2006 **200 – S/A** **DEMERARA**

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

CIVIL JURISDICTION

In the matter of the Companies Act, 1991.

-and-

In the matter of an application for the Construction of Section 199 (6) of the Companies Act, 1991.

-and-

In the matter of the Guyana Securities Act 1998 and Regulations made thereunder.

-and-

BETWEEN:

BANKS DIH LIMITED

Plaintiff

-and-

GUYANA SECURITIES COUNCIL

Defendant

Mr. BOSTON and MR. MC KAY S.C. for Petitioner

Mr. S. FRASER for Respondent.

DECISION

The Plaintiff filedan Originating Summons claiming remedies related to section 199 (6) of Companies Act No. 29 of 1991 and Regulation 6 (d) (1) of the Securities Industry (Disclosure by Reporting Issuers) Regulation No. 8 of 2002.

The issues turned upon the construction of these two acts and the Regulations and whether the applicants/Plaintiffs are bound to follow the latter Regulation despite that the latter Regulation is not consistent with the Companies Act 1991.

Section 199 (6) of the Companies Act 1991 states as follows:-

> ***" notwithstandingsubsection (4) or (5) a company ……..shall not be bound or entitled to treat the transferee of shares or debentures as the owner of them until the transfer to him has been registered or until the court orders the registration of the transfer to him, and until the transfer is presented to the company for registration, the company shall not be treated as having notice of the transferee's interest thereunder or of the fact that the transfer has been made."***

Regulation 6 (d) (1) provides:-

The issuer shall include in or with the directors' annual report –

> ***The interests of each director and chief executive of the issuer in the equity or debt securities of the issuer or any subsidiary, and of the associates of such director and chief executive in so far as is known or may be ascertained by reasonable enquiry.***

In this matter the applicant Company's director had sold and transferred his shares before the Directors' annual report had been submitted.

These shares had been sold to Banks Holdings Limited by Mr. Khan, Banks Holdings Ltd. being the transferee or new owner of the shares but the transfer had not been presented to Banks DIH for registration.

The applicants claim that Banks DIH was never notified of the change in ownership from Mr. Khan to Banks Holdings, and that only where such notice had been given that Banks DIH Ltd. would have an obligation to reflect the change in ownership in the Director's report as required by Regulation 6 (d) (1) of the Disclosure Regulations.

The Plaintiffs/Applicants also submit that section 199 (6) of the Company's Act 1991 makes it clear that Banks DIH Ltd. is not required to treat Banks Holdings Ltd. as the transferee or new owner of the shares previously owned by Mr. Khan and is not treated as having notice thereof until the transfer has been presented for registration.

The Defendants claim that the obligations imposed by regulation 6 (d) (1) is independent of the requirements of section 199 (6) of the Company Act, 1991, and that the obligation to report under Regulation 6 (d) (1) is in respect of the actual interest of the director and his associates and the interest of the person to whom the said shares may have been transferred.

The Defendantsfurther submit that section 199 (6) imposes no duty on the Company whereas Regulation 6 (d) (1) imposes a duty on the Issuer to make reasonable enquiries.

The defendants examined the long titles of both Acts the Companies Act 1991 and the Security Industries Act 1998. It is the Defendant's contention that it was parliament's intention to protect

purchasers of securities and to promote ethical behavior in the securities industry that led to the imposition of a duty on Issuers under the Act to adopt more than a passive role in ascertaining and disclosing certain information.

The defendant's further claim that there are two types of directors interests that are required to be disclosed;-

(1) Interests that are known
(2) Interests ascertainable by reasonable enquiry.

It is the court's view that at the time when the Company's Act was formulated and came into force the stock market was not a known entity in Guyana. Trading shares in the stock market was not an everyday occurrence in Guyana. It is only some years after that a stock exchange market came into being in Guyana and people began to freely trade their shares, by buying and selling shares on the stock market.

The Securities Industry Act 1998 came into force seven years later and as its Long Title indicates it is

> ***"An Act to provide for the Registration of securities brokers and dealers, certain self-regulatory organisations, and certain issuers of securities; and for the regulation of securities issuances; with the purpose of encouraging capital formation and the growth of efficient securities markets and promoting ethical behavior in the securities industry."***

As a result Regulations were made in 2002 pursuant to the Act in order to carry out the purposes of the Act.

The Companies Act 1991 at the time it was enacted imposed no duty on the company to ascertain whether a transfer had been made, and notice was imputed only when the transfer is presented to the company.

However, the Securities Industry Act, 1998 required that more diligence was needed and that even if notice was not given as required by the Company's Act, then the issuers were required by reasonable inquiry to ascertain the existing directors interests in the Company.

In other words the 1998 Act is saying that notwithstanding notice was not given since the signed transfer was not presented to the company as is required by the Company Act 1991, the issuers must go further and make reasonable inquiry of the director's interests for the purpose of the Directors annual report, which was required before the AGM could be held.

In other words the Company's Act 1991, section 199 (6) is a purely internal administrative section for the purpose of registering shares and transfer of shares, and to enable members to exercise their rights.

The Securities Industry Act 1998 however, is more than that and has a wider umbrella where the public at large is required to be notified of changes in the interest of Directors in a Company, to protect purchasers of Securities and to protect investors, and to ensure that markets are fair and transparent.

The Applicants further submitted that therefore the duty imposed by the securities Industry Act 1998 and its Regulation has to be greater, and the Company's Act 199 (6) cannot remove that duty to make reasonable inquiry, especially since the knowledge of the Directors who sold their shares would be knowledge imputed to the Company, and reasonable inquiry would have revealed that Mr. Khan had sold his share to Banks Holding Ltd. and this is a factor that was required to be revealed in the Director's annual report, since the sale had already taken place before the report was submitted.

The very fact the words "upon reasonable enquiry being made" were used means that even though the transfer has not been presented to the Company for Registration, the Company can by enquiry find out whether or not shares were sold by a director, since that is the class of persons to whom the Act is directed, and if so that information must be included in the Director's annual report.

In other words for the purposes of the annual report reliable information gotten by means of reasonable enquiry is sufficient for that purpose.

Canada Sugar Refining Co. V. R (1898) AC 735 of 741 seems pertinent, where it is stated as follows:-

> ***"Each clause of a statute should be construed with references to the context and other clauses in the act, so as, as far as possible, to make a consistent enactment of the whole statute or series of statues relating to the subject matter."***

Lord Campbell CJ in Liverpool Borough Bank v Turner (1860) 30 LJ CH 379 at 380 remarked:

> ***"No universal rule can be laid down. It is the duty of courts of Justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed."***

In Howard v Bodington (1877) 2 PD 203 at 211 Lord Penzance observed:

> ***"I believe as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject matter, consider the importance of the provision and the relation of that provision to the general subject intended to be secured by***

> ***the act, and upon a review of the case in that aspect decide whether the enactment is what is called imperative or only directory."***

Chancellor Luckhoo in Reece v Abdulla summed up what must be done at p. 36

> ***"In order to determine whether a statutory provision is mandatory or directory, a casual or superficial approach is not enough. One would have to get, so to speak, under the 'skin' of what is enacted, its scope and object would have to be surveyed; the justice or injustice that would accrue either way assessed, the extent or hardships and inconveniences examined, etc. if the probe is to reveal the time intendment and purpose of the legislature."***

It is to be noted that should a mandatory construction be placed on the provision under review, Legislation enacted during that period could be called into question. In urging for an interpretation of the provision that is permissive or directory then one must look at the implications, consequences and effect in interpreting Legislation mandatory or directory.

In Schachter v Canada (1996) 3 S.C.R. 609 and Adler v Canada (1992) 2 S.C.R. 679 the Supreme Court of Canada struck down certain pieces of legislation as being inconsistent with the charter. In so doing it is noteworthy that the court, being mindful of the consequences did not hesitate in holding the impugned legislation as such. Instead, the court suspended the effect of their declaration so as to allow the relevant authorities time to bring the impugned Acts into conformity with the constitutional provisions.

It is obvious that in the interpretation of these two pieces of Legislation one has to consider whether the subsidiary legislationie the Securities Industry Regulations no. 8/2002 overrides the obligations imposed by the company's Act.

Regulation 6 d (1) of the Securities Industry (Disclosure by Reporting Issuers) Regulations 2002 was made pursuant to the authority given to the Minister by section 126 (1) of the Securities Industries Act 1998.

However, the Interpretation and general clauses Act Chapter 2:01 states at section 19 (1) "Every section of an Act shall have effect as a substantive enactment without introductory words."

Section 20 (1) (b) states that no subsidiary legislation shall be inconsistent with the provisions of an Act.

It is clear that there is an inconsistency between Regulation 6 (d) (1) which is subsidiary legislation, and the substantive enactment of section 199 (6) of the Companies Act.

The issues, therefore, is whether section 199 (6) of the Companies Act should prevail.

In Re Ontario Securities Commission and Brigadoun Scotch Distributors Canada Ltd. (1970) 30 R 714 at p. 717 states that "the basic aim or purpose of the Securities Act 1966 is the protection of the investing public through full true and plain disclosure of all material facts relating to the Securities being issued."

Therefore does the Securities Industry Regulation 2002 when read together with section 199 (6) of the Companies Act 1991 make it mandatory that the Company must make disclosure of shares sold by Directors but not registered nor submitted to the Company for registration at the date of submitting of the Director's annual report to the Defendant?

It is clear that the purpose of the Securities Legislation is the protection of the public, and this is secured by providing that the issuer (company) must "include in the Directors Annual Report or statement at the end of the financial year the interest of each director and chief executive of the issuer and (b) the interest of the associates of such Directors and chief executive in the equity securities of the issuer or any subsidiary as is known or may be ascertained by reasonable enquiry."

In this case the regulation made under another statute is requesting that the issuer (the company) must do a particular thing of which the issuer knows of its existence and the substantive enactment of an Act says that the issuer (the company) should take no notice of such a thing even if they know of its existence unless certain conditions are satisfied.

It is clear that the subsidiary legislation cannot override the Companies Act of 1991 and impose an obligation where under the Act that obligation would be contrary to what the Act has mandated, and the inconsistency must be resolved in favour of the directions made under the Act.

Is the wording in the Securities Act Regulation 6 (d) (1) mandatory or directory? This court is of the view that since this Regulation clashes with the Companies Act, a substantive Legislation then the words "the issuer shall include" ought to be interpreted as directory only and not mandatory, for if the word 'shall' were to be interpreted as mandatory then section 199 (6) of the Companies Act would be called into question and that could not be allowed since the Companies Act is a substantive Act as against the Regulation under the Securities Act which is subsidiary legislation.

It is the courts view having considered the relevant legislation and the purposes thereof, under s. 199 (6) a Company is not obliged to transfer shares into the Company's register of shareholders, without the transfer duly signed is presented to the company for registration.

It is also this courts view that under the Regulation 6 (d) (1) of the Securities Industry Regulations no. 8/2002 the company cannot lawfully register shares sold by a shareholder into the company's register of shareholders without receipt of a duly signed transfer.

It is also the courts view that the Plaintiff/Company has no obligation under Regulation 6 (d) (1) to reflect the change in ownership in the Director's report where no notice of change of ownership was given to the Plaintiff/Company by way of presenting the duly signed transfer for registration.

As was said in Young and Company v Mayor and Corporation of Royal Leamington Spa (House of Lords) (1883)

> ***"It may be said that this is a hard and narrow view of the law; but my answer is that Parliament has thought its expedient to require this view to be taken and it is not for this or any other court to decline to give effect to a clearly expressed statute because it may lead to apparent hardship"***

And at P. 526 it was stated:

> ***"We ought in general, in construing an Act of Parliament, to assume that the Legislative knows the existing state of the law."***

If subsidiary legislation shall not be inconsistent with the provisions of an Act, then it was the duty of Parliament to ensure that subsidiary legislation under the Securities Act did not conflict with a substantive Act, in this case the Companies Act 1991.

Therefore Parliament could not have intended that the absence of any duty imposed under section 199 (6) of the Companies Act should be overridden by subsidiary Legislation made under another Act, that imposed a duty to make reasonable inquiry. That inconsistency has to be resolved either by subsequent Legislation or amendment to bring the two sections into conformity with each other.

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Diana F. Insanally

Dated this 7th day of March, 2013