JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 95/90

BEFORE: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

BETWEEN	GEOFFREY CHONG DOROTHY CHONG FAMILY FOODS LTD	DEFENDANTS/APPELLANTS
AND	GLORIA MOO YOUNG ERLE MOO YOUNG	PLAINTIFFS/RESPONDENTS

David Muirhead, Q.C. and Arthur Hamilton for Appellants

Andrew Rattray, and Benito Palominio for Respondents

March 1, October 1 & December 2, 1991

ROWE, P.

On October 31, 1990, Wolfe, J ordered that Dorothy Chong her servants and/or agents be restrained from transferring, mortgaging, leasing or dealing in any way with the land known as the Mansfield property registered at Vol. 1201 Fol. 466 of the Register Book of Titles on the usual undertaking of the respondents herein to be responsible in damages. From this interlocutory injunction an appeal has been filed. It is unclear whether all three defendants have appealed or only the second defendant Dorothy Chong as the Notice of Appeal states that the court will be moved "on behalf of the defendant/appellant" whereas the legend showing on whose behalf the Notice of Appeal was filed speaks of the Attorneys-at-law acting 'on behalf of the defendant/appellants.' This lack of clarity has one minor effect as it relates to the ability of Dorothy Chong to pay damages as distinct from the assets of the other defendants.

Four natural persons, being the respondents and the 1st and 2nd appellants, formed a limited liability company known as

Family Foods Limited. Each respondent held 450 shares while the 1st and 2nd appellants held 550 shares each. The Company operated a supermarket in Ocho Rios. The respondents allege, inter alia, that the 1st and 2nd appellants, in fraud of the 3rd appellant and of the respondents, and in breach of their duty to the 3rd appellant caused land known as Mansfield property registered at Vol. 1201 Fol. 466 of the Register Book of Titles to be transferred into the name of the 2nd appellant Dorothy Chong, whereas such property ought to have been transferred to the 3rd appellant which provided the purchase money and on whose behalf the purchase was negotiated.

On 21st October, 1987 the respondents commenced an action in the Supreme Court against the appellants claiming damages for breach of duty, fraud, breach of trust and conversion as against the 1st and 2nd appellants. Neither the Writ nor the Statement of Claim contained a prayer for injunctive relief. Through their attorneys-at-law on May 4, 1988 the respondents lodged a Caveat against the registration of any change in the proprietorship or any dealing in the Mansfield property registered at Vol. 1201 Fol. 466 of the Register Book of Titles. Then on June 13, 1988 the respondents petitioned in suit E57A of 1988 for the winding-up by the Court of Family Foods Limited under the provisions of the Companies Act on the grounds that it was just and equitable so to do. When this petition came on for hearing on September 22, 1988 an Order was made that Family Foods Limited be wound up by the Court under the provisions of the Companies Act and Mr. Kenneth Lacruise was appointed Liquidator.

The respondents were informed that on October 23, 1990 the Registrar of Titles advised their attorneys-at-law that the appellant Dorothy Chong was seeking to register a mortgage of the Mansfield property to the Bank of Nova Scotia Jamaica Limited.

There had earlier been an advertisement in the Sunday Gleaner of April 1, 1990 that Noble House Limited intended to develop the land the site of the Mansfield Property by erecting an office and shopping complex thereon. These two events, viz: the proposed mortgage loan and the possible development of the disputed property led the respondents to seek injunctive relief.

Wolfe, J found that the respondents have locus standi to bring the action under the second exception to the rule in **Foss v. Harbottle** [1843] 2 Hare 461, viz: that the subject matter of the suit sounded in fraud against the minority and the wrong-doers were themselves in control of the company, and that the respondents were entitled to, and did institute a derivative action. Before us Mr. Muirhead reserved his position on the issue as to the pleadings and did not argue ground 1 which had alleged that the proceedings were fatally flawed in that the Writ and Statement of Claim failed to comply with sections 4 and 97 of the Judicature (Civil Procedure Code) Law. His main arguments were in support of ground 3 which complained that:

> "There was no evidence before the learned trial judge -
>
> (i) to establish any legal right in the plaintiffs to maintain the application for injunction or to support a grant of interlocutory injunction and/or
>
> (ii) that the plaintiffs possessed sufficient means to make an undertaking efficacious and acceptable to the Court."

Mr. Muirhead referred to the Caveat filed by the respondents in which they asserted their "claim for an estate or interest in equity" in the Mansfield property and submitted that if the respondents had truly brought a derivative action for the protection of the company, they could not at the same time have a separate

personal interest in that suit. If, he submitted, the respondents had no personal right to support a Caveat directed to property which ought to have been owned by the company, but which through the fraud of the appellants had been registered in the name of the 2nd appellant, these respondents would be seeking injunctive relief in a case in which they had no legal right. He relied on the statement of the law in Order 29/1/9 of the Supreme Court Practice, 1970 which provides in part that:

> "It is a fundamental rule that the Court will grant an injunction only to support a legal right. ... The person entitled to an injunction is the person whose legal right has been infringed."

Counsel on both sides readily subscribed to this principle. But Mr. Muirhead, for the appellants, made two points based upon the provisions of the Registration of Titles Act. He said, firstly, that by section 68 of that Act, every Certificate of Title issued under that Act shall be received in all Courts as evidence of the particulars contained therein and secondly that a procedure is established by section 140 to deal with circumstances where a Caveat is challenged. I agree with the contention of Mr. Rattray that where fraud is alleged section 68 of the Registration of Titles Act provides no protection for the holder of the Certificate of Title and that efficacious as may be the procedure in section 140 of the Act to enable the Caveator or the registered proprietor to challenge the Caveat, that procedure does not oust the jurisdiction of the court to grant equitable relief if fraud is alleged. What Mr. Rattray maintained was that the minority shareholders were claiming a legal right to the title to the property and the issue could not be settled by the simple answer that at the present time the 2nd appellant holds the legal title to the property. To me this contention is most persuasive and I therefore find no merit in ground 3 (i) quoted above.

Wolfe, J held that damages could never be an adequate remedy if the allegations of the respondents were substantiated at trial. He went on to consider the sufficiency of the respondent's undertaking in damages. He said this:

> "It now remains to decide whether if the defendants were to succeed on the action they would be adequately compensated under the plaintiff's undertaking as to damages for the loss they would have sustained by being prevented from dealing with the property between the time of the application and the time of the trial. If this question is answered affirmatively and the plaintiffs would be in a financial position to pay the damages awarded, then the interlocutory injunction ought not to be refused. The affidavit filed in support of the application is silent as to the ability of the plaintiffs to pay. Equally the defendants have not contended that the plaintiffs would be unable to pay any damages which may be awarded. It has been argued that the failure of the plaintiffs to set out in the supporting affidavit their ability to pay any damages which may be awarded can lead to no other conclusion but an adverse finding as to their ability to pay. I disagree with this approach. The undertaking to pay must be given some weight. Equity presumes that all men are honest. Hence, the undertaking given ought to be interpreted to mean that the plaintiffs have the ability to pay such damages as may be awarded."

Mr. Muirhead submitted that in the circumstances of this case damages is the only remedy that the respondents can hope to receive as the company is in liquidation, the whole object of which is to enable the liquidator to realise the assets and distribute them among the shareholders. This he said, is a claim which requires a money determination and consequently the only remedy lies in damages. He relied upon the provisions of section 137 of the Companies Act and Article 135 of Table A for the proposition that a liquidator can only distribute in specie or kind, if he has the sanction of an extra-ordinary resolution, the passing of which requires a 75% voting majority.

There was no evidence that the Articles of the 3rd appellant either incorporated Table A or were similar thereto. It is stated in the Law of Company Liquidation by B.H. McPherson at page 247 that:

> "When all the assets of the company have been got in and realised, and all the debts and liabilities including the costs of the winding-up, have been paid or provided for, the liquidator may proceed to distribute any surplus among the members of the company. Their rights of sharing in the distribution are prescribed by the articles, but subject to these, the principle is one of equality. In order to carry this into effect it may be necessary for the liquidator to adjust the rights of the contributories inter se by making calls on those who have paid less on their shares than their fellow-members in order to ensure that losses are evenly distributed among all the members of the company. Once this stage has been reached the liquidator is virtually a bare trustee for the members who can call upon him to distribute the remaining assets either in their liquidated form or in specie." [emphasis supplied]

Mr. Rattray submitted that as the 3rd appellant is solvent, the possibility exists that the liquidator could be called upon to distribute the assets of the company in specie. After an adjournment for affidavits of the means of the parties to be filed, the respondents produced an affidavit from the liquidator which shows that the 3rd appellant has net assets of $1,424,705. Therefore, if, at trial, it is found that the Mansfield property forms part of the assets of the company the real possibility exists that there could be a distribution in specie. I conclude that damages is not, inevitably, the only remedy that the respondents can obtain if they succeed in their claim at the trial.

Wolfe, J must have been concerned that if the Mansfield property were to be developed and transferred to sundry purchasers by Noble House Limited, insurmountable difficulties might arise to trace the proceeds of the development venture. By using an equitable maxim of doubtful utility, by which he invested all men with honesty, Wolfe, J found the respondents' undertaking in damages to be of value, in the absence of any evidence whatsoever of their ability to pay. At the request of the Court, all parties have provided evidence as to means. The respondents say that their net worth is $844,973. On the other hand the appellants have provided an affidavit which does not differentiate between property owned by the 2nd appellant, against whom the injunction exists, and property of the 1st appellant. Significantly too, this affidavit is silent as to liabilities in respect of all the properties listed therein.

It is not for this Court to draw an inference that where estimated values are given, these are not values. The obligation rests upon the deponents to make a full and frank disclosure of all material facts - See **Jamculture Ltd vs. Black River Upper Morass Development Co., Ltd.,** S.C.C.A. 75/88 per Wright, J.A. On the evidence the respondents have substantial surplus assets out of which they could pay damages. On the evidence too there was no estimation of the damages which the appellants would suffer if the development did not proceed as they had planned. In the result, this case seems to fall neatly within the guidance given by Lord Diplock in **American Cyanamid v. Ethicon** [1975] 1 All E.R. 504 at 511 where he said:

> "Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing something he has not done before,

> "the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark on a course of action which he has not previously found it necessary to undertake."

As I do not find merit in the grounds argued on behalf of the appellants, I would dismiss the appeal with costs to the respondents to be agreed or taxed.