

IN THE SUPREME COURT ROCKHAMPTON Petition No. 2 of 1981

CIVIL JURISDICTION

BEFORE MR. JUSTICE DEMACK

9 MARCH 1982

IN THE MATTER OF "The Companies Act 1961 to 1981"

- and -

IN THE MATTER OF FOSTER CALVES PTY. LTD.

JUDGMENT

HIS HONOUR: Foster Calves Pty. Ltd. was incorporated under the Companies Act on 23 November 1967. The company has a considerable number of objects, but it seems to me that it is possible to say that the principal object of the company was to conduct and carry on the business of pastoralists, graziers, breeders and fatteners of cattle, sheep and other livestock, stud masters and farmers of all descriptions.

The nominal capital of the company was \$40,000 divided into 100 "A" class shares of \$1 and 39,900 "B" class shares each of \$1. The amount of capital paid up was \$18,000. This shareholding was divided among members of the Thomas family, Mr. & Mrs. Ballard and two Mr. & Mrs. Hoffmann. Of the Thomas family Mr. Thomas held 60 of the "A" class shares and Mrs. Thomas 40 of the "A" class shares. The significance of this holding lies in the Articles of Association which give all of the effective control of the company to the holders of the "A" class shares. In addition to their "A" class share holdings Mr. & Mrs. Thomas held 3,000 "B" class shares; two of their sons held 300 "B" class shares.

Mr. & Mrs. Bollard held 2,000 "B" class shares and each of the Hoffmann families own 6,300 "B" class shares.

The petitioners who seek to have the company wound up are the Bollards and the Hoffmanns. The situation therefore is an unusual one in that the majority of the holders of the capital of the company complain of the acts of the minority shareholders.

The company acquired land at Gracemere so that it would have the place to fatten cattle. However, only one calf has ever been fattened by the company. The various shareholders seem to have used the land for agistment purposes. It is clear that friction developed between Mr. Thomas and the male Hoffmanns sometime about 1975. Since then there has not been any useful communication between Mr. Thomas and the Hoffmanns.

The grounds on which the petitioners seek to have the company wound up are, first of all, that the directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole or, alternatively, they have acted in a manner which appeared to be unfair and unjust to the other members further, that in the circumstances, it is just and equitable that the company be wound up.

At the hearing, particulars of these allegations were sought and given. These are contained in the record and it does not seem to me to be necessary to refer to them in detail. In substance, the complaint is a lack of communication and a lack of a desire to carry out the wishes of the majority of the owners of "B" class shares in the sale of the sole asset of the company. The land that was purchased was land in Gracemere which, although suitable for grazing, obviously has its future best use as industrial land. The land was all, apparently, subdivided prior to purchase. I am not aware of knowing the purchase price but it does seem to have been bought with the capital that was subscribed. Over the years the company has incurred various expenses which have been met by borrowing. However, the total amount of the borrowing and of accumulated debts is only of the order of \$6,000.

The land, as I have said, has been subdivided, and one of the things that has been done is to obtain separate titles for each of the subdivided blocks. The petitioners contend that the land, which was apparently purchased for less than \$18,000 after the formation of the company, is now worth considerably more than \$200,000; the directors maintain that it is now worth considerably more than \$300,000. The directors claim that they have some support for their contention in that a contract has been signed for the purchase of one of the blocks of land for \$37,500, a figure which is well in excess of the valuation for that block for which the petitioners contend.

It will be seen, therefore, that this is not a case where it is suggested there is any fraud in the establishment of the company or any illegal conduct on the part of the directors which prejudices the standing of the company as a commercial entity or which puts at risk the assets of the shareholders. The directors agree that the land ought to be sold because there does not seem to be any future in fattening another calf. Consequently, the only dispute is whether the land ought to be sold under the control of the directors or under the control of someone responsible to the Court in the winding up of a company.

It does seem to me that it is important to keep in mind some of the things that the Court is concerned with in a case like this. One of the early High Court decisions which does, of course, have facts which are radically different to those of which I am concerned, contains a passage which seems to me to contain useful guidelines for the exercise of my jurisdiction. The case is Menard v. Horwood & Co. Ltd. (1922) 31 Commonwealth Law Reports page 20. The High Court simply adopted the reasons and judgment of Street C.J. in Equity, from whose judgment an appeal was taken. In the course of that judgment at page 23, the following passage occurs:

"The present case, however, is not a case of a company which had a fraudulent origin, or which is systematically carrying on fraudulent practices, nor am I satisfied that the retention of Horwood at the

head of affairs, reprehensible as his conduct was, will prejudicially affect the carrying on of the business."

That, of course, is by no means an exhaustive statement in which the Court will act under the power given under section 222 to wind up a company, but it does, it seems to me, refer to matters that could be germane in a case such as this, but which certainly do not appear.

Another case which sets out more exhaustively the kind of things that the Court looks for is the decision of the Privy Council in *Loch v. John Blackwood Ltd.* (1924) Appeal Cases, p. 783, (1924) All England Reports Reprint, p. 200. In the judgment of Lord Shaw reference is made to some of the things that the Court looks for, and the following passage appears at 203 of the All England Reprint:

"It is undoubtedly true that at the foundation of applications for winding up, on the 'just and equitable' rule, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. Furthermore, the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs, or on what is called the domestic policy, of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter, and it is, under the statute, just and equitable that the company be wound up."

I have referred to these old cases because it does seem to me that all we have heard is personal animosity between the majority of the shareholders and the directors. The majority of the shareholders will only gain considerably if the directors' expectations are fulfilled. There is, in round figures, a difference of \$100,000 between the valuation for which the petitioners contend and the valuation that the directors say they can obtain if they are allowed to sell the land at their price. It seems to me nonsense to say that there is any

basis for thinking that the shareholders are in any way prejudiced in those circumstances. It does not seem to me that any of the allegations made which suggest the directors have an unfair amount of power over the company are of any substance. The power is derived from the memorandum and articles of association and as such, the powers that the directors have have been accepted by the shareholders when they subscribed to the company.

It does not seem to me that this Court has any power or responsibility in a case such as this to draw any kind of inference of improper conduct. Consequently, I am satisfied that, here, nothing has been shown to justify the intervention by the Court in the affairs of the company. It is not for me to make comment upon the manner in which the directors operate unless that manner of operation is contrary to professional standards of business morality or is, in some way, prejudicial to the shareholders. It does not seem to me that either of those matters is established, and the petition is dismissed.

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HIS HONOUR: Order that the petitioners pay the company's and the directors' costs including reserve costs.
