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OFFSHORE CASES

FEBRUARY 2014

BERMUDA

SUPREME COURT

Allison Thomas and Ricardo Swan (Petitioners) -v- Fort Knox Bermuda Ltd. and Troy Symonds and Shari Poe [2014] SC (Bda) 15 Com (26 February 2014)

WINDING-UP - MINORITY OPPRESSION - SHAREHOLDER DISPUTES - S111 COMPANIES ACT, 1981

Minority oppression actions or shareholder disputes are relatively common in Bermuda but they rarely if ever go the full distance and end up in trial. In this case, the First Petitioner was a founder, shareholder, and former director of the First Respondent (the "Company"). In his capacity as a member of the Company he has issued a petition in which he applies for relief pursuant to Section 111 of the *Companies Act, 1981* (the "1981 Act"). This was on the ground that the affairs of the Company are and have been conducted in a manner oppressive or prejudicial to his interests as a member.

The Company adopted a neutral position regarding the petition. However, the petition was opposed by the Second and Third Respondents, directors of the Company (in which they hold a majority of the shares).

Section 111 is concerned with the rights of shareholders. In order to achieve relief under Section 111 of the Act, the petitioners had to show that, were it not for the existence of the statutory remedy, it would otherwise be just and equitable to wind up the company. The conduct complained of must be oppressive or prejudicial to the interests of the member as a member. It is not enough that it is prejudicial to his interests in some other capacity (e.g. as a director or employee). The Petitioners' claim for relief was dismissed with Hellman J providing a basis for rejecting each of the grounds upon which the petition was based:

The Petitoners' claimed that certain arrangements of the Company were designed by the Second and Third Respondents to dilute the First Petitioner's shareholding so that they could gain a majority interest in the Company. The Second and Third Respondents rejected the First Petitioner's allegations and asserted that the purpose of the arrangements was to provide the Third Respondent with some measure of security for the extensive sums that she had loaned to the Company. Hellman J held that the dilution of the First Petitioner's shareholding (as of the Second Respondent's shareholding) was on their evidence simply an ancillary consequence of this arrangement. Moreover, it was not sufficient to give the Second and Third Respondents a combined majority of common shares.

The Petitioners also claimed that the removal of the First Petitioner as an employee and director was oppressive or prejudicial. Hellman J disagreed and held that by the date of his dismissal as an employee, the First Petitioner's terms and conditions of employment were no longer subject to equitable considerations but were purely contractual. The Company was within its rights to dismiss him without cause. His appointment as a director was not renewed as his relationship with the Second and Third Respondents was damaged beyond repair and, in Hellman J's judgment, nothing untoward in that.

Hellman J was also satisfied that the Company's failure for a number of years to present audited accounts was due chiefly to lack of funds and, was not oppressive or prejudicial to the First Petitioner who had access to the unaudited accounts.

Finally, Hellman J held that the Company's continuing failure to pay the First Petitioner his deferred salary was not oppressive or prejudicial to him as the Company was not, and has not been at

any material time, in a position to pay deferred salary to him or any of the other shareholder employees.

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