions before issuing final judgment. Thus there had been a breach of natural justice. Counsel pointed out that both sides had wanted some form of consolidation or concurrent hearing. We comment that while it is correct that at some stage both parties had raised this issue, by the time of the 12 June hearing it was obvious the respondents' prime concern was that the election of directors ought to proceed.

Mr Naidu agreed that the submissions which the Judge required were to deal only with the issue of adjournment. Of course we accept that is Mr Naidu's recollection, which is supported by the terms of the backing sheet of the written submission he filed at the time. As we will show shortly, that was not the Judge's impression. However, for the moment we proceed on the assumption that counsel's recollection is right. We asked Mr Nagin what he expected would have happened , or what ought to have happened, had the Judge decided (as in the event he did) against any form of consolidation, with the consequence that there was no ground for any adjournment. Counsel replied that he would have expected the Judge to give the parties the opportunity to make further submissions.

It is clear that by or on 12 June Mr Naidu no longer wished to proceed with his

Article 77 contention. Thus the only remaining matter on which any submissions could have been made was whether the election of directors should proceed.

When we asked Mr Nagin what tenable argument could have been raised against the election proceeding, understandably he was unable to point to any. The existence of dissatisfaction with the terms of the 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 to conduct an Annual Meeting including the election of directors. It makes no difference whether the challenge to the Articles is oral, 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 we have mentioned cannot justify significant postponement of the meeting or election, unless of course a court so orders.

Thus, once the Judge decided against any form of consolidation there was no basis for an adjournment, and there was nothing left to argue about. We are mindful of judicial cautions about seemingly unanswerable cases that subsequently have been convincingly answered, and that 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. Exceptionally however, here we are satisfied there was in fact nothing further that could have been said. It is not as if there has been no opportunity to say it. When the appellants had their chances - before Byrne J on 12 June 1998, in the subsequent written submissions, and finally, in this Court, nothing has emerged.

Nevertheless Mr Nagin submitted that the course taken by the Judge in issuing a final decision without giving the parties the opportunity for further submissions was wrong in principle, and that this Court should make that clear. It is elementary that parties are entitled to a fair opportunity to put their case before a court issues its decision. It would be quite wrong for a court to call for submissions on a particular point and then, when there has been no opportunity for submissions on other matters at issue, to deliver judgment on the whole case. As foreshadowed however, and notwithstanding Mr Naidu's concession, we are not convinced that was the situation here. In his judgment the Judge said:

> ***When the parties came before me on 12 June I suggested to them that on what I had read so far I could see no reason why the AGM should not be reconvened but counsel for the Company requested leave to file written submission which he said would explain the Company's opposition to the plaintiff's request.***

The 12 June fixture was in fact the fixture for the hearing of the case. The passage quoted shows the Judge had expressed a tentative view on the only point at issue, and the appellants' counsel obtained leave to file written submissions arguing the contrary. The only argument submitted was that the case should be adjourned to enable some form of consolidation with the other proceedings. Upon the rejection of this argument, we do not see that appellants' counsel had any reasonable expectation of an opportunity for the advancement of further contentions which, after all, could have been contained in his written submission.

Thus, dealing with the matter by either of the routes we have taken, we are satisfied the appeal must fail.

Result

1. Appeal dismissed.

2. Appellant to pay respondents' costs in the sum of $1,500.

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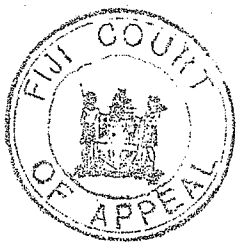
Eichelbaum JA, Presiding Judge



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Tompkins JA

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Smellie JA

Solicitors:

Messrs. Sherani and Company, Suva for the Appellants
Messrs. Munro Leys and Company, Suva for the Respondent

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