

**THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2010/0319

BETWEEN:

**INDIRA SALISBURY
STACY A. RICHARDS-ANJO
EXECUTRIXES OF THE ESTATE OF DAVID TOMS, DECEASED**

Claimant

And

**ORCO LIMITED
MARCEL A.L. COMMODORE
MICHAEL A. PIGOTT
MAJORIE RILEY ST. JOHNS
CLARVIS JOSEPH
ANDREW GOODENOUGH**

Defendants

Appearances:

Mr. Vashist Maharaj instructed by Lockhart, Mendes & Co. and Ms. Asheen Joseph for the Claimants

Mr. Craig Christopher of Christopher, Gonsalves & Co for the first, third, fourth and fifth Defendants
C. Debra Burnette of Henry and Burnette for the second Defendant

Mr. Justin Simon Q.C. cf Simon Rogers Murdoch for the sixth Defendant

2016: September 27

JUDGMENT

- [1] **HENRY, J.:** David Toms died on the 7th April 2005. By his last Will and Testament he appointed the claimants executrixes of his estate. Among his listed assets are shares in Atlantic Properties Limited (Atlantic), a company registered in Antigua and Barbuda. A search of the Company Register by the Executrixes revealed that the names of the first, second and sixth defendants are listed as the current shareholders of Atlantic.

[2] By their Amended Claim Form the Executrixes seek the following relief:-

- 1) A declaration that the claimants are the owners of all the issued shares of the Company registered as Atlantic Properties Limited.
- 2) A declaration that all transactions entered into by Atlantic Properties Limited on the authority of the defendants are null and void and of no effect.
- 3) A declaration that all decisions made and transactions entered into by the second, third, fourth and fifth named defendants as directors of the Company Atlantic Properties Limited are null void illegal and of no effect.
- 4) An order directing the second defendant that the register of members of the above mentioned company be rectified by striking out the name of ORCO limited and Andrew Goodenough there from as the holders of the share of the said company and by inserting in lieu thereof the names of the claimants as the holders of the said share and that the claimants may be authorized to effect the necessary alterations in the Register for carrying such Order into effect.
- 5) Notice of such rectification be ordered to be given to the Registrar of Companies or such other orders be given to the registrar of companies or that such other order be made as the court shall think fit.
- 6) An order that the second named defendant be directed to remove the entry therein showing that the first named defendant Company has an interest in the issued share capital of the company Atlantic Properties Limited.
- 7) An order that the sixth named defendant be directed to remove the entry therein showing that the sixth named defendant has an interest in the capital of the company Atlantic Properties Limited.
- 8) That the first, second, and sixth defendants do forthwith deliver to the claimant any certificate of share ownership in the company Atlantic Properties Ltd in its possession.
- 9) An injunction against the defendants acting or holding themselves out either individually or collectively as owners of the issued shares and as directors of the company named Atlantic Properties Limited.
- 10) An injunction against the defendants from in anyway selling mortgaging pledging or encumbering the assets of the company Atlantic Properties Limited.
- 11) An order that the memorandum of share transfer entered in the annual return of Atlantic Properties Limited for the year ending 2005 and filed on the 2fourth May 2006 be set aside as being illegal void and of no effect.
- 12) An order that the claimants as Executors of the Estate of David Toms are the owners of all of the issued shares in the company Atlantic properties.
- 13) Damages.
- 14) Costs.
- 15) Interest.
- 16) Any further or other relief that the Court may deem just.

- [3] The gravamen of the claimants' claim is that during the lifetime of David Toms (Mr. Toms) he, along with the Kingsley Thorogood and Mr. Cole, were the directors of Atlantic. They were duly named in the Annual Returns of the Company. Furthermore, at the time of his death, Mr. Toms was the sole shareholder of the shares of Atlantic. According to them, after the death of Mr. Toms, the remaining two directors were illegally removed from office. In addition, Mr. Toms' shares were illegally transferred to the first, second and sixth defendants.
- [4] In addition to the evidence of their sole witness, Indira Salisbury, the claimants rely on the documentary evidence that by the last Annual Return, filed before the death of Mr. Toms, lists Mr. Toms as the single shareholder of Atlantic and Kingsley Thorogood, Paul Cole and Mr. Toms as the Directors.

The Defences

- [5] In their defences the first, third and fourth defendants plead that in November 2002, the fourth defendant met Mr. Toms for the first time. He introduced her to an opportunity to purchase a shareholding in property known as "Savanna", title to which was vested in Atlantic. Among the things stated by Mr. Toms was that:
- 1) 66.6% of the shares of Atlantic was available for purchase at a price of US\$625,000.00
 - 2) A 10% deposit was required immediately and the balance of the purchase price was to be paid within two (2) weeks of the date of the deposit;
- [6] Sometime after a further meeting was held between Mr. Toms, the fourth defendant and the then General Manager of Antigua Commercial Bank (ACB) and it was agreed that a group of local and regional investors would be engaged to provide the required 10% deposit. The group included the third, fourth and fifth defendants. It was also agreed that Mr. Toms as agent for and on behalf of the investor group would negotiate and conclude the purchase of the shares. Subsequent to the meeting the arrangement was reduced into writing and duly signed by Mr. Toms and the fourth defendant on behalf of the investor group. The agreement was amended and signed by the parties.
- [7] Sometime thereafter difficulties arose between Mr. Toms and the investor group to the extent that the relationship broke down completely and all communications between the parties ceased.
- [8] After the death of Mr. Toms in April 2005, in an effort to safeguard their investment, the investor group met and resolved to instruct the second defendant to prepare the legal documents necessary to bring the operations of Atlantic within the control of the Investor Group. The second defendant caused to be filed in the Companies Registry an annual return for the year 2005 naming the directorship as follows:-
- 1) Michael Pigott
 - 2) Clarvis Joseph
 - 3) Andrew Goodenough
 - 4) Marjorie Riley St. John

And the shareholders as:-

- 1) Orco Ltd (66.7%)
- 2) Andrew Goodenough (33.3%)

The second defendant also caused to be filed on 11th April 2007, Annual Return for the year ending 31st December 2006. Directors of the company were listed as:-

Michael Pigott
Clarvis Joseph
Andrew Goodenough
Marjorie Riley St. John
Marcel Comodore

The shareholders were listed as:-

Orco Limited
Andrew Goodenough
Marcel Comodore

- [9] It was agreed between the members of the investor group that ORCO Holdings Ltd, a company incorporated under the laws of Antigua and Barbuda by the second defendant on instructions from the investor group would hold the shares of the investor group in the amount of 31.6% of the shares; David Toms would hold 35% and Andrew Goodenough would hold 33.3%. The second defendant was so instructed. The said defendants plead that they cannot explain why the second defendant appears on the returns as a shareholder and director. Finally, they plead that the members of the investor group at all material times stood ready to complete its obligations under the agreement and remain so to date.
- [10] The second defendant in his amended defence, admits that he is an Attorney at Law and that at all material times, he has been the Solicitor and Secretary for the first defendant, ORCO Ltd. He also admits that he was the Solicitor and Secretary of Atlantic from its incorporation to a date in or about mid 2003 or 2004 when the late David Toms attended his Chambers and requested and was given all files for Atlantic. Further, that in 2006, he was instructed by the third, fourth and fifth defendant, in their capacities as Directors of the first defendant to resume performing the functions as the Solicitor and Secretary of Atlantic.
- [11] The second defendant further states that the filings done by him on behalf of Atlantic contained certain errors, namely:-
- 1) The annual returns for the year ending 2002 erroneously listed David Toms as the sole holder of the shares of Atlantic;
 - 2) He failed to record the sixth defendant as a holder of 333 of the shares of Atlantic and David Toms as the holder of 667 of the shares. The second defendant pleads that to his knowledge

David Toms held 667 shares in Atlantic in trust for himself and the other members of the group of local investors;

- 3) With regard to the annual returns for the year ending 2005, it also contained errors in that he omitted to state that he was a director of Atlantic;
- 4) He also admits that the return for the year ending 2006 contains errors, in that he included himself as a shareholder of Atlantic.

- [12] According to his pleadings during the lifetime of David Toms, he was informed by the third, fourth and fifth defendants that the 667 shares were to be put into a Company and that there were ongoing negotiations between themselves and David Toms as to the precise shareholding for the members of the group. He has no knowledge in regard to the assertion in the Statement of Claim that the Agreement for the purchase of the shares was voided by the parties.
- [13] After the death of David Toms he was instructed by the third, fourth and fifth defendant to incorporate the first defendant for the purpose of holding the 667 shares owned by the group. Further, he was instructed to record the third, fourth, fifth and sixth defendants and himself as Directors of Atlantic.
- [14] The second defendant admits that he filed the Annual Returns for the years ending 2005 and 2006, in accordance with the above instructions.
- [15] The sixth defendant (Mr. Goodenough) in his Amended defense, admits that the records at the company registry for the year ending 2001, shows that the issued share capital in Atlantic were held as follows: Executive Directors Limited, one (1) share and Executive Holdings Limited nine hundred and ninety nine (999) shares, both of whom have their registered offices in Nassau Bahamas. Mr. Goodenough states that Guaranty Bank in Bahamas provided custodian and management services for Executive Directors Limited and Executive Holdings Limited. According to the pleading, on 1st May 1990, the director and secretary of Executive Holding Limited executed a declaration of trust whereby they acknowledged that the beneficial interest in and the ownership of 333 of the fully paid up shares numbered 336-668 inclusive and represented by share certificate No. 3 of Atlantic and in respect of which, they were registered as holders, was exclusively vested in Mr. Goodenough. A copy of the document was attached to the pleadings.
- [16] Mr. Goodenough further pleaded that the outstanding 666 shares in Atlantic were being held on trust by Executive Holdings Limited for one Robin Chapman and a company called Citron Limited. Robin Chapman was the beneficial owner of 333 shares while Citron was the beneficial owner of 333 of the shares. Mr. Goodenough denies that there was an agreement between David Toms and the shareholders of Atlantic for the purchase of all the shares and interest in the company. He states that there was an oral agreement between David Toms, on the one part and Robin Chapman and Citron Ltd on the other part for the sale of 66.7% or the 666 shares in Atlantic which was beneficially owned by Robin Chapman and Citron. Mr. Goodenough states that he was not a party to the agreement, however details of the oral agreement were later recorded in a letter dated 9th September

2002 and sent by Robin Chapman to David Toms. A copy of this letter was also annexed to his pleading.

- [17] Mr. Goodenough states that by letter dated 1st October 2002, he wrote to Guaranty Bank to confirm that he was aware of and had no objection to the proposed sale by Citron and Robin Chapman of their interests in Atlantic.
- [18] Mr. Goodenough denies that the sum of US\$63,767.00 paid to him by David Toms was in respect of the purchase of his 33.3% shares held in Atlantic. He states that the sum was in respect of repayment of personal loans he had advanced over the years to Atlantic. He maintains that at no time did he enter into any agreement with David Toms for the purchase of his 33.3% shares. Mr. Goodenough further states that after the purchase of the 66.7% shares by David Toms, he, Mr. Goodenough was invited by David Toms to attend 4 to 5 meetings of Atlantic at the offices of Astra Limited. He was invited to attend the meetings in his capacity as a shareholder of Atlantic in full recognition by Mr. Toms that he was not the sole shareholder of Atlantic.
- [19] Mr. Goodenough also states that in or around October 2002, after David Toms had acquired the 66.7% shares in Atlantic, he, Mr. Goodenough submitted his resignation as a director of Atlantic as had been previously agreed. Further, that prior to his resignation, the Board took no action nor made any agreement approving the sale of the full 1000 shares in Atlantic. Further, if the Board of Directors of Atlantic approved the purported sale as averred in the statement of claim, the said approval was null, void and ultra vires the directors as he Mr. Goodenough, never sold his shares.
- [20] Mr. Goodenough further pleads that after the death of David Toms he was invited to a meeting by the second defendant at which the third defendant was present. He was advised by the second defendant that the third defendant was representing shareholders who claimed that they owned some of the 66.7% of shares previously owned by David Toms, and that a new Board of Directors could be established to continue the management and operation of the company. It was agreed at the meeting that Mr. Goodenough and the third defendant would be directors of the company.
- [21] Mr. Goodenough maintains that he has been the owner of 33.3% of shares in Atlantic from 1990 to present, which said shares were never sold or transferred to David Toms at any time whatsoever.

Admissions by the Second Defendant

- [22] At the conclusion of the evidence of the second defendant, Counsel for the second defendant indicated that her client was prepared to take a certain course. Counsel submitted that the second defendant admits he has no interest in the shares of Atlantic and he is prepared for the court to so declare. Further, that he is willing to abide by whatever declarations and orders the court makes in respect of matters concerning the rectification of the register in which he admitted mistakes were made. Counsel also indicated the second defendant's willingness to pay prescribed cost up to the sixth May 2014, the date Counsel indicates she sought settlement discussions with the claimant.

Admission by First, Third, Fourth and Fifth Defendants

[23] At the close of the trial the third, fourth and fifth defendants conceded that the agreement made on the 17th May 2002 between the fourth defendant on behalf of the investor group and David Toms for the purchase of 66.7% of the shares in Atlantic was voided by Mr. Toms at a later date. They therefore have withdrawn their claim to an interest in the shares in Atlantic. They however insist that the 10% deposit on the purchase price of the shares was paid over to Mr. Toms on behalf of the investor group to include the third, fourth and fifth defendants. In these circumstances, the estate of Mr. Toms holds the said deposit on constructive trust to be repaid with interest. They therefore claim damages against the claimants including the sum of US\$62,500.00, the sum allegedly paid for the deposit.

[24] The issues remaining for the court's determination are:-

- 1) Whether the sixth defendant is a shareholder of Atlantic or did David Toms before his death acquired all the issued shares of Atlantic;
- 2) Whether the second, third, fourth, fifth and sixth defendants were properly appointed as directors of Atlantic;
- 3) Whether the claimants are entitled to recover general damages against the defendants;
- 4) Whether the court can make an award of damages in favour of the third, fourth and fifth defendants against the claimants.

The shares in Atlantic acquired by David Toms

[25] The only witness on behalf of the claimants was Indira Salisbury. Prior to David Toms death, she was his common law wife and is one of the executrixes appointed in his will. In support of her claim that David Toms, prior to his death held 100% of the shares of Atlantic, she relies on the 2002 Annual Return of the company. Her evidence is that she interpreted the document to mean that he owned all the shares of Atlantic. It was put to her on cross-examination that the second defendant who filed the 2002 Annual Return, indicated in his witness statement that on the 2002 return he inadvertently recorded David Toms as sole owner of the shares of the company when in fact the sixth defendant remained owner of 333 shares. Her response was that she was not prepared to accept what was in the second defendant's witness statement. She admitted that the claimants have no other document indicating ownership by David Tom of all the shares of Atlantic.

[26] The evidence of both Goodenough and Robin Chapman is that in around May 2002 Citron and Chapman entered into an agreement with David Toms. The agreement was for David Toms to purchase the 66.7% beneficial interest Citron and Chapman's held in Atlantic. A copy of the agreement signed by David Toms was tendered into evidence¹.

¹ See pages 385-388 of Trial Bundle 3

[27] Goodenough's evidence is that he was never a party to the agreement between Chapman, Citron and David Toms and specifically never entered into any agreement with David Toms or any other party to sell his 333 shares in Atlantic. Nor has he ever directed Executive Holdings Limited to transfer, sell or otherwise deal with his shares. He admits that he did give his consent as a director to the sale of the said shares held by Citron and Chapman to David Toms. The letter addressed to Guaranty Trust Bank was also tendered in evidence.

[28] Mr. Goodenough also gave evidence that following the transaction, he received a letter from David Toms confirming the sale to him of 66.7% of the shares. The letter is dated 3rd October 2002. It was admitted in evidence and reads in part as follows:

"Dear Andrew

Atlantic Properties Limited – Completion Re: 29.05.02 Agreement and Related Matters

I am pleased to advise you that Completion took place in Nassau, the Bahamas yesterday regarding the Agreement between myself and Mr. Robin Chapman and Citron Holding at Guaranty Trust Bank Limited. Although I am writing to you on the letterhead of Astra Holding Limited, I wish to emphasize that Atlantic Properties Limited is an entirely independent Company."

[29] Notwithstanding the above evidence, Counsel for the claimants submits that David Toms held 100% of the shares in Atlantic. He submits that the starting point for the court ought to be the Annual Returns for Atlantic for the year 2002 filed by the second defendant. This document lists the sole shareholder in Atlantic as David Toms. He refers the court to paragraph 11 of the Articles of Association. He submits that by virtue of Article 45 of the Articles of Association of Atlantic, the Executrixes of the estate of David Toms are the only person recognized by the company as having title to the shares registered in the name of David Toms after his death.

[30] Further, that no agreement for sale of Mr. Toms' shares in the company Atlantic was found among the papers and records of David Toms held by his executrixes, except for the agreement made on 17th May 2002 between David Toms and Marjorie Riley, which was later voided on 16th June 2002 by the parties. Further, that the names of ORCO Limited, Marcel Commodore and Andrew Goodenough are wrongly entered in the records of Atlantic as its shareholders; that any purported transfer of the interest of David Toms in Atlantic to the second and sixth defendants is illegal, null and void and without effect as the same was not done by law.

[31] The court disagrees with the submission by Counsel for the claimants that the starting point of the court's inquiry is the 2002 Annual Returns of Atlantic. The court accepts the evidence that the incorporators of Atlantic were Robin Chapman, Citron and Goodenough. The evidence of the witnesses Chapman and Goodenough together with the documentary evidence provide uncontradicted evidence that David Toms purchased the interest in the shares held by Chapman and Citron in Atlantic. David Toms himself confirmed the closing of the sale to him of the shares of

Chapman and Citron. Chapman and Citron held the beneficial interest in 66.7% of the shares in Atlantic. There is no evidence before the court that David Toms purchased the 33.3% of the shares held by Goodenough.

[32] With regard to the 2002 Annual Return upon which the claimants rely, the court notes that the Return does not list the percentage of shares owned by Mr. Toms. The fact that his name alone appears in section 7 headed "List of persons holding shares" has been interpreted by the claimants as an indication that he owned 100% of the shares. However, based on the evidence before the court, including the admissions made by the second defendant, the court finds the 2002 returns listing David Toms as the sole shareholder of Atlantic was an error in that it failed to record the 33.3% of the shares owned by Goodenough.

[33] Counsel refers to Paragraph 11 of the Articles of Association. It provides:

"The Company shall be entitled to treat the person whose name appears upon the Register in respect of any shares as the absolute owner thereof, and shall not recognise any trust or equity or equitable claim to, or partial interest in, such share whether or not it shall have express or other notice thereof."

[34] Paragraph 11 is intended to define the nature of the relationship between the company and those listed on its register. In other words the company is bound to accept and treat as shareholders those persons listed on its own shareholders register. However, where there is evidence before a court of an error on the register, paragraph 11 cannot operate to restrict the court from so finding or from providing an appropriate remedy.

[35] The court therefore finds that before his death, David Toms acquired and was the owner of 66.7% of the shares in Atlantic; that Goodenough continued to be the owner of 33.3% of the shares of Atlantic.

The Claim against the first, third, fourth and fifth Defendants

[36] The fourth defendant has admitted that the agreement entered into on 17th May 2002 between David Toms and the fourth defendant on behalf of the investor group was later voided. There is no other document before the court evidencing the transfer of any portion of the 66.7% of the shares acquired by David Toms. There is no evidence that the third, fourth and fifth defendants as members of the investor group ever became shareholders of Atlantic. They have rightfully withdrawn any claim to an interest in the shares.

[37] The evidence is that Orco Ltd was incorporated to hold the shares of the members of the investor group to include the third, fourth and fifth defendants. Since the members of the investor group never acquired any shares, Orco Ltd never held any interest in the shares of Atlantic. The inclusion of Orco Ltd on the 2005 and 2006 annual return as a shareholder of Atlantic was invalid. Further, as directors of Orco Ltd, the third, fourth and fifth defendants lacked the authority to name or establish a new Board of Directors of Atlantic. The appointment by them of Michael Pigott, Clarvis Joseph,

Andrew Goodenough, Marjorie Riley St. John and Marcel Commodore as directors is therefore null and void and of no effect. They also lacked the authority to instruct the second defendant to act as Solicitor in respect of the business of Atlantic. Any decisions made or transactions entered into by them as purported directors of Atlantic are null and void.

The Claim for Damages

- [38] In their Amended Claim Form the claimants also seek damages. However, no particulars of loss and damage are pleaded. The only witness for the claimant gave no evidence of loss or damage suffered by the claimants. Further, no submissions were made in respect of the claim for damages in the submissions filed by Counsel.
- [39] Counsel for the second defendant submits that there is not even a modicum of pleading of loss and damage and neither was any evidence to such an effect led by the claimant. If the court is called upon to determine what compensation should be awarded to the claimants, it must do so on the basis that the claimants have given evidence to the extent that they have suffered an injury/loss as a result of the wrongful acts of the second defendant. The claimants must give details of what their loss was. Since no evidence was led, Counsel requests that no award of damages be made.
- [40] In certain cases involving damage to reputation damage is sometimes said to be presumed or inferred. However, where damages cannot be said to be presumed, general damages are required to be pleaded and proved. No evidence was led by the claimants on general damages and accordingly no award is made.

The Request for an Award of Damages against the Claimants

- [41] No counterclaim was pleaded by any of the defendants. However, the third, fourth and fifth defendants in their closing submissions state that prior to the voiding of the agreement, the Investor Group paid to David Toms 10% of the purchase price of the shares in the sum of US\$62,500.00. Their submission is that the deposit was paid in anticipation of the balance being paid from the proceeds of a loan facility negotiated with Antigua Commercial Bank (ACB).
- [42] The only mention in the defences of the third, fourth and fifth defendants regarding the deposit is in the following terms:
- "4 (c) Sometime not long thereafter a further meeting was held between David Toms and the fourth-named defendant and another person, namely Mr. Gregory DeGannes at the time General Manager of ACB, and it was agreed that:-
- (i) The fourth named defendant for and on behalf of the Investor Group would engage a group of local and regional investors to provide the required 10% deposit which group included the third, fourth and fifth-named defendants . . ."
- [43] No prayer for the return of the deposit was included in their defences.

- [44] It is only in their written closing submissions that Counsel makes the submission that the third, fourth and fifth defendants have withdrawn their claim to shares in Atlantic and have offered uncontroverted facts that on the balance of probability the deposit on the purchase price was paid to David Toms, in circumstances whereby the Estate of David Toms would hold on constructive trust the 10% deposit to be repaid with interest. Counsel further states that they are not asking to be put in the position they would have been had the contract been performed, but merely to be put in the position had it never been made. Counsel states that they are seeking damages for expenses incurred in preparation for performance of the contract, that is, the return of the 10% deposit plus interest. No application to amend their pleading was made either before or during the trial.
- [45] The question is whether the court can grant judgment for a claim not asserted in a party's pleadings and no amendment of the pleadings has been sought or obtained.
- [46] The Civil Procedure Rules (CPR) imposes a duty on a defendant to set out its case, including any relief being sought. Gordon J.A. in the case of **Soumitra Sengupta v Woods Development Limited**² stated that the rules of pleading seek to ensure that the party's pleading sets out with sufficient clarity his case so that the other party is clear as to what case he is expected to meet. Further, the rules as they have evolved are to be interpreted to ensure that at a trial between parties fairness is achieved and ambush avoided. Although the question under consideration by Gordon, J was whether a claimant had sufficiently pleaded special damages, the learning is equally applicable to a defendant.
- [47] In the English case of **Rosengrenstann Ltd v Ayres** (2001) LTL 22/6/2001 it was held that a judge is not permitted to give judgment on the basis of a claim that is not included in the statements of case. If this is done, there may be no option but to order a retrial.
- [48] Did the third, fourth and fifth defendants foreshadow in their defence a claim for damages against the claimants in respect of the deposit allegedly made? I hold they did not. Their case as pleaded in the defences was that they were owners of a portion of the shares of Atlantic by virtue of the fact that David Toms had acted as the agent for the investor group when he purchased the shares in Atlantic. They pleaded the contract entered into with David Toms as proof of the relationship and ownership. It was only near the end of the trial in cross-examination by Counsel for the claimants, that the fourth defendant admitted that the said contract relied upon in the defences had been voided. This might explain why the claim for damages is only to be found in their closing submissions. There is no evidence that the written submissions were served on the claimants' Counsel. Under the circumstances, to act on the claim would be to grant relief in circumstances where the claimant has had no opportunity to address the court on the relief sought and would be unfair.
- [49] Accordingly the claim by the third, fourth and fifth defendants for damages is denied.

² Civil Appeal No. 20 of 2003, Antigua and Barbuda

Costs

- [50] Counsel for the second defendant submits that the second defendant having made admissions and made attempts to settle the matter should be visited with no costs or costs up to the filing of his defence only. In the latter case, the claimants would be entitled to 45% of prescribed cost.
- [51] The general rule is that the court must order the unsuccessful party to pay the costs of the successful party. Part 64.6 (2) however, gives the court power to order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs.
- [52] In his defence, the second defendant did make certain admissions of errors in regard to the annual returns for the years 2002, 2005 and 2005. He did not however admit any error in regard to including on the returns as directors the names of the third, fourth, fifth and sixth defendants, or that he included the name of ORCO Limited as a shareholder in error.
- [53] It was after the evidence of the majority of the witnesses had been taken that Counsel for the second defendant indicated to the court that her client was prepared to abide by whatever declarations and orders the court makes in respect of any matters touching and concerning the rectification of the registers in which he has admitted mistakes were made. Counsel for the claimants submitted that since the second defendant's admissions were only partial, he wished the trial to proceed to conclusion. At that stage, the trial was almost completed with only the evidence of the sixth defendant and the cross-examination of the second defendant to be completed. The matter therefore proceeded to conclusion. Under these circumstances, I do not accept that cost to the claimant by the second defendant ought to be 45% of prescribed cost. Appendix C sets out the percentages allowed at various stages. Up to trial, cost of 100% is allowed. However, claimants were not successful on their claim for damages. Therefore, in all the circumstances, the court will award cost in favour of the claimant of 60% of prescribed costs against the first, second, third, fourth and fifth defendants.

With regard to the sixth defendant, he was successful in defending the claim against him in respect of the shares and claim for damages. Claimants were successful on the issue of the improper directorship. Therefore the court will award cost in favour of the sixth defendant of 75% of prescribed costs.

- [54] The court therefore makes the following declarations and orders:-
1. A declaration that the claimants are the owners of 66.7% of the shares of the company registered as Atlantic Properties Limited;
 2. An order directing the rectification of the Register of Members of the said company by striking out the names of Orco Limited and Marcel Commadore therefrom as the holders of shares of the company and inserting in lieu thereof the names of the claimants as the holders of 66.7% of the shares of the said Atlantic Properties Limited, so that the Register reflects the shareholders as:-

- a. Indira Salisbury and Stacy Richards-Anjo as Executrixes of the Estate of David Toms - 66.7%;
 - b. Andrew Goodenough - 33.3%.
3. The claimants are authorized to take the necessary steps to effect the necessary alterations in the Register for carrying this order into effect;
4. An order that the first and second defendants do forthwith deliver to the claimants any certificate of share ownership in the company Atlantic Properties Limited in their possession;
5. A declaration that all decisions made and transactions entered into by the second, third, fourth, fifth and sixth defendants as purported directors of Atlantic Properties Limited are illegal, null and void;
6. An injunction against the second, third, fourth and fifth defendants acting or holding themselves out either individually or collectively as directors of the company Atlantic Properties Limited;
7. The Annual Returns for the years 2005 and 2006 filed by the second defendant as Solicitor of Atlantic be set aside as null and void and of no effect;
8. All other orders and declarations sought are refused;
9. Cost to the claimants of 60% of prescribed costs against the first, second, third, fourth and fifth defendants. Cost to the sixth defendant of 75% of prescribed cost against the claimants.



CLARE HENRY
High Court Judge
Antigua and Barbuda