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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E.179 OF 1979

IN THE MATTER OF JAMAICA PUMP AND VALVE LIMITED

A N D

IN THE MATTER OF THE COMPANIES ACT

BETWEEN	NEVILLE WILLIAMS	PLAINTIFF
A N D	JAMAICA PUMP & VALVE LIMITED	FIRST DEFENDANT
A N D	CLEVELAND BRYAN	SECOND DEFENDANT
A N D	PANSEATA BRYAN	THIRD DEFENDANT
A N D	JEFFERY WILLIAMS	FOURTH DEFENDANT
A N D	ELWORTH WILLIAMS	FIFTH DEFENDANT
A N D	LLOYD PERKINS	SIXTH DEFENDANT
A N D	HOPE ATKINSON	SEVENTH DEFENDANT
A N D	MERIDIAN INVESTMENT CORP. LIMITED	EIGHTH DEFENDANT

Enos Grant instructed by S.E.O. Hamilton for Plaintiff

Mrs. Hilary Phillips instructed by D. Tomlinson of Perkins, Tomlinson, Grant, Stewart and Company for the First, Fourth, Fifth, Sixth, Seventh and Eighth Defendants.

Ferdinand Johnson for the Second and Third Defendants.

July 13, 14, 15, 1981; March 22, 23, 24, 25, 26, 1982; June 21, 22, 23, 24, 1982; January 17, 1983; November 1, 2, 1983; February 27, 28, 29, 1984; March 1, 1984; November 12, 13, 14, 15, 16, 1984; and July 29, 1988.

ORR, J:

This action has had a chequered history. Its genesis was an Originating Summons filed on the 10th December 1979. The summons was amended and hearing commenced on the 13th July, 1981. After several days of hearing I made an order that the proceedings should continue as if the cause had begun by Writ. Thereafter the hearing continued intermittently. The proceedings were discontinued against Hope Atkinson the Seventh defendant on the 27th February, 1984. The hearing eventually concluded on the 16th November, 1984, when judgment

was reserved. In addition to the protracted period occupied by the hearing most of the Exhibits have been lost or mislaid in the Registry. To complete the litany of woe, the delivery of the judgment has been unduly delayed for which I apologise.

This case concerns the fortunes of a Company, Jamaica Pump and Valve Limited hereafter referred to as "the Company". It was incorporated on the 11th April, 1973, and classified as a Private Company under the Companies Act. The original share capital was $1,000.00 divided into 100 shares of $1.00 each. On the 31st January, 1976 the share capital was increased to $100,000.00 all of which has been issued and fully paid up.

The latest entry on the Register of Members indicated the following:

Cleveland Bryan	-	45,000
Panseata Bryan	-	20,000
David Bryan and Marcus Bryan	-	15,000
Leo Bryan	-	10,000
Myrtle Johnson	-	5,000
Noel Agustus Chin	-	5,000
		100,000

On the 4th August, 1977, it appears that there were four(4) Directors viz:

Cleveland Bryan

Panseata Bryan

Leo Bryan and

Noel Chin

On this date David Bryan was appointed a Director, Noel Chin, Chairman and the plaintiff Secretary of the Company. In addition the plaintiff was appointed Controller/Administrator and as such was responsible for the financial affairs of the Company. Shortly after this, the Bryans left Jamaica and resided in Florida, U.S.A. and Haiti. The plaintiff had frequent discussions and meetings with them abroad concerning the affairs of the Company. Unfortunately, the company experienced financial difficulties and as a result obtained financial assistance from the Jamaica Development Bank to which Mr. Noel Chin was then employed.

Differences arose between Mr. Chin and the Bryans in connection with the operation of the Company. At a meeting of the Board of Directors held in Miami, U.S.A. on the 10th March 1978,

Mr. Chin resigned as Chairman and as a Director and the plaintiff was appointed Chairman and Managing Director. Mr. Chin purported to transfer his shares to Mrs. Bryan, the Third defendant.

The following day, the 11th March 1978, was a day of activity and of importance to the fate of the Company. The plaintiff gave Cleveland Bryan, the Second defendant, a primissory note for $50,000.00. The nature and import of this note was keenly contested. The plaintiff claims that the note represents an agreement for the sale to him by the Bryans of their shares in the Company. The Bryans contend that it was a mere promissory note in respect of a loan made by Cleveland Bryan to the plaintiff.

On this same date the Bryans gave the plaintiff a proxy in respect of 80,000 shares held by the Second and Third defendants and their "minor children" David and Marcus Bryan. The plaintiff was also given an authority signed by Mrs. Panseata Bryan to enable him to have access to a safety deposit box leased by her at the Bank of Nova Scotia in Mandeville. The plaintiff contends that Mrs. Bryan by this action gave him access to the share certificates in respect of the shares. Mrs. Bryan states that it was for purposes of access to a Title and Insurance Policies for herself and her mother.

The plaintiff returned to Jamaica and consulted Mr. Roald Henriques, Attorney-at-Law on behalf of the Company. On the 18th March, 1978, Mr. Henriques and the plaintiff had discussion with the Second and Third defendants in Miami. There was a discussion about the sale of shares by the Bryans to the plaintiff. Mr. Henriques formed the opinion that there was then a concluded Agreement for the sale of the shares. He was of the view that the Bryans were resident outside Jamaica and advised that approval for the sale should be sought from the Bank of Jamaica, the relevant authority under the Exchange Control Act. Subsequently he received Blank Transfers signed by the Bryans but was later advised by Mrs. Bryan that he should not do anything about the Transfers pending further directions.

There is no indication that any meetings of either the Board of Directors or of the Company itself were held for the rest of the year.

On the 28th May 1979, the Jamaica Development Bank pursuant to powers under a debenture, put the Company in receivership and appointed Mr. Kenneth Neysmith as Receiver/Manager. Mr. Neysmith took over the management of the Company and dismissed the plaintiff as Managing Director by letter dated 1st June 1979.

Mr. Neysmith advertised the sale of the assets of the Company and Mr. Elworth Williams, the Fifth defendant contacted the Receiver, the Jamaica Development Bank and the plaintiff. His discussions with the plaintiff led him to the Second and Third defendants.

On the 25th August, 1979, a meeting of the Board of Directors was held in Miami. It is common ground that the plaintiff who resided in Jamaica, was not invited to, nor did he attend this meeting. The following persons attended:

Cleveland Bryan)
)
Panseata Bryan) Directors
)
David Bryan)

and Elworth Williams and Lloyd Perkins, the Fifth and Sixth defendants respectively. Elworth Williams was then the Managing Director of Meridian Investment Corporation Limited, the Eighth defendant, hereafter referred to as "M.I.C. Limited". At this meeting the Directors approved the transfer of the shares held by the Second and Third defendants and David Bryan, totalling 85,000 to M.I.C. Limited.

The resignation of Mr. Leo Bryan as a Director was accepted and Elworth Williams, Lloyd Perkins and M.I.C. Limited, the Fifth, Sixth and Eighth defendants were appointed Directors of the Company. Williams and Perkins were empowered to negotiate with the Receiver on behalf of the Board of Directors with a view to taking the Company out of receivership.

On the 26th August, 1979, Cleveland Bryan, Panseata Bryan and David Bryan executed a Memorandum of Agreement and Transfers all dated the 25th August, 1979, for the transfer of their shares 80,000 to M.I.C. Limited.

At a meeting of the Directors held in Miami on the 17th November, 1979, the Second and Third defendants Cleveland and Panseata Bryan tendered their resignation as Directors: these were accepted. The Directors ratified the appointment of Geoffrey Williams, the Fourth defendant, as Managing Director, Beryl Bennett as Secretary and ratified the arrangements concluded between Elworth Williams and Lloyd Perkins and the Receiver with respect to taking the Company out of receivership. Again the plaintiff was not notified of, nor did he attend this meeting.

On the 12th December, 1979, subsequent to the filing of the Originating Summons on the 10th December, 1979, the Directors of the Company purporting to act under Article 81 of the Articles, by memorandum requested the resignation of the plaintiff as a Director of the Compnay.

Against this background the plaintiff sought various Declarations based on the true and proper construction of the Articles of the Company and the Companies Act.

Declaration (a)(1) That the plaintiff is still a Director of the above-named Company.

Mr. Grant's submissions may be summarised thus:

Up to the 10th December, 1979, when the Originating Summons was filed, the plaintiff was a Director of the Company. This was recognised by the defendants who purported to remove him from office on the 12th December, 1979, under the provisions of Article 81. On a true and proper construction of the Articles the Directors could not act under Article 81 but only under the provisions of Table A of the Schedule to the Companies Act.

Alternatively, if the Articles were applicable, then the removal of the plaintiff as a Director could only be done at a meeting. However, the Directors who purported to remove the plaintiff were themselves appointed at meetings of which the plaintiff as Director did not get notice. As a consequence the decisions of these meetings were null, void and of no effect.

Directors who were not validly appointed could not validly dismiss the plaintiff.

Miss Philips submitted that the plaintiff was validly dismissed under the Articles of the Company. The Articles should be read together with Table A of the Schedule to the Companies Act and thus Article 81(4) was effective to dismiss the plaintiff as Director. In the particular circumstances the failure to invite the plaintiff to meetings of the Directors did not render the decisions null and void. The Co-Directors were entitled to assume that the meetings were properly summoned and that any business transacted thereat was valid. Fisher vs. Black and White Publishing Company /1901/ 1 Ch. 174 was relied on by both attorneys and other authorities were cited.

Section 10 of the Companies Act is as follows:-

10(1) "Article of association may adopt all or any of the regulations contained in Table A".

(2) In the case of a Company Limited by shares and registered after the appointed day, if articles are not registered, or, if articles are registered, in so far as the articles do not exclude or modify the regulations contained in Table A, those regulations shall, so far as applicable, be the regulations of the Company in the same manner and to the same extent as if they were contained in duly registered articles".

This section is identical to section 8 of the Companies Act 1948 U.K. The Oxford English Dictionary gives one definition of the word modify as:-

> "To make partial changes in; to change (an object) in respect of some of its qualities; to alter or vary without radical transformation".

In Fisher v. Black (supra) Clause 1 of the Articles provided that:

> " In so far as these articles do not exclude or modify the regulations contained in Table A, those regulations shall, so far as the same are applicable, be deemed to be the regulations of the company".

This was merely a re-statement of the statutory provisions.

The articles expressly exclude some of the clauses of Table A, but did not expressly exclude clause 74.

It was held that clause 74 of Table A was not to be excluded by implication, but that it must be taken to form part of the articles.

In Pennington's Company Law Second Edition, cited by Miss Philips, the learned author states at page 30:

> " If a Company Limited by shares has its own articles, the regulations in Table A still govern it, except so far as its own articles do not exclude or modify those regulations.
> The Company's articles and Table A must thereafter be read together, and Table A is excluded only so far as the articles are inconsistent with it".

I accept this as a correct statement of the law. Regulation 88 of Table A contains six situations in which the office of a Director shall be vacated.

Clause 81 of the Articles of the Company contains four (4) such situations, three (3) of which, 81(1)(2) and (3) are contained in Table A.

The Articles of the Company are silent as regards Table A and thus Table A has not been expressly excluded by the Articles. Regulation 88 of Table A applies but this has been modified by Clause 81 of the Articles.

I hold that Clause 81(4) has not been superseded by Regulation 88 of Table A. The Directors purported to act under this Clause in dismissing the plaintiff and could validly do so.

The question now arises as to the validity of the act of the Directors in dismissing the plaintiff.

It is common ground that notice was not given to the plaintiff in respect of any of the meetings at which the Directors were appointed.

The articles of the Company and Table A, both require notice of meetings to be given to all the Directors.

Mrs Bryan as Secretary of the Company said she did not send a notice to the plaintiff because she was unable to contact him. Cleveland Bryan proferred the same excuse. Mrs Bryan however, stated that she knew Elworth Williams was in contact with the plaintiff before the date of the meeting. Cleveland Bryan said he telephoned Elworth Williams about the meeting yet it did not occur to the Bryans to ask Elworth Williams to advise the plaintiff of the meeting.

In the Law and Practice of meetings by Frank Shackleton, Fifth Edition, the learned author states at page 237:

> " In order that Directors may meet as a board it is essential that every Director should receive notice of its meetings. Were it not for this principle it would be possible for certain members of the board to meet and transact business which may not meet the concurrence of other members of the body".

Support for this principle is found in the decisions of Re Homer District Consolidated Gold Mines Ex Parte Smith (1888) 39 Ch. D. 546 and Young v. Ladies' Imperial Club,Limited [1920] 2 K.B. 523.

Elworth Williams and Lloyd Perkins cannot rely on the rule in Royal British Bank v. Turqu and (1856) 6 E and B 327, as submitted by Miss Philips.

In Morris v. Kanssen [1946] A.C. 459, Lord Simonds said 476:

> " It is the duty of the Directors, and equally of those who purport to act as Directors, to look after the affairs of the Company, to see that it acts within its powers and that its transactions are regular and orderly. To admit in their favour a presumption that that is rightly done which they have themselves wrongly done is to encourage ignorance and condone dereliction from duty ..... I cannot admit that there is open to him the remedy of invoking this rule and giving validity to an otherwise invalid transaction. His duty as a Director is to know."

I do not accept that neither Elworth Williams nor Lloyd Perkins was unaware that the plaintiff was Director on the 25th August, 1979. On this date Elworth Williams as Managing Director of M.I.C. Limited was acquiring the majority of the shares in the Company from shareholder who were then living abroad. It would be logical to make enquires as to the Directors of the Company.

Mr. Perkins caused a search to be made at the office of the Registrar of Companies: this proved abortive. He took particular care in discussing the Agre ment for the sale of the shares with the Bryans yet did not ask them of the Directors of the Company.

I reject the contention of the defendants that the plaintiff could not be located. I find that no efforts were made to contact him and that he was deliberately excluded from the meetings of the Directors.

I hold that the failure to give notice to the plaintiff of the meetings rendered the business transacted thereat null and void.

Re memorandum under Article 81(4). The memorandum is signed by the following:

1. Elworth Williams
2. Lloyd Perkins
3. M.I.C Limited
4. William Eaton
5. Dennis Tomlinson - alternate Director for Myrtle Johnson - Abrahams
6. Geoffrey Williams.

Elworth Williams, Lloyd Perkins and M.I.C. Limited were not properly appointed as Directors. They were appointed at meetings of which the plaintiff was not noticed.

No documentary evidence was produced to substantiate the appointment of William Eaton on the 1st December, 1979. Elworth Williams stated that the appointment was by round robin and later ratified. No minutes were produced in support.

In the circumstances I hold that Mr. Eaton has not been validly appointed as Director.

Dennis Tomlinson appears to have been validly appointed. Geoffrey Williams is in a similar position to the other Directors.

In the circumstances I hold that the memorandum dismissing the plaintiff as Director was null, void and of no effect.

As a consequence of my findings above, the plaintiff is entitled to the following declarations that:-

(a) (i) The plaintiff is still a Director of the above-named Company;

(iii) The Fourth, Fifth and Sixth defendants are not properly appointed as Directors of the Company;

(v) Any meeting of the Company and in particular of the Board of Directors that is held without due notice thereof being given to the plaintiff is null and void and is of no effect. The plaintiff is still the Managing Director of the Company.

DECLARATION a(ii)

The Plaintiff was dismisses as Managing Director by Mr. Neysmith the Receiver. It was common ground that Mr. Neysmith was the agent of the Company.

The submissions were directed to the question as to whether the appointment of the Receiver automatically terminated the appointment of the plaintiff as Managing Director.

It appears that at the time of his dismissal the plaintiff was Controller/Administrator directly responsible for all the financial affairs of the Company and Managing Director.

The letter of dismissal confirmed his dismissal as Managing Director as of the 29th May, 1979.

In Griffiths v. Secretary of State for Social Services [1973] 3 W.L.R. 831, Lawson J. having considered various authorities and textbooks cited, said at page 845 C:

> " I therefore find the law to be this, and counsel I think made this submission to me, that the appointment by debenture holders of a receiver and manager as agent of the company, not an appointment under order of the Court, does not of itself automatically terminate contracts of employment previously made and subsisting between the relevant company and all its employees. There are three (3) situations in which this may be qualified".

He deals with the first and second situations which are not relevant and states:

> " The third situation and this is the situation with which I am concerned here, is where, to use Pennycuick J's language and the language of Kerr on Receivers and supported by some of the other text book writers, the continuation of the employment of a particular employee is inconsistent with the role and functions of a receiver and manager. The mere fact that he is labelled 'Managing Director' does not, in my judgment, indicate that because he is so labelled his employment in that capacity or office is inconsistent with the position, role and functions of a receiver and manager for two reasons. "

And at page 846:

> " So my conclusion is that unless such an inconsistency of roles be found, as a matter of fact, then one is not concerned with the termination of a subsisting contract of employment as of the date when the receiver and manager is appointed ....."

I adopt his conclusion.

In the instant case there are no facts to indicate that the position of Managing Director was inconsistent with that of the Receiver. Accordingly I hold that the plaintiff was not validly dismissed as Managing Director of the Company.

This brings me to consideration of declaration (e):

Further and in the alternative, damages for wrongful dismissal and/or inducing breach of contract.

The plaintiff was appointed Managing Director on the 10th March, 1978. His dismissal was effective from the 29th May, 1979.

He was paid one month's salary in lieu of notice. There is no stipulation as to the period of notice.

Section 3(1)(a) of the Employment (Terminat on and Redundancy Payments) Act stipulates that the notice required to be given by an employer shall be not less than two weeks if the period of continous employment is less than five years. The plaintiff's employment was less than five years and he received one month's pay in lieu of notice. I hold that one month's notice was reasonable in the circumstances.

In Kaiser Bauxite Company vs. Vincent Cadien. Supreme Court Civil Appeal No. 49/81 July 29, 1983, (unreported), Carey J.A., said at page 19:

> "In the result the authorities establish that in an action such as the present, the measure of damages must be related to the period of notice in the absence of Agreement, held to be reasonable."

That action was for wrongful dismissal.

The plaintiff is not entitled to any further damages. There is no evidence to substantiate a claim for inducing a breach of contract.

DECLARATIONS:

(b) That the contract between the plaintiff and the Second and Third defendants to purchase 80,000 shares is a valid contract;

(c) That the purported purchase of the said 80,000 shares by the Eighth defendant is null, void and of no effect and/or that the Eighth defendant is not a shareholder of the First defendant;

(d) Specific performance of the said contract between the plaintiff and the Second and Third defendants;

(f) Damages in lieu of Specific Performance.

These declarations are in respect of the transactions in respect of 80,000 shares held by the Bryans.

(b) RE CONTRACT:

I accept the evidence of the plaintiff that the Promissory Note was in respect of the sale of these shares by Cleveland Bryan and Panseata Bryan to him.

I accept the evidence of Mr. Henriques that the question of the sale of the shares was discussed at the meeting in Miami on the 15th March, 1978. In particular that the Bryans indicated that they had agreed to sell the shares and that the plaintiff had paid them a deposit. That he advised that the approval of the Bank of Jamaica was necessary. I reject the contention of the Bryans that the Promissory note was in respect of a loan to the plaintiff.

I find that the plaintiff paid the sum of U.S. $10,000 on account of the sale of the shares and further sums thereafter.

I find that the authority given by Mr. Bryans to the plaintiff was to enable him to have access to the share Certificates in the safety deposit box. That approval for the sale of the shres was obtained from the Bank of Jamaica pursuant to the contract and that the sale of the shares / was not conditional on the plaintiff's assuming the guarantees by the Bryans to the Jamaica Development Bank. This declaration is granted.

(c) Re Purchase of shares by the Eighth defendant M.I.C. Limited.

The Agreement for the sale of the shares was executed in Miami on the 26th August, 1979, Mr. Perkins, then attorney for M.I.C. Limited prepared the Agreement. The question of the residence of the Bryans was vital.

It was the plaintiff's contention that the Bryans were resident outside Jamaica at the time of the Agreement and thus the approval of the Bank of Jamaica was necessary to give validity to the contract. The Bryans contended that they were not resident outside Jamaica.

Mrs. Bryan stated that she left Jamaica in August 1979 because she had been threatened and assaulted. She did not return to Jamaica in 1978, and could recall only one visit in 1979. During the period of her absence she resided in Miami with her children. She intended to and did return to Jamaica in October 1980, shortly after the General Elections.

Cleveland Bryan could not state definitely when he left Jamaica. He resided in Haiti and Miami and paid visits to Jamaica.

Section 11 of the Exchange Control Act states that except with the permission of the Minister, a security registered in the Island shall not be transferred unless the following requirements are fulfilled, that is to say:-

(a) Neither the transferor nor the person, if any, for whom he is a nominee is resident outside the scheduled territories.

Under the Act Jamaica falls under the scheduled territories.

In Levene v. Commissioners of Inland Revenue, [1928] A.C. 217 Viscount Cave said at page 222:

> " My Lords, the word 'reside' is a familiar English word and is defined in the Oxford Dictionary as meaning 'to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place."
> No doubt this definition must for present purposes be taken subject to any modification which may result from the terms of the Income Tax Act and Schedules, but subject to that observation, it may be accepted as an accurate indication of the meaning of the word reside."

In Commissioner of Inland Revenue v. Lysaght [1928] A.C. 234, Lord Warrington said at page 249:

> " I have reluctantly come to the conclusion that it is now settled by authority that the question of residence or ordinary residence is one of degree".

On the evidence I find that the Bryans were resident outside Jamaica at the time the Agreement was made.

What is the result of the failure to obtain approval for the transaction?

In Re Transatlantic Life Assurance Company Limited [1979] 3 All E.R. 352, Slade J. considered the effect of section 8(1) of the exchange Control Act 1947 U.K. which is similar in terms to section 11(1) of the Exchange Control Act. He held that a purported issue of shares without permission rendered the issue wholly invalid and void.

I respectfully adopt his reasoning and hold that the purported transfer to M.I.C. Limited was wholly invalid and void. Declaration (b) granted and (c) that the purported purchase of shares by the eighth defendant is null, void and of no effect.

By resolution of the 25th August 1979, the Directors approved the transfer and resolved that the transfer be noted in the Company's Shares Register.

Submissions were made as to the question of priorities assuming that the transfer was valid. On this assumption, I accept the evidence of the plaintiff that he discussed the question of shares with Mr. Elworth Williams prior to the 25th August, 1979. That the plaintiff told Williams he had purchased the shares.

I find that at the time of the Agreement for sale, M.I.C. Limited through its Managing Director, Elworth Williams, had knowledge of the plaintiff's claim to be entitled to the shares by virtue of a sale.

M.I.C. Limited would take subject to the claim of the plaintiff.

(a) (d) Specific Performance of the Contract between the Bryans and himself. This remedy is discretionary. In all the circumstances I hold that damages will be adequate remedy.

I order that such damages be assessed.

(k) An injunction is sought restraining the Fourth and/or Fifth and/or Sixth and/or Seventh defendant from interfering in the management and/or afairs of the Company by themselves or through their servants and/or agents and/or nominees.

In view of my order for damages in lieu of Specific Performance this remedy is not available to the plaintiff as no right of his will be infringed. The application for injunction is refused.

(i) Declaration that the sum of $20,189.99 is due and owing by/the company to the plaintiff has proved the following:

Air Fares	$1,254.00
Hotel Expenses	355.10
Motor vehicle expenses	$ 443.60
	$2,052.70

There will be judgment against the First defendant for this amount. There will be costs to the plaintiff against all the defendants except the defendant Hope Atkinson. Such costs to be agreed or taxed.

Costs to Defendant Hope Atkinson up to 27th February, 1984 to be agreed or taxed.