IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO 2005 HCV 01705

IN THE MATTER OF CARIBBEAN PAPER RECYCLING COMPANY LIMITED.

AND

IN THE MATTER OF THE COMPANIES ACT

Mr. Kent Gammon instructed by DunnCox for the Petitioner.

Caribbean Paper Recycling Company Limited not appearing or being represented.

15th June & 7th September, 2006

BROOKS, J.

Mr. Stephen Lalino has petitioned that this court finds that the affairs of Caribbean Paper Recycling Company Limited ("the Company") are being conducted in a manner which is oppressive or unfairly prejudicial to him as a director and minority shareholder. He seeks one of two means of relief; firstly that the Court orders that the two majority shareholders or either of them, purchase his share in the Company, or secondly that the Company be wound up.

Mr. Lalino has however provided very little information about the Company or those shareholders, and curiously, he has not paid for the share which he alleges was allotted to him.

Background Facts

The information provided to the court was contained in an affidavit by Mr. Lalino, sworn to on 6th October, 2005. In it he states that he, Mr. James Orioli, and Mr. Phillip Corrigan were the first shareholders and directors of the Company. The Company was incorporated on 4th July, 2003. One of its main objects was to carry on the business of waste paper recycling. Though there was some inconsistency in the mathematics outlined in the affidavit, Mr. Lalino states that the authorised share capital of the Company was $999,999.00 divided into 3 ordinary shares and that these three shareholders were issued an equal number of shares, that is one each.

Mr. Lalino has, by his admission, not paid for his share. It is not clear from his affidavit whether there was a formal call by the company for the payment of shares, but apparently this non-payment was the source of some dispute between the three shareholders. He asserts that he has received no formal communication from the company on the matter.

What eventually transpired was that there was a "gradual breakdown in the relationship" between him and the others. He deposes that, contrary to

their agreement, he has been excluded from the management of the operations and day to day running of the Company". He also deposes that:

> "Despite "several requests from me as well as my Attorneys-at-law I have not been provided with any information on the financial affairs of the Company and in particular I have not been allowed access to or provided with copies of the Company's financial records, accounts or statements or any other business records....
>
> There were never any shareholders' or directors' meetings of the Company that I was called to attend....
>
> I was removed from the Company's mailing list, the password was changed so that I could no longer access the Company's emails and I have been denied access to the Company's premises....
>
> Phillip Corrigan and James Orioli have excluded and continue to exclude me from any share in the conduct of the Company's business or in the distribution of its profits and have refused to provide me with any Company records." (Paragraphs 13 (f), (g), (h) and 14)

The Application

Based on that situation Mr. Lalino asks that the court finds, pursuant to Section 213A (2) of the Companies Act, 2004 ("the Act"), that the "business or affairs of the company...are or have been carried on or conducted in a manner...that is oppressive or unfairly prejudicial to" him. Section 213A (3) provides for various methods by which the Court may grant relief to the oppressed party. They include the following:

> "(f) directing a company, subject to subsection (4), or any other person to purchase the shares or debentures of a holder thereof;

> (g) directing a company, subject to subsection (4), or any other person to pay to a shareholder or debenture holder any part of the moneys paid by him for his shares or debentures;...
>
> (i) requiring a company, within the time specified by the Court, to produce to the Court or an interested person, financial statements or an accounting in such forms as the Court may determine;...
>
> (l) liquidating and dissolving the company;
>
> (m) directing an investigation to be made; or
>
> (n) requiring the trial of any issue."

Mr. Lalino's application has been by way of a Petition. He has also had the Petition advertised in a daily newspaper and in the Jamaica Gazette, as if the Petition were one for a winding-up of the company. Unfortunately although the company was served with the Petition herein and the affidavit verifying the Petition, it has neither acknowledged service, nor sought to resist the application. Neither, indeed has either of the other shareholders. The court therefore only has the very limited information provided by Mr. Lalino. So limited is the information provided, that the court was not even provided with copies of the Memorandum or Articles of Association.

The Law

Although section 213A, quoted above, speaks to the complainant making an application, the method of application is not specified. Section 196 of the 1967 Companies Act (now repealed), which was the section providing for a remedy in cases of oppression, had stipulated that the

application may be made by petition. I therefore find no fault with Mr. Lalino's application being made by way of Petition, especially as he has claimed a winding up of the Company as one of the remedies sought.

Similarly, I find that the fact that Mr. Lalino has not paid for his shares, does not prevent him from making or prosecuting this application. Even if he may be prevented *qua* shareholder, on the basis that he has no, "tangible interest in the Company", he could not be so prevented as a director. In this regard, the instant case is different from the circumstances in *Win-Doors Limited and Dennis Howell v. Steve Bryan and others* (1990) 27 JLR 292. In that case, one of the grounds for dismissing the petition to wind up, was the failure of the petitioners to show that Win-Doors Limited was solvent, thereby giving them "a tangible interest in the company".

One other possible ground for a preliminary objection to the petition herein is that Mr. Lalino has not shown that he has complied with the provisions of rule 33 of the Companies (Winding Up) Rules, 1949. Those are the rules, which, pursuant to Section 340 of the Act, govern applications to wind up. Rule 33 requires that the petitioner should, prior to the hearing of the petition, attend upon the Registrar of the Supreme Court and satisfy the Registrar that the petitioner has complied with the provisions of the rules with respect to petitions. The rule provides further that no order should be

made on any petition in respect of which the petitioner has not so attended. This, I find to be a proper objection to a grant to the application to wind up the Company. The judge's bundle filed in this matter reveals that the petition was served and advertised as mentioned above but does not reveal a certificate of compliance or any proof of an attendance upon the Registrar.

The application of the provisions of Section 213A, in the context of an entity such as the Company, has been demonstrated in the case of *Ebrahimi v. Westbourne Galleries Ltd. and Others* [1973] A.C. 360. In that case the House of Lords ruled that a company, which has been formed on the basis of more than the mere creation of a legal entity, and in which its subscribers had good reason to expect the continuation of personal relations and the participation in the management of the entity, may be wound up upon the proof of a change from that situation, to the detriment of a subscriber.

In *Radcliffe Butler v. Norma Butler* (1993) 30 JLR 348, the Court of Appeal upheld an order for the sale of shares by one of a company's two shareholders, to the other. There the evidence was that it was being operated by one of the shareholders for his personal benefit. His conduct was considered "oppressive" by their Lordships. Though that case was decided in the context of section 196 of the 1967 Companies Act, it is one instance of such an order in our jurisdiction.

Conclusion

Mr. Lalino is entitled to bring this application pursuant to section 213A of the Act. Since, however, he has not shown that he has complied with the provisions of rule 33 of the Companies (Winding Up) Rules 1949, Mr. Lalino is not entitled to an order for the winding up of the Company.

I accept as fact, however, that the Company was formed on the basis that the three subscribers would be "equal partners" and that Mr. Lalino would "fully participate in the operations and affairs of the Company". Accordingly the change in that position, to his detriment, is a basis for finding that their association should be terminated.

There is no evidence concerning the value of the shares or the ability or otherwise of Messrs Corrigan and Orioli to purchase Mr. Lalino's shares. An order that they should purchase those shares would, however, seem to be the appropriate remedy, since according to Mr. Lalino the Company is "lucrative" and there would be incentive for those gentlemen to continue its operation and their involvement in it. The case of *Scottish Co-Operative Wholesale Society Ltd. v. Meyer and anor.* [1959] A.C. 324, cited by Mr. Gammon on behalf of Mr. Lalino is an appropriate guide in these circumstances. In that case their Lordships in the House of Lords, ruled that because of the depreciation of the value of the shares of the subject

company, a winding up order would unfairly prejudice the minority shareholders. Their Lordships affirmed an order that the majority shareholder purchase the shares of the minority. The purchase price was set at a value assessed to have been the price at the start of the legal proceedings, "had it not been for the effect of the oppressive conduct of which complaint was made" (per Lord Keith of Avonholm at page 364).

In the instant case Mr. Lalino filed his petition on June 15, 2005. He deposed at paragraph 15 of his affidavit that apart from the exclusionary course conducted by the other shareholders/directors, there may be some impropriety which could affect the value of the company. I shall not expand on this allegation, because he states that he is informed of these events, but he has not revealed the source of his information. There has, however, been a long lapse of time since the petition was filed. In the circumstances a current value may not be the appropriate value to be used for his shares.

I also have to take into account the fact that Mr. Lalino has not paid for his shares and that the Company is entitled to receive payment before Mr. Lalino receives any benefit from their sale.

The order, therefore, is that:

1. Phillip Corrigan and James Orioli, shareholders of Caribbean Paper Recycling Company Limited, shall purchase the share of the Petitioner Stephen Lalino, in the said Company.
2. The sale price shall be the value of the said shares as at the 15th June 2005. Such sums as are due to the Company by Mr. Stephen Lalino for the said shares shall not be paid directly to him, but shall be paid to the Company, and the receipt of the Company to that effect shall be proof of the payment of that portion of the sale price to Mr. Stephen Lalino.
3. The valuation shall be conducted by a firm of accountants to be agreed upon by the parties, but failing agreement within 30 days from the date of the service of the formal order hereof on both Messrs. Corrigan and Orioli, the Registrar of the Supreme Court shall, and is hereby empowered to appoint such firm of accountants upon the application of any party.
4. Liberty to apply.
5. The costs of this petition and the valuation shall be paid from the assets of the company. The said costs are to be taxed.