

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV 2008/0226

BETWEEN

MARILYN H. SPENCER
FRANKLIN G. SPENCER
GRACELYN U. THOMAS
ALTINO K. SPENCER
GLENSON S.B. KNIGHT
MARILYN E.E KNIGHT

Claimants

And

ATTORNEY GENERAL

Defendant

Appearances:

Mr. Kelvin John and Mrs. Lisa John-Weste for the Claimants

Mr. Justin Simon QC Honourable Attorney General with Mrs. Carla Brooks-Harris Crown Counsel I for the Defendant

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2008: November 27
December 1
2009: January 28
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JUDGMENT

[1] **Blenman J:** This is an application by the claimants for a number of declarations in relation to the non approval of the Attorney General, of the proposed registration of a church as a non-profit company.

[2] **Background**

The claimants, who are the executive committee of the church Hallelujah Square Harvest Tabernacle, submitted to the Attorney General for his approval, the Articles of Incorporation, for the proposed "Hallelujah Square Harvest Tabernacle Inc." to be incorporated as a non-profit company for religious purposes. They also submitted to the Honourable Attorney General the intended Articles of Association.

[3] The Attorney General responded and stated that he was unable to accede to the claimants' request for approval to register the church as a non-profit company. The Attorney General outlined the reason for his decision as being based on his interpretation of sections 3, 328(1) and 329 of the Companies Act 1995 Laws of Antigua and Barbuda that a non-profit company must be a commercial enterprise, which is to be carried out without pecuniary gain to its members.

[4] Subsequently, the claimants through their Attorneys-at-Law, responded to the Honourable Attorney General, stating that the Companies Act does not require non-profit companies to be commercial enterprises, but instead, section 328(2) of the Companies Act restricts a non-profit company's operations by listing a number of 'useful' non-commercial objects, including specifically that "a non-profit company shall restrict its business to one that is of religious object".

[5] As a consequence of the impasse between the two sides, the claimants filed a claim seeking the following orders that:

(a) A declaration that the Attorney General erred in law in interpreting sections 3, 328(2) and 329 of the companies Act 1995, as amended, by taking the position that the business of a non-profit company must be a commercial enterprise so as to deny the claimants the requested approval to incorporate a non-profit company, "Hallelujah Square Harvest Tabernacle Inc." for religious purposes;

(b) A declaration that the Attorney General erred in law in failing to approve the claimants' application to incorporate a non-profit company "Hallelujah

Square Harvest Tabernacle Inc.” as a church in pursuit of religious objects;

- (c) A declaration that the Attorney General erred in law in failing to apply the Literal Rule of Statutory Interpretation, so as to ascertain that the true intention of Parliament in section 328 of the Companies Act 1995, as amended, is to approve the incorporation of churches as qualifying under religious objects;
- (d) A declaration that the Attorney General misdirected himself in law by refusing to approve the Articles of Incorporation of “Hallelujah Square Harvest Tabernacle Inc.” as a non-profit company, thus rendering his decision unreasonable, irrational, unlawful exercise of his discretion, ultra vires, and in breach of the principles of Administrative Law, and thus void;
- (e) A declaration that the Attorney General misdirected himself in law by refusing to approve the Articles of Incorporation of “Hallelujah Square Harvest Tabernacle Inc.” as a non-profit company, in breach of the claimants’ legitimate expectation in Administrative Law to have their non-profit company approved for incorporation.

[6] **Issue**

I have sought to crystallize the issues in the case at bar. The issues that arise for the Court to resolve are:

- (a) Whether a church can be registered as a non profit company if it is not engaged in a commercial enterprise;
- (b) Whether the claimants had a legitimate expectation to have their non-profit church approved for incorporation, based on the Attorney General’s history of approving the incorporation of churches as non-profit companies;
- (c) Whether the Honourable Attorney General has properly refused to approve the incorporation of the proposed company.

[7] **Agreed Statement of Facts**

- The parties have quite helpfully agreed to the following facts. Pursuant to Section 328(1) of the Companies Act 1995 as amended on the 19th day of November 2007, the claimants duly submitted to the defendant, for his approval, the Articles of Incorporation for the proposed "Hallelujah Square Harvest Tabernacle Inc." to be incorporated as a non-profit company for religious purposes.
- [8] By letter dated the 29th day of November 2007, the defendant, through his office, responded to the claimants' Attorney-at-Law, stating that he was unable to accede to the claimants' request for approval for the church to be registered as a non-profit company. The defendant outlined the reason for his decision as being based on his interpretation of sections 3, 328(1) and 329 of the Companies Act, that a non-profit company must be a commercial enterprise, and that he hesitated to think that the church would be operated as such.
- [9] By letter dated the 12th day of December 2007, the claimants' attorney responded to the defendant, and stressed the proper interpretation of the law. It was further stated that section 326(2) of the Companies Act states that "when a provision of this division is inconsistent with, or repugnant to, any provision of this Act, the provision of this division in so far as it affects a non-profit company to which the division applies, supersedes and prevails over the other provisions of this Act".
- [10] By letter dated the 8th day of January 2008, the defendant replied stating that his office stands by the contents of its letter dated the 29th day of November 2007.
- [11] The claimants' Attorney-at-Law performed a search at the Companies' Registry, and discovered that the defendant and his office have, in the past, granted approvals for the incorporation of non-profit companies in pursuit of religious objects, more particularly, churches.

[12] **The Attorney General's submissions**

Learned Attorney General Mr. Justice Simon QC stated that section 328 of The Companies Act 1995 does not contain a definition of "charitable" which is one of the businesses that a non-profit company is obliged to conduct.

[13] The learned Attorney General Mr. Justin Simon QC stated that the claimants sought the approval of the Attorney General pursuant to section 328 of the Companies Act 1995, for the incorporation of an association called the "Hallelujah Square Harvest Tabernacle Inc." as a non-profit company, and seeks qualification for approval on the ground that the association has restricted its business to one that is primarily religious, and accordingly qualifies for approval.

[14] The Learned Attorney General advocated that a non-profit company is a company without a share capital, and is addressed in Division A of Part III of the Companies Act. As such it is subject to all of the provisions of the Act in respect of the formation and operation of companies, save and except the provisions dealing with share capital. That exception is fundamental as section 329(b) clearly provides that the articles of a non-profit company "shall state that the company has no authorised share capital and is to be carried on without pecuniary gain to its members, and that any profits or other accretions to the company are to be used in furthering its business".

[15] It is clear that registration under The Companies Act constitutes incorporation of a company thereby giving it "the capacity, and subject to the provisions of the Act, the rights, powers and privileges of an individual"; see section 17. A company can, however, restrict by its articles the kind of business that it can engage in. In the case of a non-profit company, section 328(2) provides in obligatory terms that such a company "shall restrict its business to one that is of a patriotic, religious, philanthropic, charitable, educational, scientific, literary, historical, artistic, social, professional, fraternal, sporting or athletic nature, or the like, or to the promotion of some other useful object".

- [16] The learned Attorney General contended that that restriction contained in section 328(2) does not remove a non-profit company from the category of a commercial enterprise, that is an association, partnership, society or body “formed for the purpose of carrying on any trade or business for gain” as stated in section 3; the restriction simply prohibits the members of such a company from sharing in any profits made by the company, and instead use such profits in furthering the business of the company. Hence, a non-profit company cannot have a share capital and its members cannot be issued shares whether as a class or otherwise.
- [17] The learned Attorney General emphasized that the claimants seek to register a company whose undertaking is, as stated in their proposed Articles, “restricted to the propagating of the Gospel of Christ operating a church and other associated ministries”. And their complaint is that the Attorney General is wrong in law to refuse his approval because of his determination that the company will be operating as a church and not a commercial enterprise.
- [18] The Attorney General then said that the word church is defined in the Concise Oxford Dictionary (tenth edition) as:
1. A building used for public Christian worship;
 2. A particular Christian organization with its own distinctive doctrines;
 3. Institutionalized religion as a political or social force.
- [19] The proposed By-Laws in its preamble makes the *raison detre* of the proposed company clear beyond doubt: “For the purpose of establishing a place of worship of the Almighty God, Our Heavenly Father, to provide for Christian fellowship for those of like precious faith, to assume our share of responsibility and the privilege of propagating the gospel of Jesus Christ by all available means, both at home and in foreign lands; we, the adherents of “Hallelujah Square Harvest Tabernacle Inc.” of All Saints, Antigua, do hereby recognise ourselves as a sovereign body and adopt the following articles of church order and submit ourselves to be governed by them”.

- [20] There follow: Article II which declares the company to be perpetual (thus not subject to the winding up provisions of the Companies Act); Article III declaring the church's right to govern itself according to the standards of the New Testament Scriptures; Article V which declares the Tenets of Faith as acceptable common ground of faith and practice; Article VII which provides for the ordination of pastors; and Article VIII which speaks to church government and wherein a named senior pastor is declared to be the spiritual leader who will be the perpetual chair of the Executive Board and who "shall have the responsibility and authority to appoint all members of the Executive Board and church staff," with an appointed board whose "Directors shall be members of the corporation who regularly attend services or functions of the corporation and exemplify the spirit of the Christian Faith".
- [21] However, the regulations made pursuant to section 527 of the Companies Act provide in Part XI of the By-Law which "may with suitable modification and adaptation" be used as the general By-law of a non-profit company and set this out in the Fifth Schedule. Importantly, the prescribed draft By-law makes provision for an entrance fee, annual subscription, and meeting of members – none of which are addressed by the proposed company and how will their entitlement to membership be determined? While sections 332, 333, 334, 335 and 336 of the Act are permissive in respect of matters to be contained in the By-Laws of an non-profit company, they clearly indicate a framework within which the rights of members are protected and expressed, factors which are singularly absent in the proposed By-Law.
- [22] The learned Attorney General said that apart from the exemption from corporate tax, there is no real advantage to church organizations registering as non-profit businesses in Antigua and Barbuda. And, in any event, a church is not a business.
- [23] The learned Attorney General submitted in the alternative that the claimants' proposed By-Laws does not conform to such of the provisions of the Companies Act 1995 as are relevant to non-profit companies as stipulated in section 326(3), and they depart substantially from the model By-Law contained in the Companies Regulations 1997. There

are no provisions for membership, mode of holding meetings, election of directors, and audit of accounts, to name a few.

[24] Finally, the learned Attorney General submitted that previous registration cannot give rise to a 'legitimate expectation' on the part of the claimants. The Court's hand cannot be tied in determination which should be made.

[25] **Mr. Kelvin John's submissions**

Learned Counsel Mr. John argued that the Attorney General's interpretation is a non-sequitur, since in law a non-profit company cannot be a commercial enterprise. The non-profit company is a special creature of the Companies Act, specifically limited in its object and purposes by section 328(2) of the Companies Act, and further prohibited by section 329 of the Companies Act from having any of the constituent elements of a commercial enterprise. A non-profit company is prohibited from having any share capital, from generating any pecuniary gain for its members, or from utilizing profits or other accretions for any other purpose than furthering its business.

[26] The non-profit company is restricted in sections 328(2) of the Companies Act thereof to business that is of a "patriotic, religious, philanthropic, charitable, educational, scientific, literary, artistic, social, professional, fraternal, sporting or athletic nature, or the like, or to the promotion of some other useful object".

[27] Next, Mr. John learned Counsel said that section 329 of the Companies Act further places restrictions on the non-profit company as regards the manner in which it may operate based on its prescribed Articles of Incorporation. The non-profit company must have "no authorised share capital, and is to be carried on without pecuniary gain to its members, and that any profits or other accretions to the company are to be used in furthering its business". Clearly, the legislature ensured that the non-profit company would be devoid of any characteristic elements associated with a commercial enterprise.

- [28] The Attorney General seeks to rely on section 3 of the Companies Act 1995, which states that: "No association, partnership, society, body or other group consisting of more than twenty persons may be formed for the purpose of carrying on any trade or business for gain unless it is incorporated under this Act or formed under some other enactment". Section 3 of the Companies Act is a provision which only refers to companies formed as commercial enterprises, which are "formed for the purpose of carrying on any trade or business for gain". Non-profit companies formed under Part 3, Division A, are not formed as commercial enterprises or for commercial gain. Learned Counsel Mr. John said that on a plain and ordinary interpretation of the words, section 3 cannot apply to non-profit companies with a religious object or purpose created under sections 328(2) and 329 of the Companies Act.
- [29] In any event, section 326(2) of the Companies Act puts the issue beyond doubt by stating that "when a provision of this Division is inconsistent with, or repugnant to, any provision of this Act, the provision of this Division in so far as it affects a non-profit company to which the Division applies, supersedes and prevails over the other provisions of this Act". As such, Mr. John said that while he cannot agree that non-profit company must be a commercial enterprise under section 3, if this were the interpretation to be accepted, then such an interpretation would be inconsistent with sections 328 and 329 of the Companies Act (Part 3, Division A), and accordingly, sections 328 and 329 would supersede section 3. Thus, the literal position is that a non-profit company cannot be a commercial enterprise.
- [30] Next, learned Counsel Mr. John argued that the provisions of the Companies Act are clear, and that the Attorney General had erred in law in his interpretation of sections 3, 328(2) and 329 of the Companies Act, by taking the position that the business of a non-profit company must be a commercial enterprise, so as to deny the claimants the requested approval to incorporate a non-profit company, "Hallelujah Square Tabernacle Inc." for religious purposes.

[31] **Legitimate expectation**

Finally, Mr. John urged the Court to find that the Attorney General has breached the claimants' legitimate expectation. Counsel referred the Court to the judgment of Lord Fraser in the House of Lords in **Council of Civil Service Unions and others v Minister for the Civil Service [1984] 3 All ER 935 at 944** that:

“Even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and if so, the Courts will protect his expectation by judicial review as a matter of public law. Legitimate expectation may arise from the existence of a regular practice which the claimant can reasonably expect to continue”.

[32] Learned Counsel Mr. John advocated that in so far as the claimants have fully complied with all the requirements of the Companies Act, they had every legal right to have their request granted by the Attorney General. Indeed, the law provides that even if this was not the case, because of the Attorney General's practice over several years of granting approvals to identical applications, then a legitimate expectation was created, which the claimants could reasonably expect to continue. As such, the claimants had a legitimate expectation that when they submitted their Articles of Incorporation for “Hallelujah Square Harvest Tabernacle Inc.” to be incorporated as a non-profit company with religious objects, the Attorney General would grant approval for same, since the Attorney General had for numerous years granted approvals for identical applications.

[33] Finally, Learned Counsel urged the Court to grant the declarations sought.

[34] **Court's analysis and conclusions**

I have carefully read the written submissions that were helpfully provided by all learned Counsel, together with authorities. I have also given deliberate consideration to the pleadings and agreed facts. I come now to address the issues that have been crystallised by the Court.

[35] **Issue No. 1: Whether a church can be registered as a non profit company**

It seems to me that the resolution of the first issue turns entirely on the interpretation of sections 328 and 329 of the Companies Act. Or to put another way, what is the conjoint effect of the two sections of the Act.

[36] I digress to state straight away, that it seems to me that section 3 of the Companies Act has no relevance to the issues in the case.

[37] Section 3 of the Companies Act only restricts persons who number more than 20 from carrying on their trade or business **for gain**, unless they are incorporated. Section 3 of the Act merely prohibits an association or body of more than twenty persons from carrying on any trade or business **for gain**, unless it is incorporated under that Act. The effect of this is to prohibit a group of persons in excess of twenty from carrying a trade or business **for gain** unless they form a company. There are similar provisions in the English Act. In fact, this is not new since under the 1985 English Company Act there was always a requirement that persons who desire to trade or conduct business and number more than twenty must form a company. It in no way requires that persons who are not carrying on their trade or business **for gain** can form a company. I have no doubt that section 3 does not apply to non commercial companies. In this context, non commercial is used to mean not for gain.

[38] It is agreed that the proposed company is a church and that it does not intend to carry out its business for gain. It intends to be involved in religious work. In my respectful view therefore, section 3 has no relevance to the case at bar. As stated earlier.

[39] In law, there are primarily two types of associations: partnerships and companies. If a small number of persons wish to carry on business in common either for gain or profit or even for non-profit, they may form themselves into a partnership. There is however statutory restraint on persons who number 20 or more who wish to associate for gain by way of trade or business; those persons who fall into this category are required to form a company as stated in section 3. It is noteworthy that the marginal note of section 3 of the Companies Act very helpfully underscores my position. In the marginal note, it is clearly

stated that there is a **prohibition** (against certain persons operating trade or business for gain unless they form a company).

[40] Further, in relation to the case at bar, as stated earlier, it is accepted that the proposed company does not intend to carry on any trade or business **for gain**. Therefore, in my respectful view section 3 of the Companies Act is not brought into focus. In my considered view, learned Counsel Mr. John is correct in saying that section 3 of the Companies Act does not apply to non profit companies. In fact, it has always been the law that persons who are desirous of carrying on business for trade or gain can form partnerships. This has been so for decades and has not changed. However, if their numbers exceed twenty, they are obliged to form a company.

[41] I come now to non profit companies and I digress to note that section 326(1) of the Companies Act also states that this division applies to every company without share capital. Also, I note that the heading of Part III is "Other Registered Companies".

[42] It is my considered view that section 330(1) of the Act clearly states that a non-profit company shall have no fewer than three directors. There does not seem to be any dispute that the proposed company will have no fewer than three directors.

[43] I turn my attention to section 328 and 329 of the Companies Act, which are relevant to the case at bar.

[44] Section 328 (1) makes it mandatory to obtain the Attorney General's approval in order for a non-profit company to file articles.

[45] I am satisfied that section 328(2) of the Companies Act must be given its literal meaning. Indeed, the literal rule of interpretation states that in construing or interpreting a statute, if the words are precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. **Sussex Peerage (1844) 11 CIF 85**. There is no reason for reading any other words into section 328(2) of the Act.

- [46] It has always been recognised that companies have three distinct functions: companies formed for purposes other than the profit of their members, for example those formed for social, charitable or religious purposes, companies formed to enable a small body of persons to carry on a business and finally, companies formed in order to allow members of the public to invest in its and share in its profits. It is usual for the first type of companies to be limited by guarantee. Even though in common parlance the word “company” is used to refer to persons who associate for economic gain, this is not the exclusive purpose of a company. Further, it need not be the purpose at all of a company. Companies can be charitable in nature. These types of companies are limited by guarantee instead of shares. This is recognised by section 326(1) of the Companies Act which acknowledges that companies without a share capital can be incorporated as a non-profit company. Speaking for myself, I see no difference between a non-profit company and one that operates not for economic gain.
- [47] Even though most companies are incorporated for “business purposes” which is used here interchangeably with “commercial purposes”, I do not hold the view that “business” as used in section 328 (2) of the Act is confined to commercial transactions. I am more attracted to the meaning as advocated by Mr. John, namely purposeful activities, functions, affairs, matters, commercial, personal activities.
- [48] Accordingly, I am afraid that I am unable to accept the interpretation of the above sections as urged by the learned Attorney General. That is too restrictive. It is my respectful view that the word “business” as used in the section 328 (2) is wider in scope than commercial business and includes one’s concerns or affairs, matters, purposeful activities. Section 328(2) of the Act enables persons to associate themselves and form a company for religious or charitable purposes, once it is non-profit. The section mandates the non-profit company to restrict its business to either charitable or religious purposes, to name a few, in order to qualify for approval. It is imperative that the entire section be construed as a whole. See Maxwell on Interpretation of Statutes, 12th Edition, page 36. To attribute any

other meaning to the word “business” or to require potential non-profit companies to be involved in commercial transactions may create an inconsistency of sorts.

[49] With respect, I am afraid that I am unable to agree with the learned Attorney General, that in order to obtain approval for incorporation a non-profit company must be a commercial enterprise. There is no basis for reading into the sections 328(2) the meaning urged on the Court by the Attorney General. In fact, to the contrary, it is apparent that the real reason for enabling non-profit companies to be incorporated as companies under section 322(8) is to address the situation similar to that is before the Court, in addition to others, such as to enable other non commercial organizations to be incorporated. I am buttressed in the above view from a reading of section 329 (2) (b) of the Companies Act.

[50] It is equally clear that section 329(b) of the Act reinforces section 328(2) in so far for example, that section 329(b) states that the articles of a non-profit company shall be in the prescribed form and shall state that the company has no authorised share capital and is to be carried on without pecuniary gain to its members. There is nothing in section 329(b) that adds in any material way to section 328(2) of the Act and requires that the non-profit company to be a commercial enterprise in order to qualify for approval by the Attorney General.

[51] By way of emphasis, I do not share the view urged on the Court that the conjoint effect of section 328 (2) and section 329 of the Companies Act means that a church cannot be incorporated as a company. I do not accept that in order to be registered as a company a non-profit entity must be a commercial enterprise. It seems clear to me that any organization whose business is restricted to patriotic, religious or charitable activities and is operating not for gain or profit is eligible to obtain the requisite approval.

[52] For what it is worth, in passing, it is important to observe that in several Caribbean jurisdictions, in which there are similar legislative schemes, non-profit Churches, Cancer Societies, Diabetic Associations have been incorporated under the relevant statutory

provisions. These organizations do not engage in any commercial enterprise but are definitely involved in religious and/or benevolent activities.

[53] In view of the foregoing, I have no doubt that a church that is not operating **for gain** can receive the Honourable Attorney General's approval to be registered as a non-profit company. Accordingly, I declare that the Honourable Attorney General erred in law in holding that the church is ineligible to receive approval to be registered in so far as it is not a business or is not a commercial enterprise.

[54] **Issue No. 2 and Issue No.3**

Legitimate Expectation and Non-approval

It seems as though there is no need for me to address the second and third issues on legitimate expectation and non-approval. However, for the sake of completeness, I state that the Honourable Attorney General's non-approval of the registration of the "Hallelujah Square Harvest Tabernacle Inc." was based on the fact that it was not a commercial enterprise.

[55] In passing, I state that the question must therefore be asked whether it is proper for the defendant at this stage to seek to take issue with the contents of the By Laws of the proposed company and attempt to advance that as a reason for refusing to approve the incorporation of the company. The Court is of the view that the justice of the matter requires that steps be taken by the claimants to ensure that their proposed company's By-laws are in order, with a view to obtaining the Honourable Attorney General's approval. In my respectful view, this aspect of the matter should not engage the Court's attention since it was not a live issue in the matter.

[56] In view of the totality of the circumstances, it is the law that a church that is a non-profit organization that is engaged in religious activities is eligible to receive the Attorney General's approval. In order to be incorporated, it is essential that the proposed company have no share capital and does not operate for pecuniary gain.

[57] **Costs**

The parties have very helpfully agreed to costs in the sum of \$5,000.00.

[58] **Conclusion**

In view of the foregoing premises, the Court hereby declares that there is no requirement for the "Hallelujah Square Harvest Tabernacle Inc." to be a commercial enterprise in order to qualify for approval to be incorporated as a non-profit company under sections 328(2) and 329 of the Companies Act. It is further declared that the Honourable Attorney General erred in law in holding that in order to obtain approval to be incorporated under sections 328 and 329 of the Companies Act, the company must be a commercial enterprise. The claimants are to have costs in the sum of \$5,000.00, as agreed.

[59] The Court gratefully acknowledges the assistance of all leaned Counsel.

Louise Esther Blenman
High Court Judge