

FEDERATION OF ST CHRISTOPHER AND NEVIS
ST CHRISTOPHER CIRCUIT

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO SKBHCV2013/0021

In the Matter of Section 75 of the Title by
Registration Act

And

In the Matter of an Application to settle Articles of
Sale of the Respondent's property comprised in a
Certificate of Title dated 10th February 2006 in
Register Book F3 Folio 69

BETWEEN:

**FIRST CARIBBEAN INTERNATIONAL BANK
(BARBADOS) LIMITED**

Applicant

And

**CARIBBEAN BUILDING SYSTEMS
(ST KITTS) LIMITED**

Respondent

Appearances

Mr Damien Kelsick and Ms Keisha Spence holding for Mr J Emile Ferdinand QC, Ms Elizabeth Kelsick and Mr Garth Wilkin for the Applicant/Bank

Ms Constance Mitcham and Ms Rivi Warner for the Respondent Company

Mr John Tyme also on record for the Respondent Company/and for Mr Adam Bilzerian

Mrs D. Camilla Cato for Mr Brian Bowen, a Judgment Creditor of the Respondent Company

Dr Denis Merchant for Ms Sybil Carter, a Judgment Creditor of the Respondent Company

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2013: May 8; June 18
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Reasons for Decision

[1] **LANNS, M:** On 8th May 2013, after oral arguments, I dismissed an application by Mr Adam Bilzerian under CPR 19.3 (1) to be joined as a Respondent in these proceedings, and I indicated that I will give written reasons for my decision. I do so now.

- [2] By Notice of Application filed on 28th January 2013, FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LIMITED (FCIBBL), applied to the court for an order under Section 75 of the Title by Registration (T by R) Act to (a) settle Articles of Sale of ALL THAT lot piece or parcel of land situate at Mount Pleasant Estate in the Parish of St Paul in the Island of Saint Christopher containing by admeasurement 4.524 acres, described in a Certificate of Title dated 10th February 2006; registered in Register Book 3 Folio 69 of the Register of Titles in the Island of Saint Christopher Circuit in favour of CARIBBEAN BUILDING SYSTEMS (ST KITTS) LIMITED (CBSSKL) the Respondent; (b) to estimate an upset price; (c) to fix the day of sale; and (d) to adjust the announcements of sale and the mode of publication thereof.
- [3] The application was supported by the affidavit of Peter Irish, the Credit Counselor of FCIBBL.
- [4] The application was also supported by the Affidavit of SANJAY M. AMIN of the firm of BCQS International, Property Development Consultants, Chartered Quantity Surveyors, Project and Construction Management, Real Estate Valuers and Appraisers, with a document marked "SMA-1" attached thereto as an exhibit;
- [5] JENNIFER CLARE DUNN, an Associate Director of the firm of BCQS International, Property Development Consultants, Chartered Quantity Surveyors, Project and Construction Management, Real Estate Valuers and Appraisers, also swore to an affidavit filed in connection with FCIBBL's Application. A document marked "JD-1" was attached thereto as an exhibit.
- [6] The application came up for consideration on 5th February 2013 but was adjourned to 5th March 2013 to allow Mr Kevin Horstwood, Director of CBSSKL (who was, and still is incarcerated in connection with another matter) to appear.
- [7] On 5th March 2013, when the matter next came before me, Mr Emile Ferdinand QC, with Ms Keisha Spence appeared for FCIBBL; and Mr Kevin Horstwood appeared for CBSSKL.

- At the request of Mr Horstwood, an adjournment was granted to 9th April 2013 to allow him to retain Counsel.
- [8] On 2nd April 2013, a Notice of Appearance was filed indicating that Mr John Tyme has been appointed to act as Attorney for CBSSKL. The record shows that “Notice of Appearance” was copied to Kelsick, Wilkin and Ferdinand.
- [9] On 9th April 2013, when the matter was called up, Mr Emile Ferdinand QC, with him Ms Elizabeth Kelsick and Mr Garth Wilkin appeared for FCIBBL. Mr John Tyme was present still on record for the Respondent Company. Curiously, in answer to the Court, Mr Horstwood stated that he had retained Ms Mitcham and not Mr Tyme. Ms D. Camilla Cato appeared for Mr Brian Bowen, a Judgment Creditor of the Respondent Company; Dr Denis Merchant appeared for Ms Sybil Carter, a Judgment Creditor of the Respondent Company; Ms Constance Mitcham indicated that she was holding a watching brief for CBSSKL. She also indicated that she had just been retained and she indicated her intention to put herself on record for CBSSKL.
- [10] The application to settle articles of sale was finally adjourned to 8th May 2013 to allow Ms Mitcham to place herself on the Record for CBSSKL, and to allow her to peruse the file.
- [11] On 22nd April 2013, Mitcham filed an Entry of Appearance on behalf of CBSSKL. Mr Tyme has not withdrawn his “Corrected Notice of Appearance” filed 18th April 2013.
- [12] On 26th April 2013, Mr Bilzerian filed an application to be joined as a respondent “in this Suit”.
- [13] Accordingly, when on 8th May 2013, the matter came up for further consideration, there were two applications pending before the Court. – The application by FCIBBL, to settle Articles of Sale and the application of Adam Bilzerian to be joined as a Respondent to FCIBBL’s application. The appearances remained the same, except that Ms Mitcham and Ms Rivi Warner appeared for the CBSSKL and Mr Tyme appeared for Mr Bilzerian. I decided to hear Mr Bilzerian’s application first.

Basis of Mr Bilzerian's Application

[14] The grounds of the application are not stated in the application. However, the application was supported by the affidavit of Ms Yulanda Vanterpool with two documents attached thereto as exhibits. Exhibit "YV1" is the Order of Justice Errol Thomas dated 2nd March 2012. Exhibit "YV2" is a copy of an email sent to Mr Curtis Small an officer of FCIBBL. If this affidavit is intended to contain the grounds of the application, then this is in clear breach of CPR 11.7 which stipulates that "the application" - not the affidavit "must state briefly the grounds on which the applicant is seeking the order." In **The Caribbean Civil Court Practice 2011**, the learned authors noted ¹ that the practice of failing to set out grounds of application attracted severe criticisms in the case of **Beach Properties Barbuda Ltd v Laurus Master Fund Ltd**² . In that case, the Court of Appeal stated, among other things that:

"[18] The prescribed form for making applications expressly require the grounds to be stated in the form by providing a section beginning "The grounds of application are – ". The lawyers for the appellants thought it satisfactory to complete this section by inserting: "As set forth in the Affidavits [filed in support]."

"[19] This is a completely unacceptable practice. It is an abuse of the process of the court that should attract condign consequences. One objective of requiring that the application must state its grounds is to focus the thinking of lawyers. By being required to identify the grounds for making the application, before making it, lawyers are required to consider the merits of the application. A lawyer who has difficulty in formulating grounds for making an application, has reason for thinking that perhaps it is because there are no grounds. The requirement of stating grounds also serve to clarify for the judge and the opposing party the basis on which the applicant claims to be entitled to the order sought. When an applicant states no grounds, it raises the suspicion that the application may be groundless, not just in form, but also in substance ... By telling the court to find the grounds in the affidavits, the drafter revealed a clear advertence to the requirement of stating the grounds of the application and a conscious decision not to comply with the requirement. But even if it had been a case of laziness and not obfuscation, that would have been a difference only of degree. Failure to state the grounds of an application because it is too much trouble for the lawyer to do so is still very much an abuse of process."

¹ Note 8.2

² Antigua and Barbuda Civ App No 2 of 2007

THE SUBMISSIONS

Mr Tyme

- [15] The main plank of Mr Tyme's submissions was the Order of Justice Errol Thomas dated 2nd March 2013, in a separate Claim, No SKBHCV2011/320 between ADAM BILZERIAN and KEVIN HORSTWOOD. The relevant part of that Order is in the following terms:

"IT IS ORDERED AND DECLARED as follows:-

1. That the Claimant, Adam Bilzerian is the owner of all the issued and outstanding shares of Caribbean Building Systems (St Kitts) Ltd.
2. That the Defendant, Kevin Horstwood is not a shareholder nor does he hold any position in Caribbean Building Systems (St Kitts) Ltd.
3. That the Defendant, Kevin Horstwood is not a shareholder nor does he hold any position in Lemon Grove Co Ltd.
4. The Defendant, Kevin Horstwood is restrained whether by himself, his agents or assigns from in any way interfering in the running of the affairs of either Caribbean Building Systems (St Kitts) Ltd or Lemon Grove Co Ltd.

On that Order, Mr Tyme submitted that Mr Bilzerian ought to be part of the proceedings before the Court.

- [16] In answer to a question posed by the Court, Mr Tyme indicated that if his application were granted he would be expected to be served with the documents filed in the proceedings and be allowed to protect Mr Bilzerian's interest in CBSSKL.

Mr Ferdinand QC's reply submissions

- [17] In his replying submissions, Mr Ferdinand QC observed that Mr Tyme placed great reliance on the Order of Thomas J, but went on to submit that while not ignoring the Judge's Order, that Order goes only so far as it says it goes, in that it says Mr Bilzerian is a shareholder of CBSSKL. Learned QC pointed out that FCIBBL's application is a Title by Registration Act (T by R) application and that according to s. 75 of the T by R Act, the application before the Court requires the applicant mortgagee to "call upon the registered proprietor and all other mortgagees and incumbrancees to appear before the Court". Mr

Bilzerian is none of those; he is neither a registered proprietor nor an incumbrancee, argued Mr Ferdinand QC.

[18] Mr Ferdinand next referred me to the decision of Gordon JA in the case of **Dejoria and Anor v Bingeman et al**³ submitting that the basic principle of company law is that a company is a separate legal entity from its incorporators. Counsel went on to quote Gordon JA as saying at paragraph [18]:

"[18] The fundamental and underlying principle of company law is that a company is a separate and distinct legal entity from its incorporators. As it is put in **Halsbury's Laws of England**⁴:

"Effect of incorporation. From the date of incorporation, the subscribers of the memorandum, together with such other persons as may from time to time become members of the company, are a body corporate by the name contained in the memorandum, separate and distinct from individual members of the company."

The usual authority quoted for the above proposition is **Salomon v A. Salomon & Co Ltd**⁵ though there have been many cases which have followed and reinforced the basic premise."

[19] Mr Ferdinand QC further submitted that allied to the basic principle stated above is that a person's banking affairs are private and confidential and third parties ought not to be made privy to such affairs save and except as prescribed by law. He stated that a shareholder of a company cannot go to the bank and say tell me the balance of the account of the company. Mr Ferdinand QC was of the view that Mr Tyme is attempting to ride a horse and a carriage through the personality of the company under the colour of an argument that this Court must respect an order made by the High Court. However, Learned QC was not of the view that to dismiss the application would in any way amount to disregarding the Order of Thomas J. Mr Ferdinand QC submitted that it would be an administrative nightmare if Mr Bilzerian were allowed to be joined as a party to the matter.

³ Civil Appeal No 4 of 2005 [Anguilla]

⁴ 4th Ed, 1996, Vol. 7 (1) paragraph 92

⁵ [1897] AC 22

[20] In his further submissions, Mr Ferdinand contended that the reference to CPR 19.3 (1) is misconceived because FCIBBL's application is a T by R matter and it is governed by the provisions of s. 75 of CAP 10:19. Mr Ferdinand QC further submitted that even if one were to take Mr Tyme's point, then Mr Bilzerian's application does not satisfy the formal requirements of the CPR in that the supporting affidavit does not comply with the requirements of rule 30.2 (d) 1 to 6 which requires certain markings in the top right hand corner thereof. Counsel therefore urged the Court to dismiss Mr Bilzerian's application on the simple ground that being a shareholder of a company does not give him a right to be heard. Furthermore, he has made it abundantly clear that what he wants is access to the company's affairs and that is not something that he is entitled to.

Ms Mitcham

[21] Ms Mitcham was served with Mr Bilzerian's application, but did not offer any submissions on behalf of CBSSKL, although counsel indicated that in the interest of time, she will simply adopt the submissions put forward by Mr Ferdinand QC, which she did.

Mr Tyme's reply submissions

[22] In his brief replying submissions, Mr Tyme took issue with the submission of Mr Ferdinand QC that it would be an administrative nightmare in a proceeding such as this to allow Mr Bilzerian to be joined as an interested party. He posited that this is a proper forum for Mr Bilzerian's application and he reiterated the terms of the Order of Thomas J made on 2nd March 2012.

DISPOSITION

[23] Mr Tyme did not convince me that the Order of Justice Thomas dated 2nd March 2012, was intended to put Mr Bilzerian in a position that allows him to be joined as a Respondent/Interested Party in the proceedings under section 75 of Title by Registration Act, Cap 10:19.

I was persuaded by the submissions advanced by Mr Ferdinand QC that

- (a) CPR 19.3 (1) is inapplicable to these proceedings;
Even if the CPR was applicable, the Applicant has run afoul of CPR 11.7 which stipulates that the application must state briefly the grounds on which the applicant is seeking the order." Additionally, the Applicant is in breach of the requirements of CPR 30.2 (d) 1 to 6 which requires the affidavit to be marked in the top right hand corner indicating on whose behalf the application is filed.
- (b) Section 75 of the Title by Registration Act, Cap 10:19 is the governing Act. It tells who have standing in proceedings to settle Articles of Sale. Mr Bilzerian is not one of those persons.
- (c) CBSSKL is a separate and distinct legal entity from its incorporators;
- (d) Being a shareholder of a company does not give Mr Bilzerian the right to be heard in proceedings of this nature.

[24] Having considered the application and the supporting affidavit; and having heard the supporting and opposing submissions of Counsel, I preferred and accepted the submissions of Mr Ferdinand QC, and I refused to accede to Mr Bilzerian's application. I therefore ordered that the application be dismissed with no order as to costs.

Pearletta E Lanns
Master