

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
Civil Division

VIRGIN ISLANDS

Claim No. BVIHCV2022/0290

In the matter of an application by ESTHER
O'NEAL WHEATLEY to be added as a party to
this claim.

BETWEEN:

ESTHER DEVELOPMENTS LIMITED

Claimant

-and-

WILLA CORNUCOPIA LTD

Defendant

-and-

ESTHER O'NEAL WHEATLEY

Applicant

Before Master Alvin Pariagsingh

Appearances: John Carrington KC and Reisa Singh for the Claimant;
B. St. Michael Hylton KC and Kerri Ann Mayne for the Defendant; and
Astra Penn for the Applicant.

2023: January 20
January 27

DECISION
Application to add a party

[1] PARIAGSINGH, M: - There are three substantive applications before the Court. The first in time is an application for interim injunctive relief filed by the Claimant¹. The last in time is the application of the Applicant to be added as a party to this claim.² The third application is an application for an order that this claim be heard together with a pending

¹ Filed on November 14, 2022.

² Filed on December 21, 2022

matter in which the parties to this claim are also parties.³ The Court invited the parties to make written submissions on the priority of hearing of the pending applications before the hearing.⁴ The Court has received submissions and authorities of the parties and has considered them. The Court has also considered the oral submissions of the parties and the Applicant at the hearing on January 20, 2023.

PRIORITY OF HEARING OF APPLICATIONS:

[2] At the hearing on January 20, 2023 the Court heard the joinder application first. These are my reasons for so doing.

[3] Generally, applications are heard in order of their filing. Following this approach, the application for injunctive relief would be heard first. The Court of Appeal in *St Kitts Nevis Anguilla National Bank Ltd v Caribbean 6/49 Ltd*⁵ restated this general principle. This principle is not however inflexible. The Court has a discretion in appropriate cases to depart from the general position. In considering whether to depart from the general rule and direct that the applications not be heard in order of priority, the Court considers the overriding objective and the utility in hearing the applications in a different order pursuant to its wide powers to actively manage cases. The Court looks at the best use of the time and resources of the parties in determining the applications in a particular order which will further the overriding objective.

[4] Having considered the submissions of the parties, the Court was of the view that the joinder application should be heard first although it was filed last. The Court was of this view for the following reasons. Firstly, if the joinder application is successful, a new party would be added to the claim. This new party will be entitled to be served with the pleadings and the other pending applications. The new party will be entitled to also file

³ Filed on December 20, 2022 to have this claim heard with BVIHCV2022/0103

⁴ By an order of December 23, 2022. This order was varied by consent to extend the time for the parties to make submissions to January 05, 2023.

⁵ CA 6 of 2002

evidence in the pending applications, including the application for injunctive relief and participate in it.

[5] Secondly, one of the grounds raised by the Applicant in the joinder application is the medical condition and mental capacity of the sole director and surviving shareholder of the Claimant to institute this claim. This goes to the root of the claim and the ability of the sole director to continue it. This is a substantial ground in my view. It has the potential to stymie the further progress of this claim in its entirety.

[6] For these reasons, the Court heard the application for joinder first and reserved its decision.

THE LAW ON JOINDER OF PARTIES:

[7] Part 19 Rule 19.2 (3) of the Civil Proceedings Rules 2000 as amended⁶ states that:

‘(3) The court may add a new party to proceedings without an application if –

1. it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
2. there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue.’

THE APPROACH OF THE COURT TO JOINDER APPLICATIONS:

[8] In *Deloris Jackson Goulbourne v The Bank of Nova Scotia*⁷, Henry J articulated the approach in considering an application to add a party. The learned Judge stated:

‘[7] CPR Part 19 confers very wide discretion on the court to add a new party to proceedings. The court may do so of its own volition or pursuant to an application by an existing party or a person who wishes to be

⁶ Civil Proceedings Rules 2000 as amended

⁷ SVGHCV2015/0014

so joined. In exercising its discretion the court must do so judicially and have regard to the overriding objective to deal with cases justly. It is clear that the twin objective of CPR Part 19 is to ensure that the court:

1. disposes of all the issues which arise on a claim; and
2. as far as possible involve all relevant parties who can assist the court to do so.

This approach advances the overriding objective of the CPR by contributing to the expeditious resolution of matters and saving additional expense and resources occasioned by multiple suits.

[8] The only considerations for the court are whether:

1. it is desirable for him to be added to enable the court to resolve all the issues in the case;
2. one or more of the issues in the case involve him and are also connected to the matters in dispute between the parties; and
3. adding him will further the overriding objective.

[9] Although CPR 19.2 (3) (b) uses the expressions “an issue” and “all issues”, that provision would be applicable even if more than one, yet not “all” of the issues are connected to Mr Jackson. This is because the singular includes the plural. BNS’ application is not rendered invalid merely because his involvement can assist the court in resolving more than one, but not all the issues in the claim. Likewise, it is not defeated because Mrs Jackson Goulbourne has not pleaded matters against Mr Jackson in her claim, or because there is no evidence that he wishes to be a party. Those are not requirements under the CPR or in law.’

[9] The English approach to applications to joinder applications is similar to that expressed by Henry J above. The English Rule 19.2 CPR is in similar to Part 19.2 (3) CPR of our rules. ⁸

⁸ 19.2 (2) CPR – England and Wales

‘(2) The court may order a person to be added as a new party if –

(a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or

(b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue.’

[10] The approach is stated by the learned authors of *Blackstone's Civil Practice* ⁹ as follows:

'The Court of Appeal confirmed in *Davies v Department of Trade and Industry* [2006] EWCA Civ 1360, [2007] 1 All ER 518, that the Court has a very wide discretion to consider joinder under r. 19.2 (2). In this case, the interest of existing parties in keeping costs to a minimum outweighed the possible injustice to parties who wished to be added as additional defendants, which might arise from their being prevented from participating in the trial in circumstances when Part 20 proceedings might be brought against them at a later date. A party may be added to a claim under r. 19.2(2) even if none of the existing parties to the litigation could assert a substantive claim against the new party (*Dunlop Haywards (DHL) Ltd v Erinaceous insurance Ltd* [2009] EWCA Civ 354). The court's power to add a new defendant is not limited to joining a person against whom the claimant wishes to make a claim or who is needed to complete the claimant's cause of action. Rule 19.2 (2)(b) is wider than that. For the rule to be engaged, all that is necessary is that there is an 'issue' to be determined, which is 'connected to the matters in dispute to the proceedings', not that the issue forms part of a claim for relief against the new party (*Shetty v Al Rushaid Petroleum Investment Co.* [2011] EWHC 1460 (Ch). See also *XYZ v Various Companies* [2014] EWHC 4056 (QB).'

THE EVIDENCE OF THE APPLICANT:

[11] The Applicant's evidence is that her father Ralph Telford O'Neal, died on November 19, 2019 (the deceased).¹⁰ At the time of his death the deceased was a shareholder in the Claimant's company. His shareholding was one ordinary share.¹¹ The Applicant accepts her father's directorship in the Claimant ceased on his death.¹² At present, there are proceedings in the High Court concerning the deceased's estate. The Applicant is a Claimant in the estate proceedings.¹³ The Applicant discloses nothing further about the estate proceedings. In particular, no mention is made of who is the Defendant to the estate claim, the relief being claimed or whether the deceased's share in the Claimant features in the estate claim.

⁹ Blackstone's Civil Practice 2020 page 322 para 14.81

¹⁰ Paragraph 5 of the first affidavit of the Applicant

¹¹ Paragraph 12 of the first affidavit of the Applicant

¹² Paragraph 18 of the first affidavit of the Applicant.

¹³ Paragraph 6 of the first affidavit of the Applicant.

[12] The Applicant's evidence is that at the time of the death of the deceased and up to shortly before this claim was commenced, the Claimant was struck off the Register of Corporate Affairs for non-payment of its annual licence fees.¹⁴ She contends that she recently became aware that the Claimant was involved in litigation. This caused her to instruct her lawyers to write to the Claimant and a series of letter were exchanged.

[13] The Applicant's contention is that her position regarding the Claimant being restored to the Register and that of her family were communicated to the Claimant's lawyers and notwithstanding, the Claimant was restored to the Register.

[14] The Applicant further contends that she has seen agreements entered into which affects the Claimant and she questions whether her cousin, the sole surviving registered shareholder and director of the Claimant, Mr. O'Neal was advised of his right to seek and obtain independent legal advice or if he in fact obtained same.¹⁵

[15] She contends that the agreement on the face of it did not extend to commencing fresh legal proceedings. The Applicant contends that her cousin, is a man in his mid-70's and has been ill for every years so much so that he is bedridden. She contends that he is diabetic and is severely impaired as he is almost blind if not completely so.¹⁶ Reference is made to him also suffering a stroke and not having consulted any family member in relation to the agreement that he was entering into.

[16] The Applicant's contention is that the agreement entered into by Mr. O'Neal are detrimental to her family and in particular to her father's estate.¹⁷ Her contention is that her cousin, the sole surviving shareholder of the Claimant, had no power or authority to enter into the agreement he did and the decisions he took were not in the best interest

¹⁴ Paragraph 16 of the first affidavit of the Applicant

¹⁵ Paragraph 26 of the first affidavit of the Applicant

¹⁶ Paragraph 32 of the first affidavit of the Applicant.

¹⁷ Paragraph 34 of the first affidavit of the Applicant.

of the Claimant.¹⁸ The Applicant filed a second affidavit which restated some of the facts stated in the first and provided some of the document refereed to.¹⁹

EVIDENCE OF THE CLAIMANT:

[17] Mr. Robert Merrick swore to an affidavit in opposition to the application on behalf of the Claimant. In his affidavit he represents himself as the attorney in fact for the Claimant.²⁰ He contends that as the sole director and surviving shareholder, Mr. O'Neal has sole power of management of the Claimant.²¹ He contends that Mr. O'Neal has no legal obligation to consult the Applicant or any family member in making decisions on behalf of the Claimant.

[18] He further contends that the Applicant has put no evidence before the Court that she is no more than a daughter of a deceased shareholder. The Claimant contends that prior to restoration of the Claimant, the parcels of land subject of the dispute would have been held bona vacantia by the Crown.²²

[19] In relation to the alleged medical condition and mental capacity of Mr. O'Neal the Claimant contends that these allegations are not supported and ought to be disregarded by the Court. No evidence has been led on behalf of the Claimant to refuse the claims of the Applicant.

THE APPLICANT'S SUBMISSIONS:

[20] The Applicant contends that it would be fair and just to add her as a party having regard to the overriding objective. It was also submitted that the Applicant has to be a party to this claim to move the Court; *The Heirs of Camselle St. Catherine v Darius St.*

¹⁸ Paragraph 35 of the first affidavit of the Applicant.

¹⁹ Second affidavit of the Applicant filed on January 19, 2022.

²⁰ Paragraph 1 of the Fourth affidavit of the Merrick

²¹ Paragraph 6 of the fourth affidavit of Merrick

²² Paragraph 8 of the first affidavit of Merrick

Catherine et al.²³ The Applicant's contention is that her father's one share in the Claimant forms part of her father's estate. She submitted that although there are ongoing High Court proceedings regarding the estate of her father, she is one of the beneficiaries of her father's estate.

[21] The Applicant contends that the grant of interim injunctive relief in this claim can result in a claim for substantial damages against the Claimant. She contends that this can translate into a financial liability to the estate of her deceased's father. The Applicant submitted also that there can be no prejudice to either of the parties by her being added as a party to this claim which cannot be compensated in costs. The Applicant contends that the legality of an agreement entered into between Mr. O'Neal and Dr. Merrick is challenged as the same was executed without proper authority and corporate authorization.

[22] The Applicant contends that she does not support this claim and is desirous of it being dismissed. The Applicant also raises the issue that the agreements were potentially procured by deceit and that Mr. O'Neal is a sick man with impaired vision who did not understand what he was agreeing to, was not aware of what documents he was signing and the legal consequences of signing them.

[23] At the hearing the Applicant's Counsel also submitted that the Applicant is a beneficiary in her own right irrespective of her interest in her father's estate. The Applicant submitted that the Memorandum and Articles of Association would show that a minimum of two directors are necessary to institute proceedings.

THE CLAIMANT'S SUBMISSIONS:

[24] The Claimant submitted that the application ought to be dismissed for eight (8) reasons. These are:

²³ SLUHCv2003/0444

1. The Applicant's challenge to the agreement is misplaced as she has no interest in parcels 22 and 23. These parcels are owned by the Claimant in its own right and have been since 1978.
2. Any allegation of loss to the shareholding that forms part of the estate is necessarily reflective only of loss to the Claimant for which the Claimant would be the proper Claimant.
3. Ralph O'Neal deceased was a shareholder of the Claimant. His estate's interest is limited to his shareholding in the Claimant.
4. That Edison O'Neal was at the material time the sole director of the Claimant. As director, he has the sole power of management of the affairs of the company.
5. The Applicant has given merely her own opinion as to the current state of health of Mr. O'Neal, which is not relevant as she does not indicate that she has any relevant medical qualification or experience and in any event she does not address his mental capacity to make decisions.
6. The Agreement is clear that the Claimant grants a yearly lease to the Association. This is not contrary to the Non-Belonger Landholding Regulation Act, nor does such a lease require stamping.
7. The Order for restoration of the Claimant was made on 10th October 2022. The Applicant, from her correspondence, was well aware of the restoration application and did not seek to intervene on that Application. This court has no jurisdiction to interfere with the final Order for restoration. The Applicant's recourse was to appeal, which she has chosen not to do.

8. The Applicant was not a party to the Agreement and so under the doctrine of privity of contract cannot challenge the terms of the Agreement or ask this court to rule whether the claim herein is in keeping with the Agreement.

[25] At the hearing Counsel for the Claimant also raised the issue of Section 78 of the Business Companies Act²⁴. Counsel submitted that only a registered shareholder or the personal representative of a shareholder would have standing to bring a claim for the matters alleged by the Applicant in relation to the Claimant.

THE DEFENDANT'S SUBMISSION:

[26] Although the Defendant was not a party to the application, Counsel for the Defendant indicated that the application was supported by the Defendant. Counsel will forgive me for summarizing his arguments in the interest of brevity:

1. Adding the Applicant will assist the Court in resolving the issues in the claim.
2. The issue the Applicant can assist to resolve is; Whether Mr. Merrick is authorized to act as he has acted in relation to the Claimant.
3. The undertaking as to damages given by Mr. Merrick on the application for injunctive relief is an issue the Applicant can assist in resolving;
4. There is no prejudice in adding the Applicant as she is familiar with the facts of the case.
5. The Applicant can assist in determining the issue of the status of the person who brought the claim.

²⁴ Act No. 16 of 2004 as amended

6. The Applicant stands to suffer diminution in the value of her interest in the share of her father's estate

ANALYSIS:

[27] The starting point in resolving this application are principles which the Applicant and the Claimant are *ad idem*. The Claimant is a separate legal personality capable of suing and being sued.²⁵ Companies are owned by shareholders and managed by directors. A directorship ceases when a director dies. A share can form part of the estate of a deceased shareholder.

[28] The central issue in this claim concerns the alleged breach of a covenant by the Defendant. There is no pleaded issue which directly touches or concerns the Applicant in her personal capacity.

[29] The issues which the Applicant raises to are capable of being issues connected to this claim. The issues raised by the Applicant are not minutia issues. The issues raised by the Applicant can be placed into two categories; Issues concerning Mr. O'Neal personally and issues affecting the Claimant Company.

[30] In relation to the issue affecting the mental health of Mr. O' Neal, there is no medical evidence before me that supports the Applicant's contention that Mr. O'Neal suffers from any of the conditions or ailments or effects of any ailments averred to. They are bare assertion about his medical condition and mental capacity. The only evidence on this issue is the Applicant's direct evidence of what she knows, observed and heard.

[31] The Claimant would have easily been in a position to rebut this evidence. The medical condition and capacity of Mr. O'Neal is an issue which is germane to his ability to give instructions and make decisions on behalf of the Claimant, including the decision to institute this claim.

²⁵ Saloman v Saloman [1896] UKHL 1

[32] The Claimant has not filed any affidavit of Mr. O'Neal or adduced any medical report which rebuts any of the allegations made regarding his medical condition or mental capacity. The Claimant's response to the allegations regarding Mr. O'Neal's medical and mental condition was simply, the Applicant has put no evidence of his medical condition before the Court.

[33] One of the allegations gleaned from the affidavits of the Applicant is that Mr. O'Neal may be in a vulnerable position given his age, being confined to a bed, his medical condition and his blindness. The allegations are that the decisions allegedly taken by him as the sole director of the Claimant may not have been made with the relevant understanding and approval necessary.

[34] In so far as the evidence discloses an issue regarding the medical condition and mental capacity of the sole director of the Claimant, I am not satisfied that this is an issue in the proceedings before the Court or an issue involving the Applicant. Applying strictly the criteria in Rule 19.2 (3) (a) CPR, the issue of the medical condition or mental capacity of Mr. O'Neal is not an issue raised in the claim or in the defence. This is not an issue which requires adding the Application to pursue.

[35] Applying the criteria in Rule 19.2 (3)(b) CPR the Applicant also does not fall into the category of persons contemplated. There is no issue involving Mr. O'Neal and the Applicant in the present claim. Mr. O'Neal in this claim is acting in his capacity as sole director and surviving shareholder of the Claimant. There is no issue between the Claimant and him in that capacity.

[36] I am fortified in my view that it is not desirable to add the Applicant as a party based on this issue based on the Defendant's support of the application. Any application concerning the instructions given by the shareholder of the Claimant or his capacity can be taken by the Defendant. The Applicant, whose application the Defendant supports, can advanced her evidence regarding Mr. O'Neal's medical and mental condition by being a witness for the Defendant as opposed to a party.

[37] Further, the Court has considered that if the Applicant is made a party and proceedings are served on her, there is no issue to which she can file a defence. There are no pleaded allegations against her. This in my view, would not be in furtherance of the overriding objective. The Applicant would have been made a party to essentially raise an issue which the Defendant can properly raise as an interlocutory application or as part of its defence.

[38] The Applicant's ability to assist the Court in resolving this issue is not dependent on her having standing in the Claimant or in her father's estate or her being a party to this claim. Whilst the evidence led by the Applicant on this application is by no way determinative of the medical condition or mental capacity of Mr. O'Neal, such evidence can be advanced by her in support of any interlocutory application taken by the Defendant. In my view it certainly is not sufficient for the Court to exercise its wide discretion as set out in *Goulbourne* (supra) and *Blackstone's* (supra) to add her as a party to the claim.

[39] In relation to issues affecting the Claimant Company, I agree with the Claimant that the Applicant in her personal capacity has no standing to raise any of these issues.

[40] The Applicant is a beneficiary in waiting of a possible interest in one share. She has not applied for a limited grant to represent the estate of the deceased nor has she alluded that she is the Executor or Administrator of the estate of the deceased. The Applicant's evidence on this issue is vague and save for alluding to pending proceedings regarding the estate of the deceased, does not go further.

[41] Remedies for any breach of duties by members of a company is provided for in **Section 184 A of the BVI Business Companies Act**. In this section the right to bring such an action is given to a "member". A 'member' is defined as:

- "184A. In this Part, "member", in relation to a company, means—
- (a) a shareholder or a personal representative of a shareholder;
 - (b) a guarantee member of a company limited by guarantee; or
 - (c) an unlimited member of an unlimited company

[42] A “shareholder” is defined in Section of the Act as:

“shareholder”, in relation to a company, means a person whose name is entered in the register of members as the holder of one or more shares, or fractional shares, in the company’

[43] The Court does not agree with the Applicant that she is a beneficiary of her father’s estate. There is no evidence of whether the deceased died testate or intestate. Further, there is no evidence of the nature of the pending proceedings concerning the estate of the deceased. The Court is unable to conclude without more that the Applicant is a daughter of the deceased who may be entitled to an interest in his estate upon the completion of a connected matter which has not been disclosed.

[44] The Applicant being a beneficiary in waiting has no standing to raise any issue regarding breach of duty of director to act in the best interest of the Claimant, possible conflict of interest between the Claimant and Little Bay Homeowners Association acting by Dr. Robert Merrick and breach of the Stamp Act (Cap.212). Any issues regarding the acts of a Director of the Claimant, likely beneficial interest of the Claimant, entering into contracts by the remaining Director or validity of undertakings given on behalf of the Claimant are all issues which the Applicant in her personal capacity has no standing to pursue.

[45] The Applicant’s submission that it would be fair and just to add her as a party having regard to the overriding objective only finds favour in relation to the ground regarding the medical condition and mental capacity of Mr. O’Neal.

[46] The Applicant contention concerning the grant of interim injunctive relief and any damages which may flow against the Claimant is misplaced. Any such liability will not be a liability of the Applicant. It would be a liability of the Claimant. Even if there were to be any personal liability attributed to the estate of the deceased, it would be for the personal representative of the estate to pursue such an issue. The Applicant has not satisfied the Court that in her own capacity as a beneficiary she can speak on behalf of the estate of the deceased. On this issue I agree with Counsel for the Claimant.

[47] I agree with Counsel for the Applicant that any resulting prejudice by making her a party to this claim can be compensated by an order for costs.

[48] I also agree with Counsel for the Claimant that there was no obligation to consult the Applicant or any relatives in making any decision on behalf of the Claimant. Similarly, I agree with Counsel for the Claimant that the Applicant not having put into evidence the memorandum or articles of association, the Court cannot take judicial notice of what the Applicant's Counsel says the document states. The onus was on the Applicant to lead this evidence. The Court notes that the Applicant filed evidence in this matter up to the date before the hearing. If these documents which she contends were relevant were in her possession, they ought to have been disclosed.

DISPOSITION:

[49] For these reasons, application is dismissed.

COSTS:

[50] The Claimant and the Applicant have both prayed for their costs should they be successful in this application. There is no reason to depart from the general rule that costs follow the event. In this regard, the Applicant must pay the Claimant's costs. These costs are to be assessed by this Court in default of agreement by the parties within 28 days of the delivery of this decision.

ORDERS:

[51] In the circumstances, it is hereby ordered that:

1. The Applicant's application filed on December 20, 2022 is dismissed; and

2. The Applicant shall pay the Claimant's costs of the application to be assessed by this Court in default of agreement within 28 days from today's date on the application of either party.

Alvin Shiva Pariagsingh
High Court Master

By the Court,

Registrar