IF YOU WERE THE CHAIRMAN OF A PUBLICLY LISTED COMPANY, WHAT WOULD YOU DO WHEN FACED WITH THESE SITUATIONS ?

It has long been held that the position of chairman of a publicly listed company has not just a notional value, but one that can be translated into dollar and cents.

The logic of the above statement is unquestionable.

When an approach is made to the chairman of a publicly listed company by a businessman, desirous of engaging in a transaction of one sort or another with the publicly listed company, which is headed by this chairman, that approach was, probably, made because the man, sitting as the chief executive of the publicly listed company, was known to be holding the reins of power and, as such, he or she had the absolute authority to make a determination in respect of the proposed transaction in a very short space of time.

If the chairman of that publicly listed company is cognisant of his duty of fidelity to his publicly listed company, then, he will act accordingly and decide whether or not it would be advantageous for him, as the head of his publicly held company, to accept the proposal of the businessman on behalf of the publicly listed company.

If the chairman, noting that the proposed business transaction is likely to be extremely lucrative, takes advantage of his privileged position and invests in the project himself instead of permitting his company to make the investment, it could be held that his actions were not only ultra vires the memorandum and articles of association of his company, but, de jure, a fraud on the company which he heads.

Shareholders, on discovering this fraud, would, most likely, have a legal Action against the chairman and/or the company itself – with the company, eventually, having to foot the bill for the legal Action because the company would, after all, be the beneficiary of the determination if a court held in favour of the plaintiff.

This is one of the very rare exceptions to the determinations in Foss v Harbottle.

Foss v Harbottle (1843) [2 Hare 461, 67 ER 189] is a famous English decision on corporate law and encapsulates the rules, regarding the proper plaintiff in a legal Action.

The determination in this famous case was the result of 2 minority shareholders of a limited liability company, who initiated legal Proceedings against, inter alia, the directors of their company, whom they claimed had misapplied the company's assets.

The court dismissed their claim and held that when a company is wronged by its directors, it is only the company that has a locus standi to seek legal redress.

In effect, the court established 2 rules: The proper plaintiff rule; and, the majority rule principle.

In the Hongkong Special Administrative Region (HKSAR) of the People's Republic of China (PRC), today, very often, the chairmen of well-known and very rich publicly listed companies are faced with one dilemma after another, especially when approaches are made to them by representatives of corporate entities, controlled by the PRC Government.

When such representatives approach the chairman of a well-known, publicly listed company with a view to trying to persuade that chairman to loosen his company's purse strings and to agree to purchase shares in the

PRC-Government's company, a company which is about to seek a listing in the HKSAR, that chairman is faced with at least the following 3 considerations:

(a) Is it to the advantage of my publicly listed company to take up the offer of the purchase of shares?

(b) Can the company that I head make a profit from an investment in this PRC-Government entity?

(c) If I cannot, in good conscience, allow my publicly listed company to take up the offer of the purchase of shares, would it appear that I am not a loyal patriot of my country? And, if it is held that I am not a loyal patriot of the PRC, what could be the repercussions to my company or to me in the future?

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