Privy Council Appeal No. 16 of 1995

Panel on Takeovers & Mergers and Another *Appellant*

v.

William Cheng Kai-man *Respondent*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, Delivered the 30th October 1995

Present at the hearing:-

Lord Keith of Kinkel
Lord Jauncey of Tullichettle
Lord Slynn of Hadley
Lord Steyn
Lord Hoffmann

*[Delivered by **Lord Keith of Kinkel**]*

This appeal arises out of an application by the respondent William Cheng Kai-man ("Mr. Cheng") for judicial review of a decision of the Hong Kong Panel on Takeovers and Mergers ("the Panel") given in December 1993. By that decision the Panel determined that in November 1988 Mr. Cheng, together with others acting in concert with him, had acquired more than 35% of the shares in a company called Shun Ho Resources Holdings Limited ("Shun Ho") without making a general offer to shareholders, and had thus acted in breach of Rule 33 of the Hong Kong Takeover Code ("the Code"). That Rule provides *inter alia* that, where any person acquires shares which together with shares held by any person acting in concert with him carry 35% or more of the voting rights in a company, that person must extend a general offer to other holders of similar shares. The offer must be at not less than the highest price paid by the offeror for such shares during the preceding six months. The Panel's ruling required Mr. Cheng to pay compensation to shareholders amounting to some HK$49 million.

Mr. Cheng's application for judicial review contained a number of alleged grounds, but leave to apply was granted only in respect of an allegation of bias on the part of one of the members of the Panel who were party to its determination, namely a Mr. Stephen Clark.

The statutory body responsible for regulating the securities market in Hong Kong is the Securities and Futures Commission ("the S.F.C."), who are the second appellants. Before April 1992 there was a Committee of the S.F.C. called the Committee on Takeovers and Mergers, which policed observance of the Code. This was replaced in April 1992 by the Panel on Takeovers and Mergers, who are the first appellants.

In November 1988 Royle Corporation Limited ("Royle"), a company controlled by Mr. Cheng, purchased 34.5% of the issued share capital of Shun Ho from members of a family called Soon at the price of HK$1.21 per share. In February 1991 Mr. Cheng purchased further shares in Shun Ho, to the effect that the shares in Shun Ho controlled by him amounted to 34.97% of the share capital. The price paid was 35 cents, below the market price. Then on 6th April 1991 Mr. Cheng exercised an option previously granted to him by a Mr. Danny Chen to the effect of purchasing 100,000 Shun Ho shares at 40 cents per share. This had the effect of increasing the Royle/Cheng holding in Shun Ho to an apparent 35.02%, and on 9th April 1991 Royle announced its intention to make a mandatory general offer for Shun Ho shares at the price of 40 cents per share.

When Mr. Clark read this announcement, he sent to Mr. Ermanno Pascutto, Chairman of the S.F.C., a letter dated 9th April 1991 in these terms:

> "Dear Ermanno,
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> I am writing to you in my assumed capacity as the keeper of the conscience of the chairman of the Takeover Committee. In the newspaper, Royle Corporation Limited announced that it had purchased 100,000 shares in Shun Ho Resources at 40 cents per share, thereby triggering a takeover offer. Since the shares in Shun Ho Resources have, with the exception of one day in January, traded consistently above 40 cents per share over the last six months (see attached chart), the seller must have been particularly well disposed to Royle Corporation to have sold shares at below the market price. Has any enquiry been made as to the identity of the party who sold these shares, as it has the looks of a concert party action.

If you look back at the press clippings, you will find that William Cheng purchased marginally less than 35% of Standard Lloyds (now Shun Ho Resources) and the Soon family's shareholding dropped from about 65% to nil, the balance of the Soon family's holding apparently being placed. It is quite conceivable that William Cheng knew the identity of the placees as it is entirely illogical for him to have controlled a listed pyramid on such a small shareholding base.

Best regards.
Yours sincerely,
Stephen Clark."

The Corporate Finance Division of the S.F.C. enquired into the matter, in particular the circumstances of the grant of the option by Mr. Danny Chen to Mr. Cheng. Staff took the view, and so informed Shun Ho, that Mr. Cheng's purchase of 100,000 Shun Ho shares from Mr. Danny Chen at a discount of 30% to the market price was an artificial transaction and a device to avoid the Code. Mr. Cheng was offered the alternative of either withdrawing the offer and disposing of the 100,000 shares on the market, or of revising the offer and proceeding with it subject to a 50% minimum acceptance condition. Mr. Cheng agreed to the latter alternative, and on 17th May 1991 Royle issued a revised offer at 45 cents per share. That, for the time being, was the end of the matter so far as the S.F.C. was concerned. Mr. Mark Dickens, a senior director of the Corporate Finance Division, deponed that he had noticed the original announcement of the Royle offer, and would have enquired into the matter even if Mr. Clark's letter had not been received.

The next development was that the Chairman of the Committee on Takeovers and Mergers received a letter dated 21st June 1991 from a firm of solicitors acting on behalf of General Nominees Limited, a company that held 20.6% of the issued share capital of Shun Ho. The letter stated that in August 1990 General Nominees, following discussions with Mr. Cheng, had sold 5,564,000 Shun Ho shares to a company called Star Holdings Limited at the price of $0.6355 per share. It was suggested that Star Holdings might have been a company controlled by or associated with Mr. Cheng, so that the transaction triggered an obligation on him to make a general offer for Shun Ho shares of $0.6355 per share. Questions were also raised about purchases by Mr. Cheng and Mr. Chen in February 1991 of Shun Ho shares at 35 cents per share. The letter concluded with a request that the Committee should investigate the matter in order to ascertain whether Mr. Cheng was obliged to make a general offer for Shun Ho shares at $0.6355 per share, rather than $0.45.

On 17th October 1991 the Secretary of the Committee on Takeovers and Mergers submitted to the Committee a report on the complaint on behalf of General Nominees, detailing the matters in September 1990 and February 1991 which appeared to merit investigation. On 19th November 1991 the complaint by General Nominees was withdrawn, but in December 1991 the Committee heard a number of witnesses and adjourned for further inquiries. Mr. Clark was a member of the Committee which sat on this occasion. The further inquiries by S.F.C. staff led to a draft report being sent to Mr. Cheng for his comments on 21st November 1992. This raised for the first time the question whether in November 1988 Mr. Cheng, Royle and a Ms. Geraldine Wong Pui-ching had been acting in concert on the occasion of Royle's first acquisition of Shun Ho shares. Ms. Wong, a broker in the firm of K.S. Lam & Co., had then purchased 9,682,000 Shun Ho shares, representing 8.35% of the issued share capital, at prices between $0.84 and $0.88. She had originally booked them in the names of Power International Inc. and ten persons called Chen with first names beginning with the letters A to J. Subsequently the staff, on 6th August 1993, submitted a full report to the Panel, which had by that time superseded the Committee. The issues were stated to be whether the 35% trigger level was exceeded (i) upon Ms. Wong's transactions in November 1988, (ii) upon the sale by General Nominees in September 1990, or (iii) upon the acquisitions made by Mr. Cheng and Mr. Chen in February 1991. The Panel, upon which Mr. Clark sat, heard evidence and submissions in October 1993 and announced its decision orally on 22nd October. It found that Mr. Cheng, Royle and Ms. Wong had been acting in concert in November 1988. Ms. Wong had "warehoused" for Mr. Cheng the 9,682,000 Shun Ho shares which she had then acquired. A mandatory general offer for Shun Ho shares at $1.21 should have been made at that time.

Mr. Cheng's case on bias on the part of Mr. Clark was founded on the terms of his letter dated 9th April 1991 to Mr. Pascutto, and also upon the circumstance that on 27th July 1993 an agreement, described as a "mandate", had been entered into between Royle and Anglo Chinese Corporate Finance Limited ("Anglo Chinese"). Mr. Clark was a director of that company and a substantial shareholder in its holding company. The agreement was negotiated between Mr. Cheng and a director of Anglo Chinese called Christopher Howe. It was in substance a non-exclusive agency agreement, setting out the basis upon which Anglo Chinese would act for Royle in connection with the disposal by it of any property, using its best endeavours to find

purchasers and negotiate price. The most important provisions related to the fees which would be payable to Anglo Chinese in the event of any concluded agreement to dispose of property. The whole terms of the agreement are set out in the judgments of the Court below and it is unnecessary to repeat them here. The significance of the argument for present purposes lies in the claim by Mr. Cheng that it gave Mr. Clark a pecuniary interest in the outcome of the proceedings before the Panel.

The application for judicial review was heard by Liu J., who on 17th February 1994 gave judgment dismissing it with costs. However, on 24th August 1994 the Court of Appeal of Hong Kong (Penlington J.A., Godfrey J.A. and Barnett J.) set aside the judgment of Liu J. and granted *certiorari* to quash the decision of the Panel that Mr. Cheng had breached Rule 33 of the Code. The Panel and the Commission now appeal to Her Majesty in Council.

The House of Lords has recently, in *Regina v. Gough* [1993] A.C. 646, laid down authoritatively the principles to be applied in cases involving allegations of bias on the part of judicial or quasi-judicial tribunals. Lord Goff of Chieveley, in the course of a speech concurred in by the rest of their Lordships, said at page 670, after a careful review of earlier decisions:-

> "In conclusion, I wish to express my understanding of the law as follows. I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators. Likewise I consider that, in cases concerned with jurors, the same test should be applied by a judge to whose attention the possibility of bias on the part of a juror has been drawn in the course of a trial, and by the Court of Appeal when it considers such a question on appeal. Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the

tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him."

Earlier, at page 661, Lord Goff of Chieveley had adverted to the special situation where a member of a tribunal has an interest in the outcome of the proceedings before him. He said:-

> "Before I do so, however, I wish to draw attention to the fact that there are certain cases in which it has been considered that the circumstances are such that they must inevitably shake public confidence in the integrity of the administration of justice if the decision is to be allowed to stand. Such cases attract the full force of Lord Hewart C.J.'s requirement [in *Rex v. Sussex Justices, ex parte McCarthy* [1924] I.K.B. 256, 259] that justice must not only be done but must manifestly be seen to be done. These cases arise where a person sitting in a judicial capacity has a pecuniary interest in the outcome of the proceedings. In such a case, as Blackburn J. said in *Regina v. Rand* (1866) L.R. 1 Q.B. 230, 232: 'any direct pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter'. The principle is expressed in the maxim that nobody may be judge in his own cause (*nemo judex in sua causa*). Perhaps the most famous case in which the principle was applied is *Dimes v. Proprietors of Grand Junction Canal* (1852) 3. H.L. Cas. 759, in which decrees affirmed by Lord Cottenham L.C. in favour of a canal company in which he was a substantial shareholder were set aside by this House, which then proceeded to consider the matter on its merits, and in fact itself affirmed the decrees. Lord Campbell said, at page 793:
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> 'No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred.'
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> In such a case, therefore, not only is it irrelevant that there was in fact no bias on the part of the tribunal, but there is no question of investigating, from an objective point of view, whether there was any real likelihood of bias, or any reasonable suspicion of bias, on the facts of the particular case. The nature of the interest is such that public confidence in the administration of justice requires that the decision should not stand."

As regards Mr. Clark's letter of 9th April 1991, therefore, the question is whether in all the circumstances the terms of it are such as to lead properly to the conclusion that there was a real

danger of bias on Mr. Clark's part when he sat as a member of the Committee in December 1991 and of the Panel in October 1993, in the sense that he might unfairly have regarded with disfavour the case of Mr. Cheng. It is apparent from the terms of the letter that Mr. Clark thought it suspicious that Mr. Cheng should have acquired the 100,000 shares at below the market price, and that the effect of the acquisition was to trigger a takeover offer at only 40 cents per share. It occurred to him that whoever sold the shares to Mr. Cheng at such a low price might be connected in some way with Mr. Cheng, and he suggested that the persons with whom the shares of the Soon family shareholding had been placed in November 1988 might be known to Mr. Cheng. Their Lordships' view is that upon a fair reading the letter did no more than indicate that the circumstances might merit investigation in order to ascertain whether or not a concert party had been involved. Penlington J.A., in the Court of Appeal said: "the whole tone of the letter of 9th April 1991 was accusatorial" and later:-

> "It is perfectly proper for a member of the Panel to bring to the attention of the S.F.C. any matter which he considers calls for investigation but if he goes further than that and appears to be accusing somebody of being in breach of the Code he should not be a member of the Panel if, subsequently to that communication, an inquiry is held. On the facts here, and in particular the wording of the letter of 9th April 1991, I think Mr. Clark did go beyond merely informing the Chairman and was an accuser".

Godfrey J.A. said that in the circumstances he would hesitate to describe the letter as accusatorial, but that he did not think it mattered whether or not it was treated as an accusation. He continued:-

> "Mr. Clark's letter left me, on reading it, with the distinct impression that the writer had not only decided that Mr. Cheng had a case to answer but that it was up to Mr. Cheng to rebut that case."

Barnett J. considered that the first paragraph of the letter, had it stood alone, would have been unexceptionable, but that the second paragraph drew an inference strongly unfavourable to Mr. Cheng. He said: "Looking at the letter as a whole, I find it difficult to understand it was not a complaint and its author not an accuser".

As already indicated, the terms of the letter convey a different impression to their Lordships, as they did to Liu J., the trial judge. Mr. Clark was doing no more than indicate the reasons

why he thought the transaction in April 1991 merited investigation. But in any event other circumstances require to be taken into account in determining whether there was a real danger of bias on Mr. Clark's part. Mr. Clark's letter was concerned with the acquisition of 100,000 shares by Mr. Cheng on 6th April 1991. Its reference to the original disposals by the Soon family (in November 1988) was limited to the possibility that the placees of the balance of their holding were in some way connected with Mr. Cheng so as to explain his acquisition in April 1991 at a price so far below the market price. As described above, staff at the S.F.C. did investigate the April 1991 transaction and took the view that it was artificial. They proposed to Mr. Cheng that he should make a general offer at 45 cents, and he accepted that. There matters rested until the complaint on behalf of General Nominees Limited in June 1991. That complaint was concerned with transactions in September 1990 and February 1991, and not at all with the circumstances of Mr. Cheng's acquisition of Shun Ho shares in November 1988, in relation to which the Panel held that Mr. Cheng had acted in concert with Ms. Wong. The Panel's inquiry into the 1988 transactions was prompted by investigations carried out by S.F.C. staff. Their Lordships can find no good grounds for inferring from the terms of Mr. Clark's letter of 9th April 1991 that he might have unfairly regarded with disfavour Mr. Cheng's case in relation to the events of November 1988, or dealt with the evidence about these events otherwise than with complete impartiality.

As regards the mandate of 27th July 1993 it was argued for Mr. Cheng that this had the effect of giving Mr. Clark a direct pecuniary interest in the outcome of the Panel's proceedings, because, if the Panel required Mr. Cheng to pay compensation to Shun Ho investors, he might have to sell Shun Ho shares or other property. If such sale were effected through Anglo Chinese, commission earned by Anglo Chinese would redound to Mr. Clark's benefit as a shareholder in its holding company. In their Lordships' opinion any interest which Mr. Clark might have had is properly to be described as a remote and contingent one, such as in many of the decided cases has been held not to involve any presumption of bias. The interest was plainly extremely remote, and it depended on the contingencies that Mr. Cheng would utilise the services of Anglo Chinese in relation to any disposal of property, and that Anglo Chinese would find a purchaser at a price acceptable to Mr. Cheng. The mandate was non-exclusive. It did not bind Mr. Cheng to use the services of Anglo Chinese for any disposal of property, and in view of Mr. Clark's involvement it may be regarded as highly improbable that he would do so. Both Liu J. and the majority of the Court of Appeal found that the existence of the mandate did not give Mr. Clark a direct pecuniary interest in the Panel's decision. Godfrey J.A., the

third member of the Court of Appeal, appears to have taken the view that, notwithstanding that Mr. Clark's interest might properly be described as remote and contingent, he would have been bound to ask himself "how will this affect me financially?" and that on that footing he had such a pecuniary interest as to disqualify him. In their Lordships' opinion there is no reason to suppose that Mr. Clark might have asked himself any such question, and in any event the authorities provide no support for such a test. Liu J. and the majority of the Court of Appeal applied the right test and reached the right conclusion.

For the reasons first stated above their Lordships will humbly advise Her Majesty that the appeal should be allowed and the order of Liu J. restored. The respondent must pay the appellant's costs before the Court of Appeal and their Lordships' Board.