ST. VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. 211 of 1997

BETWEEN

ORMINSTON KEN BOYEA

Claimant

AND

EASTERN CARIBBEAN FLOUR MILLS LIMITED

Defendant

Appearances:

Mr. S. John with Mr. S. Bennett for the Claimant

Sir H. Forde Q.C, Mr. Gale Q. C. and Mr. D. Williams for the Defendant

CIVIL SUIT NO. 212 of 1997

BETWEEN

HUDSON WILLIAMS

Claimant

AND

EASTERN CARIBBEAN FLOUR MILLS LIMITED

Defendant

Appearances:

Mr. S. John with Mr. S. Bennett for the Claimant

Sir H. Forde Q.C, Mr. Gale Q. C. and Mr. D. Williams for the Defendant

2002: March 21

2002: October 03

DECISION

PEMBERTON J.

[1] By Writs of Summons filed on 19th June, 1997, the Claimants sued the Defendant for damages for wrongful dismissal from their employment as Managing Director in the case of Claimant Boyea and Financial Controller in the case of Claimant Williams, costs and further and/or other relief. The Defendant countered in both cases that the dismissals had been justified, and counter claimed for damages for breach of fiduciary duty in each of their cases. On 22nd November, 2001, under Order of Case Management, the parties were directed to *inter alia* identify preliminary points and file notices by 15th January, 2002. On 22nd January, 2002, the Claimants filed a statement of Preliminary Issues of Law, together with submissions thereon. The Defendant filed written submissions on 5th February, 2002, the Claimants responded on 21st March 2002 and the Defendant further responded. On 21st March, 2002, there was a further hearing at which Counsel made further submissions.

[2] The issue for decision at this hearing is whether the Preliminary issues of law as outlined by the Claimant should be tried as such or whether they should be addressed as issues of law to be decided based on evidence. From the outset, Counsel for the Claimants reduced his mission to three of the issues raised. They are as follows:

- The effect of Article 138 of the Articles of Association;

- The ability of ECFML to sue on behalf of other corporate entities; and
- The timing of the claims against Claimant Ormiston Ken Boyea.

[4] The fundamental issue of both fact and law in this case is: was the dismissal of the Claimants by the Defendants wrongful, as alleged by the Claimants or justified as alleged by the Defendant? The sub issues are, if the dismissal was wrongful, what is the measure of damages? If the dismissal was justified, can the Defendant succeed on the Counterclaim in its suit for damages for breach of fiduciary duty?

[5] The law recognizes the right of an employer to terminate the service of an employee for cause. What constitutes "cause" is a mixed question of fact and law. Two instances of "cause" are if an employee during the course of his employment becomes privy to certain information and acts in such a way as to derive a benefit himself whether at the expense of the employer or not **or** if he acts outside the scope of his authority and that action results in losses or harm to the employer. The first instance is a matter of evidence. The second can only be gleaned from the terms of the contract of employment and in the case of the employer being a company, the Articles of Association, which govern the day to day running of the company, and which are by implication incorporated into the terms of the contract. It is on this second arm that Counsel for the Claimants hangs his argument.

[6] Article 138 of the Articles of Association of Eastern Caribbean Flour Mills Limited (ECFML) reads as follows-

> Every account of the Directors, when audited and approved by a general meeting, shall be conclusive, except as regards any error discovered therein within six months next after the approval thereof. Whenever any error is discovered within that period, the account shall forthwith be corrected and thenceforth shall be conclusive.

Counsel's argument is that the approval by the Board of Directors of financial statements and arrangements and standing for six months thereafter are conclusive of the facts therein and cannot be reopened. Hence he submits that any counterclaims relating to the monies already approved by the Board cannot be considered by a Court of law. As the Court understands it, Counsel is in effect raising an argument similar to that of estoppel if not the argument itself, which is an issue of law – See **MOORGATE MERCANTILE CO LTD v TWITCHINGS [1975] 3 WLR 286 at page 296 per Lord Dennning M.R.**

[7] This seems straightforward enough except that Queen's Counsel, Counsel for the Defendant countered that Article 138 was not raised on the pleadings by the Claimants. Queen's Counsel submitted that this was "a late attempt to raise a new defence under the guise of a preliminary issue" and should not be allowed by the Court. The Claimants' Reply and Defence to Counterclaim seek to answer the Defence to say that no wrongdoing was perpetrated by the Claimants therefore it is a Reply to an allegation as well as a defence to the Counterclaim of breach of fiduciary relationship. The Claimants did not raise Article 138 as an alternative or additional ground. The issue though is can the Court at this stage of the proceedings allow the Claimants to amend their pleadings to introduce the use of Article 138 as a defence to the Counterclaim even if an application to do so is not made?

[8] **THE CIVIL PROCEDURE RULES, 2000** at Part 20 provide for Changes to the Statement of Case. Under part 2.4 "statement of case" refers as well to Defences. Part 20 refers to situations in which the parties to the action apply to effect changes to the statement of case. Part 26 of the Rules gives the Court extensive powers at the case management conference, one of which at paragraph 26.1(2) (w) reads:

> take any step, give any other direction, or **make any other order for the purpose of managing the case and furthering the overriding objective.**

This Court will not shy away from the duties imposed by that Part and the Overriding Objective as stated in Part 1 of dealing with cases justly, in this case saving expense and dealing with the matter expeditiously.

[9] Can an amendment be ordered by the Court in the circumstances of the case at bar. Counsel for the Claimants argued vigorously against the use of pre-Civil Procedure Rules authorities as aids to construction of the existing Rules. He cited **BIGUZZI v RANK LEISURE plc [1999] All E. R. 934** in support of his view in which Lord Woolf M.R. opined at page 941:

> The whole purpose of making the CPR a self-contained code was to send a message which now generally applies. Earlier authorities are no longer of any relevance once CPR applies.

On the other hand, Queen's Counsel for the Defendant argued that the case "is an authority for the proposition that the pre-CPR cases on abuse of process in the form of wholesale disregard of Court Rules are not binding or persuasive authorities on the exercise of the Court's discretion under CPR. It is only where there is a fundamental change between the old Rules and the new that the Court will be reluctant to look over its shoulder". This Court wishes to associate itself with the interpretation of learned Queen's Counsel for the Defendant, based on the following dicta of Lord Woolf M.R. at page 939 g:

> As r 1.1 makes clear the CPR are ...'a new procedural code with the overriding objective of enabling the court to deal with cases justly'. The problem with the position prior to the introduction of the CPR is that often the courts had to take draconian steps, such as striking out the proceedings, in order to stop the general culture of failing to prosecute proceedings expeditiously.

In other words, the restrictive approach to procedure under the pre-CPR dispensation, and the authorities arising therefrom will hold no sway in the event that the CPR provides a wider discretion under which the court can act. The Court will proceed on the basis that where the pre-CPR authorities mesh with the overriding objective, they can be highly persuasive in arriving at a decision.

[10] When the pre-CPR position on amendment of pleadings is examined, it is observed that the courts had taken a somewhat liberal approach. The **SUPREME COURT PRACTICE 1999** is replete with learning on the court's approach to amendment of pleadings. The learned authors at **paragraph 20/8/6** state as follows:

> It is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought to be made 'for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings ... See **per Jenkins L. J. in G. L. BAKER LTD. v MEDWAY BUILDING AND SUPPLIES LTD [1958] 1 W.L.R. 1216; 1231.**

Further, the authorities state that an amendment should be allowed if it can be made without any injustice to the other side. **Brett M.R.** in **CLARAPEDE v COMMERCIAL UNION ASSOCIATION (1883) 32 W. R. 262 at 263** opined that there can be no injustice if the other side could be compensated in costs. One of the most apt statements can be found in the cases of **KURTZ v SPENCE (1888) 36 Ch. D. 774.**The learned authors cite this case for the proposition that "An amendment ought to be allowed if thereby 'the real substantial question can be raised between the parties' and multiplicity of legal proceedings avoided". This position ought to be put against the caveat contained at

paragraph 20/8/6 in which Lord Griffiths in **KETTEMAN v HANSEL PROPERTIES LTD [1987] A.C. 189; 220** states:

> There is a clear difference between allowing amendments to clarify the issues in dispute and those that permit a distinct defence to be raised for the first time. Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. I do not think it possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view, a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other. **Furthermore** to allow an amendment before the trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.

[11] In light of these dicta and when the case at bar is examined, this Court is of the view that to allow the Claimants to amend the Replies and Defences to Counterclaim will not run contrary to established practice and will certainly further the Overriding objective of the **CIVIL PROCEDURE RULES, 2000** as expressed in Part 1.

[12] Once that amendment is effected, the Claimants can mount their Defences to the Counterclaims based on Article 138. As stated before this Court is of the view that that is an issue of law. The question is can it be classified as a preliminary issue of law, to be argued before the taking of evidence at the trial?

[13] Queen's Counsel for the Defendant argues that this Court should decline the Claimants' invitation to treat the determination of the legal effect of Article 138 as a preliminary issue of law. Queen's Counsel bases his submission on the criteria as laid down in **ALLEN v GULF OIL REFINING LTD [1981] A.C. 1001**. In that case, Lord Wilberforce stated at page 1010 letter H:

> My Lords, I and other of your Lordships have often protested against the procedure of bringing, except in clear and simple cases, points of law for preliminary decision. The procedure indeed exists and is sometimes useful. In other cases, and this is frequently so where they reach this House, they do not serve the cause of justice. The present is such an example ...The fact is that the result of the case must depend upon the impact of detailed and complex findings of fact upon principles of law which are themselves flexible. There are too many variables to admit of a clear cut solution in advance.

Lord Roskill had this to say at page 1022 letters A – B

> The preliminary point procedure can in certain classes of case be invoked to achieve the desirable aim both of economy and simplicity. But cases in which such invocation is desirable are few. Sometimes a single issue of law can be isolated from

> the other issues in a particular case whether of fact or law, and its decision may be finally determinative of the case as a whole. Sometimes facts can be agreed and the sole issue is one of law.

[14] Queen's Counsel opines that the issue raised in relation to Article 138 will not be finally determinative of the case at bar. If it is argued successfully that Article 138 operates as a bar to proceedings based on the accounts as audited and approved, then the court hearing the matter may find that the Claimants have proved their case. This needs to be fully ventilated and this court will say no more on this issue. The second requirement is that the case cannot be tried without reference to disputed facts. It is not disputed that the accounts as presented were audited and approved by a general meeting, One of the contentions raised by Queen's Counsel for the Defendant was that the provision can have no application to the Claimants neither of whom were directors of the Company. The Article makes reference to the accounts of the Directors, the operative word being the "accounts" as "audited and approved by a general meeting" and not "directors". There is no need for proof that either of the Claimants were directors. It seems therefore that no issue of fact needs to be determined, therefore that hurdle is crossed. Thus even on an application of the dicta in the **ALLEN** decision, it seems that the effect of Article 138 can be accorded the status of a preliminary issue of law and can be argued as such at a summary hearing under Part 15 of the **CIVIL PROCEDURE RULES, 2000.** The Court takes the liberty of formulating the issue as follows:

> - **Do the provisions of Article 138 of the Articles of Association of the Defendant Company effectively bar the Defendant from relying on the accounts submitted in accordance with the Article to justify the dismissal of the Claimants?**

- **If the answer to the above is yes, can this be displaced by any act of alleged fraud or misconduct by the Claimants?**

[15] The second issue which Counsel for the Claimants urges as a preliminary issue is:

> ECFML is a corporate body distinct in law from each and every other company in respect of whom allegations are made in the Counterclaim for monies due from the Plaintiffs. There is no linkage in law between the Defendant company and such other companies; and therefore the claims by or on behalf of in respect of any such companies against the Plaintiff cannot be heard or entertained in a Court of law.

On a reading of the Defendant's Defence and Counter Counterclaim in both actions, it is apparent that the allegations with respect to the Companies, not party to the suit were raised as instances of alleged misconduct sufficient for the Defendant to allege that the Claimants had breached their fiduciary duties to the Defendant, so as to justify their dismissals. These raise issues of fact which must be ventilated and as such the issue is not one of law.

[16] The third issue raised by Counsel for the Claimants is:

> In respect of Mr. Ken Boyea as a member of the Board of ECFML he was entitled to do the things which were in his view in the interest of the company and the minutes of the Board of Directors disclose that all his disclosures to the Board covered the

matters in respect of which new allegations are made in the counterclaim in hindsight.

Again, the Court is of the opinion that the questions raised in that issue are ones of fact. The Defendant raises the point that the Claimant Boyea was not a Director of the Company. That is an issue of fact in dispute. In addition, once the question of opinion or entitlement is raised, then that needs to be investigated by way of taking and testing of evidence. The third issue therefore fails as a preliminary issue of law.

[17] As this Court see it, the steps that should now be taken in furtherance of Part 1 of the **CIVIL PROCEDURE RULES, 2000** are as follows, and the Court now **ORDERS AND DIRECTS:**

(1) That Leave be and is hereby granted to the Claimants herein to amend their Replies and Defences to Counterclaim by inserting reference to Article 138 of the Articles of Association of the Defendant Company.

(2) That the Claimants do file and serve their amended Replies and Defences to Counterclaims within 21 days of the date of this Order.

(3) That the Defendants be at liberty to file and serve further Replies to Amended Defences and Counterclaims within 21 days of the date of service on them of the pleadings above.

(4) That the costs of this amendment be paid by the Claimants to the Defendant in any event in the sum of $3,500.00.

(5) That the issue as to the effect of Article 138 of the Articles of Association of the Defendant Company be tried as a preliminary issue of law.

- **Do the provisions of Article 138 of the Articles of Association of the Defendant Company effectively bar the Defendant from relying on the accounts submitted in accordance with the Article to justify the dismissal of the Claimants?**

- **If the answer to the above is yes, can this be displaced by any act of alleged fraud or misconduct by the Claimants?**

(6) **That the issue be heard by in the month of December, 2002 on a date to be notified by the Court Office and that further directions if any be given at the hearing.**

The Court gratefully acknowledges the assistance of all Counsel.

Charmaine Pemberton
High Court Judge.