

SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV2006/0277

BETWEEN:

IN THE MATTER OF AN APPLICATION PURSUANT TO
SECTION 241 OF THE COMPANIES ACT 1996

AND

IN THE MATTER OF THE COMPANIES ACT OF SAINT LUCIA 1996

DESMOND DUBOULAY

Applicant

AND

1. DUBOULAY ESTATES COMPANY LIMITED
2. MICHAEL DUBOULAY
3. DAVID DUBOULAY
4. MONA MICHELLE DUBOULAY-CHARLEMAGNE
5. MARY JULIAN-ANN SANCHEZ
6. VIMLA ST. HILL

Respondents

Appearances:

Mr. Peter Foster in association with Ms. Renee St. Rose for the Applicant
Ms. Ewa Girard for defendants

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2006: June 13
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DECISION

MASON J

[1] An application without notice supported by affidavit was filed in this court on 11th April 2006 for an interim order that :

1. The Second, Third, Fourth, Fifth and Sixth named Respondents be restrained whether by themselves their servants and or agents or however otherwise from convening any meetings of the Board of Directors or Shareholders of the First Named Respondent or passing any resolution for the First Named Respondent until the returnable date of this application and or further order of the Court.
2. The Second, Third, Fourth, Fifth and Sixth Named Respondents be restrained whether by themselves their servants or agents or however otherwise from carrying out any functions and or acting on behalf of the First Named Respondent in any way or at all until the returnable date of this application and or further order of the Court.
3. The Applicant and the Second and Third Named Respondents are permitted to transact business on behalf of the First Named Respondent in accordance with paragraph 4 hereof.
4. The Applicant and Second and Third Named Respondents are only permitted to transact and or pass any resolutions upon the unanimous agreement of the Applicant, Second and Third Named Respondents.
5. Should the Applicant and the Second and Third named Respondents be unable to agree to the business to be transacted on behalf of the First Named Respondent, then the

aggrieved party shall have liberty to apply to the Court for an order that a resolution be passed.

6. The Notice of Change of Directors and the Notice of Change of Secretary filed in the Registry of Companies on the 21 March 2006, the Return of Allotments filed on the 4 April 2006, and all Resolutions passed or filed from 20 February 2006 to date are stayed until the returnable date of this application and or further order of the Court.
7. All and any directives issued by the Second, Third, Fourth, Fifth and or Sixth named Respondents are stayed until the returnable date of this application and or the further order of the Court.
8. Maurice Lennie is appointed Secretary of the First Named Respondent until the returnable date of this application and or until further order of the Court.
9. That the Applicant be given leave to file and serve a Fixed Date Claim Form and Affidavit in support within seven (7) days of the date of this Order.

[2] The grounds of the Applications are:

1. That up to 4 April 2006, the Applicant was a 505 shareholder and a Director of the Respondent Company and the acts of the Directors and Shareholders of the Company since 10 March 2006 have been carried out in a manner which is oppressive and is unfairly prejudiced to and unfairly disregards the interest of the Applicant.

2. This Application is made Without Notice as the Applicant fears that the Respondents will carry out further acts which are oppressive and unfairly prejudicial to the Respondents should notice be given. This matter is also of extreme urgency there is not sufficient time within which to give Notice to the Respondents.
 3. The Applicant undertakes to file and serve a Fixed Date Claim Form in this matter within seven (7) days of the interim order.
 4. The Grounds of the Application are set out in the Affidavit in Support of Desmond DuBoulay dated 11 April 2006 which accompanies this Application.
- [3] The application came on for hearing on 12th April 2006. Although it was listed as a without notice hearing, Counsel for the Respondent were in attendance.
- [4] The Court made the order as prayed. It was also order that:
1. The Second, Third, Fourth, Fifth and Sixth named Respondents be restrained whether by themselves their servants or agents or however otherwise from convening any meetings of the Board of Directors or Shareholders of the First Named Respondent until the returnable date of this application and or further order of the Court.
 2. The Second, Third, Fourth, Fifth and Sixth Named Respondents be restrained whether by themselves their servants or agents or however otherwise from carrying out any functions and or acting on behalf of the First Named

Respondent in any way or at all until the returnable date of this application and or further order of the Court.

3. The Application and the Second and Third Named Respondents are permitted to transact business on behalf of the First Named Respondent in accordance with paragraph 4 hereof.
4. The Applicant and Second and Third Named Respondents are only permitted to transact business and or pass any resolutions upon the unanimous agreement of the Applicant, Second and Third Named Respondents.
5. Should the Applicant and the Second and Third Named Respondents be unable to agree to the business to be transacted on behalf of the First Named Respondent, then the aggrieved party shall have liberty to apply to the Court for an order that a resolution be passed.
6. The Notice of Change of Directors and the Notice of Change of Secretary filed in the Registry of Companies on the 21 March 2006 and the Return of Allotments filed on the 4 April 2006 and all Resolutions passed or filed from 20 February 2006 to date are stayed until the returnable date of the application and or further order of the Court.
7. All directives issued by the Second and or Third Named Respondent are stayed until returnable date of this application or the further or of the Court.
8. Maurice Lennie is appointed Secretary of the First Named Respondent until the returnable date of this application and or until further order of the Court.
9. This Order is returnable on the 19 day of April 2006.

10. That the Applicant is to file and serve a Fixed Date Claim Form and Affidavit in Support and this matter is set for hearing by the Court Office on the 19 day of April 2006.

VARIATION OR DISCHARGE OF THIS ORDER:

11. Any Respondent shall have leave of this Court to vary or discharge this Order but if he or she wishes to do so, he or she must file an application and give 72 hours notice to the Applicant's Solicitors.
12. However, under part 11/16 of the Civil Procedure Rules 2000, and Respondent may apply to the Court at any time to vary or discharge the Order but if a Respondent wishes to do so, he or she must file an application not more than 14 days after the date on which the order was served on the Respondent.

THE EFFECT OF THIS ORDER:

13. The Respondent who is an individual who is ordered not to do something must not do it through other acting on his behalf or on his instructions or with his encouragement.
14. The Respondent which is a corporation and which is ordered not to do something must not do it itself or by its directors, officers, employees or agents or in any other way.

[5] No hearing took place on 19th April as ordered but the injunction continued in effect and a date of hearing of 2nd May 2006 was set. On the date the following order was made:

[6] A notice of application was filed on 8th May 2006 on behalf of the Respondents for an Order that:

1. The interim injunction order granted ex parte by this Court on the 12th day of April 2006 and continued on the 2nd day of May 2006 be discharged.
2. Alternatively that the interim injunction order granted ex parte by this Court on the 12th day of April 2006 and continued on the 2nd day of May 2006 be varied to allow the Defendants/Respondents to acquire relevant information pertaining to the First Named Respondents from the Ministry of Transport, the Bank of Saint Lucia Limited and any other institution or entity with which the First Named Defendant/Respondent has or has had dealing ; and
3. That the costs of this Application be provided for.

[7] The grounds of that application were:

1. There is no legal evidence before the Court to support the Applicant's application for an ex parte injunction. This is because the Affidavit sworn on 11th April 2006 was sworn and filed before the issue of the Claim Form but no undertaking was given by the Applicant to re-swear the Affidavit after the issue of the Claim Form which instituted the proceedings. Further, the contents of the First Affidavit were incorporated into the Affidavit sworn on the 19th April 2006 in support of the Application to continue the injunction.

2. There is material non-disclosure on the part of the Applicant in relation to his dealings with the First Named Respondent.
3. The Applicant has exercised his powers as a director of the First Named Defendant/Respondent and had conducted some of the affairs of the First Named Defendant/Respondent in a manner that is oppressive, unfairly prejudicial to or which unfairly disregards the interest of the other shareholder(s), director(s) and/or officer(s) of the First Named Respondent.
4. There is no prima facie or good and arguable case that the actions of the Defendants/Respondents complained or have been carried out in a manner that is oppressive or unfairly prejudicial to, or which unfairly disregards the interest of the Applicant.
5. The balance of convenience does not favour the Applicant.
6. The status quo which should be preserved is that from the 4th April 2006
7. Other grounds as disclosed in the Affidavit(s) in support of this application.

[8] Hearing of the application of 8th May, 2006 took place on 12 June, 2006.

[9] Counsel for the Respondents argued that:

1. The evidence supplied to the Court by the Claimant/Applicant in support the application made ex parte for the grant of an injunction is contained in an "Affidavit In Support of Application without Notice" (hereinafter called "First Affidavit"), which was sworn by the Claimant/Applicant and filed on the 11th April 2006. The Claim Form which instituted the claim of the Claimant/Applicant was not filed until the 19th April 2006. However, the First

affidavit does not contain an undertaking by the Claimant/Applicant to re-swear and re-file the First Affidavit after the issue of the Claim Form.

Further, in a Second Affidavit of the Claimant/Applicant entitled "Affidavit In Support of Notice of Application" sworn and filed on 19th April 2006, hereinafter called "the Second Affidavit"), the contents of the First Affidavit are incorporated into it by reference at paragraph 1 and thereof.

The legal consequence of the foregoing is that there is no legal evidence before the Court in respect of the First Affidavit, and to the extent that it is incorporated into the Second Affidavit. As a consequence, the injunction must be discharged.

See: Mohammed V. Home Construction Limited, (1988) 43 Wir 380:
Halbury's Law of England 4th Edition Reissue, Vol 24 page 518,
paragraph 970

(hereinafter called "Halbury's Laws")

2. MATERIAL NON-CLOSURE ON THE PART OF THE CLAIMANT/APPLICANT:

The granting of an injunction by the Court is an exercise in its equitable jurisdiction. Equity requires that *"He who comes to equity must come with clean hands"*.

The Court has discretion to set aside an order made ex parte where the Applicant has failed to make sufficient or candid disclosure: Halbury's Laws, page 517, paragraph 969.

Furthermore, in the Fixed Dated Claim Form filed on behalf of the Claimant/Applicant on the 19th April 2006, the Claimant/Applicant is seeking equitable relief on the grounds of oppression and unfairly prejudicial conduct.

However, the basis of the allegations contained in the Affidavits of the Respondents/Defendants in support of the application to discharge the injunction, the Claimant/Applicant has failed to make full and frank disclosure to the Court about his conduct and his dealings with the First and Second names Respondents.

The following are some examples of the non-disclosure on the part of the Claimant/Applicant as stated in the Affidavits of the Defendants/Respondents:

1. That he caused a vehicle which was owned by the registered in the name of the First Named Defendant/Respondent (hereinafter called "the Company") to be transferred to the name of a company or entity under his management and/or control without any authorization from or knowledge on the part of the Second or Third Named Respondents, who were the other directors of the Company at the

time. This amounts to the misappropriation and/or conversion by the Claimant/Applicant of property belonging to the Company.

2. That he caused the account of the Still Restaurant to go into overdraft while under his management.
3. That he has not accounted to the Company for monies collected from the Still Restaurant or the Still Plantation Resort from 2nd November, 2005
4. That he has failed to continue servicing a loan in the original amount of One hundred and Fifty Thousand Dollars (\$150,000.00) taken with the authority of the Second Named Defendant/Respondent to effect repairs to the Still Restaurant. The Claimant/Applicant was responsible for repaying this loan from the account of the Still Restaurant at the Bank of Saint Lucia. The loan balance at the 10th January 2006 was \$112,355.96.

3. THE SUBSTANTIVE CLAIM

The Claimant/Applicant claims relief under section 241 of the Companies Act of Saint Lucia 1996 on the ground that the actions of the Defendants/Respondents complained of are oppressive and unfairly prejudicial to him and unfairly disregard his interests.

The evidence of the Defendants/Respondents is that the Company was established in 1972 by the Second Named Defendant/Respondent, who is the

father of the Claimant/Applicant. The Second Named Defendant was the business mind involved in the formation, operation and financing of the Company from its incorporation. He directed that the Articles of Association of the Company be framed to allow him to be its Managing Director during the term of his life or until he resides or ceases to hold shares in the Company. While provisions were made in the Articles for him to appoint other directors, it is provided at Article 23 (b) that such directors shall exercise such powers as he delegates to them and shall be bound to conform to his discretion in regard to the business of the Company.

By virtue of Section 360 of the Companies Act of Saint Lucia No 19 of 1996, the Company is a "*Former-Act Company*" within the meaning of that section. As such, its Articles of Association ("the Articles") continue in force. Therefore the Second Named Defendant/Respondent continues to have and to be authorized to exercise all the powers granted to him under the said Articles. All of the actions complained of by the Claimant/Applicant are authorized by and were carried out in accordance with the Article of the Company, pursuant to the powers and directives of the Managing Director.

Further, the Claimant/Applicant had actual notice of the provisions of the Articles of the Company.

The other directors also state that they acted in the best interest of the Company, and in accordance with the directives of its Managing Director and of the Articles of the Company.

4. THE BEHAVIOUR OF THE CLAIMANT APPLICANT:

In addition to the matters stated above under the heading of “*Material Non-Disclosure ...*”, the Affidavits of the Defendants/Respondents state that (1) the actions of the Claimant/Applicant have affected the profitability of the Company and consequently the interest of the Second Named Defendant/Respondent who is the other shareholder of the Company, and (2) the Claimant/Applicant has deliberately sought to exclude the Second named Defendant/Respondent who is the Managing Director of the Company, from its affairs, in contravention of the Articles.

Therefore the Claimant/Applicant is himself in contravention of section 241 (b) and (c) of the Companies Act of Saint Lucia.

5. OTHER CONSIDERATIONS

By reason the matter outlined above, it is submitted as follows:

1. There is no prima facie or good and arguable case that the actions of the Defendants/Respondents complained of have been carried out in a manner that is oppressive or unfairly prejudicial to, or which unfairly disregards the interest of the Applicant.
2. The balance of convenience does not favour the Applicant

3. The status quo which should be preserved is that from the 4th April, 2006
4. The pending injunction order should be discharged or varied as per the Notice of Application filed on behalf of the First to Sixth named Defendants/Respondents herein.

[10] In response Counsel for the Applicant stated that with respect to the first ground of the application namely evidence, the application of the Respondents was made with a lack of understanding of how the Civil Procedure Rules have changed procedure in the Court, that the application without notice for the injunction had indeed been made under Part 17 CPR.

[11] Counsel continued that proceedings in these courts are begun in accordance with Part 8 of the Rules and that the Applicant's application was also in compliance with Part 30 CPR.

[12] Counsel was of the opinion that the case cited by Counsel for the Respondents: Mohammed V Home Construction Limited was different from the instant case and that in any event, procedure in these courts is governed by the CPR 2000.

[13] Counsel noted that the Applicant had commenced his application without notice in accordance with CPR and had supported his application with an affidavit and that there had been no procedural breach of Part 17 CPR.

- [14] With respect to ground number 2 material non-disclosure – Counsel made reference, Bear on Injunctions 8th edition page 97 para 6:31: discharge of injunctions and the grounds stated therein.
- [15] Counsel stated that on review of the affidavit in support, of the Applicant went through a great deal in an attempt to give the Court full and frank disclosure to give a “reasonably detached appreciation of the case”.
- [16] He argued that the Applicant was a 50% shareholder of the company and that he had been trying to have a meeting in accordance with proper procedure. Attempts had failed and as a result he had to apply to the Court so that the affairs of the company would be dealt with properly.
- [17] Before this could be done, a meeting was held by the Respondents after which the shareholding capital of the company had increased. The Applicant was removed as a director, shares were issued to other persons which reduced his percentage holding in the company.
- [18] This Counsel felt was totally wrong and was an illegal act, that no company could operate in that manner without the sanction of the court.
- [19] Counsel referred to Section 361 of the Companies Act as well as to Section 97 and stated that under section 73 of the Act it provided for removal of directors, that certain legal

procedures have to be followed before a director can be removed or the shareholding interest of a shareholder can be changed.

[20] If a shareholder is aggrieved, he can bring an action under section 241 to have the Court remedy the alleged wrongdoing.

[21] Counsel stated that what the affidavits show is that there are many issues which need to be aired and that it seemed that would not be done by the parties and it therefore had to be done through the Court.

[22] The Order granting the injunction in this case is perfectly suited to the circumstances of this case and ought to remain and the matter proceed to trial on 4th July.

[23] The usual reason for discharging any injunction are also quoted on page 97 of Bear paragraph 6.32 namely, where the injunction was granted on terms and those terms have not been fulfilled; where the continuing effect of the injunction has become oppressive; where there has been inordinate delay by the Claimant who is under a duty to proceed with diligence.

[24] Counsel was of the view that what had been raised by the Respondents was known to them prior to the return date and prior to the adjourned date.

- [25] Counsel sees no reason for the discharge of the injunction and states that it should continue given the behaviour of the Respondents in having the shareholding changed without having the courtesy of informing the Claimant.
- [26] With reference to paragraph 2 of the notice of the application in request for variation of the terms of the injunction, the Respondents could have written to the Claimant to have all disclosure.
- [27] Counsel for the Respondents in response to this last submission stated that the reason why the Respondents felt they could not write to the Ministry of Transport to get the information needed was because of the sweeping terms of the injunction.
- [28] However Counsel was satisfied that the Respondent had acted in good faith and in the best interests of the company in that they were seeking to uphold those provisions of the articles which govern appointment and removal of directors and issuance of shares.
- [29] The Court having heard the arguments of the parties and having previously read the affidavit in support of the application was minded to discharge the injunction.
- [30] The submissions of Counsel for the Applicant with respect to the procedural aspect of the application were accepted in that the Court agreed that the procedure for starting of proceedings had been properly complied with and the cited authority had no relevance to the case at Bar since it dealt with procedure under the old rules of the Supreme Court and that all procedure in these courts are governed by the CPR 2000.

[31] However the court felt that there was material non-disclosure of the facts surrounding the matter, a ground for discharge of the injunction.

[32] It was also felt that the Respondents were indeed acting in the best interests of the company and that the Second Respondent was acting in accordance with the articles of the Company, and that the Applicant by his actions viz in seeking to exclude the Second Respondent was acting in contravention of the articles of the company.

[33] The Court then made an order that:

- 1) the injunction be discharged
- 2) leave to appeal be granted
- 3) Cost to be costs in the cause and
- 4) stay of execution granted for two (2) days.

SANDRA MASON Q.C.

High Court Judge