

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

GRENADA

CLAIM NO. GDAHCV2015/0422

**IN THE MATTER OF THE COMPANIES ACT NO. 35 OF 1994 AND THE COMPANIES
REGULATIONS S.R. & O. NO.2 OF 1995 OF THE REVISED LAWS OF GRENADA**

AND

**IN THE MATTER OF THE CONTRAVENTION OF SECTIONS 69, 72, 73, 74, 149
AND 153 OF THE COMPANIES ACT NO. 35 OF 1994**

AND

**IN THE MATTER OF THE REMEDIES UNDER SECTIONS 241 AND/OR 377, 244 AND 518 OF
THE COMPANIES ACT NO. 35 OF 1994**

AND

IN THE MATTER OF PALM TREES IMMO LTD

AND

**IN THE MATTER OF A LOT OF LAND WITH DWELLING HOUSE THEREON SITUATE AT
FORT JEUDY IN THE PARISH OF SAINT GEORGE CONTAINING BY ADMENASUREMENT 26,
794 SQ. FT. AND REGISTERED IN THE DEEDS AND LAND REGISTRY OF GRENADA IN
LIBER 18-2001 AT PAGE 511**

BETWEEN:

**[1] HANS PAULIG
[2] MARLEN PAULIG**

Claimants

and

**[1] EVA KACHELRIESS-ABAN
[2] WILLIAM ABAN
[3] PALM TREES IMMO LTD**

Defendants

Heard together with

SUIT NO. GDAHCV2020/0127

IN THE MATTER OF PALM TREES IMMO LTD

AND

IN THE MATTER OF THE COMPANIES ACT NO.35 OF 1994

BETWEEN:

[1] HANS PAULIG
[2] MARLEN PAULIG

Petitioners

and

PALM TREES IMMO LTD.

Respondent

Before:

The Hon. Mr. Justice Raulston L. A. Glasgow

High Court Judge

Appearances:

Mr. Derick F. Sylvester with him Ms. Hazel Hopkin for the Claimants in Claim No. GDAHCV2015/0422 and the Petitioners in Claim No. GDAHCV2020/0127

Mrs. Deborah Mitchell for the Defendants in Claim No. GDAHCV2015/0422 and the Respondent in Claim No. GDAHCV2020/0127

2021: January 21;
April 29;
August 09 .

JUDGMENT

Introduction

- [1] **GLASGOW, J.:** This judgment concerns two separate claims which were heard together. In the first claim, the main issue is whether the claimants (the Pauligs) and the Kachelriess or either of them are entitled to a beneficial share or interest in the property situate at Fort Jeudy in the parish of Saint George, which is registered in the sole name of the third defendant, Palm Trees Immo Ltd (the company). The second claim involves a petition

brought by the Pauligs (petitioners) seeking an order pursuant to section 377(e) of the Companies Act¹ for the company to be wound-up on the ground that it is just and equitable in the circumstances.

Background

- [2] In or about the year 1996, the Pauligs and the first defendant, Eva Kachelriess-Aban (Eva) and her deceased husband, Lutz Kachelriess (Lutz) met while on holiday in Jamaica. The parties became close and maintained great relations. On 31st October 1996, Lutz purchased property from one Mary Delves. The property is located at Petit Calivigny in the parish of Saint George in Grenada. Following the sale, the property was conveyed solely to Lutz.
- [3] Following Lutz's purchase of the Petit Calivigny property, he came up with a plan to do business with the Pauligs and made an offer to the first claimant, Hans Paulig, to invest in the property at Petit Calivigny. This offer was reduced into writing by way of a written document dated 16th October 1996. The document provided that: (1) Lutz agreed to sell half of the land to the Pauligs for the sum of 35,000 deutschmarks; (2) Lutz and the Pauligs were to "repeat the deal" (execute the agreement) in the presence of a notary public in Grenada in order to validate it; and (3) the Pauligs were to pay the sum of 35,000 deutschmarks upon execution of the agreement in Grenada.
- [4] The company, Palm Trees Immo Limited, was incorporated on 28th April 1997 by Raymond Anthony, attorney-at-law pursuant to the provisions of the Companies Act 1994. By Indenture of Conveyance dated 12th February 1998, Lutz conveyed his interest in the property at Petit Calivigny to the company. In 1999, the company sold the Petit Calivigny property to Klaus Weinmuller. Subsequent to the sale of the Petit Calivigny property, it was discovered that the vendor, Mary Delves, did not possess good title. Klaus Weinmuller therefore sued the company for breach of the sale agreement.

¹ Cap 58A of the 2010 Continuous Revised Edition of the Laws of Grenada

[5] On 9th August 1999, the company purchased another property situate at Hope Vale in the parish of Saint George, subdivided it and sold it in lots to the general public who purchased the lots by way of monthly instalments. On 2nd May 2000, the company purchased property at Fort Jeudy in the parish of Saint George and construction of a dwelling house thereon began thereafter. In June 2003, the company obtained a mortgage from the Bank of Nova Scotia to repay the sums due to Klaus Weinmuller as a result of his lawsuit for the breach of the Petit Calivigny sale agreement.

[6] Lutz died in May 2010. Between the years 2013 and 2015, the relationship between the Pauligs and Eva deteriorated over discrepancies in the finances and management of the company and issues related to the ownership and maintenance of the Fort Jeudy property. Being dissatisfied with the events that unfolded, the Pauligs filed a fixed date claim on 30th September 2015 seeking relief entitling them to a fifty percent share in the Fort Jeudy property, damages and declaratory orders in relation to the actions taken by Eva with respect to the administration and management of the company's affairs.

[7] On 30th September 2015, the Pauligs filed a fixed date claim seeking the following reliefs:

- (1) General damages for negligence and/or breach of contract;
- (2) General damages for breach of statutory duty pursuant to the Companies Act No. 35 of 1994;
- (3) A declaratory order that the claimants are entitled to fifty percent (50%) interest and/or share of property situate at Fort Jeudy in the parish of Saint George and State of Grenada containing by admeasurement 26,794 Sq. Ft. English Statute Measure owned in the name of the Third Defendant and registered in the Deeds and Land Registry of Grenada in Liber 18-2001 at page 511;
- (4) An order that the status quo remains and the claimants are allowed to reside in their portion of the property, the subject matter of this action until final determination of the matter;

- (5) And/or in the alternative a declaration that the claimants are entitled to an undivided 50% share of and or interest in the dwelling house and lot of land situate at Fort Jeudy in the parish of Saint George in the State of Grenada, as a matter of equity; and or constructive trust; and or of proprietary estoppel; and or of unjust enrichment;
- (6) An order pursuant to section 241 of the Act, for the appointment of a Receiver-Manager of the Company to manage and secure the assets of the company thereof in accordance with the order of the court;
- (7) An order that the said property to be sold and the claimants be paid fifty percent (50%) of said sale pursuant to their interest therein;
- (8) In the alternative, an order that the said property be valued and the claimants be paid fifty percent (50%) of the value thereof;
- (9) An order that the first and second defendant hand over the book of accounts held in the name of the third defendant in their premises in the Fort Jeudy aforesaid;
- (10) A declaratory order that the claimants have expended an approximate sum of EC\$590,376.84 for the construction, maintenance, furnishing and other work on the dwelling house situate on the lot of land at Fort Jeudy aforesaid;
- (11) An order that the said house be valued and the defendants forthwith pay the claimants for their share and or interest in the dwelling house on the lot of land situate at Fort Jeudy aforesaid, as a matter of equity; and or of constructive trust; and or of proprietary estoppel; and or of unjust enrichment;

- (12) An order pursuant to section 241 of the Act for the appointment of a Receiver-Manager of the Company to manage and secure the assets thereof in accordance with the order of the court;
- (13) An order pursuant to section 241 of the Act directing the Defendant to purchase the value of the shares held by the claimants or in the alternative and order pursuant to section 377 of the Act for the winding up of the said company;
- (14) An order pursuant to section 241 of the Act directing the defendant within a time specified by the court to produce to the court and the claimants financial statements in the form required by section 149 of the Act or an accounting in such other form as the court may determine for the period from the incorporation of the company to present;
- (15) An order pursuant to section 244 of the Act restraining the defendant from calling or holding a meeting of shareholders or paying off any dividends or disposing any of the company's assets before the rectification sought in paragraph (5) above;
- (16) An order pursuant to section 518 of the Act for an investigation of the company from its incorporation to present;
- (17) Such further or other relief as this Honourable Courts deems fit;
- (18) Costs.

Case for the Pauligs

Agreement to do business with Lutz

- [8] The Pauligs claim that in or about the year 1996, they formed an agreement with Lutz and Eva to purchase property in Grenada at Petit Calivigny in Woburn in the parish of Saint George measuring one acre three roods and 23 poles. The agreement contemplated that the Pauligs would purchase half of the value of the land from the Kachelriess for the sum

of DM 35,000.00. This agreement was made before a Notary Public, Dr. Thomas Feldmeier, in Germany.

[9] In 1997, the Pauligs, Eva and Lutz formed the company "Palm Trees Immo Ltd", a limited liability company with registered office at Fort Jeudy. The parties were made directors and shareholders of the company each holding a 25% share interest in same. The property at Petit Calivigny was purchased for the purpose of building cottages for sale and/or rent. However, the Pauligs state that this proved to be too costly and the property was therefore sold for \$400,000.00. After the sale was completed, it was discovered that the vendor of the Petit Calivigny property, Mary Delves did not have the authority to sell the property. The purchaser sued and was repaid the purchase price. In June 2003, the company obtained a loan of \$500,000.00 to repay the purchaser. The Pauligs states that they contributed to the mortgage payments to repay the loan.

[10] In relation to the Hope Vale property, the Pauligs state that the land was purchased by the company with financing from themselves and the Kachelriess. The property was sold in lots to locals who paid the purchase price by monthly payments with no interest.

Fort Jeudy property

[11] The company purchased the property at Fort Jeudy for the purpose of constructing a townhouse for two families: the Pauligs and the Kachelriess. A plan was drawn up and the work on the house commenced. The construction of the house was financed from the sale of the lots at the Hope Vale property. After its completion, both families moved in and shared a wonderful relationship over the years.

[12] The finances of the company were kept by Lutz from the commencement of the company to the date of his death. An account was set up at Scotia Bank in the name of the company and the documents for the account were signed by the Pauligs and the Kachelriess in their capacities as directors of the company. Hans Paulig explains that occasionally he and Lutz went through the record book and verified the accounting information, including all income and expenditure of the company.

[13] The Pauligs assert that all expenses of the company and the Fort Jeudy property were shared equally between the couples. They deposited monies into the company's account for the maintenance, general upkeep to pay utility bills all of which were recorded in the book. The Pauligs also state that they sent two wire transfers in the sum of DM 20,000.00 to the company and also made cash payments to Lutz for the company. In total, the Pauligs indicate that they expended the sum of EC\$590,376.84 for the acquisition, development, maintenance and upkeep of the Fort Jeudy property.

[14] After Lutz died in 2010, the Pauligs claim that the relationship between the parties deteriorated. Between 2013 and 2015 various pieces of correspondences by way of letters and emails were exchanged between the parties concerning the Pauligs' removal as directors of the company, access to the book of records and discrepancies in the financial information recorded in the book since Lutz's death.

[15] The Pauligs state that they left for Germany on 4th April 2015. They explain that they received letter dated 18th August 2015 from Eva, in which letter Eva asserted legal title over the Fort Jeudy property. The letter also sought to terminate their purported tenancy. On their return to Grenada on 16th September 2015 they were denied access to the Fort Jeudy property. They were able to regain entry into the property on 29th September 2015 and thereafter they initiated these proceedings seeking injunctive relief, declaratory orders and other reliefs.

Case for the Defendants

[16] Eva Kachelriess-Aban (Eva) says that Lutz was a successful businessman who owned a company "Kuester GmbH" since 1988 and several other businesses in Germany and Grenada, including "Lisa's" jewellery store. In January 1995, Eva, Lutz and the Pauligs met on vacation in Jamaica and became good friends. Eva describes Lutz as a very generous person who entertained guests.

[17] In December 1995, The Kachelriess visited Grenada and stayed for six weeks. Lutz saw business potential in Grenada and on the last day of their vacation, 22nd January 1996, he purchased a lot of land at situate at Petit Calivigny from Mary Delves for EC\$80,000.00.

He signed an agreement with RE/MAX Grenada for the sale and a 10% deposit was paid immediately to RE/MAX. The balance of the purchase price was paid via Mr. Raymond Anthony, the lawyer who they instructed to assist with the purchase of the land.

[18] The Kachelriess met with a Notary Public in Germany on 16th October 1996 because Lutz intended to sell half of Calivigny property to the Pauligs. A document was drawn up which stated that all necessary documents had to be signed in Grenada. It was agreed that the Pauligs would purchase a half share of the Calivigny property for DM 35,000 (German Marks). The agreement provided that once the monies were paid, then half of the property should be conveyed to the Pauligs. All the necessary paperwork had to be signed in Grenada according to its laws. Eva says that to her knowledge the monies were never paid by either Marlen or Hans. Further, she states that she never saw any receipt for the transaction. She says that Lutz managed all of the finances and administration. She further explains that Lutz would have told her if the Pauligs ever paid the purchase price for Calivigny.

[19] Lisa's Limited was registered in Grenada in 1996 with its first jewellery store on Grenville Street. The stock was sent from Germany and was valued at EC\$1 million. The company, Palm Trees Immo Ltd was registered in 1997, and the property at Petit Calivigny was transferred from Lutz to it. On 2nd August 1999, the Kachelriess moved to Grenada and applied for and were granted permanent residence on 6th December 1999. Subsequent to their arrival, the Kachelriess decided to develop the land in Hope Vale. Eva says that they arranged for the land to be subdivided in 15 lots, built a road, and added water and electricity connections. The lots were sold on a payment to local Grenadians and after placing one advertisement in the local newspaper all the lots were sold within a short time.

[20] Eva says that she and Lutz purchased Lot 22 in Fort Jeudy In February 2000. RE/MAX was the sales agent. The Fort Jeudy property was purchased in the name of Palm Trees Immo Ltd. and the purchase price was paid out of the Kachelriess' private account. Eva avers that the Pauligs came to visit Grenada twice per year. They expressed their wish to retire soon and spend a longer time in Grenada. The Kachelriess decide to build one house at Fort Jeudy with four bedrooms. The idea was that part of the house could be

separated into a self-contained apartment to accommodate the Pauligs during their visits to Grenada.

[21] On 10th December 2000, the Kachelriess commenced construction of the house at the Fort Jeudy property. Eva testified that they supervised the construction with the assistance of a foreman hired from a company called Modern Design. During the nine months of construction, the Kachelriess visited the site twice per day - Monday to Friday. They transported the workers in the morning and evening and paid them every Friday. They supplied all materials including blocks, nails, screws, cement, steel bar, among other things. During the weekend, the Kachelriess would attend at the property and water the concrete slabs. Eva explains that the monies to construct the house were taken from income earned from the Hope Vale and Petit Calivigny projects and from Lisa's Limited.

[22] With regard to the Petit Calivigny project, the Kachelriess planned to develop the land into a holiday resort. Plans were designed but the project never materialised. Eva states that Mrs. Hyacinth McBarnette from RE/MAX assisted them to find an investor who wanted to build a beachfront property for a holiday resort. In April 2001, the property was to sold Karin Grime and Klaus Weinmuller for \$400,000.00. In 2002, a search from the Attorneys for Klaus Weinmuller, Wilkinson, Wilkinson & Wilkinson revealed that Mary Delves was not the rightful owner of the Petit Calivigny property.

[23] Eva accepts that the Kachelriess received €50,000.00 euros approximately EC\$145,000.00 from the Pauligs. She testifies that Lutz applied by way of Palm Trees Immo Ltd. for a loan in the sum of \$500,000.00 from Scotia Bank. The loan was to be repaid by monthly instalments of \$4,167.00 together with interest over a period of 10 years. In order to qualify for the loan, they had to produce financial statements. Therefore, the parties retained W.R. Agostini to prepare financial statements for a period of 39 months ending 31st March 2003. The annual return for the company was filed by W.R. Agostini in March 2005 and it showed that no shares were issued by the company. In 2008, Lisa's Limited paid off the remaining balance of the loan in the sum of \$250,000.00

through income generated from Lisa's Limited over the Christmas seasons in December 2004, 2005, 2006 and 2007.

[24] Between 2002 and 2009, Eva states that the Kachelriess lived at the Fort Jeudy property. The Pauligs continued their visits during the above period. As part of the Kachelriess hospitality they allowed the Pauligs access to part of the house. The parties agree that the Pauligs would stay at the property during the summer vacation and that they would be charged a rental fee of half of the expenses incurred, which was approximately EC\$5,000.00. The Pauligs had full use of the Kachelriess' car until they decided to transfer a 3 door Suzuki which was owned by Lisa's Limited to Palm Trees Immo Ltd for their use.

[25] In 2009, Lutz fell ill and had to travel to Germany for medical treatment to fight cancer. Unfortunately, Lutz died on 20th May 2010. During the year 2010, Eva explains that it was extremely difficult for her having lost her husband and faced with the responsibility of managing two companies — Lisa's Limited and Palm Trees Immo Ltd.

[26] She met the second defendant, William Aban in 2010 and the couple married in May 2012. Thereafter, Eva says that her relationship with the Pauligs broke down. The Pauligs refused to fulfil their financial obligations to Palm Trees Immo Ltd. Therefore, Eva decided to separate the Grenlec and Nawasa bills by installing separate meters. Eva explains that she sent a statement of expense to the Pauligs every year since Lutz died. She claims that notwithstanding receiving the statements, the Pauligs have not paid and the outstanding balance is now EC\$108,000.00.

[27] Eva testifies that in early 2015 she discovered that the Fort Jeudy property was listed for sale with Coldwell Bankers. Eva and the second defendant, William Aban, made a search at the Registrar's office (Company Registry) which revealed that Lutz was the founder of Palm Trees Immo Ltd. and only one share was issued to run the company. Eva expressed the view that now that Lutz has died, she is the only legal beneficiary. Eva goes on to state that when she discovered that the Pauligs attempted to sell the property without her permission, she sought legal advice from Wilkinson, Wilkinson & Wilkinson who advised

her to replace the Pauligs as Directors of Palm Trees Immo Ltd. and to appoint William Aban, her husband as director.

Issues

[28] The following issues are to be determined:

- (1) Whether the Pauligs and the defendants share a beneficial interest in the Fort Jeudy property held in the name of the company. If yes, what is the extent of the shares held by each side to the property?
- (2) Whether the decisions or actions taken by Eva to remove the Pauligs as directors and to appoint William Aban as a director in the company were lawful.
- (3) Whether in the circumstances it is just and equitable to wind-up the company.

Applicable Legal Principles

[29] The legal interest in the subject matter of this claim, the Fort Jeudy property with dwelling house thereon, is recorded and registered in the name of the company, Palm Trees Immo Ltd. However, the parties dispute whether the company holds the property on trust for both the Pauligs and Kachelriess jointly or for either party solely. The Pauligs' case is that they are entitled to a fifty percent beneficial interest in the property by virtue of their arrangement with Lutz along with their contributions to acquisition and build-up of the property held by the company. Conversely, the Kachelriess' case is that they are entitled to the entire beneficial interest in the property. If either of the parties is able to establish that the property was held on trust for them so as to give them a beneficial interest therein then, the question that remains is the extent of that share or interest having regard to the circumstances.

Constructive trust

[30] Baroness Hale as she then was in **Stack v Dowden**² sought to bring consistency in the approach to the starting point taken by courts, when determining a claim for beneficial ownership in property held jointly or in sole the name of another. Baroness Hale stated:

“Just as the starting point where there is sole legal ownership is sole beneficial ownership, the starting point where there is joint legal ownership is joint beneficial ownership. The onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership. So in sole ownership cases it is upon the non-owner to show that he has any interest at all”³. (Underlining supplied)

[31] Lord Hope of Craighead in agreeing with the approach taken by Baroness Hale in establishing a starting point for joint and sole ownership cases further elucidated:

“I think that consistency is to be found by deciding where the onus lies if a party wishes to show that the beneficial ownership is different from the legal ownership. I agree with Baroness Hale that this is achieved by taking sole beneficial ownership as the starting point in the first case and by taking joint beneficial ownership as the starting point in the other. In this context joint beneficial ownership means that the shares are presumed to be divided between the beneficial owners equally. So in a case of sole legal ownership the onus is on the party who wishes to show that he has any beneficial interest at all, and if so what that interest is.” (Underlining supplied)

[32] Further, Baroness Hale in adopting the approach to taken by Chadwick LJ in the English Court of Appeal case of **Oxley v Hiscock**⁴, where property is registered in the name of a sole owner stated:

“Oxley v Hiscock was, of course, a different case from this. The property had been conveyed into the sole name of one of the cohabitants. The claimant had first to surmount the hurdle of showing that she had any beneficial interest at all, before showing exactly what that interest was. The first could readily be inferred from the fact that each party had made some kind of financial contribution towards the purchase. As to the second, Chadwick LJ said this (at [69]):

‘. . . in many such cases, the answer will be provided by evidence of what they said and did at the time of the acquisition. But, in a case where there

² [2007] 2 All ER 929

³ [2007] 2 All ER 929 at para. 56

⁴ [2004] EWCA Civ 546

is no evidence of any discussion between them as to the amount of the share which each was to have—and even in a case where the evidence is that there was no discussion on that point—the question still requires an answer. It must now be accepted that (at least in this court and below) the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property. And, in that context, “the whole course of dealing between them in relation to the property” includes the arrangements which they make from time to time in order to meet the outgoings (for example, mortgage contributions, council tax and utilities, repairs, insurance and housekeeping) which have to be met if they are to live in the property as their home.”⁵ (Underlining supplied)

Resulting trusts

[33] With regard to the effect of purchase in or transfer into another's name, the learned authors of Halsbury's Laws of England elucidated:

Where a person purchases property in the name of another or in the name of himself and another jointly, or gratuitously transfers property to another or himself and another jointly, then, as a rule, unless there is some further indication of an intention at the time to benefit the other person or some presumption of such an intention, the property is deemed in equity to be held on a resulting trust for the purchaser or transferor.⁶ (Underlining supplied)

Discussion

Common intention among the parties to invest in property

[34] The parties both accept that sometime in 1996, the two sides held discussions concerning acquiring property in Grenada. This discussion formed the basis of an agreement dated 16th October 1996 between the Pauligs and Lutz, where the parties agreed that the Pauligs would purchase half of the Petit Calivigny property from Lutz at a purchase price of DM 35,000.00. The Pauligs maintain that they provided the consideration of DM 35,000.00 to Lutz pursuant to the agreement. The Pauligs rely on a cash transaction from Deutsche Bank dated 11th January 1999 paid to Lutz Kachelriess in the sum of USD\$28,900.00.

⁵ Stack v Dowden [2007] 2 All ER 929 at para. 61 per Baroness Hale

⁶ Halsbury's Laws of England: Trust and Powers Vol 98 (2019) para. 139

[35] Conversely, the defendants declare that this agreement was not properly executed since the consideration of DM 35,000.00 was never received by Lutz. Eva⁷ states that ***“to my understanding and knowledge the money was never paid by Marlen or Hans. I know this as I never saw a receipt for this money. Lutz did all of the finances and administration. If this money had been paid Lutz would have told me.”*** Strikingly, Eva accepts in her evidence that Lutz managed all of the finances and the administration of the company. Given this evidence one can reasonably conclude that Eva may not have had sight of the many receipts, transactions and other financial documents since she accepts that Lutz controlled and managed those aspects of the company. Therefore, the finances and administration of the company would not have been within her own knowledge. Indeed, she could not confirm for a fact whether she saw evidence that the Pauligs paid the purchase price for the Calivigny property but accepts that she would have been told by Lutz if they did pay.

[36] The court notes that the agreement between the parties did not provide for a completion date for the purchase monies to be paid by the Pauligs. While the purchase monies were paid in January 1999, some 26 months after the agreement was made, this was hardly surprising or incongruous. As would appear later in this judgment, the course of dealings between the parties does not expose a sterile business partnership. Rather, the evidence seems to support the position explained by the Pauligs that the two sides retained a close friendship and conducted their business affairs in an amiable, fluid and flexible manner. Instructively, the Calivigny property was the only real estate venture in existence at the time of the alleged payment in January 1999. This large lump sum of USD\$28,900.00 could not have been paid for the acquisition of the Hope Vale and Fort Jeudy properties since those properties were purchased in August 1999 and May 2000 respectively. Accordingly, I accord greater weight to the Pauligs’ explanation that the USD\$28,900.00 which was equivalent to 50,020.78 DM was sent to Lutz on 11th January 1999 in performance of the agreement between the parties that they would purchase half of the Calivigny property. I prefer this evidence to Eva’s unverified assertions that the purchase monies for the Petit Calivigny property were never received from the Pauligs.

⁷ Witness statement of Eva Kachelriess-Aban filed on 28th November 2016 at paras 9-10

[37] On 28th April 1997, the company was incorporated by Raymond Anthony, an attorney-at-law, who prepared the articles of incorporation dated 24th April 1997. Mr. Anthony also acted as the solicitor for the company. On 12th February 1998, Lutz conveyed all of his interest in the Petit Calivigny property to the company. Thereafter, the company held its first meeting on 18th February 1998 with the Pauligs being present as Managers/Directors; Lutz as President/Director, Mr. Raymond Anthony as Secretary/Director and Eva as Consultant/Director.

[38] On 19th February 1998, the Pauligs and the Kachelriess opened a bank account at the Bank of Nova Scotia which account was set up for the company. I pause to observe that the Pauligs' paid the USD \$28,900.00 after the company was formed, the Calivigny property was transferred to the company and a director's meeting was held. All of this suggests a concrete number of steps in furtherance of the business relationship to jointly acquire and develop property as asserted by the Pauligs. It is clear on the evidence that the parties did business together and incorporated the company to execute their business plans and ideas.

[39] On 31st December 1999, the company entered into an agreement with Klaus Weinmuller to sell the Petit Calivigny property for EC\$400,000.00. The Pauligs assert that the proceeds from the sale of the Petit Calivigny property was equally divided among the parties.

Source of loan repayments in relation to the Petit Calivigny property

[40] On 16th June 2003, the company borrowed the sum of EC\$500,000.00 from the Bank of Nova Scotia to repay Klaus Weinmuller after the sale of the Petit Calivigny property fell through. The Pauligs plead that they assisted with the repayments towards the loan. The defendants deny this and rejoin that the loan was repaid using funds from the Lisa's Limited and from the company's account. In support of their contention, the Pauligs exhibited a document dated 8th March 2003 to the statement of claim⁸ with the heading "**SACHLAGE**". The document which is signed by the Kachelriess appears to be written in German. It recites the repayment of the monies to Klaus Weinmuller. At the foot of the

⁸ Exhibit "L6" in the Statement of Claim

document it reads in English “***we acknowledge the receive of euro 50,000, (fifteen thousand) in cash.***”

[41] At paragraph 24 of her witness statement Eva admits that she and Lutz received the sum of €50,000.00 from the Pauligs, but does not state how the monies were used or whether they were applied in relation to the loan to repay Klaus Weinmuller. The defendants exhibited a document labelled “***Guarantee to the Bank of Nova Scotia***” dated 4th June 2003⁹, in which Lutz and Eva executed a guarantee for the loan to the company. At the foot of the document, it states “***NB: Signature of this Guarantee involves personal liability***”. Further, the defendants exhibited in their list of documents¹⁰ a schedule of payments concerning on the loan account from 11th June 2003 to 28th December 2007. As at 28th December 2007, the remaining balance on the loan stood at EC\$199,984.00.

[42] The court notes that large lump sums were applied to the loan on 22nd December 2004 in the sum of \$16,668.00; \$50,004.00 on 28th December 2004; \$50,004.00 on 30th December 2005; \$25,002.00 on 29th December 2006 and \$100,000.00 on 28th December 2007. This evidence corroborates the defendants’ contentions that large sums were paid during the Christmas seasons from 2004 to 2007. But this evidence is not conclusive of the contention that the Pauligs did not pay moneys towards this venture. I accept that the evidence before this court is not clear as to aggregate sums each party contributed towards the repayment of the loan. But like I have stated above, much of the dealings among the parties was conducted in a way that reflected the apparently close friendship rather than arm’s length, sterile business relations among ordinary business persons. As a consequence, I accept the Pauligs’ assertion that the 50,000 Euros was paid by the Pauligs towards liquidating the loan obtained by the company. Eva accepts that this money was paid by the Pauligs but does not accept that it was paid for the sums due under the loan.

Source of funds for Hope Vale property

⁹ List of Documents filed 18th October 2016 at page 39-41 (Trial bundle 3B)

¹⁰ Ibid at pages 76-77 (Trial Bundle 3B)

[43] With regard to the purchase of the Hope Vale property, there is no clear or express common intention on the facts of this case as to how the parties were to hold the beneficial interest in the property. The property was purchased from Charles Lennox Thompson in the name of the company for the purchase price of \$265,000.00 as recited in the Deed of Conveyance dated 9th August 1999. There is no pleading from the Pauligs as to the specific amount of monies they contributed to the acquisition of the property. The Pauligs' case is that the Hope Vale property was purchased by the company with financing from themselves and the Kachelriess.

[44] The Pauligs rely on a letter dated 27th July 2000¹¹ written by Hans Paulig addressed to the National Commercial Bank of Grenada Ltd instructing the bank to transfer the sum of \$70,000.00 to the account of the company on 3rd August 2000. The Pauligs stress that this money represented their contribution to the purchase of the Hope Vale property. Counsel for the Pauligs accepts that the property was purchased in 1999 and the monies were transferred to the company in 2000. However counsel says that this merely reflects the flexible way in which the directors handled the business of the company.

[45] In response, the defendants testify that the Kachelriess purchased the Hope Vale property utilizing financing from Lutz's personal account and with funds provided by Eva. In support of their contention, the defendants exhibited in their list of documents¹² a manager's cheque dated 15th October 1999 from the National Commercial Bank in Grenada to Raymond Anthony in the sum of \$228,000.00. The manager's cheque reveals that the remitters as Lutz and Eva.

[46] The defendants suggest that this \$70,000.00 and much of the documentary evidence on payment of money by the Pauligs exposes payments made towards the Pauligs' obligations to pay rent and share in the maintenance costs for Fort Jeudy. However, I fail to see how this particular payment of \$70,000.00 could be made for rental and maintenance of Fort Jeudy when this payment was made in July 2000. Fort Jeudy was acquired in May 2000. The defendants state that the house was thereafter constructed

¹¹ Page 57 of the Trial Bundle 3 filed on 15th January 2021

¹² Page 85 (Trial Bundle 3B) filed 18th October 2016

over a period of about 9 months. It could hardly be the case that in July 2000 the Pauligs were paying for rent and maintenance of a house that was not in existence at that time.

[47] Accordingly, I again accept the Pauligs' documentary evidence in support of their contention that they contributed the sum of \$70,000.00 to the company for the purchase of the Hope Vale property. While those monies were paid to the company after the property had already been purchased, I accept the Pauligs' contention and I am satisfied that this was an arrangement to which the parties were accustomed having regard to the almost familial way in which they conducted their business relationship. In the premises, I do not accept the defendants' contention that they purchased the property solely from their own funds, but I accept that Eva and Lutz received the contribution of \$70,000.00 from the Pauligs towards the purchase of the property.

Whether the claimants and the defendants have a beneficial interest in the property at Fort Jeudy owned by the company. If yes, what is the extent of their beneficial interest?

[48] Counsel for the Pauligs, Ms. Hazel Hopkin, submits that a company is vested with all the rights, powers and privileges of a natural person and can own real or personal property and make claims in respect of such property¹³. Counsel submits that a resulting trust arises or is presumed to arise in the context where one person or party to a transaction pays money toward the purchase or acquisition of a thing or property, and the title to that thing or property is made solely in the name of the other person or party to the transaction¹⁴.

[49] Counsel refers the court to the principles enunciated in the case of **Westdeutsche Landesbank Girozentrale v Islington LBC**¹⁵, where the court stated that there is a presumption that money or property is held on trust for a person who made a voluntary payment for the purchase of property, but it was vested in the sole name of another.

¹³ Section 17 of the Companies Act Cap 58A of the 2010 Continuous Revised Edition of the Laws of Grenada.

¹⁴ *Dyer v Dyer* [1775-1802] 2 All ER 205

¹⁵ [1996] AC 699

Further, there is a presumption that the person who made the voluntary payment to purchase the property did not intend it to be a gift. Counsel also relies on the resulting trust/ constructive trust principles elucidated by Lord Diplock in **Gissing v Gissing**¹⁶.

[50] Counsel for the Pauligs submits that at all material times there was an agreement among the parties that they would each hold 25% of the shares in the company. Counsel submits that the Pauligs were of the belief that any financial investments made in the company, including their contributions towards the Fort Jeudy property would ultimately accrue to a beneficial interest to them as shareholders. It is pursuant to this understanding and intention that the Pauligs expended sums totalling \$590,376.84 in the company. The Pauligs invested monies in the company since the year 1999 on the understanding that they were 2 of the 4 shareholders therein.

[51] Counsel states that the letter written by Eva on 9th May 2014 to the Companies Registrar and the letter that she wrote to the Pauligs on 23rd March 2013 expose a clear intention that the Pauligs were intended to acquire shares in the company. Counsel urges the court to find that either the purpose of the investment was to acquire shares so that upon the failure of the company to issue shares the monies returned to the Pauligs or on resulting trust. Counsel urges the court to hold that the intention of the Pauligs was clearly an acquisition of shares and substantial sums of monies had been paid by them. As such they were entitled to proportionate shares in the company in accordance with their investment.

[52] Counsel for the defendants in her closing submissions filed on 13th May 2021 says that in the instant matter, the legal estate in the Fort Jeudy property lies in the company and not in the individual defendants. It follows that the Pauligs will only be able to maintain an action for constructive or resulting trust if they can prove that:

- (1) The company, prior to the acquisition, entered into a transaction or venture with the Pauligs in connection with the Fort Jeudy property subsequent to which it (the company) has so conducted itself that it would be inequitable to allow the

¹⁶ [1970] 2 All Er 780

company to deny to the *cestui qui* trust¹⁷ (the Pauligs) a beneficial interest in the land acquired.

(2) Even though the legal title to the Fort Jeudy property resided in the company, it holds in trust for the individual defendants and the court must then pierce the corporate veil. Counsel relies on the well-known authority of **Salomon v Salomon & Co. Ltd**¹⁸ to support her arguments that the company is a separate legal entity from its incorporators and shareholders.

(3) In both scenarios whether in an action in constructive or resulting trust, the onus is on the Pauligs to show that they have beneficial interest in the property held by the company.

[53] Counsel for the defendants submits that the company was incorporated in 1997, several years before the Fort Jeudy property was purchased in February 2000. Therefore, it ought not to be reasonably concluded that the company had been interposed so that the separate legal personality of the company will defeat the rights of the Pauligs or frustrate any entitlement of theirs.

[54] Further, counsel says it is the defendants' case that there can be no dispute that there are no shareholders of the company and that the Pauligs cannot sustain a claim in constructive or resulting trust in respect of the Fort Jeudy property. The more logical convincing theory is that the Pauligs were allowed to continue to visit, occupy and share the amenities of the Fort Jeudy property once it was completed at a fee to be paid equally between themselves and the defendants and not to own a beneficial interest in the same.

[55] With regard to Eva's letter to the Pauligs informing them of a fifty percent (50%) share, counsel submits that Eva simply misspoke as a lay person not being legally advised. Counsel observes that Eva said that she too owned shares in the company when in fact, she held no such shares. Counsel says the fact that the Pauligs and the Kachelriess

¹⁷ *Stack v Dowden* [2007] UKHL 17

¹⁸ [1897] AC 22

shared half of the physical space in the house at Fort Jeudy does not make them shareholders in the company.

Analysis

Source of funds for the purchase and construction of dwelling house at Fort Jeudy

[56] Again on the facts of this case, there is no clear agreement or common intention written or expressed that the parties would share the Fort Jeudy property beneficially to give rise to a trust. However, in light of the long list of authorities, the court can infer a common intention by examining the conduct of the parties and have regard to their entire course of dealings in relation to the property and the company.

The Pauligs' contributions

[57] With regard to the source of the financing for the construction of the house on the Fort Jeudy property, the Pauligs claim that those monies came from the sale of the lots at the Hope Vale property. The Pauligs also aver that they contributed to the acquisition development, maintenance and payment of the expenses, including utility bills of the Fort Jeudy property. In total, the Pauligs maintain that they expended the sum of \$590,376.84. The documentary evidence in support of these transactions are found at pages 56-116 of the Claimants' List of Documents (Trial Bundle 3).

[58] The following documentary evidence, including payments made by the Pauligs in relation to the Fort Jeudy property are illuminating:

- (1) Copy of a letter dated 9th August 2001 from Deutsche Bank in Germany written to Mr. Kingsley Ashby, Commercial Banking Manager of the Bank of Nova Scotia confirming that it wired the sum of USD \$35,000.00 to the account of Palm Trees Immo Ltd.
- (2) Copy of a statement or document written in German from Deutsche Bank dated 17th July 2001 which shows a wire transfer in the sum of EC\$ 80,000.00 to the account of Palm Trees Immo Ltd at Scotia Bank as the beneficiary.

- (3) Copy Another document written in German from Deutsche Bank dated 28th June 2001 which appears to wire the sum of EC\$ 80,000.00 to the account of Palm Trees Immo Ltd at the National Commercial Bank in Grenada.
- (4) Copy of an undated letter¹⁹, signed by “Eva & Lutz” originally written in German, but translated into English by the Pauligs. The lines 1 to 3 of translation of the letter read “***please find a proposed layout for a possible common house in Fort Jeudy. With this way of construction we could save some money...***”
- (5) Copy of a letter dated 26th April 2002 written in German but translated into by the Pauligs.
- (6) Copy of a document dated 21st June 2005 seemingly signed by the deceased, Lutz Kachelriess, acknowledging the receipt of €5,000.00 euros in cash. The court notes that this receipt which is written in German and English does not state from whom the monies were received from or for what purpose.
- (7) Copy of Letter dated 23rd March 2013 from Eva to the Pauligs which reads “***I (Eva Kachelriess) would like to set the records straight regards Palm Trees Immo Ltd: 1. Palm Trees Immo Ltd is a Real Estate company in the island of Grenada, West Indies. 2. It has four (4) shareholders with equal shares: Mrs. Marlen Paulig 25%, Mr. Hans Paulig 25%, Mr. Lutz Kachelriess 25% and Mrs. Eva Kachelriess 25%. 3. Mr. Lutz Kachelriess passed away in May 2010, therefore I (Eva Kachelriess) is no the holder of 50% shares. Palm Trees Immo Limited bought the property known as lot No. 22 in Fort Jeudy and built a bungalow (Townhouse style) – a large house built for 2 families separated by a wall – one for Mr. and Mrs. Hans and Marlen Paulig and the other for Mr. and Mrs. Lutz and Eva Kachelriess.***”

The Defendants' contributions

¹⁹ Claimants' Certificate of exhibits filed 7th December 2015 (pages 219-220 of Trial Bundle)

[59] It is the defendants' contentions that the Pauligs have no interest in the Fort Jeudy property; did not contribute to the acquisition of the land or the construction of the house thereon. The Pauligs did not contribute to the servicing of the mortgage which partly financed the construction of the house built on the land. All finances used in the acquisition and development of the Fort Jeudy property were derived from Eva and Lutz and/or from the businesses owned by them. In relation to the construction of the house, the defendants' position is that Lutz and Eva paid for the materials and the costs of labour for the project.

[60] The following documentary evidence has been put forward by the defendants in relation to the Fort Jeudy property²⁰.

- (1) Copy of an Agreement for sale dated 2nd February 2000 between Lennox Archibald and Palm Trees Immo Ltd specifying the purchase price of the \$120,000.00 and the completion date of 2nd May 2000, among other terms.
- (2) Copy of a Deed of Conveyance dated 2nd May 2000 between Lennox Archibald and Palm Trees Limited.
- (3) Copy of a Manager's Cheque dated 2nd May 2000 from the National Commercial Bank of Grenada Limited to Raymond Anthony in the sum of \$108,000.00 from Lutz and Eva.
- (4) Copy of a receipt dated 8th February 2000 from REMAX Grenada Limited showing that the sum of \$12,000.00 was received from Palm Trees Immo Limited for the deposit on Lot # 22 Fort Jeudy.
- (5) Copy of a receipt dated 10th October 2001 from Aluminium Suppliers of the Republic of Trinidad and Tobago to Eva Kachelriess in the sum of \$US1, 665.00 as deposit for sliding window.

²⁰ Defendants' List of Documents filed 18th October 2016 pages 106-122

- (6) Copy of purchaser's receipt dated 17th January 2002 and in the sum of TTD\$30,000.00 from Lisa's Limited through its bank, National Commercial Bank for cheque payable to Delta Glass Limited as payment for supplies.
- (7) Copy of invoice from Delta Glass Limited to Eva Kachelriess in the sum of USD\$10,000.00 as payment for two crates of aluminium shopfront units and doors.
- (8) Copy of invoice dated 24th June 2003 from Bauhaus (the home store) to Palm Trees Immo Ltd in case of Lutz and Eva Kachelriess for balcony boards.
- (9) Copy of invoice dated 24th June 2003 from Bauhaus (the home store) to Palm Trees Immo Ltd. in care of Lutz and Eva Kachelriess for floor tiles.
- (10) Copies of invoices dated 6th July 2003 from Bauhaus (the home store) to Palm Trees Immo Ltd. in care of Lutz and Eva Kachelriess for household goods and supplies.
- (11) Copy of invoice dated 9th July 2003 from Bauhaus (the home store) to Palm Trees Immo Ltd in care of Lutz and Eva Kachelriess for boards.

[61] Counsel for the defendants says that before the court can declare that the company held the property on trust for the defendants, it must first "pierce the corporate veil". However, I do not see the relevance of the **Salomon v Salomon** principles as there is no demur in this case that the company holds the legal title to the Fort Jeudy property. What is at issue whether or not it holds the property on trust for the Pauligs and/ or the Kachelriess. If it does so for either of them, then what is the extent of their beneficial interest? The corporate veil does not have to be pierced for these questions to be examined and answered.

[62] The discourse thus far in this case based on the evidence discussed above leads me to conclude the company was incorporated for the purpose of acquiring and investing in real estate in Grenada. Eva Kachelries says as much in her letter dated 23rd March 2013, where she stated that **“Palm Trees Immo Ltd. is a Real Estate company in the island of Grenada, West Indies”** Further, I am satisfied based on the discussion of the evidence thus far that there was a common intention that the Pauligs and the Kachelriess would acquire the land at Fort Jeudy and construct a dwelling house thereon to be shared by both families. There seems to be very little support for the defendants’ contrary view that the Pauligs were merely meant to rent two rooms at Fort Jeudy and pay sums towards rent and towards maintenance.

[63] What is the extent of the interest to be shared in the property? Again, that question is to be resolved by examining the course of dealings between the parties. The letter dated 23rd March 2013 is somewhat telling. In that letter Eva acknowledged that the Pauligs held a combined 50% stake in the company. Counsel for the defendants submits that Eva misspoke when she wrote that letter to the Pauligs. However, I am not convinced. This letter is further telling proof confirming the Pauligs’ position regarding the relationship between the parties, the purpose and use of the property and the manner in which the parties treated the extent of their interests therein. The defendants in their pleadings and evidence²¹ have admitted that the home was specifically designed to be shared by both families.

[64] In the undated letter²² from Lutz and Eva addressed to the Pauligs, it proposed a plan to **“save some money”** in construction costs by designing the house in a way that it can be used by two families. This letter further bolsters the Pauligs’ contentions that the acquisition of the land and construction of the dwelling house was a common and joint effort. Further, in the letter dated 26th April 2002²³, Eva and her husband acknowledged the receipt of \$40,000.00 from the Pauligs as payment for “the building”. The defendants therefore fail in their argument that there was no intention to share the property jointly and

²¹ Para. 6 of the Defence and para. 17 of Witness Statement of Eva Beate Kachelriess-Aban

²² Pages 219-220 of Trial Bundle (Certificate of Exhibits filed 7th December 2015)

²³ Supra pages 217-218 of Trial Bundle

in their attempt to explain that the Pauligs were mere tenants who were merely obligated to pay rent and pay towards the maintenance and upkeep of the property.

[65] More candidly, the defendants' posture cannot be maintained in light of the clear evidence that the Pauligs contributed substantial amounts to the company during the time of the acquisition of land and the construction of the house at Fort Jeudy. It is indeed the case that no shares were issued by the company but the letters written by Eva further bolsters my assessment that the parties in their dealings always intended and acted on the basis that the company held the property on trust for the Pauligs and Kachelriess as equal beneficial owners. I find therefore that the Pauligs are entitled to a 50% beneficial share in the Fort Jeudy property. Eva would be entitled to the other 50% beneficial share in the Fort Jeudy property in light of her inheriting Lutz's 25% share in the same.

Whether the decisions or actions taken by Eva Kachelriess to remove the Pauligs as directors and to add William Aban as a director in the company were unlawful.

[66] By way of notice dated 21st May 2015, Eva Kachelriess removed the Pauligs as directors of the company and appointed her husband, William Aban, the second defendant as a director. The main issue is whether those decisions were lawful. Counsel for the Pauligs states that it is not in issue whether the Pauligs were appointed as directors of the company. Counsel refers to the document titled "Notice of Change of Directors" which reveals that Eva and the Pauligs were appointed as directors of the company on 31st July 2001. Counsel submits that the company's by-laws provide the method for which the company could lawfully remove its directors. The relevant law on the termination and removal of the directors can be found at sections 66, 67, 69, 72, 73, and 74 of the Companies Act.

[67] In this claim, counsel argues that the defendants unilaterally removed the Pauligs as directors by way of notice dated 20th May 2015. Moreover, at no time was there a shareholders meeting to determine whether the Pauligs ought to have been removed from office. In any event, if there was such a meeting, the Pauligs were not notified of it. The

only proper way to remove the Pauligs from office was pursuant to their resignation, death or incapacity, since their tenure as directors was not limited by time.

[68] In light of the above, counsel submits that the defendants have not complied with the procedure set out in the Companies Act or in the company's by-laws. Therefore, counsel concludes that the Pauligs' removal as directors was at all times unlawful. It follows that Eva's appointment of William Aban's as director is ineffective in law, null and void. Counsel relies on the case of **Bridgette Rosemarie Neipp v Gloria Watt**²⁴ to support her arguments.

[69] Counsel for the defendants, Mrs. Mitchell, responds by submitting that the Pauligs, at all material times, were not directors of the company at the time of purchase of the properties at Calivigny, Hope Vale and Fort Jeudy. Accordingly, the Pauligs were not in position to act or execute any business on behalf of the company as Lutz controlled, operated and managed the company.

[70] Further, counsel explains that the Pauligs, at all material times, were resident in Germany and were never active directors in the company or took any active part in its affairs. Counsel argues that the Pauligs were not lawfully appointed directors since at the time of the filing of the articles of incorporation they were not named as directors in the Notice of Directors on the issuance of the Certificate of Incorporation.

[71] With regard to the removal of directors section 73 of the Companies Act provides:-

73. Removal of directors

- (1) Subject to section 71(g), the shareholders of a company may—
 - (a) by ordinary resolution at a special meeting, remove any director from office;
 - (b) where a director was elected for a term exceeding one year and is not up for re-election at an annual meeting, remove such director by ordinary resolution at that meeting.

²⁴ ANUHCv2005/0163

- (2) Where the holders of any class or series of shares of a company have an exclusive right to elect one or more directors, a director so elected may only be removed by an ordinary resolution at a meeting of the shareholders of that class or series of shares.
- (3) Subject to section 71(b) to (e), a vacancy created by the removal of a director may be filled at the meeting of the shareholders at which the director is removed, or, if the vacancy is not so filled, it may be filled pursuant to section 75. (Underlining supplied)

[72] Clauses 4.3 and 11 of the company's by-laws provide:

4.3. Election

"Directors shall be elected by the shareholders on a show of hands unless a ballot is demanded in which case such election shall be by ballot."

11. Appointment of officers

"The directors shall as often as may be required appoint a Secretary and, if deemed advisable, may as often as may be required appoint any or all of the following officers: a Chairman, a Deputy Chairman, a Managing Director, a President, one or more Vice-Presidents, a Treasurer, one or more Assistant Secretaries or one or more Assistant Treasurers...."

Analysis

[73] Counsel for the defendant says the Pauligs were unlawfully appointed as directors since they were not named as directors at the time of filing of the articles of incorporation. On the evidence before this court, at the time of the filing of the said articles of incorporation, Mr. Raymond Anthony, the then solicitor for the company was appointed as the sole director²⁵. I observe that on the 19th September 2000, the company filed a document at the Registry of Companies outlining that at the first meeting²⁶ of the directors of the company held at Grenville Street, St. George's on 18th February 1998 at 3:00 clock in the afternoon, Lutz, Eva, the Pauligs and Raymond Anthony accepted office as directors/officers of the

²⁵ Page 35 of Trial Bundle 1A

²⁶ Page 127 of Trial Bundle 3B

company. By Notice of Change of Directors dated 20th May 2015, it states that Pauligs and Eva were indeed appointed as directors on 31st July 2001. The evidence before this court reveals that the Pauligs together with Eva and Lutz were appointed subsequent to the filing of the articles of incorporation.

[74] There is no contestation of the fact that Eva removed the Pauligs as directors of the company and appointed the second defendant, William Aban as a director in their stead. Eva accepts that much at paragraph 39 of her witness statement²⁷. Her main justification for the Pauligs' removal was their attempt to sell the property without her permission. She asserts that she was advised by previous attorneys to remove the Pauligs as directors of the company and to appoint her husband, the second defendant, William Aban as a director.

[75] I have already alluded to the fact that no shares were ever issued or allotted in the company notwithstanding the parties' belief that they were shareholders of that entity. The annual returns²⁸ of the company as at 31st March 2002 reveal that no shares were allotted to the parties or anyone for that matter. Accordingly, there could not have been a meeting of shareholders of the company to vote on the removal of the Pauligs as directors since no shares were ever issued or allotted. There was no other legal basis pleaded or argued on which the Pauligs are said to have been replaced as directors. In the premises, I have no doubt that these actions taken by Eva were unlawful, null and void and of no effect. The Pauligs remain directors of the company until such time as they have removed themselves or are removed or deemed to have been removed in accordance with the provisions of the above cited provisions of the Companies Act and/or the by-laws of the company.

Whether in the circumstances it is just and equitable to wind-up the company.

[76] Counsel for the Pauligs submits that there is no set of circumstances that define the scope of the "*just and equitable*" ground for the winding up of a company, but it has been

²⁷ Witness Statement of Eva Beate Kachelriess-Aban filed on 28th November 2016

²⁸ Defendants' List of Documents filed 18th October 2016 at page 62 of Trial Bundle 3B

determined that this ground applies where the substratum of the company has gone.²⁹ Counsel relies on the Court of Appeal decision in **Wang Zhongyong et al v Union Zone Management Ltd**³⁰ and states that while the Court of Appeal did not attempt to establish an exhaustive list as to the application of the just and equitable ground, the court went on to find that for the equitable principles to apply there may be an association formed or continued on the basis of a personal relationship, an agreement or understanding that all or some of the shareholders shall participate in the conduct of the business or restriction upon the transfer of the members' interest in the company. Counsel in her submissions also referenced the authorities of **In Re Davis and Collett Limited**³¹; the learned authors in **Stair Memorial Encyclopaedia**³² and **Ebrahimi v Westbourne Galleries Ltd and Ors.**³³

[77] In this claim, counsel for the Pauligs contends that it is evident from the way the parties dealt with the company that it was akin to that of a partnership which was established on the basis of a friendship of mutual trust and confidence. The Pauligs contend that they are being unfairly treated and as such they wish to invoke the equitable jurisdiction of the court. The Pauligs complain that:

- (1) They have been unilaterally removed as directors of the company;
- (2) Eva and William Aban have taken control of the company and the Pauligs have been wilfully excluded from any dealings with that entity;
- (3) They were forcefully expelled from the Fort Jeudy property by Eva and William Aban;
- (4) Eva and William Aban have breached orders of the court;
- (5) They have no access to the financial status for the company despite investing heavily into the same.

[78] The Pauligs complain that they are not simply aggrieved by the management of the company, but their added disquiet is that their relationship as partners has been

²⁹ Halsbury's Laws of England (2017) Volume 16, at para. 360

³⁰ BVIHCMAP2013/0024 at para 2 of the head note.

³¹ [1935] Ch. 693

³² (6th edn) at para. 219

³³ [1973] AC 360

unilaterally terminated by Eva, who ousted them from the company. In the premises, the Pauligs conclude that the substratum on which the company was formed has been destroyed and it is just and equitable in all the circumstances to order that the company be wound-up.

[79] Counsel for the defendants submits that the Pauligs are claiming to be directors and investors of the company. However, she does not accept that they are eligible to present a petition for the winding-up of the company. Directors or former directors cannot present a petition for winding-up and it is beyond doubt that the Pauligs were never allotted and issued shares in the company. Further, counsel submits the Pauligs cannot claim that they are capable of being held liable to contribute to the assets of the company on it being wound-up. Counsel refers the court to sections 373, 377 and 379 of the Companies Act in support of her submissions.

[80] Additionally, counsel for the defendants submits that the Pauligs have not complied with Rules 27 and 32 of the Companies Winding-up Rules 1909 which is applicable to this jurisdiction³⁴. The Pauligs have also failed to advertise the petition 7 days before the hearing and to attend before the Registrar and satisfy her of the compliance with the winding-up rules pursuant to Rule 32. In closing, counsel submits that the Pauligs have not established that there is a *bonafide* dispute between themselves and the company. The alleged dispute is itself the subject of a separate high court civil suit which is vigorously defended. In any event, the Pauligs are not entitled to present the petition for winding-up of the company.

Analysis

[81] The main issue before this court is whether the Pauligs have made out a case for a winding-up of the company on the grounds that it is just and equitable. Counsel for the Pauligs referred the court to the landmark decision of the House of Lords in **Ebrahimi v Westbourne Galleries Ltd & Ors**³⁵, in which the court upheld the ruling of a trial judge in ordering a company to be wound-up where a director of a company was removed and

³⁴ Per *Actie J in Roger Keith Ver v Grenada Citizenship Development Limited* GDAHCV2019/0521

³⁵ [1972] 2 All ER 492

excluded from management of the company by the other two directors. Lord Wilberforce stated:

“It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence—this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business; (iii) restriction on the transfer of the members' interest in the company—so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.³⁶” (Underlining supplied)

[82] Lord Wilberforce’s dictum in **Ebrahimi** was adopted by the Privy Council in **Chu v Lau**,³⁷ an appeal from Territory of the Virgin Islands.

[83] The court’s power to wind-up a company on the ground that it is just and equitable to do so is a discretionary statutory remedy. The relevant provisions of the Companies Act are as follows:

373. Definition of contributory

The term “contributory” means every person liable to contribute to the assets of a company in the event of it being wound-up, and for the purposes of all proceedings for determining, and all proceedings prior to the final determination of the persons who are to be deemed contributories, includes any person alleged to be a contributory.

377. Circumstances in which company may be wound-up by court

³⁶ Ibid at page 500

³⁷ [2020] UKPC 24

A company may be wound-up by the Court if—

- (a)
- (b)
- (c)
- (d)
- (e) the Court is of the opinion that it is just and equitable that the company should be wound-up.

379. Petition for winding-up

- (1) An application to the court for the winding-up of a company shall be by petition presented, subject to the provisions of the section, either by—
 - (a) the company;
 - (b) a creditor, including a contingent or prospective creditor, of the company;
 - (c) a contributory; or
 - (d) the trustee in bankruptcy to, or personal representative of, a creditor or contributory,

380. Powers of court on hearing petition

- (1) On hearing a winding-up petition the court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it thinks fit, but the court shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.
- (2) Where the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound-up, the court, if it is of the opinion—
 - (a) that the petitioners are entitled to relief either by winding-up the company or by some other means; and
 - (b) that in the absence of any other remedy it would be just and equitable that the company should be wound-up,

shall make a winding-up order, unless it is also of the opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound-up instead of pursuing that other remedy.

[84] The principles for consideration by the court on a petition to wind-up a company on the ground that it is just and equitable to do so were reiterated by the Privy Council in the recent case of **Chu v Lau** as follows:

“It is well established that winding-up is a shareholders’ remedy of last resort. But this does not mean that winding-up is unavailable to members if they have any other remedy. The member retains a significant element of choice in the remedy to be sought, even though the court has the last word. As is clearly enshrined in section 167(3) of the 2003 Act, the court carries out a three stage analysis, asking:

- (a) Is the applicant entitled to some relief?
- (b) If so, would a winding-up be just and equitable if there were no other remedy available?
- (c) If so, has the applicant unreasonably failed to pursue some other available remedy instead of seeking winding-up?”³⁸ (Underlining supplied)

[85] I agree with counsel for the defendants’ that the Pauligs have failed at the first limb, that is to say, they have not shown that they are entitled to present this petition for the relief that they seek. I advert to section 379 of the Companies Act which lists the persons who are entitled to petition the court for a winding-up order of a company. The Pauligs have not presented evidence that they fall into any of the categories of persons allowed to present a petition to wind up pursuant to section 379 of the Companies. I surmise that their request would have been premised on the assumption that they are shareholders of the company. However, I have already alluded to the fact while the directors and principals of this company may have discussed the manner in which they wished shares to be allotted or issued and indeed intended for the same to be issued or allotted, none was in fact issued or allotted. Accordingly, the Pauligs have not demonstrated that they are creditors, trustees nor contributors of the company for the purposes of section 379 of the Companies Act. Therefore, they are not entitled to present a petition for the winding-up of the company.

³⁸ [2020] UKPC 24 at para. 20.

However, for completeness, I will briefly address the substance of their arguments on the petition.

[86] I agree with the Pauligs that they are entitled to relief as a result of their unlawful removal by Eva Kachelriess' as directors from the company. They may also have some legitimate grievances about her conduct in excluding them from its management and its assets. However, I am not satisfied that a winding-up of the company is the appropriate remedy or relief in the circumstances. For one thing, the long established authorities have elucidated that the winding-up of a company is a shareholders' remedy of last resort.

[87] Further, the main thrust of the Pauligs' case centres on their entitlement to a beneficial interest in the property at Fort Jeudy, which is the main asset of the company. Having found earlier in this judgment that the Pauligs are entitled to a fifty percent (50%) beneficial interest in the Fort Jeudy property, I am satisfied that this alternative remedy would provide relief to them. Equally, having declared the act of removing them from the directorship of the company as one that was unlawful, the Pauligs are now free to return to the helm of managing the company as a viable going concern. These two reliefs, that is to say, a declaration as to their beneficial interest in the property held in the name of the company and an order restoring them to the directorship are, in my view, adequate remedies to address their grievances instead of the conclusive act of winding up the company. Accordingly, the petition for an order winding-up the company is refused.

Conclusion

[88] For reasons given above, the claimants' fixed date claim filed on 30th September 2015 is granted in part and I order and declare as follows:

- (1) The claimants are entitled to a beneficial interest of fifty percent (50%) of the property with dwelling house thereon situate at Fort Jeudy in the parish of Saint George in the State of Grenada being Lot 22 of Westerhall Fort Jeudy subdivision plan containing by admeasurement 26,794 Sq. Ft. English Statute Measure held in

the name of the company and registered in the Deeds and Land Registry of Grenada in Liber 18-2001 at page 511 (the Fort Jeudy property);

- (2) The first defendant (Eva Kachelriess) is entitled to a fifty percent (50%) beneficial interest in the Fort Jeudy property;
- (3) The company is to commission a valuation of the Fort Jeudy property within 21 days of the date of this judgment. The cost of the valuation is to be borne equally by all of the parties;
- (4) Within 28 days of the receipt of the valuation, the company is to put the Fort Jeudy property up for sale by a reputable real estate firm that is locally based;
- (5) If the company fails to conduct the valuation and sale as ordered above, the Registrar of the Supreme Court (the Registrar) is to commission a valuation of the Fort Jeudy at a cost to be borne equally by all of the parties;
- (6) Within 60 days of the receipt of a valuation conducted by the Registrar, the Registrar is to conduct a sale of the Fort Jeudy property by public auction. The sale shall be conducted at a reserve price of no less than 75% of the assessed value of the Fort Jeudy property;
- (7) After the sale of the Fort Jeudy property, whether by the company through a locally based reputable real estate firm or by the Registrar by public auction, the proceeds of the sale are to be divided at 50% to the claimants and 50% to Eva Kachelriess after all legal charges and expenses, including expenses associated with the sale are deducted;

- (8) The claimants' removal as directors of the company is unlawful, null and void.
They remain directors until such time as they demit office or are removed in accordance with the terms of the Companies Act and/or the company's by-laws;
- (9) The defendants' counterclaim is dismissed;
- (10) The petition in Suit No. GDAHCV2020/0127 seeking an order to wind-up the company is refused;
- (11) The claimants are awarded costs in the sum of \$6,000.00.

Raulston L.A. Glasgow
High Court Judge

By the Court

Registrar