(21)

ST. VINCENT:

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 4 of 1977

BETWEEN: LEROY KNIGHTS - Plaintiff/Appellant

and

CARDON KNIGHTS
GRENVILLE TRUMPET
ALEXANDER KNIGHTS
NORMA KNIGHTS
CLEVE BROWNE
LAWRENCE CLARKE
REGENT MOTOR SUPPLIES LIMITED - Defendants/Respondents

Before: The Hon. Sir Maurice Davis, Q.C. - Chief Justice
The Honourable Mr. Justice Peterkin
The Honourable Mr. Justice Bruno (Acting)

Appearances: E. Robertson for Plaintiff/Appellant
E.A.C. Hughes for Respondents Cardon Knights and Norma Knights.
Respondent Lawrence Clarke in person.
No appearance of remaining Respondents.

1978; Feb. 8, 9 & 10; May 12

J U D G M E N T

PETERKIN, J.A.:

This is an appeal against the judgment of Berridge, J dated 3/6/77 dismissing two summonses brought by the Plaintiff/Appellant which were heard together by the consent of the parties. The first, dated 12/3/77, sought an order appointing some fit and proper person to be a Receiver and Manager of the undertakings and assets of the Company named. The second, dated 1/4/77, sought in effect an injunction restraining the other Respondents

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from appointing the 5th named Respondent Cleve Browne as a director of the Company, and enjoining him from acting in that capacity.

The summonses were both supported by affidavit evidence, and there were affidavits filed in reply by the 1st and 4th named Respondents, and by Arthur Connell. The facts and circumstances are briefly as follows:-

The Company was first a partnership. The sole partners being the Plaintiff/Appellant and his brother Cardon Knights, the first-named Respondent. For several years they carried on business together, and on 14th October, 1972, the business was converted into a limited liability Company and was incorporated under the Companies Act, Cap. 219 of the Laws of St. Vincent, as the Regent Motor Supplies Limited. As at 14/6/76, a summary of capital and shares of the Company filed with the Registry showed, Cardon Knights, Managing Director, 106,295 shares. Leroy Knights, Director, 53,147 shares. In addition, Norma, Levi, Ethel, Winston and Frank Knights are shown as holding one share each. The business of the Company appears to have been successfully carried on until 25th June, 1976, when differences arose between the brothers Leroy and Cardon Knights who were the only two directors of the Company. They fought openly on the business premises, and since then there has been no dialogue between them concerning the management of the Company. On 18/10/76 the first named Respondent changed the lock to that part of the premises of which the Plaintiff/Appellant was manager. He has since also withdrawn his authority to sign

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cheques on behalf of the Company and has denied him access to the books of the Company. The office of the Company was closed on 13/1/77, but was since re-opened sometime in December, 1977. Alexander Knights and Grenville Trumpet were appointed directors of the Company, bringing the number to four, and the Plaintiff/Appellant was notified of an intention to appoint Cleve Browne also as a director. According to the joint affidavit of Cardon Knights and Norma Knights a meeting was held on 1st April, 1977, at the residence of Leon Clarke, and a resolution appointing Cleve Browne to be a director of the Company was passed unanimously. The affidavit reads in part,

> 2. On the 24th day of February, 1977, pursuant to Article 63 of the Articles of Association we signed a requisition for an extraordinary general meeting of the Company for the following object which was stated in the requisition:-
>
> > "for the purpose of appointing Cleve Browne of Vermont or some other fit and proper person to be a Director".
>
> 3. No meeting having been called within 21 days, on the 18th day of March, 1977, we as requisitionists pursuant to Article 63(2) of the Articles of Association convened a meeting for the same purpose to be held on the 1st April, 1977, at 4.15 p.m. at the residence of Leon Clarke and notice of the said meeting was duly given to the shareholders as required by Articles of Association.
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> 4. On the 1st April, 1977, the meeting was duly held at the residence of Leon Clarke and there was present a quorum consisting of Levi Knights and we the deponents.

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5. At the said meeting a resolution appointing Cleve Browne of Vermont to be a Director of the Company was passed unanimously.

Article 63 (i) and (ii) of the Articles of Association states,

63. The directors may, whenever they think fit, convene an extraordinary meeting, and they shall, on the requisition of the holders of not less than one-tenth of the issued capital of the Company upon which all calls or other sums due have been paid forthwith proceed to convene an extraordinary meeting of the Company, and in the case of such requisition the following provisions shall have effect:-

(1) The requisition must state the objects of the meeting and must be signed by the requisitionists, and deposited at the office, and may consist of several documents in like form each signed by one or more of the requisitionists.

(2) If the directors do not proceed to cause a meeting to be held within twenty-one days from the date of the requisition being so deposited, the requisitionists or a majority of them in value may themselves convene the meeting, but any meeting so convened shall not be held after three months from the date of such deposit."

The learned trial judge has found that Cleve Browne was validly elected a director of the Company notwithstanding the fact that the requisition to convene the meeting was not deposited at the office of the Company. He also went on to make the following findings which are recorded at page 11 of the record,

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"In regard to the appointment of a Receiver/Manager it may well be that the company is in a state of suspended animation but I am not convinced that the assets of the company are in jeopardy; the keys of the premises are in the custody of Mr. Connell by mutual consent and the nature of the assets is such that, far from depreciating, they are likely to appreciate in value in the light of prevailing world wide conditions. I have already observed that the case law cited is relevant where winding-up proceedings are involved and, assuming that a winding-up of the company is imminent then it appears that other proceedings are more appropriate. In any event, I am satisfied that the majority of the share holders are prepared to run the company."

The grounds of appeal are,

(1) The learned trial judge was wrong in law in failing to appoint a Receiver and Manager of the assets of the Defendant Company having regard to the facts and circumstances of the case to the admitted deadlock.

(2) The learned trial judge was wrong in law in holding that the non-compliance with Article 63(1) of the Company's Articles by the requisitionists was not fatal to the appointment of Cleve Browne as Director.

(3) The learned trial judge was wrong in law in holding that the appointment of Cleve Browne was valid notwithstanding the fact that the requisition to convene the meeting was not deposited at the office of the Company.

(4) The learned trial judge was wrong in law in holding that the assets of the Company are not in jeopardy since the keys of the premises are in the custody of Mr. Connell by mutual consent and the nature of the assets are such that far from depreciating they are likely to appreciate in value in the light of prevailing world wide conditions, there being no evidence to substantiate such a finding.

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(5) The learned trial judge was wrong in law in not having any regard to the fact that the Company was in essence a partnership subsequently converted into a limited liability Company and that the underlying factor of probity and fair dealing was fundamental to the existence of this Company.

(6) The learned trial judge failed to have any regard to/or to construe the legal effect of a resolution dated the 25th June, 1976, in the following terms.

"That the directors be hereby authorised to sell all the undertakings, property and assets of the Company subject to the liabilities owing by the Company to be paid in cash or in any other way as the directors may determine pursuant to paragraph (aa) of the Memorandum of Association."

(7) The learned trial judge was in all circumstances of this case wrong in law in refusing to make an interlocutory injunction and in refusing to appoint a Receiver and Manager.

In arguing grounds (2) and (3) together, Counsel for the Appellant submitted that the object of depositing the notice is to allow the directors to convene the meeting, and that the failure to deposit the requisition, which is conceded, was a non-compliance with Article 63 the terms of which were mandatory. He argued that it was not a mere irregularity but a matter of substance, and, as such, was fatal to the appointment of Cleve Browne as a director. He referred the Court to the Cases of In re State of Wyoming Syndicate, 1901 2 Chancery Division 431, and In re Haycraft Gold Reduction and Mining Company, 1900 2 Chancery Division 230. Neither case is on all fours with the instant matter, but both show the weight to be attached to compliance with the articles. In dealing

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with the service of documents and process the learned author of Halsbury's Laws of England States the law in Vol. 6 of the third edition at paragraph 275:

> "275. Service of documents on a company. All communications and notices may be addressed to the company at its registered office(s); and in particular a document may be served on the company by leaving it at or sending it by post, whether ordinary or registered, to the registered office. Document includes summons, notice, order and other legal process. A summons to appear before a magistrate must be served at the registered office, and appearance by a solicitor to contest the validity of the service is not a waiver of the objection. Service need not be by post; the document may be left with a director at the office.
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> Service on the solicitor of the company is sufficient only where the company agrees to accept it and enters appearance. The secretary may waive service on him at the registered office by requesting that it may be served on him elsewhere.
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> Where there is no registered office, service at the office in fact used by the company will be sufficient. Where there is no office, the company having ceased to carry on business, service on some of the late officers may be allowed."

One of the cases cited by Counsel for numbers (1) and (4) Respondents is that of Gaskell v Chambers, 1858, 26 Beav., 252. Here, a Company, though not formally dissolved, had practically ceased to exist, and had no office or officers. The Company being made defendants in a suit, the Court ordered that service of the bill on the late chairman and the secretary should be good service on the company. In short, an order was sought of the Court before service was attempted. In the instant case it is common ground

/that.....

that the offices of the company were shut at the relevant time by mutual consent and the company had ceased to do business. Further to this, the secretary of the company, the 4th named Respondent, was one who signed the requisition for an extraordinary general meeting of the company. She is the wife of the first named Respondent In these circumstances it is in my opinion difficult to hold that the requirements of Article 63 were complied with by service on the secretary without an order from the Court. In my view the appointment of Cleve Browne as a director was not valid, and I would grant an injunction enjoining him from acting as such until such time as steps are taken to have him validly appointed.

I turn now to the summons requesting the appointment of a Receiver and Manager to which Counsel has devoted his arguments on the remaining grounds of appeal. The conditions which should subsist as a prerequisite to the appointment of a Receiver or a Receiver and Manager are stated at para. 987 of Halsbury's Laws of England, 3rd Edition, Volume 6 as follows:-

> "987. When appointed by court. A receiver or receiver and manager will be appointed by the court where the principal or interest is in arrear; or where the security is in jeopardy, even if no event has happened which either under the debentures or the trust deed makes the security enforceable; or where the company has sold the whole, or substantially the whole, of its undertaking and assets otherwise than in the ordinary course of business, and has ceased to be a going concern; or on an order being made or a resolution being passed for the winding up of the company. The court will also in some cases appoint a receiver in place of a receiver appointed by debenture holders under a power contained in the debentures."

/Counsel's.....

Counsel's arguments here have been based mainly on the two following submissions:

(i) that where a pre-existing partnership has been converted into a limited liability company, as in the instant case, the underlying factor should be probity and fair dealing, and when there is a breach of such the court ought to interfere, and legal rights will be subjected to equitable considerations.

(ii) that a Receiver ought to be appointed where the assets of the company are in jeopardy.

The second submission does not give rise to much difficulty. The learned trial judge has made a finding in regard to this at page 7 of his judgment; (page 11 of the record). He has found that the Plaintiff/Appellant has not convinced him that the assets of the company are in jeopardy. I can see no reason to differ from his finding on this. He did however, go on to find, to which objection has been taken by Counsel, that the nature of the assets is such that, far from depreciating, they are likely to appreciate in value in the light of prevailing world wide conditions. I would agree that there is no evidence to support this further finding which I regard as mere surplusage.

In the course of his argument on the first submission Counsel has referred the Court to a number of cases including that of Ebrahimi v Westbourne Galleries Ltd., 1972, 2 A.E.R., 492, most of which deal with petitions to wind up companies under the just and equitable clause and to which I think different considerations would apply. There could be no useful purpose served in my view in entering into an exhaustive analysis of these cases, but in

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the judgment of Lord Wilberforce in the Ebrahimi case, at page 500, are to be found the following words,

> "But the expressions may be confusing if they observe, or deny, the fact that the parties (possibly former partners) are now co-members in a company, who have accepted, in law, new obligations. A company, however small, however domestic, is a company not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in."

The just and equitable clause has been described by Lord Cross of Chelsea in the same case as an equitable supplement to the common law of the company which is to be found in the memorandum and articles. This clause is to be found in Sec. 71 of the Companies Ordinance of St. Vincent which deals with the circumstances under which a company may be wound up by the Court. There was no application before the learned judge for a winding up order, nor was the question of winding up the company agitated in the lower Court before him, and so, this court should not in my view grant any such relief.

In the instant case, the Respondents, while admitting that there is a temporary deadlock, have denied that it is of a permanent nature. In my view Counsel for the Respondents has rightly argued that it can be resolved by the shareholders of the company. In such circumstances the Court will not intervene to appoint a receiver or manager so as to deprive the shareholders of their right to run the Company. They are manifestly prepared to do so as appears from the affidavits.

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For the reasons stated I would refuse the application. In the result, I would allow the appeal in part only.

In all the circumstances, there should be no order as to costs.

(N.A. Peterkin)
JUSTICE OF APPEAL

I agree.

(W. Bruno)
JUSTICE OF APPEAL (Acting)

I also agree.

(Sir Maurice Davis)
CHIEF JUSTICE