

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA**

CLAIM NO. ANUHCV 2010/0340

**IN THE MATTER OF THE COMPANIES ACT, 1995
AND
IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 241 OF THE COMPANIES ACT**

BETWEEN:

**SDP GESTION SAS
SCAFS TRADING COMPANY LIMITED**

Petitioners

AND

**FRANCIANE'S BAKERY LIMITED
LE MARCHE CONSEIL
ERIC KAYSER
JEAN-PIERRE WONE**

Respondents

Appearances:

Ms. Leslie-Ann Brissett for the Petitioners
Ms. Marian-Barbara Hesse for the 3rd Defendant

2013: May 16

Ruling

- [1] Remy J.: The First –Named Petitioner is a company whose registered office is in Guadeloupe. The Second-Named Petitioner is a company whose registered office is situate in Tortola, British Virgin Islands.

[2] The First Respondent (hereinafter also referred to as "Franciane's" or "the Company") is a company registered under the Companies Act of Antigua and Barbuda and whose registered office is situate in St. John's, Antigua. The Second Respondent is the majority shareholder of the Company. The Third and Fourth Respondents are Directors of the Company; the Third Respondent is the General Manager of the Company.

[3] On the 31st May 2010, the Petitioners filed a Petition in which they state among other things that:-

- a) The First Petitioner is the holder of 2000 shares; the Second Petitioner is the holder of 2500 shares and the Second Respondent is the holder of 5,500 shares in the Company.
- b) The principal object for which the Company was established is to operate as a French bakery.
- c) The Third Respondent who was vested by the Board of Directors with all powers of managing the business, failed to properly direct the management of the business and affairs of the Company and grossly mismanaged the business of the Company.
- d) Throughout the months subsequent to the Third Respondent's appointment as General Manager of the Company, the Petitioners consistently requested financial statements and also asked that a meeting be held to discuss the affairs of the company. On or about August 31st 2007, without ever convening any meeting of the shareholders or any general meeting, the Respondents instructed the closure of the Company's operations. By Notice in the Antigua Sun on October 23rd 2007, the Shareholders became aware that the Company had gone into member's voluntary winding up by resolution of the Company dated September 26th 2007. The Company also appointed a liquidator who subsequently resigned on 31st December 2007.
- e) The actions by the Third and Fourth Respondents as Directors of the Company are contrary to Sections 130 and 427 of the Companies Act as well as Article 12.10 of the Company's by-laws. Consequently, the resolution to voluntarily wind up the company is void and of no effect.
- f) As a consequence of the mismanagement of the Company by the Third Respondent, the Petitioners shareholdings have been seriously diminished.

- g) Furthermore, by an agreement in writing dated March 2004 the Company entered an agreement with the First Petitioner to sub-lease equipment to be used in the bakery for a period of six years. It was a term of the agreement that the Company would insure the equipment against robbery and damage whilst in its use.
- h) At all material times the equipment, the subject of the agreement with the Company, was leased by the First Petitioner from a third party Sarl Inobail for the benefit of the Company. This latter agreement was for a six year simultaneous period which would have expired in 2009. At all material times this fact was known by the Company.
- i) The Company breached the agreement by failing to insure the equipment and by failing to pay several monthly payments.
- j) The eventual closure of the Company on August 31st 2007 lead to a breach of the fixed term of the agreement which had a prejudicial impact on the First Petitioner who had to make continued payment for the equipment until the termination of the Head Agreement in 2009.
- k) After the closure of the Company, the Petitioners also had to pay all the debts of the Company in the sum of 19,613.03 Euro.
- l) The Petitioners submit that they are authorized to make this Petition pursuant to section 241 of the Companies Act, being that act(s) of the Company and the business of the Company have been conducted in a manner that is oppressive, unfairly prejudicial to, or that unfairly disregards their interests. Furthermore, that the powers of the Directors of the Company have been exercised in a manner that is oppressive unfairly prejudicial and which unfairly disregards their interests as minority shareholders of the Company.

[4] The Petitioners seek the following Orders: -

- 1. The Respondents produce to the Court financial statements in accordance with section 149 of the Companies Act or an accounting in such other form as the Court may determine.
- 2. A Declaration that the resolution of September 26, 2007 is null and void and of no effect.
- 3. An Order compensating the Petitioners in the sum of 367, 650.00 (Euro) or its E.C. \$ equivalent, which represents the fair value of their shareholdings as at 26 September

2006. Alternatively, such compensation as the Court deems reasonable in the circumstances.

4. An Order compensating the First Petitioner for breach of contract in the sum of 78,000 (Euro) or its EC \$ equivalent, alternatively such sum as the Court deems just in the circumstances.
5. An Order compensating the Petitioners in the amount of 19,613.03 (Euro) or its EC \$ equivalent, being the total sum of debts paid by the Petitioners. Alternatively such compensation as the Court deems reasonable in the circumstances.
6. An Order that the Respondents be ordered to pay the costs of the Petitioners.
7. Any other Order that the Court thinks fit.

[5] The Petition was accompanied by an Affidavit in Support, sworn to by Simon Hayot, a Director of the Petitioners. Mr. Hayot deposed inter alia as follows: - he was the sole proprietor of Franciane's prior to September 26, 2006. In August 2006 the Third and Fourth Respondents offered to inject capital into the business and as a result on September 26th, 2006, by a company resolution, Eric Kayser (Kayser) and Jean Pierre Wone, the Third and Fourth Respondents were appointed Directors of the Company and Keyser was appointed as the General Manager. In exchange for majority shareholding in the company, the Third Respondent agreed to introduce a superior management technique and the brand name "reve de pains" to the Franciane outlets. However, the Third Respondent did little to manage the company. He visited the company once in October 2006 and never returned after that. As a result of this mismanagement, the company failed and the Respondents closed the business on August 31st, 2007. The closure took place without any meeting with the Petitioners and without the knowledge of the Petitioners. The shareholders were unaware of the reason for the closure; however they did see a notice of voluntary liquidation of the company in the Antigua Sun on 23rd October, 2007, pursuant to a resolution made on September 26th, 2006.

[6] According to Mr. Hayot, the Third Respondent, despite his statutory obligations and his assurance that he had expert managerial skills, neglected the business. The Petitioners wrote several letters to the Third Respondent requesting accounts and a meeting but the Third and Fourth Respondents failed to respond. The company was unable to meet its obligations and as a result the First

Petitioner had to make good on payments for equipment that had been leased for the business, in the sum of 78,000.00 euro. The shareholdings of the Petitioners have been diminished significantly and at the liquidation they paid \$36,694.20 ECD to Antigua Commercial Bank to liquidate a loan, and \$47,466 ECD for outstanding utilities for the leased premises. The Third Respondent mismanaged the company, jeopardized its profitability, and caused it to close. He did not act in the best interest of the shareholders.

[7] Pursuant to an application made on behalf of the Petitioners, on the 18th day of June 2010, the Learned Master Cheryl Mathurin made the following Order:-

- a) The Applicant (the Petitioners) be granted leave to serve the Petition, Affidavit in Support and Affidavit verifying Petition and all other documents required to be issued and served on the Second, Third and Fourth Respondents by personal service by the Applicants or the Applicants' agents on the Respondents at 19/21 Rue Valette 75005 Paris, France or 8 Rue Monge, 75005, Paris, France or elsewhere in France pursuant to Part 7 of the Civil Procedure Rules 2000, to wit, Part 7 Rule 7.3(2) (a) (i), Rule 7.3 (3) (a), Rule 7.3 (3) (b) (iii) and (iv) and Rule 7.3 (4).
- b) That the Second, Third and Fourth Respondents must file an acknowledgement of service within 35 days of service of the Petition, Affidavit in Support and Affidavit verifying petition and accompanying documents.
- c) That the Second, Third and Fourth Respondents must file a Defence/Affidavit in Reply within 56 days of Service of the Petition, Affidavit in Support and Affidavit verifying petition and accompanying documents.

[8] An Acknowledgment of Service of Petition dated 20th October 2010 was filed on 25th October 2010 on behalf of the Third Respondent. The Address for service was given as: - The Law Cottage, #2 Stapleton Lane, St. John's, Antigua.

[9] On 15th November 2010, a Request for Further Information – to provide the Third Respondent, was filed on behalf of the Third Respondent.

- [10] On 15th November 2010, a Notice of Application was filed on behalf of the Third Defendant for an Order that the Applicant, the Third Defendant, be granted an extension of time to file a Defence and to be granted relief from sanctions for failing to file a Defence within the prescribed time. An Affidavit in Support accompanied this application.
- [11] On November 18th 2010, an application was filed on behalf of the Third Respondent for an Order that the Petition against the Third Respondent be struck out pursuant to Section 357 (1) of the Companies Act of Antigua; section 8 (1) (c) of the Non-Citizens Land Holding Regulation; Part 9.7 (1) (b) of the Civil Procedure Rules (CPR). Also for a declaration that the Court should not exercise its jurisdiction to determine the Petition pursuant to Part 9.7 (1) (b) of CPR.
- [12] On 10th January 2011, an Amended Notice of Application by the Third Defendant was filed for an Order that the Petition be struck out pursuant to Sections 249 of the Companies Act and section (sic) 8.1 of CPR; Section 357 (1) of the Companies Act; Section 8 (1) (c) of the Non-Citizens Land Holding Regulation; Part 9.7 (1) (b) of CPR. Also for a declaration that the Court should not exercise its jurisdiction to determine the petition pursuant to Part 9.7 (1) (b) of CPR. An Affidavit in Support filed on the same date, accompanied this application.
- [13] An Affidavit in Reply was filed by Alfred Peters on behalf of the Petitioners, on the 12th January, 2011.
- [14] On 1st April 2011, yet another Amended Notice of Application was filed by Ms. Hesse on behalf of the Third Respondent. In this Notice of Application, she asked that the Petition be struck out on the same basis as the earlier applications. Additionally, that the Petition be struck out pursuant to Part 19.2 (4) of CPR. An Affidavit in Support filed on 1st April 2011 accompanied this Amended Notice of Application.
- [15] On August 3rd 2012, an Affidavit (Exhibiting Judgment) was filed by Alfred Peters. This exhibited the Judgment dated June 20th 2012.

[16] In the Amended Notice of Application filed on 1st April 2011, the Third Respondent seeks an Order that:-

- i). The Petition brought by the Petitioners be struck out pursuant to section 249 of the Companies Act No. 18 of the Laws of Antigua and Barbuda (hereinafter referred to as the Companies Act) and section 8.1 of the Civil Procedure Rules (CPR) 2000.
- ii). That the petition against the Third named Respondent Eric Kaiser be struck out pursuant to section 357 (1) of the Companies Act.
- iii). That the Petition against the Third-named Respondent be struck out pursuant to section 8 (1) (c) of the Non-Citizens Land Holding Regulation Cap 293 of the Laws of Antigua and Barbuda.
- iv). For a declaration that the Court should not exercise its jurisdiction to determine the petition herein pursuant to part 9.7 (1) (b) of CPR.
- v). That the petition be struck out pursuant to part 9.7 (1) (b) of CPR.
- vi). That the petition be struck out pursuant to Part 19.2 (4) of CPR.
- vii). That there are no reasonable grounds to claim for the value of the said shares.
- viii). Costs of the application to be paid by the Petitioners in the sum of \$25,000.00

[17] A multiplicity of grounds for the application were set out - sixteen (16) in number.

[18] An Amended Affidavit in Support accompanied the Amended Application. This Affidavit was sworn to by Ron Murrain, an employee in the Chambers of the Solicitor for the Respondents. In his Affidavit, Mr. Murrain deposed, inter alia, that: - the Third Respondent was never appointed as General Manager of Francianes as evidenced by the minutes of the meeting of the Board of Directors on September 26, 2006 and therefore cannot be sued in that capacity. The claim for €78,000.00 for the equipment lease is brought against the wrong party. The lease agreement was between the First Petitioner and Simon Hayot trading as Franciane's. The claim for 19,613.03 € is for personal debts of Simon Hayot:

- A. The loan from Antigua Commercial Bank (ACB) for 8,553.43 euro
- B. The outstanding utilities for the leased premises for 11,059.60 euro

[19] Mr. Murrain further deposed that the loan was between ACB and Simon Hayot and the lease agreement for the premises was between Simon Hayot trading as Francianes and Robert Shoul. He states that the Petitioners are not registered as external companies in Antigua. The First Named Petitioner is registered in Guadeloupe and the Second Named Petitioner is registered in the British Virgin Islands. Therefore the First and Second Petitioners have no locus standi to bring an action. He adds that Mr. Simon Hayot is not a citizen of Antigua and Barbuda. Further, that there is an identical claim to the petition filed in Antigua pending in France. The claim in France was filed on September 16, 2008 and the petition filed in Antigua was filed on May 31st, 2010. The Petitioners did not dispute the jurisdiction of France, and the issues of the case are identical to the issues in the case in Antigua and Barbuda.

[20] According to Mr. Murrain, in the case in France, Mr. Hayot avers that he drew up a memorandum of understanding that stated that at least 50% of shares would be transferred based on an evaluation by KPMG. The figures were never established therefore the 55% transfer of shares was done for a symbolic amount. The memorandum also stated that Le Marche Conseil was to be given the mandate to manage the company and Mr. Hayot would give support. There was to be a signing of a definitive agreement in 45 days. This agreement was never signed.

[21] The Court heard oral submissions from Counsel on the 17th day of January 2013. Learned Counsel for the Third Respondent, Ms. Barbara Hesse, indicated at the outset, that she was abandoning Grounds (vii), (viii) and (ix) of the application. These Grounds are:-

vii) That the Petitioners are not shareholders under the Laws of Antigua and Barbuda, pursuant to the breach of section 8 (1) (c) of the Non-Citizens Land Holding Regulation Act CAP. 293 and in accordance to section 8 (2) of the said Regulation. Thus, the Petitioners have no locus standi to bring the said action in Antigua and Barbuda.

viii) The Petitioners being non-citizens failed to obtain a licence from the Governor-General of Antigua and Barbuda to permit them to hold shares in accordance with section 8(1) (c) of the Non-Citizen Land Holding Regulation, rendering the forfeiture of their shares pursuant to section 8 (2) of the said Regulation.

- ix) That the Company Register has no record of any licence to hold shares on behalf of the Petitioners pursuant to section 11 of the Non-Citizen Land Holding Regulation and thus the Petitioners have no locus standi to bring this action.

[22] Accordingly, the Court will disregard the following relief, namely;- That the Petition against the Third-Named Respondent be struck out pursuant to section 8 (1) (c) of the Non-Citizens Land Holding Regulation Cap 293 of the Laws of Antigua and Barbuda.

[23] Before moving on to address the remaining grounds of the Application, the Court notes that the application before the Court is being made solely on behalf of the Third Respondent. In essence, this application before the Court is an application to strike out the Petition on the grounds of non-compliance with several provisions of the Companies Act as well as the Civil Procedure Rules (CPR). However, there is no application before the Court on behalf of the First, Second or Fourth named Respondents seeking an Order to strike out the Petition. One of the items of relief sought by the Third Respondent is: - "That the Petition be struck out pursuant to Part 19.2 (4) of the Civil Procedure Rules 2000." That Rule states:-

"The Court may order any person to cease to be a party if it considers that it is not desirable for that person to be a party to the proceedings."

In the view of the Court, this is the only item of relief that affects only the Third Respondent. Further, that an application made pursuant to Part 19.2 (4) of CPR is normally brought as an application that a person or party be removed as a party to proceedings; it is not brought as an application to strike out the proceedings.

[24] The Court will now deal with Grounds (x) and (xi), since these grounds touch and concern the issue of the Court's jurisdiction. These grounds are:-

GROUND (x) and (xi)

- x) That the Third-named Respondent argues that the court should not exercise its jurisdiction due to the principle of forum non conveniens pursuant to part 9.7 (1) (b) of the Civil Procedure Rules 2000.

- xi) That there is an identical Claim to the Petition filed in Antigua and Barbuda pending in France. Although, the French Claim is framed differently, the issues are identical and there is a risk of contradictory results and the Courts should not exercise its jurisdiction in the aim of protecting its integrity.

[25] Based on the above grounds, the Third Respondent seeks the following relief:-

(iv) - A declaration that the Court should not exercise its jurisdiction to determine the petition herein pursuant to part 9.7 (1) (b) of CPR.

(v) - That the petition be struck out pursuant to part 9.7 (i) (b) of CPR.

[26] The procedure for disputing the Court's jurisdiction is governed by Part 9.7 of CPR. Part 9.7 – as amended reads in part:-

"9.7 (1) A defendant who disputes the court's jurisdiction to try the claim may apply to the court for a declaration to that effect.

(2) A defendant who wishes to make an application under paragraph (1) must first file an acknowledgment of service.

(3) An application under paragraph (1) of this Rule must be made within the period for filing a defence; the period for making an application under this Rule includes any period by which the time for filing a defence has been extended where the court has made an order, or the parties have agreed, to extend the time for filing a defence."

[27] Rule 9.7 A (1) which replaces the old Rule 9.7 (1) (b) (pursuant to which the Third Respondent's application was made) states:-

"9.7 A (1) A defendant who contends that the court should not exercise its jurisdiction in respect of any proceedings may apply to the court for a stay and a declaration to that effect.

(2) A defendant who wishes to make an application under this paragraph 1 must first file an acknowledgment of service if he has not previously done so."

[28] Learned Counsel for the Third Respondent has urged the Court to find that Antigua is not the forum conveniens, that is that it is not the appropriate place for the matter to be tried. According to the learned writers of The Caribbean Civil Court Practice 2011, at page 111, Note 7.1;-

"The Court has unfettered jurisdiction to determine the existence and limits of its own jurisdiction: Canada Trust v Stolzenberg [1997] 4 All ER 983. Just because a court has jurisdiction, that does not mean that it either must or will exercise it.the court may decide, for example, that even though it has jurisdiction another country may be a more appropriate place for the claim to be tried."

[29] The Court has jurisdiction to stay proceedings on forum non conveniens grounds, so as to ensure that the claim is tried in the forum which is more suitable "for the interests of the parties and for the ends of justice." In the leading case of The Spiliada [1987] AC 460, Lord Goff enunciated several principles for determining whether to grant a stay. These include: the efficiency, expedition and economy of bringing the action; the places where the parties live and carry on business; the law governing the relevant transactions or to which the fructification of the transactions might be subject; the availability of witnesses and the likely language which they speak.

[30] In the Affidavit in Reply filed on the 12th January 2011, Alfred Peters, an employee of the Petitioners' Solicitors, deposed as follows:-

- a) At paragraph 14 - that before the Court grants an application to serve outside the jurisdiction under Part 7 of the Rules, it must satisfy itself amongst other things that the local jurisdiction is the proper place in which to bring the claim under the principle of forum conveniens – see House of Lords decision of Seaconsar Far East Ltd v Bank Markazi [1994] 1 AC 438.
- b) Antigua is the most convenient forum for obvious reasons including the fact that the company the center of the claim is seated in Antigua and operated in Antigua. The evidence surrounding the dispute is readily available in Antigua.
- c) There are two claims filed in France concerning the same parties. In any event, a result in France will not affect the case at bar and there is no risk of a contradictory result by possible enforcement of the French judgment in Antigua, since there are no provisions for the enforcement of a French judgment in Antigua whether by statute or convention.

- d) The Third Respondent has voluntarily submitted to the jurisdiction of this Court and cannot now refute the jurisdiction that the Court now has.
- e) The facts of this case will show that the Third Respondent entered an acknowledgment of service indicating that he intends to defend the case on October 25th 2010 and has further made an application requesting further information and also an application requesting an extension of time to file a defence and relief from sanctions. At no time has the Third Respondent indicated that his appearance was conditional to oppose the jurisdiction of the Court.

[31] With respect to the above Affidavit, the Court notes that the filing of an acknowledgment of service does not debar a defendant from making an application to dispute jurisdiction. In fact, Part 9.7 specifically provides that a defendant who wishes to make application to challenge jurisdiction must first file an Acknowledgment of Service. Further, the said rules provide that an application for an extension of time will not amount to a submission to the jurisdiction because the rule expressly permits the defendant to apply to challenge jurisdiction even if he has applied for an extension of time.

[32] However, as stated in paragraph 7 above, on 18th June 2010, pursuant to a "without notice" application, the Petitioners were granted leave to serve the Petition and all other documents required to be served by personal service on the Respondents in France. The grounds of this application included the following:-

- a) The Petitioners' potential key witnesses and former employees of Franciane's French Bakery Limited (the First Defendant) are based in Antigua.
- b) That Antigua is the forum conveniens and has a real and substantial connection with the action and is the most appropriate court for trial of the action in the interest of all the parties.

[33] It is significant that the Third Respondent did not, and still has not applied to set aside the Order for service. He has given as his address for service, the Law Firm of the Law Cottage, in Antigua.

- [34] In Ms. Hesse's affidavit, dated April 1, 2011, reference was made to a French Claim, filed on September 16, 2008. The contention is being made that this is an identical claim to the one filed in Antigua and therefore there is a risk of contradictory results. However, attached to the affidavit of Alfred Peters, dated August 3rd, 2012, is a copy of the judgment in that matter. A reading of the judgment shows that the matter was disposed of on 20th June, 2012.
- [35] The Court notes that the Third Respondent has not asked for a stay. It is noteworthy also that the Third Respondent prays for a declaration that the Court should not exercise its jurisdiction to determine the Petition pursuant to Part 9.7 (1) (b) of CPR, yet at the same time asks the same Court to exercise its jurisdiction to strike out the same Petition pursuant to other provisions of CPR as well as provisions in the Companies Act.
- [36] The Court is of the view that the above Grounds, namely Grounds (x) and (xi) lack merit and should be dismissed.

GROUND (i) of the Third Respondent's Application is:-

- i). That according to section 249 of the Companies Act, applications may be made in a summary manner by originating summons, originating notice of motion, or otherwise as the rules of the Court provide. Alternatively, section 8.1 (5) (d) of the Eastern Caribbean Supreme Court CPR 2000 states, that a Fixed date claim form must be used where by any enactment proceedings is required to be commenced by originating summons or motion. The Petitioners claim that is brought before the Court in an Application pursuant to section 241 of the Companies Act entitled "Petition" is an irregular procedure, as this is contrary to section 249 as stated above. Alternatively, the said application brought by the Petitioners is not in compliance with the Eastern Caribbean Supreme Court CPR 2000 and is subject to section 8.1 (5) (d).

- [37] Section 249 of the Companies Act (the Act) states:-

"Subject to the Act, where it is provided that a person may apply to the court, the application may be made in a summary manner by originating summons, originating notice of motion, or otherwise

as the rules of the court provide, but subject to any order respecting notice to interested parties or costs, or any other order the court thinks fit."

[38] Part 8 of the Civil Procedure Rules (CPR) deals with the procedure to be followed on starting proceedings. Part 8.1 (5) states that Form 2 (fixed date claim form) must be used: -

(a).....

(b).....

(c).....

(d) where by any enactment proceedings are required to be commenced by originating summons or motion.

[39] In her oral submissions before the Court, Learned Counsel for the Third Defendant Ms. Hesse reiterated that the Petitioners' claim that is brought before the Court entitled "Petition" is an "irregular procedure" as this is contrary to Section 249 of the Act as any application to be made in a summary manner is to be made by Originating Summons, Originating notice of motion or otherwise, subject to the Rules of the Court. Learned Counsel stated further that, pursuant to Section 8.1 of CPR, petitions being brought to the Court should be made pursuant to the said Section. As a result, contends Counsel, the action being brought under Section 241 is improper.

[40] By way of reply to the above submissions, Learned Counsel for the Petitioners Mrs. George stated that she relied on what was contained in the documents already before the Court. Counsel stated that with respect to section 249 of the Companies Act, the emphasis is on the words "otherwise as the rules of the Court provide." She stated that CPR at section 8.1 (5) (d) states that a Fixed Date Claim must be used "(d) where by any enactment proceedings are required to be commenced by originating summons or motion."

[41] Learned Counsel further submits that this rule does not provide that it must be brought by Fixed Date Claim Form. What it does, is that it refers back to the Act; but it does not mandate that a Fixed Date Claim must be used. She stated that, in this case, the legislator provides several options which includes the originating summons or motions. She added that, in section 249 the

legislator is leaving it open to parliament to prescribe rules that were specific to presentation of applications for unfair prejudice and oppression by minority shareholders. When the CPR came into force in 2000, part 8 simply replaced Originating Summons or Motions with the Fixed Date Claim Form. By reference, the CPR has guidelines for defamation claims, contentious probate practices, and admiralty claims, but there's no specific guidelines for presentation of unfair prejudice application by minority shareholders.

[42] Counsel states that in this case, guidance is taken from the case of Hugh Marshall Snr. and The Antigua Aggregates case, Civil Appeal No. 23 of 1989. Further, that there is authority to adopt certain rules to guide once there is an absence of local law on any given matter. Counsel refers to the case of Savita; she states that at Page 5, reference was made to the jurisdiction of the High Court to hear constitutional motions. In that case, part 56 was the relevant rule; it was an administrative order and the issue was whether or not part 56.7 (2) mandated the use of an originating motion. That rule states ...“The claim form in an application under a relevant Constitution requiring an application to be made by originating motion should be headed “Originating Motion.” The Constitution of Antigua and Barbuda in that case provided that the person aggrieved may apply to the High Court for redress. The Court found that although such applications have generally been made by Originating Motions, the claimant was correct in her submissions to the extent that the wording of the rule, namely rule 56.7 (2) does not command an applicant for relief under the Constitution to seek such relief only by an Originating Motion.

[43] According to Learned Counsel, the Petition has followed the UK (1986) – Unfair Prejudice Rules. The legislator gives the complainant various options in which to make applications to the Court. She states that the procedure that was utilized is not improper. When one considers that the Unfair Prejudice Rule U.K. that is being used, the Court on hearing the matter can give various directions which includes whether particulars of claim and defence are to be delivered generally as to the procedure on the petition. Furthermore, section 241(3) provides the Court with wide discretion to make interim or final orders as it deems fit, which includes an order requiring the trial of any issue.

[44] Learned Counsel further contends that, in her opinion the CPR rules do not govern the petitions which are based on the UK Rules. As such, the jurisdiction given to the Court to strike out statement of case would similarly not apply. Alternatively, there has been no rule or practice direction that has been breached that would give the Court jurisdiction to strike out as the Respondents have applied for. Furthermore, based on the evidence submitted, the Petitioners do have a reasonable ground for bringing their action.

[45] Ms. Hesse replied to the submissions. She stated that, in the case of *Hugh Marshall Sr. v Antigua Aggregates*, to which Mrs. George referred, there were no rules in Antigua and Barbuda that provided guidance for winding up a company. She states that, in the instant case, the Eastern Caribbean Supreme Court Act provides that where no special procedures are made within the jurisdiction of Antigua and Barbuda, the law and practice administered for the time being -, that is the High Court of Justice of England, will take precedence. As a result, relying on U.K rules is only applicable when there are no provisions provided by the rules of Antigua and Barbuda. Counsel adds that in the instant case, with regards to bringing a petition, the statute, namely the Companies Act, as well as the CPR rules, Part 8.1 provide guidance. Therefore, the Petitioners should have complied with the said rules.

ANALYSIS

[46] The Petition filed by the Petitioners is pursuant to Section 241 of the Companies Act (the Act). This Section deals with "Restraining Oppression." Section 241 (1) states that "a complainant may apply to the court for an order under this section." Section 241(3) confers upon the Court wide powers to make any interim or final order it thinks fit.

[47] The Court is of the view that striking out the Petition in the instant case is neither fair nor equitable. Counsel for the Third Respondent urges the Court to strike out the Petition on the basis that, inter alia, the said Petition does not comply with Section 8.1 (5) (d) of CPR. (the Rules). The Court is of the view that it has to bear in mind the overriding objective of the Rules, namely to deal with cases justly. According to Blackstone¹ - (page 47, paragraph 1.27):-

¹ Blackstone Civil Practice 2011 edition, Lord Justice Maurice Kay, Oxford Press 2011

"Shutting a litigant out through a technical breach of the rules will not often be consistent with doing justice, because the primary purpose of the civil courts is to decide cases on their merits, not to reject them for procedural default."

[48] In the view of the Court, the Petitioners' application being in the form of a Petition and not a Fixed Date Claim is a procedural defect, and does not merit the draconian measure of striking out. Further, that given the nature of the application, namely that of restraining oppression, the action of striking out of the Petition by the Court would itself be oppressive.

[49] Accordingly, the Court dismisses this ground of the application.

GROUND (ii), (iii), (iv) and (v).

- ii) That as defined in section 543(1) (f) of the Companies Act, an external company means any firm or other body of person, whether incorporated or incorporated, formed under the laws of a country other than Antigua and Barbuda. Thus, the Petitioners are external companies. Additionally, the Petitions are non-registered external companies pursuant to section 340 (c) of the Companies Act, which presumes that an external company whose name does not appear on the register is not registered
- iii) In addition and pursuant to section 357 (1) of the Companies Act 1995, the Petitioners cannot maintain any action, suit or other proceedings in any Court in Antigua and Barbuda in respect of any contract made in whole or in part within Antigua and Barbuda in the course of, or in connection with, the carrying on of any business by the company in Antigua and Barbuda.
- iv) That the First-named Petitioner is a company registered under the laws of Guadeloupe and the Second-named Petitioner is a company registered under the laws of the British Virgin Islands and both Petitioners are external companies defined by section 543 (1) (f) of the Companies Act 1995.
- v) That pursuant to section 338 (c) of the Companies Act 1995, the First-named Petitioner carried on business in Antigua and Barbuda by possessing assets in Antigua and Barbuda

for the purpose of carrying on its business to obtain from those assets profit and/or gain realized in Antigua and Barbuda.

[50] For the purposes of this discussion, the relevant provisions of the Companies Act (the Act) are as follows:-

Section 543 (1) (f):- "external company means any firm or other body of persons, whether incorporated or unincorporated, that is formed under the laws of a country other than Antigua and Barbuda."

Section 357 (1) - "An external company that is not registered under this Act may not maintain any action, suit or other proceeding in any court in Antigua and Barbuda in respect of any contract made in whole or in part within Antigua and Barbuda in the course of, or in connection with, the carrying on of any business by the company in Antigua and Barbuda."

Section 338 - "An external company carries on business within Antigua and Barbuda.

(a).....

(b).....

(c) if the company owns, possesses or uses assets situated in Antigua and Barbuda for the purpose of carrying on or pursuing its business, if it obtains or seeks to obtain from those assets, directly or indirectly, profit or gain whether realized in Antigua and Barbuda or not.

Section 340 (1) "No external company shall begin or carry on business in Antigua and Barbuda until it is registered under this Act."

(2).....

(3) An external company whose name appears on the register maintained by the Registrar pursuant to section 494 is presumed to be registered under this Act, and

an external company whose name does not appear on that register is presumed not to be registered under this Act.

[51] In her oral submissions before the Court, Learned Counsel for the Third Respondent re-iterated what was stated in the grounds of the application. She stated that the Petitioners are external companies having shares in the company Franciane's French Bakery Ltd. (the 1st Named Respondent), the First Named Petitioner holding 2000 shares and the Second Named Petitioner holding 2500 shares. She contended that the order being sought by the Petitioners inter alia is for compensation for breach in contract of the sum of 78,000 euros; compensation for debt in the amount of 19,613 euros and 03 cents; and compensation representing the fair value of shares as of September 2006 in the sum of 367,650 euros or the EC equivalent. Learned Counsel contends that the Petitioners, trading within the jurisdiction of Antigua and Barbuda have not sought the relevant external Registrar's Certifications to properly trade or carry on business within Antigua and Barbuda, are required by Section 508(1) of the Act. Accordingly, that the Petitioners, by virtue of Section 357 of the Act, cannot bring an action, suit or other proceeding in any Court in Antigua and Barbuda.

[52] In her response to the above submissions, Learned Counsel Mrs. Brisset-George stated that she relied on the Affidavits and documentation before the Court filed on behalf of the Petitioners. Mrs. George submitted that the Petitioners do not need to be registered for the purposes of the Act before instituting these proceedings. She referred to the provisions of section 338 (c) of the Act. She contended that the evidence submitted illustrates that the Petitioners did not benefit from the contracts regarding Sarl Inobail, the equipment lease agreement. Sarl Inobail was the owner of the equipment and the First Petitioner was the facilitator and the payment was knowingly for the account of Sarl Inobail and not the Petitioners. Learned Counsel further contended that this action is not only in respect of a contract and the Petitioners do have locus standi, notwithstanding a failure to register as an external company

[53] In responding to the submissions of Mrs. George that the Petitioners do not fall within the terms of external companies, Ms. Hesse contended that the lease agreement entered into by the First named Petitioner was a business transaction within the jurisdiction of Antigua and Barbuda and

that the said transaction carried out by the Petitioner brought him profits as owner of the equipment. She contended that this establishes that the First named Petitioner does fall within the requirements of an external company, and has breached the rules of the Companies Act. She stated further that the second named Petitioner as well as the First named Petitioner, are both shareholders within Franciane's French Bakery Ltd. and entitled to dividends. The said Petitioners are gaining or making a profit as shareholders of Franciane's Bakery Ltd. within the jurisdiction of Antigua and Barbuda. As a result the Petitioners do fall within the requirement of an external company.

ANALYSIS

[54] It is common ground that the First named Petitioner and the Second named Petitioner are registered in Guadeloupe and the British Virgin Islands respectively and not in Antigua and Barbuda. They are therefore external companies for the purposes of the Companies Act (the Act).

[55] The provisions on external companies in the Companies Act of Antigua and Barbuda only apply where the external company is carrying on an undertaking in the territory. Section 357 (1) of the Act states:-

"357 (1) - "An external company that is not registered under this Act may not maintain any action, suit or other proceeding in any court in Antigua and Barbuda in respect of any contract made in whole or in part within Antigua and Barbuda in the course of, or in connection with, the carrying on of any business by the company in Antigua and Barbuda."

[56] Andrew Burgess in his text *Commonwealth Caribbean Company Law*², at page 33 states: "In the Grenada High Court decision in *Inbro Citygate Insurance Brokers Ltd. v Worldwide Insurance Ltd.* [unreported] Suit No. 602 of 1996, Gren HC, it was held that, for non-registration by an external company to operate as a bar under this provision, the defendant must adduce evidence that the contract in question was made in whole or in part within the relevant territory and that the contract was made in the course of, or in connection with the carrying on in the relevant territory of the business of the external company."

² Andrew Burgess; *Caribbean Commonwealth Company Law* – Cavendish, 2013

[57] The Court finds that the Third Respondent has not adduced any cogent evidence that there subsists a contract "made in whole or in part within Antigua and Barbuda." In fact, in his Amended Affidavit in Support filed on April 1st 2011, Ron Murrain, at paragraph 7 thereof states:-

"I am advised by Counsel and do verily believe that a search was carried out on behalf of the Third-named Respondent at the Intellectual Property Registry for the registration of the Petitioners as external companies, and found them not to be registered in respect of any contract made in whole or in part within Antigua and Barbuda, for carrying on of business."

[58] In the view of the Court, the above disposes of the first limb of Section 357(1). The Court will now address the second limb of Section 357(1), namely that the contract was made in the course of, or in connection with the carrying on in Antigua and Barbuda of the business of the external company.

[59] Section 338 of the Act defines the term "carrying on of business". The Section states that an external company carries on business within Antigua and Barbuda:-

- a) if business of the company is regularly transacted from an office in Antigua and Barbuda established or used for the purpose;
- b) if the company establishes or uses a share transfer or share registration office in Antigua and Barbuda.
- c) if the company owns, possesses or uses assets situated in Antigua and Barbuda for the purpose of carrying on or pursuing its business, if it obtains or seeks to obtain from those assets, directly or indirectly, profit or gain whether realized in Antigua and Barbuda or not.

[60] It is apparent from the evidence before the Court that (a) and (b) above do not apply. In order for (c) to apply, it must first and foremost be established by the Third Respondent, on a balance of probabilities, that the company owns, possesses or uses assets situate in Antigua and Barbuda.

[61] It is the contention of Ms. Hesse that the Petitioners are trading within the jurisdiction of Antigua and Barbuda. According to Ms. Hesse, the lease agreement entered into by the first named

Petitioner was a business transaction within the jurisdiction of Antigua and Barbuda and that the said transaction carried out by the Petitioner brought him profits as owner of the equipment. Therefore, contends Learned Counsel, we can establish that the first petitioner does fall within the requirements of an external company, and has breached the rules of the Companies Act.

[62] The evidence of the Petitioners, as can be gleaned from the Affidavit of Alfred Peters, is that the Company and not the Petitioners was the benefactor/user of the equipment which was owned by Sarl Inobail, which is French Company. Further, that the First Petitioner did not derive any benefit from the sub lease agreement and at all material times was a mere facilitator, the payment was knowingly for the account of Sarl Inobail and the business that the equipment was used for was that of the Company.

[63] Learned Counsel for the Third Respondent Ms. Hesse also submitted that the Petitioners are gaining or making a profit as shareholders of Franciane's Bakery Ltd. (the First Respondent) within the jurisdiction of Antigua and Barbuda. As a result, the Petitioners do fall within the requirement of an external company. It would appear that Learned Counsel is contending that the Petitioners, by virtue of their shareholding in Franciane's Bakery Ltd. (the First Defendant) are entitled to the assets of that company. I disagree. It is trite law that shares do not comprise any proprietary interest in a company's assets. Further, that shareholders are not the owners at law or in equity of the company's property and that a shareholder does not even have an equitable lien on the company's property.

[64] In any event, Section 357(1) of the Companies Act only applies if the action, suit or other proceedings is in respect of a contract. The Petitioners have filed the Petition pursuant to section 241 of the Companies Act complaining of oppressive conduct. As deposed to by Alfred Peters in paragraph 23 of his Affidavit filed on the 12th January 2011, the Petitioners' right of action is derived from statute and not from contract. Learned Counsel for the Petitioners contends that this action is not only in respect of a contract and the Petitioners do have locus standi, notwithstanding a failure to register as an external company. I agree.

[65] Accordingly, Grounds (ii), (iii), (iv) and (v) are dismissed.

[66] Ground (vi), (which follows on from grounds (ii), (iii), (iv) and (v) stated above,) is stated as follows:-

"That the assets mentioned above are equipment allegedly leased to Franciane's French Bakery Limited (hereinafter referred to as FFBL). That the Third named Respondent, as Director and alleged General Manager is being sued for breach of contract of the lease of the equipment in the sum of 78000 GBH. That in the Petition pursuant to section 241 this breach of contract is an act of the Company and the business of the Company being conducted in an oppressive, and unfairly prejudicial manner that disregards the Petitioners interests. It should be noted that the gain is the rental price of the equipment."

[67] The Court is unable to comment on Ground (vi) above, as the same is unclear.

GROUND (s) (xii), (xiii), (xiv) and (xv).

xii.) That the Petition be struck out on the basis that FFBL (the First Respondent) is not a party to the three (3) contracts subject to the claim herein. Thus, the said claims are not the affairs of the Company that the Third Named Respondent cannot be held to be responsible for the alleged to have mismanagement as Director/General Manager.

xiii) The three contracts are particularized as follows:

- a. A long-term lease agreement between the First named Petitioner and Simon Hayot trading as Franciane's,
- b. A loan with Antigua Commercial Bank (ACB) and Simon Hayot, not FFBL,
- c. The rental of the property owned by Robert Shoul and contracted to Simon Hayot trading as Franciane's.

xiv) In addition, the Third Named Respondent was never appointed as General Manager according to the Minutes of the Board of Directors dated 26th September 2006 and cannot be sued in that capacity.

xv) That the Petitioners brought an action against the Third-named Respondent claiming compensation in the sum of €367,650.00 alleging that the Third-named Respondent as

General Manager mismanaged the affairs of FFBL, causing the value of their shareholdings to be diminished. That this claim arises out of the claims for the alleged breaches of the three contracts listed in the Petition and thus, according to (xii) – (xiv) of this Amended Notice of Application there are no reasonable grounds for this claim.

[68] The Court finds that the above Grounds (xii), (xiii), and (xv), involve the First Respondent company. Since, as stated above, this application is not made on behalf of the First Respondent, the Court will not adjudicate on the said grounds.

[69] The Court will now address Ground (xiv), namely that the Third named Respondent was never appointed as General Manager according to the Minutes of the Board of Directors dated 26th September 2006 and cannot be sued in that capacity. In her oral submissions, Mrs. George stated that she relied on the documents submitted before the Court. She contends that in some instances, the Defendant acknowledges that he is the General Manager. She also relies on the Notice of Directors attached. She submits that the principle of *de jure* applies. Alternatively, that the Third Respondent is estopped by representation made by the company and himself holding him out to be the Managing Director of Franciane's. Counsel cited the case of Freeman (1964) - Civil Appeal # 8 of 1995. Learned Counsel submits that Ground xiv is without merit.

[70] By way of response, Ms. Hesse submitted that there is no evidence to support such appointment of Eric Kayser as General Manager of Franciane's. Refers to exhibit AP2 which is letter of appointment as general manager - is actually notice of Directors which only states the Directors of the Company Franciane's French Bakery Ltd. and is not evidence of an appointment of Mr. Eric Kayser as General Manager. She states that such an appointment pursuant to the Companies Act should have been by resolution.

[71] The Court is of the view that the Notice of Directors filed in the Intellectual Property and Commerce Office on the 19th March 2007, stating that Eric Kayser (the Third Respondent) is "General Manager", is evidence to support his appointment as General Manager.

GROUND # (xvi) - That the Petition against the Third-named Respondent is an abuse of the process of the Court and the Petition should be struck out.

[72] According to Blackstone (2011, page 476, paragraph 33.12), the Court's power to strike out a statement of case which is an abuse of the court's process is a power "which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people". (per Lord Diplock in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at p. 536.)

[73] At page 477, paragraph 33.13, the learned writers state that general examples of abuse of process include:-

- a) A claim that is issued after the expiry of limitation.
- b) Issuing a claim form merely to protect the claimant's position at a time when the claimant has not decided to pursue a claim against the defendant.
- c) It is an abuse of process to have simultaneously two active, identical claims against the same defendant. This is because it is oppressive to force a defendant into defending the same claim in multiple proceedings.
- d) Starting a claim with no intention of pursuing it is an abuse of process.
- e) Issuing a claim for which the Claimant knows no basis is an abuse of process.
- f) Litigating for the purpose of causing expense, harassment or commercial prejudice beyond that normally encountered in the course of properly conducted litigation justifies striking out as an abuse of process.
- g) Re-litigation may amount to an abuse of process.

[74] In the circumstances of the instant case, the Court is not satisfied that the Petitioners' claim against all the Respondents or against the Third Respondent in particular, is an abuse of process. This ground is therefore dismissed.

[75] In conclusion, the Court is of the view that the application of the Third Respondent is without merit and should be dismissed. I so order.

My Order is as follows:-

1. The Amended Notice of Application filed on behalf of the Third Respondent Eric Kaiser on the 1st April 2011 is dismissed.
2. Costs to the Petitioners to be assessed if not agreed.


Jennifer A. Remy
High Court Judge