

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

GRENADA

CLAIM NO. GDAHCV2014/0037

BETWEEN:

**[1] KAYACK RADIO LIMITED
[2] KIMBERLAIN MILLS**

Claimants

and

MICHAEL WARD

Defendant

Before:

The Hon. Mde. Justice Agnes Actie

High Court Judge

Appearances:

Ms. Sandina Date for the Claimants

Mr. George Prime for the Defendant

2022: May 30;

ORAL RULING

- [1] **ACTIE, J.:** The first named claimant is a limited liability company duly incorporated on 25th January 1996 under the Companies Act 1994. The second named claimant is a director of the first named claimant. The first claimant carries on business as a broadcasting station for which it holds a valid license.
- [2] The defendant was a former director of the first named claimant and was employed as an engineer. On or about 28th December 2012, the defendant was removed as a director of the first named claimant and dismissed from his position as technical engineer.
- [3] The claimants allege that the defendant after his dismissal, began broadcasting on the claimants' frequency FM106.3 without knowledge or consent of the claimants, preventing the claimants from

using the FM106.3 frequency for which they hold a license. The frequency which was used by the defendant covered a wide band range from 100.1FM to 107.2FM.

- [4] The claimants in a claim form filed on 24th January 2014 claim against the defendant damages for fraudulent misrepresentation. The claimants seek the return of the original Kyack Radio Limited Radio Licence and keys to the Kyack's Radio Limited transmitter building located at Belair in the island of Carriacou. The claimants also seek the return of:
- i. One computer valued at \$900.00;
 - ii. Two microphones valued at \$450.00 each;
 - iii. One dual CD player valued at \$1,100.00;
 - iv. One single CD player valued at \$900.00;
 - v. One compressor valued at \$950.00;
 - vi. One broadcast mixer valued at \$8,500.00;
 - vii. One 1000wt transmitter valued at \$9,000.00;
- [5] The claimants also aver that the defendant was never a de jure director since he is an alien and as he did not hold a licence in accordance and by virtue of section 8 of the Aliens (Land-Holding) Regulation Act Cap 13 of the Continuous Revised Laws of Grenada. The claimants further rely on sections 84(1)(a) and (b) of the Companies Act No. 35 of 1994.
- [6] Moreover, the second named claimant avers that he requested the return of a list of equipment which belong to the first named claimant amounting to the total value of \$22,250.00. The claimants aver that the defendant fraudulently misrepresents himself as the first named claimant on the internet since January 2013 notwithstanding being removed as a director.
- [7] The claimants claim that they have suffered loss and damage, and that they have been warned by the National Telecommunications Regularity Committee that their license could be revoked due to the defendant's wrongful and illegal use of the FM106.3 frequency. The claimants also contend that they have lost about 25% of their advertising business.

Defendant's case

- [8] By defence filed 25th March 2014, the defendant avers that he provided services to the first named claimant as co-owner and not as employee.
- [9] The defendant contends that his purported removal as a director was done without his information, knowledge or consent contrary to the Companies Act and the Articles of Incorporation and By-Laws of the first claimant. He states that he first had knowledge of his removal as a director when he was served with letter dated 4th April 2013.
- [10] The defendant further avers that the absence of a license does not bar him from being a director and from voting at meetings of the first claimant, or from being a co-owner of a company.
- [11] The defendant counterclaims:
- (a) A declaration that the defendant's purported removal as a director of the first claimant is contrary to the Companies Act and the Articles of Incorporation and By-Laws of the first claimant, and as such it is null and void and of no effect in law;
 - (b) A declaration that the defendant has been and remains a director of the first named claimant and is entitled to all of the rights, benefits and pre-eminencies attached to that position;
 - (c) An order that the claimants provide to the defendant an account of the operations of the first named claimant and the Kyack 106.3 FM radio station;
 - (d) Damages for loss suffered as a consequence of the illegal removal of the defendant as a director of the first named claimant and the unilateral turning off and/or closing of Kyack 106.3 FM radio station by the second named claimant;
 - (e) Interest and Costs.
- [12] The defendant admits being in possession of the listed equipment belonging to the first named claimant but avers that a more realistic valuation of the equipment is \$2,319.00. The defendant states that he is in possession of the equipment as co-owner and director of the first named claimant, and that most, if not all, of the equipment were initially purchased and/or built by him. The defendant further states that he has always owned and maintained the website 'Kayak106.com'.

Legal Analysis

Whether the Absence of an Alien Land-holding Licence disqualifies the Defendant from being a Director of, or to vote at Meetings of, or to Hold Shares in the First Claimant

[13] **Section 8 of Aliens (Land-Holding Regulation) Act Cap 13** states that:

- (1) The Minister may, if he or she thinks fit, from time-to-time grant licences, either subject to conditions or not, for all or any of the following matters, that is to say:
 - (a) For an alien to be a director of a company...
- (2) On breach of any condition in a licence granted under this section, the licensee shall forthwith cease to be a director of the company and to be entitled to vote at any meeting of the company, and all shares and debentures in the company held by the licensee shall be forfeited to the Government.

[14] The defendant argues that failure to obtain an Alien Land-holding License where one is required simply entitled the State to forfeit the interest of the offending party.

[15] The Privy Council in **Young v Bess**¹ ruled that prohibition on land holding by an unlicensed alien could be enforced by a discretionary power of forfeiture vested in the Crown.

[16] In the Court of Appeal decision in **Murphy v Quigg**², Sir Vincent Floissac Chief Justice stated:

“In any case, the fact that a contract, trust or other transaction is illegal in the sense that it is prohibited by statute or at common law does not necessarily invalidate every claim or title which is contaminated by the illegal transaction.

[17] The Court of Appeal in **Edwin M. Hughes v La Baia Limited**³ stated in a line of authorities including **Young and Another v Bess, Equipment Rental and Services Ltd v Texaco [West Indies] Limited** and **Spiricor of Saint Lucia Limited v The Attorney General of St. Lucia**, states that title to property which an alien holds remains in the alien and is voidable only at the behest of the Crown.

¹ [1995] 46 W.I.R 165

² [1996] 54 W.I.R.

³ HCVAP 2006/008

- [18] **Section 6 of the Companies Act** states that a company shall be deemed to be under alien control—(a) if any of its directors is an unlicensed alien. **Section 8** provides for license for an alien to be a director of a company; for an alien to vote at meetings of a company; for an alien to hold shares or debentures; or for an alien to be a member of a company having no share capital.
- [19] The defendant as an alien and director of company renders the company under alien control in accordance with **Section 6 of the Companies Act** and therefore required an alien licence. However, the jurisprudence is clear that the obtaining of a license is a requirement by legislation in order for an alien to effectively become a director. The defendant's and by extension the company's failure to obtain a licence does not automatically render the appointment as a nullity. A forfeiture judgement is required to render the company and directorship null and void.

Whether the Defendant was Wrongfully Removed as a Director of the First Claimant

- [20] Part 6 of By-Law No. 1 of the first claimant authorises the meetings of directors and specifies the manner in which same is to be conducted.
- [21] Part 6.2 stipulates that a meeting of directors may be convened at any time by any director or by the Secretary when authorised by any director. Notice of such meeting is to specify the purpose of or the business to be transacted at the meeting and is to be served not less than three days before the meeting is to take place. By Part 18.1, notices are required to be delivered personally, or sent by prepaid mail, cable or telex, to any such director at its latest address.
- [22] Lastly, Part 6.3 of the By-Laws indicates that two directors shall form a quorum for the transaction of business.
- [23] The claimants argue that the first claimant's by-laws direct that the presence of two directors is considered a quorum for the conduct of business. The claimants further submit that the defendant was duly informed of the meeting, thus he was lawfully removed as a director.
- [24] The defendant, on the other hand, argues that he received no notice from the claimants as to a directors' meeting.

[25] **Section 78 of the Companies Act Cap 58A** states that:

“(1) Unless the articles or By-laws of a company otherwise provide, the directors of a company may meet at any place, and upon such notice as the By-laws require.

(2) Subject to the articles or By-laws, a majority of the number of directors or minimum number of directors required by the articles constitutes a quorum at any meeting of directors; and notwithstanding any vacancy among the directors, a quorum of directors may exercise all the powers of the directors.”

[26] Joseph-Olivetti J in **Donald Ashley v Irene Ashley & Ors**⁴ states that the requirement that all directors must be given notice of meetings is well established. At paragraph 35, the learned judge cites **Gore-Browne on Companies** at para 26.2:

“Notice of the meeting must be given to all directors, for business done at a meeting of which some directors had no notice is invalid, and a director has no power to waive his right to notice; but if a director is abroad and out of reach of notices, a meeting held without notice to him is valid.”

[27] The learned judge went on to hold that, as the directors’ meeting was not properly convened as the claimant and one of the directors, Mr. Ashley, was not given notice. As a result, no company business could have been properly conducted at that meeting, and the resolution passed was null and void.

[28] The meeting at which the resolution was passed to remove the defendant as director took place on 28th December 2012. The claimants offer no document or evidence which supports their contention that the defendant was duly notified in compliance with the Articles of Incorporation. There is no compliance of the requirements of notice in writing in accordance with the articles of Incorporation. Also, the claimants have failed to disclose the minutes of the meeting.

[29] This court is therefore of the view that the meeting of 28th December 2012 was not properly convened, notice not having been given to the defendant, and the resolution purportedly passed is null and void.

⁴ Claim No. 2007/0058

- [30] The defendant contends that the second claimant as Managing Director of the first claimant has a duty to account to the defendant for its operation since the defendant's purported removal as a director of the first claimant. The defendant being validly appointed as director, and not validly being removed as said director, the defendant would be entitled to an accounting of the first claimant.

Whether the Claimants are entitled to the Return of Broadcasting Equipment in the Possession of the Defendant

- [31] The court accepts the evidence at the trial that Kimberlain Mills, the second named claimant and the defendant Michael Ward, are co-owners of the first claimant, Kyack Radio Limited incorporated on 25th January 1996. Kimberlain Mills, James Stafford and Michael Ward were the named directors. The company did not issue any shares.
- [32] The defendant admitted that the equipment was in his possession, which he stated was on the basis of him being a director of the company. The defendant acknowledges that this equipment belonged to the company. The defendant's basis for retaining possession of said equipment is that he is director of the first claimant, and that the equipment was initially purchased by him.
- [33] The claimants argue for the return of equipment listed at paragraph 8 hereof, which they allege is valued at \$22,250.00. The defendant on the other hand avers that a more realistic valuation of the equipment is \$2,319.00. Neither party has presented the court with evidence of the value of the equipment at the time of trial.
- [34] The claimants' claim is for damages for fraudulent misrepresentation. Fraudulent misrepresentation arises in contract law where a false statement is made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false⁵.
- [35] The claimants neither plead nor argue the existence of a contract between themselves and the defendant. The particulars of fraud were not pleaded. A perusal of the evidence, circumstances and submissions of the case however reveals that the claim which the claimants intended to bring is perhaps that of conversion. A party cannot raise in submissions points of law that have not been

⁵ Derry v Peek (1889) 14 App Cas 337

pleaded. It is an elementary rule of pleadings that a party is bound by his pleadings unless he is allowed to amend them⁶. There is no documentary evidence before the court as to the existence of a licence which the claimants rely on to purport their ownership of the radio frequency.

Conclusion

[36] Counsel for the defendant concedes that the equipment itemized in the statement of claim belong to the company and not to any of the individual owners. The defendant admits that he is in possession of the items which he said that the second claimant asked him to remove from the company because he, the second claimant, had purchased new equipment.

[37] The company is a separate entity apart from the owners. All the equipment in the absence of evidence to prove otherwise, belong to the company. The defendant could not have retained the equipment neither could the second claimant direct the defendant to take possession of the equipment for his own use. Any transfer of ownership had to be executed in accordance with the Articles of Incorporation agreed by the co-owners on incorporation of the company. In the absence of share ownership, the incorporators are all tenants in common. Accordingly, the defendant must return all the items and equipment to the company.

ORDER

- [38] (1) The claimants' claim is dismissed in part.
- (a) The first claimant is entitled to the return of equipment in the possession of the defendant.
- (2) The defendant succeeds on the counterclaim and it is ordered and declared as follows:
- (a) The defendant's purported removal as a director of the first claimant is contrary to the Companies Act and the Articles of Incorporation and By-Laws of the first claimant, and as such it is null and void and of no effect in law.
- (3) The defendant has been and remains a director of the first named claimant and is entitled to all of the rights, benefits and pre-eminencies attached to that position.

⁶ Yorkshire Provident Life Assurance Co. v Gilbert and Rivington (1895) 2 QB 148, 152 CA

- (4) The claimants shall provide to the defendant and the other director, James Stafford, an account of the operations of the first named claimant from the date of defendant's removal as a director until judgment.
- (5) Damages for loss suffered as a consequence of the illegal removal of the defendant as a director of the first named claimant and the unilateral turning off and/or closing of Kyack 106.3 FM radio station by the second named claimant to be assessed if not agreed.
- (6) Liberty to the defendant to apply for the assessment of damages, if not agreed within twenty days from today's date.

Agnes Actie
High Court Judge

By the Court

Registrar