Citco Banking Corporation N.V. v. Pusser's Ltd & Anor (Eastern Caribbean Supreme Court (British Virgin Islands)) [2007] UKPC 13 (28 February 2007)

Privy Council Appeal No 55 of 2005

Citco Banking Corporation N.V. *Appellant*

v.

(1) Pusser's Limited

(2) Charles S Tobias *Respondents*

FROM

THE COURT OF APPEAL OF THE EASTERN CARIBBEAN SUPREME COURT (BRITISH VIRGIN ISLANDS)

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered the 28th February 2007

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Present at the hearing:-

Lord Hoffmann
Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Lord Mance

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*[Delivered by **Lord Hoffmann**]*

1. Pusser's Ltd ("the company") is a company incorporated in the British Virgin Islands which, previous to the events in issue in this appeal, had an authorised share capital of $4.4m divided into 4.4m class A shares of $1 each, of which 1,673,217 shares and warrants for another 248,000 had been issued. Each class A share or warrant carried one vote. At an extraordinary general meeting on 16 March 1994 the company by

special resolution amended its articles of association to create 200,000 class B shares, each carrying 50 votes. It further resolved that 200,000 of the class A shares held by the chairman of the company, Mr Charles S Tobias, be converted into class B shares. The resolutions were carried by 1,125,665 votes to 183,000, the dissenting shares all being held by Citco Banking Corporation NV ("Citco"). Citco alleges that the resolutions were invalid because they were passed in the interests of Mr Tobias, to give him indisputable control, and not bona fide in the interests of the company. The judge (Benjamin J) accepted this submission but the Court of Appeal (Alleyne and Gordon JJA, Mitchell JA (Ag)) reversed his decision and held the resolutions valid. Citco appeals.

2. The evidence about the distribution of the shareholdings and the beneficial ownership is somewhat unclear, but a general impression may be obtained from the share register and such evidence as was given at the trial. The holdings appear to have been widely spread, mostly among individuals, described as "Business Executive", "Retired Business Executive", "Financier" and so forth, who made up 33 of the 50 registered shareholders. Mr Tobias held 62,439 shares and he and his wife held another 133,000. The company's New York attorney, Mr Lloyd de , who was the only substantive witness at the trial, said that Mr Tobias also controlled the 327,245 shares registered in the name of Piccadilly Properties Ltd, which brought the total under his control to just under 28% of the issued share capital. Three companies in the Citco group were registered as together holding 256,617 shares or 13%. Only one other shareholder (Glenmore Distilleries Co) held more than 100,000 shares (114,546) and 33 shareholders were registered as each holding less than 50,000 shares or warrants.

3. The original business of the company appears to have been the sale of rum under the trade name "Pusser's", a name said to be a corruption of "Purser's" and to have old associations with the Royal Navy. It has however diversified into running restaurants and bars and selling other gift items with a naval flavour. Until 1993 its main area of activity was the British Virgin Islands and other tourist resorts in the Caribbean. There is no dispute that in 1994 it was in serious need of more working capital, not least because in the previous year Citco, which had lent some $800,000 to the company, brought proceedings to recover its loan. A board minute of 5 March 1993 shows that some of the directors, including Mr Tobias, had to advance money to fill the gap.

4. Over the following year the directors considered how they might obtain more long-term finance. A report by Mr Tobias dated 27 January 1994 accompanied the notice of the annual general meeting at Tortola on

4 March 1994. The company, he said, had made losses for four successive years ended
30 June 1992 but the year to 30 June 1993 had shown a profit of $56,000. The current year was also expected to yield a modest profit. But Mr Tobias said that the company's future lay in an expansion of its activities into the United States, starting with a retail enterprise in Annapolis. This would require both equity and loan finance. He was trying to raise equity finance by a private placement of shares with potential investors (known as an offer under Regulation D of the relevant US securities regulations) and to raise loan finance from banks.

5. The minutes of the annual general meeting on 4 March 1994 show that a resolution to create class B shares in the same terms as that subsequently passed at the extraordinary general meeting on 16 March was moved and passed. Mr Tobias explained why in his opinion the resolution was needed:

> "1. He stated that the company was in the middle of a private placement of shares. He pointed out that he had been in contact with certain investors whom he believed would purchase shares in the company resulting in proceeds of two million dollars to the company. He pointed out that certain of the key investors in this group had stated to him that their reason for investing in the company was that they were betting on him and his strategy to make the company a significant success. They told him that they would only invest in the company if he had unquestioned control over the company.
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> 2. He stated that the bankers to the company had told him that they had seen a marked improvement in the overall performance of the company since he had taken back responsibility for the day to day operations of the company. The bankers had told him that they would consider advancing a significant line of credit to the company provided that he remained in tight control of the company and would personally guarantee repayment of all or some of the advances by the company to the bank. The chairman stated that he was willing to personally guarantee repayment of the advances provided that he had assurance that he would remain in control of the company.
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> 3. He stated that he and his family had more than one half million dollars loaned to the company which was due and payable. He was not willing to continue to leave the funds in the company unless he had absolute control over the company to assure that the direction of the company was one that he believed would eventually allow

> for the repayment of these loans. He stated that he believed that it was in the best interest of the company not to have these loans called at this time.
>
> The chairman stated that he believed that it would be in the best interests of the company and all of its shareholders for the sale of securities in the United States under a Regulation D offering to be completed, a significant line of credit established with the bankers to the company and for his loans not to be called at the present time. He said that if the resolution was approved, he would not call the loans and would personally guarantee the repayment of moneys drawn under the significant line of credit proposed by the bankers to the company as required by the bank."

6. Mr Cuppy, a director, the corporation secretary and an attorney, objected that the resolution was not properly before the meeting and he and two other directors, as well as the Citco interests, voted against it. Mr Cuppy's objection was well taken. Section 89 of the BVI Companies Act Cap 285 provides that a company —

> "may in general meeting, from time to time, by passing a special resolution in manner hereinafter mentioned, alter all or any of the regulations of the company contained in the articles of association..."

7. Section 90 prescribes the requirements of a special resolution. A resolution is deemed to be special when —

> "a resolution has been passed by a majority of not less than three-fourths of such members of the company, for the time being entitled according to the regulations of the company to vote, as may be present in person or by proxy.. .at any general meeting of which notice specifying the intention to propose such a resolution has been duly given."

8. No notice of intention to amend the articles at the annual general meeting had been given and the resolution was therefore not a special resolution. In addition, the dissenting votes of Mr Cuppy and the other directors meant that less than 75% of the votes of the members present in person or by proxy were cast in favour of the resolution.

9. Mr Tobias said that he would consult counsel, who must have advised that the resolution had been invalid, because notice was immediately given of an extraordinary general meeting to be held on 16 March 1994, at which the resolutions passed at the annual general

meeting would be ratified and confirmed. On this occasion, only 183,000 votes (belonging to Citco) were cast against and 1,125,665 were cast in favour. This was a majority of 86%. 62,439 votes were recorded as having abstained and as this was precisely the number registered in the name of Mr Tobias, it may safely be assumed that he had decided not to cast their votes.

10. The special resolutions certified as having passed were:

> "RESOLVED that the Memorandum of Association of Pusser's Ltd be and is hereby amended by deleting paragraph 5(a) as amended and substituting therefor the following:
>
> 5(a) The capital of the company is US$4,400,000 divided into 4,200,000 Class A ordinary shares of $1.00 each and 200,000 Class B ordinary shares of $1.00 each.
>
> RESOLVED that the Articles of Association of Pusser's Ltd be and are hereby amended as follows:
>
> (1) By deleting paragraph 4 as amended and substituting therefor the following:
>
> 4(a) The Capital of the Company is US$4,400,000 divided into 4,200,000 Class A ordinary shares of $1.00 each and 200,000 Class B ordinary shares of £1.00 each.
>
> 4(b) The Class B ordinary shares of the Company shall automatically convert into Class A ordinary shares upon the death or permanent disability of Mr Charles Tobias.
>
> (2) by deleting Article 7 and substituting therefor the following:
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> 7. At any General Meeting of the Company on a show of hands every Member present in person shall have one vote and on a poll every holder of Class A ordinary shares shall have one vote for every share owned by that member and every holder of Class B ordinary shares shall have fifty votes for every share owned by that member.

11. The meeting also resolved that

> "200,000 shares of the Class A ordinary shares of the Company owned or controlled by the Chairman of the Company, Mr Charles S Tobias, be converted into 200,000 of the new Class B ordinary shares of the Company."

12. Section 89 of the Act contains no qualification of the power of a 75% majority to amend the articles of association. But the courts have always treated the power as subject to implied limitations. The problem

has been to say where the line should be drawn. In *Hutton v Scarborough Cliff Hotel Co.* (1865) 2 Dr & Sm 521 Kindersley V-C said that, in the absence of contrary provision in the memorandum of association, it was a fundamental condition of a company's constitution that shareholders should be treated equally. The power to amend the articles could therefore not be used to create shares with special privileges. But in *Andrews v Gas Meter Company* [1897] 1 Ch 361, in which there was a challenge to an amendment to allow the issue of preference shares, this decision was overruled, Lindley LJ saying that it was "desirable, from all points of view, to remove from companies a fetter which ought never to have been imposed upon them".

13. The limits of the power of amendment were considered again by the Court of Appeal in *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656. Mr Zuccani, a shareholder who held partly paid shares and was also the only holder of fully paid shares (which had been issued to him in consideration of a property he had sold to the company) had died and the directors envisaged some difficulty in recovering arrears of calls. The articles gave the company a lien over the partly paid shares but none over the fully paid shares. By special resolution the company amended the articles to extend its lien to fully paid shares. Despite the fact that the amendment disadvantaged only Mr Zuccani's estate, the Court of Appeal held the amendment valid. In a well-known passage (at pp. 671-672), Lindley MR said:

> "The power.. . conferred on companies [by the equivalent of section 89 of the BVI Companies Act] to alter the regulations contained in their articles is limited only by the provisions contained in the statute and the conditions contained in the company memorandum of association. Wide, however, as the language of s. [89] is, the power conferred by it must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also bona fide for the benefit of the company as a whole, and it must not be exceeded. These conditions are always implied, and are seldom, if ever, expressed. But if they are complied with I can discover no ground for judicially putting any other restrictions on the power conferred by the section than those contained in it."

14. In *Allen's* case it was for the benefit of the company as a corporate entity that it should be able to recover the debt owed by the deceased shareholder. As Romer LJ put it (at p. 682):

> "It appears to me the shareholders were acting in the truest and best interests of the company in exercising the legal right to alter the articles so that the company might as one result obtain payment of the debt due from Mr. Zuccani. The shareholders were only bound to look to the interests of the company. They were not bound to consult or consider Mr. Zuccani's separate or private interests."

15. The test of whether the amendment was "bona fide for the benefit of the company as a whole" was applied somewhat literally in *Dafen Tinplate Company Ltd v Lianelly Steel Company* (1907) Ltd [1920] 2 Ch 124, which concerned an amendment giving the board power to require a member to transfer his shares to a nominated person at a fair value. Peterson J said that the question was not whether the shareholders bona fide or honestly believed that the alteration was for the benefit of the company. It was whether "in fact the alteration is genuinely for the benefit of the company." In the judge's opinion, the new article was not and he held it invalid. But in *Shuttleworth v Cox Brothers and Co (Maidenhead) Ltd* [1927] 2 KB 9 (an amendment to give the Board power to remove a permanent director) the Court of Appeal said emphatically that this approach was wrong. Scrutton LJ said (at p. 23):

> "Now when persons, honestly endeavouring to decide what will be for the benefit of the company and to act accordingly, decide upon a particular course, then, provided there are grounds on which reasonable men could come to the same decision, it does not matter whether the Court would or would not come to the same decision or a different decision. It is not the business of the Court to manage the affairs of the company. That is for the shareholders and directors. The absence of any reasonable ground for deciding that a certain course of action is conducive to the benefit of the company may be a ground for finding lack of good faith or for finding that the shareholders, with the best motives, have not considered the matters which they ought to have considered. On either of these findings their decision might be set aside. But I should be sorry to see the Court go beyond this and take upon itself the management of concerns which others may understand far better than the Court does."

16. Bankes LJ expressed a similar view when he said (at p. 18):

> "[T]he test is whether the alteration of the articles was in the opinion of the shareholders for the benefit of the company. By what criterion is the Court to ascertain the opinion of the shareholders upon this question? The alteration may be so oppressive as to cast suspicion on the honesty of the persons

> responsible for it, or so extravagant that no reasonable men could really consider it for the benefit of the company. In such cases the Court is, I think, entitled to treat the conduct of shareholders as it does the verdict of a jury, and to say that the alteration of a company's articles shall not stand if it is such that no reasonable men could consider it for the benefit of the company."

17. These were cases in which the amendment operated to the particular disadvantage of a minority of shareholders: Mr Zuccani's estate in *Allen's* case and the director whose removal was proposed in *Shuttleworth's* case. But the same principle must apply when an amendment which the shareholders bona fide consider to be for the benefit of the company as a whole also operates to the particular advantage of some shareholders. This is illustrated by *Rights & Issues Investment Trust Ltd v Stylo Shoes Ltd* [1965] Ch 250, in which, together with a substantial increase in the issued ordinary share capital, the articles were amended to double the number of votes attached to special management shares in order to maintain the control of the existing management. 92% of the ordinary shareholders voted in favour. Pennycuick J said,at pp 255-256:

> "What has happened is that the members of this company, other than the holders of the management shares, have come to the conclusion that it is for the benefit of this company that the present basis of control through the management shares should continue to subsist notwithstanding that the management shares will henceforward represent a smaller proportion of the issued capital than heretofore. That, it seems to me, is a decision on a matter of business policy to which they could properly come and it does not seem to me a matter in which the court can interfere. So far as I am aware there is no principle under which the members of a company acting in accordance with the Companies Act and the constitution of the particular company and subject to any necessary consent on the part of a class affected, cannot, if they are so minded, alter the relative voting powers attached to various classes of shares. Of course, any resolution for the alteration of voting rights must be passed in good faith for the benefit of the company as a whole, but, where it is so, I know of no ground on which such an alteration would be objectionable and no authority has been cited to that effect. So here this alteration in voting powers has been resolved upon by a great majority of those members of the company who have themselves nothing to gain by it so far as their personal interest is concerned and who, so far as one knows, are actuated only by consideration of what is for the benefit of the company as a whole."

18. These principles, together with the proposition that the burden of proof is upon the person who challenges the validity of the amendment (see *Peters' American Delicacy Company Ltd v Heath* (1939) 61 CLR 457, per Latham CJ at p. 482) appear to their Lordships to be clearly settled and sufficient for the purpose of deciding this case. It must however be acknowledged that the test of "bona fide for the benefit of the company as a whole" will not enable one to decide all cases in which amendments of the articles operate to the disadvantage of some shareholder or group of shareholders. Such amendments are sometimes only for the purpose of regulating the rights of shareholders in matters in which the company as a corporate entity has no interest, such as the distribution of dividends or capital or the power to dispose of shares. In the Australian case of *Peters' American Delicacy Company*, to which reference has been made, the amendment provided that shareholders should thenceforth receive dividends rateably according to the amounts paid up on their shares rather than, as previously, according to the number of shares (fully or partly paid) which they held. It was, as Dixon J pointed out (at p. 512), "inappropriate, if not meaningless" to ask whether the shareholders had considered the amendment to be in the interests of the company as a whole. Some other test of validity is required. In *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286, where the amendment was to remove a pre-emption clause to facilitate a sale of control to a third party, Sir Raymond Evershed MR tried to preserve the application of the traditional test by saying that in such cases "the company as a whole" did not mean the company as a corporate entity but "the corporators as a general body" and that it was necessary to ask whether the amendment was, in the honest opinion of those who voted in favour, for the benefit of a hypothetical member. Some commentators have not found this approach entirely illuminating but for the purposes of this appeal it is not necessary to discuss such cases any further. In this case, as in the *Stylo Shoes* case, it would have been perfectly rational to ask whether the vesting of voting control in Mr Tobias was in the interests of the company as a whole.

19. Their Lordships also note that in *Gambotto v WCP Limited* (1995) 182 CLR 432 the High Court of Australia created a new rule for amendments which they characterised as conferring powers of "expropriation" of the shares of a minority. Such an amendment could be justified only if it was reasonably apprehended that the continued shareholding of the minority was detrimental to the company, its undertaking or the conduct of its affairs and expropriation was a reasonable means of eliminating or mitigating that detriment. It was not enough in such a case that the amendment was considered by the majority

shareholders to be in the interests of the company as a corporate entity or even that it actually was for the company's benefit. In a joint judgment, Mason CJ, Brennan, Deane and Dawson JJ said at p 446:

> "Notwithstanding that a shareholder's membership of a company is subject to alterations of the articles which may affect the rights attaching to the shareholder's shares and the value of those shares, we do not consider that, in the case of an alteration to the articles authorizing the expropriation of shares, it is a sufficient justification of an expropriation that the expropriation, being fair, will advance the interests of the company as a legal and commercial entity or those of the majority, albeit the great majority, of corporators. This approach does not attach sufficient weight to the proprietary nature of a share and, to the extent that English authority might appear to support such an approach, we do not agree with it."

20. The *Gambotto* rule appears to have come as something of a surprise to the profession in Australia (see the full discussion in *Heydon v NRMA Ltd* (2000) 51 NSWLR 1) but their Lordships need not consider it further because this was clearly not a case of expropriation which would have attracted its application. It is sufficient to say that, as the High Court observed, it has no support in English authority.

21. Their Lordships therefore return to the present appeal. Benjamin J heard evidence and argument over 5 days towards the end of June 1998 and reserved his judgment, saying that he would give it before the end of July. In fact he gave it on 7 April 2003, nearly 5 years later. The judgment as delivered offers the parties no explanation for the delay and their Lordships understand that the judge is no longer serving in the British Virgin Islands. But their Lordships feel bound to observe that such delays are completely unacceptable. Besides being a violation of the constitutional right of the parties to a determination of their dispute within a reasonable time, they are likely to be detrimental to the interests of the British Virgin Islands as a financial centre which can offer investors efficient and impartial justice.

22. The judge was invited to draw the inference that the 86% majority who voted in favour of the special resolutions accepted the reasons advanced by Mr Tobias as to why it would be in the interests of the company as a whole for his control to be entrenched. The judge, however, (at paragraph 35) accepted Citco's submission that —

> "[I]t was not in the company's interests to have control relinquished to a single shareholder permanently for the duration of

> his life, such shareholder not being removable should the remainder of the shareholders no longer have confidence in his management. It was said that it hardly be legitimately expected by Pusser's bankers and prospective investors that excessive voting power be placed in the hands of Mr Tobias. I do accept this reasoning especially in the absence of satisfactory proof that there was such a requirement."

23. The judge concluded (at paragraph 46):

> "I find it impossible to say that what was effected by the resolution is for the benefit of Citco and the remaining shareholders. The reasons proffered at the meeting were all largely subjective to Mr Tobias. While it is understandable that it may be desirable that superior voting power be conferred to preserve confidence in management in my view the measure went too far to the extent of being extravagant. It is not within my purview to speculate upon what formula would fall short of oppression suffice it to say that the resolution fails to pass the test of being bona fide for the benefit of the company as a whole."

24. The Court of Appeal, reversing the judge, said (at paragraph 16) that where he went wrong in principle was "when he attempted to step into the commercial arena". Their Lordships take this to mean that the judge fell into the same error as Peterson J in *Dafen Tinplate Company Ltd v Lianelly Steel Company (1907) Ltd* [1920] 2 Ch 124, namely that he took it upon himself to decide whether the amendment was for the benefit of the company. The Court of Appeal said that he should instead have applied the test laid down in *Shuttleworth's* case, namely, whether reasonable shareholders could have considered that the amendment was for the benefit of the company. The Court of Appeal considered that it would have been reasonable for shareholders to have accepted in good faith the arguments put forward by Mr Tobias as to why the amendment would be in the interests of the company. The only shareholder who gave evidence at the trial was Mr de Vos, who said that he had thought the amendments were in the best interests of the company as a whole. It was not necessary for Mr Tobias and the company to prove to the judge that the arguments were justified by the facts.

25. Their Lordships consider that this reasoning is correct. Mr Todd QC, who appeared for Citco, said that in a case in which one shareholder gained a personal advantage by the amendment, as Mr Tobias did in this case, it was necessary to show that even without his votes, the amendment would have been passed. In *Rights & Issues Investment Trust Ltd v Stylo Shoes Ltd* [1965] Ch 250, Pennycuick J laid some stress upon

the fact that the resolution had been passed at a separate meeting of ordinary shareholders at which the holders of management shares did not vote. In this case there was, prior to the amendment, only one class of shares, but Mr Todd said that it was necessary to show that the resolution would have passed even without the votes controlled by Mr Tobias.

26. Their Lordships do not think that the *Stylo Shoes* case decided that in a case like this, shareholders who particularly stand to gain from the amendment should not vote. As Evershed MR said in *Greenhaigh v Arderne Cinemas Ltd* [1951] Ch 286,291:

> "It is...not necessary to require that persons voting for a special resolution should, so to speak, dissociate themselves altogether from their own prospects..."

27. If Mr Tobias bona fide considered that the amendment was in the interests of the company as a whole, and there has been no attack on his bona fides, their Lordships do not see why he should not vote. This is only one aspect of the general principle that shareholders are free to exercise their votes in their own interests. As Lord Davey said in *Burland v Earle* [1902] AC 83, 94:

> "Unless otherwise provided by the regulations of the company, a shareholder is not debarred from voting or using his voting power to carry a resolution by the circumstance of his having a particular interest in the subject-matter of the vote."

28. In any case, it appears to their Lordships that even the test proposed by Mr Todd was satisfied. The only evidence as to the number of shares controlled by Mr Tobias was that of Mr de Vos, who said that it amounted to 28% of the issued share capital. He was cross-examined on this point, with counsel for Citco seeking to establish that Mr Tobias actually controlled very few shares, but stuck to 28%. He did also say that Mr Tobias was indirectly able to exercise the votes of 51% of the share capital, but this was consistent with the additional votes being simply those of supporters who had decided to entrust Mr Tobias with their proxies. Of the 28%, Mr Tobias did not vote the 62,439 shares registered in his own name. If he had not voted the 460,245 shares registered in the names of his wife and Piccadilly Properties Ltd, which made up the rest of the 28%, the votes cast in favour of the resolution would have been 665,420 out of a total of 848,420. This would still have been 78%.

29. Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed with costs.