IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C.L G107 OF 2001

BETWEEN	GRAINS JAMAICA LTD	PLAINTIFF
AND	DANNY WIGINTON	1ST DEFENDANT
AND	LYN WIGINTON	2ND DEFENDANT
AND	CHRISTOPHER WIGINTON	3RD DEFENDANT
AND	CRG LEE CORPORATION	4TH DEFENDANT
AND	JOHN NEWCOMB	1ST INTERVENOR
AND	PAUL BILLINGS	2ND INTERVENOR
AND	ZERLINE TAYLOR	3RD INTERVENOR
	(Executrix of the Estate William Taylor, Deceased)	
AND	VANDY INVESTMENTS LTD.	4TH INTERVENOR.
AND	COTTON ISLAND LTD.	5TH INTERVENOR
AND	PARAGON LTD.	6TH INTERVENOR

Miss Carol Davis for the Plaintiff.

Mr. Emil George Q.C and Miss Alicia Richards instructed by Dunn Cox for the Defendants

Miss D. Gentles instructed by Livingston Alexander and Levy for the Intervenors.

Heard: January 28th , 29th ; February 4, 2002

HARRISON J.

The Applications

There are two applications before me. The first, is an application for an Interlocutory injunction by the defendants to restrain the plaintiff whether by itself, its servants or agents or otherwise from convening and/or holding an Extra-Ordinary General Meeting with a view to removing the First, Second and Third Defendants as Directors of the Plaintiff Company. The defendants also seek an order to restrain the Plaintiff from

taking any other step or doing any other thing in relation to the defendants' holding of their offices as Directors and from transferring, assigning or otherwise disposing of the shares in the Plaintiff Company.

The second application is made by the plaintiff to discharge an exparte injunction granted on the 16th November, 2001 and extended on the 30th November and 19th December 2001, respectively.

I completed hearing both applications on the 29th January 2002 and reserved judgment. This is the judgment of the Court.

The Chronology of events

The facts reveal that Grains Jamaica Limited ('the Company') is a private registered company carrying on the business of importing and distributing rice in Jamaica. At the commencement of this action the shareholders in the Company were John Newcomb, Paul Billings, Bill Taylor, Taylor Cross Int. Inc, W.H Cross, Paragon Ltd, Vandy Investments Ltd, Cotton Island Ltd and Lyn Wiginton. Of the defendants, the second defendant is the only registered shareholder.

The current Directors of the Company are John Newcomb, Paul Billings, Lyn Wiginton, Danny Wiginton and Christopher Wiginton.

On or about the 27th day of January 1995, John Newcomb, Paul Billings, Bill Taylor, Danny Wiginton, Lyn Wiginton and Hy Cross, entered into an agreement entitled " SETTLEMENT AGREEMENT ON CERTAIN ISSUES" ("the Agreement") which deals with the transfer of shares giving the defendants equal shareholding and voting rights in the Company. Although the Agreement had been executed by the respective parties, no transfer of the relevant shares has taken place to date. The question as to whose responsibility it was to have the transfer of shares stamped and registered is a very live

issue in the case. It is being contended by the defendants that Newcomb, Billings and Taylor have refused to effect or cause the shares to be transferred as agreed.

The Agreement creates two sets of Directors; "A" and "B". Those falling within "A" are, John Newcomb, Paul Billings and Bill Taylor. Danny Wiginton, Lyn Wiginton and Hy Cross are in Group "B". It provides further:

> "8. The parties hereto agree to vote for and support in every way within their power and authority the changes in the GJL Articles of Association reflected on the proposed Articles attached hereto as Exhibit "A" and to further implement any changes in the Memorandum of Association of GJL necessary to accomplish and effectuate the changes to the Articles set forth in Exhibit "A". The parties further agree that the proposed changes to the Articles of Association shall be submitted to Lloyd Perkins, as counsel for the Corporation, and Mr. Perkins shall inform the parties hereto of the legality and enforceability of the same. In the event that Mr. Perkins is of the opinion that any particular provision is unlawful or unenforceable, then the remaining changes shall nevertheless be effectuated...
>
> 9. The parties acknowledge that the other parties to this Agreement may from time to time find it appropriate to:
>
> (a) Sell, mortgage, pledge, exchange, barter, transfer, assign or give their shares in GJL to a family member, a trust, or to a corporation or other entity controlled by the party in question, or to another member of their group....
>
> (b).....
>
> The parties hereto acknowledge and consent to Lyn Wiginton gifting her stock in GJL to Danny Wiginton and Danny Wiginton contributing this stock to a Cayman

Island's Corporation to be formed. This corporation shall be a permitted successor under this Agreement.

...

11. The parties hereto agree that they and their permitted successors will vote their GJL stock, and otherwise exert their lawful authority and power to accomplish the election to the GJL board of directors three nominees put forward by Group A and/or their permitted successors and three nominees put forward by Group B and/or their permitted successors. The parties agree that this obligation to support nominees put forward by the shareholders and permitted successors in the other group shall continue notwithstanding the occurrence of the types of transfers described in paragraph 9 and notwithstanding the exercise of the right of first refusal by any member of Group A or Group B as to the stock of another member of Group A or Group B or by GJL as described in paragraph 10. However, this voting agreement shall terminate upon the bona fide transfer of GJL shares owned by any member of Group A or Group B or their successors under paragraph 9 to an outsider".

CRG Lee Corporation (the 4th Defendant) was eventually incorporated in the Cayman Islands.

Newcomb has deposed in his affidavit of the 10th December 2001, that although he did sign the settlement agreement he has been advised subsequently by Counsel that the Agreement is void and unenforceable for a number of reasons. He has set out these reasons at paragraphs 4, 5 and 6 respectively of the said affidavit.

Sometime in 1999, the Company decided to expand on its milling facility and a decision was made by its Board of Directors to borrow money for this purpose. It is being alleged that the first defendant through his company the fourth defendant, loaned the Company a substantial sum of money in order to carry out this operation. Payment was

demanded towards the end of 2000 and Newcomb has alleged that the Company has fully repaid the loan. He also alleges that the first defendant failed, neglected and/or refused to return the Company's security documentation and that he has breached his fiduciary duty to the Company as a Director of the Company and which actions the second and third defendants have collaborated with and supported.

A writ of summons that is generally endorsed was filed by the Plaintiff in the Registry of the Supreme Court on the 10th September 2001. It claims against the defendants jointly and severally :

> "1. Damages arising out of a certain loan transaction and from the orchestration and implementation of a series of financial decisions calculated to defraud the plaintiff during the period 1998 – 2001 as detailed below:
> a) Against the first, second and third defendants for breach of duty of care and breach of fiduciary duty acting in their capacity as Directors and officers of the plaintiff.
> b) Against the first and fourth defendants for conspiracy to defraud and fraudulent misrepresentation.
>
> 2. An injunction restraining the first and fourth defendants from asserting any rights to the plaintiff's assets as creditors under a loan agreement dated 31st August 1999 which has been terminated by repayment of the loan.
>
> 3. An injunction requiring the first and fourth defendants to issue a Release and Discharge in respect of the plaintiff's assets that were pledged as security for the said loan.
>
> 4. Interest.
>
> 5. Costs."

To date, no statement of claim has been filed and there are no cross-actions filed in response to the plaintiff's claim.

A Notice was served on the first, second and third defendants in November 2001, requesting the holding of an Extra-Ordinary General Meeting with a view to passing a resolution to remove them as Directors of the Company. That meeting was to be held on the 19th November 2001 but on the 16th November 2001, an Exparte Injunction was granted by The Honourable Mr. Justice McIntosh restraining the Company from holding the aforesaid meeting. That injunction was extended and is still in place pending the outcome of the Interlocutory Injunction application before me.

The Affidavit evidence and Arguments

The facts that are relied upon by the parties are set out in the several affidavits on file. I have had the opportunity of reading them and assessing their contents. I am most grateful to Counsel for the respective parties for the preparation of skeleton arguments and written submissions.

Submissions

The discharge issue.

Miss Davis submitted that the defendants have misled the Court in two major respects in seeking the exparte injunction, hence it ought to be discharged. The grounds relied upon are as follows:

1. The first defendant had represented that 'The Defendants have suffered substantial damages in that their shares of stock in Grains Jamaica Limited have been rendered worthless' when in fact neither the first, third nor fourth defendants are shareholders in the Plaintiff Company. Of the defendants, only the second defendant held shares in the Company'.
2. The first defendant represented that Messrs Newcomb, Billings and Taylor 'failed and refused to effect or cause Grains Jamaica to effect the said transfer' when the true facts are that the first defendant was informed of the transfer tax and

duty payable on the transfer of shares to the fourth defendant and that it had failed to pay the duty.

Re Ground No. 1

The first defendant has deposed in his affidavit of the 15th November 2001, inter alia:

> "6. In paragraph 9 of the said Agreement, they agreed that the second defendant could transfer her shares in Grains Jamaica to me and I could assign these shares to a Cayman Island corporation to be formed. The second defendant and I did everything required of us for the effective transfer of the said shares, and they failed and refused to effect or cause Grains Jamaica to effect said transfer.
>
> ....
>
> 14 The defendants have suffered substantial damages in that their shares of stock in Grains Jamaica Limited have been rendered worthless....."

Albeit, that the first and fourth defendants are not registered shareholders, it seems clear to me that they do have a beneficial interest in the shares that have been assigned to CRG Lee Corporation, the fourth defendant. **Poole v Middleton** (1861) 29 Bcau. 646 has decided that the equitable interest passes to the purchaser as soon as the agreement is specifically enforceable. In the instant case it has been contended by the defendants that the first and second defendants have done everything required of them for the effective transfer of the shares. I cannot agree therefore with Counsel that the Court has been misled. It would be an issue at trial whether or not these shares that are held have become worthless.

Re Ground No. 2

Miss Davis submitted that "... the true facts are that the first defendant was informed of the transfer tax and duty payable on the transfer of shares to the fourth defendant and that it had failed to pay the duty". At paragraph 20 of Newcomb's affidavit sworn to on the 10th December 2001 he deposes as follows:

> "20 ...neither myself, Mr. Billings or Mr. Taylor (or his estate) have in any way prevented or attempted to prevent the transfer of any shares from the second defendant to the 1st defendant or from the 1st defendant to any corporation to be formed. The said defendants and the corporation are now and have been free to transfer the shares as they see fit. It is they and not the Company or ourselves who have failed to do all that is required to transfer the said shares. Since on or about 1999 transfer forms were sent were sent to the Company by Price-Waterhouse, and a note was endorsed on the fax and with the transfer forms forwarded to Mr. Danny Wiginton for signing. Further I was advised by Price Waterhouse that the sum of $2,599,175.67 was needed for transfer tax with regard to the said shares, and sent a note by fax requesting that Mr. Wiginton remit same. As far as I am aware the said transfer tax was not remitted by Mr. Wiginton, and it is for this reason that the said share transfers have not been effected.....In fact the 1st defendant in a meeting in December 2000 suggested that he had deliberately not transferred shares to himself and to his corporation, and boasted that neither he nor his corporation were shareholders of the Company such that they could not be liable to any creditors that the Company might have..."

A letter, written by Steven McPherson (Financial Controller of Grains Jamaica Limited) on behalf of the Company, seems to put a different view on the matter however. It states as follows:

February 18, 1999

Ms. Rhonda Adams
Duke Corporation
C/o Price Waterhouse
Scotia Bank Centre
Kingston.
Dear Miss Adams:

Re : Grains Jamaica Limited

Enclosed you will find cheque for $2,599,175.67, to cover stamp duty and transfer tax due for transfer of shares to CRG Lee Corporation.

Sincerely,

GRAINS JAMAICA LIMITED

Sgd. Steven McPherson
Financial Controller.

Due to late remittance of the tax, a penalty has been incurred and this has doubled the amount due. So far as it can be discerned, the Commissioner of Stamp Duty has not been paid. Mr. George Q.C had posed the following question, "Is it true or not that Grains Jamaica Limited had agreed to pay the necessary duty and tax"? I do agree with him that the answer to that question has to be determined at trial.

I hold therefore, that the application to discharge the exparte injunction is refused.

The procedural point issue

Miss Gentles submitted on behalf of the intervenors that the injunction prayed for by the defendants should not be granted since the defendants have neither filed a counterclaim nor a cross-action. She further argued that the injunction prayed in aid did not arise out of nor was it incidental to the relief sought by the Plaintiff. She has relied upon the cases of **Carter v Fey** [1894] 2 Ch. 541 and **Des Salles d'Ejoinoix v Des Salles d'Ejoinoix** [1967] 2 All E.R 541.

In this case, only the Writ of Summons has been filed. The relief sought is clearly stated in the endorsement. The affidavit of Newcomb also sets out the company's case against the defendants and the issues are identified. The affidavit evidence in support of the injunction also sets out detailed allegations and it is clear from them what issues the defendants are raising. I hold that the injunction sought does have a sufficient connection with the relief referred to in the endorsement. In the circumstances, it is my considered view that there is no merit in this objection.

The substantive issue

I now come to deal with the application for the interlocutory injunction.

Mr. George Q.C submitted inter alia, that in light of the Agreement which is binding on Newcomb, Billings and Taylor, they are bound in law to support the election or continuation on the Board of the first, second and third defendants and any attempt by the former to remove the defendants from the Board should be prohibited by an injunction until trial of the action. Secondly, he submitted that there are a number of serious issues to be tried in the case.

He further submitted that the fourth defendant is the equitable owner of the shares for transfer and they must be voted according to its wishes. He argued that a Court of Equity ought to prevent a group of shareholders from taking advantage of the defendants since they will use their majority on the register to out vote the beneficial

owners of shares and oust them from the Board of Directors. He referred to and relied upon the case of **Musselwhite v Musselwhite** [1962] 1 Ch. 964 which held inter alia, "2) That, when a meeting would take place after the end of the period required by law for its holding, there was no justification for determining the voting rights at that meeting by reference to the state of the share register on the last date allowed by law for the holding of it. 3) But that an unpaid or partly – paid vendor of shares remaining on the register of members after the execution of the contract for sale retained, vis-a – vis the purchaser, the right to decide how to exercise the voting rights in respect of those shares; and that, therefore, the plaintiffs were not bound to vote in accordance with the directions of B, and were entitled to complain of the defect in the meeting. Accordingly, the plaintiffs were entitled to a declaration that the meeting was a nullity."

I do agree with Mr. George Q.C that the shares to be transferred in the instant case are all fully paid up hence the defendants are in a much stronger position than the plaintiffs in Musselwhite (supra)

Both Miss Davis and Miss Gentles placed strong reliance upon section 175 of the Companies Act. Subsection (1) states:

- " A company may by ordinary resolution remove a director before the expiration of his period of office notwithstanding anything in its articles or in any agreement between it and him" (emphasis supplied)

It was their contention that there was no lawful basis on which the defendants could prevent the holding of the meeting and even assuming that the settlement agreement and the amended articles were valid, neither that agreement nor anything in the articles can affect the statutory right of shareholders to convene this meeting. Accordingly, a shareholder's statutory right to remove a director from the board of directors could not be abrogated by any agreement. **Re El Sombrero Ltd** [1958] 3 All E.R 1, **Bentley-**

Stevens v Jones [1974] 2 All E.R 653 and Palmer's Company Law (21st Edn.) at page 544 were relied upon.

It was further contended on behalf of the plaintiff and intervenors that the argument concerning the beneficial ownership of shares was to no avail since the provisions of sections 116 – 117 of the Companies Act do not recognize beneficial interests in the summoning of meetings and only registered shareholders were allowed to vote. The sections provide as follows:

> "116 No notice of any trust, express, implied or constructive, shall be entered on the register, or be receivable by the Registrar, in the case of companies registered in the Island.
>
> 117 The register of members shall be prima facie evidence of any matters by this Act directed or authorized to be inserted therein."

Conclusion

In order to obtain an interlocutory injunction, a defendant must show the Court that he has a good arguable claim and on a balance of convenience the injunction ought to be granted. (See **American Cyanamid Company v Ethicon Limited** [1975] 1 All E.R 504).

The submissions regarding the grant of the injunction seem to be based on three grounds, viz:

1. There is an agreement between shareholders to the effect that they would according to paragraph 11 of the Agreement, vote their GJL stock, and otherwise exert their lawful authority and power to accomplish the election to the GJL board of directors three nominees put forward by Group A and/or their permitted successors and three nominees put forward by Group B and/or their permitted successors.

2. The transfer of shares would give the defendants equal shareholding with voting rights.

3. The shares are beneficially owned by the defendants therefore, those whose names appear on the register as transferors of those shares would have to vote them in accordance with the wishes of the fourth defendant.

Of course, a very serious issue for determination at trial is whose responsibility it was to have the agreement stamped and the necessary tax paid? Were Newcomb, Billings and Taylor under a legal obligation to transfer the shares and have they failed to do so?

There are a number of other serious issues to be tried in the case. They are, inter alia:

1. What is the effect of paragraph 11 of the Agreement and section 175 of the Companies Act and can directors be removed regardless of an agreement entered into between shareholders.

2. Was everything done by the defendants with regards to the transfer of the shares?

3. Are the shares held beneficially by the fourth defendants to be voted according to its wishes?

4. Have the first, second and third defendants breached their fiduciary duty to the Company?

5. Is it unlawful for the parties to have shared control of the Company?

I come now to the issue of damages. Would damages be an adequate remedy were the Court to refuse the grant of this injunction? I do agree with the submission by Mr. George Q.C, that damages would not be an adequate remedy. This is so, since the

defendants would loose control of the Company and be removed from the Board of Directors. Furthermore, he argued that the applicants' would be at the mercy of the other directors; their shareholding could be systematically reduced by them and for this there could be no compensation.

It is contended also that the defendants have come to court with "unclean hands" so, a Court of Equity ought not to aid them in the grant of an injunction. I have given those allegations serious consideration.

It is my view, when all the circumstances are taken into consideration, that a Court of Equity should preserve the status quo of the Board of Directors of the Company until the Court has had an opportunity to investigate and determine the shareholding of the parties.

I hold therefore, that an interlocutory injunction ought to be granted in favour of the defendants.

Order

It is hereby ordered:

1. The plaintiff, whether by itself, its servants, agents or otherwise however be restrained, until Judgment in this action from:
    a) Convening and /or holding an Extra-Ordinary General Meeting with a view to the removal of the First, Second and Third Defendants as Directors of the Plaintiff Company.
    b) Taking any other step or doing any other thing in relation to the Defendants' holding of their offices as Directors in the Plaintiff Company until the determination of these proceedings or sooner order.
    c) Transferring, assigning or otherwise disposing of the shares in the Plaintiff Company until the determination of this action or sooner order.

2. Speedy trial ordered.
3. (a) The Statements of Claim be filed and served within 40 days of the date hereof.

   (b) The Defence be filed and served within 30 days thereof.

   © Length of trial 5 days

   (d) Mode of trial Judge alone

   (e) Time for setting down within 30 days of the close of pleadings
4. The Defendants give the usual undertaking as to damages.
5. Costs to the Defendants to be taxed if not agreed – Certificate granted for two Counsels.
6. Leave to appeal granted. It is recommended that the appeal be dealt with speedily.
7. Stay of proceedings pending the Appeal.