SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

SLUHCV2003/0424

IN THE MATTER of the Companies Act 1996

And

IN THE MATTER of an Application pursuant to Section 241 of the Companies Act 1996

BETWEEN:

JOAN DEVAUX

Claimant

and

(1) DUBOULAY HOLDINGS LIMITED
(2) FOND CACOA LIMITED
(3) THERESE ROBINSON
(4) CHARLES DEVAUX
(5) RACHEL DUBOULAY
(6) DAWN KRONE
(7) RACHEL DUBOULAY and DAWN KRONE as Trustees of THE MARGUERITE SALTMAN TRUST

Defendants

Appearances:

Mr. James Bristol for the Claimant and with him is Mr. Anthony Bristol
Mr. Kenneth Monplaisir QC for Nos. 3 and 4 Defendants
Mr. Peter I. Foster for Nos. 5, 6 and 7 Defendants

2003: August 18, 19,22
September 22

COMPANY LAW…CLAIMANT SEEKS RELIEF UNDER OPRESSION REMEDY …SECTION 241 OF THE COMPANIES ACT 1996…WHETHER ALLEGED ACTS AMOUNT TO OPPRESSION

OR ARE UNFAIRLY PREJUDICIAL TO CLAIMANT…WHETHER JUST AND EQUITABLE TO ORDER "BUYING OUT" BY CLAIMANT OR WINDING UPOF COMPANY…FAMILY UNITY

JUDGMENT

1. HARIPRASHAD-CHARLES J: This is an unfortunate family matter which could have been resolved amicably had there been a little more tolerance and understanding. It concerns a family business with large assets. Du Boulay Holdings Limited (the Company) was incorporated on or about July 1973 by Andre Cornibert Du Boulay and his wife, Marie Du Boulay who were the sole shareholders. Fond Cocoa Limited (Fond Cocoa) is a wholly owned subsidiary of the Company. The primary purpose of the Company was to acquire movable and immovable assets with the overriding objective of preserving these assets as a family concern. The major asset was the Soufriere Estate which originally comprised of 90 acres of which 60 acres was acquired by the Company. The other 30 acres was later vested in Fond Cocoa to assist with the development of the Company.

2. After the death of Andre Du Boulay and his wife, their fortune was passed on to their five children, Joan Devaux, Michael Du Boulay, Camille Devaux (now deceased), Therese Robinson and Marguerite Saltman in equal shares. Andre Du Boulay died in 1982 and his eldest child, Joan Devaux took over the operations of the Company as the Managing Director on or about 1983. At age 81, she is still the Managing Director.

3. On 23rd May 2003, Mrs. Devaux filed a fixed date claim form claiming relief under the oppression remedy as provided by Section 241 of the Companies Act 1996. She alleges that the business or affairs of the Company and Fond Cocoa are or have been carried on or conducted in a manner that is oppressive or unfairly prejudicial to and which unfairly disregards her interest as shareholder and Managing Director.

The Issues

4. The questions requiring determination are:

   (i) Has the Claimant been oppressed or been treated in a manner that is unfairly prejudicial to her within the meaning of section 241 of the Companies Act and

(ii) Are there just and equitable grounds within the meaning of the said Act to order the buying out of the Third to Seventh Defendants' shares or to order a winding up of the Company?

Background Facts

5. Some background facts will put the case in its proper perspective. Most of what I now outline reflects uncontradicted and unchallenged evidence of the parties. To the extent that there is a departure from any agreed facts, then what is expressed must be taken as positive findings of fact made by me.

6. Mrs. Devaux has been the Managing Director of the Company for the last 20 years. She owns the most shares in the Company, a total of 1,999 of the issued shares. She previously had 2,000 but gave one to Richard Peterkin, the present Chairman of the Company. The Third Defendant, Mrs. Therese Robinson owns 1,000 shares. The Fourth Defendant, Mr. Charles Devaux owns an insignificant 2 shares; the Fifth Defendant, Dawn Krone owns 489 shares, the Sixth Defendant, Rachel Du Boulay owns 509 shares and the Seventh Defendant, Marguerite Saltman represented by her daughters, Dawn Krone and Rachel Du Boulay owns 1,000 shares. Both Dawn and Rachel inherited their shares from their deceased aunt, Camille Devaux.

7. The Company has gross annual revenue of $1.5 million and a net of $233,847.00 as of the end of the financial year December 31, 2001.The 2002 figures have not been audited. The retained earnings are $2.44 million and the net assets are $2.9 million. The Company has fixed deposits of $846,152.80 and other cash of $193,862.20. The term deposits are reserves to be used for capital projects, storm damage and as a reserve or buffer in case of any down turn in the tourism industry. The present fixed deposit has been reduced by approximately $500,000.00 by paying off $111,000.00 to the previous site manager as gratuity, $340,000.00 as special dividends pursuant to a resolution tabled by the Majority and $50,000.00 as previously declared dividends. The Company is today one of the premiere tourist sites in Saint Lucia. It presently employs about 44 staff in its operations and has several thousand visitors per tourist season and has been featured in several international travel publications.

8. The success of the Company is largely due to the industry and dedication of Mrs. Devaux. She is undoubtedly an excellent businesswoman and a successful entrepreneur. All of the other shareholders respect and admire her in her management of the Company. She ran the Company well and for that, she received a decent monthly salary of $6,000.00, monthly travel allowance of $1,500.00, insurance on her car, medical insurance and telephone expenses. She alleged that she never received a market rate for her services as Managing Director nor has she demanded same as she has always treated the business as a family business. It is interesting to note however, that Mrs. Devaux dictates and authorizes her salary and allowances in consultation with the Chairman and no shareholder has ever restricted her right to remuneration for her services.

9. While the Company did become financially viable under her management, the perennial problem which goes back for years was that Mrs. Devaux was too autocratic and exercises total control over the affairs of the Company to the exclusion of the other Shareholders and Directors. There were the allegations that she ran the Company as though it was her own. The accounts of the Company were always late. There was no accountability to the Shareholders and Directors and there was a lack of communication between Mrs. Devaux and the other shareholders. The complaints were even more pronounced when Michael Du Boulay was a shareholder. He was so disgruntled by what he perceived to be the blatant mismanagement of the Company that he decided to sell his shares to the general membership of the Company in accordance with the articles of association. On 12th July 2000, through his solicitor, Mr. Du Boulay wrote to the Managing Director offering for sale his 1,000 issued shares. While the offer was still open to the other shareholders, Mrs. Devaux purchased Michael Du Boulay's shares under circumstances which were unfair and improper to the other shareholders.

The Law

10. The claim for oppression is made pursuant to Section 241 (2) (b) of the Companies Act 1996 (hereinafter referred to as "the Act"). An overview of the operation and scope of this remedy is stated in the Butterworths Shareholders Remedies in Canada at 18.21 as follows:

> "In many ways, the oppression remedy can be viewed as an equitable remedy. It is a broad and flexible tool, designed to protect the interests of corporate stakeholders in a

> variety of corporate circumstances. Nevertheless, the oppression remedy is also a creature of statute and certain essential elements must be present if a court is to have jurisdiction to invoke the remedy. It is imperative that the remedy be applied in a way that balances the protection of corporate stakeholders and the ability of management to conduct business in an efficient manner."

11. In *Brant Investments Ltd v Keep Rite Inc. (1987) 37 B.L.R. 65 (Ont. H.C.) at p. 99, Anderson J.* commented that:

> "The jurisdiction is one which must be exercised with care. On the one hand the minority shareholder must be protected from unfair treatment; that is the clearly expressed intent of the section. On the other hand the court ought not to usurp the function of the board of directors in managing the company, nor should it eliminate or supplant the legitimate exercise of control by the majority….Business decisions, honestly made, should not be subjected to microscopic examination. There should be no interference simply because a director is unpopular with the minority."

Business or affairs

12. Section 543 of the Act defines "affairs" as, among other things, the relationship among the company and the shareholders. The Courts give a broad interpretation to the meaning of "business or affairs" and look at the business realities of the situation: *Re H.R. Harmer Ltd [1958] 3 All. E.R. 689 at p. 701.*

Oppressive

13. "Oppressive" has been defined as conduct which is "burdensome, harsh and wrongful": Viscount Simmonds in *Scottish Co-Operative Wholesale Society Ltd v Meyer (1958) 3 All E.R. 66 at p. 71.* In *Elder v Elder and Watson Ltd (1952) 52 S.C.49, Lord Cooper* enunciated what has been accepted as the *locus classicus* of the broad meaning of "oppressive" as:

> "The essence of the matter seems to be that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely…."

14. In summary, "oppressive" conduct is conduct that is "unfair." What is "unfair" conduct depends on the circumstances of the case: *Re H.R. Harmer Ltd. at p. 698-699*.

15. The cases show that oppressive conduct may arise where there are illegal acts, appropriation of corporate property, breach of equitable rights, mismanagement and squeeze-outs. In general, it has been held that where a breach of fiduciary duty has occurred, the test of oppression has also been met: *Calmont Leasing v Kredl [1993] 7 W.W.R. 428 (Alta. Q.B.) at p. 462.*

16. A critical caveat on the general principles of "oppressive" conduct is that the breach of legal and equitable rights or discrimination must arise from the abuse of corporate power. Typically, the oppressor is a majority shareholder (or shareholders) who have control of the Board of Directors. The oppressor is able to perpetuate the abuses in question with impunity because it maintains the balance of corporate power. In *H.R. Harmer Ltd* the minority could not remove the influence of a director who failed to follow proper corporate procedures because the director had majority voting power.

17. In conclusion, "oppressive" conduct is the exercise of dominant power against the will of weaker corporate stakeholders by some breach of legal or equitable rights or discrimination.

"Unfairly prejudicial"

18. The phrase "unfairly prejudicial" suggests that prejudices may occur but that they cannot be unfair. "Prejudicial" may be defined as "causing of or the nature of prejudice; detrimental" and "Unfair" as (1) "not just or even handed; biased" and (2) "contrary to law and conventions; unethical."

19. Mismanagement has been characterized as unfairly prejudicial depending upon its severity. Conduct that is not "just and equitable" has been characterized as "unfairly prejudicial" but not "oppressive."

Has the Claimant been oppressed?

20. Mrs. Devaux instituted these proceedings claiming that the following acts are oppressive namely:

    (i) Waiving of interest on the Third Defendant's loan.

(ii) The threat by "the Majority" to use their voting power to have their legal costs met by the Company.

(iii) The threat by "the Majority" to use their voting power to alter the quorum for general meeting.

(iv) The threat by "the Majority" to use their voting power to declare a large dividend and then loan it back to the Company and

(v) The threat by "the Majority" to use their voting power to restrict the transfer of shares.

Waiving of Interest

21. First of all, the term "the Majority" which is used by Mrs. Devaux to collectively describe No. 3 to No. 7 Defendants is a misnomer and is misleading. Both the Fifth and Sixth Defendants object strenuously to being called "the Majority." Both Defendants have stated that they have acted and always acted independently and in the best interest of the Company, its shareholders, directors and employees. However, for simplicity, I shall continue to refer to them as "the Majority" fully appreciating that they are acting independently since there is no evidence to suggest otherwise.

22. Mrs. Therese Robinson, the Third Defendant and younger sister of Mrs. Devaux owed the Company the sum of CAN. $70,000.00 which she borrowed many years ago to purchase a home in Canada where she resided with her young children after a long and acrimonious divorce. The loan was subject to certain conditions. She was paying off this loan by way of her dividends over many years. On 5th February 2001, it was unanimously agreed by the Board, that if she pays off the principal of the debt, they would consider writing off the interest. So early this year, a meeting of the Board was requisitioned in order to deal with three (3) issues:

(i) To clear the debts of all the shareholders and to sanction a cash payment to Mrs. Joan Devaux.

(ii) That Fond Cocoa Development Ltd after payment of the principal of EC$140,655.00 as above write off the interest of $139,247.00 accumulated on the loan to Mrs. Robinson.

(iii) To consolidate the accounts of Du Boulay Holdings Limited and Fond Cocoa Development Ltd.

23. This meeting discussed these proposed resolutions and the meeting was adjourned to allow for the investigation of the financial position to determine whether or not it was in a position to make those payments. Resolutions 1 and 3 were subsequently passed and there was a discussion on Resolution 2 (the waiver of interest). At a subsequent meeting (Exhibit JD 13), at page 4, reference is made of the type of discussion and the whole atmosphere of that discussion. It was recognized that it was a family business and that Mrs. Devaux was prepared to accept Resolutions 1 and 3 as tabled, but proposed that Resolution 2 be postponed until the future of the Company can be better ascertained. Mr. Anthony Bristol, her solicitor said that the promissory note had been signed for the loan and any cancellation could be taken to form a precedent.

24. Mr. Foster argued that a precedent had already been set when Mrs. Devaux had been the beneficiary of the waiver of interest on the sum of $35,000.00 Vendor's Privilege that was owed to the Company.

25. According to Mr. James Bristol, the fact of waiver is not in issue. What "the Majority" claims is that interest was not intended to be charged. Counsel argued that the waiver of interest goes against the weight of the evidence. He submitted that if there was no interest why vote to waive it and secondly, the promissory note executed by Therese Robinson estopped her from denying her consent to be bound by the provisions of the documents.

26. Mrs. Robinson deposed that with respect to the question of interest, Mr. Willie Rapier, the then Chairman informed her that interest was placed in the note in case Michael Du Boulay finds out about the loan and that it was not the intention of the Company to charge any interest. In his evidence in chief, Mr. Rapier denies making such a statement to Mrs. Robinson and said that the interest charged was a matter of prudent commercial practice. Mr. Charles Devaux who is well respected by all including Mrs. Devaux stated that Mrs. Robinson was having financial difficulties in Canada caused by a long and apparently difficult divorce. The Company was sympathetic to her circumstances and it was never the intention to charge any interest but it was felt expedient to do so as a mask for Michael Du Boulay's constant enquiries.

27. This is a civil case wherein the standard of proof is based on a balance of probabilities. Suffice it to say, this Court had the opportunity of seeing and observing the witnesses and examining the facts presented. I was more impressed with the demeanour of and the evidence adduced by Mrs. Robinson and Mr. Devaux. Both witnesses especially the latter impressed me as witnesses of truth and I accepted their testimony as a truthful version of what occurred. On the other hand, Mr. Rapier has been the Company's Chairman for years and I observed in him a deep sense of loyalty to Mrs. Devaux. As such, I rejected his testimony as being untrue.

28. It is my firm view that the Company never intended Mrs. Robinson to pay any interest on the loan and indeed, it was used as a mask to pacify the enquiring Mr. Du Boulay. And even if it was the intention of the Company to charge interest on a loan taken by a family member who was in dire need at the time, what was the objection of Mrs. Devaux? After all, wealthy as she is, she had been the beneficiary of (1) paying a debt by book adjustments and (2) by the Company waiving interest. I see nothing burdensome, harsh or wrong with Mrs. Robinson paying her debt by applying dividends due to her towards paying off the loan and the Company waiving interest in these circumstances. It is perhaps worth saying that "he who comes to equity must come with clean hands."

29. Mrs. Devaux seeks an order that the Shareholders Resolution of May 12, 2003 whereby the interest due to Fond Cocoa by Mrs. Robinson was waived, be set aside. In my view, such resolution was properly passed in that:

    (a) The Board agreed previously that it would give consideration to waiving the interest.

    (b) Due Notice was given by the shareholders of their intention to pass the resolution and

    (c) The Claimant did not object to the resolution being passed as such but intimated that it should have been done after the Shareholders Agreement.

30. In my judgment, there is no legal barrier to such a resolution being passed: see Section 18(1) of the Act. As such, I see no reason why the court should interfere with the decision of the Board to waive interest.

The Threatened Conduct

31. Counsel for Mrs. Devaux submitted and rightly so, that anticipatory breaches can trigger the oppression remedy: *Isnor v Isnor 123 NSR (2d) 283 at para.55.* He next submitted that the circumstances do exist to trigger Section 241of the Act in so far as these anticipatory breaches are concerned. First, "the Majority" have already used their dominant position to pass a resolution to waive interest on Mrs. Robinson's loan against the Chairman's advice as well as that of the Claimant's Solicitor. Secondly, "the Majority", although claiming the proposals to be no more than for discussion, when their demands were not met, forced through the resolution waiving interest by using their majority vote. Further, the language used by "the Majority" in Exhibit JD 17 points to an intention to push through the said proposed resolutions. The Majority say: "*it is paramount that the Board begin to function in this manner immediately. It is with this in mind that we propose to pass the following resolutions…."*

32. According to Counsel, it is therefore more likely than not that the resolutions will be passed by majority vote thus being anticipatory breaches triggering the application of Section 241 of the Act.

Legal Fees and Shareholders Agreement

33. Mr. Bristol vigorously argued that the payment of legal fees to Mr. Foster and to Mr. Monplaisir QC is yet another example of a benefit being conferred on "the Majority" to the detriment of Mrs. Devaux. According to Learned Counsel, these expenses are not related to the Company's affairs but are personal to the Majority: see the case of *Re Elgindata Ltd (1991) BCLC 959.* In that case, it was held that P had improperly used the company's assets for the benefit of himself, his family and friends. He used company's assets to entertain his friends, to acquire two cars, a Porsche and a Ford Escort, to pay for holidays for himself, his wife and children and to what was succinctly described as 'a variety of other forms of personal expenditure.'

34. The facts of the instant case can be distinguished from the *Elgindata* case. In this case, the legal fees were required to pay Mr. Foster and Mr. Monplaisir to prepare a Shareholders Agreement which according to the claimant's solicitor, Mr. Anthony Bristol "was required to provide for continued good future management of the Company" (Exhibit JD 13 at page 4). On

behalf of Mrs. Devaux who was present at that meeting, he accepted and proffered strenuously the need for a Shareholders Agreement. He said that such an Agreement would provide for future dividend policy and other matters would be formulated in discussion between the various legal representatives of the Shareholders and ratified and executed by the latter.

35. There was further discussion on the timeliness of a Shareholders Agreement concerning the management of the Company. Mrs. Devaux recognized that it was important to formulate such an agreement properly. She even interjected that the Chairman could form the starting point for the discussion on the proposed agreement. So, there was consensus all around that Mr. Monplaisir, Mr. Foster and her Solicitor would meet to produce a document which would provide for the future management and dividend policy of the Company.

36. Then there was a discussion on legal costs of the shareholders in dealing with these matters. It was then suggested by the Chairman that the matter regarding the Shareholders Agreement be postponed until the quantum of the various fees could be ascertained.

37. Shortly thereafter, Mrs. Devaux changed her mind about a Shareholders Agreement. Five days after the 13th March Meeting, Mrs. Devaux decided that she would no longer agree to the Company paying the legal fees to produce a document for the benefit of the Company.

38. Against that background, Mr. James Bristol premised his argument that the legal fees were personal and should not be borne by the Company. With respect, I disagree with Counsel. In my opinion, the lawyers fees to draw up a Shareholders Agreement for the Company to remedy the problems that were obviously plaguing the Company could not be regarded as personal but as a generous expression of forbearance by "the Majority" of shareholders in a family business. Therefore, this act by "the Majority" could not have oppressed or unfairly prejudiced Mrs. Devaux.

Quorum

39. The quorum for a shareholders' meeting is any two shareholders. Section 111 of the Act requires notice of any shareholders meeting to be given to all shareholders, directors and

auditor. Therefore, if any shareholder or director is desirous of attending he or she may do so or may appoint a representative with or without a proxy.

40. Counsel for Mrs. Devaux argued that increasing the number required for a quorum does not ensure broader representation but ensures that the Majority can stymie any meetings of the Company especially in view of it not only being a quorum of four but also a minimum shareholding of 60%.

41. However, under intense cross-examination, when asked about the increase in the quorum, Mrs. Devaux stated thus: "I would prefer the quorum to be raised to five (5)." She prefers an odd number. And in the same breath, she continued "but I will have to discuss it with my advisors. I realized the dangers so I have to discuss it with the Chairman."

42. In my view, an increase in the quorum would allow for broader representation and healthier discussions on the way forward for this successful Company. There is not an iota of evidence to even remotely suggest that the quorum for a general meeting as proposed is designed to allow "the Majority" to take effective control of the Company without any recourse for Mrs. Devaux as a shareholder. I see no basis for making such an unsubstantiated statement. As I see it, Mrs. Devaux has always controlled the operations of the Company and she is not going to succumb to anyone. She has this perceived fear that she will be used or removed. There is no basis for this belief. In the premises, I do not find any threatened conduct to trigger the oppression remedy.

Dividends and Loan Back

43. One of the issues that was proposed for discussion before the Second meeting was an increase of dividends from $50,000.00 to $100,000.00. Mrs. Devaux asserted that the declaring of a dividend as proposed in Exhibit JD 17 is not in keeping with sound financial practice and could undermine the financial stability of the Company if in fact the dividends are declared and paid. This will cause there to be a higher cost of capital and not indicative of management acting prudently and this may jeopardize the Company as a going concern.

44. Counsel for Mrs. Devaux, in his skeleton arguments beautifully encapsulated the law in respect of dividends. I can do no better than to gratefully adopt his submissions. Counsel submitted that in determining whether an increase of dividends is unfair the Court is required to consider the following:

    (a) The history and nature of the Company.
    (b) The type of interests affected.
    (c) General commercial practice.
    (d) The nature of the relationship between the Claimant and "the Majority."
    (e) The extent to which the impugned acts were foreseeable.
    (f) The expectations of the Claimant.
    (g) The size, structure and nature of the Company.
    (h) The detriment to the interests of the Claimant.

    See: *Westfair Foods Ltd v Watt et al 48BLR 43 at para. 60*

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45. Counsel submitted that dividends are declared by the Board of Directors and this authority cannot be delegated. Shareholders cannot require a Company to pay a dividend. This is undoubtedly a matter for internal management. He argued that the proposed resolution will interfere with the Board's discretion and may, depending on the terms of the reinvestment, impair the Company's capacity to pay its debts.

46. In so doing, the Board must consider the limitations placed on it by the solvency requirements under section 51 of the Act. Dividends are declared every year when the accounts are examined. If the Company cannot meet the solvency test under Section 51, then the declaration of that dividend is prejudicial and oppressive. According to Counsel, the proposed dividend may very well infringe Section 51 as that section has not been considered as the decision is being imposed by "the Majority."

47. At paragraph 14 (d) of his affidavit, Mr. Lisle Chase, a witness for the Claimant stated:

> "Also the right to declare a dividend lies with the Board of Directors and must be done in consideration of section 51 of the Companies Act 1996. The proposal therefore fetters the Board's discretion and removes any consideration of Section 51 which is illegal."

48. It is interesting to note that Mr. Chase stated in cross-examination that he had only made that statement in paragraph 14 (d) of his affidavit because he was misinformed. Therefore, the argument postulated by Mr. Bristol that the Resolution to pay dividend would put the company into jeopardy of breaching Section 51 is now shown to have been completely misguided.

49. Mrs. Devaux has stated, contrary to law, that the dividends to be paid to shareholders has always been decided by her and the Chairman, and not by the Board of Directors. We have a situation where the Company has retained earnings of $2.44 million. This figure represents earned capital and it is the Shareholders claim to the assets earned during profitable operations which has been reinvested into the Company. This retained earnings therefore represents the earnings of the Company less dividends paid to its shareholders over the life of the business.

50. According to Mr. Foster, the troubling question is that in this Company, these retained earnings form largely cash in the bank and can be claimed by the shareholders provided the Company is not in danger of offending Section 51. With an annual revenue of $1.5 million, it is rather strange why a Company like this, with such large retained earnings has not paid more to its shareholders. But, we are told that Mrs. Devaux together with the Chairman are the ones who decide how much dividend would be paid. Dividends are declared by the Board of Directors and not by Mrs. Devaux and the Chairman to the exclusion of the other Board Members.

Other Resolutions

51. There are allegations that Mrs. Devaux has been uncommunicative, autocratic and has continually ignored the decisions of the Board and the shareholders.

Donation of land to Theresa Mongroo

52. On 27th February 1992, the Board of Directors resolved to donate a portion of land to Therese Mongroo. The Company signed the Deed of Donation in 1992 but to date, that matter has not been finalized. In paragraph 19 of her second affidavit filed on 31st July 2003, she averred as follows:

> "The matter of the transfer of the house is not in the best interests of the First Defendant as the life tenant, Theresa Mongroo has died and left 12 or 13 heirs,

two of whom are known criminals. Accordingly, the Claimant is concerned that there was no intention to give the land to the heirs of Theresa Mongroo, and is concerned about having these criminals living on the boundary with the estate."

Two signatures on Cheques exceeding $15,000.00

53. On Thursday, 19th September 1991, Mr. Chase, a Chartered Accountant met with Mrs. Devaux and Mr. Rapier to discuss the accounting system. It was agreed that changes would be made to the existing system with a view to strengthening the system of internal control, consistent with the size and nature of the operation. One of the suggested changes was that Mrs. Devaux will sign alone up to the limit of $15,000.00, above this 2 signatures will be required. This has never been adhered to and to date, Mrs. Devaux signs all cheques alone.

Resignation of Site Manager

54. Cheryl Cribbet, the site manager of the Soufriere Estate was due to resign in May 2003 and her resignation was of obvious concern to the shareholders, many of whom are also Directors. It was a matter of concern because the major asset and revenue stream of the Company is the sale of tours to the gardens and the sale of lunches at the restaurant. So, when such an important person who is on the ground overseeing and protecting the interest of the shareholders is about to resign, this was and is of primary concern to the shareholders.

55. Mrs. Devaux failed to communicate with the Defendants her response to their complaints about a replacement for Ms. Cribbet. Under cross-examination, she declared "the moment we find someone, the others will know."

Business Plan for Company

56. Mrs. Devaux stated that she does not oppose a Business Plan but makes no attempt to discuss it in spite of difficult times due to the general economic climate and stronger competition.

Relief sought

57. Mrs. Devaux seeks the following orders namely:

    (i) An order to purchase the majority's shares in the Company within 60 days at auditors valuation failing which "the Majority" shall have the right to purchase her

shares within 60 days thereafter, failing which the First and Second Defendants shall be wound up.

(ii) An order that the Shareholders Resolution of May 12, 2003 whereby the interest due to the Second Defendant by the Third Defendant was waived, be set aside.

(iii) An order that the Third Defendant do repay all indebtedness to Du Boulay Holdings and Fond Cocoa including interest.

(iv) An order that the Third to Seventh Defendants do pay Costs to her.

58. What is the basis of Mrs. Devaux's claim? It is trite law that in any Company, the Managing Director is employed by the Board of Directors and is in effect an employee of the Company. In this case, although Mrs. Devaux is aware of this fact, she has operated for years outside of this reality and is not prepared to, as she puts it "take orders from these people." She is not prepared to abide with the Rules of Company Law and has therefore brought this action to attempt a forced "buy out" and as such, she is seeking the sanction of the court.

59. Interestingly, when Mr. Foster asked Mrs. Devaux "why have you brought this action?", her response was "to save the Company…I do not feel that I can continue working with them because of their behaviour to me."

60. The question therefore is whether the Company is in jeopardy and needs saving, and whether if it needs saving, whether the answer is for Mrs. Devaux to buy out the other shareholders. Before the Court can even entertain any relief sought, the Court must first find out whether Mrs. Devaux has been oppressed or has been treated in a manner that is unfairly prejudicial to her as a shareholder and a director. The answer is a resounding "no."

61. Mr. Foster in a commendably clear and precise argument submitted that if Mrs. Devaux cannot control the other shareholders, then she will buy them out because at the end of the day, that is exactly what she wants: the Company for herself.

62. Mr. Foster submitted that Mrs. Devaux is a relatively well off lady, as was demonstrated in her ability to purchase the shares of Michael Du Boulay for $1,250.000.00 without a mortgage and also her prayer that she buys out all of the other defendants. This case therefore is about a rich

Claimant who has run a company for 20 years as her pet project without being in need of any financial recompense from it and who is now 81 years of age being well advanced in years and who ought to be seeing about passing on this Company to somebody else to run it. She sees herself as being able to manage this company for the next three to four years.

63. Mr. Foster posed a pertinent question: is the Court going to consider that she buys out the other shareholders when after that time she would no longer be in the managing of the Company located in the town of Soufriere in the south-western tip of the island?

64. This is pitted against the other shareholders who are not in a position financially to buy out her shares but who are committed to the ideal and dreams of Andre Du Boulay who set up the Company for the benefit of his family he has left behind. With all his wealth, Mr. Du Boulay has also left behind a physically and mentally disabled daughter, Marguerite Saltman for whom he has set up a trust. Ms. Saltman is still alive and her two daughters, Dawn and Rachel are the court-appointed trustees of their mother's trust. If the Company is wound up, who will maintain Ms. Saltman? Would the funds from the winding up or a "buy out" be sufficient to maintain her for the rest of her life? What we know of the Company is that this coming season promises to be a bright one.

65. Mr. Devaux, who has no axe to grind in that he owns an insignificant 0.04 shares in the Company succinctly puts it:

> "It was the intention of the other shareholders to encourage better communications with the claimant, to promote family unity and share the thoughts of the respective shareholders in the development of the Company…I want to avoid a situation like the one where my uncle Michael Du Boulay constantly complained at Board Meetings that the Claimant ran the Company as though it was her own, through a lack of communication with the other shareholders, and the lateness of accounts due in part to her tardiness in providing supporting documents. I am concerned at the Claimant's continuing indifference to decisions of the Board…
>
> Finally, I wish to state quite clearly that I have already pointed out that I am not interested in purchasing any more shares. I am a member of a family company with the least shares so I have nothing to gain. I am however deeply mindful of my grandfather's wishes to preserve family unity and this is all I seek to do."

Conclusion

66. Mrs. Devaux has failed to establish any element of lack of probity on the part of "the Majority." All of them have said repeatedly that they wished for her to continue running the Company. All that they are seeking from Mrs. Devaux is more involvement in the affairs of the Company of which they are shareholders. They wished to have a Shareholder's Agreement and there is nothing burdensome, harsh or wrong with such a request.

67. Having analyzed the law and the facts as I found them, I am of the view that there is no basis on which to apply the oppression remedy. In my judgment, "the Majority" were pursuing their legitimate rights to ensure the continued success of the Company against a background of impending difficult times. It is indeed surprising that proposals which are being put forward to ensure proper, fair and just conduct of the affairs of the Company are being regarded as oppressive or unfairly prejudicial to the interest of the Claimant.

68. Accordingly, I will dismiss Mrs. Devaux's claim in its totality. The issue of Costs was ventilated at trial. It was agreed that the Company would pay the Costs of $125,000.00 to the successful party by the Company. This is also in keeping with prescribed costs under Part 65.5. I will therefore order that the Company do pay the Costs of $125,000.00 to the Third to Seventh Defendants.

Postscript

69. There is one last matter to be considered. Mr. Monplaisir QC alluded to the powers of the court under Section 241 whereby the court has very wide powers and can make any order as it thinks fit. He suggested that the Court should address and give directions for professional management as well as the formulation of a Business Plan. In my view, this is the only way forward for this very successful business. Discussions have already commenced in respect of a Shareholders Agreement. I will urge the parties to expedite the preparation of this Agreement under the direction of some expert. I am positive that despite the differences, this family will continue to work together as they have done over the years. It is important for all parties to realize that this case is not just about money. More importantly, it is about preserving a legacy

that could and ought to continue for generations in keeping with the wishes of the late Andre Cornibert Du Boulay.

INDRA HARIPRASHAD-CHARLES
High Court Judge