GRENADA

IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO: GDAHCV 2001/0652

BETWEEN:

PATRICK THOMAS
PATSY THOMAS
BERNICE BRYCE
MARISKA THOMAS
WINSTON THOMAS
BEVIN THOMAS
KNEARLYN THOMAS
MIRIUM HARRYMAN
VILMA THOMAS

Petitioners

and

THOMAS REAL ESTATE COMPANY LTD
DENZIL THOMAS
EARLYNE THOMAS
DENIS THOMAS

Respondents

and

CLAIM NO. GDAHCV 2001/0653

BETWEEN:

PATRICK THOMAS
PATSY THOMAS
BERNICE BRYCE
MARISKA THOMAS
WINSTON THOMAS
BEVIN THOMAS
KNEARLYN THOMAS
MIRIUM HARRYMAN
VILMA THOMAS

Petitioners

and

CROCHU BEACH RESORTS LIMITED
DENZIL THOMAS
EARLYNE THOMAS
DENIS THOMAS

Respondents

Appearances:

Ms. Cindy John of Grant, Joseph & Co. for the Claimants
Ms. Gennilyn Ettienne and with her Ms. Claudette Joseph and Mr. Ian Sandy for the second and third named Defendants
Mr. L. Haynes instructed by Henry, Henry & Bristol for the Liquidator

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2010: November 30

DECISION

[1] **HENRY, J.:** The second and third-named defendants apply for an order that the orders of the Master entered herein on 10th June, 2003 and 19th January, 2004 be set aside. The applicants advance several grounds which can be summarised as follows:

1. The Master had no jurisdiction to make an order for the winding up of a company;

2. That Case Management powers as exercised by the Master is a creature of CPR 2000 and Part 2.2(3) b of the CPR ousts its application in respect of insolvency (winding up) proceedings;

3. The Master's powers are limited to the exercise of a Judge of the Court sitting in Chambers;

4. The winding up order purported to appoint a firm or corporation as liquidator and this was in contravention of the Companies Act;

5. The order of 10th June, 2003 ought to be set aside notwithstanding that it is a consent order on the basis of illegality and mistake;

6 The parties reserved the right to apply to have the order of 10th June, 2003 discharged by virtue of paragraph 5 which states that any party be at liberty to apply.

7. Furthermore, that the subsequent order of the Master entered on 19th January, 2004 contains far more details than the one initialled by the parties; is erroneously stated to be by consent and ought also to be set aside because it too is a nullity, the Master having lacked jurisdiction to make same.

[2] The Claimants and the Liquidator oppose the application on the grounds that:

1. The action is not an insolvency or winding up proceeding. The action was brought under section 241 of the Companies Act. Therefore the Orders were properly made under the Companies Act and the CPR and the Master had jurisdiction to make same.

2. A consent order can only be set aside on appeal or in a fresh proceeding, therefore this application by way of summons is not well founded.

3. The Court will only set aside a consent order on the grounds on which a contract may be set aside; that none of these grounds exist in respect of the consent order of 29th May, 2003.

4. Delay: Nothing has been said by the applicants to explain the delay of 6 years between the consent order and this application. All the facts pleaded are the same facts which existed 6 years ago. Therefore there is nothing upon which the Court can rely on to exercise its discretion in the applicant's favour; and

5. That the Master has always had jurisdiction to make a consent order.

Background/History

[3] The Fixed Date Claim Form, Statement of Claim and an Application for injunction in Claim No. 0652/2001 were filed on 3rd December, 2001. The fixed date claim sought the following relief:

1. A declaration that the 1st Defendant is carrying on or conducting its affairs in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interest of the claimants as shareholders;

2. A declaration that the 2nd, 3rd and 4th defendants are exercising their powers as directors of the 1st Defendant in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of the claimants as shareholders;

3. An order that the 1st Defendant do issue share certificates to the claimants;

4. An order that the records of the 1st defendant be rectified;

5. An order that the records required by the Companies Act 1994 be kept and made available for inspection by the claimants;

6. That the 2nd, 3rd and 4th defendants be removed as officers of the 1st defendant;

7. An order that the officers of the 1st defendant be appointed in accordance with the Companies Act 1994;

8. An order that the 1st Defendant be wound up in accordance with the provisions of the Companies Act 1994;

9. Further or other relief;

10. An order that the costs of the claimants be fixed in accordance with the Civil Procedure Rules 2000 and paid by the Defendants.

[4] According to the endorsement on the fixed date claim form, first hearing of the matter was set for 8th February, 2002. On that date the matter came on before Alleyne J. as he then was. The matter was adjourned to 22nd February, 2002. On that date, an undertaking was given by the 2nd, 3rd and 4th defendants that no steps would be taken to the prejudice of the Company and the Claimants and the matter was adjourned for further consideration. On 8th March by Order in Chambers, the first defendant was restrained from disposing of any of its assets pending trial or further order. Defendants were given permission to file defence within 14 days. The Court further ordered that Claim No. 0652/2001 and Claim No. 0653 be tried together and the matter was referred to case management.

[5] Subsequently by a Case Management Order, trial was set for 18th September, 2002. The matter came on for trial before St. Paul J. Due to an ongoing matter, the trial was adjourned to 19th and 20th November, 2002. Subsequently, on 19th November, 2002 the matter came on for trial, but was adjourned to enable the parties to reach a settlement. The Judge's note reads "adjourned for case management conference and for parties to indicate result of settlement discussions." At the Case Management Conference which followed, the terms of the settlement arrived at by the parties was reduced to a written Order. It was signed by the Attorneys for the parties and entered before the Master. A similar Order was also made in respect of Claim No. 0653/2001. The Consent Order provides:

"BY CONSENT IT IS ORDERED THAT:

1. Thomas Real Estate Company Limited be wound up by this Court under the provisions of the Companies Act 1994;
2. (Subject to their filing their consent to so act) that Messrs. PricewaterhouseCoopers be appointed liquidator of Thomas Real Estate Company Limited;
3. The costs of the respective parties herein be paid out of the assets of the Company;
4. The Registrar of the Supreme Court supervise the conduct of the liquidator in the winding up of the Company;
5. Any party be at liberty to apply."

[6] On 11th December, 2003, Mr. Brian Robinson of PricewaterhouseCoopers EC Inc. of Collymore Rock Barbados filed consent to act as Liquidator. Thereafter, by Order entered 19th January, 2004, the Court appointed Mr. Brian Robinson Liquidator and since then Mr. Robinson has acted as such.

Setting Aside a Consent Order

[7] I agree with the claimants that the Summons filed herein is not well founded. Lord Diplock in **De La sala v De La sala** [1980] AC 546 at 561 stated that the only ways of challenging an Order once it has been drawn up and sealed are by appeal from the judgment or order or by bringing a fresh

action to set it aside. The applicants have therefore come by the wrong procedure. Even if the applicants had come by the correct procedure, the Court is of the view that the Master had the jurisdiction to sanction the consent order dated 29th May, 2003 and entered on 10th June, 2003 and no basis exist for setting aside same.

[8] The law is that a consent order can only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons (per Winn LJ **in Purcell v F.C. Trigell** [1971] 1Q.B. 358 at 364). The second and third defendants however submit that the matter comes within the rule as set out in the case of **Chanel v Woolworth** [1981] 1 W.L.R. 485.

[9] The plaintiffs in **Chanel** brought an action for infringements of trade marks of which they were the registered proprietors and for passing off against the importers and retailers of foreign products bearing the plaintiffs' trade mark. On a motion by the plaintiffs for interlocutory injunction, the defendants gave an undertaking by consent not to deal in goods bearing the plaintiffs' marks which were not the plaintiffs' goods. The order made on consent expressed the undertaking by the defendants to be until judgment or further order.

[10] Following a Court of Appeal decision in a similar case, the second defendant sought to be discharged from its undertaking on the ground that in view of the Court of Appeal decision, the plaintiffs had no reasonable prospect of obtaining at the trial relief in the nature of that afforded by the undertaking. The Judge refused to discharge or modify the undertaking and an application for leave to appeal was made. The Court of Appeal in its decision cited **Purcell v F.C. Trigell Ltd.** [1971] 1 Q.B. 358 and noted that it had previously decided that a consent order could not be set aside even in an interlocutory matter unless there were grounds which would justify the setting aside of a contract entered into with knowledge of the material matter by a legally competent person. Buckley L.J. stated that in his judgment:

> "an order or an undertaking to the court expressed to be until further order by implication gives a right to the party bound by the order or undertaking to apply to the Court to have the order or undertaking discharged or modified, if good grounds for doing so are shown. Such an application is not an application to set aside or modify any contract implicit in the order or undertaking. It is an application in accordance with such contract, being an

exercise of a right reserved by the contract to the party bound by the terms of the order or undertaking."

[11] The matter before the court can be distinguished from the **Chanel** case. The matter before the Court recorded the final settlement of the matter and was not an interlocutory order. The order was not expressed to be "until further order of the Court". Paragraph 5 provided liberty to all parties to apply. The learning is that liberty to apply enables matters to be dealt with in the working out of the terms of the order, but does not enable the Court to deal with matters which do not arise in the working out of the order. Accordingly, in the Court's view this matter does not fall within the exception in the **Chanel** case and therefore the consent order of the court entered 10th June, 2003 can only be set aside on grounds that would justify the setting aside of a contract, the parties having freely agreed on the terms.

[12] The applicants further submit that the order ought to be set aside on the grounds of illegality and mistake. The illegality being that the Master had no jurisdiction to make the order.

Jurisdiction

[13] The applicants argue that Rule 27.2 of CPR 2000 sets out the procedure to be followed when an action is commenced by Fixed Date Claim. It provides that once a Fixed date Claim is filed a date must be fixed for the first hearing before a Judge in open court. Further that Part 27.3 (1) of CPR 2000 provides that a Case Management Conference must be fixed as soon as Defence to a claim other than a Fixed Date Claim is filed, so that under parts 27.2 and 27.3, the Master has no jurisdiction to hear a Fixed Date Claim.

[14] They further submit that the Master has no jurisdiction to deal with matters relating to the winding up of companies; that the procedure for the winding up of Companies is governed by the 1909 UK Winding Up Rules; that under these Rules only a Judge sitting in open court has jurisdiction to make an order for the winding up of a company. They cite Rules 5 (1) and 8 (1) of the said Rules. They reason that since the Master didn't have the jurisdiction, the parties by consenting could not confer such jurisdiction on him.

[15] The Applicants also submit that the order violates sections 294, 295, 296 and 298 of the Companies Act when it provided for the appointment of PriceWaterhouseCoopers as Liquidator.

Neither a firm nor a corporation, they submit, can be appointed as a Liquidator, therefore that provision was a legal impossibility. Therefore, they submit that the order of the Master should be set aside on the ground of illegality and mistake.

[16] On the issuance of the Fixed Date Claim herein, a date for the first hearing was fixed and that hearing took place before a Judge of the court. In fact the matter came before a Judge on several occasions thereafter. There is no issue involving the first hearing of this matter, nor can there be any claim that Rules 27.2 and 27.3 were violated.

[17] The jurisdiction of the Master is limited to the jurisdiction and powers of the Judge in Chambers, with certain exceptions such as where the liberty of the subject is involved. This is so both in England and in Grenada under the provisions of the West Indies Associated States Supreme Court (Grenada) Act Cap. 336 as amended by Act No 36 of 2000. I agree with the applicants therefore that under the Winding up Rules, the Master has no jurisdiction to hear Petitions which fall within the ambit of those Rules. These can only be heard by the Judge in open court.

[18] However, to the extent that the applicants are here saying that the Master, on 29th May, 2003, dealt with such a Petition, I disagree. Firstly, the matter is an action under the Companies Act section 241 and not a Winding up Petition. Secondly, the Companies Act section 241 (3) (l) gives the Court the power to make such an order in an oppression action. Thirdly, at the point when the Master sanctioned the order, the Civil Procedure Rules were applicable. It is clear from the record that the Master was not dealing with an insolvency action but sanctioned a compromise in an oppression action that had been arrived at through negotiations between the parties, the parties being duly represented by Counsel.

[19] The applicants say however, that the Master has no jurisdiction to make an order for the winding up of a Company. As I understand the applicants' submission, since the Master, under the Winding up Rules has no jurisdiction to hear a petition for the winding up of a company and since the CPR is not applicable to insolvency proceedings, the Master has no jurisdiction to sanction or approve a consent order which contains a provision for the winding up of a company, no matter the genesis of the action.

[20] The Companies Act gives the Court the power to make an order for the winding up of a company in an oppressive action. Therefore, a winding up order can be made by a Court other than in an insolvency action. The parties all agree that the Master exercises the powers and authority of a Judge of the High Court sitting in Chambers. The question is whether this consent order could have been entered into before a Judge in Chambers. There is no express provision against such in relation to oppressive actions under section 241 of the Companies Act. In my view, the consent order could have been entered before the Judge in Chambers and therefore the Master had jurisdiction to sanction the said consent order.

[21] With regard to the provision set out in paragraph 2 of the said order, it was a conditional appointment. The appointment was subject to the filing of a consent to act as Liquidator. The consent was filed by Brian Robinson a partner of the firm. The subsequent order entered 19th January, 2004 appointed Mr. Brian Robinson as Liquidator. Under these circumstances I see no violation of the provisions of the Companies Act. There was therefore no illegality or any mistake of law or facts in respect of the order.

[22] With regard to the second order entered 19th January, 2004, the parties did consent to the winding up of the companies and to the appointment of a Liquidator. This order finalized the appointment of Mr. Robinson as Liquidator and set out certain terms of his appointment. The Court having found that the Master had the jurisdiction to sanction the consent order entered on 10th June, 2003 providing for the winding up of the company and the appointment of a Liquidator. The Master certainly had the jurisdiction to make the second order.

[23] The powers of a Liquidator appointed under the Companies Act are set out in section 398 et seq and in the exercise of those powers the Liquidator is subject to the control of the Court. The powers set out in the order entered 19th January, 2004 are in general in conformity with the powers set out in the Act. The Applicants do not allege that the Liquidator has exercised or is about to exercise any of these powers to their prejudice because the Act provides a remedy in such a case.

[23] Furthermore, the order of the Master was made in May 2003. The Summons herein was filed 9th April, 2009, almost 6 years after the making of the order. During those 6 years Mr. Robinson has acted as Liquidator. He has interacted with the various parties in both actions. The applicants have advanced no reason for the delay in making the application. No new information has been discovered that was not known to the parties in 2003. Under these circumstances, the substantial delay provides, by itself, grounds to dismiss the application.

[24] Accordingly, the application herein is dismissed with costs to the claimants and Liquidator to be assessed if not agreed.

Clare Henry
HIGH COURT JUDGE