IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. CL.1987/Y009

IN CHAMBERS. October 31, 1990

BETWEEN	GLORIA MOO YOUNG AND EARLE MOO YOUNG	PLAINTIFFS
AND	GEOFFREY CHONG	
AND	DOROTHY CHONG	
AND	FAMILY FOODS LIMITED	DEFENDANTS

Andrew Rattray and Mrs. Debra McDonald for the Plaintiffs.

David Muirhead Q.C. and Arthur Hamilton for the 1st and 2nd Named Defendants.

CORAM: WOLFE J.

The third named defendant is a limited liability company incorporated under the Companies Act 1965 with registered offices at Ocho Rios in the parish of Saint Ann.

The nominal capital of the company is Two Thousand Dollars ($2,000.00) divided into 2000 shares of One Dollar ($1.00) each. The entire nominal capital is issued and paid up as follows:

1.	To Geoffrey Chong	-	550 shares
2.	To Dorothy Chong	-	550 shares
3.	To Gloria Moo Young	-	450 shares
4.	To Earle Moo Young	-	450 shares

By Writ of Summons dated the 21st day of October 1987 the plaintiffs commenced an action against the defendants. The Writ of Summons is endorsed in the following terms:

"The plaintiffs as shareholders and directors of the 3rd defendant claim against the 1st and 2nd defendants:-

(a) for breach of the duty owed by the 1st and 2nd defendants to the plaintiffs and to the 3rd defendant as directors of the 3rd defendant.

(b) for breach of the duty owed by the 1st and 2nd defendants to the 3rd defendant as officers and/or agents and/or servants of the 3rd defendant; and

(c) for fraud committed by the 1st and 2nd defendants against the 3rd defendant and against the plaintiffs; and

(d) for diverting and/or attempting to divert the property of the 3rd defendant from the ownership and/or possession and/or use of the 3rd defendant to the ownership and/or possession and/or use of the 1st and 2nd defendants and/or their nominees; and

(e) for the conversion of assets of and belonging to the 3rd defendant to their own use and benefit; and

(f) for breach of trust and of their fiduciary duties to the 3rd defendant and to the plaintiffs as shareholders of the 3rd defendant.

And the plaintiffs include the 3rd defendant as defendant of the suit, the 1st and 2nd defendants having used their control over the 3rd defendant to prevent action being brought by the 3rd defendant in protection of the rights and interests of the 3rd defendant and of the shareholders of the 3rd defendant.

Subsequent to the commencement of the action the plaintiffs by a petition dated the 13th day of June, 1988 moved the court to wind up the third defendant company on the ground that it is just and equitable so to do. The order for winding up was made by Theobalds J. on the 22nd day of September 1988.

By summons dated the 25th day of October 1990 the plaintiffs prayed the court for an Interlocutory Injunction in the following terms.

"An injunction restraining the second-named defendant her servants and/or agents from transferring, mortgaging leasing or dealing in any way with the land known as the Mansfield Property registered at Volume 1201 Folio 460 of the Register Book of Titles and referred to at paragraph 7 (2) of the Statement of Claim herein until the trial of this action."

To appreciate what shall follow, hereafter, it is necessary to summarize the plaintiffs allegations. In March 1980 the third defendant, of which the plaintiffs and the 1st and 2nd defendants are the directors and shareholders purchased lands from one Pierre Chong. The said land was duly registered in the name of the 3rd defendant at Volume 554 Folio 92 and Volume 652 Folio 31 of the Register Book of Titles. The lands were subsequently sold in or about February 1985. The first and second defendants acting qua directors of the 3rd defendant negotiated and purchased the lands the subject matter of this application. The agreed purchase price was Nine Hundred Thousand Dollars ($900,000.00). Money from the proceeds of the sale of the Pierre Chong lands amounting to One Hundred and Thirty Five Thousand Dollars ($135,000.00) was used to pay the deposit in respect of the said purchase. The balance of the proceeds of sale from the Pierre Chong lands, amounting to Nine Hundred and Fifty Eight Thousand Three Hundred and Fifteen Dollars and Thirty Seven Cents ($958,315.37), was placed in a deposit account at National Commercial Bank, Ocho Rios, having been earmarked to be used to complete the transaction. The transaction was completed but the said property, for which the deposit had been paid out of the 3rd defendants funds, was transferred into the name of the 2nd defendant only. The plaintiffs allege that such conduct on the part of the 2nd defendant acting with the knowledge of the 1st defendant constitutes a fraud upon the minority.

The essence of the plaintiffs claim as I understand it, is that while acting on behalf of the 3rd defendant, as directors, the 1st and 2nd defendants diverted a benefit, which should properly have accrued to the 3rd defendant, to the 2nd defendant. Since the commencement of the action the 2nd defendant has sought to register a mortgage of the land the subject matter of this application and of the suit, to the Bank of Nova Scotia Jamaica Limited. Further thereto an advertisement appeared in the Sunday Gleaner of the 1st day of April 1990 indicating that a registered liability company Noble House Limited of which the 1st and 2nd defendants are the sole shareholders and directors, intended to develop the said lands by erecting an office and shopping complex thereon. The foregoing summary of facts is the basis on which the plaintiffs have sought the restraining order.

In resolving the issue of whether or not to grant the injunction prayed the court relies upon and is guided by the hallowed principles laid down in American Cynamid Company v. Ethicon (1975) 1 AER 504 (HL).

Muirhead Q.C. for the respondents argued that the application should be refused for the following reasons.

1. The plaintiffs have no locus standi in the matter.

In developing the argument, in this regard, counsel submitted that if as the prayer states in the amended Statement of Claim the relief sought is for the benefit of the company then only the company is competent to commence the action.

Further if the company does not institute the action then the question arises how can such an action and on whose behalf can such an action be instituted. Relying upon Foss v. Harbottle (1843) 2 Hare 461 Counsel submitted that if the relief is for the company only the company can bring the action.

The rule in Foss v. Harbottle, supra, involves two propositions of law

i) that the court will not ordinarily intervene in the case of an internal irregularity if the matter is one which the company can ratify or condone by its own internal procedure.

ii) that where it is alleged that a wrong has been done to a company, prima facie the only proper plaintiff is the company itself. So it follows therefore that where a wrong is done to the company the derivative action should not be available and the individual shareholder should either request the Board of Directors or the general meeting to commence litigation in the name of the company.

However, to the Rule in Foss v. Harbottle there are the following exceptions. The majority cannot confirm

1. An act which is ultra vires the company or illegal
2. An act which constitutes a fraud against the minority and the wrong doers are themselves in control of the company.
3. An irregularity in the passing of a resolution which requires a qualified majority.

4. An act which infringes the personal rights of an individual shareholder.

I find that in the instant case the allegations of the applicant fall with No. 2 of the exceptions and as such the applicant would be entitled to commence a derivative action. Continuing, however, the respondents urged that if the action is a derivative one then the applicants have failed to comply with the requirements of section 12 of the Judicature (Civil Procedure Code) which states

> "If the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, the writ shall show, in a manner appearing by such of the forms in schedule I, part II, as shall be applicable to the case, or by any other statement to the like effect, in what capacity the plaintiff or defendant sues or is sued." (Emphasis mine).

It is contended by the respondent that the above provisions are mandatory and consequently non compliance is fatal.

I differ from the view expressed by Counsel for the respondent that the provisions of section 12 of the Judicature (Civil Procedure Code) Act are mandatory. I hold that the provisions are directory. If I am wrong in the view expressed then I am satisfied that the last paragraph of the general endorsement of the writ satisfies the provisions of section 12 by virtue of the phrase "Any other Statement to the like effect." Further I take the view that capacity of the parties is a matter essentially for the trial judge and not a matter for a judge considering an interlocutory question.

Continuing, Muirhead Q.C. urged that upon the appointment of a liquidator the power of the directors to act on behalf of the company cease and only the liquidator can act on behalf of the company. In this regard section 224(1)(a) of the Companies Act was relied upon.

Section 224(1)(a) states:

> "The liquidator in a winding up by the court shall have power with the sanction either of the court or of the committee of inspection:-

(a) to bring or defend any action or other legal proceeding in the name and on behalf of the company."

It is significant that section 224 is silent as to the continuing of an action commenced prior to the winding up order of the court. It cannot be good law that a right which has accrued to a person prior to the appointment of a liquidator ceases to vest in that person upon the appointment of a liquidator. I am fortified in this by the omission of the word. "Continuing" from section 224 (1)(a) of the Companies Act.

In any event the plaintiffs have not commenced the action in their capacity as directors. They are suing as minority shareholders who are alleging that they are being oppressed by the majority, consequently a wrong is being perpetrated against the company. It is my considered view that the appointment of the liquidator cannot and does not affect the capacity of the minority shareholders to continue the action.

I indicated at the outset that the principles enunciated in American Cynamid Company v. Ethicon (supra) would be the basis for deciding whether or not the injunction is granted.

1) The court must be satisfied that the claim is not frivolous or vexatious, in other words; that there is a serious question to be tried.

The respondents have urged that there is no triable issue. The basen of this submission are as follows.

(a) "The Registered Title is in the name of the 2nd defendant and equity has to be raised to prevent a registered owner from dealing with land registered in his own name."

(b) The affidavit of the plaintiffs limit the extent of the company's interest to the deposit only.

(c) The affidavit of the defendants which incorporates defendants' defence has stated how the funds from the sale of the Pierre Chong lands have been disposed of.

Where fraud is alleged and proved equity will come to the aid of the victim of the fraud. In the instant case the minority shareholders allege that the 1st and 2nd defendants have by fraudulent means, whilst acting qua directors, deprived the company of a benefit to which it was properly entitled.

I am satisfied on the basis of the evidence and the submissions made that there is a serious issue to be tried viz. whether the 3rd defendant is entitled to have the property transferred to it or whether the property has been properly registered in the name of the 2nd defendant. Next question to be decided is whether or not damages would be an adequate remedy should the plaintiffs be successful at the hearing of the substantive issue. Muirhead Q.C. submitted that on the plaintiffs' affidavit the company's interest in the land, subject matter of the claim, would be limited to the amount of the deposit and therefore if the plaintiffs' action succeeds damages would be an adequate remedy.

This argument is far from convincing. If the allegations of the plaintiff are substantiated I am of the view that the company would be entitled to an order transferring the property to it. In such circumstances, especially where fraud is alleged and proved, damages could never be an adequate remedy. To so hold, would be to allow the defendants to benefit from their fraudulent conduct.

I therefore, find that, if the plaintiff succeeds, damages would not be an adequate remedy.

It now remains to decide whether if the defendants were to succeed on the action they would be adequately compensated under the plaintiffs' undertaking as to damages for the loss they would have sustained by being prevented from dealing with the property between the time of the application and the time of the trial. If this question is answered affirmatively and the plaintiffs would be in a financial position to pay the damages awarded then the interlocutory injunction ought not to be refused.

The affidavit filed in support of the application is silent as to the ability of the plaintiffs to pay. Equally the defendants have not contended that the plaintiffs would be unable to pay any damages which may be awarded. It has been argued that the failure of the plaintiffs to set out in the supporting affidavit their ability to pay any damages which may be

awarded can lead to no other conclusion but an adverse finding as to their ability to pay.

I disagree with this approach. The undertaking to pay must be given some weight. Equity presumes that all men are honest. Hence, the undertaking given ought to be interpreted to mean that the plaintiffs have the ability to pay such damages as may be awarded. In the event that I am wrong I am prepared to follow the counsel of prudence route which says that where other factors appear to be evenly balanced then the court should take such measures as are calculated to maintain the "Status quo."

Finally I am of the view that any disadvantage which may accrue to the defendants by the grant of this injunction can be adequately compensated under the plaintiffs' undertaking as to damages should the defendants succeed on the substantive action.

For the aforementioned reasons the Injunction was granted as prayed.