IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. R.148 OF 1990

BETWEEN	RICKETTS, SMITH, GREGORY & CHARVIS LIMITED		PLAINTIFF/APPLICANT	
AND	THE JAMAICA RECORD LIMITED	FIRST	DEFENDANT/RESPONDENT	
"	NEVELLE BLYTHE	SECOND	"	"
"	KEN MORGAN	THIRD	"	"
"	VERLEY HARRISON	FOURTH	"	"
"	ALEX DRYSDALE	FIFTH	"	"
"	DURRANT GORDON	SIXTH	"	"
"	CECIL SIMMONS	SEVENTH	"	"
"	OWEN TIBBY	EIGHTH	"	"
"	DELROY COWAN	NINTH	"	"
"	REICLAND ANDERSON	TENTH	"	"

Paul Alexander, Beswick and Terrence Ballantyne instructed by Messrs Ballantyne, Beswick & Company for the Plaintiff.

Hillary Phillips and Denise Kitson instructed by Messrs Parkins, Grant, Stewart Phillips & Company for the Defendants.

IN CHAMBERS

HEARD: December 6, 7, 13, 14, 1990 & February 11, 12, 1991

LANGRIN, J.

This is an application on a Summons for an Interlocutory Injunction whereby the Plaintiff is seeking the following orders.

1. An injunction to restrain the First Defendant Company and the persons acting as its defacto Directors, from issuing and/or allotting any further shares in the First Defendant Company to any person or company or from increasing its share capital until judgment herein or further order.
2. An injunction to restrain the Defendants from allotting any further shares from any portion of the First Defendant current remaining issuable share capital until judgment herein or further order.
3. An injunction to restrain the Defendants from allotting or transferring any portion of the shares represented by the share

certificate numbered 20 dated the 9th November, 1989 and issued by the First Defendant Company until judgment herein or further order.

The applicant Company having been incorporated on 15th April, 1988 with Share Capital of $50,000.00 was the holder of share certificate dated 9th November, 1989 issued under the common seal of the First Respondent Company certifying that the applicant is the holder of 1,099,977 ordinary shares of $1.00 each fully paid up in the First Respondent Company.

The First Respondent with an authorised share capital of $12m is governed by regulations contained in its own Articles. The Applicant alleges that at time of application it held 31% of the issued share capital of first respondent.

The applicant in two lengthy affidavits filed by the Directors of the Company states inter alia that the shares were issued by the First Respondent in consideration for pre-start-up expenses of $1.3m and a further $600,000.00 representing contractor's expenses on West Street premises of the First Respondent. Besides, a subcommittee of the Directors of the Respondents Company, charged with the responsibility of verifying the expenditure made by the applicant, had made positive findings in its favour, which resulted in the issue of the shares.

The Respondents on the other hand in an affidavit made out on their behalf by Mr. Verley Harrison the Fourth Respondent in essence stated that it was about March 1990 when the Secretary to the Company was erroneously advised by Mr. Ricketts, a Director of the Applicant Company that the Directors of the Respondent Company had resolved the issue of the shares in question that the share certificate was handed over to Mr. Mark Ricketts. It was never a decision of the Company that the share certificate should be handed over since Mr. Ricketts was unable to provide any cheque, receipts, vouchers, bills or other documentary proof of the alleged expenditure.

The second to tenth Defendants were duly elected as Directors on 23rd July, 1990 at an Annual General meeting. A notice of call was made and served personally on the Applicants' office on the same day. The Applicant failed to comply with the call and on the 13th August, 1990 a Notice of Liability to forfeiture was duly served on the office of the applicant.

The applicant again failed to respond to the said notice and as a consequence on 5th September, 1990 the shares in question were duly forfeited.

Section 49(h) of the Judicature (Supreme Court) Act provides the legal basis of the grant of an Injunction and states as follows:-

> "A mandamus or an injunction may be granted or a receiver appointed, by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that such order should be made ...."

The governing principles applicable to a grant of an interlocutory injunction are not in doubt and have been stated by Lord Diplock in the case of American Cyanamid vs. Ethicon Limited 1975 A.C. 396 at p. 406 as follows:-

> "The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The Court must weigh one need against another and determine where 'the balance of convenience' lies."

A significant part of Lord Diplock's judgment dealing with the governing principles is also stated at page 407 as follows:-

> "It is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations ..."
>
> .... So unless the material available to the Court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial the Court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."

It is against this background that the applicant's submissions must be examined. I hope I do justice to Mr. Beswick's submissions when

I say that in summary its main thrust was that the Respondent Company having issued the share certificate in question as fully paid up share, was estopped from denying that they were so fully paid up. Consequently the forfeiture of the shares was invalid. In support of his submissions he cited numerous authorities. I find it only necessary for me to refer to the case of Burkinshaw v. Nicholls (1878) HL. 1004. A registered company issued shares as "fully paid up". The company entered into a contract with someone to purchase from him a mill and machinery, part payment for which was to be made in "fully paid-ups shares." They were not in fact paid-up and there was no contract in respect of them such as was required by the Companies Act. It was held: "that if shares are taken in the course of business for valuable consideration, on the person who asserts that he who took shares had notice that they were not fully paid up lies the burden of proof."

This case clearly demonstrates that the Court in the instant case is empowered to determine on evidence whether the shares were fully paid up as represented by the share certificate.

Sec. 51 of the Companies Act requires that where shares are allotted as fully or partly paid up otherwise then in cash the Company shall deliver to the Registrar for Registration a contract in writing constituting the title of the allottee to the allottment together with any contract of sale, or for services or other consideration in respect of which that allottment was made.

The question arises as to whether the shares could be exchanged for money's worth notwithstanding the absence of filed agreement as required by Sec.51 of the Company's Act. If the shares were not fully paid up but only partially, would a call demanding the full sum be valid? Did the issued share involve a purchase by the holder for money or money's worth? Was there a parting by the applicant of money or money's worth? What did the company receive if anything for the shares which it issued to the applicant? Was it a transaction for a consideration on the one side and on the other? Was the quid pro quo allegedly given by the applicant acceptable in law by the Respondent Company? These are only some of the questions which a trial Court would have to contend with at a hearing.

The applicant may be able with a considerable degree of skill and

effort at the trial to make out a formidable case in support of its contentions just as the defendant maybe able to make out a formidable case in reply. Because of the difficulty of dealing with disputed questions of fact on affidavit evidence it is my judgment that there is a serious question to be tried.

Turning now to the second question under Lord Diplock's formulation as to whether damage is an adequate remedy.

The Respondent Company's Articles of Association states at Article 35 that a forfeited share may be sold or otherwise disposed of on such term and in such manner as the directors think fit. Article 36 further provides that a person whose shares have been forfeited shall cease to be a member in respect of the forfeited shares.

On forfeiture the shares become the property of the Company. While the forfeited shares remain in the Company's hands it may not validly exercise any votes in respect of them. The effect of the non-disposal will be to reduce the Company's allotted share capital.

Miss Phillips contends quite forcibly that the shares having been forfeited on 5th September, 1990 the applicant can now only resort to an action in damages.

The Court should consider whether if the Plaintiff were to succeed at the trial in establishing his right to a permanent injunction it would be adequately compensated by an award of damages for the loss it would have sustained as a result of the Defendants disposing of the shares between the time of the application and the time of trial.

Although prima facie the Court will not grant an injunction to restrain an actionable wrong for which damages are an adequate remedy, the fact that the Plaintiff may have a right to recover damages is no objection to the exercise of jurisdiction by injunction if his rights cannot be adequately protected by damages.

Even where the injury is capable of compensation in damages an injunction maybe granted if the act in respect of which relief is sought is likely to destroy the subject matter in question. The matter of the damage which the applicant would suffer - if an injunction were refused

and the applicant should ultimately turn out to be right is that the shares may no longer be able to be re-transferred to the applicant. The critical question for the Court therefore, is that whatever maybe the ultimate result of the action should the shares remain in existence pending the trial?

Where a forfeiture has been duly and bonafide effected equity will not relieve against it. This was decided in the case of Sparks v. Liverpool Waterworks (1807) 13 Ves. 428. It was held by the Master of the Rolls that there would be no relief against forfeiture under a bye-law of a company provided that the members received notice of default in paying a call. The forfeiture was incurred by non-payment ten days after the notice was sent though the lapse arose from ignorance of the call arising from accidental circumstances and absence from town when the notice was sent.

However where in an action to rescind a contract to take shares, the Company having given notice to forfeit the shares for non-payment of calls the Court will on the plaintiff giving the usual undertaking in damages and paying into Court the amount of the call with interest, restrain the company from forfeiting the shares until the trial of the action. This was the approach of the Court in Lamb v. Sambas Rubber Company Limited 1908. Chancery 845 and later Jones v. Pacaya Rubber & Produce Company Limited (1910) K.B. 455 C.A.

Even if one were to put the most favourable construction on the complaint of the applicant one finds that if his right to holding the shares has been breached his claim to redress was open to him when he was served the notice of call. The applicant failed to respond to the forfeiture procedure which was designed to facilitate a debtor to avoid the kind of injury of which the applicant complains.

Bearing in mind that there is no dispute on whether the call was properly made or whether the day was properly appointed for payment I am inclined to the view that in the particular circumstances of this case damages would be an adequate remedy. I have come to this conclusion fully realising that the Respondents would be in a financial position to pay them coupled with the reluctance of the applicant to pay the full Cost of the shares in Court.

Assuming that I am wrong in arriving at that view let me examine the third consideration as laid down by Lord Diplock and that is the balance of convenience.

In assessing the extent to which the disadvantage to each party would be capable of being compensated in damages the Court must in arriving at the balance of convenience consider the nature of damage which the Respondents would suffer if the injunction were granted and the Respondents should ultimately turn out to be right. Essentially, this means that the Respondent Company would be deprived of the payment of the shares from the time of the grant until judgment in the action. The effect of which would be a reduction of the issued share capital, resulting in the Respondent Company's inability to borrow more funds. This action it was argued will frustrate the proper growth and development of the Company. All this must reflect adversely upon the creditworthiness of the Company as a second national newspaper and will inevitably result in its destruction. Besides, it is doubtful whether the Respondents would be adequately compensated under the applicants undertaking as to damages since the applicant owns no realty or personalty of a substantial nature. Mark Ricketts in dealing with the ability of the Applicants' Company to pay damages stated that the several Companies which he held had a networth of $2m. Nothing was said about the applicant. Applying the contrary hypothesis I am of the view that if the Applicant were to be successful at the trial it could be adequately compensated for the loss quantified in damages.

The applicant would have lost the opportunity of recovering the shares once they are sold. However it is doubtful whether a Court could direct a company to issue the equivalent number of shares if at the trial the applicant succeeds and the interlocutory injunction was refused. In any event a company if its articles so allow may decline to issue shares to a person whom it does not approve.

It is a fundamental principle of Company Law that a Court will not lightly interfere with the internal affairs of a company.

Since the applicant's loss is easily quantified as a matter of simple arithmetic it represents the classic case of where damages are clearly adequate to cover its loss in every respect.

In my judgment the balance of convenience is clearly in favour of refusing the injunction. All the Orders requested are accordingly refused.

For the aforesaid reasons I hold that the Orders prayed for in the summons dated 8/11/90 ought to be refused.

The Costs of the Summons are to be Costs in the Cause.

Certificate for Counsel granted.