GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL No.2 of 1995

BETWEEN:

ROBERT S. KIRBY

Appellant

and

LAURISTON FRANCIS WILSON JR

Respondent

Before:	The Rt. Hon. Sir Vincent Floissac	Chief Justice
	The Hon. Mr. Satrohan Singh	Justice of Appeal
	The Hon. Mr. Albert N.J. Matthew	Justice of Appeal (Ag.)

Appearances: Sir Harold St.John Q.C. for the Appellant
Mrs Celia Edwards for the Respondent

1995: November 30;
1996: January 15.

JUDGMENT

SIR VINCENT FLOISSAC, C.J.

The appellant and the respondent are both chartered accountants. The appellant resides in Barbados and the respondent resides in Grenada. In Barbados, the appellant is the senior partner in the international accounting firm of Price Waterhouse which carries on business in that island under the name of Price Waterhouse East Caribbean (P.W.E.C.). In Grenada, the appellant is the registered proprietor of a business carried on under the name of "Price Waterhouse" and registered as such under the Registration of Business Names Act.

On 31st December 1991, the appellant (representing P.W.E.C.) and the respondent concluded an agreement (the Partnership Agreement) where under they established a partnership under the name of Wilson & Co. for the purpose of carrying on the business of a chartered accountants and management consultants in Grenada. The terms of the Partnership

Agreement are contained in a letter (the Letter) dated 1st October 1991 from the appellant to the respondent (who countersigned the Letter in an agreement (the Written Agreement) executed on 31st December 1991 between the appellant and the respondent. On 9th August 1993, P.W.E.C. formally withdrew from the firm of Wilson & Co.

On 23rd November 1994, the appellant instituted suit No. 570 1 994 against the respondent. In his Statement of Claim in that suit, the appellant alleged that the respondent committed breaches of the Partnership Agreement and that the firm of Wilson & Co. has been dissolved. The appellant claimed relief in respect of those alleged breaches and in respect of the alleged dissolution of Wilson & Co.

On 24th November 1994, the respondent issued a summons to strike out the appellant's writ of summons on the ground that it is frivolous and vexatious and is an abuse of the process of the Court. In support of the summons, the respondent swore an Affidavit wherein he indicated that he relied on the specific ground that the appellant is not a party to the Partnership Agreement and had no capacity to institute suit No. 570 of 1994.

The summons was heard by *St.Paul J.* By judgment dated and delivered on 13th January 1995, the learned judge struck out the writ of summons in suit No.570 of 1994. The appellant is dissatisfied with the judgment and has appealed against it.

The issues in this appeal are (1) whether the appellant executed the Partnership Agreement as principal or as agent for P.W.E.C. (2) whether the appellant was entitled to institute suit No.570 of 1994 in his own name and solely on his own behalf and (3) whether the writ was properly struck out.

(1) Principal or agent

It is a well established principle of law that the character or capacity which a party to a written contract signed the contract is the best evidence or indication as to whether he intended to contract and in fact contracted as principal or as agent. If he qualified his signature by adding thereto such words as "on account of", "on behalf of", "for" or "as agent," he will be deemed to have intended to contract and to have contracted as agent even if the identity of his principal was not disclosed. If, on the other hand, he signed the contract without any such qualification of his signature, he will be presumed to have intended to contract and to have contracted as principal unless the proper inference to be drawn from the terms and surrounding circumstances of the contract is that he intended to contract and in fact contracted as agent only.

This principle is summarised in **Halsbury's Laws of England** (Fourth Edition) Vol.1 (2) paragraph 169 in these words:

> "The words 'as agents', 'on account of', 'on behalf of', and 'for' are conclusive when qualifying the signature to negative responsibility of the signatory as principal whether the identity of the actual principal is disclosed or not, and notwithstanding that the contract may impose active obligations upon the agent towards the other contracting party."

In Universal **Steam Navigation** Co. v **James McKelvie & Co.** (1923) A.C. 492 at 499, *Lord Shaw* said:

> "But I desire to say that in my opinion the appending of the word "agents" to the signature of a party to a mercantile contract is, in all cases, the dominating factor in the solution of the problem of principal or agent. A highly improbable and conjectural case (in which this dominating factor might be overcome by other parts of the contract) may by an effort of the imagination be figured, but, is a conclusive assertion of agency, and a conclusive rejection of the responsibility of a principal, and is and must be accepted in that twofold sense by the other contracting party."

In the same case *Lord Parmoor* said at pages 503 and 504:

> "The charterparty was signed as follows: "For and on behalf of James McKelvie & Co. (as agents).- J.A.McKelvie." The words "as agents" are, in my opinion, clearly words of qualification and not of description. They, in unambiguous language, that the respondents did not sign as principals, and did not intend to incur personal liability. The signature applies to the whole contract, and to every term in the contract. I think it would not be admissible to infer an implied term, or implied terms in the contract inconsistent with the limitation of liability directly expressed in the qualification of the signature since the effect of such an implication would be contradict an express term of the contract. It is not impossible that by plain words in the body of the document, persons signing "as agents", may expressly undertake some form of personal liability as principals, but I can find no trace of any intention of the respondents to incur any such liability in the charterparty, which is in question in the present appeal."

In **Kimber Coal Co. v Stone & Rolfe Ltd** (1926) A.C. 414 at 419, *Lord Summer* said:

> "The defenders argued that to say "we sign for the company, who are the named "charterers,'' is the same as to say: "we sign as their agents. He who signs for' another does so as his agent to sign."
>
> My Lords, in itself I think this contention is correct, nor was this point very stoutly contested."

In the present case, the appellant signed the Letter without any qualification of his signature. But the Letter was typed on P.W.E.C.'s letterhead and in the first paragraph of the Letter the appellant stated: "*I shall now set out the agreed arrangements between our firm and yourself."* However, the appellant signed the Written Agreement and therein qualified his signature by adding there to the words "representing Price Waterhouse East Caribbean." In my judgment, the word "representing" is equivalent to the words "on account of", "on behalf of", "for" or "as agent". In those circumstances, the appellant must be deemed to have intended to execute and to have executed the Partnership Agreement as agent for P.W.E.C. or as agent for all the partners (including the appellant) of the firm of Price Water House East

Caribbean and not as principal or solely on the appellant's own behalf.

(2) Capacity to sue

Where a contract is executed between a promisor and two or more promisees (including a firm or partners of a firm), in an appropriate case, one of the promisees may maintain a representative action upon the contract on behalf of all the promisees. But as a general rule, the individual promisee cannot maintain an action in his own right without joining the other promisees. In order to maintain such an action, the individual promisee must show that his contribution to the composite consideration for the promise is severable or that the contractual intention was that the promisor should incur a personal obligation to the individual promisee or a joint and several obligation to each and all of the promisees.

A classic example of a personal obligation to an individual promisee is the case of **Agacio v Forbes** (1861) 14 Moo. P.C. C160. In that case, the plaintiff or individual promisee was Agacio (who was a partner in the firm of Agacio Hermanos Brothers) and the defendants or promisors were the partners in the firm of Russell & Co. The defendants had promised to remit to Agacio a sum of money in consideration of Agacio's forbearance to enforce certain claims which the firm of Agacio Hermanos Brothers had against Robinet & Co. The Judicial Committee of the Privy Council affirmed Agacio's individual or personal right to maintain an action on the promise. Delivering the judgment of the Board, Lord Chelmsford said (at pp 169 to 171):

> "Now, the only question in the case is, whether Agacio, the Plaintiff, was entitled to maintain an action upon this agreement without joining his partners.

Various cases were cited, in the course of the argument, to show that when a contract is entered into with a person for the benefit, not of himself alone, but of himself and other persons and other competent to him to sue upon the contract in his own name, although the other parties for whose benefit the contract was entered into may be entitled also to sue upon it.

But the case of *Garrett v Handley* was relied upon, on the part of the Respondents, to show that it was not competent to Agacio to sue upon this agreement, because it was entered into for the benefit of the firm; it related to a debt due to the firm, and consideration of the agreement moved from the firm, and not from the Plaintiff alone.

With regard, however, to the case of *Garrett v Handley,* it is to be observed that there it was impossible to separate the consideration into parts, Aand to make the party who was suing the person from whom the consideration alone moved. It was an advance of money which was to be made, not by him, but by the firm of which he was a member; it was a joint consideration in no manner separable, so as to apply any part of it to the separate partners.

But in this case there is no reason why a consideration should not be considered as having moved from *Agaclo,* the Plaintiff. He was at *Hong Kong* for the purpose of obtaining a settlement of the account due from *Robinet & Co.* to his firm. His partner was absent in a foreign country, and he was the person with whom alone either *Robinet & Co.,* or *Russell & Co.,* could negotiate for the arrangement of the debt. He had threatened to institute proceedings for its recovery. It was desirable that he should abstain from these proceedings, and *Russell & Co.* having interfered for the protection of *Robinet & Co.,* would naturally apply to *Agaclo* to request a forbearance which depended upon him, and in consideration of it undertake to remit the debt to the firm.

Under these circumstances, the contract was clearly entered into with *Agacio,* the Plaintiff, himself, although the benefit of it would result to the firm.

The nature of the consideration does not resemble that in the case of *Garrett v Handley.* The agreement of *Agacio* himself to forbear to sue *Robinet and Co.* would be an important consideration, flowing entirely from himself, and available to them. For again, undertaking for himself not to sue *Robinet and Co.,* his partners could not maintain an action without his consent, and if the partners had brought an action in the name of the firm, *Agacio* might have released it."

In the present case, the appellant did not sue or purport to sue in a representative capacity for and on behalf of P.W.E.C. The appellant sued in his own name and on his own personal behalf. The question is whether he was entitled to do so having regard to the causes of action in the suit and the reliefs claimed therein.

Paragraphs 7, 9 & 11 of the appellant's Statement of Claim read as follows:

"7. The Plaintiff withdrew from the partnership with the Defendant on the 9th August, 1993, having given notice pursuant to Clause 10.5 of the Agreement, which notice was accepted by the Defendant.

9. It was an express term of the partnership that Wilson & Co may not identify itself as being a correspondent firm, of or in association with, Price Waterhouse and may not use the Price Waterhouse identification logos and standards except where so authorised.

11. In breach of the express term mentioned in paragraph 9 hereof the Defendant has held himself out as representing Price Waterhouse or being associated with Price Waterhouse by writing on Price Waterhouse's letterheads to various business places as recently as 12th October 1994."

The reliefs claimed in the Statement of Claim are A(1) A declaration that the partnership between the Plaintiff and the Defendant has been dissolved from the 9th August 1 993; (2) An order that the affairs of the partnership be wound up; (3) For the purposes aforesaid, all necessary accounts and inquiries to be taken and made; (4) The appointment of a receiver; (5) An injunction to restrain the Defendant whether by himself, his servants, agents or otherwise howsoever, from using the name "Price Waterhouse", Price Waterhouse identification logo, letterheads and other materials, and from holding himself out as being in partnership or in any way associated with "Price Waterhouse." (6) An order that the Defendant do forthwith deliver up to the Plaintiff all letterheads, and other materials bearing the name and logos "Price Waterhouse". (7) Damages. (8) Such further or other relief."

In my judgment, nothing in the Partnership Agreement or in the allegations in the appellant's Statement of Claim justifies or confers a personal or individual right of action in favour of the appellant and against the respondent for breach of the Partnership Agreement. The appellant

does not claim personally to have correspondent firms, associations, agents, letterheads, identification logos or standards. These are properties and rights which belong and have been conceded in the appellant's Statement of Claim to belong to the firm of Price Waterhouse East Caribbean (which is a compendious description of all the partners of that firm). These are not properties and rights which are divisible among the individual partners of P.W.E.C. during the lifetime of that firm. The respondent's promise in regard to those properties and rights was made to and for the benefit of P.W.E.C. or the partners of P.W.E.C. collectively. The promise was not intended to be a promise to or for the benefit of the appellant or the partners of P.W.E.C. individually. The consideration for the promise was a joint consideration which moved from P.W.E.C. or the partners of P.W.E.C. collectively. The appellant cannot sever, isolate, identify or quantify his share of or contribution to the joint consideration. Unlike Agacio, the appellant cannot show that the respondent made any promise or incurred any obligation to the appellant personally. In those circumstances, the appellant cannot in his own name and on his own behalf maintain any action against the respondent for the breach of the promise relied on in the appellant's Statement of Claim or for any other breach of the Partnership Agreement. Nor can the appellant (in his personal capacity) claim any relief in respect of any such breach of contract.

Similarly, assuming (without deciding) that contractual or judicial rights to a declaration of dissolution an order for an account and for the appointment of a receiver have been acquired by the respondents partners, those rights are vested in the partners of P.W.E.C. collectively and not individually. Those rights are not vested in the appellant

personally and merely by virtue of his being a partner in P.W.E.C.

In Halsbury's Laws of England (Fourth Edition) Vol.35 (Reissue 1994) paragraph 133, it is stated:

> "The rights and liabilities of partners between themselves have been established in accordance with equitable principles. In an action for dissolution of partnership it is a general rule that all the partners who are within the jurisdiction must be before the court, especially where questions affecting the rights of the partners between themselves, or the construction of the partnership, agreement, are raised. The personal representative of a deceased partner should be a party even if the estate of the deceased partner is reputed to be insolvent; and, generally, where there is a diversity of interest, all the partners should be parties to or represented in the action."

I therefore conclude that the appellant had no capacity to institute suit No.570 of 1994 solely in his own name or solely on his own behalf. He should have joined the other partners of P.W.E.C. as plaintiffs or should have brought a representative action for and on behalf of P.W.E.C. or all the partners thereof.

(3) The striking out of the writ

The fact that suit No.5 70 of 1 994 was not a representative action or that all the partners of P.W.E.C. were not the plaintiffs therein should not normally have constituted a defect in the writ which was fatal to the action. Adequate provisions exist in our Rules of Court for remedying such a defect in the writ and Statement of Claim by amendment thereof or by joinder of all necessary parties thereto. When, therefore, the respondent issued a summons to strike out the writ on the ground of that defect, the appellant might have availed himself of those procedural provisions. There is nothing in the record to indicate that the appellant applied for an amendment of the writ and Statement of Claim or for

joinder of the other partners of P.W.E.C. Instead, the appellant appears to have persisted in his claim to a personal right of action.

By reason of R.S.C. Ord.15 r.6(2), the learned judge could not on his own motion have added the other partners of P.W.E.C. as plaintiffs without their consent. Nor was it an appropriate case for joinder of partners as defendants.

There was no need for affidavits or other evidence to determine the issues raised in the summons to strike out the writ. The facts necessary to support the summons were undisputed and were fully disclosed in the writ and Statement of Claim and in the Letter and the Written Agreement which constituted the Partnership Agreement and which were incorporated by reference in the Statement of Claim.

We are thus confronted with an action which was instituted as a personal action by a plaintiff in his own name and on his own behalf and which should have been instituted as a representative action or jointly with other persons. In its existing form, the action or the writ or Statement of Claim which constituted the action is frivolous or vexatious because it is "obviously unsustainable" (the words of Lindley L.J. in **Attorney-General of Duchy of Lancaster v L & N.W Ry (1892) 3** Ch.274 at 277). The inadequacy of the writ and Statement of Claim might have remedied but the plaintiff (the appellant) has deliberately abstained from attempting to do so.

In these circumstances, the learned judge was fully justified in striking out the writ. For this reason, I would dismiss the appeal and affirm the learned judge's judgment. I would order the appellant to pay

the respondent's costs of this appeal such costs to agreed.

SIR VINCENT FLOISSAC
Chief Justice

I concur. SATROHAN SINGH
Justice of Appeal

I concur. ALBERT N.J.MATTHEW
Justice of Appeal (Ag.)