

BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL JURISDICTION

No. 1805 of 1998.

MARJORIE ILMA KNOX

(Applicant)

AND

JOHN VERE EVELYN DEANE

(First Respondent)

ERIC ASHBY BENTHAM DEANE

(Second Respondent)

OWEN BASIL KEITH DEANE

(Third Respondent)

ELIZABETH TESS ROHMANN

(Fourth Respondent)

LYNETT RACHEL DEANE

(Fifth Respondent)

MURIEL EILEEN DEANE

(Sixth Respondent)

OWEN GORDON DEANE

(Seventh Respondent)

ERIC IAIN STEWART DEANE

(Eight Respondent)

KINGSLAND ESTATES LIMITED

(Ninth Respondent)

CLASSIC INVESTMENTS LTD.

(Tenth Respondent)

PHILIP V. NICHOLLS

(Eleventh Respondent)

Before the Honourable Mr. Justice Lionel Greenidge, Judge of the High Court.

**1998: October 23
November 24
December 8**

**1999: March 15
July 29
November 8, 10, 11
December 15, 16, 17 and 21**

**2001: June 14, 22
July 26
September 5 and 7**

Appearances: Sir Henry Forde Q.C. and Alair Shepherd Q.C. with Adrian King and Erskine Holmes for Plaintiff.

Sir Harold St. John Q.C. with Ms. Doria Moore of Cattle Catford for 1st - 7th and 11th respondents, Mr. Vernon Smith of Smith & Smith for 8th respondent, Mr. G.C. Turney Q.C. and Ms. Zarina Khan for 10th respondent, Mr. Leslie Haynes Q.C. and Ms. Doria

Moore of Cottle Catford for 9th respondent. [1]

JUDGMENT

Background.

On the 1st July 1958 Ebenezer Estwick Deane and one of his sons Colin Ian Estwick Deane incorporated KEL under the Companies Act 1910. The Company was continued under the companies Act Cap. 308 as company numbered 1654 on the 24th July 1986. The applicant was named as one of its directors by notice dated 23rd July 1986. She continued as such director until sometime in 1995. Schedule 1 to the articles of continuance provided that there shall be the following restrictions on the transfers of the common shares of the company, which it is authorized to issue namely:-

- (1) (a) A share may be transferred by a shareholder or other person entitled to transfer such share to any Shareholder selected by the transferor; but save as aforesaid, and save as provided by clause 3 of this schedule, no share shall be transferred to a person who is not a shareholder, so long as any shareholder or any person selected by the directors as one to whom it is desirable in the interest of the company to be a shareholder is willing to purchase the same at fair value.
- (b) Any shareholder or other person entitled to do so, who intends to transfer shares (hereinafter call the purposing transferor) shall give notice in writing to the directors of his intention. Such notice shall constitute the directors his agent for the sale of the said shares in one or more lots at the discretion of the directors to shareholders of the Company or any person selected by the directors as aforesaid at a price to be agreed upon by the proposing transferor and the directors, or in default of the agreement at the fair value to be fixed in accordance with subclause (c) of this clause.
- (c) The fair value aforesaid shall be the sum fixed as the fair valuation by resolution of the shareholder in general meeting as follows, that is to say, once in each financial year the shareholders in general meeting shall [2] by resolution fix the sum which shall be deemed to be the fair value of a share until the fair value has been fixed, the fair value of any shares which it is proposed to transfer, shall be deemed to be a sum equal to the stated capital account maintained for such shares divided by the number of such shares which have been issued.
- (d) Upon the price being ascertained as aforesaid the directors shall forthwith give notice to all the shareholders of the company of the number and price of the shares to be sold and invite each of them to state in writing within twenty one days from the date of the said notice whether he is willing to purchase any and if so what maximum number of the said shares.
- (e) At the expiration of the said twenty one days the directors shall allocate the said shares

to or among the shareholder or shareholders who shall have expressed his or their willingness to purchase as aforesaid and [if more than one] so far as may be pro rata according to the number of shares already held by them respectively, provided that no shareholder shall be obliged to take more than the said maximum number of shares so notified by him as aforesaid. Upon such allocation being made the proposing transferor shall be bound on payments of the said price to transfer the shares to the purchaser or purchasers and if he makes default in so doing the directors may receive and give a good discharge for the purchase money on behalf of the proposing transferor and enter the name of the purchaser in the register of shareholders as holder by transfer for the shares purchased by him.

- (f) In the event that all of the said shares shall not be sold under subclause (e) aforesaid to a shareholder or shareholders or a person or persons selected by the directors as aforesaid the proposing transferor may, at any time within three calendar months after the expiration of the said twenty one days, transfer the shares not sold to any person [subject to clause 2 of this schedule] at any price.
2. No share in the Capital of the company shall be transferred without the approval of the directors of the company or of a committee of such directors, evidenced by resolution and the directors may in their absolute discretion and without assigning any reason therefor, decline to register any transfer of any share. This restriction shall not apply where the proposed transferee is already a shareholder. [3]
3. Notwithstanding the foregoing restrictions numbered 1 and 2 any share may be transferred by a shareholder, to any ancestor, child, or other issue, wife or husband, brother or sister of such shareholder and any share of a deceased shareholder may be transferred by his personal representation to any ancestor, child, or other issue widow or widower, brother or sister, of such deceased shareholder to whom such deceased shareholder may have specifically bequeathed the same and shares standing in the name of the trustees of the will of any deceased shareholder may be transferred upon any change of trustees to the trustees for the time being of such will.

THE DISPUTE brought under the companies Act. Section 228.

A majority of the shareholders viz the first, second, third, fourth, fifth, sixth, and seventh respondents.....now wish to sell their shares and the directors of Kingsland Estate Limited have recommended that the shares be sold to a company called Classic Investments Limited at the sum of \$30.00 per share. The applicant is contending that by reason of the schedule to the articles of continuance the majority shareholders and the directors of KEL cannot do this. Such a sale would be in breach of her rights under the articles which as she claims gives her a preemptive right to purchase the shares being offered for sale to Classic. Accordingly the applicant is seeking the following relief.

1. A declaration that the letter dated the 19th day of November 1997 written by the applicant to the Secretary of Kingsland Estate Limited is a valid exercise of the right of

- first refusal and/or the preemptive rights of the applicant to purchase the shares of the first, second, third, fourth, fifth, sixth and seventh respondents in the ninth respondent.
2. Alternatively a declaration that as a result the applicant is entitled to purchase the shares of the first, second, third, fourth, fifth sixth and seventh respondents in Kingsland Estate Limited for a fair value to be determined in accordance with paragraph (e) of the schedule 1 to the articles of continuance of filed with [4] the Registrar of Corporate Affairs on the 24th July 1986.
3. In the further alternative a declaration that the letter dated the 19th day of November 1997 written by the applicant to the Secretary of KEL is a valid exercise of the right of first refusal and/or the preemptive rights of the applicant to purchase the shares of the first, second, third, fourth, fifth, sixth and seven respondents in KEL at a value to be determined or on the same terms and conditions as is set out in the agreement dated the 17th December 1997, which the respondents signed with Classic save and except the eighth respondent.
4. A declaration that the conduct of the respondents in accepting the offer made R.G. Mandeville by letter dated the 27th day of August 1997 as amended a letter dated 11th day of September 1997 and/or entering into agreement with the tenth respondent Classic (CIL) was and is oppressive and/or unfairly prejudicial to or unfairly disregarded those interest of the applicant or unfairly disregards those interests contrary to S. 228 of the Companies Act Cap. 308.
5. A declaration that the first, second, third, fourth, fifth, sixth and seventh defendants are not entitled to dispose of their shares in KEL pursuant to the agreement dated the 17th December 1997 made with CIL hereinafter called the Classic agreement.
6. A permanent and/or interim injunction from taking any steps in respect of the disposition of their shares in Kingsland Estate Limited pursuant to the Classic agreement or otherwise howsoever restraining the first, second, third, fourth, fifth, sixth and seventh respondents from disposing of their shares in KEL.
7. A further declaration that the letters dated the 12th and 19th October 1998 written by the applicant to the Secretary of KEL is a valid exercise of the right of first refusal and/or the preemptive rights of the applicant to purchase the shares of the eight respondent in KEL limited at a price of \$30.00 per share.
8. Alternatively a declaration that as a result the applicant is entitled to purchase the shares of the eighth respondent in Kingsland Estate Limited.
9. In the further alternative a declaration that the letters dated the 12th and 19th October 1998 written by the applicant to the Secretary of are a valid exercise of the [5] right of first refusal and/or the preemptive rights of the applicant to purchase the Shares of the eighth respondent KEL.
10. A declaration that the conduct of the respondents in accepting the offer made by R.G. Mandeville & Co. by letter dated 27th August 1997 as amended by letter dated 11th September and/or entering into the agreement with the tenth respondent Classic was and

is oppressive and/or unfairly prejudicial to or unfairly disregarded the interest of the applicant or unfairly disregards those interests contrary to Section 228 of the Companies Act Cap. 308.

11. A declaration that the first, second, third, fourth, fifth, sixth and seventh respondents are not entitled to dispose of their shares in KEL pursuant to the agreement dated the 17th December 1997 made with Classic.
12. A permanent and/or interim injunction from taking any steps in respect of the disposition of their shares in KEL pursuant to the Classic agent or otherwise, howsoever, restraining the first, second, third, fourth fifth sixth and seventh and eighth respondents from disposing their shares in KEL.
13. An order that by virtue of the letter dated 19th November 1997 written by the applicant to KEL by virtue of the provisions of schedule 1 to the Articles of continuance of KEL and the oppressive conduct of the respondents the applicant is entitled to purchase the shares of the first, second, third, fourth, fifth and sixth respondents in KEL for \$4.80 per share. (This ground of application was not pursued).
14. Alternatively an order that by virtue of the letter dated 19th November 1997 written by the applicant to KEL and by virtue of the provisions of the schedule I to the articles of continuance of KEL and the oppressive conduct of the respondents the applicant is entitled to purchase the shares of the first, second, third, fourth fifth and sixth respondents in KEL for a fair share value to be determined by paragraph (c) of Schedule I of the articles of continuance of KEL.
15. Alternatively an order that by virtue of a letter dated the 19th November 1997 written by the applicant to KEL and by virtue of the provisions of Schedule I to the Articles of continuance of KEL and the oppressive conduct of the respondents the applicant is entitled to purchase the shares of the first, second, third, fourth, fifth, sixth and seventh respondents in [6] KEL for a price to be determined and or at no less favourable terms than the agreement with Classic.
16. An order restraining the eighth respondent from assigning, selling, disposing charging or in any way whatsoever alienating any of his shares in KEL.
17. An order restraining KEL from assigning selling disposing changing or in any way whatsoever alienating any of its assets including all real property.
18. Specific performance of the right to purchase pursuant to the schedule I of the articles of continuance of KEL.
19. The application to be granted such further or other relief as the Court may deem necessary and just.
20. Costs.

In support of her claim for relief the applicant has alleged grounds charging that.

1. The board of directors of KEL failed at all material times to action the notice which the

applicant gave to it of her intention to exercise her preemptive rights to purchase the shares in KEL.

2. The directors of KEL failed at all material times to ensure that the applicant received all relevant information in relation to the negotiations between themselves and CIL for the sale of the shares of KEL.
3. The directors of KEL treated the applicant unfairly in that it failed to act in accordance with the Articles of continuance in conducting the negotiations with CIL for the sale of the shares in KEL.
4. The directors of KEL treated the applicant unfairly in that it failed to act in accordance with the articles of continuance in concluding the negotiations with CIL for the sale of shares in KEL and entering into agreement with it on 17th December 1997.
5. The applicant by letters dated the 12th and 19th October wrote the secretary of KEL and validly exercised her right of first refusal an/or the preemptive rights to purchase the shares of the eighth respondent in KEL at the price of \$30.00 per share.
6. The directors of KEL failed to act in accordance with the first schedule to the articles of continuance in that [7] they inter alia failed to offer the shares of the respondents to the applicant on the same terms and conditions as the shareholders were prepared to accept from CIL

EVIDENCE:

The company KEL was incorporated on 1st July 1958 and was established with the object of acquiring certain estates and properties which Ebenezer Estwick Deane, his wife and seven children had acquired together under a family arrangement. The seven children and their mother each held 22,222 shares while Ebenezer Deane held 22,224 shares. The various sugar plantations were managed by one of the sons at one time or another. Over the years because of the falling price of sugar worldwide the sugar industry experienced severe difficulty in revenue earnings such that losses grew dramatically from 2.5 million dollars in 1984 to approximately 9.3 million dollars in 1993. Kingsland Estates Limited ceased trading as a sugar work plantation in 1993. The company is heavily indebted and has no funds to satisfy its debts. It has assets but no money to operate. These debts were assigned by its bankers the Barbados National Bank to the Barbados Agricultural Credit Trust. Various offers have been made by prospective purchasers to acquire the assets of the Company but these failed for one

reason or another, except the offer made by the tenth respondent Classic Investments Limited whose offer has been accepted by the first to eighth respondent shareholders inclusive, and recommended by the directors of the ninth respondent company to those shareholders for acceptance. The applicant did [8] not accept Classic's offer and brought this action seeking the relief claimed. In the meantime the debt continues to climb by reason of the principal and interest thereon.

By letters dated 27th August 1997 and 11th September 1997. R.G. Mandeville wrote to the directors and shareholders of KEL on behalf of their client. The offer was considered by the directors and recommended for acceptance by memo dated 15th September 1997 to the shareholders including the applicant. The applicant and the eighth respondent declined the offer in letters dated respectively the 1st October 1997 and the the 16th September 1997 addressed to R.G. Mandeville. Subsequently by agreement dated 7th October 1998 entered into between the eighth respondent and Classic for the sale of the eighth respondent's shares the price was agreed at \$30.00 per share. This was notified by the directors to the applicant by memorandum on the 9th October 1998 in terms: see paragraph 66 of the applicant's affidavit filed 21st October 1998.

"In accordance with the corporate documents of the company I am directed to and enclose herewith a copy of a letter dated 30th September 1998 received from Ian Deane as executor and personal representative of the estate of the late Colin Ian Estwick Deane deceased relating to an offer received by him from Classic Investments Limited for the purchase of 28,570 shares in the Company belonging to the above estate.

I am directed to inform you that my Board of Directors having considered the offer recommends its acceptance.

In all the circumstances Classic Investments Limited is a desirable shareholder of the Company.

You are required to respond to this Notice within 21 days from the date hereof." [9]

Earlier on the 31st October 1997 The Secretary of KEL wrote to the applicant inter alia in these terms see paragraph 36

of affidavit of 21/10/98.

“Dear sir and Madam

This is to inform you that the shareholder Muriel Eilen Deane, John Vere Evelyn Deane, Eric Ashby Bentham Deane, Owen Basil Keith Deane, Elizabeth Tess Rohmann, Lynette Rachel Deane and Owen Gordon Finlay Deane have informed us of their intention to accept the offer contained in the above mentioned letters from R. G. Mandeville & Co. Ltd. to purchase the 142860 ordinary shares of KEL held by them subject to clause 1(d) of the schedule of articles of continuance of the said KEL being compiled with. In the circumstances and in pursuance of the said clause 1(d) of schedule I to the articles of continuance of KEL the directors HEREBY OFFER the said 142860 ordinary shares to you in one lot at the price of \$4,285,800. (or \$30.00 per share).

In pursuance of the provisions of the said clause 1(d) of schedule 1 to the said articles of continuance we invite you to state by notice in writing within 21 days from the date of this notice whether you are willing to purchase the said shares as one lot and at the price mentioned above. If you are willing to purchase the said shares the notice given by you to that effect should be accompanied by a deposit in the sum of \$428,580.00.

If you fail to notify the directors of your decision within 21 days from the date here of the said shareholders will proceed to transfer the said shares in accordance with the provisions of clause 1(f) of the schedule 1 to the Articles of Continuance.”

The recommendation by the directors of acceptance of the variation of offers of 27th August 1997 as indicated by R.G. Mandeville’s letter of the 11th September 1997 was refused by the applicant’s letter of 1/10/97 and the applicant responded to the directors seeking information by letter of 3rd October. See paragraph 33 of her affidavit dated 21/10/98. On the 19th November 1997 the applicant then gave notice of her intention to exercise “her option” to purchase the shares and disputing the price and terms on which they had been offered see paragraph 39 affidavit dated 21/10/98.

On 26th November 1997 the directors sent the applicant a letter in terms see paragraph 43 affidavit filed 21/10/98. [10]

“with reference to your letter of 19th November 1997 I am directed to inform you that the Board is satisfied that it acted in compliance with schedule I of the articles of compliance of KEL and we have noted that you have not accepted the offer to purchase the shares in the company as set out in my letter dated 31st October 1997.”

On the 17th December 1997 the first seven and the 9th respondents entered into an agreement with Classic for the sale of their shares in the company. The eighth respondent subsequently on the 7th October 1998 entered into agreement with Classic for the sale of his shares and the directors had given notice of this to the applicant on the 9th October 1998. Twelve days after this latest notification the applicant filed this action. Nearly nine months had passed since the first seven

respondents and KEL had signed the Classic agreement.

THE LAW

What does the schedule to the articles of continuance mean? My attention has been drawn to a number of cases which shows that -

As I understand it from plain meaning of the words article 1(a) of the schedule 1 to the articles of continuance permits a transferor of shares who is a shareholder or other person who is entitled to transfer shares in KEL to choose any shareholders to transfer his share or shares to. This choice is qualified and a restriction imposed on the transfer to a person who is not a shareholder. The transferor shall not transfer the share so long as any shareholder, or any person not a shareholder selected by the directors as one to whom it is desirable in the interests of the company to be a shareholder, is willing to purchase the same at fair [11] value. So the directors must make such a selection before equal status can be achieved. They did so in this instance. A contract exists between shareholders as shareholders to act in accordance therewith, and the directors as such have a fiduciary duty to ensure observance thereof.

In my opinion the natural and ordinary meaning of the words of clause 1 (a) do not give a shareholder of KEL an absolute right of preemptive purchase of shares in the company. It seems to me that the applicant has an equal status with the tenth respondent. The words of clause 1 (a) do not in my opinion give a shareholder a right of preference over another person who is not a shareholder if the directors select that other person as desirable in the interest of the company to be a shareholder.

Additionally it seems to me that the shareholders gave notice in writing of their intention to accept the offer of the tenth respondent and their directors as agents of the first to seventh shareholders gave notice to the applicant for the sale of those shares to the applicant in one lot. In respect of the agreement by the eighth respondent with the tenth respondent for the sale of his shares, notice was also given to the applicant the

directors having found that the tenth respondent was a desirable person in the interests of the company to be a shareholder. In *Greenhalgh v Mallard* Lord Greene MR said AER 1943 Vol. 2 page 234 at 237.

“questions of construction of this kind are always difficult but in the case of the restriction of transfer of shares I think it is right for the court to remember that a share being personal is *prima facie* transferable, although the conditions of the transfer are to be found [12] in the terms laid down in the articles. If the right of transfer, which is inherent in property of this kind is to be taken away or cut down, it seems to me that it should be done by language of sufficient clarity to make it apparent that that was the intention.”

The applicant has rested her case on the construction of the articles of continuance of KEL schedule 1. I have found no breach by the directors as directors or as shareholders of any rights of the plaintiff from the evidence contained in the several affidavits. I find that there was compliance with the schedule I of the articles by the shareholders and directors. I disagree with the applicants contention that the agreements dated the 17th December 1997 as amended by agreement dated 7th September 1998 and the agreement by the eighth respondent with Classic dated the 7th October 1998 is null and void. I do not find that any sham offer was made to the applicant.

The conduct of the directors has been attacked by the applicant as being oppressive, unfair, prejudicial or that they disregarded the applicant's interests. It is to be remembered that the directors are also shareholders. I have been referred to the case of *Dancey* 40 BLR where two questions were raised. Were the shares properly transferred and were the actions of the transferees of shares oppressive, unfairly prejudicial or unfair in disregard of a shareholder's interest.

Each case must turn on its own facts. “what is oppressive or unfairly prejudicial in one case may not necessary be so in the slightly different setting of another. See Judgment of Haddad J.A. in *Dancey*. The Court has to view the acts [13] complained of separately or as a whole and make up its mind whether there has

been oppression unjust treatment.

Even if the applicant as in the instant case did not have all financial information about the company, she well knew that the company could not afford to have annual audited accounts. Indeed It had ceased to trade as sugar work plantations. I do not find that the absence of such records was oppressive, unfairly prejudicial, or unfairly disregarded the applicants interests. There is no evidence that any of the other shareholders were provided with any information different from that given the applicant.

CONCLUSION:

On the evidence as I find it and the legal authorities considered I find that the applicant has not discharged the burden of proof on a balance of probability to satisfy me that she is entitled to the relief sought and I decline to grant the relief sought in the amended originating summons. The action is therefore dismissed.

I will hear submissions on the issue of costs in this matter. [14]

Lionel D. Greenidge
Judge of the High Court.