

Privy Council Appeals Nos. 35 and 36 of 1990

The Government of Mauritius *Appellant*

v.

The Union Flacq Sugar Estates Co. Ltd. *Respondent*

and

The Government of Mauritius *Appellant*

v.

(1) **The Medine Shares Holding Co. Ltd.**
(2) **The Black River Investments Co. Ltd.**
and
(3) **The Flacq United Estates Co. Ltd.** *Respondents*

FROM

THE SUPREME COURT OF MAURITIUS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
23RD JULY 1992

Present at the hearing:-

LORD TEMPLEMAN
LORD ACKNER
LORD GOFF OF CHIEVELEY
LORD JAUNCEY OF TULLICHETTLÉ
LORD LOWRY

[Delivered by Lord Templeman]

The question in this case is whether certain provisions of the Companies Act 1984 of Mauritius which prevent the control of a company by a minority infringed the Constitution of Mauritius in so far as those provisions affect companies in existence at the date when the Act came into force.

Section 13(2) of the Companies Act 1984 provides that:-

"(a) subject to paragraph (b) a subsidiary which is, at the commencement of this Act, a member of its holding company, may continue to be a member.

(b) the subsidiary shall after one year from the commencement of this Act have no right to vote

at meetings of the holding company or any class of members thereof."

Immediately before the Act of 1984 the respondent United Flacq Sugar Estates Co. Limited ("UF") was the subsidiary of Flacq United Estates Co. Limited ("FUEL") and held voting shares in FUEL. Accordingly one year after the coming into force of the Act of 1984 UF ceased to be able to vote at general meetings of FUEL.

It is said in these proceedings that section 13(2) of the Act of 1984 infringes either or both sections 3 and 8 of the Constitution of Mauritius.

Section 347(13)(a) of the Act of 1984 provides that:-

"Where at the commencement of this Act a participating preference share of a public company or subsidiary or holding company of a public company carries no voting rights or carries voting rights which are more restricted than those carried by the ordinary shares of the company, the holder of such share shall ... within two months of the commencement of this Act give notice of the election to the company -

- (i) to have his share converted into an ordinary share of the company carrying the same right to vote as an ordinary share; or
- (ii) to retain his participating preference share with such restrictive right to vote or absence of vote as such share carried immediately prior to the commencement of this Act."

Immediately before the Act of 1984 UF held 50% of the ordinary shares of FUEL and by the articles of FUEL was entitled to nominate five directors of FUEL so long as UF held more than 40% of the ordinary shares. As a result of the Act and the conversion of participating preference shares into ordinary shares the shareholding of UF was reduced from 50% to 28.436% so that UF ceased to be entitled to nominate directors of FUEL.

It is said that section 347(13)(a) of the Act of 1984 likewise infringes section 3 or section 8 of the Constitution of Mauritius.

Section 3 of the Constitution of Mauritius provides *inter alia* that:-

"... in Mauritius there have existed and shall continue to exist ... each and all of the following human rights and fundamental freedoms -

....

- (c) the right of the individual to protection for the privacy of his home and other property and from deprivation of property without compensation."

Section 8 provides *inter alia* that:-

- "(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where -

...

- (c) provision is made by a law applicable to that taking of possession or acquisition -

- (i) for the payment of adequate compensation; ..."

It is said that the effect of the Act of 1984 was to deprive UF of property or compulsorily to take possession of property or compulsorily to acquire an interest in or right over property without compensation.

In order to understand the grievances of UF eloquently urged by Sir Marc David on its behalf, it is necessary to understand the ramifications of a circle of companies whose history was clearly explained by Sir Marc. Beginning in 1946 and ending about 1948 agreements were made by members of the Gujadhur family ("the Gujadhur Group") to join with other groups in order to vest extensive sugar estates and refineries and businesses and other assets in a circle of companies. The interests of each group in its own assets were converted into shares and interests in the circle of companies. In this magic circle the Gujadhur Group held a minority interest in the equity of certain companies, that is to say in the income available for distribution as dividends and in the capital available for distribution on a winding up. But voting rights attaching to shares in the circle of companies were so organised that immediately before the Act of 1984 came into force, the control and management of the companies were exercisable by the Gujadhur Group, albeit that the Group only held minority interests in the equity.

The key company FUEL held 60% of the voting shares in West East Limited ("WEAL"). The company WEAL held 91.4% of the voting shares in F & R Leclezio Co. Limited ("FRL"). The company FRL held 51.22% shares in Unity Limited. The company Unity held 51% of the shares in UF. The remainder of the shares in UF were held almost entirely by members of the Gujadhur Group. UF held 50% of the voting shares in FUEL and was able to exercise control of FUEL by reason of articles 90 to 97 and article 122 of the Articles of Association of FUEL. Those articles

provide that the number of directors entitled to vote at board meetings shall be not less than 10, but 5 of those directors shall be nominated by UF "if, and as long as, it shall hold at least 40% of the total nominal value of the shares of the company carrying the right to vote at the general meetings thereof". The articles provide that the Chairman of the Board shall be nominated by UF during the time it has power to nominate 5 of the directors of the company and as long as the company Unity Limited holds more than 50% of the total nominal value of the shares of UF carrying the right to vote at the general meetings of UF and so long as Mr. Fernand Leclezio was the manager of the company FRL or co-manager or a member of its Board of Directors. The articles provide that the Chairman of FUEL nominated by UF shall have a second or casting vote in case of equality of votes at any meetings of the Directors. Sir Marc David stated that Mr. Fernand Leclezio died before the Act of 1984 but that UF, whether or not remaining entitled to do so, continued to nominate the Chairman of FUEL and that the Chairman had continued to exercise a second or casting vote. For present purposes and in order to test the constitutional validity of the impugned sections of the Act of 1984 their Lordships will assume that control of the management of FUEL was exercised by UF through the 5 directors and Chairman with a casting vote nominated by UF. So UF controlled FUEL which controlled WEAL which controlled FRL which controlled Unity which controlled UF.

One of the objects and effects of the Act of 1984 was to break a chain or circle whereby a subsidiary company held shares in and voted at general meetings of its parent company. The holding by a subsidiary company of shares which carry the right to vote at meetings of the parent company enables the Directors and a minority of shareholders in the parent company to exercise control over both the parent and the subsidiary. Directors of the parent company can maintain themselves in office by voting the shares of a subsidiary company holding shares in the parent company. The dealings of a subsidiary company in the shares of its parent company at a price dictated by the directors of the parent company can reduce the capital of the parent available for creditors or could increase or decrease the value of other shares in the parent company including shares held by the directors. The legislature of Mauritius must have considered that these practices were undesirable and that in the public interest a subsidiary should cease to be entitled to vote at meetings of the parent; hence section 13(2) of the Act of 1984.

By section 1(5)(a) of the Act a corporation shall be deemed to be a subsidiary of another corporation where -

"(i) that other corporation -

(A) controls the composition of the Board of Directors of the first mentioned corporation; or

- (B) controls more than half of the voting power at the general meeting of the first mentioned corporation; or
 - (C) holds more than half of the issued share capital of the first mentioned corporation which does not consist of preference shares; or
- (ii) the first mentioned corporation is a subsidiary of a corporation which is that other corporation's subsidiary;"

When the Act of 1984 came into force UF was, within the meaning of the Act, a subsidiary of FUEL. Section 13(2)(b) enabled the subsidiary to vote at meetings of its holding company for the period of one year. During that period UF could have voted at meetings of FUEL and vice versa. These voting powers could have been exercised in a variety of ways so that UF ceased to be either the subsidiary or the parent of FUEL. For example, the circle could have been broken by a transfer of the shares in WEAL from FUEL to members of the Gujadhur Group and other groups. But no steps were taken, probably because agreement could not be reached, to ensure that the shares of a parent company ceased to be held by a subsidiary of that parent and consequently UF can no longer vote at meetings of FUEL. The control of FUEL by UF therefore came to an end. In addition UF by the operation of section 347(13)(a) no longer held 40% or more of the voting shares of FUEL and therefore ceased to be able to control FUEL by appointing five Directors including a Chairman with a casting vote.

By the Memorandum of Association of FUEL, the share capital of FUEL is divided into preference "A", preference "B" and ordinary shares. There was also one Founder share but for present purposes that share can be ignored. The preference "A" shareholders are entitled to a fixed cumulative preference dividend of 5% per annum and to a return of their capital on a winding up but have no other rights. The preference "A" shares were not affected by the Act of 1984. Subject to the rights of the preference "A" shareholders, the preference "B" shareholders are entitled to receive out of the profits of each year available for dividend, and which the Board decide to distribute as dividend, a non-cumulative preferential dividend for such year at the rate of 6% per annum. Subject to the rights of the preference "B" shareholders, a dividend not exceeding 6% per annum may be paid to the ordinary shareholders. Any balance left over out of the profits available for dividend which the Board decide to distribute by way of dividend accrues *pari passu* to the holders of both the preference "B" and the ordinary shares. On a winding up the preference "B" shares and the ordinary shares rank *pari passu*. It follows that the interests of the preference "B" shareholders and the ordinary shareholders in the income

and capital of FUEL are exactly the same except for the slight preference afforded to the preference "B" shareholders for payment of an initial dividend of 6%. But the Memorandum of Association of FUEL provides that the preference "B" shares shall not confer upon their holders the right to vote at general meetings of the company. This right is reserved to the ordinary shareholders.

The issue of non-voting shares which carry a substantial interest in the income and capital of the company has been frowned upon in some quarters in recent years on the grounds that the management and control of a company should be in the hands of the persons interested in the equity of the company. The Act of 1984 includes several provisions which are designed to ensure that shareholders interested in the income and capital of the company shall have equal rights save for those preference shareholders who are only entitled to a fixed cumulative dividend and to a return of capital. So far as FUEL is concerned section 347(13)(a) of the Act enabled the preference "B" shareholders, if they so wished, to abandon their slight dividend preference and to convert their shares into ordinary shares carrying the same rights to vote as ordinary shares.

The effect of section 347(13)(a) on the former voting shareholders of any company will depend firstly on the number of voting and non-voting shares issued respectively, secondly the distribution of voting shares and non-voting shares at the date of the coming into force of the Act and thirdly on the number of non-voting shares which are converted into ordinary shares after the Act. No doubt there was a good deal of discussion about the policy and effect of the elimination of non-voting shares before and during the passage of the Bill which became the Act of 1984 and there was nothing to stop shareholders of a company exercising their rights and powers before the Act came into force, for example, by the issue of additional ordinary shares or otherwise so as to ensure that *de facto* control of the company would not be altered by the operation of the Act. But of course the success of any such operation depended on the willingness and ability of the existing ordinary shareholders to accept or acquire ordinary shares or convertible preference shares sufficient in number to preserve the control which they had hitherto enforced by denying votes to the convertible preference shareholders interested in the equity of the company.

The preference "B" shareholders are interested in the equity of FUEL, that is to say, in the profits available for dividend and in the capital available on winding up after satisfying the creditors of FUEL and the preference "A" shareholders who are entitled only to a fixed dividend and to a return of their capital. The interests of the holder of a preference "B" share in the equity of FUEL are marginally superior to the interests of the holder of an ordinary share because the preference "B" shareholders are entitled to priority in the payment of a dividend of 6% and, subject to

payment of a balancing dividend to the ordinary shareholders, are entitled *pari passu* with the ordinary shareholders to the profits and capital of FUEL. FUEL issued 3,060,000 ordinary shares of Rs.10 and 12,470,100 preference "B" shares of Rs.10 amounting in the aggregate to 15,530,100 shares entitling the holders to interests in the equity of FUEL. So long as UF held at least 1,224,000 ordinary shares, representing 40% of the ordinary shares but only 8% of the aggregate of the ordinary and preference "B" shares entitled to the equity of FUEL, the control of FUEL lay with UF.

The Act of 1984 authorised the preference "B" shareholders to convert their shares into ordinary shares, thus surrendering the preference "B" 6% dividend priority but acquiring voting rights. The Act of 1984 deprived UF of the power to prevent up to 92% of the equity shareholders of FUEL from participating in the choice of the Directors to manage FUEL. The legislature of Mauritius must have considered that the power of a minority to control a company was contrary to the public interest.

The complaint of UF is that they have lost an advantage. That advantage was negotiated by the Gujadhur Group, was a lawful advantage at the time of negotiation and was an advantage which was known to or could easily have been discovered by any shareholder who at any time took any share in any of the relevant companies. But the legislature of Mauritius considered that such an advantage was unfair and against the public interest and that the persons who owned the equity of a company should have an equal voice in the conduct of the company. The advantage negotiated by the Gujadhur Group was the advantage of being able to maintain a minority interest in the equity of FUEL through UF and of being able to control FUEL as though they were majority owners. That advantage was secured by attaching to ordinary shares the right to vote at general meetings and by denying the right to vote at general meetings to the preference "B" shareholders.

The property owned by a shareholder is his share. The right of a shareholder to vote his share in general meetings of the company is not an interest in or right over the property of the company and is not property in its own right. The right to vote a share is an incident of the ownership of a share which, prior to the Act of 1984, could be attached or denied to a share. Since the Act of 1984 came into force the right to vote a share is attached by law to every share which confers on the holder an interest in the equity of the company. Thus section 67 of the Act of 1984 conferred on every share which carried a proportionate right to an interest in the equity of the company, an equal proportionate right to be voted at general meetings of the company. Section 68 prohibited a company from issuing a share which carried disproportionate voting rights. Section 367 provided that

a company must within one year bring its voting rights into conformity with section 67 and conferred on the holders of every existing share, carrying an interest in the equity of the company, the right to convert his share into an ordinary share to which proportionate voting rights were attached, unless the shareholder elected not to convert.

The Act of 1984 did not deprive the Gujadhur Group or UF of any property or right or interest in property nor did it deprive any share of the voting rights attached to that share. The Act of 1984 attached a right to vote to every share which conferred an interest in the equity of the company. This development is not particularly surprising because the Act of 1984 thereby ensured that a company is managed in accordance with the views of the majority. Directors owe a duty to a company and its shareholders to manage the company in the interests of the company and for no other purpose. But Directors appointed by minority shareholders have a conflict between the duty which they owe to the company and the duty or gratitude which they owe to the minority by whom they were appointed. In the present proceedings, for example, the Gujadhur Group would like to retain their power to appoint directors of FUEL because they intend that FUEL shall be managed in the interests of the Gujadhur Group as well as the interests of FUEL. The Gujadhur Group would not acknowledge or accept that there was any conflict between the interests of the Gujadhur Group and the interests of FUEL. There is or may be such a conflict which, prior to the Act of 1984, applied to the Directors appointed by the Gujadhur Group. On behalf of the Gujadhur Group, Sir Marc David submitted that, having regard to the history of the group of companies involved directly or indirectly in the consequences of this litigation, the legislature was unfair when by the Act of 1984 it removed the power of a minority to control a company. But the question of fairness of legislation is a matter for Parliament. The courts can only intervene if the Act of 1984 deprived a shareholder of property or a share in or right over property contrary to the Constitution.

Before the Act of 1984 came into force FUEL had issued 3,060,000 ordinary shares and UF held 1,530,000. FUEL had issued 12,470,000 preference "B" shares and UF owned 2,295,012. The preference "B" shares and the ordinary shares were alike in that every share carried a proportionate interest in the equity of FUEL. Out of the aggregate of ordinary shares and preference "B" shares, UF owned roughly 25% of the equity of FUEL but UF exercised 50% of the voting rights and UF controlled the management of FUEL. This was a case of management by a minority. The result of the management of FUEL by UF may have been wholly beneficial to the majority and may not have caused any harm to anybody. The holders of 1,981,690 of the preference "B" shares elected to retain their dividend priority and to remain non-voting instead of allowing their shares to be converted into ordinary shares with voting rights. In the result UF, which before the Act of 1984 held

25% of the equity but 50% of the voting rights, still own 25% of the equity but are now entitled to 28.8% of the voting rights. As a minority UF can no longer control the management of FUEL. The object of the Act of 1984 was to put an end to management by a minority.

The Act of 1984 and section 347(13)(a) in particular must have been intended to put an end to the control of the management of a company by a minority exercised as a result of the creation of voting and non-voting shares. The Act did not deprive the company or any ordinary shareholder of property or any interests in or right over property. The company and its property are unaffected by the Act. Each ordinary shareholder remains entitled to his property namely his share and the dividends and capital to which he was entitled by virtue of his shareholding before the Act came into force. The only relevant effect of the Act was to prevent the holder of a minority interest in the equity of the company from exercising a power to control the management of the company. This power conferred by the constitution of the company and annexed to specified shares or a specified number and type of shares is incidental to the ownership of specified property but is not in itself property and confers no interest in or right over property. A company is a creature of statute and the rules applicable to a company can be altered by statute. The legislature of Mauritius has decided that the power to control the management of a company must be vested in the holders of the majority interests in the equity of the company. The Constitution does not confer on a minority any fundamental right or freedom to prevail or to continue to prevail over a majority. The power of a minority to prevail over a majority may be conferred by agreement but can be removed by the legislature where the public interest, in the opinion of the legislature, so demands.

The Supreme Court of Mauritius took the view that the right to vote and the right to appoint directors conferred on UF by the memorandum and articles of FUEL were property or rights or interests in property. They also took the view that the provisions of the Act of 1984, which prevent a subsidiary from voting at meetings of its holding company, deprived FUEL or UF or both of property or rights and interests in property. But the law now insists that voting rights of shares in a company shall not be vested in the Directors of the company but shall be attached proportionately to the shares which confer on the shareholders interests in the equity of the company. The minority shareholders of UF were not deprived of property when control ceased to be exercisable by them.

Their Lordships were referred to a number of authorities which stipulate that a Constitution in the form accepted by Mauritius must be given a purposive construction and that the expression "property" in a

Constitution includes property of every description. Nevertheless the expression "property" cannot be extended to the powers of some shareholders to exercise a disproportionate influence over the management and control of the company.

For these reasons their Lordships allow the appeal and dismiss the appeal summons by UF for a declaration that the Act of 1984 involves a deprivation of property in violation of sections 3 and 8 of the Constitution.

In similar proceedings the respondents, Medine Shares Holding Co. Limited and Black River Investment Co. Limited and FUEL, also claimed that the Act of 1984 involved a deprivation of their property in violation of sections 3 and 8 of the Constitution to the extent that they were deprived of control of the Medine Sugar Estates Co. Ltd. and to the extent that a subsidiary company was debarred from voting shares in its parent. This claim must also be rejected and the summons dismissed. In each case the respondents other than FUEL must pay the costs of the appellant before the Board and in the court below.