SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. 93 OF 1999

IN THE MATTER OF THE COMPANIES ACT NO 8 OF 1994. AND THE FORMER ACT CHAPTER 219

AND

IN THE MATTER OF AN APPLICATION BY ROBERT BRISBANE MANAGING DIRECTOR OF PIRATES COVE RESORT LIMITED FOR AN ORDER CANCELLING THE BYE LAWS AND CERTIFICATE AND ARTICLES OF CONTINUATION of the said Company and for an **INJUNCTION RESTRAINING RACHAEL STEPHENS, EUPHEMIA STEPHENS AND RICHARD MC LEACH** from holding themselves out as **DIRECTORS** of the said Company. **AND FOR AN ORDER CANCELLING DEED NO. 465 OF 1999**

BETWEEN:

ROBERT BRISBANE
AND
PIRATES COVE RESORT LTD OF VILLA

Plaintiffs

and

EUPHEMIA STEPHENS OF VILLA
RICHARD MAC LEISH OF DORSETSHIRE HILL

Defendants

Appearances:

Mr Vernon Smith and Ms Kay Bacchus-Browne for the Plaintiffs
Mr Hansraj Matadial for the Defendants

1999: October 1, 12, November 17, 24

DECISION

[1] **MITCHELL, J.:** This is a ruling on a number of *in limine* submissions made by counsel for the Defendants.

[2] The case began by way of an originating summons issued on 4th March 1999. It was supported by affidavits of Robert Brisbane and Rosalie Brisbane and Neita Taylor all filed on 4th March, and of Robert Williams filed on 12th March. The suit has already come up, presumably at great expense to the parties, in chambers before Chong J on 26th March, 27th April, 6th and 21st May, before Adams J on 25 June, and before myself on 1st and 12th October and 17th November, all dealing with interlocutory matters. The substantive issues after 8 months of court appearances have not as yet been touched.

[3] We are not particularly concerned at this stage with the merits of the substantive dispute. But, it may be helpful to set out briefly what the matter is about as disclosed in the affidavits filed on behalf of the Plaintiffs. The facts deposed to in the various affidavits are briefly as follows. The claim was that the 1st Plaintiff, Robert Brisbane, and the late Eardley Stephens, the husband of the 1st Defendant, had formed a partnership in 1982 to develop lands and sell them. They later formed a company, the 2nd Plaintiff, in 1983 to carry out the purposes of the partnership. Robert Brisbane and Eardley Stephens both transferred land to the company. They were the two directors of the company. They were equal beneficial shareholders in the company, although there were others alleged to be nominee shareholders. Eardley Stephens had died at some stage. His estate and the company had become involved in litigation brought by one Paul Straher in 1991. That suit

was now over. The claim of the Plaintiffs was that in 1999 the two remaining Defendants, and a 2nd Defendant against whom the proceedings have since been withdrawn, wrongfully purported to have themselves appointed directors of the Plaintiff company. The Defendants had wrongfully amended the constitutional documents of the company. They had purported to adopt new bye-laws. They had applied to the Registrar of Companies to continue the company under the new Companies Act. They had done all this without notifying the surviving directors and shareholders of the company. The allegation was that the Defendants then by a deed of gift had wrongfully purported to transfer a portion of the company's land to the 1st Defendant. The court was now being asked to cancel the certificate of continuation issued on the application of the Defendants, as well as the new bye-laws and purported appointment of the new directors, and the deed of gift to the 1st Defendant. The Defendants have not as yet filed any affidavits dealing with the allegations of the Plaintiffs pending the determination of their *in limine* submissions.

[4] The *in limine* submissions made on behalf of the Defendants were that:

(a) The form of originating summons used in this matter was not one prescribed by rules of court. This application could only have been made on this form of summons if it was specifically authorized by statute. Form no 6 at the back of the 1971 Rules should have been used and not form no 7. Form no 7 could be used only if it was prescribed by rules of court. This application was not permitted to be made by any statutory provision. All the reliefs asked for were under the inherent jurisdiction of the court. There were substantial

disputes as to the facts, and the defendants might have to make a counterclaim. In the circumstances, the use of an originating summons was not appropriate. A writ of summons should have been used, not an originating summons.

(b) All the affidavits in support of the originating summons were defective. The headings of the affidavits were different from the heading of the summons. In none of the affidavits was the occupation of the deponent stated. In the case of the affidavit of Robert Brisbane he did not even state that he was one of the Plaintiffs. In none of the affidavits did the deponent say that he had been authorized by the Plaintiffs to make the affidavits on their behalf.

(c) On the face of the summons the Plaintiffs are not asking for any reliefs specific to either one of them. Robert Brisbane in his personal capacity is not entitled to any of the reliefs claimed. The summons does not specify what relief the 1st Plaintiff was asking for or what relief the 2nd Plaintiff was asking for.

(d) The originating summons had not been properly issued. The seal of the court appeared neither on the original on file, nor on the copies served on the Defendants. This meant that O.6 r.6(3) of the Rules have not been complied with, and the originating summons had not been issued nor was it before the court.

[5] I am grateful to both counsel for the care they have taken in researching the law and procedure in respect of the issues raised

in these preliminary proceedings, and for having supplied the court with copies of the relevant law. Having considered the arguments by both counsel my ruling is as follows.

[6] First, as regards the form of the originating summons. The **1971 Rules of the Eastern Caribbean Supreme Court** (hereinafter "the 1971 Rules") were based on the 1962 revised UK rules of court. In and after the year 1971, the UK began to make substantial changes in the rules and procedure followed in the UK, and the UK rules began to diverge from the 1971 Rules. During the intervening years, more and more changes were made to the 1962 revised UK rules, until eventually the two systems had diverged from each other in almost every respect. The 1970 White Book is the last to deal with the rules as they still apply in the Eastern Caribbean Supreme Court. The White Books of the years after 1970 are notorious for having to be handled with care.

[7] The 1971 Rules provide for 3 types of originating summons to be used in our courts. Form 8 is for use in *ex parte* applications. Form 7 is for *inter partes* applications where service is not required. Form 6 is for *inter partes* applications where an entry of appearance is required. All 3 forms derive their authority from **O.7 r.2** of the 1971 Rules. The procedure to be followed by the court in dealing with an application made by way of an originating summons is provided for by **O.28**. The precedent for an interlocutory summons, the first time it appears in the forms at the back of the 1971 Rules, is form no 27, which is to be amended and adapted as required.

[8] **O.5 r.3** of the 1971 Rules deals with when an originating summons is to be used to commence proceedings in the High Court. It provides that:

> Proceedings by which an application is to be made to the High Court or judge thereof under any Act must be begun by originating summons except where by these Rules or by or under any Act the application in question is expressly required or authorized to be made by some other means.

So, the general rule is that an application under any Act must be begun by originating summons and not by a writ. This is an application under the **Companies Act, 1994** and the former Act, **Cap 219**.

[9] **O.5 r.4(2)** of the 1971 Rules provides that:

> Proceedings
>
> (a) in which the sole or principal question at issue is, or is likely to be, one of the construction of an Act or of any instrument made under an Act, or of any deed, will, or other document, or some other question of law, or
>
> (b) in which there is unlikely to be any substantial dispute of fact,
>
> are appropriate to be begun by originating summons unless the plaintiff intends in those proceedings to apply for judgment under Order 14 or Order 55 or for any other

reason considers the proceedings more appropriate to be begun by writ.

In this case, the principal issues are likely to be the construction of company documents and questions of law. There is no evidence that there is likely to be any substantial dispute of fact. An originating summons was a proper form for the commencement of these proceedings. But, which form of originating summons?

[10] It was desirable in commencing this case for the Plaintiffs to use the form that would have required the Defendants to enter an appearance and have an address for service, preferably through a solicitor. This would have necessitated using form no 6. The selection and use of form no 7 by the solicitor for the Plaintiffs was inappropriate. As it was, the Defendants have upto this date refrained from entering an appearance, though they have appeared in chambers by counsel at various of the hearings listed above and have made submissions and various verbal applications, not to mention the filing on 17th May 1999 of a summons and supporting affidavit in one of the earlier interlocutory applications. That summons was endorsed at its foot with the words "This summons was taken out by H Matadial, solicitor for the defendants whose address for service is Chambers, Grenville Street, Kingstown, St Vincent and the Grenadines." Counsel for the Defendants by that document held himself out as appearing as solicitor for the Defendants in the matter, though he did not first file a form of entry of appearance. It cannot be said that the Defendants were in any way inconvenienced by the solicitor for the Plaintiffs having selected form 7 rather than form 6. The Plaintiffs only inconvenienced themselves in making it likely that they would have

to continue serving the Defendants personally until they entered an appearance by solicitor.

[11] The originating summons in this case was dated and signed in its body by the solicitor for the Plaintiffs rather as if it were a statement of claim or defence or other pleading. Neither an originating nor an interlocutory summons is ever to be signed by a solicitor as if it were a pleading. A summons is issued by the court, not by the solicitor. It is so to say signed by the court by the affixing of the seal of the court. A solicitor is expected by convention to sign the margin of originating process and to endorse at the back of the summons her name and capacity (the familiar backing, which in this case is completely missing from the back of this originating summons) so that the court will know who has prepared and filed the summons. How such an irregularity as this signing of the summons by the solicitor for the Plaintiffs could have been committed is unclear, given that **Atkins Court Forms** and the forms in the back of the 1971 Rules are all very helpful in showing exactly what an originating summons should look like. Those precedents show that a summons is not signed by a solicitor. Though this may be sloppy drafting, there is nothing to cause me to find that it is fatal to the summons. As a demonstration that this error on the part of the solicitor for the Plaintiffs is by no means unique, it is necessary only to observe without further comment that the interlocutory summons of the Defendants of 17th May 1999 was similarly erroneously signed by the solicitor for the Defendants at the foot of the document after the date.

[12] Second, as regards the heading of the affidavits. The originating summons was headed as in the title of this ruling above. The Affidavits of Robert Brisbane and Rosalie Brisbane and Neita

Taylor of 4th March, and Robert Williams of 31 March 1999 were similarly headed except that they all omit the last part-sentence found in the title of the originating summons: "And for an order canceling deed no 465 of 1999." This part-sentence appears to have been added to the summons by way of an afterthought. That appears so, not only because the part-sentence does not appear in the title to the other documents filed with the summons at the same time, but because the statutory authority for such an order as that applied for in the part-sentence is omitted from the title of the action. The statutory authority under which that application was made, in this case the **Registration of Documents Act Cap 93**, was not included in the title to the originating summons. The statutory authority for an application by way of an originating summons is a standard part of the title of the summons. This shows the haste and sloppiness with which the documents were prepared, proof-read, and filed. But, is it fatal? Are these matters that cannot be corrected with a simple application to amend? Is any prejudice caused to the Defendants that should cause the court to consider refusing such an application to amend if one should be made? Bearing in mind the provision at **O.41 r.1(2)** of the 1971 Rules for the shortening of the title of affidavits, and bearing in mind also the provision at **O.2 r.1** that irregularities shall not nullify the proceedings and that the documents may be amended on such terms as the court thinks fit, the inconsistencies in the headings of the affidavits do not amount to anything of substance. There is nothing in the submission of counsel for the Defendants that the deponents should have stated their occupation or their authorization to make the affidavit.

[13] Third, as regards the capacity of the 1st Plaintiff Robert Brisbane. The title of the summons (which appears to contain an

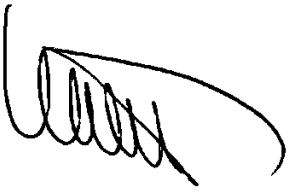
unnecessary duplication of the reliefs claimed in the body of the summons) sets out the capacity of the 1st Plaintiff. He claims as Managing Director of the 2nd Plaintiff an order canceling the bye-laws, the certificate of continuation, and the articles of continuation of the 2nd Plaintiff. The title of the summons also asserts that the 1st Plaintiff claims an order restraining the Defendants from holding themselves out as the directors of the 2nd Plaintiff. There is no subject to the final part-sentence "And for an order canceling deed no 45 of 1999." It is not expressly made clear whether it is the 1st Plaintiff or the 2nd Plaintiff or both of them who claim this relief. The body of the summons does not explain which Plaintiff claims which of the various reliefs that are mentioned. As managing director of the 2nd Plaintiff, the 1st Plaintiff might have certain rights which he could enforce. As a shareholder he might have other different rights which he could enforce. The 2nd Defendant company as owner of the land in question might have yet other rights that it could seek to enforce. The differences are obvious to any lawyer, and perhaps to every layman. This was sloppy drafting. But, is sloppy drafting fatal in this case? Have the Defendants made out that they had been in any way misled by the contradictions and inadequacies in the logic and sentence construction of the documents constituting the pleadings in this case? I think not. It should have been relatively apparent to the Defendants what rights the 1st Plaintiff had as a director, what other rights as a shareholder, and what different rights the 2nd Plaintiff had in its own capacity. This is not to say that the court welcomes or even excuses careless drafting that causes delay and confusion and a multiplicity of interlocutory proceedings before it can get down to determining the real issues between the parties.

[14] Fourth, as regards the submission on the issuing or lack thereof of the originating summons. A perusal of the originating summons in this case revealed that it did not exhibit on its face the imprint of the embossing seal of the High Court. It contained in its top right hand corner two rubber ink-pad stamps. There was one rubber stamp which contained the words that one would expect to find embossed on the document by the seal of the court, "Eastern Caribbean Supreme Court. High Court of Justice. Fiat Justitia." There was another rubber stamp with the words "Registrar's Office – filed ... St Vincent." This stamp would appear to be intended for the date and time of filing to be inserted in it. In fact, the date of filing, "4/3/99", has been inserted at the time of filing by the Registry staff in the body of the first stamp. In the second stamp, the figures "11.32", presumably the time in the morning of the filing of the summons, have been written in. Quite what was the purpose of this exercise by the Registry staff, has not been made clear. One can only deduce that the first stamp was an attempt to duplicate or replace the embossing seal by a rubber stamp. The second or date stamp is becoming redundant because the date of filing is being placed in the first stamp. Can any of this confusion be fatal? It is not the job of a plaintiff to oversee or enforce the duties of the Registry staff. When a summons is prepared by a solicitor and submitted to the Registry office for issuing, the solicitor is entitled to presume that the Registry staff know their duties and will carry them out correctly. Once the document is accepted by the Registry staff, processed by them, and the original filed and the copies returned to the solicitor to arrange serving, the plaintiff is entitled to presume that all that is required to be done has been properly done. It would not do to have lawyers presuming to instruct the Registry staff on how to perform their duties. We have to assume

that this summons was sealed and properly issued in the circumstances.

[15] An application to set aside a proceeding such as the originating summons in this case is required by **O.2 r.2** of the 1971 Rules to be made within a reasonable time and before the party applying has taken any fresh step, and must be made by summons or notice of motion. No such application has been made by the Defendants.

[16] Applying the principles set out above, the *in limine* submissions of the Defendants are overruled. The following directions are given. The Defendants will be presumed to have entered an appearance through their solicitor as of the date of the filing of the summons by the Defendants of 17th May 1999. The Defendants will be allowed 14 days to file their affidavits in response to those of the Plaintiffs, ie, on or before 8th December 1999. The Plaintiffs to file any affidavit in reply within 14 days of service of the affidavit of the Defendants. The hearing of the substantive matter is to be brought up in open court by the Plaintiffs by way of 4 days notice to the Defendants on a date to be determined by the solicitor for the Plaintiffs in consultation with the judge's clerk to be convenient to the court. Costs of this application to be costs in the cause.



Ian Donaldson Mitchell, QC
High Court Judge