

ANGUILLA

IN THE HIGH COURT OF JUSTICE

Claim No. HCVAXA 2000/0005

BETWEEN:

FAIR CONSTRUCTION COMPANY LIMITED

Claimant

AND

SELVIN RICHARDSON

Defendant

Appearances:

Ms. Mary Roberts for the Claimant

Ms. Tanya Philip for the Defendant

2002: July 17
2003: January 16

JUDGMENT

[1] **RAWLINS, J.:** This case reflects the difficulties that may arise where persons operate a company without sound knowledge or professional advise. Actions and decisions do not usually then take normal courses and classical legal principles may not easily provide fit answers to the problems that may be caused.

[2] In this case, the Claimant (hereinafter referred to as "the Company") applied for two orders for production, on the 22nd day of October 2001. These were brought for the production of documents by Banx Professional Services Limited (hereinafter referred to as "Banx") the Company's own registered agent and office, and by the Ministry of Finance of the Government of Anguilla (hereinafter referred to as "the Ministry"). The Application as it relates to Banx is for an order enjoining

that company to produce to the Solicitors of the Claimant one copy of all corporate and other such documents constituting the file of the Company. The second is for an order for the Ministry to produce one copy of all contracts together with all payment vouchers entered between the Government and or Selvin Richardson and/or Glenford Hughes and/or Glen Samuel and/or the Claimant "from 1997 to the present".

- [3] The grounds of the Application with respect to Banx state that Banx acts as the registered office and agent of the Claimant Company and, as such, is required by law to be the official repository of all of its corporate documents. Its shareholders, it states, are entitled to view and take copies of documents pertaining to the Company. It states, however, that the requests of two (2) of its shareholders, Glenford Hughes and Glen Samuel, have been denied. These two persons claim that with the Defendant, they are the only shareholders of the Company. The Application further states that it is necessary for the shareholders to have access to the files and records in order to assist them in the litigation of this case. In particular, they wish to be appraised of the incorporation details, ongoing corporate activity and their status in relation to the Claimant Company.
- [4] In relation to the Ministry, the application states that the three (3) shareholders of the company have entered into numerous contracts with the Government and that payment vouchers were issued to them for the construction of several projects. It is therefore necessary, according to the application, for the Parties to this action to verify such amounts as were contractually entered into and paid to any of the shareholders. The application further alleges that the Permanent Secretary to Public Administration has not acceded to requests for the information. The decision on this application is hereby made against the background to the case and the applicable principles.

The Background

- [5] The Claimant was incorporated under the **Companies Ordinance of Anguilla, 1994, now Chapter 165 of the Revised Laws of Anguilla, 2000** (hereinafter referred to as "the Act"). In accordance with **section 149(1) and (2) of the Act**, it named Banx as its registered office in its Articles of Association. It therein also appointed Victor Banks of Banx as its registered agent. The Defendant says that he is now the only shareholder.
- [6] The proceedings in this case were instituted on the 19th day of January 2000. The Claimants in that originating process were Glenford Hughes, Glen Samuel and Fair Construction Company Limited. The action was brought against the present Defendant. It was then re-filed by way of an Amended Writ in the names of the present parties on the 31st day of July 2000. The Claimant seeks an Order that the Defendant, as the sole director of the Claimant Company until his removal on the 23rd day of July 1999, do render account for the monies that were due to the Company up to that date. The Claimant also seeks an order that the Defendant do repay any and all sums due on the taking of the account, interest and costs. The claim is elaborated in the Statement of Claim that was filed on the 25th day of September 2000. It purports to claim, in addition, damages for breach of fiduciary duty and for breach of duty as trustee.
- [7] Interlocutory Judgment in default of Defence was filed on the 12th day of January 2001. A Defence was filed on the 9th day of March 2001 and Joinder on the 21st day of March 2001. The case first came before me in Chambers on the 12th day of July 2001. It was adjourned to Case Management Conference to be conducted on the 22nd day of October 2001. The Defendant filed the required Case Management documents on the 17th day of October 2001. Solicitors for the virtual Claimants did so on the 22nd day of October 2001. The Notice of Application herein was filed on the same date. The Case was adjourned for the hearing of the Application to the 25th day of October 2001.

[8] When the matter came for hearing on the 25th day of October 2001, the Parties undertook to preserve all documents that are relevant to the case, which they have in their possession, custody and control. Because of the unavailability of Counsel who was to appear to conduct the case on behalf of the Claimant, the matter was adjourned to the 7th day of February 2002. Counsel for the Parties were directed to file and serve Skeleton Arguments on the issues touching the application, on or before the 24th day of January 2002. The Parties were also directed to file and serve further Affidavits that may assist in the determination of those issues, on or before the 31st day of January 2002.

[9] The matter eventually came on the adjourned hearing on the 25th day of March 2002. The Parties had not complied with the directions. The time for compliance was enlarged to the 3rd day of May 2002. The Order also provided that unless the Claimant complied by the stipulated time, the action would stand dismissed for want of prosecution with costs on the Defendants. It provided that unless the Defendant complied, the Defence would stand struck out and judgment entered for the Claimant on the claim with costs to the Claimant. The hearing was adjourned to a date to be fixed in the event of compliance. It was eventually heard on the 17th day of July 2002.

The Issues

[10] The Application raises two (2) issues for determination. The first is whether, in the circumstances of the case, Banx should be required to give a copy of all corporate and other documents constituting the file of the Claimant Company to the Solicitors for the virtual Claimants. The second is whether the Ministry of Finance of the Government of Anguilla should be required to produce a copy of the contracts and vouchers entered between the Government and Selvin Richardson, the Defendant, Glenford Hughes and Glen Samuel from 1997 to the present time. However, before these issues are considered, I shall make an observation and ruling with respect to the Parties in this case.

Joinder of Parties

- [11] In my view, it was unnecessary to file the Amended Writ on the 31st day of July 2000. It served to change the Parties to the action. Glenford Hughes and Glen Samuel were deleted as Claimants. They are the persons who are interested in this action. For convenience, I have referred to them in this Judgment as the virtual Claimants. The Company remains as the only Claimant on the record. This is quite unfortunate given the disputes as to the status of the virtual Claimants with the Claimant Company. They assert that they removed the Defendant as the sole director in 1999 and appointed Hughes in his place. As far as the Defendant is concerned, he remains the sole director of the Company. He is also asserting that he is now the only shareholder.
- [12] It is noteworthy that in their own application, the virtual Claimants proffer as one of the reasons for seeking access to the records of Company, that they wish to be appraised of their status in relation to the Company. They were listed as shareholders of the Company in the Annual Return filed in 1999. The Annual Return for the year 1999, which was filed in 2000, states that they transferred their shares to the Defendant. The virtual Claimants are seeking production of the records of the Company because they wish to know, *inter alia*, how it transpired that their names were removed as shareholders of the Company. In the face of these circumstances, it seems that the original Claimants should have remained as the Claimants in this case.
- [13] The application herein was heard on Case Management Conference. Part 19.2(3) confers a discretion upon the Court to add a new Party to proceedings without application. The Court may do so if that course of action is necessary to permit the resolution of all matters in dispute in the proceedings. Part 19.2(6) enables the Court to add, remove or substitute a Party at the Case Management Conference. In the exercise of this discretion, I shall add and thereby restore Glenford Hughes and Glen Samuel as Claimants in this case. The caveat is that since Samuel

showed no interest in the hearing of the Application herein, he may be removed as a party if he indicates disinterest in the action.

Should Banx be Required to Produce?

- [14] For the purpose of this issue, the submissions on behalf of the Defendant are encapsulated in three (3) parts. The first is that directors and shareholders of a company, their agents or legal representatives may examine the records of a company during usual business hours. This is on the authority of **section 157(1) of the Act**. This section also confers a right upon these persons to take extracts from these records free of charge. **Section 157(2) of the Act** entitles a director or shareholder of a company to be provided with a copy of the register of shareholders at any given date. They may have this on request in writing to the company, and upon the payment of a reasonable fee to defray the costs. Once these requirements are met, the company must provide a copy of the register within five (5) working days of the request. This is on the authority of **section 157(3) of the Act**.
- [15] **Section 157(4) of the Act** entitles a director or shareholder of a company to have a copy of its articles and by-laws. It also entitles them to have a copy of any unanimous shareholder agreement and amendments to documents to which this sub-section speaks. **Section 157(5) of the Act** enables “any interested person” or the Registrar to move the Court to order a company that fails to comply with a request under the foregoing sub-sections to comply. On its authority, the Court may order compliance and also make any further order that it thinks fit.
- [16] In the second place, the submission of Counsel for the Defendants is that before the virtual Claimants can be granted access to the records of the Company they must prove that they are shareholders or directors. She submitted that they are not and, further, that it is in dispute whether they fall within the category of “any interested person” in **section 157(5) of the Act**. She insisted that the virtual

Claimants never paid for their shares and were thus never properly constituted as shareholders. This, she stated, is because **section 32 of the Act** stipulates that a share shall not be issued until fully paid in money or in property or past service. She submitted that even if the names of the virtual Claimants appear in the shares register, this is only *prima facie* evidence of allotment. Such evidence, she stated, may be rebutted where evidence is introduced that the contract for the allotment was not completed. She cited as authority for this **Re Atlantic Western Insurance Co. Ltd (in liquidation), Pearman v. Registrar of Companies and Official Receiver (1984) 44 W.I. R. 116**. She stated further, that a binding contract to take and issue shares is only constituted when the acceptance is notified to the applicant for the purpose of receiving the notice. The contract, she said, is not completed until then, even when the name of the applicant is registered. She cited as authority for this, **Halsbury's Laws of England (14th Ed.) Volume 7, Paragraph 364**.

[17] I think it necessary to state at this juncture that, in my view, these authorities and principles are not applicable on this Application. On the facts that are presently before the Court, the question whether the Claimants are either directors or shareholders of the Company is in dispute. From the records made available to the Court, it does not appear that they are now shareholders.

[18] **Re Atlantic Western Insurance Co. Limited (in liquidation)** was a case in which the Applicant had made an Application for shares. There is no evidence that this was done by the virtual Claimants in the case that is the subject of the Application herein. Five hundred (500) shares were allocated to the Appellant in **Re Atlantic Western Insurance Co. Limited (in liquidation)**. The Appellant was registered as a shareholder on the register in respect of those 500 shares. He paid for 250. A share certificate was issued for those 250 shares. When the company fell into liquidation, the liquidator demanded payment for the further 250 shares allotted. He wanted his name removed from the final list of contributors. The Court of Appeal held, *inter alia*, that the liquidator had failed to discharge the burden to

show that the unpaid 250 shares had been allotted. There was no entry of those 250 unpaid shares in the register as having been allotted. Neither was there a resolution of the directors or a notice to the Appellant to that effect. The facts and circumstance in the case that is the subject of this Application are quite different from the facts in **Re Atlantic Western Insurance Co. Limited (in liquidation)**.

[19] The third submission on behalf of the Defendant is that the allotment of shares to the virtual Claimants was made conditionally on the happening of a certain event. This event was to be the payment of money as the consideration for the shares. Counsel for the Defendant insisted that this condition was never performed. The result, she submitted, is that the virtual Claimants never became members of the Company, even if their names were registered. She cited as authority for this **Halsbury's Laws of England (4th ed.) volume 12, paragraph 365** and **Spitzel v. Chinese Corporation Ltd. (1899) 80 L.T. 347**.

[20] The central submission made on behalf of the virtual Claimants was that the Claimants made a request to Banx to be granted access to the documents. Banx has refused to comply. There is in the documents made available to date, a copy of a letter dated the 15th day of March 2001. Solicitors on behalf of Glenford Hughes wrote it to Banx. It refers to the failed attempts by Hughes, as a director of the Company, to examine the records of the Company at the offices of Banx. It states that Hughes would have called at the office again on that day to see the records.

[21] The response to that letter is of even date. In that response, the Assistant Manager of Banx informed Solicitors for Hughes that the records could not be made available to him because the Defendant, who she said is the sole director of the Company, had authorized Banx to file the Annual Return in January 2000. Those Returns, she stated, do not show Hughes as either a director or a shareholder of the Company.

[22] Counsel for Hughes insisted that he is an “interested person” for the purposes of **section 157(5) of the Act**. The result, she stated, is that in the absence of compliance by Banx to the request to examine the records, he is entitled to apply to the Court for an Order to require Banx to comply and to permit disclosure. She submitted that the provision is meant to assist in this situation in which a shareholder is alleging that he has been invalidly removed as a shareholder and wishes to have information to prove this. These submissions require some considerations of such facts as are available.

The Factual Perspective

[23] The documents that have been brought to Court thus far show that the Claimant Company was incorporated as a company limited by shares on the 21st day of January 1998. Its Company number is 5002. It was authorized to issue 10,000 common shares. The Defendant was named as the sole director. The Registered Office of the Company is Banx. The registered agent is Victor F. Banks. A copy of its By-laws state, at 6.2, that a special meeting of the shareholders of the Company may be convened at any date and time if all the voting shareholders agree. It states, at 7.3 and 7.4, that the shareholders shall elect directors to hold office for a period of one(1) year or such shorter or longer period until his successor is appointed by the shareholders.

[24] The first Annual Return was filed on the 1st day of April 1999. Three (3) shareholders are listed in column 8. The Defendant with 3,334 shares and Hughes and Samuel with 3,333 shares, respectively. The Annual Return for the following year was filed on the 12th day of January 2000. Column 8 shows the Defendant holding 10,000 shares. It shows Hughes and Samuel as having transferred their shares to the Defendant. The Annual Return filed in February 2001 shows the Defendant as the sole shareholder with 10,000 shares.

- [25] There are minutes of a meeting of the Company held on the 23rd day of July 1999 at the office of Banx. Hughes and Samuel purportedly signed these minutes. The minutes state that they are the majority shareholders and, as such, they had on that day voted to remove the Defendant as the director. They state that they had appointed Hughes in his place as director. In her oral submissions, Ms. Roberts submitted that this action was in accordance with the provisions for the removal of directors contained in the Act. Ms. Philip, on the other hand, asserted that Hughes and Samuel were not shareholders at the time. This, she said, was because they had not fulfilled the condition required to have the shares issued. They had not paid for the shares. Therefore, she said, they did not have the necessary *locus standi* to remove the Defendant as the director.
- [26] Ms. Philip volunteered to the Court that Hughes and Samuel were only listed in the 1999 Annual Return as shareholders because the parties had acted without legal advice. What can be gleaned from the documentation provided makes it obvious that the Parties have so acted. That statement, however, is not evidence on oath. The Parties were given the opportunity to provide Affidavits. They did not. There is no evidence thus far in the case to rebut the presumption that Hughes and Samuel were shareholders at least to sometime in 1999. It may mean that they were allotted the shares. The Annual Return for the following year may mean that they transferred their shares to the Defendant. Hughes appears to suggest that they did not. The virtual Claimants have not provided Affidavits either.
- [27] In any case, the foregoing considerations do not even appear to be centrally germane to the issues and circumstances that arise for determination on this Application. This is a case in which persons who appear, on the face of it, to have been at least former shareholders of a company pray for an order to render account for funds that came to the Company while they were listed as shareholders. They are asking for account to the time when the Defendant was purportedly removed as the director in July 1999. Whether he was lawfully removed is in dispute.

- [28] The documents that have been brought to Court thus far indicate that some construction contracts were undertaken on behalf of the Claimant Company. There are minutes of a meeting of the Company dated the 25th day of June 1999. The Defendant purportedly signed these minutes. The contents are instructive. They indicate some difficulties of accounting with respect to funds of the Company on some contracts.
- [29] The foregoing paragraphs provide some background to the circumstances in which the Claimants have applied for account to be rendered and for consequential orders. They have applied for the production of the records of the Company in order to facilitate the prosecution of their case. It is my view that the Application falls to be considered as such.
- [30] **Section 157(1),(2),(3) and (4) of the Act** speak to access to records of a company by shareholders and directors. The records of the Company are in the possession of Banx, its registered office. As we have seen, whether the applicants are or were shareholders or directors of the Company is in dispute. It appears that **section 157 of the Act** is intended to grant access to present ascertained directors or shareholders. The basis for the request to have access to the records is therefore doubtful, notwithstanding that there is no doubt that they are "interested person" for the purposes of **section 157(5) of the Act**.
- [31] Does this mean that Banx should not produce the records? It is clear that the records held by Banx for the Company can be helpful for the purposes of this case. Counsel for the Defendant contended that as the agent for holding records for the Company, Banx cannot be compelled to produce the documents. Banx is, however, holding those documents on behalf of a party to this action, the Company, whose affairs form the subject matter of the action. Other Parties have or have had substantial interests in the Company. In the premises, I think that Banx should be ordered to produce the records of the Company, and I shall so

order. The disclosure must be of documents that are relevant to these proceedings within the purview of Part 28.4 of the Rules.

[32] Let us think for a moment of the consequences of a principle that holds otherwise. It will mean that in a case such as this or in a case in which loss may be occasioned by wrong-doing, but the Claimant is struck off as a director or shareholder of a company in uncertain circumstances. That person cannot move the Court to grant access to the records of the Company. The registered office will have refused access to the record of the company which may assist in the prosecution of the case. That refusal may be on the ground that the person does not now fall within the remit of **section 157 of the Act**. If the Court meets his application for production with the same rebuff, I fear that the objective provided in Part 1 of the Rules will be rendered nugatory.

[33] It is my view, however, that disclosure of the documents that are directly relevant to these proceedings can only be done on an examination of all of the records of the Company from its inception that are at the offices of Banx. This should be done by Solicitors for the Claimants in the presence of Solicitors for the Defendants. They should be permitted to take copies or extracts of documents that are relevant to this case. Solicitors for the Claimant should formerly disclose the documents to the Court when they file and serve their list of documents. The documents are to be produced with the other documents that are to be used in the case, as the Court directs.

Should the Ministry of Finance Produce Documents?

[34] Counsel for the virtual Claimants indicated that requests were made to Mr. Julian Harrigan, the Permanent Secretary to Public Administration in the Government of Anguilla, to produce documents in this case. She said, however, that the requests were denied. There is a copy of a letter that was written to Mr. Harrigan by Solicitors for the virtual Claimants on the 27th day of September 2000. It

requested information on the nature of the work conducted by Hughes, Samuel and/or the Defendant for the Government of Anguilla. There is indeed a response by way of a letter dated the 4th day of October 2000. It is from Mr. Ralph V. Hodge, Permanent Secretary in the Ministry of Health and Social Development. The contents state: -

"Thanks for your correspondence of 27 September 2000 to Mr. Julian Harrigan, which has been referred to me for the necessary action. I regret that the Ministry cannot provide the information requested at the present time."

It is noted that letters that are in terms similar to that which was sent to Mr. Harrigan were also sent to Mr. Foster Rogers and Mr. Rommel Hughes. They are apparently Government Officials.

- [35] My observations are, first, that these letters requested information. Yet, the Application herein is not for an Order to compel reply to the request for information under Part 32.2 of the Rules. In any case it is doubtful whether the Court has discretion to compel a reply to a request for information against persons or entities that are not Parties to this case. Neither the Government nor any of its entities or agencies is a Party to this case.
- [36] The second observation is that the application that is before this Court is for an Order that the Ministry of Finance do produce copies of contracts and payment vouchers. However, there is no evidence that the said Ministry was ever requested to produce such documents, or that it has refused to do so.
- [37] The third observation is that Counsel for the virtual Claimants based the case for the production of documents by the Ministry on the ordinary law of contract. In fact, since the Ministry is not a Party to this case, there is no aspect of the case on which contract law principles are referable to the production of documents by the Ministry. This is a case in which a central Government Department is being requested to produce documents. It falls to be considered under principles that are governed by public interest immunity. The Application for the Ministry of

Finance to produce documents therefore fails. I do not agree with Counsel for the Defendant either, that the Claimant should have prayed by way of mandamus.

[38] In terms of the guiding principles I commend the reading of the text entitled **Disclosure (2001 Ed.), by Paul Matthews and Hodge Malek, pages 246-260**, under the rubric "Public Interest Immunity". I also commend **Administrative Law (8th Ed. 2000), by Wade and Forsyth, pages 825 – 836**. The former is particularly helpful because it sets out the practical approach to applications for the production of documents by Government Departments based on current British Government practices. Thereon, Solicitors for the virtual Claimants may perhaps explore the possibilities of having production of documents that may assist in the prosecution of their case by a government entity.

Conclusion and Order

[39] This case came on case Management Conference. I shall therefore provide the directions on the Application to have the case proceed to Pre-trial Review. The following is the Order on the Application:

1. The Application herein is granted in part.
2. At the instance of the Court in the exercise of its discretion under Part 19 of the Rules, Glenford Hughes and Glen Samuel are hereby joined as Claimants in this case, the action to be headed:

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BETWEEN:

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GLEN SAMUEL
FAIR CONSTRUCTION COMPANY LIMITED**

Claimants

AND

SELVIN RICHARDSON

Defendant

3. Banx Professional Services to grant access to the files and records of the Company to Solicitors for the Claimants for their inspection at the offices of Banx within seven (7) days of this Order, access to be exercised in the presence of a representative of Solicitors for the Defendant.
4. Solicitors for the Parties to be permitted by Banx to take copies or extracts of documents from the said records and files that are relevant to this action.
5. This case is hereby adjourned to Pre-trial Review before a Judge of the High Court to be held during the month of May 2003, or so soon thereafter as may be convenient, on a date to be fixed by the Registrar.
6. The Parties each to file and serve a List of documents that will be relied upon at the trial, the same to be filed with verifying Affidavit on Monday the 17th day of February 2003.
7. Exchange and inspection of documents to be on or before Monday the 3rd day of March 2003.
8. The Parties to agree on the documents that will be admitted with consent on or before Monday the 17th day of March 2003.
9. Solicitors for the Claimant to prepare, file and serve, on or before Monday the 31st day of March 2003, a core bundle of the Documents agreed by the Parties to be used with consent at the trial.
10. Solicitors for the Claimant to prepare, file and serve a List of Documents not agreed to be admitted with consent, on or before Friday the 4th day of April 2003.
11. The Parties to prepare, file and serve a list of witnesses who will be called to give evidence at the trial on or before Friday the 4th day of April 2003.
12. The Parties to prepare, file and serve Witness Statements of the persons who will be called to give evidence in this case on or before Wednesday the 30th day of April 2003, Witness Statements to be the evidence in chief for the trial, the Parties reserving the right to cross-examine thereon.
13. Pre-trial Memorandum in accordance with Part 38.5 to be filed and served by the Parties.
14. The Parties to file a Listing Questionnaire at least 10 days prior to the hearing of the Pre-trial Review.

15. The Parties may apply for Directions or Orders at least 10 days prior to the conduct of the Pre-trial Review.
16. Costs on this Application to be costs on the cause.

Hugh A. Rawlins
High Court Judge