

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

CLAIM NO: ANUHCV 2010/0402

BETWEEN:

RICKI CAMACHO, REGISTRAR OF COMPANIES
THE ATTORNEY GENERAL

Claimants

and

- (1) STANFORD DEVELOPMENT COMPANY LIMITED
- (2) STANFORD BANK HOLDINGS LIMITED
- (3) BANK OF ANTIGUA LIMITED
- (4) GILBERTS RESORT DEVELOPMENT HOLDINGS LIMITED
- (5) MAIDEN ISLANDS HOLDINGS LIMITED

Defendants

Appearances:

Mr. Reginald Armour, S.C. and Ms. Karen Defreitas-Rait for the Claimants
Mr. David Joseph, Q.C. and Ms Kema Benjamin for the First, Second, Fourth and Fifth Defendants

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2012: March 29
September 3
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JUDGMENT

[1] MICHEL, J: By fixed date claim form filed on 22nd June 2010, the Registrar of Companies and the Attorney General instituted these proceedings seeking an order for directions by the Court to the

Registrar pursuant to section 245 of the Companies Act, 1995 (hereafter "the Act"). The following companies registered at the Registry of Companies of Antigua and Barbuda were named as Defendants in the proceedings - Stanford Development Company Limited (SDCL), Stanford Bank Holdings Limited (SBHL), Bank of Antigua Limited (BOA), Gilbert's Resort Development Holdings Limited (GRDL) and Maiden Islands Holdings Limited (MIHL). The fixed date claim was supported by an affidavit sworn to by the Registrar of Companies, Ms Ricki Camacho, and filed on the same date. In the aforesaid affidavit, Ms Camacho set out in detail the several documents sent to her for filing or registration by the Defendants which she refused to file/register on the company register in as much as they contained a number of anomalies and inconsistencies, including omissions, errors, alterations or erasures and, in some cases, they contained matters contrary to law.

[2] An acknowledgement of service was filed by Messrs Marshall & Co on 2nd July 2010 purportedly on behalf of all of the Defendants, but at the first hearing of the matter on 9th July 2010, the Senior Vice President of Bank of Antigua Limited - who attended court as the representative of the Third Defendant) - informed the Court that the Third Defendant had not instructed Counsel in this matter. Counsel for the Defendants did also indicate at the commencement of the trial that they were representing the Defendants apart from the Third Defendant. The Third Defendant, however, remains a party to the proceedings.

[3] On the said 9th July, the Court made the following case management orders:

1. The Defendants shall file and serve affidavits in response to the fixed date claim on or before 6th August 2010;
2. Leave to the Claimants to reply to the aforesaid affidavits on or before 27th August 2010;
3. Leave to any of the parties to make further application on or before 10th September 2010;

4. Written submissions with authorities to be filed by or on behalf of all parties on or before 17th September 2010;
5. Pre-trial review is fixed for 24th September 2010;
6. Trial window is set for October 2010, with a specific date to be fixed by the court office after consultation with Counsel for the parties;
7. Affidavits filed shall serve as evidence in chief of the deponents, who shall attend the trial of the matter to be available for cross-examination, unless such attendance is dispensed with.

[4] On 5th August 2010, an affidavit in response sworn to by Andrea Stoelker was filed on behalf of the Defendants; an affidavit in reply was sworn to by each of the Claimants on 27th August 2010 and filed on that same date; and skeletal legal submissions (with authorities) were filed on behalf of the Claimants on 22nd September 2010; none though on behalf of the Defendants.

[5] On 10th September 2010, an application was filed by the Claimants for an order striking out parts of the affidavit of Andrea Stoelker, pursuant to Rule 30.3 of the CPR. The application was fixed for hearing on 1st October 2010 but was never heard until the beginning of the trial on 29th March 2012.

[6] On 17th September 2010, an application was filed on behalf of the First, Second, Fourth and Fifth Defendants for the trial date - which had by then been fixed by the court office for 7th October 2010 - to be vacated and for a new trial date to be fixed.

[7] At the pre-trial review on 24th September 2010, the trial date was vacated and the following orders were made:

1. A new trial date shall be fixed by the court office in consultation with Counsel for the parties;
2. The Claimants shall file a core bundle in accordance with Rule 38.6 of the CPR;
3. The Registrar of Companies shall produce to the Court all relevant files from the Companies Registry;
4. Skeletal legal submissions filed on behalf of the Claimants on 22nd September 2010 are deemed to be properly filed;
5. An extension of time is granted to the Defendants to file their skeletal legal submissions on or before 8th October 2010.

[8] The matter returned to Chambers over one year later (on 30th September 2011) when it was reported that the court office had difficulty setting a date for the trial because of the conflicting schedules of the Queen's Counsel and Senior Counsel involved in the matter. No core bundle had by then been filed, and the Defendants had not filed their skeletal legal submissions by the extended time afforded to them.

[9] The Court made the following orders on 30th September aforesaid:

1. A trial date to be fixed by the court office in the month of February or March 2012 after consultation with Counsel for the parties;
2. Leave to the Defendants to file an affidavit or affidavits on or before 28th November 2011 in response to the application filed by the Claimants on 10th September 2010;
3. Leave to the Claimants to reply (if necessary) by 28th December 2011;
4. Skeleton arguments to be filed by both parties on or before 21st January 2012 on the Claimant's application of 10th September 2010;

5. Leave is granted to the Defendants to file skeleton legal submissions on the substantive matter on or before 6th December 2011.

[10] On 5th December 2011, application was made on behalf of the First, Second, Fourth and Fifth Defendants for an extension of time to comply with the order of 30th September 2011 for the filing of an affidavit or affidavits in response to the Claimants' application of 10th September 2010. On the scheduled hearing date of the application (3rd February 2012) all parties were given leave to file any further affidavits on or before 13th February and to file replies to the opposing affidavits on or before 27th February.

[11] The trial of the matter was fixed for 29th March 2012 and the Claimants filed a trial bundle and a core bundle on 16th March 2012.

[12] On 27th March 2012, an affidavit sworn to by Hugh Marshall was filed on behalf of the Defendants, but still no skeletal legal submissions were filed on behalf of the Defendants

[13] The trial of the matter took place on 29th March 2012. At the commencement of the trial the Court dealt with the application filed by the Claimants since 10th September 2010 for the striking out of certain identified parts of the affidavit of Andrea Stoelker pursuant to Rule 30.5 (3) of the CPR, which application was partially successful, with some of the identified parts of the affidavit of Ms Stoelker being struck off by the Court. The Court then received the evidence of the Claimants, Ricki Camacho (the Registrar of Companies) and Hon. Justin Simon, Q.C. (the Attorney General), and of Hugh Marshall and Andrea Stoelker on behalf of the First, Second, Fourth and Fifth Defendants. No evidence was given on behalf of the Third Defendant.

- [14] The first witness for the Claimants was the Attorney General, Hon. Justin Simon, Q.C. Save for a correction made by Mr Simon, his affidavit filed on 27th August 2010 was deemed to be his evidence in chief. He was cross-examined by lead Counsel for the Defendants, Mr David Joseph, Q.C., and re-examined by lead Counsel for the Claimants, Mr Reginald Armour, S.C. The evidence of Mr Simon - although addressing issues raised by Ms Stoelker in her affidavit - did not materially bear on the issue of the directions sought from the Court pursuant to section 245 of the Act.
- [15] The other witness for the Claimants was the Registrar of Companies, Ms Ricki Camacho. Affidavits sworn to by Ms Camacho and filed on 14th June and 27th August 2010 were deemed to be her evidence in chief. Ms Camacho was cross-examined by Mr Joseph and re-examined by Mr Armour.
- [16] In her affidavit of 14th June 2010, Ms Camacho recounted in detail, with supporting documents, the problems and concerns which she had with documents submitted for filing/registration at the Companies Registry with respect to the Stanford Group of Companies, in particular, the Defendant companies, on the basis of which she was seeking directions from the Court.
- [17] Under cross-examination, Ms Camacho was questioned about documents filed by Messrs Marshall & Co since her initial refusal to file the documents originally submitted by the law firm for filing on behalf of the Defendants. In several instances Ms Camacho indicated that the subsequent filings by Marshall & Co resolved concerns that she had about the documents originally filed.

[18] The first witness for the Defendants was Mr High Marshall. In his testimony in court, Mr Marshall indicated his intention to rely not only on the affidavit sworn to by him and filed on 27th March 2012, but also on an affidavit sworn to by him on 23rd April 2010 (before the filing of the case) which affidavit was exhibited to the affidavit of the First Claimant in support of the fixed date claim. Mr Marshall was cross-examined by Mr Armour.

[19] The cross-examination of Mr Marshall was focussed on the issue of whether the affidavit of 23rd April 2010 (which Mr Marshall indicated he intended to rely on) was sworn by him before a person who was a legal practitioner representing the Defendants or was an agent, partner, employee or associate of such legal practitioner. Mr Marshall testified that he believed that the person before whom the affidavit was sworn was Ms Cherisa Roberts-Thomas; that Ms Roberts-Thomas is not now an associate of his Chambers; that he is not sure that she was an associate of his Chambers on 23rd April 2010. When it was put to Mr Marshall that Ms Roberts-Thomas was in fact an associate of his law practice as at 23rd April 2010, he testified that he believes that she was on her own by that date and that he does not believe that as of 23rd April 2010 she was a member of his practice. Neither Mr Marshall nor learned Senior Counsel averted to the fact that Ms Thomas had appeared in this case on 9th July 2010 as Counsel for the Defendants, whilst Mr Marshall's Chambers was on record as representing the Defendants (as per the acknowledgement of service filed on 2nd July 2010). I believe that if Mr Marshall had averted to this, his memory would have been jogged and he would have recalled that Ms Roberts-Thomas was at the material time his associate as the legal practitioner representing the Defendants in this matter and he would have conceded that, in the circumstances, the affidavit sworn to by him on 23rd April 2010 before Ms Roberts-Thomas, who was at the time an agent, partner, employee or associate of his as the legal practitioner of the Defendants on whose behalf the affidavit was to be used, cannot - pursuant to

Rule 30.5 (3) of the CPR - be admitted into evidence in this case. The contents of this affidavit will therefore not be considered by the Court in the determination of this matter.

[20] The other witness for the Defendants was Ms Andrea Stoelker. In her testimony, Ms Stoelker indicated her reliance on the affidavit sworn to by her and filed on 5th August 2010, parts of which affidavit were struck off by the Court on application by Mr Armour. The affidavit evidence of Ms Stoelker consisted mainly of an explanation by her of the need for and attempt by Mr R. Allen Stanford to regularize the filings of documents concerning the Defendants at the Companies Registry, his difficulties in so doing, his appointment of her and of Ms Barbara Streete as directors of his companies, and then his appointment of her as his attorney in fact. She then deposed to her willingness to do all such things as are required to bring the companies into full compliance with the Act. Cross-examination of Ms Stoelker was declined by Mr Armour.

[21] The testimony of the four witnesses having been concluded, the Court was addressed by lead Counsel for the parties.

[22] In his closing address, lead Counsel for the Claimants, Mr Reginald Armour, S.C., informed the Court of the Claimants' reliance on their written skeletal legal submissions filed on 22nd September 2010 and his wish to augment these submissions with some brief remarks and to cite some additional authorities not referred to in the skeletal submissions.

[23] Mr Armour submitted that the Registrar has the responsibility to administer the Act by keeping a careful and complete record of companies incorporated in Antigua and Barbuda so that the public may rely on the completeness and accuracy of the record. He submitted that in the discharge of

this responsibility, the Registrar has a wide discretion which must be exercised in accordance with the Act in particular and the laws of Antigua and Barbuda in general. He submitted too that the Registrar is required to consider whether the requirements of the Act have been complied with and to refuse registration of documents if she believes that any requirements have not been satisfied, and that the court would not interfere with the exercise by the Registrar of her discretion unless it is shown that the Registrar had not in fact exercised her discretion, that she had exercised it upon some wrong principle of law, or that she had been influenced by extraneous considerations which she ought not to have taken into account. Learned Senior Counsel then referred to and quoted verbatim section 509 of the Act, which is sufficiently important to this case to reproduce it in full in this judgment –

“509. (1) The Registrar may refuse to receive, file or register a document submitted to him, if he is of the opinion that the document

- (a) contains matter contrary to the **law**;
- (b) by reason of any omission or error in description, has not been duly completed;
- (c) **does not comply with the requirements** of the Act;
- (d) contains an error, alteration or erasure;
- (e) is not sufficiently legible; or
- (f) is not sufficiently permanent for his records.

(2) The Registrar may request that a document refused under subsection (1) be amended or completed and re-submitted, or that a new document be submitted in its place.

(3) If a document that is submitted to the Registrar is accompanied with a statutory **declaration** by an attorney-at-law that the **document** contains no **matter** contrary to law

and has been duly completed in accordance with the requirements of this Act, the Registrar may accept the **declaration as sufficient proof** of the facts therein declared.”

[24] In his closing address, lead Counsel for the First, Second, Fourth and Fifth Defendants, Mr David Joseph, Q.C. - while not denying the authority of the Registrar of Companies to administer the Act and the discretion vested in her in doing so - sought to circumscribe that authority and discretion by his contention that documents having been filed on behalf of the Defendants to address the concerns raised by the Registrar, she should now be ordered by the Court to file or register the documents submitted to her by Marshall & Co on behalf of the Defendants. He also contended that certain considerations brought to bear by the Registrar on the exercise of her discretion – like the question of whether the power of attorney granted by Mr Stanford to Ms Stoelker is valid - had no bearing on the documents sought to be filed by the Defendants. Learned Queen's Counsel asked the Court to make orders and to give directions accordingly.

[25] At the conclusion of the trial, the parties were ordered to file written closing submissions (within 14 days) to cement and augment the oral submissions made on their behalf. The submissions on behalf of the First, Second, Third and Fourth Defendants were filed on 10th April 2012, while the submissions on behalf of the Claimants were filed on 8th May 2012.

[26] I have set out in detail the passage of this case through all its stages, from the filing of the fixed date claim form by the Claimants on 22nd June 2010 to their filing of written closing submissions on 8th May 2012, so that its travels and travails could be appreciated. At the end of the journey though, it all comes down to a determination to be made by the Court on whether the Registrar of

Companies is justified, in the circumstances of this case, in seeking directions from the Court as to whether and to what extent she has a duty as Registrar to file or register in the register of companies several documents submitted for filing/registration by or on behalf of the Defendants which (in her view) contain a number of anomalies and inconsistencies, including omissions, errors or alterations, and/or matters contrary to law and, if so, what directions ought to be given by the Court.

[27] Having seen and heard the four witnesses who gave evidence in this case, having heard and read the oral and written submissions by Counsel on behalf of the parties, having read and digested the pleadings and other documents filed and the statutory provisions and judicial authorities cited and referred to by Counsel, I have come to the following conclusions:

1. That section 509 of the Act entitles the Registrar of Companies to decline to file or register any document submitted to her for filing or registration if she takes the view that the document suffers from any of the defects enumerated in clauses (a) to (f) of subsection (1);
2. That the Registrar reasonably took the view that the documents identified by her in her affidavit of 22nd June 2010 as having been submitted for filing or registration on behalf of the Defendants suffered from one or more of the defects enumerated in section 509 (1) of the Act;
3. That on the facts and in the circumstances of this case, including the facts and circumstances prior to and at the time of the submission to her of the documents in issue here, and notwithstanding the subsequent attempts by the legal practitioner for the Defendants to correct some of the defects, the Registrar was entitled to seek and justified in seeking directions from the Court, pursuant to section 245 of the Act;

4. That the directions proposed by Counsel for the Claimants in paragraphs 91 to 97 of the skeletal legal submissions of the Claimants filed in this matter on 22nd September 2010 appear to the Court to be reasonable and appropriate and will be adopted and applied by the Court.

[28] The Court accordingly gives the following directions to the Registrar pursuant to section 245 of the Act:

"As to BOA, the Registrar

- a. shall refuse to accept any and all documents submitted in respect of BOA unless such documents are expressly approved by or in conformity with the directions of the Eastern Caribbean Central Bank; and
- b. may take into consideration compliance with **section 26 of the Banking Act** when determining whether or not to accept documents filed therein regarding the appointment of a director of a Bank or other licensed financial institution.

"As to defendant companies known to the Registrar to be the owner of land, the Registrar is at liberty to refuse to accept

- a. any documents purporting to appoint or giving notice of appointment of Andrea Stoelker as a director; and
- b. any Power of Attorney purporting to give her control of such company so long as she remains an unlicensed non-citizen for the purposes of the **Non-Citizens Act**.

"As to SBHL the Registrar may, in considering the application for same to be restored to the Register take in to consideration

- a. Whether the application is being made by a person who has locus standi, that is by a person who was a shareholder or member of the company at the time that it was struck off the register;
- b. The reason(s) for striking off;
- c. The effect any restoration would have on creditors or other shareholders; and
- d. Whether the name of the company is in compliance with all applicable legislation.

"As regards a shareholder's resolution reducing the number of directors below the minimum:

- a. Such a shareholders resolution removing a director(s) is valid notwithstanding that it thereby reduces the total number of Directors below the minimum required in the Articles of the Company;

However

- b. Thereupon the Board of Directors, without the minimum number of directors required by the Articles, is unable to be constituted as a Board and has no legal capacity to conduct the business of the company until there is compliance with **section 75 of the COMPANIES ACT**.
- c. **Section 69(7) of the COMPANIES ACT**, only applies where failure to elect a minimum number of directors is as a consequence of the disqualification, incapacity or death of any candidates.

"As regards the Registrar's discretion under **section 506 of the COMPANIES ACT**:

- a. The Registrar is empowered by section 506 to demand either or both methods of verification in **sub-section 506(2) and (3)** or any such additional verification as she may reasonably deem appropriate in the circumstances of any case;

- b. The evidence or verification submitted under **section 506** must be sufficient to reasonably satisfy the Registrar as to the truth of the fact or information or as to the authenticity of the document in question;
- c. The test of what the Registrar may require under section 506 is limited only by what is reasonable to satisfy her of truth or authenticity in any particular case.

"As to **section 77 (1) of the COMPANIES ACT**:

- a. Implicit in the interpretation of **section 77(1)** is a prerequisite that the Notice of Change of Director shall be fully in compliance with all other requirements of the COMPANIES ACT and not otherwise contrary to law before the Registrar is mandated to file same on the Register;
- b. Based on the foregoing interpretation there is no conflict between **section 77(1)** and **section 509**.

"As to inconsistencies, omissions, errors, alterations or erasures on the face of a document:

- a. These are all legitimate bases upon which the Registrar may refuse to receive or file a document pursuant to **section 509 of the COMPANIES ACT**;
- b. Where, in the opinion of the Registrar, these anomalies raise serious questions as to the accuracy or legitimacy of multiple documents, or where there are multiple occasions of such anomalies, the Registrar may properly refuse all related documents in respect of a company or group of companies until such anomalies are resolved."

[29] I note that in his oral and written submissions made on behalf of the First, Second, Fourth and Fifth Defendants, Learned Queen's Counsel requested certain directions from the Court. But the Defendants are not entitled to request directions from the Court. If the Defendants were aggrieved

by the actions of the Registrar in declining registration of or in failing to register the documents submitted to her for registration, then – having regard to the provisions of section 246 of the Act - they should have applied to the Court for an order pursuant to section 247 of the Act requiring the Registrar to change her decision. No directions shall be given at the behest of the Defendants.

[30] As to the Claimants' application for costs in this matter (prescribed or otherwise) I do not consider that the Claimants are entitled to an award of costs. The Claimants were not required by the Act to institute and prosecute inter parties proceedings, because the Act does not require them to do so. An application to the Court by the Registrar of Companies could have been instituted and prosecuted otherwise than by an inter partes fixed date claim and, if the Defendants had opted to participate in and contest the application otherwise made, then they would be liable to pay costs to the Claimants. The Defendants were however brought into the arena by the Claimants and challenged to a contest with the Claimants, which they dutifully and resolutely engaged in. The fact that they did not prevail in the contest does not render them liable to foot the cost of the contest. In fact, had the Defendants complied with the several interlocutory orders made by the Court in the course of this matter, I may very well have been inclined to consider a cost award in their favour. The Defendants did not however comply in a timely manner and in at least one case - the filing of skeletal legal submissions (with authorities) – steadfastly refused to comply with the Court's order, despite extensions of time granted to them to do so.

[31] In the circumstances, I make no order as to costs.

Mario Michel
High Court Judge