

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 52 of 1985

IN THE MATTER OF NORCLIFFE LIMITED

A N D

IN THE MATTER OF THE COMPANIES ACT

Enos Grant for Petitioner

D. Muirhead Q.C., and Carl Dowding for Respondent.

Mrs. Shirley Playfair for party opposing Petition, Moo Young,
Butler and Associates Limited.

JULY 31, 1990

CHESTER ORR, J:

JUDGMENT

The delivery of this judgment has been delayed as a result of a combination of circumstances some of which were unavoidable. My apologies are proffered.

This is a petition pursuant to sections 196 and/or 203 of the Companies Act.

The Petitioner Norma Butler and the respondent Radcliffe Butler were formerly man and wife. They were married on 10 July, 1971 and divorced in November 1982. There are two children of the marriage. The petition is in respect of the affairs of a company, Norcliffe Limited.

Norcliffe Limited, hereafter referred to as "the company" was incorporated as a private company on 25 January, 1977 with a nominal capital of \$100.00 divided into 100 shares of \$1.00 all of which were allotted to the petitioner and the respondent in equal shares which have been fully paid up.

There is no formal appointment of the respondent as Managing Director of the company. However, he was de facto the managing director and so acknowledged by the petitioner. The petitioner is the only other director and also Secretary of the company.

The main asset of the company is premises No. 32 Upper Melwood Avenue, Kingston 8 in St. Andrew. The petitioner resides in these premises.

The Transaction relating to the acquisition of the premises presents unusual features. The Agreement for sale purports to have been made between the vendors and both the respondent and petitioner as purchasers. The agreement however is signed by the respondent and not by the petitioner. The premises were transferred from the vendor to the company by transfer dated 14th January, 1986 and registered on 23rd March, 1977.

The company was registered on 21st January 1977, a date subsequent to the transfer. Mr. Grant submitted that the title of the company was indefeasible under the provisions of the Registration of Titles Act. Mr. Muirhead did not controvert this.

The respondent claimed that he had provided the deposit for the purchase of the premises. The petitioner contended that the deposit was obtained from monies which were jointly owned by both parties. She asserted that the premises was purchased as the matrimonial home: the respondent denied this. In 1983, there was an unpaid balance of the purchase money due and owing. The vendor sought to make new arrangements for settlement: the petitioner refused to sign the necessary documents. She said she acted on legal advice.

There was conflict as to the payment for the shares. The respondent claimed that he had paid for the petitioner's shares which were held by her in trust for him. The petitioner maintained that she had paid for her shares herself.

The complaint of the petitioner is summarised in paragraph 11 of her Petition viz -

"That the Respondent usurped the management of the Company and has been using the funds and/or the said property of the Company as security to raise funds for his own personal use and benefit and/or to promote his own personal business interest and/or property in his own name rather than in the name of the Company, That on the other hand, he has been neglecting to pay the just debts of the Company."

The response of the respondent is summarised in paragraph 32 of his Affidavit of 25th April, 1985 viz -

" I admit that I have run the Company as own for my personal use and benefit because this is the purpose for which it was formed. All of my personal financial transactions are done through the Company: as all my personal encumbrances are lodged to the

Company's account (the Company has no other income) and all of my personal business conducted through the Company's account. The Petitioner has never lodged a penny to this account, even though while she was my wife she was allowed by me to draw cheques on the account. I could not usurp the management of the company as I am Managing Director and the Petitioner has never exhibited or expressed any interest in the affairs or management of the company as she well know I operated it as stated therein and she never objected to this.⁹

The petitioner was cross-examined in her Affidavits: the respondent was not.

The evidence disclosed that the respondent had in fact treated the company as his own. He had obtained various mortgages using the premises, the asset of the company as collateral and some of the proceeds of the mortgages had been expended on purposes other than that of the company's. The petitioner admitted that she had entrusted the operation of the company to the respondent. As a director she had signed the necessary documents in order to obtain loans by way of the mortgages. She had made enquiries as to the status of the loans, but the respondent had not been truthful in his answers. She did not sign the Agreement for the purchase of the premises because the respondent had signed on her behalf.

Affidavits were filed by Moo Young, Butler and Associates Limited in respect of loans alleged to have been made by them to the respondent for which Norcliffe Ltd. was liable. It transpired however, that these amounts were paid to the respondent as Managing Director of Moo Young, Butler and Associates for living accommodation which the company had contracted to provide in his capacity as Managing Director.

Mr. Grant submitted that the issues concerning payment for the premises and payment for shares were irrelevant. The petitioner had exhibited that the respondent had usurped the management of the company and this entitled her to an order. In addition, Section 30(1)(a) of the Companies Act prohibited shares being held in trust in a private company. Even if the respondent had paid for the petitioner's shares there was a presumption of advancement arising from the relationship of husband and wife.

Mr. Muirhead mounted a three-pronged attack. He submitted as follows:

1. There was a dispute as to the ownership of shares and the petition should be dismissed until that issue had been decided. He cited *Re JN2 Ltd.* [1977] 3 ALL ER 1104 and *Re BAMBI Restaurants Ltd.* [1965] 2 ALL ER 79.
2. The respondent had acted with the concurrence of the petitioner and thus he had not usurped the management of the company.
3. The asset in the name of the company was beneficially owned by the respondent and the petitioner held her shares in trust for the beneficial owner, the respondent. The Court in the exercise of its equitable jurisdiction should impose a trust for the benefit of the true owner, the respondent. He cited *Ebrahimi v. Westbourne Galleries Ltd.* [1972] 2 ALL ER 492. At 400 Lord Wilberforce said

"The 'just and equitable' provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way."

FINDINGS

I find that the company was formed as a family company, in view of the harmonious marital relationship then existing.

That the respondent provided the deposit for the purchase of the premises.

That the petitioner paid for her shares herself.

Although the petitioner entrusted the management of the company

to the respondent, she did not thereby divest herself of her rights and interest as a shareholder in the company. Her attitude is exemplified by her statement in relation to the dealings with Kong's Colour Lab:

"I took his word for it, he was my husband, he acted on my behalf and I believed what he told me."

There is no evidence that the company has shares in Kong's Colour Lab Limited, Carib Ocho Rios Apartments Limited nor that the funds of the company were used to purchase apartments at Caribbean Village, Salem, or Oxford Manor, Oxford Road.

There is evidence that the company has invested money in Kong's Colour Lab Limited.

Re ownership of shares

In Re JN2 Ltd. supra it was held that the Court should not allow the petition of a contributory to remain in the file where his status as a contributory was bona fide in dispute since he should not be permitted to present a petition, and, thereby interfere with the company's disposition of its assets, so long as his right to be a shareholder was in question.

In Re BAMB I Restaurants Ltd. it was held that the question of the beneficial ownership of shares was not an issue appropriate to be determined on a winding-up petition but could only be determined in proceedings constituted in the ordinary way between the person claiming to have an interest in the shares and the registered shareholder.

Section 30(1)(e) of the Companies Act, subject to certain exceptions not here relevant, prohibits any person other than the holder from having any interest in any of the company's shares in a private company.

In this case both the petitioner and respondent are shareholders in a private company.

In view of the provisions of Section 30(1)(e) of the Companies Act I hold that there is, and can be no bona fide dispute as to the beneficial ownership of the shares.

I hold that the petitioner is a shareholder in her own right and not as trustee for the respondent.

It is thus unnecessary to invoke any equitable principle in favour of the respondent.

I find that the affairs of the company are being conducted in a manner oppressive to the petitioner, a member of the company.

Accordingly, the following orders are made

1. A declaration that the Respondent is in breach of his fiduciary duties to the company
2. A declaration that the respondent is trustee for the company of all monies invested in Kong's Colour Lab Limited and/or all the monies that he has received from the use of the company's property and/or funds to finance his several personal investments and/or the profits made therefrom.
3. An account of what is due from the respondent in respect of all monies, profits or gains, which would have been realised by the company but for the wilful default and/or neglect by the respondent and/or breach of the fiduciary duty owed by the respondent to the company.
4. An order for payment by the respondent to the company of any such monies received by the respondent and/or any sum found due upon taking of such account with interest thereon at 16%.
5. An Order that the respondent is personally liable for all debts that he has incurred in the name of the company to further his personal interest and that he takes immediate steps to release and/or indemnify the company from any liability whatsoever therefor.
6. That the petitioner purchase the respondent's shares in the company at a fair value.
Costs to the Petitioner to be agreed or taxed.