

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)**

Claim No: BVIHC (COM) 2020/0010

**IN THE MATTER OF SECTIONS 184B AND 194I OF THE BVI BUSINESS COMPANIES
ACT 2004**

**AND IN THE MATTER OF FOXY'S TAMARIND BAR LTD
AND IN THE MATTER OF FOXY'S RETAIL LTD
AND IN THE MATTER OF JOST VAN DYKE ISLAND PRODUCE LTD**

BETWEEN:

PHILICIANO CALLWOOD

Claimant

and

**[1] TERESA CALLWOOD
[2] JUSTINE CALLWOOD
[3] FOXY'S TAMARIND BAR LTD
[4] FOXY'S RETAIL LTD
[5] JOST VAN DYKE ISLAND PRDUCED LTD**

Defendants

Appearances:

Ms. Hazelann Hannaway Boreland of Harneys for the claimant, who was present
No appearance for the defendants

2020: January 29;
February 3.

JUDGMENT

[1] **JACK, J [Ag.]**: On 29th January 2020 the claimant, usually known as Foxy, applied to me *ex parte* for various relief against his wife, Teresa; his daughter, Justine; and three companies in which he is a shareholder. I considered that it

was inappropriate to deal with the application *ex parte*. I adjourned the matter to Monday 3rd February 2020 and indicated that I would give my reasons for adjourning the matter in writing. This is so that the defendants are aware of my reasons. Without disrespect I shall refer to the parties by the names by which they are generally known.

- [2] Foxy's business commenced in 1964 and has traded from its current site on Jost Van Dyke since 1968. The evidence is unclear as to whether Foxy married Teresa in that year or in 1978. There were at least two daughters of the union, including Justine. The best known part of the business is Foxy's Tamarind Bar, which is run through the third defendant. It is a bar and restaurant and hosts Foxy's New Year's Party. There is also a retail arm, the fourth defendant, which runs a boutique and souvenir outlet. Foxy and Teresa own 50 per cent of shares each in both companies. Both are directors, as is Justine. The fifth defendant, trades as "Foxy's Taboo" and runs an eponymous bar and restaurant in Diamond Cay. It is owned, one third each, by Foxy, Teresa and Justine. Again all three are directors.
- [3] Foxy is the registered proprietor of land with absolute title described as Block 1440A, Parcel No 90 in Jost Van Dyke. This appears to be (the affidavit does not state this expressly) the land where Foxy's Tamarind Bar is established.
- [4] Foxy's complaints fall into two categories. The first is that he has been excluded from the management of the three companies and that monies have gone missing. He seeks the appointment of a receiver and relief against unfair prejudice. Although some of his claim might perhaps be brought by way of a derivative action, no claim by way of derivative action is pleaded.
- [5] The second is that Teresa and Justine have carried on building works on the land on Jost Van Dyke without his consent. On 8th January 2020, the Planning Authority of the Government of the Virgin Islands issued a compliance notice on Foxy in respect of the works. The nature of the works erected is not entirely clear

from the evidence put before me. Three very poor quality photographs attached to the compliance notice suggest the works may comprise a small beach bar. The notice requires that the works be removed “forthwith”. Foxy is given 28 days to appeal against the notice. He wants the defendants to remove the structure.

[6] An application will only be considered *ex parte* for some good reason. In the current case, the risk identified is that Teresa and Justine may dissipate the assets of the three companies if they are notified of the application. The evidence of risk of dissipation is in my judgment sparse. Foxy in his evidence raises issues about the payment of excessive sums by way of holiday pay, but these go back as far as 2015. That hardly shows any urgency.

[7] The *ex parte* application for the appointment of a receiver is also misconceived in my judgment. The Court will usually only appoint an interim receiver where no realistic alternative is possible. This is because, as the Court of Appeal held in **Norguff Holdings Ltd v Michael Wilson and Partners Ltd**¹ at para [27]:

“the appointment of a receiver is more intrusive, more expensive, and less reversible than the grant of an injunction... [T]he appointment of a receiver is usually more draconian than issuing a freezing order because of the expenses and inconvenience which often arise with the appointment.”

[8] Likewise, applying *ex parte* for a mandatory injunction to remove the structure on the land is misconceived. There is jurisdiction to make a mandatory order on an interlocutory basis, but it would require a very strong case to make such an order without hearing the defence. This is not such an extreme case. Further it is unclear why Foxy needs such an order. It is his land. He can, at least in principle, knock buildings down on it. He could then recover the cost of demolition as damages. An injunction will generally be refused if damages would be an

¹ BVIHC VAP 2007/0008 (delivered 29th October 2007). See also VTB Bank Public Joint Stock Company v Miccos Group Ltd BVIHC (COM) No 2018/0067 (delivered 23rd January 2020) and Industrial Bank Financial Leasing Co Ltd v Xing Libin BVIHC (COM) No 0032 of 2018 (delivered 28th January 2020), although these are both cases on equitable receivers appointed for interim or final enforcement of judgments, rather than appointments in a company law context.

adequate remedy. Now it may well be that there are licences (or at least implied licences) which he has granted to the third defendant. Foxy's affidavit, however, does not give any details of such licences. It is therefore impossible to assess whether and to what extent he needs an injunction instead of being able to resort to self-help. It is true that the law generally frowns on self-help, but, if the land is Foxy's and the defendants have no right to use it, it is difficult to see what objection could be raised to Foxy removing the structure.

[9] Even if these points were not enough, there is a substantial hole in Foxy's evidence. On an *ex parte* application there is a duty of full and frank disclosure. Nowhere does Foxy explain anything about his matrimonial relations with his wife. I assume that they are not good, since otherwise it is unlikely that he would be suing her. However, they clearly get along sufficiently for her to be (as she has always done during the marriage) running the commercial side of Foxy's businesses. An injunction (or the appointment of receivers) is a discretionary matter. The Court needs to know the background in order properly to exercise its discretion.

[10] There is a further point of substance. At common law, a husband and wife are considered one person (a rule based on Matthew 19.5-6). In England, the special status of spouses has been almost completely abrogated by the **Married Women's Property Act 1882**, the **Law Reform (Married Women and Tortfeasors) Act 1935** and the **Law Reform (Husband and Wife) Act 1962**. This Territory has its own **Married Women's Property Act 1887**², but so far as counsel's researches have uncovered the latter two English Acts have not been translated into domestic law.

[11] Section 14 of the 1887 Act provides:

"Every woman, whether married before or after the commencement of this Act, shall have in her own name against all person whomsoever, including her husband, the same civil remedies, and also (subject as regards her

² Cap. 275, Revised Laws of the Virgin Islands 1991.

husband to the provision hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*; but, except as aforesaid, **no husband or wife shall be entitled to sue the other for a tort**; and in any indictment or other proceeding under this section, it shall be sufficient to allege such property to be her property.” (Emphasis added.)

[12] On the face of it, that provides a complete answer to Foxy's claims in tort against Teresa, other than those claims permitted to establish property rights. There may, however, be constitutional issues as to the continuing validity of the emphasised passage in section 14. Arguably the provision may offend section 12 of the **Constitution of the Virgin Islands 2007**³ (Equality before the Law), but arguments the other way might be founded on section 19 (Protection of Private and Family Life) and section 20 (Protection of the Right to Marry). This issue of law is wholly unsuitable for determination on an *ex parte* application. This point only arose because, when I saw the papers prior to the *ex parte* hearing, I had my assistant ask Ms. Boreland to investigate the point. Issues of a matrimonial nature for obvious reasons rarely arise in the Commercial Division, so I thought it important to check.

[13] There is also a delay in pursuing the *ex parte* application. The claim form was prepared on 17th January 2020. The claim was only issued on 21st January with skeletons, bundle and a listing request only filed on 24th January. There was time to issue the application *inter partes*. There is in my judgment no need for Foxy to have sought relief, particularly the Draconian relief sought, *ex parte*.

³ Constitution of the Virgin Islands Order 2007 (SI 2007 No 1678).

[14] For all these reasons, I adjourned consideration of the relief sought.

Adrian Jack
Commercial Court Judge (Ag)

By the Court

Registrar