

BERMUDA SUPREME COURT

Annuity & Life Re Ltd, Madam Loh Yew @ Lau Ah Moi -v Full Apex (Holdings) Limited, Full Excellent Limited, Guan Lingxiang and Liang Huiyang [2012] SC (Bda) 73 Com

COMPANIES - MINORITY SHAREHOLDER
OPPRESSION - RIGHT OF COMPANY TO
PARTICIPATE IN LITIGATION

In this case, Full Apex Holdings Limited ("Apex") applied for an Order permitting and/or authorising it to take an active role in existing litigation involving a minority shareholder oppression application. The Petitioner in the existing litigation complained about a transaction (the "FDL Transaction") which was alleged to have merged three subsidiaries of Apex which generated 98% of its profits. The then sale of 22% of the merged subsidiaries was alleged to have been on un-commercial terms which unfairly diluted the value of the Petitioner's shareholding. It was also alleged that Apex's Directors breached their fiduciary duty to act in good faith in the best interests of Apex.

Counsel for Apex stated that the existing litigation was not an ordinary shareholder dispute but one in which Apex had an independent position to advance and, as such, the starting assumption (that Apex should play no active role during substantive adjudication of a shareholder dispute) should be modified. It was further outlined that the main reason Apex sought to play an active role in the litigation was the risk that findings might be made on issues that its majority Shareholder could otherwise address in a different way and which would adversely affect the Company's SGX listing status. Apex contended that the Company had a distinctive role to play in the litigation in advancing the argument that it: "*has acted in accordance with the letter and spirit of the listing rules*".

The Judge noted that the present case was rightly distinguished from the situation where all directors are nominees of the majority shareholder because in this case independent directors were involved. The Judge also held that the test for determining whether a company should expend its funds on actively participating in a minority shareholder oppression petition is ultimately a simple one that entails determining whether such involvement is in the interests of the company as a whole. It requires consideration of the nature of the allegations raised and their

impact (if any) on interests other than those of the disputing shareholders, being interests which the company can legitimately claim the right to represent. In the case of a publicly listed company, where public shareholders are not before the Court, a shareholder dispute which impugns the integrity of the Company's decision-making processes will often engage such wider interests.

It was, therefore, held that it was in the interest of Apex, as a whole, to play an active role in the further conduct of the litigation with a view to addressing any corporate governance issues arising which might impact upon Apex's status as a listed company and the interests of public shareholders not before the Court. The Court held that this role ought properly to be a narrow one primarily limited to dealing with issues the other Respondents are not dealing with at all or, alternatively, refining points made by the other Respondents to add a distinctive gloss which Apex feels should be added to them. The suggestion of the Petitioner that the role of Apex was too ill-defined or that the appropriate course for Apex to take was to consult the public Shareholders was rejected. The Judge took into account the fact that any abuse of the permission granted to Apex to participate in the litigation could be dealt with, to some extent at least, by way of costs

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