

BARBADOS

**IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL**

Civil Appeal No. 17 of 2001

BETWEEN:

Marjorie Ilma Knox

Appellant/Applicant

vs.

John Vere Evelyn Deane

First Respondent

Eric Ashby Bentham Deane

Second Respondent

Owen Basil Keith Deane

Third Respondent

Elizabeth Tess Rohmann

Fourth Respondent

Lynette Rachel Deane

Fifth Respondent

Muriel Eileen Deane

Sixth Respondent

Owen Gordon Findlay Deane

Seventh Respondent

Eric Iain Stewart Deane

Eighth Respondent

Kingsland Estates Limited

Ninth Respondent

Classic Investments Limited

Tenth Respondent

Philip Vernon Nicholls

Eleventh Respondent

Before: The Honourable Errol DaCosta Chase, CHB, and The Honourable Frederick Lawrence Adamstraw Waterman, Justices of Appeal and The Honourable Elliott Fitzroy Belgrave, CHB, Justice of Appeal (ag.)

2002: May 14, May 15, May 16, May 17, May 22, May 31

2003: April 16

Mr. A. Shepherd, Q.C., in association with Mr. M. Adrian King and Ms. A. Archer for Appellant.

Sir Harold B. St. John, Q.C., in association with Ms. D. Moore for 1st to 7th and 11th Respondents.

Mr. V. Smith in association with Ms. L. Greaves for 8th Respondent.

Mr. L. Haynes, Q.C., in association with Ms. D. Moore for 9th Respondent.

Mr. G.C. Turney, Q.C., in association with Ms. Z. Khan for 10th Respondent.

JUDGMENT

CHASE, J.A: This is an appeal from the decision of a Judge of the High Court given on June 14, 2001, in which the appellant's application by way of an originating summons against the eleven respondents was dismissed.

Relationship of Parties

- [2] Except for the 9th, 10th and 11th respondents, the parties are blood related with the appellant and the 1st, 2nd, 3rd and 6th respondents being the only surviving children of the deceased Estwick Ebenezer Deane's seven children.

Incorporation of and Issue of Shares in the 9th Defendant

- [3] On July 1, 1958, Estwick Ebenezer Deane (the deceased) incorporated Kingsland Estates Ltd. (KEL) under the former *Companies Act, 1910*. Of the issued 200,000 in KEL, 22,224 were held by the deceased, while his wife and seven children held 22,222 each. At the time of his death on June 16, 1985, the deceased owned 10 shares in the company and by his Will those shares were bequeathed to Owen Deane, the 7th respondent. With the passing of the deceased, his wife and certain children, the surviving children and grandchildren owned all the shares in the 9th respondent.

Purpose of Incorporation

- [4] The purpose for which KEL was incorporated was inter alia “to purchase and acquire” certain sugar plantations as set out in paragraph 3(a) of its Memorandum of Association, and by paragraphs:
- (t) to provide for the welfare of persons in the employment of the company, or formerly engaged in any business acquired by the company, and the wives, widows and families of such persons by grants of money, provisions or other payments ...
 - (v) to sell, dispose of, or transfer the business, property and undertaking of the company, or any part thereof for any consideration which the company may see fit to accept and in particular for shares, debentures or securities of any company or companies purchasing the same.
- [5] The Articles of Association also provided that the company was to operate as a private company and that there be a restriction on the transfer of its shares in accordance with the terms of the Articles.
- [6] Members of the family were therefore appointed the first directors of KEL (Art. 73) and the business of the company proved to be financially viable until in or about 1969 when the sugar industry in Barbados began to experience declining profits.
- [7] The evidence discloses that KEL’s fortune, reflecting that of the sugar industry, also declined and its debt increased to approximately \$2.5 million in 1984.

- [8] Following the death of their father in 1985, who was the Chairman of KEL at the time for several years, the appellant and the 7th respondent became directors of KEL.

Reform of Barbados' Corporate Law

- [9] In seeking to determine the issues raised by this appeal, it is of significance to observe that during the final year of the deceased's chairmanship of KEL in 1985, Barbados' corporate law experienced a radical reform by the adoption of a statutory division of powers model in substitution for the former English "Memorandum and Articles of Association" or "Contractarian" model under the former *Companies Act, 1910*.
- [10] The current *Companies Act, Cap. 308*, came into operation on January 1, 1985. Among the new concepts imported by Parliament into Barbados' corporate law are the devices of "*Articles of Incorporation*" and "*Articles of Continuation*".
- [11] These new devices are more than of passing interest, since in our view, they set the stage for any analysis and evaluation of the arguments and submissions of counsel on the issues raised for resolution in this appeal.

[12] Therefore, the significance of the repeal of the former *Companies Act, 1910*, by the reformed legislation of 1982 with its new provisions for corporate governance cannot be ignored. In this regard, it is perhaps appropriate at this stage to pose the question as to whether or not the assertion that the “Articles of Association of a company constitute a contract between the company and its shareholders”, which was made with reference to the issues in this appeal, is valid and sustainable under the reformed legislation?

[13] The former Act of 1910 contained the following provision:

“16(1). The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member and contained covenants on the part of each member, his heirs, executor and administrator, to observe all the provisions of the memorandum and of the articles, subject to the provisions of this Act.”

[14] This provision had its genesis in the earlier English legislation of 1844. Indeed, in *Gower’s “Principles of Modern Company Law”* 6th Edition, 1997, the author indicates at pp. 115 & 116 as follows:

“Contractual effect of memorandum and articles”

Section 14 of the Act provides that the memorandum and articles, “shall, when registered, bind the company and its members to the same extent as if they respectively had been signed and sealed by each

member, and contained covenants on the part of each member to observe all" their provisions, and that money payable by a member to the company under the memorandum or articles shall be in the nature of a specialty debt.

The wording of this section can be traced back with variations to the original Act of 1844 which adopted the existing method of forming an unincorporated joint stock company by deed of settlement (which did, of course, constitute a contract between the members who sealed it) and merely superimposed incorporation on registration. The 1856 Act substituted the memorandum and articles for the deed of settlement and introduced a provision on the lines of the present section.

- [15] In *Farrar's Company Law 4th edition*, the nature of the contract created by these statutory provisions, its legal effect and the principles arising from the cases resulting from their interpretation and application are set out at pp. 118-123.
- [16] The references in the foregoing paragraphs to the origin of section 16(1) of the 1910 Act and the commentaries on the comparable provisions of the English legislation would therefore seem to support the characterisation of such legislation as the "contractarian" model, a term used by *Bruce L. Welling*, in his "*Corporate Law in Canada: The Governing Principles*" 2nd edition at pp. 54 and 55.
- [17] When the existing *Companies Act, Cap. 308* came into operation on January 1, 1985 it repealed the 1910 Act, and it would seem that the
-

legal effect of section 16(1) was neither saved by or incorporated into its new provisions. In the result, the statutory basis for the assertion that the articles of association of a company constitute a contract between the company and its shareholders would seem to have disappeared from the corporate landscape of Barbados.

Transition of Former-Act Companies

[18] With the repeal of the 1910 Act, KEL the 9th respondent came within the scope of the following provisions of the current legislation:

(a) Section 349(1) which provides that:

“Every former-Act Company must within 6 years after the 1st January, 1985, apply to the Registrar for a certificate of continuance under this Act.”

(b) Section 352(2) which states:

“On the date shown in the certificate of continuance

- (i) the former - Act Company becomes a company to which this Act applies as if it had been incorporated under this Act;
- (ii) the articles of continuance are the articles of incorporation of the continued company; and

- (iii) except for the purposes of subsection (1) of section 62, the certificate of continuance is the certificate of incorporation of the continued company."

Certificate of Continuance

[19] In 1986, the 9th respondent applied for and was granted a certificate of continuance by the Registrar dated July 24, 1986. Schedules 1 and 2 to the Articles of Continuance provide essentially for the restriction on the transfer of shares in the company and for non-subscription by invitation to the public for its shares or debentures.

[20] Schedule 1 is in the following terms and format:

- "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 whom it is desirable in the interests of the company to be a shareholder, is willing to purchase the same at the fair value;
- (b) any shareholder or other person entitled to do so, who intends to transfer shares (hereinafter called the proposing 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 the 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 sub-clause (c) of this clause.

- (c) the fair value aforesaid shall be the sum fixed as the fair valuation by resolution of the shareholders in general meeting as follows, that is to say, once in each financial year the shareholders in general meeting shall by resolution fix the sum which shall be deemed to be the fair value of the 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 amongst 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 payment 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 sub-clause (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] and 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. 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 representatives 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 trustees for the time being of such will.

Approach to Interpreting Articles of Continuance

- [21] As to the effect of the restrictive provisions of Schedule 1, it is settled law that such provisions are to be strictly construed in arriving at what procedure is intended to be followed when a shareholder in a private company proposes to exercise his inherent right to transfer his share.

Greenhalgh v Mallard [1943] 2 ALL ER, 234. These provisions must, however, be construed and applied by reference to the provisions of the new *Companies Act*. In this regard, it is appropriate at this stage to note that sections 58 and 95 provide for the management of a company and for the duty of directors generally in the following terms:

58(1) Subject to any unanimous shareholder agreement, the directors of a company must

- (a) exercise the powers of the company directly or indirectly through the employees and agents of the company; and
- (b) direct the management of the business and affairs of the company.

95(1) Every director ... of a company in exercising his powers and discharging his duties must

- (a) act honestly and in good faith with a view to the best interests of the company; and

12

(b) exercise the care, diligence and skill that a reasonable prudent person would exercise in comparable circumstances.

- (2) In determining what are the best interests of a company, a director must have regard to the interests of the company's employees in general as well as to the interests of its shareholders.
- (3) The duty imposed by subsection (2) on the directors of a company is owed by them to the company alone; and the duty is enforceable in the same way as any other fiduciary duty owed to a company by its directors.
- (4) Every director ... of a company must comply with this Act and the regulations, and with the articles and the by-laws of the company, and any unanimous shareholder agreement relating to the company.

[22] It is useful for the analysis of the issues in this appeal to note that in the present case there is no evidence that there is any unanimous shareholder agreement that restricts, in whole or in part, the powers of the directors of KEL, the 9th respondent, to manage the business and affairs of the company. Therefore, the directors of KEL must discharge their duties in accordance with the Act, the Regulations, Articles of Continuance and the By-laws of the Company. Further, section 95(3) of the Act makes it unequivocally clear that the person to whom the directors of a company owe their duty is the company,

not to the shareholders, not to the creditors, not to the general public, but to the company itself.

- [23] The view expressed in paragraph 22 is supported by the decision in *Pelling et al v Pelling et al* (1981), *B.C.S.C. 130 D.L.R (3) 761* at p.762, where Berger J. in dismissing a shareholder's claim for breach of fiduciary duty said:

“there is no fiduciary obligation as between shareholders, and no general fiduciary obligation owed by a director to shareholders. A director's duty is to the company; he has no fiduciary obligation to the shareholders ...

Background to Dispute

- [24] Against the background of the foregoing paragraphs which are intended to facilitate a resolution of the issues raised in this appeal, we turn now to the factual background to the dispute.
- [25] The affidavit evidence discloses that as a result of the decline in the fortunes of KEL, the company's debt moved from approximately \$6 million in 1991 to approximately \$11 million in 1998. Indeed, in 1991 the directors of KEL were negotiating with the company SGB for the purchase of the shareholding in KEL and the appellant was a signatory to the resulting agreement.

[26] The evidence further discloses that at the time of the negotiations with SGB, the purchase price for the shares was \$7 million and the value per share was calculated at \$35.00 per share. However, the sale to SGB never materialised and KEL's debt continued to grow due to the unprofitable nature of its operations as a sugar estate. The company ceased trading in 1993.

[27] The appellant was a member of the board of directors during the period 1986 to 1995, and, as such, would have been intimately aware of the adverse financial situation of KEL during that period.

[28] Since the company ceased operating as a sugar estate, its only source of income is rent from the lease of two of its properties. No audited accounts of the company have been presented since 1993 as the company is unable to meet the costs associated with these services. Indeed, the financial affairs of the company were in such a perilous state that shareholders who were employees of KEL had not received salaries or other emoluments since 1993. The evidence also discloses that the 2nd respondent, as Chairman of the Board, paid many of the company's debt from his personal resources. By a letter dated August 27, 1997 an offer was made on behalf of the 10th respondent, Classic

Investments Ltd. (CIL) to purchase the entire share capital of KEL of \$6 million together with KEL debts limited to \$11 million.

[29] On August 29, 1997, the Board of Directors of KEL met to consider CIL's offer and concluded that the terms of the offer were inadequate. The Board also agreed that the 2nd respondent, as Chairman of the Board, should negotiate further with the Chairman of the 10th respondent, CIL for a more favourable offer for the purchase of the shareholding in KEL.

[30] Pursuant to the decision of the Board of Directors, the 2nd respondent met with the Chairman of CIL sometime after August 29, 1997, and as a result of that meeting a revised offer was submitted for the consideration of the Directors of KEL. On September 12, 1997, the Board met and resolved that the offer of August 27, 1997, as amended by letter of September 11, 1997, be recommended to the shareholders for their acceptance.

[31] In our view, the situation at this stage seems to indicate that by the time the Board took the decision to recommend to its shareholders acceptance of the offer, they would also have had to determine whether or not the prospective purchaser of the shares (whose identity

was then known) was a person whom they considered in the interest of the company to be a desirable shareholder.

[32] The directors' recommendation was communicated to each shareholder in this way:

TO: The Shareholders – Kingsland Estates Limited

FROM: O.B.K. Deane, Secretary, Kingsland Estates Limited

DATE: 15th September 1997

OFFER FOR SHARES IN KINGSLAND ESTATES LIMITED

I am directed to enclose herewith copies of letters received from Messrs. R.G. Mandeville & Co. dated 27th August 1997 and 11th September 1997 respectively on behalf of an undisclosed Principal offering inter alia to acquire the whole of the Issued Share Capital of Kingsland Estates Limited.

I am directed to inform you that my Board of Directors have considered the offer and the variation and recommend acceptance by the Shareholders.

Your Particular Attention is drawn to the fact that the final date for the acceptance of the Offer is 3rd October 1997.

It is recommended that your acceptance or refusal of the offer be communicated to Messrs. R.G. Mandeville & Co. by your Attorney-at-Law and your decision should be notified to the Chairman of the Board.

Sincerely,

*O.B.K. Deane
Secretary.*

[33] The final paragraph of the September 15, 1997 memorandum was clear in its terms in directing that each shareholder's acceptance or

refusal of the offer be communicated directly to the attorneys-at-law, acting on behalf of CIL, the then "undisclosed principal", and that the Chairman of the Board be notified of the shareholder's decision.

[34] It seems to us that at this stage the directors, qua directors, were acting as facilitators of the proposal to purchase the shareholding in KEL.

[35] The appellant and the 8th respondent duly communicated their rejection of the offer directly to the attorneys-at-law for CIL by letters of September 16 and October 1, 1997 respectively on the basis of "unsatisfactory"/"insufficient" consideration and unacceptable terms. It is contended, however, that they failed to notify the Chairman of the Board of their decision as contemplated by the memorandum of September 15, 1997.

[36] On the other hand, the remaining shareholders, namely, the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th respondents by letters dated September 18, September 24 and September 29, 1997 respectively indicated to the attorneys-at-law for CIL their willingness to accept the offer to purchase their individual shares (Exhibits 6-9).

[37] In considering the different attitudes of the shareholders, qua shareholders to the offer, it should be borne in mind that prior to these negotiations, the evidence discloses a breakdown in a once happy

family relationship, particularly between the appellant and the 8th respondent on the one hand, and the other family members.

Offer of Shares to Appellant and 8th Respondent

- [38] It is a matter of evidence that the appellant and the 8th respondent did not notify the directors of KEL of their refusal of the CIL offer. Clearly, however, it is in the nature of things in this environment that the directors would have become aware of the refusal. In this connection, however, reference to the contents of a letter from the Secretary of KEL to the appellant must be made since it provides a significant link to what follows in paragraph 39. It reads:

Dear Madge,

I received your letter dated October 3, 1997 on the afternoon of October 9, 1997. I will refer this letter to our next Directors' Meeting.

Yours sincerely

*Keith,
Secretary.*

- [39] The terms of the letter to which the Secretary of the company referred are these:

October 3rd, 1997

Mr. O.B.K. Deane,
Secretary,
Kingsland Estates Ltd.,
Hanson,
St. George.

Dear Keith,

Re: Offer for shares in Kingsland Estates Ltd. and your Board's recommendation of acceptance to all shareholders.

You should by now have received a copy of my letter to Mr. G.C. Turney Q.C. refusing the offer enclosed in your letter of 15th September, 1997 on the basis of insufficient consideration and unacceptable terms. I write with specific requests for information I require pertaining to this recent share offer, recommended for acceptance by your board.

1. I join Mr. Iain Deane in requesting to know why a letter of offer dated 27th August, 1997 would have taken until 15th September to have been forwarded to me.
2. Please provide for this shareholder the analysis and/or reasoning your board followed in arriving at its decision to recommend to shareholders that this offer be accepted.
3. Please reconcile the difference between the valuation done on 23rd February, 1984 by Mr. L.E. St. Hill, Chartered Town Planner, of lands of Kingsland Estates Ltd. (excluding Egerton) of \$18.75 million BDS with the current offer recommended by your board for shareholders' acceptance of \$17 million BDS for the whole company. To the best of my recollection I received a copy of this valuation in late 1991 or early 1992 after repeated requests. In your board's reconciliation please refer to the following points along with others you may feel to be important.
 - a. The valuation by the Chartered Town Planner, done at the behest of the Barbados National Bank occurred some thirteen years eight months ago. It is normal for land in Barbados to appreciate in value with time.

- b. *The valuation by the Chartered Town Planner did not envisage any golf course development. Experience has shown that the past Government has granted outline permission for not one (1) but five (5) golf courses. This prior approval (lapsed or otherwise) must have the effect of pushing up the value still further.*
- c. *I understand that the development tax on lands adjoining the ABC highway will soon expire. This should have the effect of pushing up the value of lands abutting the highway.*
- d. *I understand that the recent sale of land in Dover with the Half Moon Hotel took place at more than five times the square foot value in the Chartered Town Planner's Valuation of 1984 of Opionkop and Craigwell. This certainly must have the effect of pushing up the value of these two properties.*

To the best of my recollection the board was never convened for the purposes of recommending the SBG offer to shareholders. Again, to the best of my recollection, an offer from BSCH, substantially superior in consideration to the SBG offer (and to this one) was also never officially recommended to the shareholders by the board.

I believe that your board should take a position one way or the other on any such share offer to provide guidance to the shareholders it represents and whose investment it seeks to optimise. While I do not agree with the position taken, I have to say that I think your board is correct for taking a stand and letting shareholders know of it officially.

I look forward to a written response at your earliest convenience.

Yours faithfully,

*Madge Knox
Shareholder*

[40] On October 28, 1997 a directors' meeting was convened and it was decided, inter alia, that the appellant and the 8th respondent would be

given the opportunity of purchasing the 142,860 shares which were held collectively by the other seven shareholders. The relevant extract from page 2 of the minutes of the Board's decision reads as follows (Exhibit EABD 12):

Offer of Shares to Mrs. M.I. Knox and Mr. E.I.S. Deane

It was decided to write offering the shares of the six shareholders, who have agreed to sell their shares, to Mrs. Knox and Mr. I. Deane. This would be done in keeping with the "Articles and By-Laws" of the Company. The allotted time would be twenty-one (21) days when they would have to reply as to purchasing the shares in one "Lot".

[41] The decision of the Board was communicated to the appellant and the 8th respondent in the following way:

THIS DOCUMENT IS IMPORTANT. *If you are in doubt how to act you should consult your Attorney-at-Law or other professional advisor only.*

KINGSLAND ESTATES LTD.
Kingsland
Christ Church

31st October, 1997

Re: *Offer from R.G. Mandeville & Co., Attorneys-at-Law, on behalf of their client and set out in two letters from R.G. Mandeville & Co. dated 27th August, 1997 and 11th September, 1997, respectively.*

TO: *Marjorie Ilma Knox
Bannatyne, Christ Church*

*Eric Iain Stewart Deane
(Executor and Personal
Representative of the
Estate of Colin Iain
Estwick Deane, Deceased.)
Ascot House, Chelsea Road
St. Michael.*

Dear Sir and Madam,

This is to inform you that the shareholders **MURIEL EILEEN DEANE, JOHN VERE EVELYN DEANE, ERIC ASHBY BENTHAM DEANE, OWEN BASIL KEITH DEANE, ELIZABETH TESS ROHMANN, LYNETTE RACHAEL 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. to purchase the 142,860 ordinary shares of Kingsland Estates Limited held by them subject to clause 1(d) of schedule 1 to the Articles of Continuance of the said Kingsland Estates Limited being complied with.

In the circumstances and in pursuance of the said clause 1(d) of schedule 1 to the Articles of Continuance of Kingsland Estates Limited the Directors **HEREBY OFFER** the said 142,860 ordinary shares to you **IN ONE LOT** at the price of **\$4,285,800.00** (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 hereof the said shareholders will proceed to transfer the said shares in accordance with the provisions of clause 1(f) of schedule 1 to the said Articles of Continuance.

BY ORDER OF THE BOARD

O.B.K. Deane
Secretary

[42] The heading and tenor of the "document" of October 31, 1997 would seem to suggest that the directors of KEL were seeking to exercise whatever powers and discretion they perceived they had under the Articles of Continuance with honesty and in good faith in the best interests of the company and of its shareholders. This view is based on the following considerations that:

- (i) they, as directors, were notifying the appellant and the 8th respondent that the majority of the shareholders including themselves, as shareholders intended to accept the offer made by the 10th respondent to purchase the 142,860 ordinary shares held by them in the 9th respondent;
- (ii) in keeping with their understanding of the terms of the Articles of Continuance, the transfer was subject to compliance with the terms of the Articles;
- (iii) in the exercise of their discretion, as directors, the 142,860 shares were being offered in one lot;
- (iv) the price fixed for the shares was \$4,285,800.00 or \$30.00 per share;
- (v) the appellant and the 8th respondent were being invited to notify the directors in writing, whether or not, they were willing to purchase the shares in one lot and at the price indicated;

- (vi) their decision had to be communicated to the directors within 21 days of the date of the notice to them;
- (vii) in the event that their decision was not notified to the directors as stipulated, then, the shareholders would proceed to give effect to the transfer of the shares to the 10th respondent.

Reply to Directors' Offer

[43] On November 19, 1997, the appellant replied as follows to the letter of October 31, 1997:

*P.O. Box 88,
Welches Road Post Office,
St. Michael.*

November 19th, 1997.

*The Secretary,
Kingsland Estates Ltd.,
Kingsland, Christ Church.*

Dear Sir,

I am in receipt of your correspondence of 31st October, 1997 and respond as follows.

I wish to inform you of my intention to exercise my option to purchase the shares of Kingsland Estates Ltd. being offered me but wish to draw to your attention that you have neither offered me the shares at a fair value as determined in one of two methods defined in clause 1 (c) of schedule 1 to the Articles of Continuance nor have you given me the option of stating the maximum number of shares which I am willing to purchase as defined in Clause 1(d) of the same schedule.

Instead, you have required that my offer be for a quantum of shares as determined by yourself at a value which is based on a conditional offer from an unknown entity to which the shareholders are offering terms more favourable than those offered to me.

I put you on notice that your board is in breach of the said clause 1 (c) and (d). I view your board's actions as an attempt to deny me my rights as a shareholder.

I expect to be offered the same terms and conditions as those being offered to the undisclosed Principal referred to in the correspondence of 15th September 1997 from O.B.K. Deane, Secretary, Kingsland Estates Ltd. and 27th August 1997 and 11th September 1997 from R.G. Mandeville & Co.

I require the following information listed below. I must also insist on receiving a copy of the instrument of transfer from Mr. Lee Deane to his daughters with the valuation as determined by the Commissioner of Valuations and the quantity of transfer tax paid.

Do not proceed to transfer any shares of the shareholders of the Company until I have been supplied with all the necessary documentation in order for me to exercise my right to purchase the said shares.

Your prompt attention to this matter is appreciated.

Yours sincerely

*MADGE KNOX
Shareholder, Kingsland Estates Ltd.*

Encl. 5 pages – LIST OF INFORMATION BEING REQUESTED.

- [44] As indicated in the foregoing, the information requested is contained in 5 pages and its reproduction here is considered unnecessary for the purposes of this appeal. Suffice it to say that the list required all details and supporting documentation relating to the assets and liabilities of the Company, records of the Company, correspondence from/to shareholders relating to assets of the Company, all

correspondence from/to BNB, BAMC and BACTL and from/to its auditors, Coopers & Lybrand relating to the affairs of the Company.

[45] We pause here to observe that the supply of the information requested would, on the face of it, have required the Company to incur not an insignificant sum of expenditure without any indication as to its recovery.

[46] On November 21, 1997, the 8th respondent replied to the letter of October 31, 1997 in terms that were in effect a refusal of the offer. Like the appellant he requested information but not of the same nature and extent as that requested by the appellant.

[47] The evidence discloses that by letter dated November 26, 1997 the Secretary of KEL responded to the appellant in these terms:

With reference to your letter of November 19, 1997, I am directed to inform you that the Board is satisfied that it acted in compliance with Schedule 1 of the Articles of Continuance of Kingsland Estates Ltd. and we have noted that you have not accepted the offer to purchase the shares in the company as set out in my letter of 31st October, 1997.

[48] It is to be observed that the above response to the appellant's letter of November 19, 1997 made no reference to the appellant's request for further information which she perceived she was entitled to before accepting the offer. In this regard an issue arises as to whether the

appellant was so entitled within the terms of the Articles of Continuance.

Offer from Evelyn, Gittens & Farmer

- [49] Against the background of this appeal, it is our view that the perilous state of the financial circumstances of KEL would have become known to some of the other enterprises in the business community, and as such, other investors would have desired to take over the affairs of the company. One such desire was expressed by the firm of Evelyn, Gittens & Farmer, Attorneys-at-Law, who by letter dated December 18, 1997 addressed to the Chairman of KEL expressed a client's interest in purchasing the properties of KEL known as "Spion Kop" and "Craigwell". The letter also referred to a letter dated December 12, 1997 from Chartered Accountant, Joseph Ward addressed to the Chairman of KEL. It reads:

"Dear Sir,

I write to inform you that I represent a client who is interested in purchasing all of the issued shares in Kingsland Estates Limited.

The offer is in the process of being prepared and will be submitted before close of business on 19th December, 1997.

I ask that you inform the shareholders of the impending offer as I am confident that it will be in their interest not to commit themselves but to await same.

*Yours sincerely
Joseph W. Ward."*

[50] The letter of December 18, 1997 further indicated in part that:

... apart from our client personally dealing with yourselves on this matter this firm has written to the Barbados Agricultural Credit Trust Ltd. (BACT) on several occasions with regard to the purchase of these properties. To date we have not been able to obtain a written commitment from yourselves or the BACT to sell these properties and until recently we were dealing with a prospective purchaser of the shares in the Company hoping to obtain a commitment to sell these properties to our client. These negotiations have come to a standstill and the likelihood of them advancing to the satisfaction of our client seems remote.

It is with this background that our client has instructed us to propose the following to the shareholders of the Company and it is because of the constraints of time, as we understand that the shareholders are currently considering other offers, that we are unable to provide you with a draft contract, this offer is being made subject to the parties agreeing to and entering into a formal agreement.

[51] After stipulating the terms and conditions of the offer, the letter concluded as follows:

The above proposal will enable our client to purchase the properties which he has so far been unable to do and will give the Company the opportunity of re-organising its finances so that the present shareholders are the ones who will ultimately benefit from any substantial real estate profits which may be achieved.

Please indicate in writing on or before 12.00 noon on Tuesday, December 21, 1997 whether you are prepared to discuss this offer further.

[52] By way of comment on the Evelyn, Gittens & Farmer offer, it is clear from its terms that the offer contemplated the purchase of specific real estate of KEL i.e. "Spion Kop" and "Craigwell". The desire to acquire these properties was so strong that the attorneys-at-law and the client were dealing with a prospective purchaser of the shares in KEL with the hope that they would have obtained a commitment from that prospective purchaser to sell "Opion Kop" and "Craigwell" to the "client". It is also observed that the offer was "subject to the parties agreeing to and entering into a formal agreement".

[53] The Secretary of KEL responded to the Evelyn, Gittens & Farmer offer in a letter dated December 19, 1997 as follows:

Dear Sirs

Your Reference T99/1d

I acknowledge receipt of your letter dated 18th December, 1997, addressed to the Chairman and conveying the offer made on behalf of your client.

The directors have given careful consideration to the offer but have decided that it is not in the best interest of the Company.

[54] In their affidavits filed on November 20, 1998, the Chairman and Secretary of KEL set out the following reasons for rejecting the offer:

80. We had received many communications in the past which were similar to this one, and in the majority of these cases a definitive offer had never materialised.

81. Having regard to the fact that we already had a definitive offer in the form of the CIL offer and that the Board had recommended its acceptance by the shareholders and in addition to the fact that extensive negotiations had been entered into and the agreement for sale was prepared and awaiting signature, the Board was not prepared to wait until December 17, 1997 (sic) to see if a definitive offer would materialise. By the time the detailed offer was made on December 18, 1997 by Evelyn, Gittens & Farmer (EGF) the agreement with CIL had already been signed and so we could not enter into any other agreement.

- [55] In our view the decision of the directors, as the persons responsible for managing the business and affairs of the company was a rational one in the circumstances.

Agreement with CIL

- [56] The evidence discloses that on December 17, 1997, the seven shareholders referred to in the letter of October 31, 1997 entered an agreement, the terms of which were later supplemented on September 11, 1997, to sell their shareholding in KEL to CIL, and in this connection the 2nd and 3rd respondents deposed that the agreement was only entered into on receipt of the appellant's and 8th respondent's letters of November 19 and 21, 1997.

Offer from CIL to Iain Deane

[57] By a letter dated September 30, 1998, the 8th respondent wrote to the directors of KEL informing them of an offer received from CIL to purchase 28,570 shares held by him in KEL in one lot, at the price of \$30.00 per share which was the same value per share as that set out in the agreement which the seven shareholders had entered into with CIL on December 17, 1997. Among the terms and conditions, the letter contained, as a condition of sale and purchase, a requirement for the payment of a sum to the 8th respondent which was specifically agreed with respect to legal fees due, and payable in full settlement of the suit he had pending against KEL.

[58] The letter concluded as follows:

“In accordance with the Articles of Continuance, I hereby give you notice of my intention to transfer the said shares to CIL on the above-stated terms.”

[59] This new development was brought to the attention of the shareholders in a letter dated October 9, 1998 from the Secretary of KEL in these terms:

Offer for Shares in Kingsland Estates Ltd.

In accordance with the corporate documents of the Company I am directed to and enclose a copy of a letter dated September 30, 1998 received from Iain 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 Ltd. 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 Ltd. is a desirable shareholder of the Company.

You are required to respond to this Notice within twenty-one (21) days from the date hereof.

Appellant's Response to Letter of October 9, 1998

[60] The appellant's response to the correspondence of October 9, 1998 was made through her attorneys-at-law in letters dated October 12 and 19, 1998 to the effect that the appellant wished to exercise her preemptive right to purchase the shares of the 8th respondent on the same terms and conditions as set out in the letter of September 30, 1998, save and except on the terms and conditions relating to the settlement of the law suit, and that she also wished to exercise her right to purchase the entire shareholding of the other shareholders.

[61] The evidence discloses that there was no response from the directors to those letters.

Proceedings Instituted Against Respondents

[62] Being aggrieved at the manner in which the other shareholders were seeking to transfer their shareholding in KEL to CIL, the appellant on October 23, 1998 instituted proceedings in the High Court against the

11 respondents. On June 14, 2001, the relief sought in the originating summons was refused by Greenidge J.

The Appeal

[63] The grounds upon which the appellant relies to support her appeal against the decision of Greenidge J are:

- (A) *the learned trial Judge erred in law and misconstrued and/or failed to correctly and/or at all construe the effect of the pre-emptive rights as set out in the Articles of Continuance of the 9th respondent, Kingsland Estates Limited ("the company") in (inter alia):*
 - (i) *failing to address and set out in detail the effect of the pre-emptive rights as set in the Articles of Continuance of the company and the steps which the directors of the company namely the 2nd, 3rd and 11th respondents ("the directors") were obligated to take to give effect to those pre-emptive rights; and*
 - (ii) *failing to find that in the circumstances of the case the effect of the said pre-emptive rights was to mandate and/or obligate the directors of the company to offer the shares to the Appellant/Applicant on the exact same terms and conditions as they were prepared to offer them to the 10th respondent; and*
 - (iii) *failing to find that any offer made by the directors to sell the shares in the company to the Appellant/Applicant which was not on the exact same terms and conditions as they were prepared to sell the said shares to the 10th respondent was a sham and did not comply with the pre-emptive rights as set out*

in the Articles of Continuance of the company; and

- (iv) failing to find that in the circumstances of the case the agreement made between the 10th respondent and the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 9th and 11th respondents and dated the 17th day of December 1997 and 7th day of September 1998 are null and void; and*
 - (v) failing to find that in the circumstances of the case the agreement made between the 10th respondent and the 8th respondent and dated the 7th day of October 1988 is null and void; and*
 - (vi) holding that the effect of the pre-emptive rights and conditions was to confer equality of status on the 10th respondent, the Appellant/Applicant and the other shareholders of the 9th respondent.*
- (B) The learned trial Judge erred in fact in (inter alia):*
- (i) finding that the directors had at all material times acted in accordance with the pre-emptive rights as set in the Articles of Continuance of the company; and*
 - (ii) finding that the directors had at all material times acted fairly towards the Applicant and in accordance with the pre-emptive rights as set out in the Articles of Continuance of the company; and*
 - (iii) finding that the directors had by the letter dated 31st day of October 1997 acted fairly towards the Applicant and in accordance with the pre-emptive rights as set out in the*

35

Articles of Continuance of the company, and that the offer contained in the said letter was in fact an offer on the same terms and conditions as the offer contained in the letter dated 11th day of September 1997 written by R.G. Mandeville & Co. on behalf of the 10th respondent; and

- (iv) failing to find that the offer from the directors to the Appellant/Applicant as set out in the letter dated the 31st day of October 1997 was a sham offer in that it was an offer which was not as favourable as the offer contained in the letter dated 11th day of September 1997 written by R.G. Mandeville & Co. on behalf of the 10th respondent; and*
- (v) failing to find that the directors had acted oppressively and unfairly to the Appellant/Applicant in relation to the sale of the 8th respondent's shares to the 10th respondent; and*
- (vi) failing to find that the directors had acted oppressively and unfairly to the Appellant/Applicant in making the offer to sell the shares in one lot as contained in the letter dated 31st day of October 1997 and denying to the Appellant/Applicant the information as requested in the letter dated 19th November 1997 and written by the Appellant/Applicant to the directors; and*
- (vii) holding that there was equality of status and equality of treatment by the directors of the Appellant/Applicant and the 10th respondent in respect of offer of the shares being sold by the 1st to the 7th respondents.*

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 day of December 1997 which the respondents signed with Classic Investments Limited save and except any and all amendments thereto and in particular the amendments made by the appellant dated 7th September 1998.

4. *A Declaration that the conduct of the respondents in accepting the offer made by R.G. Mandeville & Co. by letter dated 27th day of August 1997 as amended by letter dated 11th day of September 1997 and/or entering into the agreement with the 10th respondent Classic Investments Limited (CIL) 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.*
5. *A Declaration that the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th respondents are not entitled to dispose of their shares in KEL pursuant to the agreement dated the 17th day of December 1997 and made the 17th day of December 1997 and made with CIL hereinafter called "the Classic Agreement".*
6. *A permanent and/or interim injunction and/or permanent or otherwise from taking any steps in respect of the disposition of their shares in KEL pursuant to the Classic Agreement or otherwise howsoever restraining the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th respondents from disposing of their shares in KEL.*
7. *A further Declaration that the letters dated the 12th and 19th days of October 1998 written by the applicant to the Secretary of Kingsland Estates Limited "KEL" is a valid exercise of the right of*

first refusal and/or the pre-emptive rights of the applicant to purchase the shares of the 8th respondent in the 9th respondent (hereinafter called "KEL") 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 8th respondent in KEL.*
9. *In the further alternative a Declaration that the letters dated the 12th and the 19th days of October 1998 written by the applicant to the Secretary of KEL are a valid exercise of the right of first refusal and/or the pre-emptive rights of the applicant to purchase the shares of the 8th respondent in KEL.*
10. *An order that by virtue of the letter dated 19th day of November 1997 written by the applicant to KEL and 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 1st, 2nd, 3rd, 4th, 5th and 6th respondents in KEL at the same price as was offered to CIL. (This relief was not pursued)*
11. *Alternatively an order that by virtue of the letter dated 19th day of November 1997 written by the applicant to KEL and 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 1st, 2nd, 3rd, 4th, 5th and 6th respondents in KEL for a fair value to be determined by paragraph (c) of the Schedule 1 of the Articles of Continuance of KEL.*
12. *Alternatively an order that by virtue of the letter dated 19th day of November 1997 written by the applicant to KEL and 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 1st, 2nd, 3rd, 4th, 5th, 6th and 7th respondents in KEL for a price to be determined and/or at no less favourable terms than the agreement with CIL.

13. An order restraining the 8th defendant from assigning selling disposing charging or in any way whatsoever alienating any of his shares in KEL.
14. An order restraining KEL from assigning selling disposing charging or in any way whatsoever alienating any of its assets including all real property.
15. Specific performance of the right to purchase pursuant to the Schedule 1 of the Articles of Continuance of KEL.
16. The appellant be granted such further and/or other relief as the Court may deem necessary and just.
17. Costs.

Appellant's Case before High Court

[65] In support of the appellant's claim for relief under sections 228 and 235 of the *Companies Act, Cap. 308*, it was contended in essence before the High Court:

- (a) that the Articles of Continuance amounted to a contract as between the shareholders themselves, as shareholders, and as between the company and the shareholders;
- (b) that as a matter of construction the Court will so interpret the Articles as importing an obligation or compulsion on the directors to give effect to the

pre-emptive provisions of the Articles by making an offer to existing shareholders on the same terms and conditions that the proposing transferor of the shares would accept from a proposed purchaser of those shares;

- (c) that the offer made by the directors to the appellant was a sham in that the offer they made to the appellant was not on the same terms and conditions as they were prepared to sell to the proposed purchaser, and to that extent the directors were in breach of the Articles of Continuance.

[66] The learned trial Judge reviewed aspects of the evidence in the course of his judgment, and turning his attention to the law, he commented as follows at pages 11-13:

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 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 pre-emptive purchase of shares in the company. It seems to me that the applicant has an equal status with the 10th 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 10th respondent and their directors as agents of the 1st to 7th 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 8th respondent with the 10th respondent for the sale of his shares, notice was also given to the applicant the directors having found that the 10th respondent was a desirable person in the interests of the company to be a shareholder.

...

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 1 of the articles by the shareholders and directors. I disagree with the applicant's contention that the agreements dated the 17th December 1997 as amended by agreement

42

dated 7th September 1998 and the agreement by the 8th 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.

- [67] In the result, the learned trial Judge found that the conduct of the directors in making the offer to the appellant on behalf of the 1st - 7th and 8th respondents was not oppressive and/or unfairly prejudicial to the appellant and that the director's conduct did not unfairly disregard the interests of the appellant.

Approach to Evaluation of Issues

- [68] As we approached the task of evaluating the issues in this appeal, we are constrained to make a few general comments by reason of suggestions advanced during the hearing to the effect that KEL, having been established as a private family business, it was the intention of the deceased Estwick Ebenezer Deane, affectionately referred to by members of the family as the "Chief", who was one of the founding fathers of KEL, to have the company remain in the hands of and to be controlled by the family members as shareholders of the company.
- [69] Indeed, we have alluded earlier to the purposes for which KEL was incorporated, and there can be no dispute that among the purposes for which KEL was established was to acquire and operate sugar

plantations for the benefit of members of the Deane family as a whole.

To that extent, the “Chief” during the period of his chairmanship of the company could have been perceived as a capitalist based on the objectives of the company.

- [70] The case of *Greenhalgh v Mallard and others (supra)* deals with the operation of a private company, and although the company in that case was established by Memorandum and Articles of Association, a reference to the following comments appearing at p.235 of the Headnote is appropriate in considering some of the contentions made in this appeal:

“This case discusses matters of importance in the carrying on of a private company. Such a company is often a family affair and it is naturally desired to avoid outside interference. At times, however, for *financial reasons* (emphasis added) it is necessary to seek outside help and those who provide this help usually require some control over the affairs of the company. One means adopted for the retention of control is the placing of restrictions on the transfer of shares. Such restrictions are to be strictly construed because shares, being personal property, are *prima facie* transferable. It is held, therefore, that the right to transfer them can be cut down only by use of clear words to that effect ...”

- [71] The foregoing comments would seem to indicate that although a private company is usually designed for the purpose of operating as a family affair, yet the sustainability of its economic viability as a

corporate entity may in spite of share transfer restrictions, require the management of the company to seek financial assistance from external sources in the interest of the company's survival.

Construction of Limits to Transfer Shares

[72] We turn now to construe the scope of the restrictions imposed by the Articles of Continuance on the transfer of shares in KEL.

[73] In our view, the scheme of the Articles is designed to apply to transfers by –

- (a) one shareholder to another shareholder;
- (b) a person who is not a shareholder, but has become entitled to the shares, e.g. under the terms of a will, to transfer those shares to a shareholder;
- (c) a shareholder to a person selected, i.e. carefully chosen by the directors as being the best or most suitable to be a shareholder in the interest of the company;
- (d) a shareholder (or other person entitled to transfer) to a person who is neither a shareholder nor a person chosen by the directors as a desirable shareholder, in effect, a transfer to a rank outsider.

[74] The critical provisions of the Articles of Continuance which seek to give effect to the scheme to restrict transfers of shares in KEL have been set out earlier in paragraph 20. However, for the purposes of this analysis, we repeat the provisions that appear in the following terms in clause 1(a) of Schedule 1:

“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.”

[75] The first limb of clause 1(a), in our view, contemplates transfers to other shareholders selected by the persons whom we have categorised at (a) and (b) of paragraph 73. The clause further describes the person intending to transfer as the “transferor”.

[76] The second limb to the clause limits, with certain exceptions and modifications, the transferor’s inherent right to transfer by way of sale in these terms:

... 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 whom it is desirable in the interests of the company to be a shareholder, is willing to purchase the same at the fair value.

[77] A proper construction of the restriction prescribed by the second limb to clause 1(a) is, in our view, the key to some of the collateral issues raised for determination in this appeal.

Intention of the Deceased Ebenezer Deane

[78] In paragraph 22 of her affidavit filed on October 21, 1998, the appellant deposes:

My view that my father always intended for KEL to remain a company which was owned by the family is fortified by the fact that in 1967 both my father and my mother distributed their approximate 2/9th shareholding in KEL equally among myself and my brothers and sisters who were the remaining shareholders in KEL. Each child received two extra share certificates for the additional 6,348 shares. At that time my father and my mother retained only 10 shares between them, 6 in my father's name and four in my mother's name. He was also at that time and remained until his death the Chairman of KEL.

[79] The basis for the appellant's foregoing assertion is derived from the conduct of her father and mother in transferring their shares in KEL in 1967 to the other family members and it is to that extent that that fact-situation is called in aid to support the assertion. We, however, find that the appellant has misappreciated the full import of clause 1(a) and her conclusion is therefore flawed and is without substance.

[80] Support for our finding on this collateral issue is to be found in the scheme of the Articles of Continuance itself which contemplates, in a given set of circumstances, transfers by way of sale to the category of persons whom we have earlier characterised as "rank outsiders", but subject to certain prescribed pre-conditions to which we will return at a stage later in our judgment.

Desirable Person

[81] Implicit in the language of the second limb of clause 1(a) that circumscribes the right of a shareholder to transfer his/her share to an outsider is a power conferred on the directors as managers of the affairs of the company to select a person whom they consider desirable to be a shareholder "in the interests of the company". When a selection is made from outsiders, the question that falls to be determined is what is intended to be the status of that person vis-à-vis existing shareholders. This question will be determined when we are considering other issues. We, however, find that by conferring a power on the directors to select a person not being a family member to be a shareholder of KEL is another indication that the founding fathers never intended that the shareholding in KEL was to be limited to family members as is canvassed by and on behalf of the appellant. The intention of the incorporators may also be inferred from the original Memorandum of Association which provided in paragraph (v) as follows:

to sell, dispose of, or transfer the business, property and undertaking of the company, or any part thereof for any consideration which the company may see fit to accept and in particular for shares, debentures or securities of any company or companies purchasing the same.

We are therefore fortified in our view in finding as a matter of construction that the shares in KEL are transferable to an outsider provided that there is compliance with the pre-conditions applying to the transfer.

Effect of Clause 1(a) based on Analysis

[82] Based on the foregoing analysis, the full effect of clause 1(a) is as follows:

- (a) a shareholder may transfer a shareholding to an existing shareholder selected by him/her without restriction i.e. without following a prescribed procedure;
- (b) a shareholder may not transfer the shareholding to an outsider so long as an existing shareholder or a person selected by the directors as a desirable person to be a shareholder is willing to purchase the shareholding at the fair price.
- (c) a person selected by the directors as a desirable person to be a shareholder is not an outsider.

[83] In this regard, it is instructive to note the following passage appearing under the rubric *“Typical Restrictions on Transfer”, in Farrar’s Company Law* at p.240:

Usually a member wishing to sell will be permitted to transfer his shares to an existing member without restriction but where he seeks to transfer to an outsider then a pre-emptive provision will come into effect. This will normally require the intending transferor to give notice to the company

49

secretary who must notify the other members that there are shares available for purchase. If the other members then make an offer for the shares, the transferor may accept or reject their offer but, if he rejects it, he is precluded normally from proceeding with the transfer of the shares to an outsider. If the shares are not taken up by the other shareholders, then the transferor is usually entitled at that stage to offer his shares to an outside purchaser, subject to the proviso that the directors may refuse to register a transfer in such circumstances.

[84] In the light of the foregoing, we are of the view that the scheme of KEL's Articles of Continuance is designed to encapsulate the typical restrictions on transfer of shares in a private company to an outside purchaser. The procedure which the scheme obligates the proposing transferor and the directors to adhere to is laid down by the provisions of the following sub-clause:

- 1(b) any shareholder or other person entitled to do so, who intends to transfer shares (hereinafter called the proposing 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 the shareholders 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 sub-clause (c) of this clause.

Effect of Clause 1(b)

[85] On a proper construction of this clause, the language of which is unambiguous, we find that

- (a) sub-clause (b) envisages a sale by a shareholder (the proposing transferor) of his/her shares to a person (the “intended transferee”) who is neither a shareholder nor a person selected by the directors within the terms of the Articles;
- (b) to the extent that the “intended transferee” is neither a shareholder nor a person selected, the proposing transferor is under a duty to give the directors notice of his intention to transfer the shares;
- (c) the notice constitutes the board of directors the agent of the proposing transferor for the sale of the shares and the Articles confer a power upon the directors to exercise their discretion without restriction to sell the shares in one or more lots either to the shareholders of the company or to the person selected by the directors as a desirable person to be a shareholder;
- (d) the transferor and the directors are obligated to agree the price which is acceptable for the purchase of the shares before written notice (transfer notice) is duly given under sub-clause (d) to the other shareholders to the effect that shares are available for purchase and to request a response to the offer within 21 days of the date of the notice.

[86] On the basis of the findings resulting from our analysis of sub-clauses (a) and (b), we are inclined to the view that the so-called pre-emptive provisions of the Articles are triggered only when the fact-situation is

one in which a shareholder of KEL intends to dispose of his/her shares to a person who is neither a shareholder nor a person duly selected by the directors. As a result of our analysis we have referred to such a person as “a rank outsider”. Additionally, we construe the scheme of the Articles as addressing the “rank outsider-situation” by sub-clause (f) which reads:

In the event that all the said shares shall not be sold under sub-clause (e) aforesaid to a shareholder or shareholders or a person or persons selected by the directors as aforesaid the proposing shareholder *may*, at any time within 3 calendar months after the expiration of the said 21 days, *transfer* the shares not sold to *any person* [subject to clause 2 of this schedule] and at any price.

- [87] Clearly the reference to “*any person*” in sub-clause (f) can only be understood within the canons of interpretation as a reference to a person, other than a shareholder or person selected, and as such, is a rank outsider in respect of whom the so-called pre-emptive provisions of sub-clause (b) would be applicable.

Status of Selected Person

- [88] For the reasons discussed in our analysis of the relevant clauses of the Articles of Continuance, we find that a person selected by the directors cannot be classified as a rank outsider vis-à-vis the existing shareholders, and that the so-called pre-emptive provisions of the

Articles do not apply to any such person. We take the further view that when the directors exercise their power of selection in favour of any such person, the effect of the Articles of Continuance is to confer on that person an opportunity equal to that of any existing shareholder to be selected for the purchase of the shares of the proposed transferor.

Applying Findings to Evidence/Submissions

- [89] In applying our findings to the evidence and the submissions made thereon we wish first of all to make a few observations.
- [90] In the course of submissions on behalf of the appellant and the respondents, several cases were cited. We have however found on a reading of the issues arising in those cases that they are, to a large extent, distinguishable from the issues presented in this appeal. The structure of our judgment will therefore indicate that we have sought to construe the terms of the Articles of Continuance of the 9th respondent without reference to or reliance upon any of those decided cases.
- [91] Further, in view of our findings that the English “Memorandum and Articles of Association” or “Contractarian” model is no longer part of corporate law of this country, submissions on behalf of any of the

parties to this appeal, particularly the appellant, to the effect that the Articles of Continuance constitute a contract between each of the shareholders and the company are misconceived and therefore without force. To that extent the principles enunciated in *Curtis v Curtis & Co.* (1986) BCLC 86; *Rayfield v Hands and others* (1960) A.C.1 are irrelevant to the issues raised in this appeal.

[92] *Gatx Corp. v Hawker Siddeley Canada Inc.* 27 B.L.R (ed) 251 is another case which was heavily relied upon by counsel in support of the appellant's appeal. The decision is a lengthy one; however on its proper reading, we are of the view that to accept that the principles in that case are relevant to the present appeal is to disclose a misappreciation of the issues which confronted the Canadian Court. To our minds, those issues are in sharp contrast to the proposed transfer of shares in the 9th respondent and, as such, are distinguishable.

[93] We acknowledge that the *Gatx case* was decided under the *Canada Business Corporation Act, R.S.C. 1985*, the concepts and principles of which have been imported to a large extent into the local legislation. However, the application of the provisions of the *Canadian Act* to the situation in the *Gatx case* must be construed

within the context of a unanimous shareholder agreement which was present in the *Gatx case* and which is a distinguishing feature from the instant case.

- [94] In the *Gatx case*, the agreement between the shareholders specifically giving to each party a right of first refusal was entered into on April 12, 1967, and one of the issues before the Canadian Court was whether or not the impact of the 1985 reformed legislation had interfered with or had overridden the pre-existing or vested contractual rights of the parties. In addressing this issue, the Court had to consider the legal characteristics attributed to a right of first refusal by the Canadian Supreme Court. Arising out of the pre-existing contract, the trial court therefore had to consider: breach of contract, breach of "good faith" obligation, breach of fiduciary duty, in addition to whether one party could have disposed of his interest under the agreement without giving the other shareholder the first right to purchase the shares on the same terms as those offered to the 3rd party.
- [95] In the circumstances, we find that the principles contained in that decision cannot be applied to resolve the dispute between the parties to this appeal.

[96] As to the many other citations referred to by counsel for the appellant we do not consider it necessary to discuss in further detail the features which distinguish them from the 9th respondent's Articles of Continuance.

Submissions for Appellant

[97] The submissions of counsel in support of the appellant's appeal may now be summarised as follows:

- (i) the Articles of Continuance constitute a contract as between each of the shareholders themselves and the 9th respondent;
- (ii) the 9th respondent being a family company, the intention of the Articles is to give the family members a preferred status over and above outsiders;
- (iii) this Court must so construe the terms of the Articles as to import the notion of reasonable business efficacy;
- (iv) the terms of the Articles therefore mandate that the Board of Directors of the 9th respondent must offer to the appellant the shares of the proposing transferors at a price and on exactly the same terms and conditions as they were prepared to accept from the 10th respondent;
- (v) to the extent that the terms and conditions being offered to the appellant by the directors are different from those which the respondents were prepared to accept from the 10th respondent, then the offer by the directors to the appellant is a sham,

in that the offer did not satisfy what the Articles mandated;

- (vi) the directors are in breach of the provisions of the Articles;
- (vii) the directors and the 8th respondent are in breach of their fiduciary duty to the appellant;
- (viii) the agreement made between the 1st-7th, the 9th and 10th respondents dated December 17, 1998 and September 7, 1998 is invalid;
- (ix) the agreement made between 8th and 10th respondents is invalid.
- (x) the conduct of the directors of the 9th respondent in relation to the offer made to the appellant was oppressive and/or unfairly prejudicial to or unfairly disregarded the pre-emptive rights of the appellant.

Submissions for 1st – 7th and 11th Respondents

[98] The submissions of counsel on behalf of the directors and the 7 shareholders who have accepted the offer from the 10th respondent to purchase their shareholding in the 9th respondent are essentially these:

- (i) the issues in this dispute involve an interpretation of the Articles of Continuance of the 9th respondent;
- (ii) this Court must determine whether or not the Directors acted in compliance with those Articles;
- (iii) the Articles properly construed do not confer upon the appellant a right of first refusal or a right of pre-emption to purchase the shares of 1st-7th

shareholders on terms and conditions exactly the same as they were willing to accept from the 10th respondent;

- (iv) the Articles clearly set out a methodology for the determination of the price for the transfer of shares in the 9th respondent;
- (v) the interpretation canvassed by counsel for the appellant would have the effect of requiring the Court to rewrite the Articles to include the words: "on the same terms and conditions" which would be contrary to the intention of the framers of the Articles;
- (vi) to the extent that the Articles are a contract between the parties, the only rights the appellant has is to compel the directors and the other shareholders to comply with the terms of the Articles;
- (vii) the directors in their management of the 9th respondent qua directors do not owe any fiduciary duty to the appellant; such a duty is owed to the company alone;
- (viii) there is no evidential basis upon which the offer made to the appellant to purchase the shares of the 7 respondents in one lot at \$30 per share could be properly characterised as a sham offer;
- (ix) one of the pricing mechanisms incorporated into the terms of the Articles is for a determination of the price of the shares by the proposing transferors and the directors of the 9th respondent;
- (x) in discharging their duties, qua directors, the directors acted scrupulously fair in dealing with the bid by the 10th respondent to purchase the shares in the 9th respondent, and as such, there is

no evidential basis that would support the appellant's claim that the directors had acted oppressively and/or unfairly to the appellant; and

- (xi) the 10th respondent being accepted by the directors as a desirable person in the interests of the company enjoys a co-equal status with the appellant and the other shareholders of the 9th respondent.

Submissions for the 8th Respondent

[99] Counsel for the 8th respondent associated himself with the legal submissions made on behalf of the directors and the 1st-7th respondents. More particularly, with respect to the status of the 8th respondent in these proceedings, counsel contended that the position of the 8th respondent is different from that of the 1st-7th respondents in their capacity as either directors or shareholders.

[100] In essence, counsel's submissions in that regard are these:

- (i) the appellant is seeking to support her application and claim for relief under sections 228 and 235 of the *Companies Act, Cap. 308* respectively;
- (ii) the 8th respondent is taking part in these proceedings only as the executor of the estate of Colin Deane, and as such, cannot be sued in his personal capacity and/or as executor of the deceased's estate jointly and severally;
- (iii) the relief sought by the appellant cannot be granted against the 8th respondent being not a person coming within the scope of section 235 of the Act;

- (iv) there can be no cause of action for any breach by the 8th respondent of any fiduciary duty owed to the appellant generally or under the Articles of the 9th respondent;
- (v) the appellant has no right of pre-emption in respect of the 8th respondent;
- (vi) the agreement entered into between the 8th and 10th respondents on October 7, 1998 is valid.

Submissions for the 9th Respondent

[101] Counsel for the 9th respondent associated himself generally with the submissions advanced on behalf of the 1st-8th respondents. His arguments in support of those submissions may be briefly stated as follows:

- (i) given a proper construction of the Articles of Continuance of the 9th respondent, a shareholder of the 9th respondent who is the proposed transferee of shares has no right under the Articles to insist that the shares be transferred from the transferor on the same terms and conditions as the transferor may be prepared to transfer to a 3rd party;
- (ii) the procedure as laid down by the Articles cannot be compared to a right of first refusal;
- (iii) there is no common law rule which recognises a shareholder's pre-emptive rights and it is open to a company to include such a provision in its Articles;
- (iv) the Articles of Association is a contract between the shareholders and the rights of the shareholders are governed by the Articles.

- (v) the appellant's letter of November 19, 1997 purporting to be a notice to the directors indicating her willingness to purchase the shares was not in accordance with the requirements of the Articles;
- (vi) the contention of the appellant that the shares of the 9th respondent are to remain in the family is founded on a false premise;
- (vii) there was no oppressive or unfairly prejudicial conduct by the directors and by the Company in not supplying the appellant with the information requested;
- (viii) in selecting the 10th respondent as a desirable person the directors of the 9th respondent were acting in the best interests of the 9th respondent.

Submissions for the 10th Respondent

[102] Counsel for the 10th respondent, while adopting the submissions of counsel on behalf of the 1st-8th respondents, contended in effect by analogy that the position of the 10th respondent is not unlike that of the 8th respondent in that the 10th respondent does not fall within the category of persons against whom a charge may be brought in respect of oppression or unfairness on the basis of misconduct.

[103] Counsel further submitted that there could be no triggering of the pre-emptive provisions of the Articles in favour of the appellant inasmuch as the 10th respondent had obtained a co-equal status with the appellant. In this regard, counsel contended that the position of the

appellant has been to hamstring the operation of the 9th respondent by insisting on rights which effectively prevented the majority of the shareholders from exercising their proprietary rights, and which inhibited the directors in the discharge of their obligations and duties.

- [104] Counsel also submitted that the relief sought by the appellant against the 10th respondent should be denied with an order for costs against the appellant.

Evaluation

- [105] Our view of the evidence is that when the bid was first made on behalf of the 10th respondent by letter dated August 27, 1997 and addressed to the directors to purchase the entire shareholding in the 9th respondent and all of the company's debts limited to \$11 million, the 10th respondent was at that stage, an outsider in the strict sense of the word. That status, would seem, however, to have changed after the Board, in the exercise of the powers of managing the business and affairs of the 9th respondent, took the decision on September 12, 1997 on the basis of a revised offer from the 10th respondent to recommend to their shareholders acceptance of the offer of August 27, 1997, as amended by the letter of September 11, 1997.

62

[106] Since the conduct of the 2nd, 3rd and 11th respondents, qua directors, is being impugned, we consider it useful to examine whether or not the directors were acting properly within the scope of their powers when they recommended to their shareholders acceptance of the 10th respondent's offer.

[107] In seeking to answer the question posed, we are of the view that two issues fall to be determined: firstly, did the directors have the power to make the recommendation, and secondly, if they did, was the power circumscribed in any way?

[108] Our analysis of clause 1(a) of the Articles discloses that the directors are undoubtedly empowered to select any person whom they considered desirable in the interests of the company to be a shareholder. Further, we can find nothing in the Articles that restricts the directors in the exercise of their management powers under the Act from making the recommendation to their shareholders.

[109] Nothing therefore has been advanced before us to support any contention that the directors were not acting in what they conceived at the time to be in the best interests of the 9th respondent in making the selection of the 10th respondent and recommending acceptance of its offer by the shareholders.

[110] In the result, we find that at the time of the Board's recommendation of acceptance of the offer, the status of the 10th respondent had changed from that of an outsider to that of a person whom it was desirable in the interests of the 9th respondent to be a shareholder.

[111] As earlier indicated by the evidence, the 1st-7th respondents, qua shareholders, informed the directors of their intention to accept the 10th respondent's offer, whereas the appellant and the 8th respondent communicated their rejection directly to the attorneys-at-law for the 10th respondent, and in this regard we turn to consider the issues raised by the appellant's letter of November, 19, 1997 (para. 43) in respect of the letter of October 31, 1997 from the Board of Directors to the appellant and the 8th respondent (para. 41).

[112] While purporting to inform the directors of her intention to purchase the shares offered, the appellant in her letter contended that the price was not determined in accordance with the Articles, she was not given the option of stating the maximum number of shares she was willing to purchase, and that the Board's action was an attempt to deny her of her rights as a shareholder to be offered the shares on the same terms and conditions as those being offered to the 10th respondent.

[113] We find that the appellant's contentions are misconceived. Indeed, the directors sought to explain their actions in this way:

75. The directors offered the shares to the appellant and the 8th respondent in one lot as the offer being made by the prospective purchaser was to purchase at least 70% of the issued share capital of the company.
76. We also state that the purchase price offered to the appellant and the 8th respondent was a price determined by the offering shareholders and the Board of Directors at a meeting between the six shareholders who desired to sell and the Board of Directors. At that meeting it was determined that the shares of the six shareholders should be offered to the applicant and the 8th respondent at a price of \$30 per share, and the Board of Directors was mandated to put this offer to the applicant and the 8th respondent.
77. as at October 31, 1997 when the Board made the offer to the applicant and the 8th respondent there was in existence an agreed price for the sale of the shares.

[114] In this regard, we can find no impropriety in the actions of the directors in offering to the appellant the shares for purchase in one lot.

[115] The price for the shares offered to the appellant is another issue that has bedevilled this appeal and the submissions of counsel on this aspect of the appeal have already been noted. However, reference may be made to section 34 of the *Companies Act* with a view to

putting the *issue of price* for the shares in its proper perspective. The section provides as follows:

“Pre-emptive rights 34(1). If the articles so provide, no shares of a class of shares may be issued unless the shares have first been offered to the shareholders of the company holding shares of that class; and those shareholders have a pre-emptive right to acquire the offered shares in proportion to their holdings of the shares of that class, at such price and on such terms as those shares are to be offered to the others.

[116] In our judgment, the wording of section 34 would seem to contemplate a situation where a company is proposing a new issue of shares, and if its articles so provide, those shares must first be offered to existing shareholders, presumably as a means of protecting their interests in the company: i.e. the articles would have, in effect, given the existing shareholders a right of first refusal. We are further of the view that to the extent that new shares are being issued by a company, the section then contemplates that the existing shareholders of the company would have a right to acquire the new shares at the same price and on the same terms as are offered to prospective shareholders.

[117] It is clear that the provisions of section 34 providing for shareholders to "have a pre-emptive right to acquire the offered shares in proportion to their holdings of the shares of that class, at such price and on such terms as those shares are to be offered to others" cannot therefore apply to a situation which involves a transfer of shares that have already been issued in a company as is the position in the present case.

[118] Of the many cases to which our attention has been directed only the *Canadian case of Dancey v 229281 Alberta Ltd. et al (1988) 40 BLR* page 180 involved articles of restriction on transfers which are substantially similar to those in this appeal. Article 11 of the defendant company provided that:

"No share shall be transferred to a person who is not already a shareholder of the company, so long as any person selected by the directors of the company as one whom it is desirable in the interest of the company to admit as a shareholder or so long as the other shareholders in the proportion in which they already hold shares in the company or otherwise, are willing to purchase the same *at the price and upon the terms at which the said share is being offered by the proposed transferor*, and for the purpose of this section the shareholder proposing to transfer any share in the company shall first give to the secretary of the company fifteen days notice in writing of his intention so to transfer the said share.

[119] We have referred to the *Dancey's* articles only for the purpose of illustrating the type of wording that is in our view necessary to support the construction which is canvassed on behalf of the appellant and which is similar in terms to those highlighted above.

[120] We therefore have no warrant to import any such words into the Articles of Continuance for the purpose of achieving the notion of reasonable business efficacy. In this regard, the terms of the 9th respondent's Articles must be strictly construed. The contentions of the appellant on this aspect of the appeal are therefore without substance.

[121] The appellant's request for information in her letter of November 19, 1997 has already been noted (paras. 43 and 48). The contention is that the information which was requested and not supplied was essential for the purpose of determining whether or not the appellant should exercise her "pre-emptive right" to purchase the shares offered.

As to this issue, the learned trial Judge commented as follows:

Even if the applicant as in the instant case did not have all the 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 a sugar work plantation.

I do not find that the absence of such records was oppressive, unfairly prejudicial or unfairly disregarded the applicant's interests.

There is no evidence that any of the other shareholders were provided with any information different from that given to the applicant.

[122] To our minds the simple answer to the appellant's request is to be determined by reference to whether or not she is so entitled as of right under the *Companies Act*, the Articles of Continuance, Regulations or the By-laws of the Company for the purpose of accepting the shares offered.

[123] By-law No. 1 relating generally to the conduct of the affairs of the 9th respondent provides in paragraph 17 as follows:

17. Information available to Shareholders

17.1 Except as provided by the Act no shareholder shall be entitled to any information respecting any details or conduct of the Company's business which in the opinion of the directors it would be inexpedient in the interest of the Company to communicate to the public.

17.2 The directors may from time to time, subject to the rights conferred by the Act, determine whether and to what extent and at what time and place and under what conditions or regulations the documents, books and registers and accounting records of the Company or any of them shall be open to the inspection of shareholders and no shareholder shall have any right to inspect any

document or book or register or accounting record of the company except as conferred by statute or authorised by the directors or by a resolution of the shareholders.

- [124] Our attention has not been directed to any provisions in the Act, Regulations or the Articles of Continuance that would override the terms of paragraphs 17.1 and 17.2 of By-law No. 1, and consequently have the effect of supporting the appellant's contention. We therefore find no legal basis to support the applicant's request.
- [125] We might add that attention has been drawn to the fact that during the negotiations with the 9th respondent, the 10th respondent had obtained information concerning the financial status of the 9th respondent which was denied the appellant. In our view, such a state of affairs could be likened to part of a due diligence exercise to ascertain the ultimate net worth of the 9th respondent as the basis for determining an acceptable price for the acquisition of the entire shareholding in the 9th respondent.
- [126] Having regard to our findings in respect of the appellant's letter of November 19, 1997, we hold that the appellant failed to accept the offer to purchase the shares of the 1st-7th respondents as set out in the letter of October 31, 1997. Indeed, it is to be noted that in her affidavit of November 23, 1998, the appellant while contending that

she ought to have been treated as equally as the 10th respondent by the Board of Directors, deposed as follows:

I am saying that the offer to me as set out in paragraph 72 of the joint affidavit was not in accordance with Schedule 1 to the Articles of Continuance and that while my response was not in terms of an acceptance of the offer, I was thereby exercising my rights to purchase the shares which I was fully entitled to do by virtue of those Articles.

[127] With respect to position of the 8th respondent, the evidence in effect discloses that the 10th respondent made an offer to purchase 28,570 shares of the estate of Colin Deane of which the 8th respondent was the beneficial owner; and briefly stated, the issue being raised is whether the 8th respondent and the directors of the 9th respondent were obligated under the Articles to make an offer to the appellant to purchase those shares before the 8th respondent concluded an agreement with the 10th respondent for the sale of the shares.

[128] Earlier in this judgment, we have indicated (para. 88) that the 10th respondent is not an outsider, the effect of which would be that the restrictive provisions of the Articles respecting share transfer would not apply to the 10th respondent. Indeed, the status of the 10th respondent confers an equal opportunity with the existing

shareholders to purchase shares freely in the 9th respondent from a proposing transferor.

[129] As noted *supra*, clause 1(a) of the Articles provides that “a share may be transferred by a shareholder or *other person entitled to transfer such share to any shareholder selected by the transferor*” (*emphasis added*). The 8th respondent clearly comes within the scope of clause 1(a) as a person entitled to transfer shares. In our construction of clause 1(a), the proposing transferor is at liberty to make the *selection* of any shareholder as he sees fit. That being the case, we find that the appellant did not have a right under the Articles to be selected to buy the shares of the 8th respondent, nor a right to receive an offer to purchase the shares.

[130] The evidence, however, indicates that the directors as a matter of courtesy informed the appellant of the 8th respondent’s intention to transfer his shareholding to the 10th respondent in the terms agreed. Perhaps, the 2nd, 3rd and 11th respondents adopted that procedure *ex abundanti cautela*.

[131] Assuming nonetheless that the appellant had a right to be informed of the 8th respondent’s intentions and to be given the right to purchase the shares, it is our view that the appellant’s letters of October 12 and

19, 1998 did not constitute an acceptance of the directors' purported offer of October 9, 1998.

[132] As to the contentions that the directors and the 8th respondent are in breach of their fiduciary duty to the appellant, we have already expressed the view that a director's duty is owed to the company and not to any shareholder of the company. However, counsel's submissions on behalf of the appellant in this regard have been extended to the 8th respondent, and we will therefore consider the issue in that context.

[133] Earlier in our analysis of the provisions of the *Companies Act*, we observed that the evidence before us did not disclose the existence of any unanimous shareholder agreement, and we also found that the 9th respondent's Articles of Continuance is not a contract between the shareholders themselves, nor as between the shareholders and the 9th respondent. Consequently, no contractual relationship existed between the appellant and the 8th respondent at the time when the 8th respondent entered into the agreement with the 10th respondent, and any submissions to that effect and in respect of the issue of breach of fiduciary duty are without substance and must fail.

[134] Our view on this aspect of counsel's submission is fortified by reference to *Benson et al v Third Canadian General Investment Trust Ltd. et al* 14 O.R (3d) at p.493 where *Farley J* in dealing with an application for an oppression remedy under the *Canadian Business Corporations Act* R.S.C. 1985, C. 44, and the *Ontario Business Corporation Act* R.S.O. 1990, C.B. 16 cited in *Brant Investments Ltd. v KeepRite Inc.* (1991), 3 O.R (3d), 80 D.L.R. (4th) 161, where the Court of Appeal at p.301 said:

It is clear that none of the foregoing authorities imposes a duty on majority shareholders or directors in favour of minority shareholders.

...

Acting in the best interests of the corporation could, in some circumstances, require that a director or officer act other than in the best interests of one of the groups protected under section 234. To impose upon directors and officers a fiduciary duty to the corporation as well as to individual groups of shareholders of the corporation could place directors in a position of irreconcilable conflict, particularly in situations where the corporation is faced with adverse economic conditions.

And at p.306, the Court said:

Of course, there may be many situations where the rights of minority shareholders have been prejudiced or their interests disregarded, without

any remedy being appropriate. The difficult question is whether or not their rights have been prejudiced or their interests disregarded "unfairly".

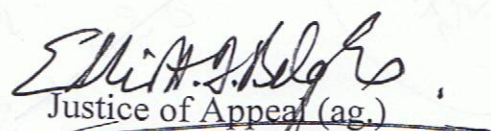
Conclusion

[135] In the result, we find that the directors in managing the business and affairs of the 9th respondent honestly sought to comply with the Act, Regulations, Articles of Continuance, and By-laws of the company as they perceived them and that in discharging their duties and responsibilities they acted in the best interests of the 9th respondent whose economic welfare was in a perilous state. Indeed, on our view of the evidence, the appellant has failed to establish any rights as a shareholder in respect of which the directors and any of the shareholders are in breach.

[136] For the reasons given in this judgment the relief sought by the appellant is without merit, and the appeal is accordingly dismissed with costs to each of the respondents, certified fit for 2 counsel.


Justice of Appeal


Justice of Appeal


Justice of Appeal (ag.)