

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO CL/2002 R. 095

BETWEEN	RONALD ROWE	PLAINTIFF
AND	SUNSHINE DEVELOPERS LIMITED	1 <sup>ST</sup> DEFENDANT
AND	CLINTON THOMPSON	2 <sup>ND</sup> DEFENDANT
AND	ALF INVESTMENTS LIMITED	3 <sup>RD</sup> DEFENDANT
AND	MAS TRADERS LIMITED	4 <sup>TH</sup> DEFENDANT
AND	DERRICK P. MAHFOOD	5 <sup>TH</sup> DEFENDANT
AND	ANDREW ISSA	6 <sup>TH</sup> DEFENDANT

Mr. Maurice Frankson for Claimant

Miss Carol Aina, instructed by Dunn Cox for 1<sup>st</sup> and 2<sup>nd</sup> Defendant

Karine Stanley instructed by Messrs. Chancellor & Co for 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> Defendant

**Heard: 14<sup>th</sup> June, 2004 and 23<sup>rd</sup> July, 2004**

**Sinclair-Haynes, J. (Ag.)**

Sunshine Developers Ltd. (SD Ltd), was incorporated on the 12<sup>th</sup> December, 1987. Ronald Rowe, the claimant, Marjorie Rowe, his sister and Clinton and Clover Thompson, husband and wife were the shareholders and the

directors of the company. Clinton Thompson was the managing director. SD Ltd. purchased properties at 67 Constant Spring Road, 26, 30 and 32 Red Hills Road in 1987 with a view to developing them. Ronald and Marjorie Rowe provided \$1,000,000 of the purchase price. A loan was obtained from Mutual Security Bank (MSB) to secure the balance. The loan was secured by SD Ltd. Mr. Rowe travelled frequently overseas. Between October, 1994 and March, 1999 Ronald Rowe was incarcerated in the USA..

SD Ltd ran into financial problems and was unable to proceed with the development. In 1991 it sold the lands to Derrick Mahfood for 2.6 million dollars who transferred them to ALF Investments Ltd as his nominee in July 1995. Andrew Issa is a director of ALF Investments Ltd. Derrick Mahfood, ALF investments Ltd and Andrew Issa will hereinafter be referred to as the purchasers. Through negotiations, Clinton Thompson was able to have 67 Constant Spring Road re-transferred to SD Ltd.,

Clinton Thompson has so far paid Ronald and Marjorie Rowe the sum of \$950,000 being a part of the \$1m they contributed to the purchase of the lands. Mr. Thompson had the re-transferred land valued which valuation was \$4m. At the request of Mr. Rowe he offered to pay him \$2m of the said \$4m for his interest in the land. Mr. Rowe has now changed his mind and has now sued SD Ltd, Clinton Thompson and the purchasers to recover damages for fraud and/or for conspiracy and/or for breach of fiduciary duty in respect of the sale of all the properties.

**The Claimant's Claim**

In his particulars of claim he alleges that SD Ltd. and/or Clinton Thompson acted in bad faith, against his interest and for improper purposes in relation to his affairs and in breach of trust and/or in breach of their obligation as trustee of the assets of SD Ltd, in that the sale was intended by Clinton Thompson to profit himself directly and or indirectly to the detriment of the Ronald Rowe.

Further he alleges that SD Ltd, Clinton Thompson and the purchasers including Mas Trader's Ltd, unlawfully conspired among themselves to injure him by doing the following:

- a) procuring the sale of the lands so as to dwindle the assets of SD Ltd;
- b) procuring the sale of the lands at an undervalue;
- c) planning the destruction of the SD Ltd or achieving a situation in which he would be deprived of his interest in SD Ltd.

**Defendant's version**

The Defendants trenchantly deny any fraud or conspiracy. The defence of SD Ltd and Clinton Thompson is that in furtherance of the plan to develop the lands, a financial proposal was put to MSB with the hope of securing funding for the proposal. This was rejected by MSB but accepted by Workers Savings and Loan Bank. Consequently, advertisements and other preliminary works towards the development of the lands were undertaken. Deposits for 30 units were obtained and lodged at the Worker's Bank.

The costs of the preliminary reports and plans were funded by another loan from MSB. This loan was acquired by Sunshine Agencies, a company owned by Clinton and Clover Thompson. SD Ltd stood the security.

Worker's Bank subsequently reneged on the agreement to provide the loan of \$6.m (which sum was to be used to liquidate the loan to MSB and construct the 30 units). As a result SD Ltd had to return the deposits for the 30 units. On the 11<sup>th</sup> November, 1991, MSB caused their attorneys-at-law to demand settlement of the loan to Sunshine Agencies also and threatened to foreclose on the properties which were secured by SD Ltd.

On the 28<sup>th</sup> November, 1991 the properties were advertised for sale in the Daily Gleaner. On the 10<sup>th</sup> December, 1991 MSB instituted legal proceedings against SD Ltd for the recovery of the sum of \$1m plus interest of \$581,513.69. In an effort to avoid the sale of the property by auction, Mr. Clinton Thompson, Mrs. Clover Thompson and Mrs. Marjorie Rowe entered into negotiations with Derrick Mahfood for the sale of the properties. On the 13<sup>th</sup> December 1991, the Agreement of Sale was signed by Clinton Thompson and Marjorie Rowe. (Mrs. Clover Thompson was no longer actively involved in the company as she had separated from her husband.)

Derrick Mahfood gave MSB an undertaking and as a result it did not proceed with its suit against SD Ltd and with the sale of the properties by auction. The sale transaction was conducted between MSB and the purchasers. Hence the purchase price of \$2.6 m was paid directly to MSB by the purchasers. SD Ltd did not profit from the sale.

There was a separate agreement between SD Ltd and the purchasers for the sale of preliminary plans and reports. The purchase price of those plans was \$2.4m and was used to discharge the sum which SA Ltd had borrowed from MSB to acquire the said plans and reports. SD Ltd and Clinton Thompson did not profit from that transaction neither. In July 1995 Derrick Mahfood transferred the properties to ALF Investments Ltd, as his nominee.

### **Application of SD Ltd and Clinton Thompson to strike out the claim**

SD Ltd and Clinton Thompson have made an application in limine to strike out the claim as being frivolous, vexatious and an abuse of the Court's process. In his affidavit in support, Clinton Thompson avers that the cause of action arose more than 6 years ago hence it is statute barred and that Ronald Rowe has also brought proceedings to wind up the company.

### **Submissions by Ms. Carol Aina for SD Ltd and Clinton Thompson**

It is her submission that in a company's affairs, the Maxim "majority rules" prevails. Therefore if a shareholder feels that the company is being disadvantaged the proper claimant with the right to sue is the company. She relied on the rule in Foss v Harbottle (18 43) 2 Hare 461 in which a shareholder by himself or herself cannot complain about a wrong done to the company by the directors however legitimate the complaint may be. The only true exception to that rule is fraud on the minority. Fraud includes unconscionable abuse of majority power. There must be some attempt to persuade the company to sue before taking minority action. These, she submits are not so in the instant case. Mr. Ronald Rowe was aware of the transaction, which he alleges was fraudulent

but failed to bring the action within the 6 years limitation period. This defence has been pleaded in the defence of the 3<sup>rd</sup>, 4<sup>th</sup> 5<sup>th</sup> and 6<sup>th</sup> defendants.

**Submissions by Mr. Maurice Frankson:**

Mr. Maurice Frankson on behalf of Ronald Rowe submits that the matter complained of is not one that could be dealt with by the company because the person against whom the relief was sought, controlled the company. In the circumstances Mr. Rowe is entitled to bring an action in his own name and on behalf of the shareholders. Further a personal wrong has been committed against Mr. Rowe. The acts complained of are fraudulent in character or beyond the powers of the company, hence can be maintained as a personal action.

The period of limitation does not begin to run until the fraud was discovered or with due diligence could have been discovered. Mr. Rowe was in no position whatever to become aware of the fraud as he was incarcerated in the US. It was only after he sought legal advice and assistance that the fraudulent conduct of the defendant was unearthed. Further, if the defendants wish to rely on the Statute of Limitation then the defence must be specifically pleaded and it becomes an issue to be determined by a tribunal upon trial,

**Ronald Rowe's response to the application to strike out**

In his Affidavit in opposition, and in his supplementary Affidavit in support of his Petition, to wind up which was exhibited, Ronald Rowe deposed that he was deceived by Clinton Thompson who led him to believe that the land was purchased for \$2 million dollars. It was misrepresented to him that Clinton Thompson had \$500,000.00 and would obtain a loan of \$500,000.00 in his

personal capacity as his contribution to the purchase price of the properties. On that understanding, he agreed to execute the necessary documents presented to him by the Defendant. He avers that Clinton Thompson's failure to obtain a personal loan for \$500,000 and instead obtaining a loan of \$1 million, which was secured by SD Limited, placed the company at risk. Such behaviour he claims was dishonest and fraudulent.

He was informed by Mr. Clinton Thompson that MSB sold the property pursuant to the exercise of its power of sale. He was unaware of the separate agreement between SD Ltd and the purchasers for the sale of the development plans for the sum of \$2.4m. In his supplementary affidavit in support of his petition, he avers that the utilization of the assets of the company to secure a loan on behalf of Sunshine Agencies Ltd, placed the company's asset at risk.

He deposed further in his affidavit in support that in 1994 whilst he resided in the USA, his sister Marjorie had kept him informed about the sale. After his incarceration ended she told him the property was sold but the entire proceeds of the sale was used to liquidate the debt to the bank but that Clinton Thompson would be responsible to pay him (Ronald Rowe) \$2.6m. This sum was to be paid after Clover, Clinton's estranged wife, sold a house. Upon his release his sister told him she received some payments from Clinton Thompson. Clinton told him that the re transferred land was valued at \$4,000,000 and he (Rowe) requested to be paid \$2.m. But he later changed his mind and requested to be allowed to construct six buildings on the premises together with a payment of 1 million dollars. He felt this would be a fair deal as Clinton Thompson had been

collecting rental on behalf of the company from tenants occupying buildings on the premises. He denied his sister participated in the decision making process of the business. He further complained that despite his requests he has not been furnished with audited accounts of the business.

### **Clinton and CloverThompson's response**

In answer, Clinton and Clover Thompson in a second affidavit averred that Clinton Thompson formulated a plan to erect a Commercial Industrial Apartment Complex on the properties. All parties agreed to the proposal and all were to participate in the project but Ronald Rowe migrated. Clinton Thompson was left to assume the principal role.

Ronald Rowe was aware that SD Ltd was borrowing the \$1.m. He signed the documentation for the loan. As regards the purchase price of the properties, Ronald and Marjorie Rowe were also signatories to the agreement. The property and chattels were purchased for \$2.m The Thompson's were responsible for the closing costs. During the preliminary period, prior to the sale to Derrick Mahfood Clinton approached Ronald Rowe with a proposal to construct a business at 67 Constant Spring Road and share the business activity. Ronald was not in a position to participate but assented to Clinton Thompson proceeding with the venture on his own. Clinton constructed a 2 level office building from his own resources. He operated offices in one part whilst Marjorie Rowe operated offices in another. The building on the premises is Mr. Thompson's and not the company's. Rental is therefore paid to him and not to the company.



He objected to Ronald constructing the six buildings on the property as it might lead to confusion among their children later on. The company has not traded or done business since 1991 so he has no accounts to audit.

They deny telling Marjorie they would pay Ronald \$2.5m upon the sale of a house by Clover.

### **The Law**

In an action to redress a wrong done to a company or to recover money or damages alleged to be due to it, the company is the only proper plaintiff. (Halsbury's Laws of England 4<sup>th</sup> Edition Vol. 7, para. 76) .This is the rule in **Foss v Harbottle** (1843) 2 Hare 461 – 67 ER 189. In that case, an action was brought by two shareholders of a company nominally on behalf of themselves and all other shareholders against the company and three directors. Sir James Wigram in the Court of Chancery established that it was not appropriate for the plaintiff's to sue personally (although representative) as the conduct with which the defendants were charged was not an injury to the plaintiffs but to the whole corporation.

The rule in **Foss v Harbottle** has been restated very clearly in **Edwards v Halliwell (1950)** 2 ALL. E. R. 1064 at page 1066 as follows:

“First the proper plaintiff in an action in respect of a wrong alleged to be done to a company . . . is prima facie the company . . . itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company . . . on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company . . . is in favour of what has been done, then cadit quaestio [i.e.the matter admits no further . . . argument.]”

### **Derivative Actions**

There are certain exceptions to the rule in Foss v Harbottle. Minority shareholders or even an individual shareholder may bring a minority shareholders action on behalf of themselves and other shareholders except those who are their offenders. The company may be joined as defendant. The directors are usually the defendants. This action is a derivative action. The right to sue derives from that of the company. This action is not open to the shareholder whose personal rights are violated. Where a personal right is infringed the proper action is a representative action.(see Charlesworth and Morrison company law 15<sup>th</sup> editon Geoffery Morse). The nature of a derivative action is that it is a “procedural device for enabling the Court to do justice to a company controlled by miscreant directors or shareholders” **Nurcombe v Nurcombe [1985] 1 WLR 370.**

### **Representative Actions**

An individual member may however bring a representative action in his own name or on behalf of himself and others where his right alone and those of others are affected. The rule in Foss and Harbottle does not apply where the individual members sue in their own right to protect their individual rights as members. The majority shareholders cannot ratify a breach of duty owed to an individual shareholder .

**Halsbury’s Laws of England 4<sup>th</sup> Edition** Vol. 7, para 764, states as follows.

“Proceedings may be brought by any member or members in his own or their own names where such authority cannot be obtained and the act

complained of is of a fraudulent character, or oppressive or is Ultra Vires the company; or is criminal or where the wrongdoers control the majority of roles; or where the result would otherwise be that the company was carrying out by an ordinary resolution, something which could only be properly carried out by a special resolution, or by any other resolution requiring a prescribed majority. In such a case the plaintiff should distinctly allege the true nature of the act complained of and the impossibility of the company to impeach its validity.”

It has been generally accepted however, that there are four exceptions to the rule. Jenkins L. J. in **Edwards v Halliwell** (1950) 2 ALL E R 1064 states the four exceptions as (1) the special majority exception (2) the illegal or ultra vires acts exception (3) the personal rights exception and (4) the true exception; “Fraud on the Minority”.

In the case of **Pender and Lushington** (1877) 6 ChD 70 a shareholder successfully enforced the article which permitted him to vote at meetings and compelled the directors to record his vote. In circumstances where the defendant owes a duty to the shareholder personally the shareholder is not restricted by the rule **R.P. Howard Ltd vs Woodman, Matthews and Co.** (1983) Com LR 100

### **How is the Rule Dealt With**

The rule is dealt with as a preliminary issue before a full trial is held. The rationale is that it obviates futile litigation that can be long and expensive where an independent majority of the company do not wish to prosecute the claim. **In Prudential Assurance Co Ltd v Newman Industries Ltd. and Others (No.4)**

**(1982) 1 All E R 354** at 366 the Lord Justices expressed the following view:

“On the other hand we do not think that the right to bring a derivative action should be decided as a preliminary issue on the hypothesis that all the allegations in the statement of claim of “fraud” and

“control” are facts, as they would see on the trial of a preliminary point of law. In our view, whatever may be the properly defined boundaries of the exception to the rule, the plaintiff ought to at least to be required before proceeding with his action to establish a prima facie case, (i) that the company is entitled to the relief claimed and (ii) that the action falls within the proper boundaries of the exception of the rule in ***Foss v Harbottle*** ”

The question is: can the facts alleged in this case justify a departure from the Rule in ***Foss v Harbottle***.

In the instant case Mr. Ronald Rowe has alleged fraud on the part of the company, the Managing Director, the purchasers and Mas Traders Ltd

In his particulars of fraud of the defendants Mr. Ronald Rowe alleges as follows:

- (a) The individual defendants caused the 3<sup>rd</sup> defendant's company to be incorporated for a purpose of acquiring the assets of the 1<sup>st</sup> defendant at an undervalue well knowing of the interest of the plaintiff.

This is a very bald statement, devoid of the particulars necessary to demonstrate fraud. In his various affidavits he has not elucidated any evidence to support the allegation.

- (b) The individual defendants caused the first Defendant to be incorporated for the purpose of mastering the fraudulent conduct of the defendants which was to deprive the first defendant of the lands well knowing the interest of the plaintiff therein.

Mr. Rowe has again alleged fraud and conspiracy on the part of Clinton Thompson and the purchasers without providing the particulars necessary. There is not a scintilla of evidence in any of his affidavits to support the allegation. Merely to throw up the words “fraudulent conduct” without substantiating and

particularizing, is not sufficient. "Fraudulent conduct must be distinctly alleged and as distinctly proved". ***Davy v Garrett (18 78) 7 CLD 473.***

"General Allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice "***(Wallingford v Mutual Society (1880) App Cas 685***

There is no evidence that the purchasers had any knowledge actual or constructive that Mr. Ronald Rowe was unaware of the details of the sale. They were under no obligation to ensure there was no irregularity (assuming there was some irregularity).

*c) The fourth defendant has purported to purchase the properties from the 3<sup>rd</sup> defendant well knowing of the fraudulent conduct of all the defendants and such conduct was designed to deprive the plaintiff of his interest therein.*

Again this is an empty accusation without the particulars or evidence to support it.

*d) The individual defendants conspired to transfer the assets of the 1<sup>st</sup> defendant at an undervalue to a nominee not yet in existence namely – the 3<sup>rd</sup> defendants and thereafter incorporated and to have the said properties transferred to the fourth defendant who had full knowledge of the transaction of all the defendants.*

Not a shred of evidence emanated from any of his affidavits to establish that the transaction was fraudulent and was meant to operate to his Ronald Rowe's detriment. In fact there is no evidence that the properties were sold at an undervalue. They were purchased for \$2 million dollars in 1987. In December 1991 they were sold for \$2.6 million in circumstances where they were advertised for sale at auction by the bank.

Assuming there was an irregularity in that ALF was not yet in existence. There is no evidence that this irregularity had any connection to or touched and concerned the purchase of the properties from SD Ltd.

A prima facie case of fraud has not been established by Ronald Rowe. Without a sustainable allegation of fraud, the action does not fall within the boundaries of the exceptions to rule in Foss v Harbottle.

**The allegation that Clinton Thompson misrepresented that the purchase price was \$2,000,000 and dishonestly borrowed \$1 million dollars risking the company's assets**

A representative action may be brought against directors for misrepresentation **(Drincqbier vs Wood)** (1899 1 ch 393)

Clinton Thompson deposed that all four shareholders signed for the loan but that he and Clover were to be responsible for it. The unchallenged evidence is that Ronald Rowe signed the loan application. In the circumstances there is no evidence that the particulars of the loan were concealed from him. Upon signing the document for something as important as a bank loan he ought to have satisfied himself of the details of the transaction. He and his sister were also signatories to the agreement to purchase the land. This evidence was never challenged by Ronald Rowe. There is no sufficient evidence of any false representation or deliberate concealment from Ronald Rowe in relation to the document which he signed. Having signed these documents he cannot disavow his deed without establishing non est factum.

**In Saunders (Executrix of the estate of Rose Maud Gallie (deceased))  
v Anglia Building Society (formerly Northampton Town and County  
Building Society [1970] 3 All ER 361**

**Lord Reid had this to say:**

The plea of non est factum obviously applies when the person sought to be held liable did not in fact sign the document. But at least since the sixteenth century it has also been held to apply in certain cases so as to enable a person who in fact signed a document to say that it is not his deed. Obviously any such extension must be kept within narrow limits if it is not to shake the confidence of those who habitually and rightly rely on signatures when there is no obvious reason to doubt their validity. Originally this extension appears to have been made in favour of those who were unable to read owing to blindness or illiteracy and who therefore had to trust someone to tell them what they were signing. I think that it must also apply in favour of those who are permanently or temporarily unable through no fault of their own to have without explanation any real understanding of the purport of a particular document, whether that be from defective education, illness or innate incapacity.

But that does not excuse them from taking such precautions as they reasonably can. The matter generally arises where an innocent third party has relied on a signed document in ignorance of the circumstances in which it was signed, and where he will suffer loss if the maker of the document is allowed to have it declared a nullity. So there must be a heavy burden of proof on the person who seeks to be granted to him, and that necessarily involves his proving that he took all reasonable precautions in the circumstances. I do not say that the remedy can never be available to a man full of capacity. But that could only be in very exceptional circumstances; certainly not where his reason for not scrutinizing the document before signing it was that he was too busy or too lazy. In general I do not think that he can be heard to say that he signed in reliance on someone he trusted.

An action may be brought by a shareholder in circumstances to prevent the misapplication of the company's assets. It is the view of the court that if that were the situation Ronald Rowe should have brought the action before the loan

was obtained since he claims that the loan should have been for \$500,000 only. Assuming, that SA Ltd improperly borrowed the sum of \$2.m on the security of the SD Ltd, an action could have been brought by Ronald Rowe in his personal capacity to prevent the transaction. However, at the time he instituted the proceedings, the horse had already galloped through the gate.

In **Smith v Croft (No 3) (1887) BCLC** 355 the action involved alleged illegal payments by the directors. It was held that an individual shareholder did not have an absolute right to bring a derivative action on that basis to recover the sum spent, as distinct from preventing it before hand.

In the circumstances, at this stage, a personal claim is misconceived. The appropriate party to sue, is now the company. Ronald Rowe cannot recover personally damages recoverable by the company as such applications are brought to prevent the misdeed from happening e.g. to prevent the improper declaration or payment of dividend, the purchase by the company of its own shares, improper forfeiture of shares or an improper reduction of capital.

In any event there is no evidence that the transaction was not sanctioned by Marjorie Rowe and Clinton Thompson. Nor is there any evidence that there was any attempt to solicit their cooperation in bringing the action.

#### **Clinton Thompson's failure to account**

Ronald Rowe has also requested that the defendant's account to him for monies received by them which related to the transaction.

An action may be brought by a shareholder to make directors account for money received by them. In **Cook v Deek** (1916) 1 A.C. 554, Directors took



profit in their own names which were made out of a construction contract. A shareholder successfully brought a minority shareholders action to compel the directors to account to the company for the said profits. See also **Spokes v Grosvenor Hotel Co (1897) 2 QB 124 CA**. Clinton Thompson's evidence is that there has been no business activity since 1991, hence there is nothing to account. Derrick Mahfood, ALF Investments Ltd, and Mas Traders are of the view that they do not owe Ronald Rowe any obligation to account to him. With that view I agree.

### **Conclusion**

In the instant case the other shareholders are Mr. Rowe's sister Marjorie Rowe and Clover Thompson. Clover Thompson has supported Clinton Thompson in every material particular. Marjorie Rowe has not given evidence. However, there is no evidence that she is aggrieved by the sale. Nor is there any evidence that he was unable to remedy the wrong because he was blocked by the majority shareholders. Clinton Thompson against whom he has levelled the allegations is not a majority shareholder. The court will not allow a person to represent others unless it is satisfied that he is authorized to do so. **Morgan Berwery Company v Crosskill (1902) 1Ch 898**.

In determining whether an action is a derivative one can the court can examine the motive of the person bringing the action. If the motives are personal and not to the benefit of the company the action will not qualify. **Barrett v Duckett** The times 27<sup>th</sup> July, 1994 **CA**.

The instant case is brought entirely for Mr. Rowe's personal benefit. Having alleged that the transaction was fraudulent, he negotiated with Mr. Thompson to be paid \$2.m and later to construct six buildings on the property together with a payment of \$1.m. It is clear that he only brought the action after his request to construct the six buildings on the land was rejected . This clearly shows he was motivated solely by personal reasons rather than any consideration for the company. It is therefore quite evident that he has not brought a derivative action.

The claim that SD Ltd and Clinton Thompson acted in bad faith against his interest and that the sale was procured to denude the company of the assets so as to injure him is untenable. It is clear that his knowledge of what happened with the company is limited because he was often out of the country and for a number of years he was incarcerated. The circumstances which led to the sale of the properties are chronicled in the affidavit of Christopher Thompson. They have not been challenged by Ronald Rowe nor have the contemporaneous documents e.g. letter dated 11<sup>th</sup> November, 1991 from Perkins, Grant, Stewart, Phillips and Co. Ltd; Advertisements in the Daily News Paper dated 28<sup>th</sup> November, 1991, the institution of legal proceedings against SD Ltd on the 10th December, 1991 by MSB. These events clearly show that the threat of sale of the properties by public auction was real and imminent rather than any crooked deal hatched and carried out by Christopher Thompson and the purchasers. The fact that Christopher Thompson was able to negotiate rather ingeniously to have the land retransferred to the company upon which he had his business does not

follow that there was fraud, dishonesty or oppressive behaviour on his part. There is no evidence that Christopher Thompson was actuated by any dishonest motives or personal advantage. Rather he acted in the honest belief that what he was doing was in the best interest of the company to prevent the foreclosure. The sale of the properties was permitted by the Memorandum of Association of the company. He has failed to establish that any personal right has been impugned which would justify a representative action. He therefore has no standing to bring such an action.

Mr. Rowe has also brought proceedings to wind up the company. If this action is successful the proper claimant will be the liquidator. In *Barret v Duckett* an action failed because the alleged wrongdoer had already sought to have the company wound up. In the circumstances the liquidator was the person to decide whether to bring an action on behalf of the company.

#### **Whether the Action is Statute Barred**

The agreement of sale of the properties was executed on the 31<sup>st</sup> December, 1991, The claimant resided continually in Jamaica from April 1991, to November, 1991. He resided as a free man in the USA from November, 1991 to November, 1994 when he was incarcerated.

Prior to his incarceration in November 1994 he was in communication with his sister about the sale of the property. The defendant had enough opportunity to acquaint himself with the details of the sale, prior to incarceration. The fact that he resided outside the jurisdiction does not absolve him from the

duty to acquaint himself with the business of the company as director and shareholder.

Nothing prevented him from obtaining information as to the sale of the properties. From December 1991 to October, 1994 with due diligence he could have discovered the alleged fraud.

In his particulars of claim he avers that in the month of July, 1995 the defendant procured the sale of the properties. However the sale did not occur in 1995.

There is no evidence that anything fraudulent occurred in July 1995. Derrick Mahfood simply transferred the properties to his nominee

The sale of properties which prompts the alleged claim in fraud occurred in excess of six years. It would therefore appear that the action is statute barred.

It would therefore appear in all the circumstances that the Claimant has no reasonable prospect of succeeding on this claim. Accordingly the claim is dismissed.