



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL COURT

CLAIM NO. 2015 CD 00057

BETWEEN	BETTER BEE SUPPLIES AND SERVICES LTD.	CLAIMANT
AND	LASCELL LLOYD SMITH	DEFENDANT

Application for Interlocutory Injunction - Company shares equally owned - Claim by Company against one of the two shareholders- Whether action properly constituted - Balance of convenience.

Ronald Young for Claimant instructed by Williams & Young attorneys-at-law.

Hugh Wildman for the Defendant instructed by Hugh Wildman & Company.

13th November, 18th November and 18th December 2015.

In Chambers

Cor : Batts J

- [1] By a Notice of Application filed on the 2nd July 2015, the Defendant, seeks to set aside an Interlocutory injunction granted on the 9th June 2015. That Order was made in the absence of the Defendant who, having been served, had not attended nor was he represented.
- [2] The application to set aside the Injunctive Order therefore became a rehearing of the interlocutory application. The Defendant in addition to challenging many of the Claimant's factual assertions also alleged that the Claimant ought properly to

have used S.213A procedures under the Companies Act or to have first obtained the permission of the court to commence the action. This because the shareholding of the Company was divided 50:50 and the Defendant was one of the two shareholders. He asserts that there were only two lawfully appointed directors and that he was one of them.

[3] The claim was commenced on the 19th May 2015. Mr. Neville Duncan a shareholder and director signed the Claim Form and the Particulars of Claim asserting that he was,

“duly authorised for and on behalf of Better Bee Supplies and Services Ltd.”

The remedies sought against the Defendant include:

- a) An accounting of all sums received by the Defendant from stated customers and apiary owners and investors.
- b) An accounting of all sums withdrawn by the Defendant from the Claimant's bank accounts
- c) An accounting of all goods and services purchased by the Defendant using the Claimant's funds or credit.
- d) An accounting of all honey received by the Defendant from third party suppliers of the Claimant and not handed over to the Claimant.
- e) An account of all honey and bee related products taken by the Defendant from the Claimant and not paid for
- f) Orders for the return of the Company's property or assets wrongfully taken and damages for fraud were also claimed.

[4] In his affidavit in support of the claim for an injunction, Mr. Duncan asserts that he was introduced to the Defendant as someone with expertise in the bee keeping business who had specialist training. In the year 2012, himself and the Defendant decided to incorporate a company and they ordered equipment and

supplies in order to go into that business. Mr. Duncan says he was the sole provider of funding for the establishment of the business. The Claimant Company was incorporated on the 18th January 2013 for the business of producing, purchasing bottling and sale of honey and bee related goods and services. The Defendant and himself were the first directors and equal shareholders with 4000 shares each of a total authorized share capital of 10,000 shares. 2000 shares being unissued. He asserts that a board of directors of three was set up being himself, the Defendant and Ms. Tricia Jack.

- [5] Importantly Mr. Duncan admits that no Notice of appointment of director as regards Ms. Tricia Jack was registered with the Companies Office. He however exhibits minutes of meetings and emails, including emails from the Defendant which acknowledged Ms. Tricia Jack as a director, see exhibit NN3 to the Affidavit of Neville Duncan dated 18th May 2015.
- [6] The Defendant's input, in return for his shareholding, was to manage the setting up of apiaries and establish relationships and contacts in the industry and/or to identify available land to set up apiaries and for the harvesting of honey. The Defendant also purchased honey on the Claimant's behalf from third party apiary owners.
- [7] Mr. Duncan asserts that it was agreed that no director was to receive a salary and no dividends would be paid until he had recovered his investment in the Claimant. It was agreed, he said, that all money from the company's account and all expenses paid from the company's credit card were to be used only for legitimate company expenses.
- [8] Mr. Duncan says that on the 25th May 2013 he, by a personal loan, purchased a Toyota Hilux for use only for the Company's business. The Defendant it is alleged uses that vehicle for his personal business. The vehicle was bought in the name of both Mr. Duncan and the Defendant.

- [9] Mr. Duncan in his affidavit alleges that the Defendant has been making private deals with apiary owners, whilst purportedly on the Claimant's business. He says the Defendant failed to account for payments by six investors for the establishment of apiaries. He alleges failure to account for honey received, failure to provide signed contracts with apiary investors, failure to provide evidence of payments by investors and failure to pay the Claimant for honey products. He alleges that the Defendant has also refused to return the motor vehicle and is using it for his own personal business. It is contended also that the Defendant was "profligate" in expenditure in 2013 and 2014 without adequate explanation.
- [10] Mr Duncan outlines a gradual breakdown in relations. The Defendant he asserts has failed to meet several requests for an accounting, see Exhibit ND9 to his affidavit which really consists of minutes of board meetings. Paras. 35 and 36 of his affidavit are as follows:

"34. I have put in millions of dollars into the Company and my investment accounts were used as security or as a cash cow to keep the company going in various circumstances. Neither the bank nor Mr. Smith stand to lose even a cent if the business goes under because of misappropriation of funds – the bank has my securitization of loans for the motor vehicle and for extension of company assets to fall back on as well as their loan to the company. Mr. Smith having only invested occasional labour, and some of it poorly, has creamed off earnings and my financial inputs. I am the only potential loser and a significant one at that, to the tune of approximately US\$307,500.00, which includes two hypothecation loan amounts for which I am liable, totalling US\$101,000.00.

36. Basically, I could not continue the folly of keeping on a business partner who used and abused the company. I wrote to both Mr. Smith and Ms. Jack on April 12th 2015 indicating my confirmation of the date of the next director's meeting of the company. This email was followed by two reminders again to Mr. Smith and Ms. Jack none of which Mr. Smith replied to. On 16th April at 6:00 p.m. the directors meeting was convened and I proceeded to indicate the terms by which Mr. Smith would be dismissed, from Better Bee Supplies and Services.”

[11] Mr. Duncan alleges that the company is now financially strained due to the conduct of the Defendant. In paragraph 41 in his capacity as a director and Chairman of the Board he gave the usual undertaking as to damages. There is no evidence to support the ability of the Claimant to honour such an undertaking, indeed the evidence is that the Claimant is “financially strained” (paragraph 39 affidavit of Neville Duncan dated 18th May 2015).

[12] By way of Defence filed on the 6th July 2015 the Defendant admitted Paragraphs 1 to 8 and 10 of the Particulars of Claim. He has denied all allegations pertaining to alleged misconduct and failures to account. At paragraph 9 he alleges,

“9 The Defendant denies paragraph 9 of the Particulars of Claim. The Defendant further states that for the initial start up of the company, Mr. Duncan was to provide the capital and the Defendant the expertise. Mr. Duncan only uses his assets as collateral against a loan at Scotia Bank for which the company is servicing. He also took out another loan to purchase a motor vehicle form Toyota Jamaica; both loans are being repaid by the Company. Expenses are paid from the Company's profit. At the initial start up of the business, Mr. Duncan did not disclose to the Defendant that he would have been getting loans to run the business and has not provided any documents regarding loans from the Bank.”

- [13] By way of affidavit filed on the 9th July 2015, the Defendant put forward his evidentiary support. He states that Tricia Jack, who introduced him to Mr. Neville Duncan, lived with Mr. Duncan, “like his stepdaughter.” He says that in the discussions he made it clear to Mr. Duncan that he had no money to invest, and that it was agreed that Mr. Duncan would provide the financial resources while he would provide the expertise. It was agreed that the shares would be equally divided.
- [14] The Defendant asserts that in February 2015 an argument developed between Ms. Tricia Jack and himself in relation to “personal matters.” He then gives an account of various exchanges between himself and Mr. Duncan as it concerned salary arrangements for Ms. Tricia Jack. He exhibits emails exchanged between them in April 2015. These emails are interesting because the one from Mr. Duncan makes no complaint about the Defendant being fraudulent or failing to account and the one from the Defendant is addressed to “the Directors.”
- [15] The Defendant asserts that on the 16th April 2015 he went to a scheduled directors meeting. He was then told that a decision had already been taken by Mr. Duncan and Ms. Tricia Jack to sever the ties between the Claimant and himself. He protested and when he attempted to leave efforts were made to prevent him leaving with the motor vehicle. He eventually called the police who facilitated his exit from the premises with the motor vehicle.
- [16] The Defendant alleges that Ms. Tricia Jack is not a shareholder or a director of the company. He asserts that he had used the Claimant’s credit card only to conduct the business of the company. As regards the motor vehicle purchased in the name of himself and Mr. Duncan, the Defendant says it was at all times agreed that he would keep and care it. Mr. Duncan he said, was not insured to drive it, and a certificate of insurance is exhibited as proof of this. The Defendant says that after the 16th April 2015 Mr. Duncan advised clients and customers of the company that he (the Defendant) was no longer authorised to conduct business on behalf of the Claimant. He says since then the only business he has

conducted was to collect 20 buckets of honey from a Mr. LInval Blagrove which the Claimant had already paid for, and 3 cheques which he lodged to the company's account. He says he still has the 20 buckets of honey because when he attempted to deliver it at the Claimant's premises he was not allowed entry.

- [17] On the 21st September 2015 I ordered that written submissions be filed and the matter was adjourned to the 13th November 2015. I also after hearing submissions, ordered that the motor vehicle be returned to the Defendant on or before the 2nd October, 2015. This was upon the Defendant undertaking that upon 2 days notice the vehicle would be made available for use by the Claimant. I also ordered that the cost of insurance and licensing be shared equally until the 13th November 2015.
- [18] The parties filed written submissions and also made oral submissions on the 13th November 2015. On that date I asked for further submissions on the question whether the Claimant's suit ought to have been a derivative action with the court's approval. Further submissions were therefore made on the 18th November, 2015 at 9:30 a.m. On that date I reserved my decision.
- [19] The Defendant's counsel contends that the claim is irregular and ought to be struck out because Ms. Tricia Jack was never appointed a director. Therefore, in order for a claim to be brought a section 213A procedure ought to have been followed and therefore both the decision to dismiss him and the commencement of legal action are irregular. Counsel also contends that there is no evidence to support the allegations of irregularities fraud or breach of fiduciary duty.. He relied on ***Bruce Wong Ken v David Fullwood HCV 05079/2010*** unreported judgment of Straw J. 6th April 2011; ***Westdeutsche Landesbank Girozentrale - v- Islington London Borough Council; (1996) AC 668*** and ***Earle Lewis et al v Valley Slurry Seal Company et al v (2013) JMSC Comm 21*** (unreported judgment of Mangatal J 27th December, 2013).

[20] When asked by the court whether it would be in the best interest of the company to dismiss the claim and lift the injunction, Mr. Wildman candidly conceded that an Order providing for (a) audited accounts (b) allowing a resumption in trading (c) providing for both Mr. Duncan and the Defendant to sign on cheques and (d) for the appointment of a trustee to monitor the affairs of the company, could be made pending the hearing of a Petition.

[21] The Claimants counsel submitted that the injunction granted is in the best interest of the company. The claim is appropriately made in the name of the company as it is the company's losses, which are being complained about. The breach of fiduciary duty is one owed by the Defendant to the Claimant and not to fellow shareholders or directors. The Claimant also complained that the Defendant is in breach of the Interim Order made on the 4th June 2015 in that he failed to account for and deliver up all cheques, cash, money transfers or other instruments collected on behalf of the Claimant since the 18th January 2014. Claimant's counsel further submits that even if the formalities were not complied with a *de facto* director can be recognised. A failure to comply with statutory formalities is not fatal to such an appointment. In any event he submits, the Defendant is estopped from contending otherwise. He conceded that an action by minority shareholders against the majority, if it is to be brought in the name of the company, has to have the court's approval. This "derivative action is dealt with in Section 212 of the Companies Act. However if an equal shareholder has the support of the majority of the board of directors the company may bring an action against the minority without the leave of the Court. Section 212 does not apply. In his oral submissions Claimant's counsel candidly conceded that the allegations of a failure to account for cheques was to be disregarded as there was no evidential basis for it. He maintains however that the unwillingness to account for expenses incurred remains a valid complaint. When asked he also candidly conceded that interim orders requiring both the Defendant and Mr. Duncan to sign on cheques and receipts would be appropriate and it would be in order to allow for both to deal with apiaries and to account.

- [22] Claimant's Counsel relied on the following authorities: Section 176 Companies Act, *Hals 5th Ed. Vol. 14 para 409 and 478*; *Re: Hydrodam (Carby) Ltd. [1994] 2 BCLC 180*; *American Cyanamid v Ethicon 1976 AC 396*; *Foss v Harbottle (1843) 67 ER 189*; *Westdeutsche Landesbank Girozentrale -v- Islington LBC (1996) AC 669*; *Re Mumtaz Properties Ltd. et al v Ahmed et al [2011] All ER (D) 237*; *Burland v Earle [1902] AC 83*; *Universal Project Management Services Ltd v Fort Gilkicker Ltd [2013] All ER (D) 313*; *MacDougall v Gardiner 1875 1 Ch Div 13*; and *Blacks Law Dictionary Fifth Edition*.
- [23] Having read the submissions and authorities cited and having listened to both counsel, I remind myself that at this interlocutory stage I am required to make no factual finding . My task is to do substantial justice between the parties this involves consideration of which decision is likely to cause the least irremediable prejudice that is where does the balance of convenience lie. This latter only becomes necessary after I satisfy myself that there is a triable issue that is that the claim is not frivolous but has some real prospect of success. The modern formulation of the test at this interlocutory stage is to be found in *National Commercial Bank Ltd v Olint [2009] 5LRC 370*, a decision of the Judicial Committee of the Privy Council.
- [24] If, as Mr. Wildman contends, the claim is improperly brought then it will almost certainly be dismissed. I therefore consider whether the Claimant has a real prospect of establishing the necessary *locus standi*, that is, that those instructing that suit be filed in the name of the company had the requisite authority so to do. In this regard, it does appear that the Claimant has a real prospect at trial of establishing locus standi. The several communications from the Defendant addressed to "the directors" and in particular to Ms. Tricia Jack in that capacity, are strong indicators that she was so appointed. Furthermore, it is clear from the minutes exhibited that she attended director's meetings. At this interlocutory stage and without the testing of evidence it cannot be said that the claim was incorrectly brought or that the Defendant might not be estopped from contending that Ms. Tricia Jack was not a director. I agree with the Claimant's submissions in

that regard, and that section 176 of the Companies Act is apt. I am not, I think, required at this interlocutory stage to make any decision (preliminary or otherwise) as to the strength of the case as it relates to the lawfulness or otherwise of the Defendant's removal as a director. This is because if Ms Jack's appointment is held at trial to be effective, there will have been a majority of directors able to act on the company's behalf and take a decision to commence this legal action. This will be so even if the Defendant's removal as a director is ultimately found to have been unlawful.

- [25] This then leads me to consider whether an injunctive order will best meet the justice of the case. It does appear that some at least of the Claimants allegations are unsupported by the evidence. Claimant's counsel conceded as much. It does also appear that there has been a less than full reporting on the business of the company. Mr. Wildman for the Defendant urged that the allegations had more to do with the personal situation of Ms. Jack and disagreement about her future remuneration, than with any real concern about the Defendant's conduct.
- [26] Whether or not this is so, really, is a matter for a judge at trial. It seems to me, and I agreed with Mr. Young on this, that the interlocutory injunctive relief mandates the performance of duties already owed by a director at common law. The Defendant has a duty to account, he has a duty not to use the company's credit card and assets except for company business or with the company's permission.
- [27] It is true that those duties are also owed by Mr. Duncan and Ms. Tricia Jack (if she is indeed a director). However there is yet no counterclaim nor application before me in that regard with respect to the other director or directors.
- [28] On the evidence before me the justice of the case is met by preserving the status quo as far as possible. In the absence of an Injunction, if the Claimant is correct, by the time of trial the Claimant's business may have been depleted. Loss would really be incalculable since if there is no accounting one will never know how

much money would be expended or how much money would be wrongly expended or how much honey or earnings may have been unaccounted for, nor how much business lost. On the other hand, if an injunction is granted which precludes the Defendant acting without the Claimant's consent it will be requiring nothing more nor less than the Defendant is obliged in law to do anyway. This renders consideration of the Claimant's ability to honour its undertaking as to damages almost superfluous because it is difficult to imagine the loss the Defendant would be able to point to consequent on his being required to do that which in law he would have had to do in any event. It matters not in this regard that he is a shareholder. The order really protects the value of the Claimant and hence the value of investors' shareholdings. As a shareholder the Defendant has certain entitlements. He will no doubt be advised of any recourse to which he may be entitled if his powers to appoint directors, call meetings or otherwise act, are impinged. These issues are not before me. I reference them only to demonstrate that the grant of the injunction on balance will do less irremediable damage to the Defendant than will likely impact the Claimant if it is refused.

[29] I do not however believe that the order requiring the Defendant to account for amounts collected and not lodged to the Claimant's account since 18th January 2013, should have been made. In the first place, the evidence that any such thing occurred is rather weak and the Defendant stoutly denies it. In the second place such an order at this interim stage assumes that there are unaccounted for monies which is a triable issue. I therefore reverse my earlier decision and will not m put the Defendant to such an expense at this interlocutory stage. In any event, the processes of discovery and inspection of documents are best suited for that line of enquiry at an interlocutory stage.

[30] On the matter of the motor vehicle, it seems to me the status quo ought to be maintained as far as possible. It is common ground that although purchased in the joint names of the Defendant and Mr Duncan, the vehicle was intended for use on Claimant's business. The Defendant was allowed to keep and care it and within reason use it for transport personally. He is a 50% shareholder and so

even if, as the Claimant contends, the vehicle is held on trust, the Defendant is ultimately 50% beneficially entitled. It therefore is only fair that in the interim and until a final resolution, the Defendant be allowed to keep and care under certain conditions.

[31] I therefore make the following Orders at this interlocutory stage:

1. The application to discharge the interlocutory injunction is dismissed.
2. The interlocutory Order made on the 4th June 2015 and modified on the 21st September 2015 is amended and will now read as follows:
 - a. The Defendant Lascell Lloyd Smith is restrained whether by himself, his servants, and/or agents or otherwise howsoever until the trial of this action or further Order of the court from:
 - (i) Without the written permission of the Claimant trading and/or doing business with the product of apiaries established and/or managed by the Claimant.
 - (ii) Without the written permission of the Claimant using the Claimant's company's credit cards and/or from withdrawing funds from the Claimant's accounts and then only for the business of the company.
 - (iii) Without the written permission of the Claimant taking, receiving and/or accepting cheques, cash, money transfers or other negotiable

instruments intended for or made payable to the Claimant.

- b. In this order the “written permission” of the Claimant refers to a document giving the Claimant’s assent which is signed by Mr. Neville Duncan director of the Claimant.
- c. It is further ordered that until the trial of this action the Defendant is entitled to keep and care the Toyota Hilux motor vehicle on behalf of the Claimant and same is to be used for the Claimant’s business and for the purposes stated within the terms of the relevant policy of insurance. The Defendant is to be afforded 2 days notice whenever such use is required by the Claimant.
- d. The costs of operating, maintenance, insurance and to license the said motor vehicle shall be borne by the Claimant until the trial of this action.
- e. The Claimant through its counsel gives the usual undertaking as to damages.
- f. Half costs to the Claimant to be taxed if not agreed.

David Batts
Puisne Judge