SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL No.4 of 1995

BETWEEN:

(1) **MICHEL DUFOUR**
(2) **MARTIN PEDRO TOUSSAINT**
(3) **SAMUEL MASON**
(4) **CAMILLE DUFOUR** (acting herein and represented by her duly appointed Attorney **MARTIN PEDRO TOUSSAINT**)

Appellants

and

(1) HELENAIR CORPORATION LTD.
(2) JOAQUIN WILLIE
(3) ARTHUR NEPTUNE
(4) MARIO REYES

Respondents

Before: The Rt. Hon. Sir Vincent Floissac - Chief Justice
The Hon. Mr. C.M. Dennis Byron - Justice of Appeal
The Hon. Mr. Satrohan Singh - Justice of Appeal

Appearances:
Mr. Parry J. Husbands Q.C. and Mr. V.P. La Corbiniere for the Appellants
Mr. Mario R.F. Michel and Mr. A. St. Clair for the Respondents

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1996: February 2 & 12.

JUDGMENT

SIR VINCENT FLOISSAC, C.J.

The appellants and the second, third and fourth named respondents are shareholders in the first named respondent (the Company) which is the sole shareholder in Helenair Corporation (Grenada) Limited (the Subsidiary Company). The second, third and

fourth-named respondents constitute the Board of Directors (the Board) of the Company.

On 13th July 1993, the appellants instituted an action against the respondents under suit 1993 No. 424. The issues in the suit are (1) whether the fourth-named appellant's 50,000 shares (numbered 150,004 to 200,003) in the capital of the Company were validly forfeited (2) whether 11 ,120 shares in the capital of the Company were validly transferred to the fourth-named respondent (3) whether the sum of $12,800.00 was validly transferred from the account of the Company to or for the use of the Subsidiary Company (4) whether the use by the Subsidiary Company of the aircraft and resources of the Company was wrongful and (5) whether the Board neglected and/or refused to have accounts of the Company for the years 1991 and 1992 audited in accordance with article 115 of the Articles of Association of the Company.

On 7th March 1994 and nearly five months after the pleadings in the suit were deemed to have been closed, the appellants issued a summons under R.S.C. Ord. 33 r 2 which provides as follows:

> "The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated."

By the summons, the appellants applied for "an order that the following question or issue raised by paragraph 9 of the Statement of Claim be tried as a Preliminary issue before the trial of the other questions or issues in this action and that until the determination of the preliminary issue all further proceedings in this action be stayed."

The summons specified the question or issue to be: "That THE BOARD has

neglected and or refused to have the accounts of THE COMPANY audited accordance with Article 115 of the Articles of Association of THE COMPANY for the years 1991 and 1992 and that in light of this the Court appoints an Independent Auditor to Audit the accounts of THE COMPANY for the years 1991 and 1992 and to submit his report accordingly. "

The summons purported to have been in pursuit of the allegation in paragraph 9 of the appellants' Statement of Claim and the relief claimed in respect thereof. Paragraph 9 of the Statement of Claim states that "THE BOARD has neglected and or refused to have the accounts of THE COMPANY audited in accordance with Article 115 of the Articles of Association of THE COMPANY for the years 1991 and 1992." The relief claimed is "An Order that THE BOARD do cause the accounts of THE COMPANY to be audited in accordance with Article 115 of the Articles of Association of THE COMPANY for the years 1991 and 1992. "

Article 115 of the Articles of Association of the Company reads:

> "Once at least in every year the accounts of the Company shall be examined, and the correctness of the profit and loss account and balance sheet ascertained by one or more properly qualified auditor or Auditors."

The summons was heard by *d'Auvergne* J. By judgment delivered on 13th January 1995, the learned judge dismissed the summons. This appeal is against that interlocutory judgment.

We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate Court is satisfied (1) that in exercising his or her judicial discretion, the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations and (2) that as a result of the error or the degree of

the error in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.

The first condition was explained by *Viscount Simon* L.C. in **Charles Osenton & Co. v Johnston** (1941) 2 AER 245 at 250. There, the noble Lord Chancellor said:

> "The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. If; however, the appellate tribunal reaches the clear conclusion that there had been a wrongful exercise of discretion, in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified."

The second condition was explained by *Asquith L.J.* in **Bellenden (formerly Satterthwaite) v Satterthwaite** (1948) 1 AER 343 at 345 in language which was approved and adopted by the House of Lords in **G v G** (1985) 2 AER 225 and which I have gratefully adopted in this judgment. *Asquith L. J.* said:

> "……We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible,
> and is, in fact, plainly wrong, that an appellate body is entitled to interfere."

In **G v G** (supra), *Lord Fraser* said (at p 229):

> "We were told by counsel that practitioners are finding difficulty in ascertaining the correct principles to apply because of the various ways in which judges have expressed themselves in these cases. I do not think it would be useful for me to go through the cases and to analyse the various expressions used by different judges and attempt to reconcile them exactly. Certainly it would not be useful to inquire whether different shades of meaning are intended to be conveyed by words such as 'blatant error' used by Sir John Arnold P in the present case, and words such as 'clearly wrong', 'plainly wrong' or simply 'wrong' used by other judges in other cases. All these various expressions were used in order to emphasise the point that the appellate court should only interfere when it considers that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative

> imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible."

The need to show blatant error in principle on the part of the trial Judge Is accentuated in cases such as Ord. 33 r 2 where the judicial discretion relates to the conduct of judicial proceedings and where such conduct must necessarily be under the exclusive control of the trial judge. This was emphasised in the House of Lords in **Ashmore v Carp of Lloyd's** (1992) 2 AER 486. There, *Lord Roskill* said (at p 488):

> "The Court of Appeal appear to have taken the view that the plaintiffs were entitled as of right to have their case tried to conclusion in such manner as they thought fit and if necessary after all the evidence on both sides had been adduced. With great respect, like my noble and learned friend, I emphatically disagree. In the Commercial Court and indeed in any trial court it is the trial judge who has control of the proceedings. It is part of his duty to identify the crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judge's time as is necessary for the proper determination of the relevant issues."

Lord Templeman said (at p 493):

> "In *Banque Financiere de la Cite SA v Westgate Insurance Co Ltd* [1990] 2 All ER 947 at 959, [1991] 2 AC 249 at 280-281 1 warned against proceedings in which all or some of the litigants indulge in over-elaboration causing difficulties to judges at all levels in the achievement of a just result. I also said that the appellate court should be reluctant to entertain complaints about a judge who controls the conduct of proceedings and limits the time and scope of evidence and argument. So too, where a judge, for reasons which are not plainly wrong, makes an interlocutory decision or makes a decision in the course of a trial the decision should be respected by the parties and if not respected should be upheld by an appellate court unless the judge was plainly wrong."

In this appeal, no error in principle on the part of the learned trial judge has been identified. This is a case where the appellants selected an issue of fact for trial as a preliminary issue. A decision on that issue would not be determinative of the other issues in the suit. The preferential trial of that issue would merely delay the trial of the other issues and would

increase (rather than save) costs. Obviously, the dominant object of the summons was not the trial of a preliminary issue but the appointment of an independent auditor to audit the accounts of the Company.

In those circumstances, I can discern no blatant or other error in principle in the learned judge's interlocutory judgment dismissing the summons in the exercise of her judicial discretion under Ord. 33 r 2 and in a matter which relates to the conduct of judicial proceedings under her exclusive control. In those circumstances the interlocutory judgment enjoys shelter in the haven of "the generous ambit within which reasonable disagreement is possible."

For these reasons, I would dismiss the appeal and affirm the learned judge's interlocutory judgment. I would do so with costs to the respondents to be taxed if not agreed.

SIR VINCENT FLOISSAC
Chief Justice

I concur.

C.M.DENNIS BYRON
Justice of Appeal

I concur.

SATROHAN SINGH
Justice of Appeal