Judgment Book
SUPREME COURT LIBRARY
KINGSTON
JAMAICA

IN THE SUPREME COURT OF JUDICATURE

IN EQUITY

SUIT NO. E.414 OF 1996

IN THE MATTER OF JAMAICA GRANDE LTD.

AND

IN THE MATTER OF SECTION 115 OF THE COMPANIES ACT.

BETWEEN	Century National Bank Ltd.	Applicant
AND	Jamaica Grande Ltd.	First Respondent
AND	Century National Merchant Bank and Trust Company Ltd.	Second Respondent
AND	C.N.B. Holdings Ltd.	Third Respondent
AND	Century National Building Society	Fourth Respondent
AND	The Attorney General of Jamaica (on behalf of the Government of Jamaica pursuant to the provisions of the Crown Proceedings Act)	Fifth Respondent
AND	Renaissance International Ltd.	Sixth Respondent

Michael Hylton, Q.C., Peter Goldson and Miss Minette Palmer for the Applicant instructed by Messrs. Myers, Fletcher & Gordon

Robert Baugh and Mrs. Verletta Green for First Respondent

Mrs. Angella Hudson Phillips, Q.C., and Dr. Adolph Edwards for the Second Respondent instructed by Adolph Edwards & Co.

Lord Gifford, Q.C., Leon Green & Audley Foster for the Third Respondent instructed by Miss Marjorie Brown.

Winston Spaulding, Q.C. and Charles Piper for the Fourth Respondent instructed by Piper and Samuda .

Lennox Campbell, Senior Assistant Attorney General, Miss Nicole Foster and Miss Marsha Dunbar for the Fifth Respondent, instructed by the Director of State Proceedings.

Mrs. Pamela Benka Coker, Q.C. and Ransford Braham for the Sixth Respondent instructed by Messrs. Livingston, Alexander & Levy.

Heard: January 7, 8, 9, 10, 15, 16, 1997 & February 13, 1997.

CORAM: WOLFE C.J.

This motion filed on the 20th day of September, 1996, prays the following orders from the Court.

1. It be declared who is the true legal and/or beneficial owner of the 1,100,040 shares in the capital of Jamaica Grande Limited now standing in the name of the second respondent, or part thereof.
2. If necessary in consequence of such declaration, the Register of Members of Jamaica Grande Limited be rectified pursuant to section 115 of the Companies Act, by striking out the name of the second respondent therefrom, as the holder of the said shares or part thereof and by inserting in lieu thereof, the name or names of the true owner. And that the applicant be authorised to effect the necessary alterations in the said Register for carrying such order into effect.
3. Notice of such rectification, if any, be given to the Registrar of Companies.
4. There be such order as the Court shall seem fit.
5. Costs of the application to the applicant.

When this motion came up for hearing on the 7th day of January, 1996, the sixth respondent was not a party to the motion. On January 8, 1997, Mrs. Benka-Coker applied to have the sixth respondent added as a respondent. The parties consented to the application and the Court pursuant to section 100, of the Judicature (Civil Procedure Code) Law, ordered the sixth respondent to be added as a respondent.

Lord Gifford, Q.C., by way of a preliminary objection, submitted that the Motion instituted by the applicant, Century National Bank Ltd., was not properly instituted, in that it was done without the lawful authority of the Board of Century National Bank Ltd., by the temporary Manager of the Bank, who lacked the necessary authority, so to do.

The Court dismissed the objection as being without merit and ordered that the hearing of the motion be proceeded with.

HISTORY

By letter dated July 10, 1996, the Honourable Minister of Finance appointed Mr. Richard Downer to be his agent in the capacity of Temporary Manager of the Century Financial Entity. This Entity includes the applicant and the second and fourth respondents. The Minister's action was taken pursuant to section 25(3)(c) of the Banking Act 1992, Section 25(3)(c) of the Financial Institutions Act 1992 and Regulation 64(d) of the Bank of Jamaica (Building Societies) Regulations, 1995.

The affidavit evidence of Richard Downer in support of the motion discloses that the first named respondent was incorporated on the 15th day of February, 1991, under the Companies Act, as a company limited by shares, with a share capital of $2,500,000 divided into 2,500,000 (ordinary and "B" shares) shares of $1.00 each, of which 1,224,998 ordinary and 1,000,000 "B" shares (amounting to 2,224,998 shares) have been issued and are fully paid up, and with the objects set forth in the Memorandum of Association, thereof. I will not dilate upon the differences between the rights attaching to the classes of shares, as such differences are not germane to the issues which arise for determination.

The third respondent was incorporated on the 25th day of June, 1992 and acquired shares in the applicant bank, the second respondent bank and the fourth respondent building society. It should be noted that prior to June 25, 1992, the majority shares in the Merchant Bank, the second respondent, were owned by the applicant.

Donovan Crawford and Valton Caple Williams were both directors of the applicant, the second respondent, the third respondent and the fourth respondent. Crawford, both personally and through another company controlled by him, owned a majority of the shares in the third respondent and through the third respondent controlled the applicant, the second respondent and the fourth respondent.

The Register of Members of the first respondent contains two entries dated May 20, 1991, which record the applicant as being a shareholder of the first respondent holding 1,100,040 shares in the share capital of the first respondent. The entries were amended by crossing out the name of the applicant and substituting the name of the second respondent.

The Return of Allotments dated October 1, 1991, and filed at the Office of the Registrar of Companies shows that the applicant was allotted 766,706 ordinary shares and 333,334 "B" shares, amounting to 1,100,040, on the fourth day of May, 1991.

By a document entitled "Amended Return of Allotments" dated March 8, 1993 and filed in the Office of the Registrar of Companies, a return of allotment of shares in the first respondent is described as having been made on May 20, 1991 for the same number of shares and to the same parties as the First Return of Allotments but for the fact that one ordinary share was allotted to Basil Anthony Parker and Judith Ann Davis and the second respondent is referred to as the entity to which the shares are allotted instead of the applicant.

It is to be observed that no explanation appears in the Register of Members of the first named respondent nor in the Minute Books of the Meetings of the Board of Directors of the said respondent, of the applicant or of the third respondent, for the crossing out of the applicant's name in the Register of Members of the first respondent and there is no record of any transfer of the said shares having been proffered, received or accepted by the first respondent, nor noted in any of its records. Further, no explanation for the substitution of the second respondent's name appears on the Amended Return of Allotments or anywhere else among the records of the first respondent at the Office of the Registrar of Companies.

Against this background, the applicant contends that there can be no doubt that the original allotment of the 1,100,040 shares was made to the applicant and that the applicant is the legal owner of the said shares. In this contention, the applicant is supported by the first, fifth and sixth respondents.

The second respondent claims the legal and beneficial ownership of the shares and in so doing contends that at all material times it was intended to allot the shares to the second respondent and this was made clear to all and sundry present at the meeting of May 4, 1991, when the shares were allotted. The purported allotment to the applicant, says the second respondent, came about by the error of the person recording the minutes of the meeting. When the error was discovered the draft minutes of the meeting were amended to reflect the true intention of the meeting of May 4, 1991. Consistent with that amendment, the Return of Allotment and the Register of Members were accordingly amended. The third and fourth respondents support the claim of the second respondent.

The question which I must now resolve is whether the allotment of shares on May 4, 1991, was intended for the applicant or for the second respondent. I bear in mind that it is the second respondent, who is alleging that there was an error and it is my view the burden of so proving rests upon the second respondent.

In support of its claim, the applicant relies upon the evidence of Horace Peter Myers, an Attorney-at-Law, Nikolas Eastwick-Field, a senior Vice President of Renaissance International Inc., one of the original and existing shareholders in the share capital of the first respondent, Fred Kassner, one of the original and existing shareholders in the share capital of the first respondent and also the surrounding circumstances.

TO WHOM WAS THE ALLOTMENT MADE ON MAY 4, 1991?

Horace Peter Myers, who was cross-examined on his affidavit evidence asserts that he was present at the first meeting of the Board of Directors of the first respondent, held on May 4, 1991. In fact, he performed the role of Recording Secretary and made a draft of the Minutes of the Meeting. He further asserts that, to the best of his recollection there was no reference made of

the second respondent. The reference at that meeting was to the applicant, Century National Bank Ltd. or "to the Bank", and that he understood the Bank to mean, the Century National Bank Ltd. At paragraph 10 of the Draft Minutes the following is recorded.

"10. **Bankers**

It was resolved that the Century National Bank Ltd. - be appointed bankers of the Company in accordance with the Resolutions, copies of which are attached to these Minutes. It was further resolved that so long as the Bank is a shareholder of the Company, the Bank Account of the Company and of the hotels owned by the Company in Jamaica shall be kept with the Bank and the Bank shall be used for all banking transactions provided that the Bank is able to offer terms and services competitive with other commercial banks in Jamaica. (emphasis mine).

Paragraph 11 of the said draft minutes entitled Allotment of Shares, indicates that 766,706 ordinary shares and 333,334 "B" ordinary were allotted to the applicant. The entries in these two paragraphs is in my view conclusive that the shares were intended to, and were in fact allotted to the applicant.

It is clear that the applicant as a shareholder in the first respondent. was claiming the right to be the Banker for the first respondent. I am not unmindful that the draft minutes were not confirmed by the Directors of the Board. I am satisfied that the draft minutes represents an accurate record of what transpired at the meeting on May 4, 1991.

Mr. Myers re-collection is challenged on the basis that he acquiesced subsequently, in amending the draft minutes. An indication, says Lord Gifford, Q.C., that Mr. Myers was not sure about the accuracy of the draft minutes.

I accept as true the explanation proffered by Mr. Myers, as to the amendment. The amendment is, in my view, a scheme hatched out between Valton Caple Williams and Aulous Madden. Madden it was who introduced the idea of an error having been made. This was "a created error" as Mrs. Benka

Coker, Q.C., so aptly puts it. Although Williams deposed that the allotment was to the second respondent and not the applicant, he nevertheless on the first day of October, 1991, signed the Return of Allotments, which stated that the allottee of the disputed shares was the applicant, Century National Bank Ltd. When he is confronted with this fact he offers the spurious excuse that at the time of signing he did not observe that the applicant was named as the allottee.

Williams was appointed Secretary to the first respondent on the 4th May, 1991. As Secretary of the first respondent he never sought to have the minutes of that meeting confirmed. I find that his failure to have the minutes confirmed was deliberate in that confirmation of the minutes would have put paid to the "error scheme".

Why was the Register of Members of the first respondent so clandestinely amended as also the Share Certificates? It had to be done that way because the draft minutes accurately represented the allotment.

In addition, the evidence of Mr. Myers is supported by the evidence of Nikolas Eastwick-Field. He is positive that the allotment was made to the applicant. He said at the time no mention was ever made of any subsidiary or wholly own subsidiary of the applicant.

Mr. Eastwick-Field was a very impressive witness and I accept his evidence and find that no allotment was ever made or intended to be made to the second respondent.

Mrs. Hudson Phillips, Q.C., submitted that the surrounding circumstances would prove more reliable than the recollection evidence.

What are the circumstances to which she refers?

(i) The shareholders agreement makes the second respondent eligible to hold the shares which are in dispute;

(ii) The affidavit of Mr. Christopher Bovell, an Attorney-at-Law;

(iii) It was the second respondent that paid for the shares;

(iv) Financial Statements of the second respondent show the shares as an asset of the second respondent.

The shareholder's agreement, in my view, while it speaks to the possibility of a wholly own subsidiary of the bank holding the shares, is not conclusive that the the original allotment was made to the second defendant.

As to the payment for the shares by the second respondent and the Financial Statements of the second respondent, I attach very little weight to these factors for the following reasons:

(i) These are part of the scheme devised by manipulative directors who are directors of all the Century Financial Entities;

(ii) The financial audit is done by Aulous Madden who, in my view, along with Williams hatched the "error scheme".

The overwhelming evidence points to the genuineness of the allotment made on May 4, 1991.

I set out below the evidence which supports this conclusion.

(i) The draft minutes although they were never confirmed by the Directors;

(ii) The Return of Allotments dated 4th May, 1991;

(iii) The Share Certificates dated 30th May, 1991;

(iv) The Register of Members dated 20th May, 1991; (prior to amendment)

(v) Minutes of the Meetings of the Board of Directors of the first respondent between 1991 and 1994 which all speak to the applicant as holder of shares in the first respondent company.

(vi) Memorandum showing injection of cash into the first respondent company by the applicant dated 29th May, 1991;

(vii) The Subordination and Intercreditor Agreement dated November 24, 1992.

A crucial question to be answered is, why were not all the persons present at the meeting of May 4, 1991, consulted to ascertain or verify to whom the allotment was made, rather than Mr. Williams acting on his own, without reference to anyone, instructing Mr. Myers as to what was the intention of the meeting.

To her credit Mrs. Hudson Phillips, Q.C. conceded that if the shares were intended to be allotted to the applicant and the Directors used money belonging to the second respondent to pay for these shares, the effect would be that the shares are owned by the applicant and that a debt would be owing to the second respondent. The amended allotment would be of no effect.

I accept this as correct.

Mrs. Benka Coker, Q.C., with her usual clarity submitted that the allotment was completed on May 4, 1991. Share Certificates were issued in the name of the applicant. The applicant was entered on the Register of Companies. Any amendment to what had been done would have to be sanctioned by the Court, as these amendments affected the rights of a legal entity. Opportunity ought to have been given to the applicant to oppose or support the amendments. Shareholders in Century National Bank would have been entitled to notice of the intended transfer.

See *Palmer's Company Law 24th Edition p. 808 paras. 51-13 and 51-14.* Also In *re Derham and Allen Ltd. 1946 1 Ch.31.*

Before leaving this issue I ought to say something on the affidavit of Mr. Christopher Bovell, a man of undoubted integrity. When all the surrounding circumstances are taken into consideration I prefer the evidence of Mr. Myers and Mr. Nikolas Eastwick-Field to that of Mr. Bovell. The surrounding circumstances support the evidence of both Myers and Eastwick-Field.

On the evidence, both documentary and oral, I find that the allotment was made to the applicant and that the clandestine amendments of the draft minutes, the Return of Allotments, the Share Certificates and the Register of Members are all void and of no effect.

The purported allotment to the second respondent, if I may borrow the words of <u>Roxborough J, in *Tintin Exploration Syndicate Ltd. v. Sandys and Others* [1947] 177 LT 412</u> -

"was a mere token a colourable transaction"

These findings are sufficient to dispose of the issues raised by the motion. However, out of deference to Counsel, I will address the other issues raised in arguendo.

<u>RE TRUST DEED</u>

Having found that the original allotment was to the applicant it follows that the Declaration of Trust between the second respondent and the third respondent is of no effect, as the property in the shares do not belong to the second respondent. The second respondent has nothing to give -

"Nemo dat quod non habet".

The second respondent was never the legal or beneficial owner of the shares, and therefore, could not make such a declaration of trust.

Like the amendment of the records referred to earlier the declaration of a trust by the second respondent in favour of the third respondent is nothing but a "sham".

I say this, for the following reasons:

1. In 1991 when the second respondent allegedly acquired the shares, the third respondent had not been incorporated. So the second respondent was holding in trust for a non existent entity.
2. It took the second respondent almost three years to make the Declaration of Trust after the alleged allotment of the shares to the second respondent. Further the Declaration of Trust was not

made until over a year from the date of the Amended Return of Allotments.

3. During all this time there is no record anywhere to indicate that the second respondent was holding the shares in trust for anyone. One would have expected, if this were so, that the financial statements of the second respondent, exhibited herein, for the periods ending June 1991, June 1992 and June 1993, would have so stated.

4. Assuming that the Shareholders' Agreement applied to the second respondent, it would be reasonable to expect that the trust in favour of the third respondent would have been mentioned in the Shareholders' Agreement.

5. The affidavit of Richard Downer at paragraph 20 states:

> "I have not been able to locate a stamped copy of the Trust Deed or any other document indicating that any stamp duty or other taxes were paid in relation thereto."

This raises serious doubts as to the validity of this document. Mr. Hylton, Q.C. submitted that the document would not have been stamped by the Stamp Office without supporting evidence in proof of the alleged trust in favour of the third respondent.

This is of significance because, if there was no trust ad valorem stamp duty and transfer tax would be payable on the transaction as a transfer of shares from the second respondent to the third respondent.

I find that the entire declaration of a trust was no more than a clever attempt to transfer the shares to the third respondent without the payment of transfer tax and stamp duties. This was also a method being employed to defeat the pre-emptive rights of other shareholders as set out in the Shareholder's Agreement and the Articles of Association.

There has been no allegation of fraud advanced, for whatever reason, but on the evidence before the Court I conclude that the entire dealing with the

shares after the allotment on May 4, 1991 was nothing but a fraudulent scheme being perpetrated by those who really controlled the operations of the different entities. The Declaration of Trust is of absolutely no legal effect. At no time whatsoever did the second respondent ever have a proper title to the shares. Nothing has therefore passed to the third respondent.

I may add that even the method of payment for the shares confirms that the entire dealing with the shares is dubious. One of the "strong points" advanced by Mrs. Hudson Phillips, Q.C. in her arguments, as to whether or not the allotment was to the second respondent, is that it was the second respondent, who paid for the shares. So it appears at first sight, but a careful examination of the First Trade transaction shows that it was the applicant which really paid for the shares. The applicant placed a time deposit with First Trade. First Trade used that money to secure a loan to the third respondent. The third respondent used the money to pay off the second respondent. First Trade appropriated the applicant's deposit to liquidate the loan which was made to the third respondent. So at the end of the day the applicant ended up paying for the shares.

NEGATIVE PLEDGE UNDERTAKING/ MEMORANDUM OF DEPOSIT DEEDS

Having found that the original allotment was made to the applicant and that the applicant was the legal and beneficial owner of the shares, it follows naturally that the negative pledge undertaking and the Memorandum of Deposit of Title Deeds, whereby the Certificate for the shares was deposited with the Bank of Jamaica, are invalid. The third respondent had no title in the shares which it could properly have pledged.

Even if the second respondent was the legal and beneficial owner of the shares there are two factors which would preclude the third respondent from pledging the shares, viz.

(i) The invalidity of the allotment;

(ii) The invalidity of the declaration of trust.

Both matters have already been addressed in this judgment.

As a matter of completeness let me state that by the same process of reasoning the fourth respondent could acquire no interest in the shares from the purported sale to it by the third respondent.

Now to the very attractive arguments urged by Mr. Spaulding, Q.C., for the fourth respondent. He posited as follows:

(1) That the second respondent owns the shares legally but the fourth respondent has a beneficial interest in the 700,000 shares under the agreement dated 21st January, 1996 and the third respondent has a beneficial interest in the balance of the shares. Both interests are encumbered, he submits, by a charge in favour of the Government of Jamaica or its nominee.

(2) If the Court finds that the shares are owned by the applicant and not the second respondent, it is submitted that the applicant is estopped from alleging that it owns the shares beneficially in that it has by its conduct in conjunction with the second respondent made representations of fact either with knowledge of its falsehood or with the intention that it should be acted upon to the effect that the shares were legally held by the second respondent, and beneficially by the third respondent and then subsequently owned beneficially by the fourth respondent, and the third respondent after the fourth respondent acquired beneficial interest in the 700,000 shares. Both interests are encumbered in the name of the Government of Jamaica or its nominee.

(3) If the Court finds that Holdings could not have acquired the beneficial interest and as part of that interest to the 4th respondent as in (1) above, that is, through the second respondent, as in (1) above, and that the applicant was not

entitled to legal ownership then the second respondent would be estopped by its conduct in conjunction with that of the applicant as set out in (2) above from claiming beneficial interest in the shares encumbered to the Government of Jamaica or its nominee.

Attractive as the argument might be re estoppel, I am of the view that the doctrine of estoppel has no place in the circumstances of this case. At least six (6) of the directors of the Century Financial entity were directors of the applicant, the second respondent, the third respondent and the fourth respondent. As Mrs. Benka Coker submitted - "none of the companies could have been misled to believe that what was untrue was true in that their entire directorship was a kind of incestuous relationship whereby the same persons controlled all the entities".

The directors of the company especially Williams and Crawford manipulated the operations of the company. If the other directors were not part of the manipulation, they clearly closed their eyes to the obvious.

By way of Summary, I find as follows:

(1) That there was no mistake of fact in relation to the original allotment of the shares by the directors at the director's meeting on May 4, 1991. That the draft minutes prepared by Mr. Horace Peter Myers, accurately reflected what the parties attending the meeting intended. That the applicant, Century National Bank Ltd., was the original allottee.

(2) That the attempt or the purported amendment of the Return of Allotment of Shares in 1993 was null, void and ineffective because -

   (i) the claim that there was an error in the draft minutes is a mere device to circumvent the original allotment.

(ii) Even if there was an error, and I hold there was none, the amendment could only have been effected by an order of the Court, ordering rectification.

3. That the Trust Deed of March 28, 1994 is illegal. In the event I am wrong in so holding, I find that it is a mere sham initiated by the directors to evade the payment of certain duties.

4. That all transactions founded upon the existence of the Trust Deed are null and void to wit:

(i) the pledging of the shares by the third respondent to the Bank of Jamaica.

(ii) The purported sale of 700,000 shares to the fourth respondent by the third respondent.

5. That article 28 of the Articles of Association of the first respondent as amended by the special resolution of the 20th May, 1991, confer upon the shareholders of the first respondent valid, effective and enforceable pre-emption rights which are still existing.

6. That the claims of the second, third and fourth respondents are completely unfounded.

As a consequence of all these findings I declare as follows:

1. That the applicant, Century National Bank Ltd., is the legal and beneficial owner of the 1,100,040 shares in the capital of the first respondent, Jamaica Grande Ltd. and order that:

(a) The Share Register of Members of Jamaica Grande Ltd. first respondent, be rectified pursuant to section 115 of the Companies Act by striking out the name of Century National Merchant Bank and Trust Company Ltd., second respondent, therefrom as holder of the said shares and inserting the name of Century National Bank Ltd., the

applicant as the legal and beneficial owner of the said shares.

(b) The applicant is hereby authorised to take such steps as are necessary to effect alterations in the Share Register of Members of the first respondent, Jamaica Grande Ltd.

(c) The applicant gives notice of the rectification to the Registrar of Companies.

(d) There will be no order as to Cost.

Finally let me place on record my profound thanks to the Attorneys-at-Law for the industry demonstrated in the presentation of the arguments.