[2015] JMSC Civ 80

IN THE SUPREME COURT OF JUDICATURE

THE CIVIL DIVISION

CLAIM NO.s. 5537, 5538, 5539 & 5540 of 2005

IN THE MATTER OF S.213A AND S.246 OF THE COMPANIES ACT

AND

IN THE MATTER OF an application by Raju Khemlani for an Order to Wind Up Public Supermarket Ltd., Topaz Investments Ltd., Kay Mart Ltd. and Lord & Lady Ltd.

BETWEEN	**RAJU KHEMLANI**	**PETITIONER/APPLICANT**
AND	**PUBLIC SUPERMARKET LIMITED**	**RESPONDENT**
AND	**TOPAZ INVESTMENTS LIMITED**	**RESPONDENT**
AND	**KAY MART LIMITED**	**RESPONDENT**
AND	**LORD & LADY LIMITED**	**RESPONDENT**

IN CHAMBERS

Mr. Bert Samuels and Mr. Able-Don Foote instructed by Knight Junior & Samuels for the Petitioner/Applicant.

Mr. Ransford Braham Q.C. and Mrs. Suzanne Risden-Foster for the Respondent Companies.

Heard: 15th December 2014 & 1st May 2015.

Injunction – Application for an injunction to restrain a Law Firm from representing the Khemlani group of companies – Breach of Article 86 of the Articles of Association – Conflict of interest – Whether in the circumstances the injunction should be granted – Application for injunction refused.

CAMPBELL J,

Background

[1] The companies in the Khemlani Group of Companies were formed between the years 1972 and 1994. The companies prior to 1989 were owned by Madhu Khemlani, the father of the Khemlani brothers; Raju Khemlani and Suresh Khemlani. No disrespect is meant, the parties, where for ease of reference will be referred to by their first names.

[2] Prior to his death in 1989, the father, Madhu, the majority shareholder transferred all his shares to his two sons making them equal shareholders/Directors of the said companies. Raju, the elder was appointed Managing Director in 1989.

[3] In or about the year 1997, the group of companies was faced with financial challenges. As a result, negotiations ensued between the brothers and National Commercial Bank (NCB). The negotiations were successful and the companies were restructured by way of a compromise agreement. Raju stepped down and appointed Suresh as the new Managing Director. Since then, there has been deadlock between the brothers and this has lead to a series of matters being brought to the court.

[4] Suresh is contending that the management of the companies was transferred to him by Raju by way of an oral agreement, and as a result he has obtained 100% beneficial shares of the companies. Raju on the other hand is arguing that each has 50% shares in the companies. This matter has been settled in the judgment of Justice Hibbert, in **Khemlani v Khemlani et al**, [2013] JMSC Civ 119; where it was held that each of the brothers is a 50% shareholder in the Respondent Companies.

[5] In 2005, Raju filed a petition to wind up the companies, claiming that Suresh has excluded him from the operation of the companies. Suresh has appointed Attorneys-at-Law, Grant, Stewart, Phillips & Co. (GSP) to act as Attorneys for the companies in the winding up petition.

The Application

[6] By way of an Amended Notice of Application for Court Orders filed on 12th May 2014, the Applicant is seeking the following Orders from the Court;

> 1. *"An interim injunction restraining the Respondents and everyone purporting to act on their behalf from continuing to restrain or appointing the Law Firm Grant, Stewart, Phillips & Co. or any other Law Firm from acting on their instructions to represent the Respondents; and restraining the said Law Firm, or anyone acting on their behalf, from representing the Respondent companies, save and except in accordance with*

a resolution of the duly appointed Board of Directors for each company or by an order of the court.

2. *The legal firm Grant, Stewart, Phillips & Co, Attorneys-at-Law be forced or ordered to recuse themselves as the Attorneys-at-Law on record for the Respondents.*

3. *Time for service of this Notice of Application be abridged.*

4. *Further and such other relief as the court deems fit*."

[7] The grounds on which the aforementioned Orders are sought are as follows:

1. *The Applicant is the registered holder of 50% of the issued shares in each company and he is a Director of the companies. The other 50% shareholder, Suresh Khemlani has been in absolute and unfettered control of the companies and was not authorized by the Board of Directors to appoint lawyers for the Defendants or to resist the Applicant's Petition to wind up the Defendant companies.*

2. *The law firm of Grant, Stewart, Phillips & Co. currently appears on behalf of Suresh Khemlani in several matters before the court, in which the Defendant companies have been named as Defendants by him; the Firm is, therefore barred by reason of this conflict of interest from appearing on behalf of the Defendant companies in the hearing of the Taxation in claim numbers 2005 HCV 5537, 5538, 5539 and 5540 scheduled to be heard on the 15th May, 2014.*

3. *The Applicant has been excluded from the daily affairs of the company, which is in breach of the judgment of Justice Hibbert, which was handed down on the 11th September, 2013.*

4. *The Civil Procedure Rules provide under Rule 11.11 that the Court has the power to abridge time for the service of the Notice of Application of Court Orders.*

5. *That the Applicant will suffer irremediable prejudice if the orders sought herein are not granted*.

The Applicant's submission

[8] Counsel for the Applicant pointed out that despite the judgment of Hibbert J, in **Khemlani v Khemlani et al,** Suresh is justifying his monopolization of the companies on two limbs that; (a) since 2006, he has owned 100% of the shares; and (b) the Applicant walked away and gave him stewardship and sole authority to act on behalf of the companies. However, the issue of the ownership of beneficial shares in the companies has been decided and settled. The case has settled who the Directors are and who the shareholders are. It is important to note that Brooks J, in **Khemlani v Public Supermarket Limited et al**, (unreported, delivered on the 21st December 2010), gave consideration to the fact that the companies would be unrepresented. The only reason for this consideration is because the issue of the beneficial interest was not resolved. Additionally, an attempt was made by Suresh to remove Raju as Director, due to alleged misconduct, but this was refused by Mangatal J, in **Khemlani v Khemlani et al, (**unreported, delivered the 4th November 2008).

[9] Mr. Samuels, Counsel for the Applicant noted that the court had refused to stay execution of the judgment of Justice Hibbert. There has not been any appeal from the refusal of the stay of execution. The court has refused the submission on behalf of Suresh that there has been an oral agreement between the brothers. Hence, Suresh is not the 100% shareholder/Director. It is good law that a successful party may go on with their case where there is a refusal of a stay of execution*. (See; **Part 65.16 of the Civil Procedure Rules**, which states that taxation is not stayed pending an appeal unless the court or the Court of Appeal so orders).*

[10] The thrust of the Applicant's contention is that the Law Firm of Grant, Stewart, Phillips & Co. was retained by Suresh to represent the companies in litigation against him. He argues that for Attorneys to be appointed to represent the group of companies there must be consensus between both Directors or by virtue of a decision by the Board of Directors of the companies. It was further pointed out that at no time the Applicant was consulted about the appointment of the Attorneys nor was the Board of Directors. Consequently, the Attorneys on record were not properly authorized to commence or defend any of the matters before the Courts. Counsel relied on Article 86 of the **Articles of Association.** (See also; First Schedule Table A, Article 87 of the **Companies Act**, 2004).

[11] Suresh has changed his appearance in the winding up Petition from "Manager Director" representing the companies along with GSP, and is now appearing, represented by GSP, as a "Contributory" of the companies, (See; Application dated the 1st July 2014). Without the authorization of the Board of the companies he cannot appear on their behalf neither can he appoint Attorneys to represent them. The only way Suresh could make this decision is if the Applicant gave him a power of attorney.

[12] After the judgment of Hibbert J, Raju attempted to convene an extraordinary general meeting. However, this meeting was never held. Suresh failed to attend and as such Suresh cannot now oppose the injunction and then seek to say if the injunction is granted the companies will be left unrepresented.

[13] Section 213A of the **Companies Act** is the statutory basis of an injunction to be granted. This section deals with remedy in case of oppression. The Order sought here is not an interim order but a final order. The Applicant complains that he has been excluded from the daily affairs of the company to date and this is breach of the judgment of Hibbert J. This action has been oppressive. In addition, the court was urged that the solvency of the companies and poor management of Raju is a non-factor to a breach of Article 86 of the **Articles of Association** or Section 87 of the **Companies Act**. The Applicant has exhausted all alternative remedies. The Attorneys representing the Respondent companies were asked to voluntarily recuse themselves from representing the companies. This was not done and as a result we are now seeking an injunction to that effect.

[14] The Applicant also argues that GSP has represented him in several matters before and has been exposed to confidential information. As a result of the intimate knowledge of the affairs of the companies, conflict of interest is a real issue. The risk of knowledge to the Attorneys is a real risk. On the face of it, the issue of conflict of interest speaks for itself.

[15] Counsel submitted that the dictum of Lord Hoffman in the Privy Council decision of **National Commercial Bank of Jamaica Ltd. v Olint Corporation Ltd.** [2009] UKPC 16, is the relevant principle. The court must assess whether the granting or withholding of the injunction is more likely to produce a just result. This is also in harmony with the principle elucidated in the **American Cynanamid v Ethicon** (1975) AC 396, where it was established that there must be a serious issue to be tried and the claim must not be frivolous or vexatious. The claim is not frivolous nor can it be classified as vexatious. The just result in granting this injunction is to enforce the right of the companies to choose who will represent them. The usual balance of convenience test does not apply in this matter.

The Respondents' submission

[16] It was submitted that Suresh has a realistic prospect of success in his appeal and any action taken as a consequence of any reliance on the judgment of Hibbert J, will have the effect of rendering the appeal nugatory should Suresh be successful on the appeal.

[17] As it relates to the interim order sought by the Applicant, it was argued that since the substantive claim had fallen away, he is not entitled to rely on 213A of the **Companies**

Act in aid of the application. In addition, reliance on the **Civil Procedure Rules** is unacceptable as these claim deals specifically with a winding up petition. Further, the Applicant has ambushed Counsel for the Respondent companies with the application pursuant to section 213 A of the **Companies Act**.

[18] The application to restrain the Attorneys from acting on behalf of the companies is unmeritorious. It was posited that Suresh, has been the Managing Director and the sole beneficial shareholder of each of the Respondent companies since 1997. By virtue of an agreement the Applicant transferred his 50% shareholding in the companies to Suresh. In 2000, a transfer was given to Raju to sign but despite his assurances that he would sign, he failed to do so.

[19] The companies were indebted and because of Suresh's hard work the companies' debts were substantially reduced; hence increasing the viability of the companies. The Applicant has been an absentee Director and has excluded himself from the financial affairs of the companies by his own choice. The Applicant was not willing to deal with the indebtedness of the companies.

[20] Raju declares and concedes that as he was exhausted from the pressures of the business, he felt that it was in the best interest of the family to hand over control to Suresh. Therefore, Suresh has been running the companies undisturbed since 1997. Since then, Suresh has retained many Attorneys-at-law to represent the companies and he has never had to seek Raju's permission or consent to do so. This raises the question of acquiescence and the petition been barred by laches.

[21] In **Hely-Hutchinson v Brayhead Ltd** [1968] 1 QB 549, it was held that transference of power may be conferred by conduct. In this case, Raju handed the management of the companies to Suresh who was better able to do so. This is implied, even though he did not expressly say he had the power to appoint an Attorney. In these circumstances, there is no useful purpose in removing GSP.

[22] It was contended that after the ruling of Hibbert J, Raju by Notice sought to convene the meeting to be held on November 13, 2014. Raju was absent from the meeting. The issue had to be dealt with at a shareholders' meeting. The meeting did not have as an agenda item, the appointment of new Attorneys.

[23] Even though, there was no strict compliance with the formal procedures set out in the Companies' **Articles of Association**, as the sole remaining de facto Director, by virtue of Article 102 of the **Articles of Association**, Suresh was not required to notify Raju of Director Meetings and was instead entitled to make critical decisions on behalf of the companies to ensure their continued survival; financial viability and appointment of legal representative. Pursuant to **Article 102 of the Articles of Association**, Suresh is also the Chairman of the Respondent companies and has a second and casting vote. Therefore, in the case of an absent Director being out of the jurisdiction,

the sole remaining Director need not notify the absentee Director of any Directors' meeting.

[24] It was submitted that the relevance of the authorities of **Charlesworth and Morse Company Law** 15th Edition (1996), **Barron v Potter** [1914] 1 Ch 895, **Monecar (London) Limited and Euro Brokers Holdings Limited** [2003] EWCA Civ 105, **In Re Duomatic Limited** [1969] 2 Ch. 365, as applied to the instant matter is that Raju cannot insist on formal compliance with the procedures stipulated by the Articles of Association in the circumstances where he effectively ceased to act as Director at the material time and was outside the jurisdiction when GSP had been initially retained to represent the companies and also Suresh in the consolidated action. Suresh was the Managing Director, and as such he had the authority to appoint GSP to represent the companies as provided by Article 114 of **Articles of Association**.

[25] In this case the application is misconceived. The shareholder in this case, Raju contends that the company is being hard done by the fact that GSP continues to act as Attorneys in this matter. Raju is not contending that he is suffering any harm, it is the companies that are suffering harm, according to him. It was submitted that the Applicant is not entitled to raise the point on behalf of the companies in his own name. He is prevented to do so by the rule in **Foss v Harbottle** (1843) 67 ER 189. See also; Section 212 (1) of the **Companies Act** which states;

> *"Subject to subsection (2), a complainant may, for the purpose of prosecuting, defending or discontinuing an action on behalf of a company, apply to the Court for leave to bring a derivative action in the name and on behalf of the company or any of its subsidiaries, or intervene in an action to which any such company or any of its subsidiaries is a party."*

The Applicant has not complied with Section 212(1) of the **Companies Act,** by applying to the court to bring a derivative action in the name and on behalf of the companies. Therefore this application is misconceived and cannot be proceeded with. It is the companies that are allegedly suffering harm, it is not Raju in his personal capacity.

[26] Counsel submitted that the issue whether the Attorneys have been properly appointed was already dealt with by Brooks J, in **Khemlani v Public Supermarket Limited, Topaz Investments Limited & Ors**. (unreported decision delivered 21st December, 2010). There has been no appeal and as such this is an abuse of the court's process.

[27] The case of **Prince Jeffery Bolkiah v KPMG**, is distinguishable on the facts. Raju was the one who took adverse steps against the companies by bringing the petitions in 2005 to wind up the companies which was opposed by the contributory Suresh.

[28] For a claim of conflict of interest to be substantiated, it must be established that the Attorney is in possession of confidential information and there is a real risk of disclosure of this information. It is clear that if an Attorney is still acting, there is an issue of a fiduciary relationship. Also, we are aware that if dismissed we are not to put ourselves in the position where there is a real risk of disclosing confidential information. Again it must be a real risk and not a fanciful one.

[29] In this case, GSP is representing the companies and Suresh being the Managing Director and Chairman, there is no evidence before the court that Suresh stands in adversial relationship to the companies. The issue between Raju and Suresh, as to the ownership of shares in the companies conveys no adverse interest between Suresh and the companies. In addition, Raju has not asserted that GSP at any time represented him in any matter so as to have any knowledge of confidential information divulged by him to that firm as a result.

[30] Counsel referred to Suresh's application for an Attorney to recuse herself on the basis of conflict of interest. The Attorney gained unique knowledge of that company's liabilities owed to Mutual Security Bank/National Commercial Bank Limited and details of its loan portfolio with that bank. In the winding up petition the question of liability is a live issue. It was expressed that the Attorney's continued representation of Raju would prejudice the companies' chances and indeed their right to a fair trial. This conflict of interest would give the petitioner a tactical advantage because of the history of the relationship with the companies during the course of which confidential information was exposed. Counsel argued that the Attorney's situation was different and is wholly inapplicable to this case.

[31] As it relates to the adequacy of damages, counsel highlighted that although Raju gives an undertaking of damages he fails to provide any evidence as to his capability to satisfy the undertaking in the event he is unsuccessful in his application to restrain GSP. Suresh has stated that based on his knowledge Raju has no tangible asset in Jamaica save and except shares in the companies which are the subject of dispute currently. Reliance was placed on the case of **Wheelabrator Air Pollution Control v F C Reynolds** (1995) 32 JLR 74.

Findings and Analyses

[32] Although there has been deadlock over several issues between the brothers for more than a decade, there are some areas of agreement and judicial determinations between the parties, which are relevant to these proceedings. Firstly, it is not challenged that Raju, handed over control of the businesses to Suresh, because he felt it was in the best interest of the family to do so. That in an affidavit filed by Raju, on the 1st February 2007, Raju states that he had given Suresh "*unrestricted and unfettered call on the resources of the family business to service the repayment plan...*" It has also been acknowledged by Raju that he was ordinarily resident out of

the island. The court recognized this fact, in making an Order for security for costs, there being established no tangible or visible assets within the jurisdiction from which, the Respondents companies could recover their costs, in the event they were successful.

[33] Secondly, there is the judgment of Brooks J, in Claim Nos. 2005 HCV 5537, 5538, 5539 & 5540. This is the claim which is similar to the one before this court. Brooks J, had before him, as I do, an application which raised the issue whether the Attorneys-at-law acting on behalf of the Respondent companies should be disqualified from so doing. In refusing the application, the Learned Judge, refused to accept Mr. Small's submission, for the reason that "*it presumes Suresh's sole beneficial ownership of the shares in the company, when in fact it is a matter which is hotly disputed and the subject of litigation*." Brooks J, however, adopted the practical approach undertaken by Warrington J, in **Barron v Potter** [1914] 1 Ch 895, where Warrington J, had opined that;

> "*For practical purposes there is no board of directors at all. The only directors are two persons, one of whom refuses to act with the other, and the question is, What is to be done in the circumstances?*" Brooks J, said, "*From my perspective it must be recognized that Suresh is the individual who is presently in charge of the company. It is he who would give directions to any new attorneys who would be appointed to act on behalf of the company."*

[34] Another judicial determination, is in the consolidated matters of Claim No. 2008 HCV 02350 and Claim No. 2007 HCV 04473. In both actions initiated by Suresh, Raju was named as a Respondent along with the four Respondent companies herein in the latter claim, and Topaz investments Limited, in the former. The claim consolidated sought declarations that Suresh was entitled to the shares being held by Raju, in the named companies. The court found that Suresh had failed to satisfy the court that the brothers had agreed that Suresh should take over sole responsibility for all the debts owed to NCB and in return Raju would transfer all his shares in the Respondent companies to Suresh.

[35] Justice Hibbert, in his judgment noted that in 1989, Mr. Khemlani, passed away leaving Raju as the Managing Director of the companies jointly owned by the bothers. It was subsequently alleged by Suresh that Raju by oral agreement agreed to transfer all his shares in the companies to him in return for being relieved of his debts servicing obligations. The necessary share transfer was never executed despite Raju's assurance. This was countered, as it was stated that Raju was merely allowing Suresh to have a free hand in the management of the companies.

[36] Raju in his evidence said he appointed Suresh as Managing Director and admits under Suresh's management the indebtedness of the companies were somewhat controlled. But disagrees that there was an oral agreement to transfer all his shares. Evidence adduced before the court conveyed that the compromise agreement with NCB was signed in April 1997 by Raju and Suresh on behalf of the companies. Evidence also pointed to the fact that Raju at no time displayed an attitude that he was giving up ownership of the companies to Suresh. Because of the personal guarantee given by Raju, he could not distance himself from the debts of the group.

[37] Hibbert J, highlighted at paragraph 25 of the judgment that, Suresh admitted that he was aware of the provision of Section 3 of the then **Companies Act** which required that there be at least two shareholders in a registered company. As such the transfer of shares in the companies from Raju to him would therefore be a breach of this provision and would have prejudiced the compromise agreement. It was noted that Suresh failed to take action to enforce the agreement between himself and Raju between 1997 and 2005. The reason given was that he thought Raju would have honoured the agreement. There were also questions as to the delay of enforcing the agreement. The answers to these questions were not convincing.

[38] The granting of an injunction is wholly discretionary. The Court of Appeal, in **Carib Ocho Rios Apartment v Proprietors Strata Plan No. 73 & Anor** (2013) JMCA Civ. 33 recently rehearsed the relevant principles on an application for the grant of an injunction. The court in **Carib Ocho Rios Apartment v Proprietors Strata Plan No. 73 & Anor** examined the case of **American Cyanamid Co. v Ethicon Limited** (1975) AC 396 and the Privy Council decision in **National Commercial Bank Jamaica Limited v Olint Corporation Ltd.** [2009] 1 WLR 1405, where at paragraph 17, Harris JA said:

> *"there must be a serious issue to be tried; where there is a serious issue to be tried, if damages are an adequate remedy and they can be paid, an injunction should not be granted." However there are cases in which serious triable issues are raised and a claimant could be adequately compensated in damages. In such circumstances, consideration should be given to the balance of convenience as to whether or not an injunction ought to be granted."*

[39] Mr. Samuels has identified, as serious issues, the question of whether or not Suresh, as one of the Directors is entitled to appoint an Attorney-at-law on behalf of the companies without the consent of Raju, the other Director or the decision of the Board of Directors. There is also a question of conflict of interest based on GSP having a history of providing legal representation for the parties in the matter. Mr. Bert Samuels, in his written submission, summaries the evidence adduced, as clearly showing a

simple indisputable fact. GSP has not been appointed as the Attorneys for the companies neither has Raju consented to their appointment, and, as per Article 86 of the **Articles of Association** of all the Respondent companies, Raju is in fact objecting to them representing the companies.

[40] Mr. Braham Q.C, in his oral submission indicated that, the substantive claims in this matter were commenced by the filing of a Petition for the winding-up of the companies. It was ordered, on the Respondents' application, that Raju provide security for costs, within a specified time. The failure to comply with that Order rendered the Petition struck out. What remains before the court is the taxation of the costs, awarded on the striking out of the Petition. Learned Queen Counsel submitted that there was no Petition extant before the Court, there is no substantive claim remaining.

[41] The evidence that supports the application, is provided by Raju in three affidavits, the first of which is dated 29th April 2014, which states at paragraph 4, that there is currently before the Court two (2) taxation matters that were scheduled to be heard in this matter on the 15th May 2014 arising from the same claims herein being Claim No.s 5537, 5538, 5539 & 5540 of 2005. In paragraph 8, he, states that he does not want the *"companies wasting their resources paying any Attorneys in any legal campaign."*

[42] In his affidavit dated 12th May 2014, Raju alleges, "*that he will suffer irremediable prejudice in that the Respondent Companies have the right to representation of its choice, and the taxation hearing if allowed to precede the injunction will cause me grave hardship in that the Petitioner will be liable to pay sums ordered which will be substantial and also this will expose him to enforcement proceedings*."

[43] Suresh's affidavit in response to Raju filed on the 8th and 20th May 2014, states at paragraph 4, "*I am of the view that the Applicant's protestations is remarkable in circumstances where subsequent to about 1997, I have retained several lawyers who have acted for the companies including Minett Lawrence (nee Palmer), Gordon Robinson, Trevor Patterson, Heather Facey, Victor Zadie, Winsome Marsh, Priya Levers, Richard Small, Hiliary Phillips, Q.C. and Grant, Stewart and Philips Co. amongst others. I have never had to seek the Applicant's permission or consent to retain the said attorneys, nor has he insisted in participating in the decisions to retain those attorneys…*"

[44] Raju responds, in his third affidavit, at paragraph 6, which states "*As regards paragraph 4, for the period 1986 to 1997 when I was Managing Director of the companies I always appointed Attorneys in consultation with Suresh and my late father as co-directors and thereafter by mutual agreement which were Attorneys Minett Lawrence, Gordon Robinson, Victor Ziadie, Winsome Marsh and Priya Levers*." This response does not challenge Suresh's assertion that he has appointed several Attorneys, including GSP, on previous occasions without permission or the consent of the Applicant. Would Raju by his conduct of not protesting or seeking to exercise

control over the power of appointing an Attorney confer that power on Suresh? Suresh, a Managing Director had conferred on him the necessary powers exercisable by the Directors pursuant to Article 114 of the **Articles of Association**.

[45] Suresh depones at paragraph 5, inter alia, that in 2006, he instructed GSP to embark on protracted negotiations with Myers Fletcher and Gordon on behalf of the Bank with a view to the settlement of the outstanding liabilities owed by the Companies to the Bank. Raju's responds, at paragraph 11, that the matters raised by Suresh at paragraph 5, are an attempt to introduce irrelevant and prejudicial matters, and said he was kept out of the day to day affairs of the companies. This evidence is germane to the issue before the court. GSP had in 2006, represented the Respondent companies at crucial negotiations on the instructions of Suresh, as Managing Director. There is no challenge that those negotiations inured to the benefit and financial well-being of the Respondent companies. There was no suggestion, that Suresh's position then had put him in an adverse position with the companies. The unchallenged evidence before this court goes in the other direction, that the Respondents' creditors were only willing to continue their association with the Respondent companies if Suresh continued as Managing Director. The evidence of the previous representation of GSP is relevant to demonstrate that there was no conflict between the Respondent companies and Suresh or between GSP and the Respondent companies on that occasion. That the Respondent companies were not prejudiced by the earlier representation and in the absence of evidence to the contrary, is unlikely to be prejudiced by GSP present representation.

[46] It seems to me that Suresh had authority to appoint GSP, such authority being implied from Raju transferring of managing director functions with "*unrestricted and unfettered call on the resources of the family business to service the repayment plan*;" and Raju being ordinarily resident out of the island. Importantly, Raju's conduct over the years and his acquiesce in Suresh's appointing the several Attorneys he had.

[47] At paragraph 22, Suresh alleges, that the matters of the striking out of the Petition for winding-up, raises no issue of conflict between the Companies and himself. Raju's third affidavit, made no response to paragraph 22. The lack of challenge to this evidence leaves the court with no evidence of conflict of interest as is being alleged as a ground for the grant of the injunction. In **Hely-Hutchinson v Brayhead Ltd** at page 583, it was stated that;

> "*it is there shown that actual authority may be express or implied. It is* express *when it is given by express words, such as when a board of directors pass a resolution which authorises two of their number to sign cheques. It is* implied *when it is inferred from the conduct of the parties and the circumstances of the case, such as when*

the board of directors appoint one of their number to be managing director."

[48] The winding-up petition was struck out on the 14th January 2011. This application for injunctive relief was filed on the 8th May 2014. The learned author of **A Practical Approach to Civil Procedure**, Stuart Simes, (9th) Ninth Edition at page 378, paragraph, 34.3.2 states;

> *"An application for an interim injunction must be supported by evidence unless the court orders otherwise. The evidence must cover the substantive issues. Injunctions are only remedies, they are not cause of action and can only be granted if the Applicant has a substantive cause of action".*

Lord Denning stated it thus in **The Siskina** (1979) AC 210;

> "*A right to obtain an (interim) injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the Defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the Claimant for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain (interim) injunction is merely ancillary and incidental to the pre-existing cause of action*."

[49] There stands no pre-existing cause of action in the absence of the winding-up petition, which has been struck out. The taxation of costs consequent on the striking out, does not revive the petition, or creates one. In any event it would seem to me it is the successful party, the Respondent companies, who has acquired the right to enforce the award of costs against Suresh, who is amenable to the jurisdiction of this court for such recovery. The injunction sought cannot be granted in the absence of a substantive cause of action. I find that the Applicant has no existing cause of action against the Respondent to disallow the Applicant from obtaining a grant of injunction. Nonetheless, I will examine the other issues raised in the application.

[50] Mr. Samuels, relies on Article 86 of the **Articles of Association**, and Section 87 of the **Companies Act**, for his submission, that without the authorization of the Board of the Companies, he (Suresh) cannot appear on their behalf neither can he appoint Attorneys to represent them. He further submits that, Section 213 of the **Companies Act**, provides the statutory basis for the granting of an application for an injunction. That may be interim or final injunction. He claims that the Articles have been breached, and the appointment of GSP brings about a conflict of interest. There was

no evidence provided in the affidavits in support of the application, of the circumstances giving rise to the conflict of interest. In his submission he states that, GSP represented Suresh against Raju and his companies. They have appeared against the Companies. Section 213A of the **Companies Act**, frowns upon this oppressive conduct and the representation by GSP of the companies constitute oppressive conduct against Raju.

[51] On the question of conflict, GSP is representing the Companies and Suresh, the Chairman and Managing Director. There is no evidence that the parties stand in an adversial relationship. The issues complained of are between Raju and Suresh. GSP cannot be said to be representing two clients, with adverse interest in the same matter. Neither can it be said that GSP had formerly represented a party, and currently represents another who is in an adversial position to its former client, in a matter in which both clients appear, or there a likelihood of confidential material flowing from the former Attorney to the current client. GSP has represented the parties from the inception. The termination of Attorney-at-law, Minette Palmer, is distinguishable on the grounds that Ms. Palmer, who had formerly represented the Companies, had been retained by another person in a matter against her former clients.

[52] It has not been established by the Applicant that any information of a confidential nature concerning Raju or the Respondent Companies, which is relevant to these proceedings came to GSP as a result of that Firm's relationship with the Applicant or the Respondent Companies. The case of **Prince Jefri Bolkiah v KPMG (a firm)** [1999] 1 All E.R. 517 is the locus classicus on the issue of conflict of interest. The House of Lords in allowing the appeal, held that;

> *"Where therefore, a former client established that the defendant firm was in possession of information which had been imparted in confidence, that he had not consented to its disclosure, and that the firm was proposing to act for another client with an interest adverse to his to his in a matter to which the information was or might be relevant, the court would intervene to restrain the firm from acting for that other client, unless the firm satisfied it, on the basis of clear and convincing evidence that effective measures had been taken to ensure that no disclosure would occur and that there was no risk of information coming into the possession of those acting for another client."*

[53] The application for the injunction is filed in a claim which deals with winding-up petitions. The **Civil Procedure Rules** does not apply to matters relating to winding-up petitions. What is relied on in this case is not evidence in the substantial claim, but evidence relevant to the remedy of the injunction itself. There is no substantive claim,

for bringing this application pursuant to Section 213A of the **Companies Act**. The suffering that Raju alleges or complains of, is not suffering that Raju endures in his personal capacity, but the suffering of the Respondent Companies. He is not entitled to complain on behalf of the companies, in his own name. (See; **Foss v Harbottle**). In order to do so now, Raju would be required pursuant to Section 212(1) of the **Companies Act** to bring a statutory derivative action, which requires service of Notice on the Directors. Nothing has been done to comply with Sections 212 and 213 of the **Companies Act**.

The conduct of Raju, indicates that for a number of years he had handed over power to Suresh. In the absence of the power to appoint being implied, in the circumstances where there were only two Directors, one of whom was Chairman, with a second and casting vote, the desire to have GSP as Attorney would have prevailed.

[54] Article 102 of the **Articles of Association** provides that there must be consensus between the Directors or by virtue of a decision by the Board of Directors of the Companies to appoint an Attorney to represent the companies.

[55] After assessing the evidence presented to the court, there is no evidence adduced to support the submission that GSP has in its possession confidential information and that there is a real risk of disclosure of this confidential information. It seems to me that the risk perceived is speculative. In that, since the Attorneys have a history of representing the Applicant, confidential information will be disclosed. An Attorney is not wholesomely precluded from acting for a former client. He must however take steps from disclosing confidential information. The Applicant must establish that the Firm GSP has possession of information imparted in confidence. This was not particularized or substantiated in the submission of Counsel for the Applicant.

[56] I adopt the reasoning of Brooks J, who dealt with the similar issues between the parties presently before the court. He said at page 5 of the judgment;

> *"I however, approach the matter from a slightly different, and what I perceive to be, the practical, perspective. From my perspective it must be recognized that Suresh is the individual who is presently in charge of the company. It is he who would give directions to any new attorneys who would be appointed to act on behalf of the company. In those circumstances, merely appointing new attorneys-at-law would not cure the situation of conflict, as Raju perceives it, between Suresh's interest and that of the company."*

Conclusion

[57] I find that Suresh had the requisite authority to appoint GSP, he being the individual who is in charge of the Companies. That there was transference of power to Suresh; expressly and by implication from the conduct of Raju. That transference of power includes the right to appoint Attorneys. That the threshold requirement of an existing cause of action, has not been made out. The application fails because of the lack of any invasion, actual or threatened by the Respondent.

The court hereby Orders;

1. That the application for injunction is refused.

2. Costs to the Respondent to be agreed or taxed.