

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

(CIVIL)

CLAIM NO. ANUHCV2009/0092

BETWEEN:

MYRTLE LOOBY

Claimant

And

GEO TECH LIMITED

1st Defendant

DOROTHY GITTENS as Personal

Representative of the Estate of George Looby

2nd Defendant

Appearances:

Mrs Alicia Williams-Grant for the Claimant

Mrs Eleanor R. Clarke-Solomon for the Defendants

2010: January 26, February 15

2011: March 11

JUDGMENT

- [1] **THOMAS J:** In a Fixed Date Claim filed on 19th February 2009 the Claimant, Myrtle Looby, is seeking a number of orders and declarations.

- [2] In her Statement of Claim the Claimant pleads her calling as a management consultant and marriage to the deceased in September 1972 and the dissolution thereof in June 2001.
- [3] It is the Claimant's contention that with a view to incorporating the 1st Defendant with the deceased she subscribed to a Memorandum of Association for 1 share each. The purpose of the incorporation of the company was to hold certain properties which they had acquired and/or intended to acquire jointly. It is the further pleading of the Claimant that she injected substantial sums of capital into the business operations of the 1st Defendant in light of her 50% shareholding, which interest was never transferred to anyone.
- [4] At paragraph 6 of the said Statement of Claim the Claimant identifies certain parcels of land situate at Falmonth and Bethesda which she contends were held by the 1st Defendant. Further at paragraph 7 the issue of her appointment of the 1st Defendant is pleaded.
- [5] Also at paragraphs 8 and 9 the following is pleaded:
- “8. Mr. Looby died intestate on the 4th December 2004. At the time of his death he was married to the 2nd Defendant who applied for and on the 18th day of January 2005 was granted Letters of Administration for Mr. Looby's estate. At all material times the 2nd Defendant was the Administrator of the Estate of George Looby.
9. Save and except as stated in paragraph 7, since the appointment of the said Defendant as the Personal Representative of the Estate of George Looby, the Claimant had been excluded from this management of the 1st Defendant as a Director and has no knowledge of the status of the affairs of the company. At all material times, the 2nd Defendant has sought to exercise exclusive control over the assets and management of the 1st Defendant to the total exclusion of the Claimant.”
- [6] With respect to the shareholding and directorship of the 1st Defendant, the Claimant contends that there were certain changes which were revealed as a result of a search which revealed that the 2nd Defendant was the sole director and shareholder of the 1st Defendant. Consequently the Claimant contends that: “The resolutions filed were purportedly made at meetings held by the 1st Defendant of which the Claimant as a Director was never notified, contrary to the company's Articles and the Companies Act 1995 and they were therefore invalid and were a nullity.” Further, it is contended that the absence of the duly appointed directors of the company at a meeting there was no quorum

and as such the company could not take any decisions reflected in the resolutions filed or any decisions were invalid and of no effect.

- [7] Other changes in the Articles of the company with which the Claimant takes issue included change to the minimum number of the directors and a quorum of the company. In this connection the following is pleaded at paragraphs 15 and 16 of the Statement of Claim.

“15. The records of the Register of Companies now reflect that the Claimant is no longer a director and further that she has no interest as a shareholder of the 1st Defendant. However, there are no share transfers filed at the Company Registry to reflect a transfer of the Claimants shares to the said George Looby during his lifetime nor to the 2nd Defendant.

16. Despite the Claimant giving the 2nd Defendant and the 2nd Defendant's attorney notice of her interest as a shareholder and director as evidenced in the bundle copy of letters exhibited hereto..., the 2nd Defendant continued and continues to all contrary and prejudicial to the Claimant's interest in the 1st Defendant. In full, she has refused and or failed to acknowledge the Claimant's interest in the 1st Defendant.”

- [8] In the circumstances the Claimant contends that she has been and continues to be prejudiced by her exclusion from the management of the 1st Defendant and had received no dividend or communication since 2005 with respect to the financial position or general status of the 1st Defendant.

- [9] The Claimant claims the following:

- (a) A 50% shareholding interest in the 1st Defendant.
- (b) Declared dividends from the 1st Defendant for the period 2004 to the present plus interest pursuant to the Eastern Caribbean Supreme Court Act Cap. 143.
- (c) Rectification of the registers and records of the 1st Defendant to record her interest as a shareholder and director in the 1st Defendant.
- (d) Damages for wrongful interference by the 2nd Defendant with the Claimant's interest in the 1st Defendant.
- (e) Costs
- (f) All other relief set out in the Claimant's Claim Form.
- (g) Such further on other relief as the Court may deem fit and appropriate.

[10] The Claimant also pleaded that she will be seeking the following reliefs set out in the Fixed Claim Form:

1. A Declaration that the Claimant is a shareholder of the 1st Defendant.
2. A Declaration that the shares in the 1st Defendant are owned wholly by the Claimant and the Estate of George Looby, deceased in equal shares, that is to say 50/50.
3. An Order that the records and registers of the 1st Defendant located both at the registers offices of the 1st Defendant and at the Registry of Companies or wheresoever located be rectified to reflect the Claimant's interest as a shareholder and a Director of the 1st Defendant.
4. A Declaration that the meeting of Shareholders purportedly held on the 27th of January 2005 was invalid and a nullity and that the purported appointment of the 2nd Defendant as a Director and the removal of the Claimant as a Director of the Board of the 1st Defendant were invalid and a nullity.
5. A Declaration that the Board of Directors meeting purported to have been held on the 27th January 2005 was invalid and a nullity.
6. An Order that the 1st Defendant be restrained from paying any further dividends before the records and registers are rectified.
7. The payment of dividends declared by the 1st Defendant but not paid to the Claimant since 2004 plus interest thereon.
8. A Declaration that the 2nd Defendant has wrongfully and unlawfully interfered in the management of the business of the 1st Defendant and that the purported removal of the Claimant as a Director and Shareholder of the 1st Defendant by the 2nd Defendant was unfair, oppressive and prejudicial to the Claimant's interest and an Order that the Claimant be awarded damages accordingly.
9. A Declaration that the 2nd Defendant should give account of her role and function in the affairs of and the assets of the 1st Defendant from 2004 to present.
10. An Order that a meeting of the Shareholders of the 1st Defendant be convened and conducted forthwith and that the financial statements of the 1st Defendant for the material period be produced and tabled at the meeting in accordance with section 149 of the Companies Act 1995.
11. Such further or other relief as the Court shall think fit.

Defence

- [11] The Defendants in their Amended Defence do not admit paragraph 1-3 of the Statement of Claim which relate to the Claimant's calling, the marriage of the Claimant to the deceased and the children of the marriage, and the assets acquired by the parties during the marriage.
- [12] It is the contention of the 2nd Defendant that prior to the incorporation of the 1st Defendant, George Looby owned and operated a business known as Geotech Associates and that the incorporation of the 1st Defendant was for the purpose of taking over the said business. It is also pleaded that the late George Looby paid for the properties mentioned at paragraph 5 herein. It is further pleaded that the business of that 1st Defendant was conducted by Geotech Associates and Geotech Company Limited; and Geotech Company Limited was also owned by George Looby, deceased.
- [13] The Defendants while acknowledging the fact that the Claimant and the deceased were subscribers to the Memorandum of Association of the 1st Defendant they contend that it was "merely to establish the 1st Defendant and it was not intended that the Claimant would be involved in the ownership and/or management of the 1st Defendant." And further, no shares of the 1st Defendant were issued and the Claimant never took part in the operations of the 1st Defendant.
- [14] With respect to paragraph 5 of the Statement of Claim, the Defendants do not admit or deny same (investment of capital into the 1st Defendant); And in relation to paragraph 6 of the said statement of Claim, it is pleaded that the parcels of land mentioned therein were created from subdivisions of properties registered as parcels 30 and 113 of Block 34 2282 A in Falmouth and Bethesda Registration Section.
- [15] As to paragraph 9 of the Statement of Claim the Defendants' averment is that during the lifetime of the deceased his acts indicated that he was the sole shareholder of the 1st Defendant. And the 2nd Defendant further avers that as a consequence the shares of the 1st Defendant form part of the estate of the deceased to be distributed in accordance with the relevant laws of intestacy.
- [16] Regarding paragraphs 10-12 of the Statement of Claim, the Defendants aver that the actions were in accordance with the Articles of the 1st Defendant and the Companies Act, 1995. And also, that

Articles of Continuance and Articles of Amendment were filed in accordance with the requirements of the Companies Act, 1995.

- [17] Finally, the Defendants contend that the Claimant was never a shareholder of the 1st Defendant was never involved in its management and is not entitled to receive dividends nor any financial reports relating to the 1st Defendant. As such say the Defendant the Claimant is not entitled to the reliefs pleaded.

Counterclaim

- [18] In the Counterclaim the 1st Defendant contends that at the time of the signing the instrument of transfer in respect of properties registered as Parcel 100 of Block 34 2282, Falmouth and Bethesda, the Claimant lacked the authority so to do. And the following are claimed:

1. A declaration that the resolutions passed by the Defendant on 27th January 2004 and dated 24th October, 2006 are valid.
2. A declaration that the Claimant had no authority to sign the instrument of transfer in respect of the properties registered as Parcel 100 of Block 34 2282A in Falmouth and Bethesda Registration Section.
3. A declaration that the said George Looby, deceased was the sole shareholder of the 1st Defendant.
4. A declaration that the Claimant is not entitled to 50% of shareholding in the 1st Defendant.
5. A declaration that the Claimant is not entitled to any dividend from the 1st Defendant.
6. Prescribed costs and Court costs.
7. Any other relief as the Court may deem just.

Reply and Defence and Amended Counterclaim

- [19] In her Reply, in response to paragraph 2 of the Defence, the Claimant contends that Geotech Company Limited was incorporated on 26th February 2002 and was a separate entity from the 1st Defendant. And further that Geotech Company Limited was not a property development company as is the 1st Defendant but was a civil and geotechnical engineering company which did mainly road construction, soil testing and general contractor work.

- [20] With respect to the matter of the Claimant being a director of the 1st Defendant; the Claimant maintains that she was and was also involved in the management of the said company and took part in decision making process of the said 1st Defendant. In this connection the Claimant contends that as a shareholder of the 1st Defendant she is entitled to receive dividends and the financial reports in accordance with the Companies Act, 1995 and the Constitution of the 1st Defendant.
- [21] In the Defence the Amended Counterclaim states that as a director she had the authority to execute the instruments of transfer averred to in paragraph 16.
- [22] At paragraph 10 of the said Defence to Amended Counterclaim the pleading is in these terms: "The Claimant repeats paragraph 1 to 7 of her Statement of Claim and denies that the Defendants are entitled to the reliefs claimed.

The Evidence

Myrtle Looby

- [23] At paragraphs 2 to 15 of her witness statement Mrs Myrtle Looby details her relationship with her late husband, their business ventures and in particular the operations of certain business and companies by her late husband as the extent of her involvement.
- [24] The business and companies mentioned are Geotech Associates (Geotech Trinidad), Geotech Associates (Geotech Antigua) and Geotech Company Limited which was incorporated in Antigua. According to Mrs Looby, she and her husband each held one share in the latter company. She says further that she was also a director of the company and Mrs Gloria Lake was appointed company secretary.
- [25] It is the evidence of Mrs Looby further deposed that since its incorporation Geotech Ltd acquired a number of parcels in the Falmouth and Picadilly area including lands more particularly described as Registration Section: Falmouth and Bethesda Block 34 2282A Parcels 33 and 113 which all formed

part of the Roses Development in Falmonth. And with respect to parcel 113, the witness said that title thereto was obtained in 1994.

[26] Regarding her involvement with Geotech Ltd, Mrs Looby says that she was at all time involved in discussions with her husband on various aspect of the company's operations, including the financing of the said company. She says further that she was also involved in the execution of instruments of transfer to purchases of land from the company. These instruments were countersigned by Gloria Lake in her capacity as company secretary.

[27] It is Mrs Looby's contention that she never resigned her position as a director of Geotech Ltd and never executed a share transfer with respect to her shares to her husband during her lifetime, nor to his estate, after his death.

[28] At paragraphs 28 to 30 Mrs Looby details certain events in relation to Geotech Ltd. These include: the evaluation of lands held by the company with a view to sale thereof in the corporation of the Board of the Company, her removal as a director of the company, a declaration in the annual returns that Ms Gittens as personal representative of the deceased's estate was the sole shareholder of the company, Ms E. Ann Henry, Attorney-at-Law was appointed as the new company secretary in place of Ms Lake; amendment of the Articles of the company to allow for a minimum of one director instead of two as in the original Articles; and one director constituting a quorum of the holding of Board meetings.

[29] According to Mrs Looby, the changes to the company were reported to have been made at a Shareholders' meeting held on 27th January, 2005.

[30] Mrs Looby re-states her position as a shareholder of Geotech Ltd in the following terms at paragraphs 31-34 of her witness statement:

"31. As a director, I was never notified of this meeting purportedly held on the 27th of January 2005 nor did I attend the said meeting. Similarly, as a shareholder, I did not receive any notice of the meeting nor did I attend the said meeting.

32. On the 3rd day of October, 2007 I wrote a letter to Ms Gittens advising her of my interest in Geotech Ltd. This was challenged and my interest was disputed by Ms Gittens. On 6th October, 2008, on my instructions my attorneys, Williams Grant Inc. wrote a letter to Henry and Burnette advising of my interest in Geotech Ltd and included a letter dated August 10th 2005 from the then attorney of the company, Mr Marcel Commodore confirming my status as a 50% shareholder of Geotech Ltd. The letter also requested Ms Gittens to make the necessary changes to the company records accordingly. Again by letter in response, Ms Gittens through her attorney disputed my rights and interest in Geotech Ltd.
33. Since Ms Gittens has intervened in the affairs of Geotech Ltd I have been excluded from the management of the company and I am not aware of the financial position or general affairs of the company. I have been denied access to any records or information whatsoever relating to the company including the financial statements. Ms Gittens actions have been unfairly prejudicial to my interest which Ms Gittens who has assumed full control of the company has refused to acknowledge despite being notified of the same.
34. I am convinced that I should not benefit from my 50% interest in Geotech Ltd which I am lawfully entitled to."

- [31] In cross-examination by Mrs Solomon, learned counsel for the Defendants, Mrs Looby explained that Geotech Associates was a business carried on by Mr Looby and that there was another business in Trinidad and Tobago with the same name.
- [32] With respect to the question whether she had an association with Geotech Associates in Trinidad and Tobago, Mrs Looby rejected the suggestion by learned counsel that she did not. She went on to explain that she made no attempt to claim an interest in that company in Trinidad and Tobago.
- [33] In terms of her contribution to Geotech Ltd, Mrs Looby testified that she contributed hundred and hundreds of dollars. She testified further Geotech Ltd was incorporated in 1988 and she was one of the subscribers and did sign the Memorandum of Association.
- [34] It is Mrs Looby's evidence that Geotech Associates paid for the land purchased by Geotech Ltd, but she also said that she was not aware that Geotech Ltd borrowed money for that purpose. She also denied that Geotech Ltd had a loan account.

- [35] On being referred to page 485 of Vol. II of the Amended Trial Bundle, Mrs Looby conceded that she was not aware that Geotech Ltd was struck off in 1995 or the reinstatement in 2006. She conceded further would not have had the authority to sign a transfer during this period.
- [36] With respect to “assets” mentioned at paragraph 7 of her witness statement, Mrs Looby explained that she is referring to house and land. She explained further that some of the properties are in both names while others were in the name of her deceased husband. And specifically in relation to Antigua and Barbuda she said that there were 3 such properties in both names. She added that most of the properties were in the name of the deceased.
- [37] As far as directors meeting of Geotech Ltd are concerned, it is Mrs Looby’s testimony that she was always present; however there were no minutes of such meetings.
- [38] There was no re-examination of Mrs Looby

Gloria Lake

- [39] In her witness statement Mrs Gloria Lake says that she worked with Geotech Ltd as the company secretary since its incorporation in 1988. The witness further states that from July 1987 she worked as office manager for Geotech Associates which became Geotech Ltd.
- [40] At paragraph 2 Mrs Lake explains her responsibilities as company secretary, which according to her, included the execution of instruments of transfer. She also recalls that the last transfer in which she was engaged, on behalf of Geotech Ltd, was one to Cynthia Bailey and Shamina Bailey in or about May 2005.
- [41] At paragraphs 4 to 6 Mrs Lake indicates that her services with Geotech Ltd were terminated in May 2006, that she was not notified of nor did attend any shareholders meeting held on 27th January 2005; and that she was aware that Mrs Looby was a director of Geotech Ltd and that she would often come to the office when she was in Antigua.

[42] At paragraph 9 of her witness statement the following is deposed:

“I am aware that there was an arrangement between the two companies that is Geotech Ltd and Geotech Associates with respect to the purchase of the land that were to be developed by Geotech Ltd and which form part of the Roses Development in the Falmonth area. This allowed Geotech Associates to pay for the lands with the intention that Geotech Ltd would repay the sums on sale of the lots. I am also aware the at times Geotech Associates benefited from assets owned by Geotech Ltd.”

[43] In cross-examination Mrs Lake testified that Geotech Ltd was incorporated in 1988. She said further that she looked at the Memorandum and Articles of the company which were signed by Myrtle Looby, George Looby and the lawyers.

[44] On being referred to pages 451 and 485 of Vol. II of the Amended Trial Bundle, Mrs Lake conceded that her signature appears on the instrument of transfer but she was never aware of the striking off or reinstatement of Geotech Ltd in 1995 and 2006, respectively.

[45] There was no re-examination of Mrs Lake.

Geotech Ltd and Dorothy Gittens as Personal Representative of the Estate of George Looby

[46] In the witness statement Ms Gittens described herself as a business consultant and she contends that the witness statement is made of herself and also on behalf of the 1st Defendant Geotech Ltd.

[47] At paragraphs 3 to 6 Ms Gittens details her relationship with the deceased and the relationship between Geotech Associates and Geotech Ltd. According to the witness, the deceased was the sole owner of Geotech Ltd. She says further that although the Memorandum of Association of Geotech Ltd shows the Claimant as the deceased were subscribers in 1987 no shares were issued to either of them and that when the said company was reinstated in 2006 that shares were issued to her and administrations.

[48] As far as the management of Geotech Ltd is concerned, Ms Gittens says that it was done without any input from the Claimant. And she says further that she has not seen any document which gives any indication of a contribution from the Claimant to Geotech Ltd.

- [49] At paragraphs 11 to 13 Ms Gittens dwells on the properties owned by Geotech Ltd in terms of their origin and subsequent sub-division and certain transfers.
- [50] At paragraph 16 of the witness statement, Ms Gittens says that the 1st Defendant was struck off the register on 1st June 1995 and that she made application to have it restated and this was effected on 21st November, 2006. She also says that the Articles of Continuance were filed in accordance with the Companies Act, 1995.
- [51] In terms of the resolutions passed on 24th October, 2006 the witness says that these were passed in accordance with the requirements of the Articles of the 1st Defendant as the company law.
- [52] Finally, Ms Gittens deposes that the Claimant is not entitled to any dividends or any financial reports relating to the 1st Defendant.
- [53] In cross-examination Ms Gittens acknowledged that her signature does not appear in relation to the Memorandum and Articles of Association of the 1st Defendant, but she says that she is now a director of the said company in her capacity as Administratrix of the estate of the deceased.
- [54] In terms of the resolutions passed Ms Gittens explained that she became a director on 27th January, 2005 and took responsibility for the company. She explained further that she commenced meetings on the same day and was the only person present along with the acting company secretary, Ms E. Ann Henry.
- [55] Concerning the directors of the 1st Defendant, this is Ms Gittens' evidence in part:
- "I did not know Mrs Looby. She is my husband's former wife. I knew the names of the persons who were the directors. I knew sometimes where resolutions were passed. I was involved with the details of the company. The directors were removed on 27th January, 2005. I appointed the acting secretary. The resolution was filed on 23rd November 2006 and dated 24th October 2006. No decision was taken to inform the directors. They were not invited to the meeting. Prior to Mr Looby's death the company did conduct business properly. I cannot say it operated in 2005. The records show that Geotech conducted business."

- [56] Regarding the properties owned by Geotech Ltd, Ms Gittens testimony is that she went over all she considers salient when she took over and has determined that the said company owns 6 properties.
- [57] In reference to paragraph 8 of the witness statement, Ms Gittens said that she was not involved in the incorporation of Geotech Ltd. She however added that she is now a director and holds all the shares as Executrix of the estate of the deceased. And further that in that capacity she would have assumed the responsibility as of that date since the instrument gave her that authority.
- [58] Regarding the shares of the company Ms Gittens acknowledged that two persons subscribed to the Memorandum and Articles of the company; but says that this was merely in relation to the formation of the company. In this connection Ms Gittens testified that she has not seen a transfer of shares to anyone.
- [59] Concerning the Resolution of the Board of Directors appearing at page 188 Vol. I of the Trial Bundle of documents, Ms Gittens explained that Mrs Eugene Richards is the sister of the deceased and she was not advised of her removal as a director of Geotech Limited.
- [60] Speaking of her knowledge and experience in the management of companies, Ms Gittens testified that she has some experience in this regard and knows that the responsibility of the director is to provide leadership. She went on to say that she is familiar with the constitution of the company and has reviewed the Articles of this company. She also said that she recalls changing one Article in 2005 whereby the minimum directors was changed to one.
- [61] On being referred to a letter dated 3rd October, 2007 from the Claimant which appears at page 210 of Vol. I of the Trial Bundle of Documents, Ms Gittens responded thus:
"I recall receiving this document. I do not understand the content as it made claims I did not understand. There is no reason I did not respond to her subsequent letter I received a court case."
- [62] Again, in relation to a letter dated 6th October 2008, appearing at page 214 of Vol. I of the Trial Bundle of Documents, Ms Gittens said that she recalls the letter. She went on to say that Henry

and Bernadette were acting for the estate and that she believed that Ms Henry responded by refuting a few of the issues.

ISSUES

[63] The issues for determination are:

1. Whether:
 - (a) the Claimant is a shareholder of the 1st Defendant, and if so, the extent of her shareholding.
 - (b) the deceased was the sole shareholder of the 1st Defendant.
2. Whether the 2nd Defendant had become as director of the 1st Defendant by reason only of having been appointed the Personal Representative of the estate of the deceased.
3. Whether the 2nd Defendant had authority to convene and set a time and place of an AGM of shareholders or Board of directors of the 1st Defendant in particular the shareholders' and Board meetings held on 27th January, 2005. If not, what is the status of the meeting?
4. If the meetings were lawfully convened
 - (a) whether the Claimant as a director and/or a shareholder was entitled to and should have received notice of the meeting held on 27th January 2005 and was entitled to attend the said meetings.
 - (b) whether there was a quorum of the Board at the meeting.
 - (c) whether the decisions emanating from the meetings were null and void and in particular the decision to remove the Claimant as a director.
5. Whether the Claimant should be awarded damages for wrongful interference by the 2nd Defendant with the Claimants' interest in the 1st Defendant.
6. Whether the Claimant is liable on the counterclaim.

ISSUE NO. 1

Whether the Claimant is a shareholder of the 1st Defendant and if so, the extent of her shareholding.

[64] It will be recalled that the Claimant's plea is that she and her deceased husband subscribed to the Memorandum of Association of the 1st Defendant for one share each. Further, that the said Memorandum and Articles of Association were filed with the relevant authority and the 1st

Defendant was duly incorporated on 20th January 1988. And further still, that the Claimant and the deceased were the only subscribers to the Memorandum of Association and as such the only shareholders of the said company, being the 1st Defendant.

- [65] For their part the Defendants aver that the signing of the Memorandum was merely to establish the 1st Defendant and was not intended that the Claimant would be involved in the ownership and/or management of the 1st Defendant. The further contention is that after the 1st Defendant was incorporated, prior to the death of the late George Looby, no shares were issued to the Claimant and that the Claimant never took part in the operation of the 1st Defendant.

Claimant's Submissions

- [66] For the Claimant it is submitted that the Claimant is a shareholder of the 1st Defendant based on the following:
- (a) By subscribing to the Memorandum of the company.
 - (b) Under section 371(3) of the Companies Act, 1995 the Claimant is a shareholder being on incorporator of the first Defendant. This proposition is by Palmer's Company Law¹
 - (c) The fact that no shares were issued to the Claimant is irrelevant to the Claimant's status as a shareholder.
 - (d) Professor Gower in commenting on section 26 of the UK Companies Act 1948 (now embodied in section 371(3) of the Companies Act, 1995, A&B) says that "the effect of the provision has been held to be that on registration of the company or subscriber automatically becomes a member and holder of the shares for which he has signed even if the company omits to fulfill its duty to put him on the register and to allot the shares to him".
 - (e) Palmers Company Law describes the result of subscribing is that the subscriber 'becomes a member ipso facto on the incorporation of the company and is liable as the holder of whatever number of shares he has subscribed for'. This is embraced and buttressed by Article 9 of the first Defendant.
 - (f) Section 105(3) of the Companies Act, 1995 further provides that shares are considered as having been issued if any person is a shareholder in respect of them.

¹ 21st Edition at page 440

- (g) The case of *Re London*², *Hemburgh* and *Continental Exchange Bank* is instructive in terms of the liability of a subscriber.
- (h) The Defendants' contention that the Claimant's signing of the Memorandum was merely to establish the first Defendant and there was no intention for the Claimant to be involved in the ownership and shareholding of the first Defendant is not supported by the evidence.
- (i) The suggestion that the Claimant was a nominee shareholder remains unsubstantiated. And further that even after the divorce of the Claimant and the deceased there was no steps taken prior to his death in December, 2004 to compel the Claimant to transfer her share to any person, including the said George Looby.
- (j) The presumption of advancement supports the Claimants' position to rebut the Defendants' contention that the Claimant was a mere nominee. The relevant principle being that "if at the relevant time the relationship of husband and wife was in existence the prescription of advancement will be applied notwithstanding that the parties were subsequently divorced".³
- (k) With respect to the percentage of shareholding, the Annual Returns for 2007 shows that number of shares issued and outstanding is 150,000 and that since the deceased and the Claimant both subscribed to 1 share each and there is no evidence to suggest any change, the Court should infer that the Claimant and the deceased continued to hold the shares in the first Defendant equally up to death.

Defendant's Submissions

[67] The following in summary are the submissions on behalf of the Defendants:

1. In cross examination the Claimant admitted that the deceased, George Looby, alone controlled and managed the 1st Defendant.
2. That evidence corroborates the Defendants' evidence at paragraph 9 page 353 (Bundle of Documents Vols. II and III). The Claimant was never involved with the management of the company.

² [1867] LL 2 CL. App. 427

³ See: *Petit v Petit* [1969] 2 All ER 385

3. The Claimant also stated that she signed the Memorandum of Association of the 1st Defendant for the purpose of facilitating its incorporation.
4. The Claimants' evidence corroborates the evidence of the 2nd Defendant found at page 8 of the witness statement of the Defendant (page 351 of Bundle of Documents Vols II and III) where she states:

"individuals would sign the Memorandum of Association simply for facilitating the incorporation of the company."

Analysis and Conclusion

[68] In Palmer's Company Law⁴ a number of circumstances are identified in which a person may become a member of a company. These are:

- "(1) By subscribing the Memorandum of Association upon registration of the Company.
- (2) By agreeing with the company to take a share and being placed on the register of members.
- (3) By taking a transfer of shares and being placed on the register of members.
- (4) By succeeding to the estate of a deceased or bankrupt member and being placed on the register of members.
- (5) By allowing his name to be on the register of members or otherwise holding himself out or allowing himself to be held at as a member."

[69] Closer to the issue, section 105(1) of the Companies Act, 1995 say this,

"105(1) the following persons are shareholders in a company namely –

- (a) a person who is a member of the company under subsection (3) of section 371;
- (b) the personal representative of the deceased shareholder and the trustee in bankruptcy of a bankrupt shareholder;
- (c) a person in whose favour a transfer of shares has been executed but whose name has not been entered in this register of members of the company or, if two or more such transfers have been executed, the person in whose favour the most recent transfer has been made".

⁴ At page 440

[70] In turn section 371(3) of the said Act provides in part that “‘member’ in relation to a company means an incorporation of the company and any other person who agrees to become a member of the company and whose name is entered in the company’s register of members”.

[71] With respect to subscribers to the Memorandum, this is what the learned author⁵ says:

“Every subscriber to the Memorandum of Association becomes a member ipso facto on the incorporation of the company, and liable as the holder of whatever number of shares he has subscribed for. ‘It is plain’, said Lord Caines in *Evans Case*, that the original subscribers, are by the Act of Parliament, deemed to have taken the shares set apposite their names’, the object being that the public might rely with confidence on the subscribers of the Memorandum, therefore, no allotment is required, and no entry on the register of members is necessary in order to constitute membership. The subscriber is bound to take the shares from the company, and to pay for them on calls duly made like any other shareholder. He cannot in satisfaction of this obligation take a transfer of fully paid shares from another member; the only way he can escape liability is by showing that all the shares have been allotted to others. In *Re Esparto Trading Co*, a subscriber who had not been placed on the register was nevertheless held liable after a lapse of nine years for the shares for which he had subscribed”.

[72] It is clear from the learning that matter of signing the memorandum brings with it certain legal consequences one of which is liability to the company. In this regard section 105(3) of the Companies Act, 1995 says that: “for the purposes of this Act shares shall be considered as having been issued if any person is a shareholder in respect of them”.

[73] Cases such as *Evans’ case* and in *Re Esparto Trading Company* establish that even where no shares are issued or there is no entry on the register the liability of a shareholder continues. However, section 105(3) quoted above combined with section 371(3) of the Companies Act remove the doubts sought to be created by the Defendants. The non-issue of shares is not relevant, it is a question of the Claimants liability and other consequences that matter.

[74] In the absence of evidence to support the Defendants’ contention that the Claimant was merely a matter of convenience in signing the Memorandum cannot thrive; and as such rejected.

⁵ Op cit at page 440

- [75] On the whole the Court agrees with the submission on behalf of the Claimant and it is therefore the determination of the Court that the Claimant is one of two shareholders of the 1st Defendant and as such is entitled to a 50% interest in the said company which must now be reflected in the records of the said 1st Defendant.

ISSUE NO. 2

Whether the 2nd Defendant had become a director of the 1st Defendant by reason only of having been appointed the Personal Representative of the deceased.

- [76] By virtue of section 105(3) of the Companies Act, 1995 one of the three circumstances in which a person becomes a shareholder is where a person is the Personal Representative of a deceased shareholder and the trustee of a bankrupt shareholder. The issue of a director is determined otherwise.
- [77] In terms of the appointment and removal of directors of a company, both the Companies Act and the Articles of Association speak to the issue.
- [78] A director of a company, by virtue of section 72(1)(a) of the Act ceases to hold office when he dies or resigns and the shareholders of a company may by ordinary resolution at a special meeting remove any director.⁶
- [79] On the other hand, the following Articles of the Articles of Association also address the issue: Article 76 provides that the number of the Directors and the names of the first Directors shall be determined by the subscribers of the Memorandum of Association. And Article 77 says that until Directors are appointed the subscribers of the Memorandum of Association shall be deemed to be Directors. And with respect to the filling of a vacancy, Article 78 says that this may be done by the shareholders by way of an appointment with the new appointee holding office until the next following Ordinary General Meeting. Such a Director need not have any share qualification.⁷

⁶ Section 73(1)(a) of the Companies Act 1995

⁷ Articles 79 of the Articles of Association

[80] Under the rubric "Rotation of Directors", Article 97 places the following restriction on the appointment of directors.

"No person not being a retiring director shall, unless recommended by the Directors for election be eligible for election to the office of Director at any General Meeting unless he has or some other member intending to propose him has at least seven clear days and not more than twenty-eight days before the meeting left at the office of the company a notice in writing duly signed specifying his candidature for the office of the intention of such member to propose him."

[81] Therefore regardless of the circumstance a Director must be appointed and the Court agrees with the submission on behalf of the Claimant that the Articles are "pellucid" and do not provide for any automatic right of assumption of the roles and responsibilities of a deceased Director by his personal representative to hold office in his stead. The Court also agrees that there is no evidence that the 2nd Defendant was appointed in accordance with Article 97.

ISSUE NO. 3

Whether the 2nd Defendant had authority to convene or set a time and place for a Board of Directors and the Board meetings held on 27th January 2005. If not, what is the status of the meetings?

[82] It is common ground that certain resolutions of Geotech Limited were passed on 27th January 2005 by the Board of Directors of the said company. The following is the full text of the resolutions aforesaid:

"ANTIGUA AND BARBUDA

Geotech Limited

Resolution of the Board of Directors

The following are true statement of the Resolutions of Geotech Limited passed the 27th January, 2005 by the Board of Directors of the above Company.

BE IT RESOLVED that with effect from the 8th day of December, 2004 the following persons shall cease to the Directors of the Company

1. Mrs. Myrtle Looby
2. Mr. George Looby, deceased
3. Mrs. Eugenie Richards.

BE IT FURTHER RESOLVED that with effect from the 8th day of December, 2004, the following persons were appointed to the Board as Directors of the above Company:

Dorothy Gittens in her capacity as the sole Administratrix of the Estate of George Looby, deceased.

Dated the 24th day of October, 2006

Secretary (Ag)"

- [83] In broad outline it is the Claimants' contention that resolutions were not passed in accordance with the Act and the Articles of the company. On the other hand, the Defendants contend that they acted in accordance with the Companies Act 1995 and with Articles of Association, namely Articles 45, 60, 61, 83 and 95.

The Legal Matrix

- [84] It has already been noted that section 105(1)(b) prescribes that the Personal Representative of a deceased shareholder is a member of the Company⁸. It goes without saying that such membership can only commence from the date on which there is an assumption of office as Personal Representative. Further, section 105(4) of the said Act provides that meetings of shareholders shall be held in Antigua and Barbuda at a place provided in the by-laws, or in the absence of any such provision at such place as the director determine.
- [85] The Articles of the company further elaborate on the matter of meeting. To this end Articles 58-61 of the 1st Defendant's Company prescribe the time within which an ordinary general time meeting is to be held, being within 15 months from the last ordinary general meeting at such place as the Directors determine. All other meetings and extra-ordinary general meetings may be convened wherever the Directors think fit. The notice to be given to members is also prescribed. It is however prescribed by Articles 61 that the accidental omission to give such notice to any member shall not invalidate any resolution passed at such meeting. And further still Article 62 says that two members present in person or by proxy still be a quorum for a general meeting. And that: "No business shall be transacted at any general meeting unless the quorum requisite shall be present".

⁸ This position is also reflected in Articles 45 of the Articles of Association

- [86] Central to the management of a company are the Directors. As noted before, Article 76 says that the number of Directors and the names of the first Directors shall be determined by the subscribers of the Memorandum of Association, and until Directors are appointed the subscribers of the Memorandum shall be deemed to be Directors.
- [87] With respect to the removal of a Director Articles 96 requires that this may be effected by an "Extraordinary Resolution" before the expiration of his period of office.
- [88] Critically Article 98 provides that:-
- "The Directors may meet together for the dispatch of the business adjourn and otherwise regulate their meetings, as they think fit, and determine the quorum necessary for the transaction of business. Until otherwise determined three directors present personally or by proxy shall be a quorum".

The Factual Matrix

- [89] The evidence is that prior to 27th January, 2005:
- (a) The shareholders of the 1st Defendant were George Looby⁹ deceased, and Myrtle Looby by virtue of the fact that they subscribed to the Memorandum of Association.
 - (b) The Directors of the first Defendant were George Looby, deceased, Mrs Myrtle Looby and Mrs Eugenie Richards.
 - (c) By virtue of the Grant of Letters of Administration the 2nd Defendant became a member of the first Defendant by virtue of section 105(1)(b) of the Act and Article 45 of the Articles of Association.

Submissions

- [90] The following submissions were made on behalf of the Claimant:
- "3.47 The evidence of the Claimant is that as a director she did not become aware of the meeting on the 27 January 2005 until sometime in 2007 when she had cause to conduct a search of the company's records at the Registrar of Companies. It is the 2nd Defendant who on cross examination admitted that only she and the attorney E. Ann Henry, attended the meeting or meetings held on the 27th of January 2005; and it was she, the 2nd Defendant, who was the convener.

⁹ The Court notes that George Looby died on 4th December, 2004

She also indicated that there was no reason why notice of the meetings were not sent to Directors. In essence, the 2nd Defendant's evidence is that she convened the meeting by reason of her being the Personal Representative of the Deceased who was a Director and decided who she wanted to be there.

3.48 It is submitted that the 2nd Defendant had failed to substantiate that she had any authority whatsoever to convene a shareholders' meeting of the company. On the contrary, she was not a Director of the company at the material time and was therefore not authorized to convene any such meeting. We have already submitted under issue 2 above the bases why the 2nd Defendant was not a Director of the 1st Defendant and continue to rely on the same.

3.49 Further and/or alternatively, should this Honourable Court find that the 2nd Defendant was a Director of the 1st Defendant, the Claimant's evidence (supported by the 2nd Defendant on cross examination) is that she did not receive notice of the meeting. Section 74(1) of the Act provides that a director of a company is entitled to receive notice of and to attend and be heard at every meeting of shareholders. The Claimant contends that this is contrary to the Articles and the Act and thus was unlawful and the meeting was invalid.

3.50 Additionally, Article 62 provides that two members present or by proxy shall be a quorum for a general meeting. It is respectfully submitted that with only the 2nd Defendant who had a share interest being in attendance at this purported meeting there was no quorum and no meeting could have therefore lawfully taken place.

3.51 With respect to the submissions herein, the Claimant on the case of Brigette Rosemarie Neipp v Gloria Watt and Overseas Property Bond Management Ltd.¹⁰ In this case this Honourable Court was presented with similar facts where *inter alia* meetings of the company, OPBM, were apparently convened, resolutions passed and various persons appointed Directors from time to time to the exclusion of and without notice to the Claimant who was a shareholder by reason of her representative capacity of the estate of a deceased shareholder. The Court found that such meetings were unlawfully convened and of no effect".

Analysis

- [91] The resolutions referred to above indicate that Mrs Myrtle Looby, Mr George Looby, deceased and Mrs Eugenie Richards were removed as Directors of the first Defendant. Also indicated is the appointment to the Board of Directors of Dorothy Gittens in her capacity of the Sole Administratrix of the Estate of George Looby, deceased.

¹⁰ ANUHCv2005/0163

[92] The matrix of law and facts reveal the following:

- (a) There is no relevant law cited by the Defendants which enabled the 2nd Defendant to become a Director of the 1st Defendant Company.
- (b) The resolutions are stated to have been passed by a resolution of the Board of Directors of the 1st Defendant.
- (c) The Claimant was a Director of the 1st Defendant by virtue of Articles 76 and 77 of the Articles of Association.
- (d) There is no evidence to suggest that Mrs Looby, the Claimant was removed in accordance with Article 96 of the Articles of Association.
- (e) Articles 98 require that the directors to meet to dispatch company business and which time the quorum is three Directors.
- (f) In cross examination Ms Gittens testified that she and the acting secretary, Ms E. Ann Henry were the only persons present at the meeting of the Board of Directors.
- (g) The further evidence from Ms Gittens' testimony is that the other Directors, (Looby and Richards) were not invited to the meeting for no apparent reason.
- (h) Ms Gittens also admitted that she knew the names of the other Directors.
- (i) The quorum required by Article 98 was not attained and more than that Ms Gittens had no authority to convene the meetings of to cause them to be convened.
- (j) The resolution are stated to take effect from 8th December, 2004 even before Ms Gittens became a shareholder and even before she purported to appoint herself as Director.
- (k) The legal basis of such retrospectivity was not cited to the Court and as such is illegal.

Conclusion

[93] It is therefore the conclusion of the Court that:

- (a) the 2nd Defendant had no authority to convene the meeting of 27th January, 2005;
- (b) the Claimant as a Director was entitled to be informed of the meeting;
- (c) there was no quorum at the meetings as prescribed by Article 98 of the Articles of Association and;
- (d) The resolutions are null and void and of no legal effect.

ISSUE NO 4

If the meeting were lawfully convened ;

- (a) whether the Claimant as a Director and/or a shareholder was entitled to notice of the meetings held on 27th January 2005 and was entitled to attend the said meetings;
- (b) whether there was a quorum of the Board of at the meeting.
- (c) whether the decisions emanating from the meetings were null and void and in particular the decision to remove the Claimant as a Director.

[94] This issue has been dealt with above but for the avoidance of doubt the Court will re-state the following:

- (a) The meetings were not lawfully convened
- (b) The Claimant became a shareholder by subscribing to the Memorandum of Association which is expressly declared in sections 105(1)(a) and 371(3) of the Companies Act, 1995.
- (c) The Claimant was also a Director of the 1st Defendant Company by virtue of Articles 76 and 77 of the Articles of Association of the 1st Defendant and as such way entitled to be informed of and be present at any meeting of this Board of Directors.
- (d) A person, being the 2nd Defendant, purporting to convene a meeting of the Board together with a person appointed as acting secretary was unlawful null and void.
- (e) Articles 98 of the Articles require a quorum of three Directors for a meeting of the Board and there was in fact no Director present and hence the meeting never took place in law and hence the resolutions are of no legal effect.
- (f) The 2nd Defendant said expressly in cross examination that she did not invite the other two Directors (whom she sought to remove) and had no reason for doing so.
- (g) A reasonable inference from the foregoing is that if the other two Directors were present the balance may have been different since the other two Directors may not have voted with the 2nd Defendant who in law had no vote anyway.

ISSUE NO. 5

Whether the Claimant should be awarded damages for wrongful interference by the 2nd Defendant with the Claimant interest in the 1st Defendant.

- [95] Learned counsel for the Claimant has identified a number of factual issues in support of the contention that damages should be awarded in the circumstances. The conduct of the second Defendant is described as acrimonious and highhanded attitude and unfair and prejudicial conduct.
- [96] With that said a quantum leap is made to **Rooks v Bernard**¹¹ to say that damages should be awarded where conduct is engaged in which is calculated to make a profit. This become even more illogical and bizarre when note is taken of the fact that the said case was concerned with the tort of intimidation and exemplary damages.
- [97] On the whole this Court is not satisfied that any authority was cited which can form the basis for the award of damages.
- [98] This relief is accordingly refused.

ISSUE NO 6

Whether the Claimant is liable on the Counterclaim

- [99] Given the determination made by the Court with respect to the 2nd Defendant and the actions purported to be taken as a director of the 2nd Defendant the ruling on the Counterclaim is as follows:
- (a) Subject to paragraph (b) the Counterclaim is dismissed.
 - (b) Any transfers of land owned by the 1st Defendant executed by Mrs Myrtle Looby and others or during the period 6th May 1995 to 20th November 2006 were without authority since during this period the said 1st Defendant did not exist in law.

Costs

- [100] The claim is not for monetary sum and with the refusal of damages as pleaded, the Claimant costs must be calculated in accordance with Part 65.5(2)(b)(ii) of CPR 2000. Although there is very

¹¹ [1964] AC. 1129

limited success on the counterclaim it is the determination of the Court that no costs will be awarded in all the circumstances.

Apology

It is common ground that after this judgment and others had been reserved a number of other matters which touch and concern governance and/or the national interest of Antigua and Barbuda and in the Commonwealth of Dominica arose which had to be presided over by this judge and judgments rendered and as such these were given priority. Further, this judge was transferred to another jurisdiction, where a single judge presides, with effect from 1st September 2010 with the foreseeable consequences. This accounts for the delay. Despite the foregoing a deep and sincere apology is tendered for the delay.

ORDER

[101] **IT IS HEREBY ORDERED AND DECLARED** as follows:

1. The Claimant is a shareholder of the first Defendant by virtue of sections 105(1)(a) and 371(3) of the Companies Act 1995.
2. The shares in the 1st Defendant are owned equally by the Claimant and the 2nd Defendant as the Personal Representative of the estate of George Looby, deceased.
3. The Claimant as a shareholder is entitled to any dividends by the 1st Defendant and fees or allowances as a Director for the period 2004 to the date of this judgment with interest pursuant to the Eastern Caribbean Supreme Court Act, Cap. 143.
4. The registers and records of the 1st Defendant must be rectified so as reflect the interest of the Claimant as a shareholder and a Director.
5. There will be no award as to damages for wrongful interference by the 2nd Defendant in the Claimant's interest in the 1st Defendant.

6. The meeting of the Board of Directors held on 27th January 2005 is invalid and a nullity and the purported appointment of the 2nd Defendant as a Director and the removal of the Claimant as a Director of the Board of the 1st Defendant were invalid and a nullity.
7. The 2nd Defendant must within 60 days after the date of this Order give report containing an account of disposal or otherwise of the assets of the 1st Defendant. The report must be filed in the High Court and served on the Claimant.
8. A meeting of shareholders of the Defendant must be called as soon as possible in accordance with the Articles of Association of the 1st Defendant at which meeting the financial statements for the period during which the second Defendant acted as sole shareholder and Director must be tabled in accordance with section 149 of the Companies Act, 1995.
9. Subject to paragraph to, the 1st Defendant's Counterclaim is dismissed.
10. Any transfers of land owned by the 1st Defendant executed by Mrs Myrtle Looby and others on behalf of the said 1st Defendant during the period 1st June 1995 to 20th November 2006 were without authority since during the said period the said 1st Defendant did not exist in law.
11. The Claimant is entitled to costs in accordance with Part 65.5(2)(b)(ii) of CPR 2000.



.....
Errol L Thomas
High Court Judge